# SELECT STATUTORY METHODS OF OBTAINING CONTROL OF THE INSOLVENT ESTATE

**by**

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# I DECLARATION OF ORIGINALITY

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## II DISSERTATION SUMMARY

The trustee or liquidator of the insolvent estate is tasked to take effective control of the insolvent estate. There are various asset tracing- and recovery mechanisms at the trustee's disposal, which are ultimately to be implemented for the benefit of the creditors of the insolvent estate following the advent of the *concursus creditorum*.

In this dissertation the focus is placed exclusively on three distinct statutory remedies which aim to achieve precisely this purpose of the trustee in taking control of the insolvent estate. These statutory remedies are firstly, the process to deal with void dispositions in terms of section 341(2) of the Companies Act, 61 of 1973, with the view of reclaiming the disposed of property in contravention of this section, secondly, the issuing of warrants in terms of section 69(3) of the Insolvency Act, 24 of 1936 with the view of tracing estate property and thirdly, the conducting of private enquiries in terms of section 417(1) of the Companies Act, 61 of 1973 to collect pertinent information relating to assets of the insolvent estate.

These three statutory remedies serve to reinforce one another in many respects, as is evident based on the hitherto case law. By way of a comparative study with the laws of England, these same types of statutory remedies hold similar equivalents in the latter jurisdiction. However, the characteristics of such remedies in England differ from the South African context in numerous respects and by analysing these two distinct legal positions relating to these types of remedies, a call for potential legal reform may be apt where a more efficient mode of implementation of such remedies could be supported.

In addition to the comparative study conducted, there is a working document for a Draft Bill on Insolvency Law with an explanatory memorandum of the Department of Justice, last informally published to interested parties in 2015, which is also considered since it may be indicative of the way the legislature may ultimately decide to go with the insolvency law reform project in South Africa. In more specificity, it needs to be ascertained how the aforesaid three distinct statutory remedies for taking control of the insolvent estate assets stand to be affected, should the said working document ultimately be enacted as an Act of Parliament in its current format.

In having conducted this study, all applicable legal authorities of primary and secondary nature of both South African and English origin were considered as these existed on 31 October 2023.

# III ACKNOWLEDGEMENTS

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On a personal note, all my feline friends. My favourite one will always be the one in front of me.

Lastly, to the one who consistently inspires me to liberation and self-preservation above all other priorities – you know who you are.

## IV LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| 1892 Companies Act | Companies Act 25 of 1892 |
| 1926 Companies Act | Companies Act 46 of 1926 |
| Companies Act | Companies Act 61 of 1973 |
| 2008 Companies Act | Companies Act 71 of 2008 |
| Criminal Procedure Act | Criminal Procedure Act 51 of 1977 |
| Insolvency Act | Insolvency Act 24 of 1936 |
| LAWSA | The law of South Africa |
| OS | Official Service |
| PAJA | Promotion of Administrative Justice Act 3 of 2000 |
| RS | Revision Service |
| PELJ | Potchefstroom Electronic Law Journal |
| UNCITRAL | United Nations Commission on International Trade Law |
| SI | Service Issue |
| ICR | International Corporate Rescue |
| JQR | Juta's Quarterly Review |
| RLR | Restitution Law Review |
| JBL | Journal of Business Law |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg |
| CILSA | Comparative and International Law Journal of Southern Africa |
| JO | Judicial Officer |

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# CHAPTER 1: INTRODUCTION

## 1.1 General background

In this dissertation, the focus is on certain select statutory procedures for the tracing and recovery of assets on behalf of an insolvent estate. Such asset tracing and recovery mechanisms are intended to operate to the benefit of the creditors of the insolvent estate following the advent of *concursus creditorum*, which follows after the commencement of sequestration or liquidation.

From the onset, it must be noted that the Insolvency Act 24 of 1936 (the Insolvency Act), as well as the different Company Acts, provide mechanisms to the trustee and liquidator of insolvent debtors and companies respectively to trace estate assets. Section 391 of the Companies Act 61 of 1973 (hereinafter "the Companies Act"), for instance, specifically tasks the liquidator to recover the assets of the company. It is also important to note that our insolvency law is somewhat fragmented in that the rules are to be found in different pieces of legislation. Whilst the Insolvency Act applies to "debtors' as defined in section 2 of this Act, companies may be liquidated in terms of the Companies Act 71 of 2008 (hereinafter "the 2008 Companies Act") read with Chapter XIV of the otherwise repealed Companies Act. In principle to find and to apply the correct procedure all the relevant legislation must be considered.[1]

Sequestration or liquidation procedures include the powers of the sheriff to compile an inventory of estate assets following the commencement of sequestration or liquidation, and to effect control over such assets. The trustees or liquidators have at their disposal, some statutory powers to trace assets and to attach the same by following the procedures available to them in terms of insolvency legislation or ordinary civil procedures. To obtain information about the whereabouts of assets, insolvency examinations may, for instance, be conducted to obtain information and in some instances, estate assets may be discovered by search warrants and attachments procedures provided for, and certain transactions may be voided with the view of reclaiming assets belonging to the insolvent estate.

The trustee's ability to effectively carry out his or her duties is ultimately dependent

[1] See item 9 of sch 5 of the Companies Act read with Ch XIV of the Companies Act. See ss 19(1) & 69(1) of the 1936 Insolvency Act; Kunst *et al Meskin: Insolvency Law and its Operation in Winding-Up* SI 59 (2022) 4-25–4-26(2) (hereinafter Meskin); Bertelsmann *et al Mars: The Law of Insolvency in South Africa* 10 ed (2019) 199-211; Cassim *et al*: *Contemporary Company Law* 3 ed (2021) 1288. See *Bernstein v Bester* 1996 (2) SA 751 (CC) (hereinafter *Bernstein*) [15] for a succinct exposition of a liquidator's duties in general. Due to the fragmentation, provisions of the Insolvency Act will also apply to companies unable to pay their debts — see s 339 of the Companies Act.

on the effective working of the statutory mechanisms afforded.[2] If these methods are theoretically properly understood they may be implemented more effectively. Further, a historical and comparative research approach to these procedures may also assist in gaining a better understanding of these procedures, and in addition, improve the current systems that are in place.

It is generally accepted that the main function of a provisional liquidator or trustee — amongst certain collateral ones such as attending to the general administration of the insolvent estate — is to obtain effective control of the insolvent estate. This is done to enable the final liquidator or trustee to commence the process of liquidating the insolvent estate.[3] In this dissertation, the focus will be on three distinct statutory mechanisms aiding the trustee and/or liquidator in his obligation of taking control of the insolvent estate. These mechanisms are:

(a) The recovering of property disposed of after the commencement of liquidation, as void dispositions prescribed in section 341(2) of the Companies Act, and the possibility of validation of such void dispositions. This occurs in the instance of an insolvent liquidated company, one specifically wound up as a result of its inability to pay its debts, having disposed of its property, or rights to any property, after the commencement of such company's liquidation, and certain affected parties may apply for such void disposition to be validated;

(b) In the instance of both natural persons and juristic entities, the trustee's right to obtain a warrant for the search and seizure of assets is in terms of section 69(3) of the Insolvency Act. This applies to instances where the trustee has reason to suspect that further assets belonging to the insolvent estate are either unlawfully withheld- or concealed from the trustee; and

(c) Obtaining information into the trade, dealings, and affairs of a company in terms of private insolvency enquiries, conducted in terms of section 417(1) or 418(2) of the Companies Act. Such enquiries enable the trustee/liquidator, or any other person with some vested interest in the company, to expose untoward conduct in the company that may have contributed to its ultimate demise.

This study is limited in its scope in that it does not discuss any other statutory- or

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2 Meskin (2022) 4-26.

3 *Commissioner, South African Revenue v Stand Two Nine Nought Wynberg (Pty) Ltd* 2005 (5) SA 583 (SCA) at 587B; Meskin (2022) 4-54; Bertelsmann *et al* (2019) 199, confirming that the provisional trustee is tasked with taking control of and preserving the estate until the appointment of a final liquidator.

common law remedies at the disposal of the trustee or liquidator in taking control of the insolvent estate, apart from what is described in paragraphs (a)–(c) above. The reason is that these measures are the most important instruments enabling the estate representatives to trace assets and take control of them.

Another limitation of this study is that none of the discussions contained herein relate to the winding-up of solvent companies.[4] This is done in terms of sections 79 to 81 of the 2008 Companies Act and such provisions are entirely irrelevant to a discussion revolving around the liquidation of insolvent companies.

The statutory remedies identified above are not arbitrarily selected but are ones that are often encountered alongside one another in practice. It may happen, as did for example in the Supreme Court of Appeal matter of *Naidoo v Kalianjee*,[5] that during an insolvency enquiry, examinees may reference assets being withheld from- or concealed from a trustee, which will invariably call for a section 69(3) warrant being necessitated to recover such property. The same can be said about examinees during their testimony in an insolvency enquiry referencing assets disposed of by the company after the commencement of liquidation, which will trigger the provisions of section 341(2) becoming relevant and therefore calling upon the trustee to have such dispositions voided and the property so identified and unlawfully disposed of, returned to the insolvent estate.

By the same token, it is equally likely that the liquidator or trustee, through the process of taking control of the assets of the insolvent company, comes to learn of further assets having been disposed of and further individuals who may bear knowledge as to the disappearance of assets suspected of having belonged to the insolvent estate. Such a scenario can likely give rise to the liquidator seeking the issuing of a section 69(3) warrant and calling certain individuals to a private enquiry in terms of section 417(1).

These statutory remedies are therefore not to be considered in a vacuum. Instead, it is to be borne in mind that such remedies are likely to share a connection with another at some point in time and that the facts obtained during the course of implementation of one of them, may likely lead to the incorporation and amplification of another.

Before proceeding in such a categorical discussion of these three distinct remedies, a brief discussion on the historical development of the need to take control of the insolvent estate is apt. The need to take control of the insolvent estate goes back for centuries with its

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4 See Yeats *et al Commentary on the Companies Act of 2008* RS 1 (2020) 2-1333–2-1362 for a discussion about liquidation of solvent companies.

5 2016 (2) SA 451 (SCA) (hereinafter *Naidoo*).

origins embedded in different sources. Traces of the insolvency procedure date back to ancient Rome, as found in the Twelve Tables,[6] which refer to the process of *bonorum venditio*, which commenced in Rome under the hand of Publius Rutilius Rufus in 104 BC,[7] as well as the first bankruptcy-related statute of England in 1542, passed under the hand of King Henry VIII,[8] though the advent of insolvency laws in England with regard to bankruptcy is accepted as having originated as early as medieval times.[9] Thus, the insolvency procedure has historical roots in Roman law and English law.

The collective interest of creditors *versus* the interests of an individual creditor is the appropriate point of departure regarding the commencement of *concursus creditorum* in the context of South African insolvency law. The inception of the *concursus* principle carries with it an array of consequences, potentially affecting a range of transactions such as uncompleted contracts, liens, rights of set-off, *ultra vires* acts, and overpayments by a trustee, to name but a few.[10]

The *locus classicus* in South African insolvency law, aptly summarising the concept of the collective interest of creditors as opposed to the individual interests of creditors, is *Walker v Syfret*.[11] According to the court in *Walker*,

> the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body.[12]

The task of taking control of the insolvent estate of a company is first vested in the Master of the High Court and is only thereafter assigned to the liquidator, which is similar to the appointment of a trustee for the insolvent estate of an individual entity.[13] According to Joubert and Calitz, the liquidator of a company

> is expected to be detached, independent, impartial and even-handed in his dealings and must also

6 Calitz "Historical overview of state regulation of South African Insolvency Law" (2010) *Fundamina: A Journal of Legal History* 5.

7 Calitz (2010) *Fundamina* 7. *Bonorum venditio* provided for the appointment of a *magister* who was tasked with the responsibility of listing the debtor's assets in an account, arranging for the sale thereof by public auction, and thereafter disbursing the proceeds of the sale to creditors in accordance with their preference of claims.

8 Calitz (2010) *Fundamina* 11.

9 Finch *Corporate Insolvency Law Perspectives and Principles* 2 ed (2009) 10.

10 Bertelsmann *et al* (2019) 244-271.

11 1911 AD 141 (hereinafter *Walker*) at 166. See also Meskin (2022) 5-50(2)–5-50(3) for a discussion of the concept *concursus creditorum*.

12 *Walker* at 166.

13 S 18(1) of the Insolvency Act; ss 367 & 368 of the Companies Act.

be seen to be so.[14]

Whilst it is accepted that a trustee or liquidator's primary duty remains to take control of the insolvent estate, the duty to investigate the affairs of the company is essential to successfully carry out the mandate.[15] This is a duty that is wide in scope, as it adumbrates an investigation of the affairs of the company both before and after the vesting of *concursus creditorum*.[16]

Apart from the general duty of taking control of the insolvent estate from the perspective of civil law, a liquidator of a company is expected to act with circumspection by also investigating whether or not any criminal offences had been perpetrated by the insolvent and to report the same to the relevant authorities.[17] In realising the assets of the insolvent, the liquidator or trustee is further to ensure that in doing so, the insolvent's liabilities are to be satisfied *pari passu*.[18]

During the sequestration or liquidation process, the liquidator or creditors may raise concerns that suspected untoward dealings in a company (during its existence) may have led to its ultimate demise. This suspicion may arise due to many conceivable circumstances.

In practice, the liquidator tasked with taking control of the insolvent estate usually comes as a stranger to the affairs of the company, which has sunk to its financial doom.[19] This means that it is possible that some of those concerned in the management of the company, and others, have been guilty of misconduct or some impropriety, which is of relevance to the liquidation.[20]

### 1.2 Problem statement

Considering the backdrop of the abovementioned position the trustee or liquidator finds himself/herself in relation to the insolvent estate, this dissertation is a theoretical and comparative analysis of select statutory procedures for attaining the necessary control of the insolvent estate assets, after said liquidator has taken initial control of the insolvent estate.

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14 Joubert & Calitz "To be or not to be? The role of private enquiries in the South African insolvency law" (2014) *PELJ* 898.
15 Joubert & Calitz (2014) *PELJ* 899.
16 Meskin (2022) 8-1.
17 S 81(1)(*d*) of the Insolvency Act; s 400(1) of the Companies Act.
18 Finch (2009) 534.
19 Calitz "Sections 417 and 418 of the Companies Act 61 of 1973 — Relevance prevailing over the right to privacy: *Gumede v Subel* 2006 (3) SA 498 (SCA)" (2006) *Obiter* 409, with the wording herein being borrowed from the English case of *Re Rolls Razor Ltd* (1969) 3 All ER 1386 (hereinafter *Rolls Razor*) at 1396G–1397A.
20 Delport *et al Henochsberg on the Companies Act 71 of 2008* Vol 2 (2011) APPI-257–APPI-258.

Below, I shortly peruse the liquidation of companies and the sequestration of individuals. The categorical divide between such procedures will be in the following sequence:

(a) Liquidation of a company: the voidness of dispositions that were effected *contra* the provisions of section 341(2) read together with section 348 of the Companies Act.[21] Despite this voidness, section 341(2) contains a rider provision that makes it possible for such void disposition to be validated by way of court application. This naturally only applies to the position of a liquidator in relation to an insolvent company in liquidation, and not the sequestration of individuals, associations, partnerships, or trusts.

(b) Liquidation of a company and/or the sequestration of an individual: the recovery of assets either concealed or unlawfully withheld from a trustee or liquidator by way of a warrant, issued in terms of section 69(3) of the Insolvency Act.[22] This can apply to either a company in liquidation or an individual in sequestration; and

(c) Liquidation of a company: the private examination of individuals into the trade, dealings, and affairs of the insolvent company. In the case of a liquidated company, this takes place in terms of either by the court or the Master of the court section 417(1) or by a commissioner in terms of section 418(2) of the Companies Act.[23]

To be able to conduct the said theoretical and comparative analysis, additional sources apart from the laws of the Republic of South Africa will be considered, namely certain apposite laws of the United Kingdom of England. With reference to paragraph (a) above,

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21 S 341 states that: "(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void. (2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders." S 348 states that: "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

22 S 69(3) states that: "If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document."

23 S 417(1) states that: "(1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company." S 418(2) states that: "(2) A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in [s] 417."

insofar as sections 341(2) and 348 of the Companies Act are concerned, our courts have held, with no equivocation, that the heritage of our law of insolvency from English origin is "readily recognisable".[24] It was held by the Court in *Vermeulen*[25] that

> [t]he English decisions and textbook commentaries on the corresponding provisions are therefore instructive.[26]

Apart from English authority being prevalent in nearly all cases within the context of sections 341(2) and 348 of the Companies Act (the topic of discussion in para (a) above), it comes as no surprise that the remaining topics of discussion alluded to in paras (b) and (c) above also have roots entrenched in the English law that are self-evident.

With regard to the background and problem statement above, the following is apt to be mentioned in relation to each such identified subject:

### *1.2.1 Void dispositions in terms of section 341(2) read with section 348 of the Companies Act and the validation of such void dispositions*

It must be stated from the outset that section 348 of the Companies Act, fulfils an essential purpose in the domain of liquidation procedures. The reality in practice is that there often elapses a considerable period of time from the date that the liquidation application is issued until the day that a liquidation order is granted by the court.

The predecessor of section 348 of the Companies Act was section 115 of the Companies Act 46 of 1926 (1926 Companies Act), which read as follows:

> A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

On a peripheral note, the commencement of sequestration for individuals (and by extension, joint estates of spouses married in community of property, partnerships, and trusts) is in no way similar to the commencement of winding-up of companies.[27] The

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24 *Vermeulen v CC Bauermeister (Pty) Ltd* 1982 (4) SA 159 (T) (hereinafter *Vermeulen*) at 162.

25 As above.

26 As above. A similar sentiment was also expressed in *Herrigel v Bon Roads Construction Co (Pty) Ltd* 1980 (4) SA 669 (SWA) at 678 (with cross-reference to s 227 of the 1948 Companies Act of England): "[…] English law is, of course, not binding upon me, but, in view of the similarity of the South African and English sections, it is not inappropriate to refer to such English authority as exists in regard to the said English section as a matter of persuasive interest, provided that our law does not differ from English law on the point on which guidance is sought from judicial pronouncements emanating from English Courts." See also *Schmidt v ABSA Bank Ltd* 2002 (6) SA 706 (W) at 716 perpetuating this view of reliance upon English law being of considerable persuasive value in this context.

27 Ss 6(1) & 10 of the Insolvency Act; Meskin (2022) 5-50(3) makes a clear distinction between the vestige of the *concursus creditorum* for a company, versus that of an individual. In short, the commencement of sequestration is deemed to only commence once an order of court is granted to that

commencement of sequestration for individuals shall therefore not be the focus of discussion in this dissertation.

The underlying principles governing sections 341(2) and 348 of the Companies Act are by no means simple in their everyday application in practice. The implications of these statutory provisions can be particularly far-reaching and intrusive in their literal application. With reference to the commencement of winding-up in terms of section 348 of the Companies Act, our courts have described the essential purpose that section 348 fulfils in the matter of *Lief v Western Credit (Africa) (Pty) Ltd*,[28] where its vital objective was aptly summarised in the following terms:

> From the scheme of arrangement under the Act, it would seem that section 113 provides for the initiation of proceedings for the winding-up of a company and that section 115 supplements it by ante-dating the commencing date of the order. The mischief aimed at by section 115 is a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court.[29]

It can be stated that section 341(2), read together with section 348 of the Companies Act, serves a recognised and essential purpose based on sound commercial considerations. It can easily be postulated that absent the provisions of these two sections, creditors would be gravely prejudiced if a company, knowing that the proverbial writing is on the wall, had the opportunity to dispose of company assets in the critical stage following the presentation of an application for the company's winding-up, until the date of the court order for its winding-up. It has clearly been intended by the legislature, and maintained by the courts, that due to the undeniable propensity of clandestine dealings typically transpiring between the date of presenting an application of winding-up to court and the eventual date when the order for winding-up is granted, a presumption ought to exist that all transactions falling within that critical period (aptly referred to often times as "the twilight period") are to be considered void unless the court otherwise orders.

Absent these mentioned statutory provisions, the very mischief which the court in the case of *Lief* aimed at preventing, will inevitably manifest itself, namely a myriad of creditors will be able to procure undue benefits for themselves during the period of the application for winding-up being presented to the registrar and the ultimate date that an order is made for the winding-up of the debtor company — something which the very concept of *concursus*

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effect, whilst in the context of liquidation, same commences on the date of issuing the application for winding-up, as contemplated in [s] 348 of the Companies Act.

28 1966 (3) SA 344 (W) (hereinafter *Lief*) at 347B–347C, bearing in mind that the court was, at the time, referencing and applying the relevant ss of the Companies Act 46 of 1926.

29 *Lief* at 347B–347C.

*creditorum* is intended to prevent.

Section 341(2) is however not merely as simple as unconditionally declaring all post-liquidation dispositions void without any possible degree of clemency to allow at least certain dispositions as valid. The wording of the section clearly has a rider provision incorporated in it which states "unless the Court otherwise orders". The question that then comes to mind is to what extent, under which circumstances, and upon the meeting which requirements a court will be willing to declare select post-liquidation dispositions valid and free from section 341(2)'s paralysing effect.

Understanding how the Court applies its mind when exercising its discretion under the validation rider extant in section 341(2), it will be considered in this study how this judicial discretion differs from the equivalent judicial discretion exercised in England. Through such a comparative law study, it will be examined if the judicial discretion applied by our Court stands to benefit in any way from adopting a similar stance to the discretion hitherto applied in English law.

Understanding the very essence of post-liquidation dispositions and the judicial discretion exercised when the Court is asked to validate such dispositions. This matter is also to be considered in view of a Working Document of the Department of Justice, made available to some interested parties in the field, and which contains a Draft Bill on Insolvency Law with an Explanatory Memorandum, version as part of the broad South African insolvency law reform project.[30] The latter makes no express provision for the commencement of the liquidation, namely a counterpart to the existing section 348 of the Companies Act. Instead, it appears as though the draft Insolvency Bill attempts to bring the commencement of winding-up for companies under the same proverbial umbrella as that of individuals commencing sequestration proceedings.

It is apparent that the date of commencement of liquidation in the newly proposed draft Insolvency Bill does not resemble the current section 348 of the Companies Act in any way but rather appears more akin to what we know to be the commencement of sequestration

30 The Draft Insolvency Bill in the format of a Working Document of the Department of Justice and Constitutional Development, with its accompanying Explanatory Memorandum is hereinafter termed "The 2015 Working Document". It is on file with the author since it was only made available to some interested persons working in the field. This 2015 Working Document is relevant since it is a continuation of Project 63, the SA Insolvency Law Reform Project 63 started by the South African Law Reform Commission (the "SALRC") in 1987, but unlike previous publications by the SALRC in this regard, the 2015 Working Document contains provisions relating to both personal as well as corporate insolvency law. For work previously done by the SALRC, see the Draft Memorandum with an Insolvency Bill and Explanatory Memorandum under the Project 63 title in 2000 which covers personal insolvency, at https://www.justice.gov.za/salrc/projectlist.htm.

of individuals in terms of the Insolvency Act.

The potential problem of this newly proposed legal position needs to be thoroughly considered. In particular, one needs to ask what the effect would be if a new Insolvency Act was to delete the existing section 348 from our law. If similar protection for the benefit of the *concursus creditorum* is not incorporated in the newly proposed legislation, liquidators and creditors may consequently need to resort to alternative measures to protect the collective interests of creditors.

### *1.2.2 The recovery of assets either concealed or unlawfully withheld from a trustee or liquidator by way of a warrant, issued in terms of section 69(3) of the Insolvency Act*

It is well-established within the practice of insolvency law that the initial rudimentary step taken after a liquidation or sequestration order is granted is attended to by the deputy sheriff of the court who is mandated to carry out an attachment of the assets of the insolvent together with the compilation of a detailed inventory of the attached assets.[31] Concomitant to the attachment of assets, the deputy sheriff is expected to report to both the Master of the High Court and the trustee of the insolvent estate that he has complied with his obligations in terms of section 19 of the Insolvency Act.[32]

It frequently occurs that, after the deputy sheriff has attached the company's assets, the trustee gains information which causes the suspicion on the side of the trustee that further assets belonging to the insolvent, are either concealed or unlawfully withheld from the insolvent estate. This is where section 69 of the Insolvency Act provides the necessary relief to the trustee in tracking down- and gaining possession of such missing assets.

It has happened consistently in the past that practitioners in the law of insolvency mostly instigated section 69 proceedings in the form of motion proceedings, subscribing to Rule 55 of the Magistrate's Court Rules.[33] Based on the wording utilised in section 69(3), more specifically the reference to the word "Magistrate", this would understandably lead most practitioners into believing that a formal court application in the Magistrate's Court is

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31 S 19(1) of the Insolvency Act, specifically s 19(1)(*d*) relating to the inventory requirement. See Meskin (2022) 5-20(1)–5-23 for a detailed exposition of this process.

32 Ss 19(3)(*a*)–(*b*) of the Insolvency Act.

33 Select examples showcasing the utilisation of s 69 in the form of motion proceedings, include the matters of *Putter v Minister of Law and Order* 1988 (2) SA 259 (TPD) (hereinafter *Putter*); *First National Bank of SA Ltd v Cooper* 1998 (3) SA 894 (W) (hereinafter *Cooper*); the unreported matter of *De Beer v Hamman* (Case No 1290/2004) [2005] ZAGPHC 71; *Naidoo v Kalianjee* 2016 (2) SA 451 (SCA) (hereinafter *Naidoo*).

what is being called for by the legislature in the circumstances.[34]

Section 69 is a remedy that distinguishes it from alternative remedies at the disposal of a trustee or liquidator in taking control of the insolvent estate. A succinct consideration of these unique characteristics is apt in illustrating this point.

Firstly, select authorities have crystallised in case law, illustrating that the actual nature of section 69, as truly intended by the legislature, does not lend itself to motion proceedings in the conventional sense, as most would presume.[35] The result of approaching the issuing of section 69(3) warrants in a judicial sense, when this is not what is intended by the legislature, could bring about adverse consequences.

Secondly, section 69(3) also bears with it no determination of rights to property in favour of- or against any party. A magistrate hearing such a request to issue a warrant for seizure and attachment is consequently not called upon to determine the merits of various parties' competing claims to property.[36]

Thirdly, the efficiency of section 69(3) is ensured by providing the trustee or liquidator with expeditious possession of property suspected to belong to the insolvent estate, and in this way, the interests of creditors remain safeguarded.[37] It is only this element of physical possession that is achieved by a trustee or liquidator upon successful implementation of section 69(3).[38] To the liquidator and creditors however toiling in uncertainty as to the whereabouts of assets, physical possession of such assets could prove invaluable.

Fourthly, warrants issued in terms of section 69(3) cannot be held as emanating from the process of civil litigation.[39] Our courts have instead held that the procedure in section 69 has no given formalities whatsoever, requiring only a statement made under oath, be it verbal or in writing, and for such statement to contain certain averments.[40]

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34 As above.

35 *Naidoo* [20].

36 *Kerbyn 718 (Pty) Ltd v Van Den Heever* 2000 (4) SA 804 (WLD) (hereinafter *Kerbyn*) at 811; *Cooper* [22].

37 *Cooper* [22].

38 *Naidoo* [16] where the court quoted, with approval of the stance taken by Marais J in the minority judgment of *Cooper*, that: "The decision to issue a warrant is in no sense an adjudication of any substantive issue, existing or potential, between the trustee and any third party or between the insolvent and the third party. Success in obtaining a warrant and success in its execution brings the trustee no more than provisional physical possession of the relevant asset. The trustee's continued possession is open to challenge in the courts and the customary gamut of remedies (review proceedings, prohibitory interdicts, vindicatory actions, declarations of right, etc.) is available to the third party. A successful challenge will bring an end to the trustee's possession." The court in *Naidoo* [26] also distinguished this warrant from that of a warrant issued in terms of s 21 of the Criminal Procedure Act 51 of 1977.

39 *Naidoo* [20].

40 *Snyman v Simon* 2001 (2) SA 998 (W) (hereinafter *Snyman*) at 1002G–1002H: "I do not think that s 69(2) and 69(3) of the Act require any particular formalities. The application may be brought orally, and the statement upon oath may be made orally, but the statement must be upon oath".

With section 69 of the Insolvency Act holding many characteristics that are unique (as briefly alluded to above) in comparison to other alternative remedies, it needs to be considered to what extent this remedy is implemented by practitioners in an appropriate or erroneous manner. If implemented in a manner not foreseen by the legislature, the result may be that the efficacy of the remedy is negatively affected thereby.

A comparative law study will therefore be undertaken in examining how the statutory equivalent of section 69 has been approached in English law. It is possible that the English courts have taken to interpret and apply these provisions relating to search and seizure warrants in ways entirely different from the South African judiciary. A juxtaposition between the two distinct legislations (and relevant case law) is discussed in Chapter 3 of this work, with the aim of considering in which respects the current regime surrounding section 69 can be improved upon.

It needs to be established what value (if any) can potentially be extracted from comparing the legal position in South Africa with that of England in the context of these types of search and seizure warrants.

### *1.2.3 The examination of individuals by way of private examinations into the trade, dealings, and affairs of the insolvent company in terms of section 417 of the Companies Act*

For many, the concept of summoning a witness with no prior notice, no opportunity to call for discovery, no indication of the nature of questions to be put to them, or even so much as access to the application for examination, might appear a draconian one. Despite one's visceral response to such a seemingly unilateral consideration of interests, it has been hitherto tritely opined that the process of private interrogations remains a legitimate process, capable of justification in our modern and democratic society.[41]

As one can infer from the wording of section 417(1) of the Companies Act itself, such provision is notably wide in scope. The section has the predictable likelihood of impacting not only the individuals who were the driving force behind the company but also upon the

> […] innocent third parties whose misfortune it is to know something about the trade, dealings, affairs or property of the company.[42]

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41 Joubert & Calitz (2014) *PELJ* 889; *Bernstein* at 818C–818F; Blackman *et al Commentary on the Companies Act* RS 9 Vol 3 (31 March 2012) 14-480, confirming that it is not unfair to expect a witness to submit himself to interrogation absent any prior information in the possession of the examiner.

42 See *Bernstein* [39].

The reason why the provisions of these seemingly draconian insolvency examinations are still dutifully maintained can be answered as follows: the promotion of public policy considerations which require that a company be candid with its creditors regarding its dealings.[43] It has been held that a witness delivering his or her testimony in this context, fulfils a public duty, something which supersedes the same individual's personal liberties.[44]

There are many facets of section 417 private enquiries which lend these enquiries a unique nature. These facets are summarised herewith, will also be examined in chapter 4 hereof, and through comparative law with the applicable laws of England, will be examined with the purpose of comparing how these unique characteristics of private enquiries are approached in the two different jurisdictions. As is also the case in chapters 2 and 3 of this dissertation, upon such comparative law study having been done, it may also be that with regard to private enquiries too, some benefit can potentially be extracted from adopting English law principles.

The characteristics which lend section 417 its unique nature, are the following:

### *1.2.4* Locus standi *of the person initiating the examination*

It is of prudent consideration that neither in statute nor case law is there any definitive impediment on the persons suitable for initiating section 417 proceedings. As Blackman[45] states, one would typically expect a liquidator to take such steps, but failing his intervention, it remains open for creditors, or any other person (typically one with a financial interest in the matter) to initiate such proceedings, even if a person were to have no definitive pecuniary interest in the matter.

This distinguishes section 417 proceedings from an applicant applying for relief of a more common nature such as an ordinary civil claim, or any of the other legal alternatives at the disposal of a trustee or liquidator, where the applicant's definitive and proven interests in the matter are paramount.[46]

Though this may be considered as a progressively inclusive provision that allows a

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43 See *Bernstein* [26], [50] & [55]; *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC) (hereinafter *Ferreira*) at 267.

44 *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T) at 675E–675G; *Gumede v Subel* 2006 (3) SA 498 (SCA) (hereinafter *Gumede*) [19]: "In my view, the bare assertion made by the appellants that the documents were confidential does not entitle them to withhold them […]. The proper approach is to determine whether there is reason to believe that the documents requested will throw light on the affairs of the company before the winding-up. If so, their relevance will, in general, outweigh the right to privacy."

45 Blackman *et al* (2012) 14-461–14-462.

46 See *Miller v NAFCOC Investment Holding Co Ltd* 2010 (6) SA 390 (SCA) at 394E–394F, which mentions that s 417 does not envisage an application being initiated by only a limited class of persons.

wide scope of affected parties to initiate an enquiry into a company's insolvent estate, the flipside can easily be argued that it also potentially lends itself out to utilisation by malicious litigants attempting to resort to section 417 enquiries for improper and self-serving purposes.

### *1.2.5 The potential of abuse arising in section 417 enquiries*

It has been established that section 417 enquiries are, for all intents and purposes, considered to be "the court's enquiry".[47] Enquiries of this nature can be subject to possible review by the court if improperly conducted. Examples hereof may include examinations being done for an improper purpose, amounting to an abuse of power, or being done in an oppressive or vexatious manner.[48]

In South African law, the applied approach in considering whether or not to excuse a witness from compliance with a summons calling for his attendance at a section 417 enquiry, is fairly rigid in its application. If alleged that a summons to attend a section 417 enquiry has been improperly applied for and issued, the onus rests upon the intended witness to demonstrate principally a clear abuse of the examination proceedings. It appears at first glance in South African law that the potential of oppressing the witness or other adverse effects felt by the witness or other affected parties are of secondary and less persuasive value.[49]

As an example, one needs only to refer to the Supreme Court of Appeal matter in *Roering*,[50] illustrating the point that if the court is satisfied that no sinister motivation lurks behind the actions of the instigating party and it further appears *ex facie* the papers that a legitimate purpose is evinced therefrom, the aggrieved party will be at pains to show that the adverse effects caused thereby sufficiently justify setting aside such proceedings. By way of a further example, Courts have held, that it is not necessarily seen as an abuse of the enquiry process to initiate the same for the purpose of considering the institution of future civil litigation.[51]

One therefore only needs to consider the recent case law to gather that in the South African context, the question of possible abuse of section 417 proceedings appears manifestly

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47 Blackman *et al* (2012) 14-455; see also *Bernstein* [35].
48 Blackman *et al* (2012) 14-484; *Bernstein* [24] & [153].
49 *Kebble v Gainsford* 2010 (1) SA 561 (GSJ) (hereinafter *Kebble*) [56]; see *Roering v Mahlangu* 2016 (5) SA 455 (SCA) [35]–[40] for a comparative discussion in different jurisdictions on what precisely constitutes an "abuse".
50 *Roering v Mahlangu* 2016 (5) SA 455 (SCA) (hereinafter *Roering*) [35]–[40].
51 Meskin (2022) 8-3; *Botha v Strydom* 1992 (2) SA 155 (N) at 159H–160F; *Anderson v Dickson (Intermenua (Pty) Ltd Intervening)* 1985 (1) SA 93 (N) (hereinafter *Anderson*) at 112A–112B.

lopsided, favouring the continuance of the enquiry over the potential prejudice caused to examinees, or other affected parties being compelled to subject themselves to the enquiry.

The approach adopted in England on the topic of possible abuse of insolvency enquiries, differs markedly in this regard. It appears the English courts embark upon a proportionality exercise of sorts, which weighs the interests of the liquidator with that of the potential examinees intended to be called.[52] Both respective sides of competing interests are considered on equal footing for all intents and purposes and if shown that one outweighs the other to any marginal degree, the same will carry the result of the enquiry being either allowed or refused by the Court.

This disparity in approach requires examination, which will be done in Chapter 4 hereof. In comparing these two clearly divergent approaches, it needs to be considered to what extent, if any, our legal position on private enquiries (one which clearly displays a "pro-creditor" inclination) stands to benefit from implementing what appears to be a notably more equally balanced approach, as can be gathered from the English context.

### *1.2.6 The privileged status of statements given at an enquiry in terms of sections 417 and 418*

Often, witnesses being called upon to subject themselves to an enquiry in terms of section 417, may do so with apprehension considering the consequences that may flow from such proceedings. In both South Africa as well as England it is accepted that incriminating statements given by an examinee at an insolvency may not be used against such person in ensuing or pending criminal proceedings against the same examinee. The issue is however not as clear-cut when considering the use of incriminating statements given by examinees in separate and distinct civil proceedings against such examinees.

In the South African context, and insofar as it concerns civil proceedings against an examinee there is no immunity of any sort afforded to persons subjected to an enquiry in terms of section 417. In fact, as stated above,[53] there is nothing untoward in a litigant's (or even potential litigant's) legal position being strengthened as a result of what transpires at such an enquiry. This can, understandably so, cause trepidation in the minds of many examinees and result in such examinees becoming uncooperative in the insolvency enquiry process.

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52 See *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* (1990) 3 WLR 574; *Official Receiver v Deuss* (2021) BCC 257.

53 *Roering* [47].

This current position in South African law however stands in stark contrast to the current position in England, which was crystallised recently in their Court of Appeal.[54] The principle which safeguards examinees almost entirely from the civil consequences of their testimony in England is known as "immunity from suit".[55] As will be demonstrated in Chapter 4, it appears as though the English Court has only recently taken what appears to be a decisively liberal stance compared to the position in South African law.

It has to be conceded that if examinees to an insolvency enquiry are afforded an immunity of some sort, guaranteeing therewith that all statements given at an insolvency enquiry cannot be used against such individual from both a criminal and civil perspective, such examinees will understandably be more cooperative and answer more truthfully to questions put to them at such an enquiry.

At the same time, it is also worth recognising that if the pendulum swings too far in the direction of protecting the examinee at all costs, at some point it may happen that these enquiry proceedings could start to lose their effectiveness in ultimately recovering the assets of the insolvent estate, particularly when the liquidator is prevented from relying in further civil proceedings upon an examinee's statements deposed to at the insolvency enquiry.

It will be considered in Chapter 4 to what extent the approach currently adopted in England can be meaningfully implemented in South Africa in a manner that adequately serves the intention of the legislature in uncovering untoward conduct having led to the company's downfall, whilst simultaneously affording examinees the requisite protection to ensure their continued cooperation during the examination process.

## 1.3 Research topics

First, the provisions of sections 341 and 348 of the Companies Act, read in tandem with one another, serve a legitimate commercial purpose that has been recognised for a considerable period of time.[56] It does however need to be considered if, in light of the rider provision contained in section 341(2) of the Companies Act, precisely how judicial discretion is

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54 See *MBI International & Partners Inc, Re, Al Jaber v Mitchell* (2022) 2 WLR 497 (hereinafter *Al Jaber*).

55 The doctrine of immunity from suit has long been recognised as a principle in English law that shields not only the court officials from liability in the performance of their duties, but also in respect of witnesses obliging in giving testimony. This was set out in *Arthur J S Hall & Co (A Firm) v Simons* [2002] 1 AC 615 at 740: "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity". This was quoted with approval in *Al Jaber* [49].

56 *Lief* at 347B-C.

exercised validating such void dispositions, both in the South African and English contexts. One may need to consider suggestions for law reform should such judicial discretion be applied more efficiently in favour of the collective interest of creditors in the foreign jurisdiction of England. In the form of the 2015 working document, this legitimate purpose faces an imminent threat, as the said Bill in its current form is silent on any equivalent of section 348 that has hitherto given section 341(2) its retrospective voiding effect. If the said Bill progresses into an Act of Parliament, the question will arise as to what degree the preservation of the interests of the *concursus creditorum* is potentially compromised by such deletion of section 348.

Secondly, warrants issued in terms of section 69(3) of the Insolvency Act have always proven an expedient and effective tool in the arsenal of a trustee of an insolvent estate. Yet despite that this remedy is not a new one by any measure, our courts have recently revealed that it is a remedy still profoundly misunderstood.[57] Even considering the remedy's ideal and correct application, the further question of relevance is to what extent our application of this remedy can be further improved upon. Based on the wording of the statutory equivalent of this section in the laws of England, it is apparent that despite obvious similarities, discernible differences are also extant. By way of comparison, it needs to be considered in what possible ways the application of English law principles to these types of warrants stands to benefit the effective utilisation of the same in our law.

Thirdly, most of the principles relating to private insolvency enquiries into the trade, dealings, and affairs of a company appear certain and well-established. That being said, even a cursory reading of the relevant authorities shows our law being evidently lopsided on this subject, still sympathising far more with the position of creditors, than that of other potentially affected persons. On the other hand, it is clear that the English courts have approached this seemingly draconian concept of insolvency enquiries and transformed same into something more balanced for all persons affected thereby. The question should then be if comparative systems could provide for a more balanced approach to these types of enquiries, and how one could achieve such equitable balance, affording examinees more rights and protection, without diluting the efficacy of such enquiries from the liquidator's- and creditors' vantage point.

57 *Naidoo* [20]-[24]; *De Beer v Magistrate of Dundee* (2021) 1 All SA 405 (KZP).

## 1.4 Approach and methodology

The research will be conducted by means of a desktop study. In doing so, problem areas will be investigated and possible solutions and approaches provided by authors and precedents will be considered. Law reform efforts to date will also be compared with current provisions.

A comparative study between the juxtaposed legal potions of South Africa and that of England will be done as well by comparing the position in South Africa with that of English law in relation to every relevant aspect. In summary, the select legislative provisions in English law that will be considered are as follows:

(a) The English equivalent of section 341(1) of the Companies Act is to be found in section 127(1) of the 1986 Insolvency Act of England, which reads as follows:

> In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void.

(b) The English equivalent of section 348 of the Companies Act is to be found in section 129(2) of the 1986 English Insolvency Act, which reads as follows:

> In any other case, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up.

(c) The English equivalent of section 69(3) of the Insolvency Act is to be found in section 365(1) of the 1986 English Insolvency Act, which reads as follows:

> At any time after a bankruptcy order has been made, the court may, on the application of the official receiver or the trustee of the bankrupt's estate, issue a warrant authorising the person to whom it is directed to seize any property comprised in the bankrupt's estate which is, or any books, papers or records relating to the bankrupt's estate or affairs which are, in the possession or under the control of the bankrupt or any other person who is required to deliver the property, books, papers or records to the official receiver or trustee.

(d) The English equivalent of section 417(1) of the Companies Act is to be found in section 236(2) of the 1986 English Insolvency Act, which reads as follows:

> The court may, on the application of the office-holder, summon to appear before it —
> (a) any officer of the company,
> (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or
> (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

A side-by-side comparison of the above-quoted sections, makes the origin of our own

similar statutory provisions[58] fairly obvious, save for subtle differences. As was expressly stated by the court in the cases of *Vermeulen* and *Herrigel*,[59] reference to the English authority, at least in the domain of insolvency law, is entirely appropriate and stands to be of considerable persuasive value.

This recognition of the English origin of our insolvency law and the comparative value to be attained from such foreign insolvency law appears to be widely accepted by our courts and authors. It has specifically been highlighted that South African insolvency law stands to learn much from that of England, at least insofar as the regulatory framework of our insolvency law is concerned, such as the regularisation of the functions and obligations of trustees and liquidators.[60]

Apart from foreign law, and the subject of law reform, such a discussion cannot be complete without reference to the 2015 working document as produced by the National Assembly and put forth by the Department of Justice in February 2015, dubbed the "Insolvency Bill". The Insolvency Bill's Preamble reads as follows:

> To consolidate, unify and amend the law relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities, with or without legal personality, so as to balance the needs of the different stakeholders.

Whereas the totality of our law of insolvency is currently permeated in different statutes and the common law, the aim of the draft Insolvency Bill (should it be published as a Bill of parliament in the future) is to consolidate and unify these divergent sources, which seems to be a sensible one.

The remaining portions of each chapter to follow will consist of informed criticism and approval (as the case may be) of select provisions contained in the Insolvency Bill working paper, which will be done with the assumption that the current draft working paper on the Insolvency Bill will in future become the exclusive codified source of our insolvency law.

### 1.5 Relevance of the research topic

On the first categorised topic discussed above, namely, section 341(2) of the Companies Act, read together with section 348 of the same Act, the Supreme Court of Appeal has recently

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58 Paras 1.2(a)–(c) above, with the South African equivalent of these English statutory provisions quoted in the footnotes.

59 *Vermeulen* above; *Herrigel v Bon Roads Construction Co (Pty) Ltd* 1980 (4) SA 669 (SWA) (hereinafter *Herrigel*).

60 Calitz "System of regulation of South African insolvency law: Lessons from the United Kingdom" (2008) *Obiter* 352.

rendered a judgment in the matter of *Pride Milling Company (Pty) Ltd v Bekker*[61] where the court applied the principles enunciated in the case of *Lane v Olivier Transport.*[62] In turn, such principles have, to the largest extent, been borrowed from English sources.

The court in *Pride Milling* made appropriate reference to the matter of *Lief*[63] and the mischief that sections 341(2) and 348 aim to prevent. Clearly, the propensity to attempt to circumvent the objective of section 348, is one that still lingers to this day and logically assumed, will always be present. As such it is categorically imperative that it be ensured that the rider provision contained in section 341(2), providing for the validation of void dispositions, is a judicial discretion that is applied by the Court in a manner that continues to serve the *concursus creditorum* in a manner most efficient and fair.

On the second categorised topic discussed above, namely, section 69 of the Insolvency Act, case law has also recently surfaced in the form of *Naidoo*, demonstrating a hitherto errant application of a remedy not envisioned by the legislature whatsoever, however fortunately also clarifying therewith what the correct application of such remedy entails.

There exist subtle differences in wording between said section 69 and section 365(1) of the Insolvency Act of England. Despite such differences seeming of little consequence, it needs to be considered in what respects the approach to warrants for seizure of assets (in its idealised and correct form of an application) in South Africa differs from that of England. Should comparative law however show that there lurks much more behind such seemingly subtle differences, it is to be investigated how any different approaches in the English counterpart stand to benefit South African sensibilities regarding these types of warrants.

Lastly, on the third categorised topic discussed above, namely section 417 of the Companies Act dealing with private enquiries, and since the judgment of *Roering*,[64] case law on the subject has been limited, and in a lot of respects, the legal position pertaining to private enquiries, *vis-à-vis* the examinees summoned to the enquiry, appear certain. The recent development of mention, however, transpired in England.[65]

Although the principle of immunity from suit and the right against self-incrimination within the context of criminal law is well-delineated,[66] the situation regarding immunity from

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61 2022 (2) SA 410 (SCA) (hereinafter *Pride Milling*).
62 1997 (1) SA 383 (C) (hereinafter *Lane*) at 386D–387B.
63 *Pride Milling* [14]; *Lief* at 347B-C.
64 *Roering* [35]–[40].
65 I.e., *Al Jaber*.
66 S 417(2)(*c*) of the Companies Act; *Bernstein* [92]-[120]; see also Steyn "Insolvency enquiries and the right against self-incrimination: divergent approaches in South Africa and other jurisdictions" (2005) *CILSA* 415.

suit in the civil context is less certain. In the recent English Appellate Division matter of *Al Jaber*,[67] this concept was expanded to protect an array of potential third-party witnesses called to private enquiries. The judgment has been subjected to some critique,[68] however, one will first need to fully comprehend what the principle of immunity from suit entails before any suggestions for law reform can be made about such a concept.

The extension of the principle of immunity from suit, safeguarding witnesses from civil repercussions of their evidence, could understandably hold many benefits. Over and above the rights of immunity of witnesses, the other differentiating characteristics between the two respective legal systems of South Africa and England such as *locus standi* of persons initiating private enquiries and the threshold for when such enquiries start crossing the line into abusive proceedings, are mentionable examples of different approaches in foreign law that potentially stand to benefit us. Any suggestions for law reform in this regard should, however, understandably not subtract from the ultimate purpose of these enquiries in unveiling to the liquidator and creditors the full extent of the company's trade, dealings, and affairs.

### 1.6 Overview of chapters

The structure of this dissertation is as follows:

Chapter 1 serves as an overview of the select statutory methods of obtaining control of the insolvent estate. The relevant background is set out to inform the reason why such select methods can be implemented more effectively, or improved upon through the adoption of foreign law principles. Taking into account such foreign law principles, appropriate suggestions for law reform will be set out in each following chapter. Considering further the potential impact of the 2015 working document and its content in relation to all the respective statutory methods for obtaining control of the insolvent estate, such working paper's possible impact upon such statutory remedies will also be considered where appropriate.

Chapter 2 assesses and evaluates the important functions that sections 341(2) and 348 of the Companies Act serve in tandem with one another. This point is demonstrable if regard is given to the various instances that litigants have attempted to circumvent such a purpose. Understanding that the validation of void dispositions in terms of this remedy is a discretionary exercise in both the South African and English context, a comparison will be made to foreign law in considering if there are sensible suggestions for law reform to be

67 *MBI International & Partners Inc, Re, Al Jaber v Mitchell* (2022) 2 WLR 497 (hereinafter *Al Jaber*).
68 Cooper *et al* "Al Jaber & Ors v Mitchell & Ors" (2022) 19(1) *ICR* 45.

made as to how such judicial exercise can be exercised in a more efficient manner.

Chapter 3 considers exclusively the legal position surrounding section 69 of the Insolvency Act. Recent case law in this section showcases that legal practitioners may potentially be applying section 69 in a manner not intended by the legislature. As a necessary first endeavour, this chapter will examine what precisely the correct proposed application of section 69 entails. Compounding thereto, the latter section and section 365 of the English Insolvency Act bear many similarities to one another. Yet, despite such similarities, it needs to be illustrated in what respects there may exist fundamental differences in their approach by the judiciary. Suggestions for possible law reform, where appropriate, will be made at the conclusion of the chapter.

Chapter 4 examines the remedy of private enquiries in terms of section 417(1) of the Companies Act. This is and remains an efficient manner in gauging the whereabouts of assets belonging to the insolvent estate and in rooting out untoward dealings of the company leading to its ultimate demise. Such statutory remedy also finds application in England through the provisions of section 236 of the Insolvency Act of England. As stated above, it holds particularly true in the case of England that there has been significant development in its legal position in further advancing the rights of examinees summoned to appear at such enquiry.

As such, there may be prominent areas in which our legal position in relation to private insolvency enquiries potentially stands to benefit from adopting foreign sensibilities into our law of private insolvency enquiries, and this relates not only to immunity from suit but with regard to other epithets of private enquiries in the laws of England as well. This includes issues pertaining to *locus standi*, the right against self-incrimination, the right to privacy, and abuse of proceedings.

# CHAPTER 2: THE COMMENCEMENT OF LIQUIDATION AND VALIDATION OF VOID DISPOSITIONS

## 2.1 Introduction

The commencement of liquidation of companies (and close corporations) and the voidness that befalls dispositions of property after such commencement date, is one that is unique to companies, in that the same provisions are not mirrored in the case of commencement of sequestration of natural persons.[69]

This chapter focuses predominantly on the validation of dispositions that take place after the commencement of liquidation, taking into consideration the precise date of commencement of liquidation of companies (and by extension, close corporations),[70] as articulated in section 348 of the Companies Act which reads as follows:

> A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.

As alluded to in Chapter 1 of this dissertation, section 348 of the Companies Act describes a concept that has existed in South African insolvency law for a considerable period of time. Its predecessor was section 115 of the 1926 Companies Act, which read nearly identical to that of the current section 348.

The roots of section 348 are discernible as being of English origin and remnants thereof can be traced back even further. The Companies Act 25 of 1892 (published and enacted on 27 September 1892 in the Cape of Good Hope, as an English colony, hereinafter the 1892 Companies Act), reads as follows:

> A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for winding-up on which any order for winding-up shall be made.

It is prudent, for introductory purposes, to highlight that section 348 is a provision that brings about retrospective consequences.[71] The retrospective effect described is that an

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69 As outlined in Ch 1, the commencement of sequestration in the case of insolvent natural persons, trusts, and partnerships, is regulated in terms of the Insolvency Act and is not the focus of discussion in this chapter. See ss 6(1) & 10 of the Insolvency Act; Meskin (2022) 5-50(3), distinguishing between the concepts of commencement of sequestration *versus* commencement of liquidation.

70 S 66(1) of the Close Corporations Act 69 of 1984: "The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act." Refer also to Sch 3 of the 2008 Companies Act.

71 Blackman *et al* (2012) 14-191–14-192-1 containing a discussion revolving the practicalities surrounding the retrospective application of s 348; also refer to *Venter v Farley* 1991 (1) SA 316 (W) at 319H–320F.

application (or "petition" as referred to in the 1926 Companies Act) for liquidation if granted by the court on some future date, will have the effect that the liquidation of said company will retroactively be deemed to have commenced on the preceding date when the liquidation application was issued by the Registrar of Court, and not on the date that court order for winding-up is granted.

The provision in section 348 and this retroactive effect that is brought about, are not provisions of recent import into our legal system. On the contrary, even prior to the 1926 Companies Act, this section's equivalent can be traced as far back as the 1892 Companies Act.[72]

The court in *Vermeulen*[73] qualified such retroactive application by stating that in order for retroactive working to take place, an order for winding up needs to ultimately be made.[74] If such an order is absent, the retroactive working, as described, becomes of no effect. The operation of section 348 is a functional provision and as interpreted by our courts, holds that the commencement date of liquidation will still be considered to be the initial preceding date of the main application for liquidation, in the event that the eventual liquidation order should be granted based on a later intervening application and not upon the initial, main application.[75]

This retroactive nature of section 348, and its coupling with the proviso that retroactive application is dependent upon an ultimate order for winding-up being granted (as articulated in *Vermeulen*), is actually more aptly described in the aforesaid 1892 Companies Act where the legislature qualified the provision by adding the phrase "on which any order for winding-up shall be made".

The statutory provision relied upon to give pragmatic effect to section 348 (for purposes of this dissertation), is that of section 341(2) of the Companies Act, which reads as follows:

> (2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.

It, therefore, becomes clear that there is an identifiable mischief that the legislature

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72 S 138: "A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for winding-up on which any order for winding-up shall be made". The same s was later incorporated in s 115 of the 1926 Companies Act. S 341(2), curiously, did not have an equivalent in the 1892 Act, but was later imported in s 178(2) of the 1926 Companies Act, which reads nearly identical to the current s 341(2).

73 *Vermeulen* at 163.

74 *Herrigel* at 678.

75 Blackman *et al* (2012) 14-192-1; also *Nel v The Master* 2002 (3) SA 354 (SCA) [9].

aimed at preventing with sections 341(2) and 348, in tandem with one another, such mischief being defined in the matter of *Lief*, a matter still quoted in recent case law on the subject. The mischief aimed at being prevented is an

> attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court.[76]

The court further elaborated upon the objective underpinning section 341(2) in the matter of *Lane* where the court stated that:

> The obvious purpose of [section] 341(2) is to ensure that the property of the company threatened with a winding-up is not improperly distributed prior to the commencement of the winding-up and is available for the satisfaction of the claims of its creditors on a footing of equality of treatment, subject only to any securities or preferences which any of them may enjoy under the Insolvency Act.[77]

The court in the matter of *Lane* can be criticised somewhat for stating that section 341(2) could find any application to the company's dealings prior to the commencement of winding-up, but the remainder of the paragraph correlates with similar authorities on the subject.[78]

In more concise terms, the Supreme Court of Appeal ultimately described the mischief being prevented by these statutory provisions, as follows:

> The mischief that [section] 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of creditors.[79]

In further refined terms, Blackman described the rationale of section 341(2) in the following terms:

> The object of Section 341(2) is to prevent the dissipation of the company's assets while the winding up application is pending and to ensure that its creditors are paid *pari passu*.[80]

In England, the same rationale was described as ensuring that the assets of a company

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76 *Lief* at 347B–347C. A similar sentiment was expressed in the English case of *In re Wiltshire Iron Co, In re, Ex parte Pearson* (1868) LR 3 Ch App 443 at 446: "[S] 153 no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis."

77 *Lane* at 385E–385F.

78 The wording of s 341(2) clearly adumbrated only void dispositions of property post the date of commencement of liquidation. Provisions such as ss 26 & 29–32 of the Insolvency Act are more appropriately aimed at the voidability of dispositions carried out prior to the commencement of liquidation.

79 *Pride Milling* at 422A–422B.

80 Blackman *et al* (2012) 14-50.

are divided rateably amongst the creditors of such a company.[81] More precisely worded, in the matter of *In re Wiltshire Iron Co*,[82] it was stated that the aim of the section is

> to prevent during the period which must elapse before a petition is heard the improper alienation and dissipation of the property of a company in extremis.[83]

The wording of section 341(2), read with section 348 (and by extension, sections 127(1) and 129(2) of the 1986 English Insolvency Act), however, does have a wide and far-reaching impact, as it effectively strikes all transactions with the effect of nullity if they happened to transpire at any time after commencement of liquidation and the court order for liquidation being handed down. As criticised by Armour and Bennett, the effect of these sections is that

> [section 127] effectively paralyses the company's business, for without the leave of the court, not so much as a stitch of cloth can be disposed of, not one penny spent, even to acquire an asset worth a pound.[84]

The effect of section 341(2) of the Companies Act is, therefore, an effect that may appear harsh, but one that still fulfils a vital function in the preservation of the interests of creditors. This recognition of the retrospective working of section 341(2), is something which is tritely acknowledged in England as well, with section 127(1) being the relevant provision in the latter context.[85]

This chapter is therefore firstly a theoretical- and comparative examination of the manner in which section 341(2), read together with section 348 of the Companies Act, serves the useful purpose of countering clearly identifiable and perpetual mischief that continues to threaten the interests of the *concursus creditorum*; and secondly, to examine the nature of the judicial discretion which applies to a transaction that seemingly transgresses the provisions of section 341(2), in aiming to have such dispositions validated.

## 2.2 The nature of a "disposition" for purposes of void dispositions in terms of section 341(2): the South African interpretation

In order to properly dissect the issue of voidable dispositions post the commencement of

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81 *Re Civil Service & General Store Ltd* (1889) 58 LR 220 at 221; *Re J Leslie Engineers Co Ltd* (1976) 1 WLR 292 (hereinafter *Leslie*) at 304.

82 *In re Wiltshire Iron Co, In re, Ex parte Pearson* (1868) LR 3 Ch App 443 (hereinafter *Wiltshire Iron*).

83 *Wiltshire Iron* at 447.

84 Armour & Bennett *Vulnerable Transactions in Corporate Insolvency* (2003) 333–334. See also Goode *Principles of Corporate Insolvency Law, Student Edition* 2 ed (2005) 493 articulating this indiscriminate nature of s 127(1): "Unhappily it is not so limited: it applies as much to *bona fide* business transactions as to preferences".

85 Lightman & Moss *The Law of Administrators and Receivers of Companies* 5 ed (2011) 433.

liquidation, it is necessary to first and foremost have regard to what precisely constitutes a "disposition" within this particular context. Though the Companies Act does not contain a definition for the term, the Insolvency Act does, and section 2 of the Act states that:

> [disposition] means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the Court; and 'dispose' has a corresponding meaning.[86]

Section 339 of the Companies Act makes the provisions of the insolvency law applicable to companies in an instance where a *lacuna* should exist in the company legislation.[87] It can be stated, with reference to the hitherto quoted authority, that a disposition has certain elements intrinsic to it, like the following:

(a) A disposition necessarily refers to a disposition of the company's property (be it movable or immovable, wherever situated within the Republic);[88]

(b) The disposition needs to be effected by the company itself;[89]

(c) A disposition made in compliance with an order of court, does not constitute a disposition within this context;[90]

(d) A disposition of property includes a contract concluded to effect such a transfer, alienation, or otherwise an abandonment of rights of the company;[91] and

(e) In the event of a bank receiving funds into an overdraft account of its client and crediting such overdraft with the corresponding amount received, such is considered to be a disposition of the company's property in favour of the bank.[92]

In simplified terms, Blackman holds that a disposition is carried out by a company when

> it disposes, i.e. rids itself, of property belonging to it, under an orderly or preconceived or predetermined arrangement or procedure.[93]

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86 See also the definition of "disposition" correlating with the definition contained in s 2 of the 1916 Insolvency Act.

87 S 339: "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act"; Blackman *et al* (2012) 14-51–52 confirm the application of this definition in the law of insolvency, equally applying to companies as well. The insolvency-law definition was also applied to a company in the matter of *International Shipping Ltd v Affinity Ltd* 1983 (1) SA 79 (C) at 85D–85F and *Herrigel* at 674A.

88 Blackman *et al* (2012) 14-52; Smith *et al Hockly's Law of Insolvency: Winding-Up & Business Rescue* 10 ed (2022) 167.

89 Blackman *et al* (2012) 14-53.

90 See the literal wording of s 341(2) of the Companies Act; Smith *et al* (2022) 168.

91 Armour & Bennett (2003) 333–334; Goode (2005) 493.

92 Blackman *et al* (2012) 14-53; Delport *et al Henochsberg on the Companies Act 71 of 2008* SI 30 Vol 2 (2022) APPI-24 referencing *Schmidt v ABSA Bank Ltd* 2002 (6) SA 706 (W).

93 Blackman *et al* (2012) 14-52.

The act of disposition of property can also occur when assets are merely alienated without receiving any value in return, even in instances where the insolvent merely had some contingent right in the disposed property.[94] A disposition in this context also does not limit itself to dispositions in favour of the insolvent's creditors, but dispositions in favour of any person whatsoever.[95] A disposition may also include a loan of money, even though the borrower has to repay the loan sum in due course.[96]

The mere repudiation of an inheritance or insurance benefit will however not suffice as a disposition within this context. The rationale for this is that, until such acceptance of inheritance or insurance benefit, the right is yet to accrue to the beneficiary, meaning that same cannot be disposed of prior thereto.[97]

A key distinction to bear in mind is that whilst section 341(2) avoids the void disposition of property, the same section does not provide in itself for the recovery of property which had been so unlawfully disposed of *contra* the provisions of the said section.[98] Recovery of such property remains subject to the ordinary civil remedies applicable in each instance.

The act of a disposition is, therefore, in the present context, a notably wide one in ambit, restricted by few parameters. The executability of a restitutionary claim in terms of section 341(2) of the Companies Act may, for example, be met with some restrictions in terms of other statutes.

In the context of business rescue, and specifically, how void dispositions have overlapped into the domain of business rescue, it is interesting to note that the Supreme Court of Appeal has adjudicated upon the issue of a potential conflict between the provisions of section 341(2) and section 154(2) of the 2008 Companies Act. This is an instance where a disposition has taken place within the meaning of section 341(2) and the disponee company immediately thereafter places itself in business rescue. There then exists the conflict of a debt being owed in terms of section 341(2); however, the same simultaneously amounts to a pre-business rescue debt which is not recoverable by a creditor for the entire duration of the business rescue proceedings, as stipulated in section 154(2). This was the issue in *Eravin Construction v Bekker*.[99] In this case, the Supreme Court of Appeal mentioned that

94 *Burns v Adlam* 1963 (3) SA 718 (D) at 720B–720D.
95 *Standard Finance Corporation of South Africa Ltd v Greenstein* 1964 (3) SA 573 (A) at 578B–578C.
96 Van Dorsten *Revenue Words and Phrases Judicially Considered* (1989) 244.
97 Smith *et al* (2022) 167.
98 Delport *et al* (2022) APPI-24.
99 2016 (6) SA 589 (SCA) (hereinafter *Eravin*).

> all creditors — as opposed to creditors who had been given notice of the business rescue proceedings — are precluded from enforcing pre-business rescue debts.[100]

In such an instance, the existence of the cause of action in terms of section 341(2) is not denied, and it may well be that a void disposition is recoverable in principle, but the enforcement of such action will certainly be delayed until the business rescue proceedings have been set aside in one way or another.[101]

## 2.2 The nature of a "disposition" in terms of English law

The concept of a disposition of property in the jurisdiction of England is not simple by any means. In actual fact, the concept is somewhat different from the South African interpretation thereof, in certain respects.

The term "disposition" in the company laws of England is also not statutorily defined and has no precise meaning. Such meaning has been ascribed through the conceptual interpretation thereof, predominantly through case law and academic authors.[102]

A disposition of property within the English meaning of the term can be described as including any dealing in the company's tangible or intangible assets by sale, exchange, lease, charge, gift, or loan, but also the conferment of a possessory or other lien on an asset.[103] In English law, dispositions are likewise given a wide interpretation.[104]

The English definition of the concept of a disposition is further broadened by Armour and Bennett[105] by giving an exposition of viable transactions typically falling within the ambit of a disposition. Such list entails:

(a) An outright transfer by the company of its assets, whether by gift, sale, or exchange;

(b) The grant of a mortgage, charge, or lease by the company over its assets;

(c) The grant of an equitable interest by the company in its assets whether by a declaration of trust or otherwise; and

(d) A payment made with company money (including payments made in discharge of a

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100 *Eravin* at 594I.

101 S 131(6) of the 2008 Companies Act; *GCC Engineering (Pty) Ltd v Maroos* 2019 (2) SA 379 (SCA) at 383G-H.

102 Goode (2005) 494: although the definition of a disposition is not statutorily limited in England, Goode makes the argument that a contract to deal with a company's property can in itself suffice as a disposition within this context; Fletcher *The Law of Insolvency* 5 ed (2017) 794; Armour & Bennett (2003) 337.

103 Goode (2005) 494.

104 Keay & Walton *Insolvency Law: Corporate and Personal* 5 ed (2020) 296 state that a disposition applies to a broad range of forms of dispositions that "covers the destruction, or at least the reduction in value of a proprietary right belonging to the company, causing an immediate and equivalent accrual in value to another person".

105 Armour & Bennett (2003) 337–338.

valid debt or contractual obligation).

Some authors have listed as further examples of dispositions, the sale of company property, repayment of debts, payments out of its bank account, the grant of security or payments for goods supplied, and even transfers of property in terms of a court order (in select circumstances).[106]

In the instance of money being paid from a company's bank account, it is to be borne in mind that such dispositions are deemed dispositions in favour of the recipient of the funds, and cannot be held to be dispositions in favour of the bank, the latter simply acting upon the instruction of its client. Although there has been some division on this subject in the past, dispositions from either an overdraft account or dispositions from a company account with a positive balance, are treated in the same vein, meaning they are both considered to be dispositions in favour of the payee and not the bank.[107]

In line with what was held in obiter in *Gray's Inn*, there are those who reckon a payment made into a company's account in credit constitutes a disposition within the meaning of section 127. This is based on the rationale that in such instance the company relinquishes its proprietary right over its funds to the bank (the bank essentially loaning such an amount from its customer) and the customer only attains a personal right or promise of repayment from the bank in return. This may however be regarded as a purist view which could only possibly have some relevance in the case of later insolvency of the bank.[108]

There are certain parameters as to what actions do not constitute dispositions of property. As stated above within the context of bank overdraft accounts, simply adding further to the indebtedness of a company, without any of its assets being necessarily affected, will not

106 Milman & Durrant *Corporate Insolvency: Law and Practice* (1999) 212.

107 Sealy & Milman *Annotated Guide to the Insolvency Legislation* (2004) 154 refer to the critique levelled by Goode (2005) 499–500 against the judgment of *Gray's Inn* (1980) 1 All ER 814 (hereinafter *Gray's Inn*). The latter judgment held (at 818E–818H) that payment into a company's bank account will indeed constitute a disposition of property if such account is in overdraft and upon a receipt of funds, the bank credits such overdraft accordingly. In such instance the bank reduces the indebtedness of the company owing to the bank, to the exclusion of other creditors, however the court further held that even if the account was in credit, a payment into said account would constitute a disposition in favour of the bank; see however the Court of Appeal in *Hollicourt (Contracts) Ltd (In Liquidation) v Bank of Ireland* [2001] Ch 555 at 566: "We would add that, even if the company's bank account were in overdraft, which is not this case, the foregoing analysis of the legal effect of [s] 127 would produce the same result in respect of a claim for recovery against the bank. This result has the very real practical advantage of not requiring what in some cases could be a complex analysis of whether payments were made out of an account which was in debit or in credit. The need for such an analysis cannot be justified by any sensible view of the purpose of [s] 127"; see also Keay & Walton (2020) 297–300 for a comprehensive discussion.

108 Lo "Current accounts and void dispositions after commencement of winding up" (2020) *JBL* 634–635.

qualify as a disposition under English law.[109]

In instances where a cheque is presented and the bank, on the instruction of its client, transfers funds in favour of a payee, this would not be considered a disposition in favour of the bank, but a disposition in favour of the payee, irrespective of whether the account is in credit or overdrawn.[110] This is sensical, as the beneficial interest in the check never passed to the bank but the latter merely acted as the agent of the drawer of the cheque.[111]

It, therefore, goes without saying that the act of a loan being granted by a bank in favour of its client company cannot be said to constitute a disposition of the company's property. If anything, this amounts to a disposition of the bank's property in favour of the company.[112]

On the subject of issued shares of a company, it has further been held that in the event of notice having been given prior to the commencement of liquidation, the mere conversion of preference shares into ordinary shares after the commencement of liquidation, is not considered to be a disposition of property as defined in section 127(1) of the 1986 English Insolvency Act.[113] This is in contrast with section 341(1) of the Companies Act which explicitly holds that an alteration in the status of shares in a company, is to be considered a void disposition, absent the sanctioning thereof by the liquidator.[114]

Lastly, it has further also been recognised that a disposition can also be effected within the meaning of section 127(1) of the English Insolvency Act even if the company was not a party to such a transaction.[115]

Although one can discern similarities between the South African and the English interpretations of the term "disposition", it is worth briefly outlining certain key epithets that are carried with the term.

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109 See *Officeserve Technologies Ltd (In Liquidation) v Anthony-Mike* (2017) BCC 574 (hereinafter *Officeserve*) at 594; Armour & Bennett (2003) 342.

110 Blackman *et al* (2012) 14-51.

111 *Coutts v Stock* (2000) 1 WLR 906 (hereinafter *Coutts*) [8]–[9]. This view was endorsed in the appeal matter of *Bank of Ireland v Hollicourt (Contractors)* (2001) EWCA Civ 263 (hereinafter *Hollicourt*) at 563–564 where the court remarked that: "The beneficial ownership of the property represented by the cheque was never transferred to the bank, to which no alienation of the company's property was made". See also Keay "Dispositions of company property post presentation of winding-up petitions and the plights of banks" (2001) *RLR* 86 for a case discussion of the matters of *Coutts* and *Hollicourt* (at 87–91); however, such cases are of more value on the question of restitutionary liability of banks towards the insolvent estate, than on the issue of the definition of dispositions of property.

112 *Coutts* [6].

113 Snaith *The Law of Corporate Insolvency* (1990) 426.

114 S 341(1): "Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void".

115 Sealy & Milman (2004) 155.

### *2.2.1 The definition of "property" as the object of a disposition*

The types of property susceptible to being affected by section 341(2) of the Companies Act, seem to relate firstly to "property" in the common-law sense of the word, namely movable and immovable property, corporeal or incorporeal, situated within the Republic.[116] In truth, the definition of the term "disposition", as defined in section 2 of the Insolvency Act, is of paramount assistance in considering the definition of "property".[117]

Section 2 of the Insolvency Act however also intended to include contracts, concluded in favour of the company concerned, meaning any conceivable contract in terms of which the company holds a defined interest in any type of property.

In English law, this concept of "property" has been afforded a similarly inclusive interpretation. In this regard, section 436 of the 1986 English Insolvency Act defined the term as follow:

> [property] includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.

It can be deduced that both jurisdictions intended to employ a similarly wide interpretation of the term "property".

In the case of contracts being potentially considered as forming part of the company's property within the meaning of section 127(1) of the English Insolvency Act, the English courts approach the question from the perspective of "beneficial ownership".[118]

If the company had already sold its interests to a buyer prior to the commencement of winding-up, which sale is unconditional and specifically enforceable, and a petition for winding-up is presented thereafter, the company had already disposed of its beneficial ownership, it would not be considered to be a disposition within the meaning of section

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116 Blackman *et al* (2012) 14-51–14-52; Meskin (2022) 2-13, 5-1.

117 S 2 of the Insolvency Act contains the definition of "disposition" that also describes the types of property capable of disposition by a company; see also a similar definition contained in s 2 of the 1916 Insolvency Act; Meskin (2022) 2-13–14 clarify that this concept encompasses movable and immovable property, corporeal and incorporeal; s 339 of the Companies Act further provides that in the event of the Companies Act not providing for any contingency, the provisions if the insolvency laws (including the Insolvency Act) will apply *mutatis mutandis*; see also Delport *et al* (2022) APPI-23 in confirmation that the definition as one finds in s 2 of the Insolvency Act, finds equal application in this instance of dispositions effected by companies, and not exclusively natural persons.

118 Armour & Bennett (2003) 337; Keay (2001) *RLR* 87: "For there to be a disposition within s 127 there must be some change which takes out of the company at least the beneficial ownership in an asset and conveys it to someone else".

127(1), and the disposition would likely be validated by the court.[119] The result would, however, be different if such a pre-commencement contract is conditional and the company still has some retained vested ownership after the date of commencement of winding-up. In such a case the transaction might well be struck by section 127(1) of the English Insolvency Act as being void.[120]

An argument could therefore be made that the conclusion of an agreement that is conditional or voidable by nature and finding itself interrupted by the commencement of winding-up, could be prevented from fulfilment, the reason being that such fulfilment would constitute a disposition of beneficial ownership which the insolvent company still held in such contract.[121]

One can accept that within the context of dispositions post commencement of liquidation, the concept of disposition of property is one that ought to be afforded a wide interpretation. It has been aptly stated that in order for a disposition to exist,

> [t]here must be some change that takes out of the company at least the beneficial ownership in a corporate asset and passes it to someone else.[122]

The beneficial ownership being passed from the company to a third party may also be subtle in many instances. Case law has clamped down on instances where a company attempted to release its debtors from payment of its debts to the company in liquidation. The same is also considered to be a void disposition.[123]

Affording the definition of "property" with such a wide interpretation appears to be a globally accepted norm. In the context of what was set forth by the United Nations Commission on International Trade Law (hereinafter UNCITRAL), the property to be considered to form part of the insolvent estate is said to encompass the following:

> The estate may be expected to include all assets of the debtor, including rights and interests in assets, wherever located, whether in the forum or a foreign State, whether or not in the possession of the debtor at the time of commencement, and including all tangible (whether movable or immovable) and intangible assets. It would include the debtor's rights and interests in encumbered assets and in third-party-owned assets (where the continued use of those assets by the estate may

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119 Sealy & Milman (2004) 154–155: "Where a company has entered into a binding and unconditional contract for the sale of an interest in land (or, probably, any other specifically enforceable contract to alienate property) before the presentation of a winding-up petition against it, it will in most cases already have disposed of the beneficial interest in the property concerned, and so, strictly speaking, the completion of the transaction by the conveyance of the legal title after the presentation of the petition is not a 'disposition' within s. 127"; Snaith (1990) 426; Goode (2005) 495.

120 Fletcher (2017) 793; Snaith (1990) 426.

121 Armour & Bennett (2003) 340.

122 Lo (2020) *JBL* 626.

123 *Officeserve* at 605–606; Snaith (1990) 427.

be subject to other provisions of the insolvency law.[124]

Even though the literal wording of section 2 of the Insolvency Act refers to assets "wherever situated within the Republic", it can nonetheless be said that assets even situated outside of the Republic are considered to fall within the voiding effect of section 341(2).[125]

Drawing from the aforesaid sources, it is clear that the concept of "property" is thus one that is not intended to be confined to proprietary rights in the conventional sense in either corporeal or incorporeal assets but also meant to encapsulate personal- or related rights amounting to a beneficial interest in even the property of another, existent or contingent, or merely a contractually accrued obligation to deal with the company's property in future.

### *2.2.2 Dispositions of company property, not disposed of by the company*

In the South African context, the legislature unequivocally intended section 341(2) to only envisage a disposition of company property, made by the company itself. This is evident from the section's wording.[126] This position, juxtaposed with that of English law, is considerably less inclusive in its scope. There is, in actual fact, nothing in section 127(1) of the English Insolvency Act which prevents its paralysing effect from also permeating into dispositions of company property made by third parties or indirect dispositions in favour of select creditors (such as the instance where a director issues cash cheques, buys money orders, and utilises same to pay certain creditors).[127]

With the concept of a disposition being relatively clear, and undoubtedly wide in ambit and scope, one has to consider how these dispositions are dealt with within the context of section 341(2) of the Companies Act, read together with section 348 of the Companies Act.

## 2.3 The operation of sections 341(2) and 348 of the Companies Act and their foreign counterparts

One needs to consider a juxtaposition of the literal wording of sections 341(2) and 348 of the Companies Act alongside the equivalent statutory provisions of the laws of England, which

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124 UNCITRAL "Legislative Guide on Insolvency Law" (2005) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (accessed 25 October 2023) at 75–76 (hereinafter UNCITRAL (2005)).

125 Delport *et al* (2022) APPI-23.

126 Blackman *et al* (2012) 14-52.

127 *Leslie* at 297: "It seems to me to be wholly immaterial, so long as one is dealing with the company's property, whether the purported disposition is made by the company or by a third party, or whether it is made directly or indirectly"; Fletcher (2017) 795.

leads one to gather that they are notably close in relation to one another. As a considerable portion of this dissertation focuses on a comparative study between these two legal systems, it is important to remain conscious of the content of these respective related sections.

First, the English equivalent of section 341(2) of the Companies Act is to be found in section 127(1) of the English Insolvency Act, which reads as follows:

> In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void".

Secondly, the English equivalent of section 348 of the Companies Act is to be found in section 129(2) of the English Insolvency, which reads as follows:

> In any other case, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up.

As mentioned in Chapter 1, our courts have explicitly and with approval, placed much reliance upon the substantive law of England, particularly on the subject discussed herein.[128]

As stated above, the operation of section 341(2) will only be of relevance after the commencement of liquidation, and before the eventual granting of the liquidation order.[129] As discussed above, dispositions falling within such a period are to be considered void, unless a court orders otherwise.

Though attempts have been made to expand the validation potential of section 341(2) of the Companies Act beyond the date of the court order for winding-up, such a notion has been resoundingly rejected by our courts.[130] The reason for this is that once an order for winding-up is handed down the estate has been disengaged from the hands of its directors, and then falls into the hands of the Master of the High Court, and thereafter, into the hands of the liquidator.[131] It is inconceivable what dealings could legitimately transpire at such a time without the Master or liquidator authorising the same.

The discussion in this Chapter is therefore adumbrated to only discuss the operation of

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128 See *Vermeulen* at 162D-F; *Herrigel* at 678A–680F; *Pride Milling* at 419C–420A where the court refers to the matter of *Lane* with approval, the latter referring to the apposite English authorities in substantiating its findings.

129 Blackman *et al* (2012) 14-54.

130 See *Excellent Petroleum (Pty) Ltd (In liquidation) v Brent Oil (Pty) Ltd* 2012 (5) SA 407 (GNP) at 425A–425C; *Engen Petroleum Ltd v Goudis Carriers (In liquidation)* 2015 (6) SA 21 (GJ) 21 (hereinafter *Engen Petroleum*) at 28F–30B; *Pride Milling* at 417F–417H; see Delport *et al* (2022) APPI-22–22(1); see also Smith *et al* (2022) 182 & 296.

131 S 361(1) of the Companies Act: "In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office". A similar provision is found in s 20(1)(*a*) of the Insolvency Act.

section 341(2) of the Companies Act, read together with section 348 of the Companies Act, as it relates to the period commencing at the date of presenting (or issuing) the winding-up application at the Registrar of court, spanning to the date of the court order for winding-up being made (and nothing post the date of court order). It is within this interim period that the mischief, as elaborately discussed above, is likely to manifest.

Although there may have existed some legal uncertainty as to the effect of section 341(2), read together with section 348 of the Companies Act upon post-liquidation dispositions, such ambiguity has been unequivocally elucidated in the Supreme Court of Appeal matter of *Pride Milling*.[132] In this case, the court stated that:

> In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (In Liquidation)* […] the court held that the 'primary purpose of [section] 341(2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid'. This statement is not entirely correct. What [section] 341(2) does as its predominant purpose is to decree that all dispositions made by a company being wound-up are void. This provision must of course be read with [section] 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render [section] 341(2) operative. This is different from saying that they are rendered invalid retrospectively, or that they were initially lawful and valid. That suggests that the invalidation of all such payments is presumptively harsh or undesirable, which is not the case.[133]

Hence, it must be properly understood that the consequence brought about by these two respective statutory provisions, is not that a presumed valid and legitimate post-liquidation transaction is rendered retrospectively invalid by virtue of the company's liquidation. Instead, the correct interpretation is that due to the commencement of liquidation, all transactions following such date, are deemed void *ex lege* and that the onus falls squarely on the shoulders of an affected party to convince a court to deviate from such default position by having the disposition retrospectively validated.

This is a subtle, yet impactful difference. A misapprehension of this foundational basis of section 341(2) will lead to a misplaced understanding of where the true onus of proof lies in matters where section 341(2)'s operation has voided a disposition.

Understanding this concept of retrospective validation of void dispositions, it becomes necessary to consider how the judiciary has applied its discretion as to whether or not such void dispositions ought to be retrospectively validated.

For purposes of structure, this discussion shall be divided into the old approach in the implementation of sections 341(2) and 348, followed by the recent approach adopted by the

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132 *Pride Milling* at 415H–416C.
133 As above.

courts. The differences in approach shall be illustrated with reference to, predominantly the case law.

### *2.3.1 The old position in English law*

As a result of our law being borrowed to a large extent from the laws of England, a reference to the erstwhile prevailing legal position in England is a fitting point of departure in this discussion. It is clear that in the year 1950, the discretion afforded in what we now know to be section 341(2) of the Companies Act, was a discretion of particularly wide scope (granted the relevant statutory provision at that point in time was section 227 of the Companies Act of 1948 (c. 38)).

This was apparent in the matter of *In Re Steane's (Bournemouth) Ltd*[134] Vaisey J, applying the principles of the Companies Act, 1948 of England was clearly interpreting the provision of section 227 to hold a meaning which ascribes a wide discretion to a presiding officer. This is apparent in the following quotations of the judgment:

> Under the provision of s.227 the 'disposition' (consisting of the issue of the debenture) is void unless I 'otherwise order', and the question is whether or not I ought to do so. The section itself gives me no guidance whatsoever as to the principles on which I should act, nor do I get much assistance from *Re Park Ward& Co., Ltd*.[135]

Ultimately, the court concluded that:

> The legislature, by omitting to any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion.[136]

It is clear from the judgment that the court was however guided by certain factors such as, that the parties to the questioned transaction were clearly *bona fide* and that the expenses incurred, were seen as reasonably necessary for the preservation of the business of the company.

It has been held that the general principles of justice and fairness, are what is to be considered as the guideline for courts in exercising this discretion, however, when the transaction is evidently one of honest dealing, for the benefit of the company and in the ordinary course of business, courts are likely to exercise the discretion favourably towards

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134 (1950) 1 All ER 21 (hereinafter *Bournemouth*).

135 *Bournemouth* at 24B–24C.

136 As above; Delport *et al* (2022) APPI-24–25; *Rousseau v Malan* 1989 (2) SA 451 (hereinafter *Rousseau*) at 458I–458J where the court affirms there being no *numerus clausus* of factors to be considered when exercising this discretion.

validating the transaction instead of confirming its void status.[137]

However, underlying this discretion, it seems that courts were consistently mindful that the underlying principle to be honoured in applying its mind regarding this wide discretion, was to ensure that creditors were treated *pari passu*, and that one was not favoured to the prejudice of other creditors, which would be contrary to the very objectives the insolvency law seeks to attain.[138]

Fletcher commented further in the context of English law, that the law should maintain a "clear and principled approach" in exercising its discretion as to whether or not to validate transactions falling within this aptly dubbed "twilight period" (i.e. the period from presenting the application for liquidation and the eventual granting of an order for liquidation).[139]

As time passed, the courts developed a list of guiding principles, intended to aid the court in exercising the discretion inherent in section 341(2) of the Companies Act. Nowhere are these guiding principles more clearly set out, than in the matter of *Lane* where the court summarised the following:

> (a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion. […]
> (b) Each case must be dealt with on its own facts and particular circumstances.
> (c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.
> (d) The court must be free to act according to what it considers would be just and fair in each case. […].
> (e) The court, in assessing the matter, must attempt to strike some balance between what is fair vis-a-vis the applicant as well as what is fair vis-a-vis the creditors of the company in liquidation.
> (f) The court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation. […][140]
> (g) The court should investigate whether the disposition was made to keep the company afloat or augment its assets. […].
> (h) The court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor

137 Fletcher (2017) 792. In the matter of *Wiltshire Iron*, it was shown in particular that the court will show a propensity to validate the questioned transaction, granted that it was done so in the ordinary course of business.

138 *Re Civil Service and General Store Ltd* (1887) 57 LJCh 119 at 120; see *Herrigel* at 678D–678G illustrating our court's approval of the wide discretion as articulated in *Bournemouth*, yet qualifying same by stating that the *pari passu* principle remains central to the discretion; see *Rousseau* at 459B–459D expressing a similar sentiment, adding further that the transaction being considered ought to have at least been one that was commercially sensible and reasonable; Furey "The validation of transactions involving the property of insolvent debtors. A comparison of judicial discretion with a statutory code" (1983) *MLR* 259.

139 Fletcher (2017) 794.

140 On a peripheral note, see Delport *et al* (2022) APPI-26 referring to the authorities where it has been held that in order for a transaction to qualify as resorting within a company's "ordinary course of business", this by implication encompasses only *lawful* dispositions of property. Unlawful dispositions of property are likely to be recovered under the unjustified enrichment action of the *condictio ob turpem vel iniustam causam*.

> may be decisive. […].
> (i) The court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties. […].
> (j) Little weight should be attached to the hardship which will be suffered by the applicant if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. […].
> (k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions. […].
> (l) Generally a court will refuse to validate a disposition by a company when it occurs after the winding-up has commenced unless the liquidator (duly authorised) consents accordingly and there is a benefit to the company or its creditors. […].[141]

It is apparent, not only from the above-quoted text but also from the remainder of the judgment in *Lane*, that the English authorities are of compelling significance on the subject of section 341(2)'s application to void dispositions post commencement of liquidation.

An important distinction to be drawn when considering the factors listed in the *Lane* matter is which of such factors are of an inherent objective or subjective nature. The factors listed in subparagraphs (a), (d), and (l) are clearly of an objective nature, whereas those listed in subparagraphs (b), (c), and (e)–(k) are subjective in nature, as they require an evaluation of the specific parties' conduct in each given transaction, and same is not measured against an objective standard of some sort.

With regard to subparagraph (c) above, referring to the relevance of good faith of the parties, the fairness of the transaction vis-à-vis both the applicant and creditors, and whether or not the disposition was made as a last-ditch effort to salvage the company; these considerations also have prominent English roots, much like the remainder of the factors listed.[142]

One of the oldest indications of recognition being afforded to the subjective considerations being relevant in this regard is in the English matter of *In re Wiltshire Iron Co*, where the principle was articulated that a disposition, carried out in good faith and in the ordinary course of business at a time when the parties are unaware that a petition has been presented, is a transaction which would typically be validated by the court.[143]

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141 *Lane* at 386D–387B. These factors were also quoted in the matters of *Engen Petroleum* at 30D–31A & *Pride Milling* at 419D–420A.

142 *Clifton Place Garage Ltd Re* (1970) Ch 477 (hereinafter *Clifton Place*) at 484. Although not acknowledged in *Lane* sub-para (e), the principle that the court must exercise a discretion which is fair vis-à-vis the applicant and also fair vis-à-vis the creditors of the liquidated company, Sachs J (in a minority judgment) referred to this factor as also being relevant (at 492). Further, in the other minority judgment of Phillimore J, acknowledgement was given to the principle that it can also be relevant if the disposition has the goal of having the company "turn a corner" (at 494).

143 *Wiltshire Iron* at 447. This premise was also relied upon by the court in the matter of *Gray's Inn* at 825B–825D.

As one can gather from Meskin,[144] there are still remnants of this approach in *Bournemouth* that remain embedded in our law, where it is stated that courts will have a general propensity to validate transactions that have been concluded *bona fide* continuance of the company's business in the ordinary course of events. If this was the whole of the test being applied though, it would lead to an imbalance of subjective considerations outweighing the objective considerations.

This is perhaps why Meskin goes further by qualifying such a statement by elaborating further and saying that courts will however dig their heels into the ground in a situation where a creditor attempts to attain an advantage for itself, ahead of other competing creditors.[145]

The interplay between these subjective- and objective considerations, is of more than just academic concern. It needs to be understood how the courts approach these considerations when deciding a matter. One such illustration can be found in the English matter of *Clifton Place*[146] where the court remarked as follows:

> Looking at the present facts, how does the matter stand on general equitable principles? Good faith is not in issue. There is no question of trying to get an undue advantage. The receiver thought that he was doing the best for all concerned, and that has been accepted all round; but it is said that there is no evidence that these payments did any good to Clifton at all.[147]

The importance of the quoted passage is that it shows the sequence in which the court considers these subjective considerations in relation to the objective ones. The court in *Clifton* had no difficulty in accepting the *bona fides* of the dispositor (a subjective consideration), but then the court had to further consider what the ultimate good was that was attained in making the disposition in question, particularly in relation to the creditors as a collective whole (an objective consideration).

This objective part of the test applied showed that an amount of £4,000 was paid, yet ultimately the same disposition caused £4,800 in liabilities of Clifton to be paid off, the general body of creditors was, in reality, better off as a result of the disposition than without it. The court, therefore, had no difficulty validating the disposition contrary to the presumption of voidness. The result obtained was however largely due to objective considerations.

As later enunciated in the English matter of *In re J Leslie Engineers Co Ltd*,[148] the

144 Meskin (2022) 5-132(4).
145 Meskin (2022) 5-132(4)-(5).
146 *Re Clifton Place Garage Ltd* (1970) Ch 477 (hereinafter *Clifton Place*).
147 *Clifton Place* at 491.
148 (1976) 1 WLR 292 (hereinafter *Leslie*) at 304. The importance of this overriding principle was further echoed in the matter of *Rousseau* at 459B–459D. Also, in the matter of *Herrigel* at 679H–680D one

overriding consideration ought still to be that it is to be prevented that select creditors are preferred to the prejudice of others — again laying emphasis on the objective considerations, in preference to the subjective ones. In the matter of *Leslie* the court stated:

> I think that in exercising discretion the court must keep in view the evident purpose of the section which, as Chitty J. said in In re Civil Service and General Store Ltd., 58 L.T. 220, 221, is to ensure that the creditors are paid *pari passu*.[149]

The English authorities have held, without reservation, that even a transaction resorting within a company's ordinary course of business, stands to be maintained as void if it cannot be decisively shown that the disposition was beneficial to the company.[150] Once more, it leaves no doubt that ultimately the question as to whether or not the disposition will (objectively considered) either injure or aid the general body of creditors of the company, is truly the gravamen of the issue, and stands to reign in preference to subjective considerations.

This emphasis of the interests of creditors above the interests of the parties to a singular transaction was cemented further in the matter of *SA&D Wright Ltd, Re* (*Denny v John Hudson & Co Ltd)*[151] where the court held that:

> [a] disposition carried out in good faith in the ordinary course of business at a time when the parties were unaware that a petition had been presented would usually be validated by the court unless there is ground for thinking that the transaction may involve an attempt to prefer the disponee — in which case the transaction would not be validated.[152]

It then begs the question of why the subjective considerations are at all relevant, especially in circumstances where they fulfil what appears to be an entirely secondary (and almost superfluous) role. Even in later matters following this accentuation of objectively verifiable advantage to the collective group of creditors *pari passu*, the court still recognised the question of *bona fides* together with the honest intentions of the parties, alongside considerations of fairness towards the party aggrieved and prejudiced by section 341(2)'s seemingly harsh effects, to be of notable relevance.[153]

In English law, one can discern the prominent role of subjective considerations that came to be mentioned in the Appeal Court in England in the matter of *In Re Gray's Inn*

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can see an illustration of objective considerations carrying the result where the court refused to validate a disposition, simply because doing so would be a transgression of the underlying fundamental rule that one creditor cannot be preferred in favour of another as a result of the disposition.

149 *Leslie* at 304.

150 See *In Re Burton & Deakin Ltd* (1977) WLR 390 at 395G–395H & 396H.

151 (1992) BCC 503 (hereinafter *Denny*).

152 *Denny* at 506.

153 *Herrigel* at 386C–387B; *Lane* at 389B–390F.

*Construction Ltd*.[154] Until recently replaced by a different authority, the *Gray's Inn* case was considered to be the leading authority on the subject of validation orders. In this matter, the court, borrowing from the matter of *Wiltshire*, referred with approval to the guideline that:

> A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the court, unless there is any ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case the transaction would probably not be validated.[155]

Although the court in *Gray's Inn* ordered in favour of validating a void disposition based on objective reasoning, the premise is one that can be seen as being in disharmony with the espoused objective paradigm which overrides subjective factors surrounding a disposition.

Dissecting the above-quoted text, the entirety thereof examines only the conduct of the parties to the transaction. If one were to approach post-liquidation dispositions in this manner, applying only such subjective tests in isolation, it is possible that a court could validate a transaction that does not serve the interests of the *concursus*. As stated in the matter of *Denny* it is wholly possible that persons can continue conducting their business with the most honest of intentions, yet such transactions could likely still not be to the benefit of the company (such being an occurrence where the subjective test would be satisfied, but not the objective one).[156]

Fortunately, the court in *Gray's Inn* did qualify its statement, with reference to the *Leslie* matter, in saying that it must still ultimately be ensured that creditors are paid *pari passu* – same providing some objective certainty at least.

The problem that can arise in this regard is that certain transactions may come to the fore that, although appearing at first glance as preferring one creditor above another, the nett effect of such transaction still benefits the general body of *creditors* (as coincidentally happened in the *Leslie* matter).[157] If one was to apply the principle highlighted in *Gray's Inn* to such an instance, it may well be found that a transaction either:

(a) Gets validated for being done in a *bona fide* manner, in the ordinary course of business, where the creditor involved was not aware of a pending liquidation application, and more importantly, where there was not a subjective intention to prefer such a creditor above

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154 (1980) 1 All ER 814 (hereinafter *Gray's Inn*).

155 *Gray's Inn* at 820J.

156 Armour & Bennett (2003) 372 state that the subjective consideration of *bona fides* is a factor weighing strong in favour of validation, but that something more is required.

157 *Gray's Inn* at 717D: "It may sometimes be beneficial to the company and its creditors that the company should be enabled to complete a particular contract or project, or to continue to carry on its business generally in its ordinary course with a view to the sale of the business as a going concern".

others (because there was value received as counter-performance), yet such a transaction does not advantageously serve the *concursus*; or

(b) Gets invalidated simply due to the disposition having been effected contrary to the *pari passu* principle (preferring one creditor above another), yet such transaction, objectively considered, did in actual fact benefit the creditors as a whole (as happened in the *Clifton Place* and *Denny* matters).

The court's further finding in *Gray's Inn*, namely that the court is likely to validate transactions that have the nett effect of increasing the insolvent estate's assets, is, therefore, a sensible one.[158] Unsurprisingly, it has also been held on a different occasion that a transaction causing a company's assets to decrease, is likely to be confirmed as invalidated.[159]

One of the instances where the court made an order affirming the validation of a transaction that fell within the provisions of section 341(2), and further doing so having taken into consideration exclusively subjective considerations, was in the matter of *Excellent Petroleum (Pty) Ltd (In liquidation) v Brent Oil (Pty) Ltd*.[160] In this particular instance, the court was persuaded to rule in favour of a validation order based on the issues of good faith, honest intentions, the prejudice suffered by the defendant in the event of a validation order being refused, the dispositions being made in the ordinary course of business or whether or not the disposition was an isolated transaction or part of a series of transactions.[161]

Such an approach can be criticised for being overly subjective and not in keeping with the overriding *pari passu* principle underlying section 341(2), which is intended to provide the necessary objective balance to the discretion exercised by the court. Maintaining such an approach would equate to prioritising individual interests above that of the *concursus* — an approach that would subvert the very purpose of the legislature.

On a peripheral note, it has been noted that in the event of a bank seeking to validate a void disposition, there does rest some additional duty of care in ensuring that its client company conducts its business properly and is attentive to possible winding-up applications being issued against its clients. In particular, untoward activity such as returned unpaid cheques and large quantities of cash withdrawals ought to cause banks to raise an eyebrow

158 *Gray's Inn* at 821B–821C. This finding further buttresses the court's general finding at 820B that dispositions should not, generally speaking, prejudice the general body of creditors. A further application of this principle is to be found in *Denny* where the court was satisfied in leaning towards validating the transaction, not on the subjective *bona fides* alone, but due to the assets of the company having been found to have increased as a result of the disposition. See also Goode (2005) 502.

159 *Wilson v SMC Properties Ltd* (2015) EWHC 870 (Ch) (hereinafter *Wilson*) [38].

160 2012 (5) SA 407 (GNP) (hereinafter *Excellent Petroleum*).

161 *Excellent Petroleum* at 421D–423A.

and further investigate.[162]

In summary, therefore, one can state that the old position on section 341(2) amounted to the court exercising its discretion in the following manner:

A disposition that occurred after the commencement of winding-up shall be void unless the court finds that the transaction is to be validated, which is to be decided upon taking into consideration if the transaction was executed in good faith, in the ordinary course of business, whether or not the recipient was aware that the application for winding up of the company has been delivered at the time of the disposition and whether or not the disposition was part of a series of transactions or a singular transaction, provided however that the court shall not so validate the disposition if it can be shown that same was done with the effect that one creditor was preferred above another or the *concursus* as a whole had its collective assets reduced as a result of such disposition.[163]

### *2.3.2 The new position in English law*

It will be demonstrated hereinafter that there has been a significant departure from the above old position, which has become apparent in recent case law. Nowhere is this sentiment more accurately expressed than in the English matter of *MKG Convenience Ltd (In Liquidation), Re*,[164] where the court stated that:

> Dealing first with the question whether a validation order should be made, counsel are agreed that the relevant principles are now set out in the judgment of Sales LJ (with whom Patten LJ and Etherton C agreed) in Express Electrical Contractors Ltd v Beavis [2016] EWCA Civ 765; [2016] 1 W.L.R. 4783; [2016] B.C.C. 566, and that that case represents a substantial change in emphasis as to the approach to be taken by the court in the exercise of its discretion.[165]

To borrow from the wording of the *MKG* case, it is this "change in emphasis" in applying the validation discretion that has caused the discretion in the context of post-liquidation dispositions to have gained notable improvement.

In the context of South African law, one can discern a clear negation of the old position in the matter of *Gavin Cecil Gainsford v Tanzer Transport (Pty) Ltd*[166] where the court remarked that:

> I now turn to deal with the merits of the main application. On behalf of Tanzer it was contended

162 Snaith (1990) 428.
163 There is no explicit authority for phrasing the test in this manner, but has been compiled based on the relevant legal principles crystallised from the preceding pages.
164 (2019) BCC 1070 (hereinafter *MKG Convenience*).
165 *MKG Convenience* [43].
166 2014 (3) SA 468 (SCA) (hereinafter *Tanzer*).

> that the payments sought to be set aside by the liquidators were made bona fide in the ordinary course of business of the company. It was submitted that this fact was a complete answer to the application to have the payments set aside. I disagree.[167]

It is this finding that needs to be considered alongside the premise which was sustained in the preceding English matter of *Gray's Inn* (a case often quoted in South African authorities), in which the latter court held that:

> A disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented may, it seems, normally be validated by the court (see *In re Wiltshire Iron Co*, In re Neath Harbour Smelting and Rolling Works, In re Liverpool Civil Service Association) unless there is any ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case the transaction would probably not be validated.[168]

The departure from the old position, specifically within the domain of England can be identified in select case law. In the matter of *Wilson v SMC Properties Ltd*,[169] a decisively progressive step was taken — one gradually departing from the legal position of subjective considerations towards a predominantly objective regime. The court stated:

> Good faith in the context of section 127 IA 1986 relates to knowledge of the petition (the narrow view of good faith). However I acknowledge that good faith may extend beyond knowledge of the petition (the wider view). If this is correct, a transaction which significantly depletes the assets of a company to the detriment of the general body of creditors is unlikely to be made in good faith. In other words the further away from value a transaction is or was, the less likely it is that the court will find that it is or was made in good faith.[170]

The court therefore expressly held that certain objective factors (in this case, the objective reality of a disposition either stripping the majority of a company's assets from it or a disposition being disproportionate to the value received) can never be held to be a *bona fide* transaction. Differently stated, a disposition being clearly detrimental to the collective interest of the *concursus* can never be said to be superseded by even the most benevolent of subjective intentions.

The court in *Wilson's* application of the *pari passu* principle is also of note. The question is not a perfunctory one, enquiring only if one creditor was paid *in lieu* of another. It may well be that a certain creditor was paid its full claim, but the nett result of such a transaction did not prejudice the creditors at all. As happened in *Wilson*, the immovable property was sold, but the proceeds obtained were on par with the value of the property, hence the court had no difficulty validating the transaction.

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167 *Tanzer* at 478A–478B.
168 *Gray's Inn* at 820J.
169 *Wilson* above.
170 *Wilson* [38].

It must therefore be kept in mind that what the court is to be cognisant of, is not the disposition in a vacuum, but rather the end result of such disposition upon the *concursus creditorum*.

Another instance where there has also developed a leap of objective factors trumping subjective intentions is where the allegation is made that one of the contracting parties was ostensibly unaware of the financial status of the disposer. Certain foreign jurisdictions have established that in the event of a disposition being made too closely prior to the commencement of the liquidation, or the payment was made in respect of an unmatured debt in an unusual manner, it is rightly presumed that the disponee had knowledge of the impecunious status of the disposer.[171]

One can see how this new approach is notably different from the approach adopted in the *Denny* matter where the court applied the test in the inverse – considering first the subjective intentions of good faith of the parties to the transaction and whether or not carried out in the ordinary course of business, and thereafter, consider the objective nett effect on creditors collectively.[172]

The evolution of this progression away from the old position was made demonstrably apparent in the later judgment in the Court of Appeal of England in *Express Electrical Distributors Ltd v Beavis*[173] where the court stated that:

> I confess that I have difficulty in following some of Buckley LJ's [the presiding Judge in *Gray's Inn*] reasoning in these passages. First, I do not see why Buckley LJ appears to accept the bald proposition that a disposition carried out in good faith in the ordinary course of business at a time when the parties are unaware that a petition has been presented should normally be validated by the court (p 718F–G). Validation on that basis could well prejudice the interests of the body of unsecured creditors unless the making of such a validation order depends upon a more searching inquiry whether it is in the circumstances in their overall interest that the transaction in question should be validated.[174]

The English Court of Appeal has therefore criticised its own previous stance in its erstwhile acceptance of the arbitrary premise that transactions concluded in good faith and in the ordinary course of business are likely to be considered validated under the operation of Section 127(1) (the South African equivalent of Section 341(2)). In truth, one can conceive of

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171 UNCITRAL (2005) 151.

172 *Denny* at 507: "Accepting, as I do, that the parties acted in good faith, the essential questions I think are: (1) Were the parties acting in the ordinary course of business? (2) Were the relevant transactions likely to be for the benefit of the creditors generally?"; see also *Rose v AIB Group (UK)* (2003) EWHC 1737 (Ch) [14] reiterating this approach by phrasing it as a "disposition carried out by the parties in good faith at a time when they were unaware that a petition had been presented would normally be validated".

173 (2016) 1 WLR 4783 (hereinafter *Beavis*).

174 *Beavis* at 4791.

many instances where such transactions may well prejudice the general body of creditors.

An interesting remark made by Sales J in the appeal case of *Beavis*, paragraph [26], concerns the question of whether the court, in interpreting the judgment of *Gray's Inn*, ought to either:

(a) consider the disposition as at the time of the disposition having been effected, with the parties to said disposition only having had the knowledge they had at the relevant time, and whether or not same was done to the ultimate benefit of creditors; or

(b) consider the disposition with the benefit of hindsight, having further regard to the facts and evidence as it unfolded subsequent to the disposition having taken place and with such added facts and evidence at its disposal, whether creditors benefitted from the disposition.

It appears from the *obiter* judgment of Sales J in paragraph [26] that the latter interpretation at (b) above is to be considered as the accurate interpretation of *Gray's Inn*. The conclusion reached by the court in *Beavis* however leaves no doubt as to what the court considered to be the true interpretive position of section 127(1), the same being as follows:

> "In my judgment, the time has come to recognise that the statement by Buckley LJ at p 718F–H cannot be taken at face value and applied as a rule in itself. The true position is that, save in exceptional circumstances, a validation order should only be made in relation to dispositions occurring after presentation of winding up petition if there is some special circumstance which shows that the disposition in question will be (in a prospective application case) or has been (in a retrospective application case) for the benefit of the general body of unsecured creditors, such that it is appropriate to disapply the usual *pari passu* principle."

The use of the phrase "has been" is illuminating. This ties in with the Judge's previous remark in paragraph [26] of the judgment where Sales J favoured the second interpretation of *Gray's Inn*, as paraphrased in paragraph (b) above. It means that the court would be expected to have regard to the disposition (and its benefit to creditors, or not, as the case may be) from the vantage point of having the benefit of hindsight and in so doing, considering not merely the prevailing circumstances as they existed at the time of the disposition, but also the unfolding of events thereafter.[175]

The court's finding in *Beavis* is furthermore important because it affirms that, in order for a court to favourably exercise its discretion towards validation of a void disposition, the court would have to be convinced that the disposition *was in fact*, in retrospect, to the actual benefit of the *concursus creditorum*, not whether the transaction was *likely to be* for the

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[175] The second interpretation of *Gray's Inn* was also given support in *Officeserve* at 109: "I do not agree with Mr Hagen QC that Sachs LJ in *Clifton Place Garage* should be read as supporting the view that on a retrospective validation exercise one must ignore hindsight".

benefit of creditors.[176]

It is not proposed that the old position had lost sight of the underlying *pari passu* principle in exercising the discretion of whether or not a post-liquidation disposition ought to be validated retrospectively, but it is clear that there has been a change in emphasis as to which considerations ought to be determinative of the issue, and which considerations ought to be diluted to secondary importance.

The approach adopted in *Beavis* was perpetuated in matters that followed. For instance, in the case of *MKG Convenience*, the court remarked that there had been a clearly discernible shift in the approach to be adopted in considering the discretion applied in validation applications. This new approach (quoted above), referring to the *Beavis* judgment, was referenced as follows:

> […] that case [*Beavis*] represents a substantial change in emphasis as to the approach to be taken by the court in the exercise of its discretion.[177]

The culmination of the judgment, regarding the issue of the newly altered position regarding the discretion to henceforth be applied, is to be found in paragraph [47] thereof, which reads as follows:

> This judgment therefore makes clear that the starting point for the court is the strong legislative policy of ensuring that the assets of the company at the commencement of the winding up (i.e. normally as in this case the time of presentation of the petition) should be made available for distribution among its creditors at that date. It is not sufficient for an applicant for a validation order to show: (a) that a disposition to him was in the ordinary course of business; (b) that he was unaware of the presentation of a petition; and/or (c) that he acted in good faith, though no doubt all of these will be relevant matters to consider in the exercise of the court's discretion. He must demonstrate the special circumstances referred to by Sales LJ, i.e. that the transaction will be or has been beneficial for creditors generally, or other 'exceptional circumstances', the possible example given being where a director of the company aware of the petition has deceived a person into entering into a transaction, in which case the merits would have to be argued between the liquidator and the innocent party.

There can therefore be no doubt that in instances where the court is requested to exercise its discretion on whether a transaction stands to be validated, the court is to be guided by the "strong legislative policy" which section 127(1) (section 341(2)) has cemented into our law regulating post-liquidation dispositions.

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176 *Beavis* [26] lends support to the principle of taking into consideration all relevant facts in hindsight, was further approved in the recent matter of *Macclesfield Town Football Club Ltd (in liquidation) Re* [2020] EWHC 3605 (Ch) [33]: "It is apparent that the evidence that the court should expect in relation to a retrospective order is something quite different from that which it may expect when a prospective application is made. In a retrospective application the court is looking at what in fact had happened whereas in a prospective order situation what the court has to make an assessment of the outcome based on the evidence".

177 *MKG Convenience* [43].

Such "strong legislative policy" is a reference to the *pari passu* principle and the general interests of creditors which are not to be placed subservient to any other facts or considerations.

It was in the recent matter of *Changtel Solutions UK Ltd (In Liquidation), Re*[178] where the court applied, with approval, the interpretation by *MKG Convenience* of the new approach espoused in *Beavis*, where the court said:

> The learned deputy was not satisfied that NISA continued to act 'in the normal course' but said that even if it had, in the light of Express Electrical that would not be sufficient on its own to justify a validation order.

This drastic shift to an objective policy consideration, placing the collective interest of unsecured creditors ahead of the individuals that might be adversely affected thereby, was articulated as follows:

> There are cases that have said that in exercising their discretion courts should seek to ensure that there is justice as between the unsecured creditors and those who claim pursuant to the transaction that is under scrutiny, and each case is determined on the particular circumstances, according to what is just and fair. Given what the Court of Appeal said in *Electrical Distributors Ltd v Beavis*, it is questionable whether these statements are now sustainable without being subject to heavy qualification.[179]

One can further discern clear support of the stance adopted in *Beavis*, having regard to a recent matter such as *James Court Limited (in liquidation) v Hindsight Contractors Limited*,[180] confirming the test applied in *Beavis* to be the leading authority on the validation question.[181] The English courts have, in actual fact, approached the test on the strict basis of assessing whether or not the dispositions ultimately benefitted the company or not.[182] If not, a validation order cannot reasonably follow. This sentiment was expressed as follows:

> The court in these applications has a discretion. See my reference to Denney at paragraph 22 above. Every case must be considered on its own particular facts within the parameters of respecting the pari passu principle in reaching a view as to whether the transactions were of benefit to the general body of creditors. In other words, was the company's position improved by the payments being made?[183]

It then begs the question if one ought not to narrow the prescripts underlying this

178 2022 WL 00993841 (2022) (hereinafter *Changtel*) [130].
179 Keay & Walton (2020) 302.
180 [2023] EWHC 1101 (Ch9) (hereinafter *James Court*).
181 *James Court* [25].
182 *Touchstone Retail Ltd v Grabal Alok UK Ltd* [2019] EWHC 3927 (Ch) (hereinafter *Touchstone*).
183 *Touchstone* [24]–[25]: "Over that period the company's financial position worsened to the detriment of the general body of creditors. That was the view of the joint liquidators in their evidence, see paragraph 9 of Mr Bonney's witness statement dated 5 March 2019 when he concluded that losses of £3.851 million had been sustained in the post-petition period, a view that was not challenged by Touchstone in its evidence in reply".

statutory discretion, given the judgment of *Beavis* that has hitherto been referred to with approval by other courts. If the *ex post facto* consideration of a transaction, most critically its value to the collective interest of creditors is to be the centre of focus in cases of this nature and that a conclusion in either the positive or the negative is indubitably going to be determinative of the direction in which the discretion of the court ought to be exercised, then surely most practitioners would ask the following:

First, if an affected party, insistent upon validation of a void disposition cannot demonstrably show that the disposition has benefitted the company (and concomitantly its collective interest of creditors), what value is then to be derived at all from the remaining considerations such as the parties' good faith, the fact that the disposition was initiated- and effected in the ordinary course of business, and that the recipient was ignorant to the pending winding-up proceedings?

Secondly, taking cognisance of the strictly objective and commercially centred approach that has been established regarding this discretion, the time has perhaps come to realise that these subjective considerations are to ultimately yield to the new objective (and one may argue, increasingly more focused and legally certain) approach.

### 2.4 The defence of "change of position"

Something which however surfaced in both the matters of *MKG Convenience* and *Changtel* and which was in need of clarification, was whether or not a recipient of a disposition can rely upon the defence of "change of position" as a way of resisting a claim of reimbursement by a liquidator following a declaration of such disposition being void in terms of section 127(1).

The defence of change of position is a defence against a restitutionary claim where the respondent alleges that delivery of the goods or money as claimed, considering that such recipient's financial position has changed since receipt of the disposition to such an extent that it is inequitable towards the recipient to be ordered to such return and that doing so will cause the applicant to be unjustifiably enriched at the expense of the respondent if such restitution was ordered.[184]

It is accepted that section 341(2) only stipulates that certain dispositions of property of a company are to be considered void. The section does not entitle the applicant to a return of the goods so disposed of. This is something that is regulated by the provisions of the

[184] *Changtel* [107] where the court describes the defence as "a defence to monies had and received if the defendant's circumstances have changed detrimentally as a result of receiving the enrichment […]".

general law.[185] It is therefore reasonably assumed that a restitutionary claim would naturally follow upon a declarator that a disposition is void.

The question which was put to both courts in *MKG Convenience* and *Changtel*, was if a respondent should be entitled to raise the defence of change of position, granted that a court has made a preceding order of voidness of a disposition in terms of section 127(1). In the *MKG Convenience* case, the finding of the court amounted to the following:

> Looked at in this way, the result would be that although the defence is in principle as a matter of jurisprudence available, the circumstances in which it can succeed are constrained in the same way and for the same reasons as the exercise of the court's discretion to validate.[186]

In an earlier English judgment of *Rose v AIB Group (UK)*[187] the court gave express recognition to the notion that a recipient of a disposition is perfectly entitled to raise the restitutionary defence of change of position in response to a claim for return of property or money in terms of section 127(1). Differently stated, the judgment of *Rose* made it possible for a finding of voidness to be made by the court, however seeing as section 127(1) did not provide for the actual return of goods or money, this still made it possible for a recipient of the disposition to retain its possession by raising a separate restitutionary defence, entirely divorced from the context of section 127(1).

As commented in the most recent matter of *Changtel*, the judgment of *Rose* must be read in the proper context, and not in a vacuum. Specifically, the court remarked that:

> [143] Against that backdrop, the learned deputy in Rose went on to rule (at [41]) that change of position was available as a defence to a claim under section 127, saying 'I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by a liquidator'. He went on to state that 'I do not see why the defence should not be available where, for instance, a creditor did not know and could not have known (because it had not yet been advertised) of the existence of the petition'.
> [144] The Court of Appeal's decision in Express Electrical [2016] 1 WLR 4783 changed the landscape. Sales LJ (with whom Patten LJ and Sir Terence Etherton C agreed) held in Express Electrical at [55]-[56] that Buckley LJ's principle (at paragraph 141 above) was 'misleading as a

185 Blackman *et al* (2012) 14-51; *MKG Convenience* [42]: "s 127 does not however specifically provide a remedy for the liquidators in relation to any such void disposition, that being left to the general law. In the case of a void disposition of property other than money, the company remains the owner of the property and may recover it by asserting its rights as owner. In the case of a disposition of money, including payments out of a bank account, the remedy is a restitutionary one against the person to whom payment has been made, […]". The passage is further quoted with approval in the matter of *Changtel* [127].

186 *MKG Convenience* [69].

187 (2003) 1 WLR 2791 (hereinafter *Rose*) [41]: "I do not consider that change of position can be entirely ruled out as a possible way of resisting a claim for repayment by a liquidator. It seems to me that the question of validation of a disposition is distinct from the question of actual recovery if the disposition is not validated. I do not see why the defence should not be available where, for instance, a creditor did not know and could not have known (because it had not yet been advertised) of the existence of the petition. After all, in other cases where payments can be treated as void or *ultra vires*, it is commonplace that restitution is available subject to restitutionary defences".

> general proposition' because it 'does not marry up in a coherent way with the basic principles' and that 'the time has come to recognise that [it] cannot be taken at face value.[188]

Paragraph [144] is critical in understanding the *Rose* judgment. It is unlikely that the finding in *Rose* would have been the same had the legal position ensconced in *Beavis* already been the governing law at the relevant time. Given the conclusion arrived at in *Beavis*, it is plainly inconceivable that a court, in the present day, will rule against validating a disposition as same does not serve the collective interests of creditors, yet immediately thereafter find that an individual creditor's prejudice is to outweigh the very same collective creditors' interests. Such would be a flagrant disregard of the "strong legislative policy" that was propagated in *MKG Convenience*.

The court in *Changtel,* therefore, went further by stating that:

> Trower J went on to confirm, however, that change of position cannot be a 'strong factor' in the exercise of the discretion because that would 'give insufficient weight to the underlying policy considerations illustrated by Conway and the difficulty of balancing the interests of a class against the interests of an innocent transferee' (at [94(iii)). Rather, '[the] policy that underpins the statute means that the balance is only likely to come down in favour of the transferee where the circumstances are sufficiently out of the norm to be exceptional.[189]

With the approval of the court's stance in *MKG Convenience*, the court stated that:

> In striking that balance, the court is bound to have regard to the nature of the equitable claim being asserted, and in the context of a claim being made to give effect to the legislative policy to preserve and where necessary return assets for the benefit of creditors in insolvency that requires the court to recognise the strength imparted by that policy to the claim. If it is to be denied, it must be because the circumstances of the defendant are such as to outweigh the policy imperative and show that that enforcement of the policy would be unjust on the particular facts.[190]

To illustrate further the point that the defence of change of position cannot be considered in isolation, but instead ought to be considered alongside the legitimate purpose sought by section 127, the court in *James Court* illustrated the principle as follows:

> I am also satisfied that it would bring the administration of justice into disrepute. Claims to restitution and validation order applications, if they are made, are inextricably linked due to the special context in which they arise under section 127. As night follows day, if a validation order is refused a liquidator will seek to recover the void payments; they are duty-bound to do so. In that context litigants who do not adduce all of their evidence on an issue in earlier validation order proceedings, and obtain an undesirable outcome, should not be seen to be able to relitigate precisely the same issue against the same party in a claim to restitution, with new evidence, in the hope of achieving a different result.[191]

Considering all the aforesaid, it is clear that a transferee of a benefit of whatsoever nature

188 *Changtel* [143]–[144].
189 *Changtel* [152].
190 *Changtel* [167].
191 *James Court* [81].

is entitled, as per the provisions of the general law, to raise a change of position as a restitutionary defence, and nothing in the law can exclude the applicability thereof. Doing so, however, would present the following challenges:

(a) The proverbial landscape in relation to post-liquidation dispositions has been transformed (in large part due to the *Beavis* judgment) to such an extent that the public policy considerations are now almost exclusively the determining factors dictating the fate of applications seeking the validation of void, post-liquidation dispositions. It is now plainly impossible to obtain a validation order absent consideration first and foremost to the collective benefit of unsecured creditors;[192]

(b) The defence of change of position at the behest of an aggrieved litigant still remains, an individual-focused imperative at its core, and given judgments such as *MKG Convenience*, *Changtel* and *James Court*, such individual concerns will only be able to tip the scale in its favour for validation if such individual interests can be decisively shown to be so exceptional that it outweighs public policy imperatives. On a pragmatic level, this borders near the unimaginable; and

(c) Even in the earlier matter of *Lane*,[193] our courts have recognised that, in exercising this discretion, little weight should be attached to the consideration of potential hardship to be suffered by the respondent if a validation order is not granted. This is no new conviction, as even in the old position, the judiciary was alive to the collective interests of creditors being foundational to the intention of the legislature.

### 2.5 Comparison between current law: South Africa and England

Against the backdrop of all the above, and the significant strides having been made within the context of English law, it is necessary to consider how the South African judiciary has responded to such development, particularly considering the value that has been attached by South African courts to English law in the domain of the law of insolvency.

Two Supreme Court of Appeal cases will be briefly considered herein, namely that of *Tanzer* and *Pride Milling*.

The case presented in 2013, when *Tanzer* was being considered, was that the recipient contended that the sole facts that the disposition was effected *bona fide* and within the ordinary course of business (without any independent evidence substantiating the advantage to- or even equal treatment of creditors) was a complete answer to the effect of the voidness

192 Keay & Walton (2020) 303–304.
193 *Lane* at 386J (referring to *Herrigel* at 381).

of a post-liquidation disposition. The court displayed its negation of such an attitude by stating that:

> On behalf of Tanzer it was contended that the payments sought to be set aside by the liquidators were made bona fide in the ordinary course of business of the company. It was submitted that this fact was a complete answer to the application to have the payments set aside. I disagree.[194]

In reaffirming the importance of advantage to creditors still being at the core of the court's discretion, the court reached the following conclusion:

> There is in my view no acceptable basis provided by Tanzer for justifying a departure from the well-established rule of law which prohibits any disposition by the company after the commencement of its winding-up. Ordinarily a court will consider whether fairness and justice require the rule to be disregarded.18 No such considerations were disclosed in the papers. On the contrary, the evidence demonstrates that the exercise of a discretion in favour of validity would result in extreme and irreparable prejudice to the creditors of the company.[195]

It is therefore enlightening to see that in 2013 already the elements of *bona fides*, ordinary course of business, and ignorance of pending winding-up proceedings were rightly headed towards a downward turn in its evidentiary value, especially in circumstances where such factors were counterproductive to the welfare of creditors in general, ie contrary to the very objects of the Act.[196]

As one would expect, the *Tanzer* matter was central to the discretion exercised by the same court some eight years later in the matter of *Pride Milling*.

Similar to *Tanzer*, the disponee in *Pride Milling* also asserted that it received the disposition *bona fide* and in the ordinary course of business. The court disposed of such an argument, with reference to the conclusion reached in *Tanzer*. The conclusion of the court is furthermore a sensible one and in line with the new position that has been established in the English matter of *Beavis*. The court stated:

> I pause here to mention that given the effect of [section] 341(2), a party approaching a court and seeking that the court order otherwise would logically need to establish its entitlement to the relief sought. Thus, in that sense such a party bears the onus to persuade the court with clear evidence as to why a court should depart from the statutorily ordained default position and 'otherwise order'. This, Pride Milling failed to do.[197]

The reference to "clear evidence" is therefore to be construed as objectively verifiable evidence, considered in hindsight, indicative thereof that the transaction was in actual fact to

194 *Tanzer* at 478A-B.
195 *Tanzer* at 478G.
196 Delport *et al* (2022) APPI-25: "But the Court ordinarily will refuse to validate a disposition where it was made eg with the object of securing an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference"; see also Smith *et al* (2022) 296.
197 *Pride Milling* at 423D–423E.

the advantage of creditors, free of any aspects left to conjecture, hypotheticals, or subjective intentions of whatsoever nature.

Though this is the court's *ratio decidendi*, the court made preceding reference in its judgment to passages from Blackman, which passages are still indicative of the outdated reference to the premise captured in *Gray's Inn*, where it was declared that, as a general rule, good faith and honest intentions are key enquiries which would typically favour validation orders. Reference to other works of Blackman indicates that even if a disposition had no benefit to a company at all, it will still be validated if at least there were accompanying elements present of good faith, intended to advance the interests of the company.[198]

These references to the works of Blackman are particularly mystifying because the principles contained therein accord with the legal position as it existed in the old position, yet the ultimate conclusion reached by *Pride Milling* is acutely on par with the legal position under the new position. It is unclear what degree of credence was awarded by the court to the principles set out in Blackman. Even further thereto, it is possible that had the appellant been able to present a more substantial case founded on these misguided principles derivative from the old position, the court's judgment could have gone in a different direction and consequently become susceptible to criticism.

This migration towards the new position was further approved in the unreported matter of *Sithole v Sachal & Stevens (Pty) Ltd*,[199] where the court held:

> As the judgment in Tanzer Transport illustrates, the mere fact that a payment was allegedly made in the ordinary course of business will not, of itself, afford sufficient reason to have it declared valid and effective.[200]

The judgment of *Pride Milling* has until recently received further approval in the matter of *Mazars Recovery & Restructuring (Pty) Ltd v Montic Dairy (Pty) Ltd (in liquidation)*[201] where it was reiterated that section 341(2) is unambiguously clear in meaning, namely that it invalidates any and all dispositions after commencement of winding-up, even if such disposition was in the form of remuneration paid to a business rescue practitioner, *bona fide* in carrying out his services after the commencement of liquidation, but prior to the granting of the order for winding-up. Such remuneration of the business rescue practitioner is claimable against the free residue as a concurrent claim in terms of section 44 of the

198 *Pride Milling* at 420G–421G.
199 [2021] ZAWCHC 194 (hereinafter *Sithole*).
200 *Sithole* [44].
201 (2022) ZASCA 135 (hereinafter *Mazars*).

Insolvency Act.[202]

It is unfortunate that the Supreme Court of Appeal in *Mazars* did not make any findings on the issue of validation of dispositions based on the proviso contained in section 341(2). In paragraph [14] of the said judgment it can be seen that this point was not pursued by the business rescue practitioners with any vigour. Paragraph [14] states that:

> Either way, I am not persuaded that the BRPs made out a case that the disposition made are not void *ex tunc*. They had available to them the proviso in [section] 341(2) but did not make out a case for such order. As such, it follows that the high court correctly held that the dispositions were void and set them aside.

As is intrinsic in the court's judgment, there is no reason why a business rescue practitioner would not be able to rely on the proviso of section 341(2), as would be the right of any other disponee. Granted that the business rescue practitioner would have to show that it received a disposition (in the form of his/her remuneration), and in return, through the continued operations of the company, placed creditors ultimately in a better financial position than prior to the disposition in question.

Applying the principle in *Beavis* however, business practitioners would not be well advised in such an instance to place their exclusive reliance upon considerations of good faith, honest intentions, ordinary course of business, or prejudice to be suffered by them if validation is not ordered.

It is apparent that our legal position in this regard is far from unified.[203] It appears that, although the Supreme Court of Appeal in *Pride Milling* has recently handed down a judgment (one which was favourably considered at least twice in different matters since), the conclusion which happens to accord with the conclusion one sees in the English Appeal Court case of *Beavis*, it is clear that their respective arguments in arriving at such conclusion, are not aligned.

A recent case that warrants discussion here, is the unreported case of *Symes v de Vries*

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202 *Mazars* [11]: "The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law i.e. the disposition is regarded as if it had never occurred"; Meskin (2022) 5-132(3) & 18-54(18).

203 Stoop, H, The Law of South Africa (LAWSA), Volume 6(3) - Third Edition, par 67, referring to the absolute discretion that has been laid out in *Bournemouth*, and holding that: "The court is free to act according to the Judge's opinion of what is just and fair in each case. In assessing what is just and fair, the court must of necessity strike a balance between what is fair vis-à-vis the applicant and what is fair vis-à-vis the creditors. Each case is dealt with on its own facts and particular circumstances, special regard being given to the good faith and honest intention of the persons concerned".

*Attorneys Inc*[204] where the Court stated as follows:

> The jurisprudence and commentaries on the Old Companies Act make the point that the Court ordinarily will refuse to validate a disposition where it was made for example with the object of securing an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference.[205]

The above-stated general position declaring an overall blanket ban on dispositions that aim to prefer one creditor ahead of another can be criticised for losing sight of the very purpose of the voidness provision of section 341(2). As was the case in select English authorities, it often happens that such dispositions which prefer one creditor above others may still have the nett effect of benefitting creditors generally, and should therefore be validated. For example, a transport company paying its supplier of fuel, which enables the insolvent company to continue trading, and possibly doing so to the demonstrable advantage of creditors, ought to have realistic prospects of validation.[206]

Had the Court in *Symes* simply approached the discretion of validation from the vantage point of *Beavis*, the test would have been a brief but effective one: The question would have amounted thereto to what extent the insolvent company, in this particular instance paying its arrear legal fees, could have in any conceivable manner benefitted thereby the *concursus creditorum* in general. With the hypothetical answer thereto being resoundingly in the negative, a validation order could never have followed.

On a peripheral remark, the Court in *Symes* then went further to consider two subjective elements, namely the recipient's knowledge about the disponer's insolvency status at the time of the disposition and the prejudice felt by the recipient if a validation order is refused. The cumulative effect of all these factors caused the Court to refuse the validation of the void disposition, as sought.

Subsequent to the *Symes* judgment, however, there was the case of *Smith v Pinnar Seed (Pty) Ltd*[207] where the court had the opportunity of once more applying the validation discretion afforded in section 341(2). The disponee in this matter, being a supplier of soybeans to the insolvent, relied on a conditional counterclaim, seeking the validation of a void disposition received after the commencement of liquidation. The crux of the court's finding is as follows:

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204 (011114/2022) [2023] ZAGPJHC 777 (Delivered 10 July 2023), (hereinafter *Symes*).
205 *Symes* [40].
206 Refer to *Denny* at 507.
207 [2023] ZAFSHC 396 (hereinafter *Smith*). See *Smith* [36]-[37]: the court acknowledged *Pride Milling* & *Mazars* and the list of applicable factors when considering the rider provision of s 341(2), as identified by the court in *Lane* [48].

> [51] From the aforesaid it is evident that the first respondent`s willingness to have sold the sunflower seed to Golden Ribbon was an essential lifeline to Golden Ribbon and all its creditors at the time, *without which its creditors would have suffered even bigger losses.*
>
> [52] The seed so supplied by the first respondent enabled Golden Ribbon to generate substantial proceeds which were to the benefit of all the creditors of Golden Ribbon. In fact, the initial estimate of the proceeds from the maize and sunflower crops, was an amount of R6 951 300 as stated in the Business Rescue Status Report dated 19 April 2019, *whilst it eventually yielded an actual income of R7 554 134. More importantly, R6 026 516 of the last-mentioned total emanated from the sunflower crops.*
>
> [53] The transaction therefore benefitted the general body of creditors, since it generated surplus funds for distribution. All the secured creditors of Golden Ribbon had also been paid in full.[208]

In the *Smith* matter it was concluded that the void disposition, considered in hindsight, had ultimately rendered a greater advantage for the benefit of the general body of creditors, compared to the benefit that the creditors would have received absent such disposition. This factor alone was deemed sufficient reason for the court to order that the void disposition was validated by virtue of section 341(2), without the need to consider the remainder of factors described in *Lane*. This judgment marks an application of the section 341(2) rider provision's discretion in a manner precisely as intended in the English case of *Beavis*, together with the retinue of cases thereafter having hitherto referenced *Beavis* with approval.

The *Smith* judgment aside, there are many authorities in South African law supporting the following of the old position, but these authorities have to be considered in the proper context — preferably one where the public policy considerations attached to the *concursus creditorum* are given first and foremost preference (with reference to tangible evidence, before- and after the disposition in question, so as to ascertain whether or not the collective interests of unsecured creditors were served positively or negatively by the transaction), and failing such test, all other subjective and individualistic considerations fall entirely to the wayside unless particularly exceptional circumstances dictate otherwise. In the hitherto South African case law, this hierarchy of relevant considerations is not well-defined at all.

In conclusion, it can be said that whereas English law has started to establish a clearly defined hierarchy and sequence of factors to be considered when tasked to consider if an aggrieved applicant in a validation application is entitled to such remedy, the South African position is less certain – with the same factors being considered by the court, but with a distorted sequence of importance (save for *Smith*, discussed above). Unless such hierarchy or sequence is better defined, the possible outcome of validation applications in South Africa will remain uncertain in the future.

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208 *Smith* [51]-[53]. Own emphasis added.

## 2.6 Select considerations published by UNCITRAL read with the 2015 working document

As referred to above in the matter of *Lief,* section 348 of the Companies Act serves to prevent particular mischief, such being the propensity of companies to dispose of their assets in the critical period between the presentation or issuing of the liquidation application and the eventual order for winding-up being given. As demonstrated herein, this safeguard principle, incorporated by South Africa from English origins, serves a long-standing and legitimate interest.

It is a matter that has been given international recognition. In illustration of this point, is an excerpt of the suggested legislation published by UNCITRAL, stating that:

> To provide certainty for the debtor and for creditors, the insolvency law should specify the date by reference to which the estate will be constituted. Some insolvency laws refer to the effective date of commencement of proceedings, while others refer to the date of the application for commencement or to an act of insolvency that forms the basis of the application. The significance of the difference between the dates relates to the treatment (and most importantly the protection) of the debtor's assets in the interim period between application and commencement. For that reason, some laws constitute the estate from the date of application. Other laws, for reasons of clarity and certainty, constitute the estate from the date of commencement, but also contain provisions that restrict the debtor's powers to dispose of property during the period after the application is made.[209]

This period within which creditors' interests are to be preserved has been aptly dubbed the "twilight period" by English authors such as Fletcher.[210] A different nomenclature can be found in the writings of UNCITRAL's guide, where it is described as the "suspect period", and defined as:

> To address situations where there is the potential for delay to occur, an insolvency law could stipulate that the suspect period applies retroactively from the date an application is made and address transactions between application and commencement in other terms, such as whether they were fraudulent or whether they were in the ordinary course of business.[211]

Recommendation 37 contained in the same 2005 UNCITRAL guidelines states that any system of insolvency should, as a matter of necessity make provision for the recognition of an earlier date prior to the winding-up order being given, for the insolvent estate to be formed at such earlier date. This is expressed in the following terms:

> The insolvency law should specify the date from which the estate is to be constituted, being either the date of application for commencement or the effective date of commencement of insolvency

209 UNCITRAL (2005) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (accessed 25 October 2023) at 81 (hereinafter UNCITRAL (2005)).
210 Fletcher (2017) 791.
211 UNCITRAL (2005) 147.

proceedings.[212]

This was echoed in the later recommendations laid down by UNCITRAL in 2022,[213] dealing specifically with the subject of the effective date of commencement of liquidation proceedings, upon the application of a petitioning creditor. This resulted in Recommendation 297, which reads as follows:

> The insolvency law providing for a simplified insolvency regime should specify that a simplified insolvency proceeding may be commenced on the application of a creditor of a debtor which is eligible for simplified insolvency proceedings, provided that:
> (a) Notice of application is promptly given to the debtor;
> (b) The debtor is given the opportunity to respond to the application, by contesting the application, consenting to the application or requesting the commencement of a proceeding different from the one applied for by the creditor; and
> (c) A simplified insolvency proceeding of the type to be determined by the competent authority commences without agreement of the debtor only after it is established that the debtor is insolvent.

Apart from the prudence of sections 341(2) and 348 being apparent in the history of South African- and English law, due recognition of this statutory protective measure can be seen on a global level.

With the fundamental importance of these provisions in mind, it needs to be considered to what extent the continued preservation of these principles is in harmony with the 2015 working document. Considering the possibility that the latter may likely become a unified and codified source of South African Insolvency law, the impact of the same upon the aptly named "twilight period" or "suspect period" needs to be examined.

The starting point for such examination is the definitions clause of the proposed Bill. In terms of said definitions, one can see the phrase "date of liquidation" being defined as:

> the date of the first liquidation order or, in the case of a voluntary liquidation by resolution, the date of the registration or filing of the liquidation resolution.

Although the current section 200, read with section 352(1) of the Companies Act is in line with the wording of the quoted section insofar as it concerns the commencement of liquidation in the case of a voluntary creditors' winding-up and concomitant registration of a special resolution,[214] the remainder of the quoted section is strikingly at odds with the wording of section 348 of the Companies Act.

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212 UNCITRAL (2005) 82.

213 UNCITRAL "Legislative Guide on Insolvency Law" (2022) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/msms_insolvency_ebook.pdf (accessed 25 October 2023) at 88 (hereinafter UNCITRAL (2022))

214 S 352(1): "A voluntary winding-up of a company shall commence at the time of the registration in terms of [s] 200 of the special resolution authorising the winding-up."

Under Chapter 4 of the aforesaid working paper, the title of the chapter reads "Liquidation orders and commencement of liquidation" yet incongruously none of the sections in Chapter 4 speak directly to the issue of commencement of liquidation. The working paper seems to envisage the liquidation of companies to commence only upon an order being granted to that effect.

Instead, it appears as though the draft Insolvency Bill attempts to bring the commencement of winding-up for companies (even in the case of compulsory liquidation proceedings against companies) under the same proverbial umbrella as that of individuals commencing sequestration proceedings.

Given the paramount importance of section 341(2) and section 348 in tandem with one another, as elaborately set out herein above, it goes without saying that omitting to carry forth an equivalent to 348 in the newly proposed Insolvency Bill, will consequently have a neutralising effect on the efficacy of section 341(2) as a remedy to affected parties.[215] It, therefore, becomes relevant if there is a similar provision to section 341(2) that has been imported into the Insolvency Bill. Such equivalent can be found in section 172(2), same which reads as follows:

> Every disposition of its property including rights of action by any debtor being liquidated made after the commencement of the liquidation, is void unless the Court orders otherwise.

Section 172(2) therefore clearly envisages the concept of "commencement of liquidation" being a relevant point of departure in declaring post-liquidation dispositions void. The only sensible meaning that can be attributed to section 172(2), read in conjunction with the definition connoted to "date of liquidation", is that liquidations by the company, after the date of the liquidation order (provisional or final) are to be considered void.

If the date of commencement of liquidation in the context of the newly proposed Insolvency Bill is therefore to be construed as the date of the first liquidation order (not the date of issuing the application for winding-up), this would be a senseless interpretation of the legislature's intention behind the section 341(2), as adapted to section 172(2). This conclusion is based on the provisions of section 361(1) of the Companies Act, which reads as follows:

> In any winding-up by the Court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office.

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215 Armour & Bennett (2003) 331: "The full significance of [s] 127 can only be appreciated if it is read alongside [s] 129 of the Act".

If the entirety of the insolvent estate vests in the Master of the High Court once an order for winding-up is made, the notion that any assets in such an estate can be disposed of by anyone other than the Master or the later appointed liquidator is a juristic fallacy.[216]

The consequence that must follow is that a disposition somehow factually carried out by a representative of a company subsequent to its liquidation, is incapable of being declared void within the confines of section 341(2), and by extension, section 172(2), but will rather be considered void due to the very fact that section 361(1) made such an act of disposition by the company, legally impossible.

If the legislature of the working paper of the draft Insolvency Bill, therefore, intended to insert an equivalent of section 341(2) of the Companies Act, but to omit an insertion of an equivalent to section 348, the result would be legally untenable.

As was stated above, the hitherto recommendations set forth by UNCITRAL confirmed the perennial existence of this symbiotic relationship between sections 341(2) and 348, and speaking on a basis of probabilities, it is unlikely that the legislature intended to arbitrarily deviate from such globally recognised position.

## 2.7 Suggestions for law reform

### *2.7.1 Reform of the discretion exercised by courts in validation applications*

Section 127(1) of the English Insolvency Act (and by extension, section 341(2) of the South African Companies Act) has been critiqued as being too broad in scope of application.[217] As the author has put it, this is so because in principle section 341(2) voids all post-liquidation dispositions indiscriminately – whether they are beneficial to the company or not.

This is where the court's discretion is called upon when asked to validate a disposition which, upon the insistence of any affected party, even someone not being a party to the disposition, such as a shareholder, calls for the court to exercise its statutory discretion in validating the disposition in question.[218]

Although the old position of section 341(2) did, amongst the majority of authorities,

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216 Meskin (2022) 5-132(4); Blackman *et al* (2012) 14-54: "After the order has been made, control of the company's property vests in the Master until a provisional liquidator is appointed; and hence those who could have disposed of the company's property before the winding-up order are impotent to make any dispositions of its property after the making of the order".

217 Armour & Bennett (2003) 333–334; Goode (2005) 493. As stated in Meskin at 5-50(2)–5-53, the result of the mere presentation of an application for winding-up, is that the trading of the company is paralysed, whether the liquidation application is "groundless or well-founded". The broadness of the discretion was articulated in the matter of *Bournemouth* with reference to the phrase: "The court's discretion is controlled only by the general principles which apply to every kind of judicial discretion".

218 Blackman *et al* (2012) 14-56; *Re Argentum Reductions (UK) Ltd* (1975) 1 WLR 186 at 190.

have an adequate consideration for the importance of the *pari passu* principle when exercising its validation discretion, the problem remained that the foundational importance of the collective interest of creditors was often times obfuscated by other subjective considerations. Singular examples hereof include:

(a) The matter of *Excellent Petroleum* where issues of good faith, honest intentions, the prejudice suffered by the defendant in the event of a validation order being refused, the dispositions being made in the ordinary course of business;

(b) The matter of *Gray's Inn* where the court was prepared to accept that, as a point of departure, the court would be inclined to validate a void disposition, granted it was done in good faith and in the ordinary course of business, as rightly criticised in *Beavis*;

(c) The matter of *Lane*, where it was stated that the court must have equal regard to what is fair vis-à-vis the applicant and what is fair vis-à-vis the creditors when instead the newly adopted objective approach dictates that the interests of creditors ought to enjoy preference;

(d) Though one cannot fault the conclusion of the recent Supreme Court of Appeal authority in the matter of *Pride Milling*, in that case, the court surprisingly still gave recognition to the principle that, even if a void disposition does not actually benefit creditors, it will still be validated if at least the disposition was done *bona fide* with the intent of advancing the company's business and holding even further that insofar as it concerns the court's discretion, "[same will not] involve any element of reasoning by hindsight in an endeavour to determine whether the transactions provided actual benefit to the creditors". This is notably in stark contrast with the *Beavis* judgment;

(e) The importance of the *Smith* judgment above cannot be overstated in this context. That case is a paragon of the ideal application of the validation discretion afforded in section 341(2), in which instance the court took heed first and foremost of the nett effect that the disposition had on the overall wellbeing of the general body of creditors, meaning that an affirmative finding (or negative finding, as the case may be) on that question, renders any consideration of further factors in support of an argument for validation irrelevant and redundant; and

(f) Overall there are many remnants of the old position embedded in our current law in the context of section 341(2), specifically regarding the hierarchy of relevance of many other considerations such as *bona fides*, ordinary course of business, counter-performance received, prejudice suffered by the recipient, the preference of one creditor ahead of

another and the disponee's ignorance of the pending winding-up proceedings.[219]

The development of this discretion in relation to the validation of void dispositions, specifically as can be tracked in the English insolvency law is commendable, as it undoubtedly serves the interests of the *concursus* above all other concerns. The *Beavis* judgment (as affirmed recently in *James Court* and *Touchstone*) can now be held as the authority in deviation of the previous position that a court ought to be favourably inclined towards validation of post-liquidation dispositions where the same has been done in good faith advancement of the company's affairs and in the ordinary course of business.

As demonstrated, one can conceive of many instances where even with the element of *bona fides* and having a disposition done in accordance with the ordinary course of business, such transactions may well still be of detriment to the collective interest of the creditors.

The observation made by the English Appeal Court in *obiter* in *Beavis* that its own previous judgment in *Gray's Inn* ought to be interpreted as considering not the relevant facts of the disposition at the time of so making it, but instead considering all facts, with the benefit of hindsight and having further regard to all facts as they transpired after the disposition in question, is pertinently valuable in answering the question if such a disposition was to the benefit of the *concursus* or not, and ought to be the primary question asked in instances where validation of a void disposition is sought.

The remaining factors referenced in *Lane*, namely whether or not the void disposition was executed in the *bona fide* course of business, the disposition had the effect of advancing the interests of certain creditors above others, the disposition was part of a series of dispositions and not an isolated incident, the knowledge of insolvency on the side of the beneficiary and the prejudice suffered by the beneficiary if a validation order is refused are all supposed to fulfil a secondary function only insofar as they can be contributory to the ultimate question of the nett effect upon the estate of the insolvent in relation to its creditors.

If one considers the most recent apposite authorities in South African law, it is clear that within the South African context, there has not yet been such an explicit shift in focus of the elements underlying the discretion inherent in section 341(2), except for the one as identified in *Smith*.[220] A shift in approach, as identified in *MKG Convenience Ltd*, could well serve to be similarly adopted in South African law.

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219 Meskin (2022) 5-132(3) – 5-132(5); Blackman *et al* (2012) 14-58–14-61.

220 *Smith* [51]-[53].

### *2.7.2 Prospective validation applications*

Another aspect that may be beneficial for importation into South African law, is that of prospective validation applications. These applications are brought by the company itself to obtain the leave of court in validating dispositions after a petition for winding-up has been issued, but prior to a winding-up order having been pronounced by the court.

These types of applications are common practice in England, given that nothing in section 127(1) of their Insolvency Act prevents validation applications from being made in advance of a winding-up order being decided upon.[221]

In the regulation of the insolvency law of England, there exists a separate practice directive on the subject of insolvency law.[222] The relevant portion of such practice direction for purposes of this discussion is the one that deals expressly with validation orders being sought on a prospective basis.[223]

The purpose of such practice directive is contained in paragraph [9.11.1] thereof, which reads as follows:

> A company against which a winding up petition has been presented may apply to the Court after the presentation of a petition for relief from the effects of s.127(1) of the Act, by seeking an order that a certain disposition or dispositions of its property, including payments out of its bank account (whether such account is in credit or overdrawn), shall not be void in the event of a winding up order being made at the hearing of the petition (a validation order).

Paragraph 9.11.4 of said practice direction further mandates the full and frank disclosure of the company's financial affairs to illustrate that the company is authorised to carry out certain dispositions for purposes continuing in its business, lest creditors approach the court after the fact and seek that the court declares such dispositions to be void.

A further cardinal provision in relation to these prospective validation applications is to be found in paragraph [9.11.7], which holds that:

> The Court will need to be *satisfied by credible evidence* either that the company is solvent and able to pay its debts as they fall due or that a particular transaction or series of transactions in respect of which the order is sought *will be beneficial to or will not prejudice the interests of all the unsecured creditors as a class*. (Emphasis added).

The advantage of a company pro-actively seeking the validation of ongoing dispositions, as opposed to taking the risk and potentially having the disponee later seek the

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221 Sealy & Milman (2004) 154 refer to *Re A I Levy Holdings (Ltd)* [1963] 2 W.L.R 1464; see also reference to prospective validations applications in *Gray's Inn* at 821F–822B; *Wilson* [79]; *Beavis* [22].

222 UK Judiciary "Practice Direction: Insolvency Proceedings" (2018) https://www.judiciary.uk/wp-content/uploads/2018/07/pd-insolvency-proceedings-july-2018.pdf (accessed 25 October 2023) (hereinafter UK Judiciary (2018)).

223 UK Judiciary (2018), part 2 [9.11].

validation of such dispositions after the order for winding-up has been given, is self-evident:

If the application for validation is brought prospectively, the court will exercise its discretion based on credible evidence available at the time, in determining whether the envisaged dispositions will either serve the collective group of creditors or prejudice them. If however, the court's sanction was not obtained prior to the fact, it is the disponee that will need to seek the validation of the disposition after the court has already granted the order for winding-up.

Once the retrospective validation application, on the other hand, is brought, considerably more proverbial water would have flowed under the bridge, and as stated in the *Beavis* matter, the court will, in such an instance, not be considering a previous (perhaps more favourable) state of affairs, but a current state of affairs when the company has already reached its downfall and all evidence, considered in hindsight after the disposition up until the order for liquidation, will be of relevance.[224]

As stated above, the wording of section 127(1) of the English Insolvency Act, and that of section 341(2) of the Companies Act, are nearly identical. One then ought to ask why the concept of prospective validation applications is not a standard practice in South Africa. There is certainly no bar upon such applications based on the literal wording of section 341(2), yet no such applications have hitherto been brought in South Africa.

As mentioned, there may be a considerably reduced onus to overcome in the event that a validation application was sought prospectively instead of retrospectively. Perhaps given time, this is a practice that ought to be gradually implemented in South African law.

[224] This difference in approach between retrospective- and prospective validation applications, and specifically the different evidential considerations applicable to them respectively, was affirmed in *Macclesfield* [33]-[35].

# CHAPTER 3: OBTAINING CONTROL OF THE INSOLVENT ESTATE BY WAY OF WARRANTS IN TERMS OF SECTION 69(3) OF THE INSOLVENCY ACT

## 3.1 Introduction

The taking of control of the insolvent estate, be it that of a company or a natural person (or whichever other type of legal entity or association), is the main function of a liquidator or trustee after his or her appointment as such[225] As alluded to in Chapter 1 of this dissertation,[226] in the case of a provisional liquidator or trustee, their purpose is specifically to obtain the necessary control of the insolvent estate until the final liquidator is appointed.[227]

The liquidator or trustee is appointed by the Master of the High Court, and similar to that of an individual appointed in a fiduciary capacity, he or she has to provide the necessary security for the proper fulfilment of his or her functions.[228] In principle, the provisional trustee is clothed with many of the same powers and duties as that of a final trustee, with the exclusion of instituting or defending legal proceedings on behalf of the insolvent estate.[229]

If a liquidator or trustee attains his or her appointment after following the appointment of a *curator bonis*, initially appointed in the insolvent estate, the *curator bonis* effectively becomes *functus officio* and is to report to the Master of the High Court on his or her actions during such tenure before surrendering control of the insolvent estate to the later appointed liquidator or trustee.[230]

The ability of a liquidator or trustee to effectively obtain such control of the insolvent estate is dependent upon the powers provided in the applicable legislation, in this case, section 69 of the Insolvency Act.[231]

Whereas the content of chapters 2 and 4 of this dissertation is expressly limited in its scope by examining only the legal position of companies (and where applicable, that of close corporations as well), to the clear exclusion of natural persons, this chapter covers both natural- and juristic persons. The majority of authors hold the view that section 69 of the Insolvency Act applies to companies as well, as this section is a unique remedy that has no

225 Smith *et al* (2022) 158.
226 S 391 of the Companies Act; ss 19(1) & 69(1) of the Insolvency Act; Meskin (2022) 4-25, 4-26(1) & 4-54; Bertelsmann *et al* (2019) 199-211, 345; see *Bernstein* [15] for a succinct exposition of a liquidator's duties in general.
227 Bertelsmann *et al* (2019) 199, 345; *Roux v Van Rensburg* 1996 (4) SA 271 (A) at 276C–276D confirm this duty of taking control by the trustee to be one of common-law origin.
228 S 18(1) of the Insolvency Act.
229 S 18(3) of the Insolvency Act.
230 Shrand *The Administration of Insolvent Estates in South Africa* (1953) 10.
231 Meskin (2022) 4-26–26(2).

equivalent in the Companies Act.[232]

The remedy of section 69 is one that is applicable to both the sequestrated estate of a natural person and the liquidated estate of a company or close corporation. For purposes of this chapter, therefore, reference to a trustee is by necessary implication to be interpreted as a reference to the office of the liquidator as well, unless the contrary is clearly stated.

To properly understand the nature and purpose of section 69, it is necessary to first cover the context that would typically follow the implementation of said statutory provision; differently stated, the factual state of affairs that would ordinarily necessitate the invocation of section 69 as an appropriate remedy.

One of the first rudimentary actions taken after an order for sequestration or liquidation is granted is the attachment of the insolvent's property, which is attended to by the deputy sheriff with the required jurisdiction. Subsequent thereto is the sheriff's compilation of an inventory depicting the extent of the property so attached, and in this way, earmarking the same as presumably belonging to the insolvent estate. A copy of such an inventory is also provided to the Master of the High Court following the attachment.[233]

Section 69 becomes relevant after the initial attachment of property which has been attended to by the deputy sheriff. As a point of departure, one must consider the wording of section 69 and its relevant subsections, which reads as follows:

> (1) A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section 19, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.
>
> (2) If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).
>
> (3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.
>
> (4) Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized

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232 S 339 of the Companies Act: "In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by this Act". See the unreported case of *Venter v Alba Skrynwerkersgeboue (Pty) Ltd* (2022) ZANCHC 38 (hereinafter *Alba*) [21]; *Kerbyn* at 811E–881F; *Putter* at 261H–261J; *Fourie v Le Roux* 2006 (1) SA 279 (T) at 285H–286B; Meskin (2022) 5-31–32.

233 S 19(1) of the Insolvency Act; Meskin (2022) 5-20(1)–5-23; Bertelsmann *et al* (2019) 177-179.

thereunder to the trustee".

Considering the quoted section 69, it is clear that the latter section provides the trustee with a specific power in exercising his statutory task of searching for, and taking control of, the insolvent estate more efficiently. This remedy finds application after a section 19 attachment of assets has already transpired. Section 69(3) provides for a warrant issued by a magistrate to enable the trustee to conduct a further search for property, books or documents of the insolvent, granted the trustee has reason to believe that additional assets are being either concealed or unlawfully withheld from the trustee.[234]

The obstruction of the trustee in his or her location of property of the insolvent estate assets is a criminal offence, and it carries the penalty of a fine or imprisonment.[235] It is therefore to be expected that the trustee will also initiate the necessary criminal charges against such individuals obstructing the trustee from attaining possession of the insolvent estate's assets.

The wording of section 69 may, at first glance, seem that the remedy provided is unilateral and draconian. In actual fact, this view has, for some time, been taken by the courts and authors alike.[236] The obvious reason for such a view, given the wording of section 69, is that the latter essentially first authorises the issuing of a warrant, on the version of the liquidator (and to the exclusion of the *audi alteram partem* rule), and secondly, based on no more than "reasonable grounds for suspecting" concealment of, or unlawfulness of, possession of assets, without independently verifiable proof thereof.

In principle, section 69 fulfils a vital function in enabling the trustee to obtain swift possession of goods suspected to belong to the insolvent estate. In this regard it strengthens the hand of the trustee in allowing him or her to take the required control of the insolvent estate — all with the ultimate aim of preserving the interests of creditors.[237]

In the three main sections of this chapter, the issues surrounding section 69 are approached in three broad sections.

(a) First, a critical examination of section 69 from a theoretical perspective is undertaken to conclude whether or not this remedy (as intended by the legislature) is correctly understood and applied by courts and practitioners, and to what extent this can be improved upon.

234 Meskin (2022) 5-24–5-27; Bertelsmann *et al* (2019) 345-347.
235 Meskin (2022) 16-29–16-30.
236 *Bruwil Konstruksie v Whitsun* 1980 (4) SA 703 (T) at 711A; Bertelsmann *et al* (2019) 346.
237 *Bruwil* at 711B–711C; *Cooper v First National Bank of SA* 2001 (3) SA 705 (SCA) at 713E–713F; Meskin (2022) 5-25.

(b) Secondly, a comparative study comparing the section 69 remedy with the apposite parallels found in the laws of England. Consideration is then given to the UNCITRAL's publications on ideal statutory contents on the subject.

(c) Lastly, considering the abovementioned comparative study, possible law reform is considered.

### 3.2 The history of section 69 of the Insolvency Act

Before examining section 69, it is necessary to have regard to the historical origin of this section. As demonstrated herein, the historical context will illuminate the legislature's intention with regard to the present legislation.

The Companies Act 25 of 1892, contained an equivalent section like section 69, albeit in a modified way. Section 175 of the 1892 Act read as follows:

> The court may at any time before or after it has made an order for winding up of a company, upon proof being given that there is probable cause for believing any contributory to such company is about to quit the Colony, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, moneys, securities for monies, goods and chattels to be seized, and him and them to be safely kept until such time as the court may order, and may give such directions and make such order for the release of such contributory from custody, and of his books, papers, money, securities, goods and chattels from seizure upon his entering into bail or depositing security as to the court may seem fit.

There seems to be a dichotomy concerning the different bodies authorised to issue warrants of this kind as one could gather from section 175, read with section 69 of the Insolvency Act. First, section 69(1) refers to the warrant of seizure being authorised by a magistrate, whereas section 175 stipulated that such authorised body was the court. Secondly, whereas section 175 required that proof be given in support of probable cause that goods and chattels were on the cusp of being removed or concealed, section 69(3) requires no such proof explicitly, and merely prescribes that the magistrate must be satisfied on oath that there are reasonable grounds for suspecting that goods were either concealed or unlawfully withheld from the trustee. The relevance of this is highlighted in the paragraphs to follow.

This landscape of warrants changed drastically when the 1916 Insolvency Act was enacted. Against the backdrop of the above-quoted section 175 of the 1892 Act, section 129 of the 1916 Insolvency Act read as follows:

> (1) If it appear[s] from any statements made upon oath that there is reason to believe that property (including books and accounts) belonging to an insolvent or assigned estate is concealed upon any premises a magistrate may, upon the application of the legal representative of the estate, issue a warrant to search for and take possession of that property.

(2) Any such warrant shall be executed in the like manner as a search warrant for property suspected of being stolen or concealed.

It was in the 1916 Act that one sees the departure from the authorised individual being shifted from the court to a magistrate, and also where a statement upon oath in satisfaction of a reason to believe that goods are concealed, is deemed sufficient for the issuing of the requisite warrant.

In considering the definition of a magistrate, the 1916 Act, defined it as:

> [S]hall include an assistant magistrate as well as a chief magistrate or other magistrate.

Considering the further discussion herein, it is prudent to note that the reference to a magistrate does not explicitly state that the magistrate needs to be acting in the capacity of a presiding officer in a court, upon a court application compliant with a notice of motion and founding affidavit.

There was no equivalent to section 175 of the 1892 Companies Act to be found in the succeeding 1926 Companies Act.[238] Given the fact that section 69, therefore, finds application to both natural persons and companies, section 129(1) of the 1916 Insolvency Act found similar application to both types of debtors.

After the 1916 Insolvency Act was repealed by the current 1936 Insolvency Act, section 69 of the current Insolvency Act applied. An important distinction between section 129(1) of the 1916 Insolvency Act and section 69(3) of the 1936 Insolvency Act is that the former only provides for the issuing of a search and seizure warrant upon the suspicion of goods being *concealed*, whereas the latter is wider in scope since it also makes provision for searching and seizure of goods *unlawfully withheld* from the trustee of the insolvent estate.

Section 129 of the 1916 Insolvency Act marked the first departure away from the court having the jurisdiction to issue warrants of this nature and granted similar jurisdiction to magistrates. This notion was carried forward to section 69 of the 1936 Insolvency Act.

## 3.3 The theoretical- and technical nature of section 69

### *3.3.1 The purpose of section 69*

As a point of departure, the pivotal objective of section 69 is to be borne in mind. Such objective is the speedy and efficacious obtaining of physical possession of assets

[238] The only relative in the 1926 Companies Act, addressing the taking of control by way of court procedure by a liquidator, is that of s 130(4)(*a*), which resembles s 386(4)(*a*) of the Companies Act.

reasonably believed to belong to the insolvent, and as sought by the trustee.[239]

The sole aim of section 69 is to provide the trustee with physical possession of goods which, upon reasonable suspicion, are believed to be owned by the insolvent, wherever such assets may find themselves.[240] The aim is certainly not to make any juristic determination of any rights (proprietary or possessory) in relation to such goods.[241] Section 69 is also not of relevance insofar as the trustee's duty to take control of the insolvent's immovable property. The securitisation of immovable property is to be achieved by the trustee by having an appropriate *caveat* registered against the title of the relevant property, so as to prevent its disposition.[242]

Given the insurmountable task of a trustee often trying to recoup assets of the insolvent estate, the location of which is often unknown, section 69 has the sole purpose of granting the trustee physical possession. Such possession can understandably prove invaluable to creditors toiling in uncertainty over the status of such assets.

### *3.3.2 The applicable test when issuing warrants in terms of section 69(3)*

It is necessary to understand the test or threshold considered when a magistrate is requested to authorise a warrant for the search and seizure of property under the circumstances depicted in section 69. This is most accurately illustrated with reference to the relevant case law.

The *locus classicus* in relation to warrants in terms of section 69(3), is that of *Bruwil Konstruksie*.[243] The test applied in this context is that insofar as the trustee or liquidator applies for the authorisation of a warrant for search and seizure, something less is required than what would ordinarily be expected of a litigant required to prove a *prima facie* case, as is typically expected of a *dominus litis* in the ordinary course of civil litigation.[244] To require a trustee to meet the civil test on a balance of probabilities, supported by adequate primary and secondary evidence, would be to defy the very purpose of section 69.[245]

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239 Bertelsmann *et al* (2019) 346; Meskin (2022) 5-25; *Bruwil* at 711A–711B; *Cooper* at 713B–713C.

240 *Cooper* at 713B–713E; *Le Roux v Viana* 2008 (2) SA 173 (SCA) (hereinafter *Viana* SCA) at 175B–175D.

241 *Kerbyn* at 811E–811I; Meskin (2010) 5-25.

242 S 18B of the Insolvency Act; Smith *et al* (2022) 160.

243 *Bruwil Konstruksie v Whitsun* 1980 (4) SA 703 (T) (hereinafter *Bruwil*).

244 Smith *et al* (2022) 158 affirming that the yardstick for determining the existence of *reasonable grounds* for issuing a s 69(3) warrant, is whether there simply exists a suspicion that property is concealed or withheld from the trustee, even if such suspicion may turn out to be wrong.

245 *Bruwil* at 711B–711D, stating that: "Unfortunately, there is no guidance or precedent on this particular section, but in my view, it contemplates a lesser burden than a *prima facie* case in a court of law, otherwise there would be hardly any purpose in the section. The section is obviously designed to enable a liquidator or trustee to obtain possession of assets speedily and to place an onus on the person in possession to prove his ownership or right to possession, and to remove the burden from an estate of

Differing from the judgment in the *Bruwil* case, the same court in *Advance Mining Hydraulics v Botes*[246] expressed the view that, in determining the validity of a warrant issued in terms of section 69(3), one ought not to consider that the remedy is a draconian one, therefore necessitating a particularly circumspect investigation, but instead the judgment in *Advance Mining* affirms that the question ought simply to be if the remedy is justified given the hitherto facts and circumstances, as presented to the magistrate.[247]

In reality, the effect of section 69 is that it reverses the *onus*, by placing same upon the third parties affected by the section 69(3) warrant to prove their entitlement to the property in question. This is sensible as the trustee comes aboard the affairs of an individual as a complete stranger, whereas the aforementioned third parties have all the information at their disposal, to prove or disprove (as the case may be), to address the issue of entitlement to the property attached in terms of section 69(3).[248]

The courts, however, do seem *ad idem* that it would be inappropriate to insist upon a warrant in terms of section 69 where there is a clear and *bona fide* dispute between the trustee and the third-party possessor regarding the right of possession, and the trustee is evidently attempting to strengthen his or her hand through the utilisation of section 69 as a means of evading the ventilation of such dispute and obtaining possession of the contested property.[249]

It has also been held that a trustee is not to abuse the mechanism of section 69(3) warrants to obtain possession of a solvent spouse's property of the insolvent where it is clear that the provisions of section 21 of the Insolvency Act are to find application.[250]

Turning to the issue of what meaning the phrase "reasonable grounds" entails, as stated in Meskin,[251] the safeguard in the protection of the interests of third parties potentially affected by the issuing of a warrant in terms of section 69(3), lies in the phrase "reasonable grounds". The magistrate authorising the issuing of a warrant is to satisfy himself or herself that there are reasonable grounds for issuing such a warrant, before so doing.

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instituting action first and of discharging the onus of proving that the estate is the owner". See also *Philip Business Services CC v De Villiers* 1991 (3) SA 552 (hereinafter *Philip Business Services*) at 554A–554B; *Deutschmann v Commissioner for the SARS* 2000 (2) SA 106 (ECD) at 118B–118C; Bertelsmann *et al* (2019) 346.

246 2000 (1) SA 815 (TPD) (hereinafter *Advance Mining*) at 821H–822C.

247 *Highstead Entertainment v Minister of Law and Order* 1994 (1) SA 387 at 393A–393B. See also *Kerbyn* at 811H–811I stating that: "Nor will the warrant be invalid if the property does not belong to the estate, for its validity depends only upon whether it was authorised by the section […] If the requirements of the section are met, then the magistrate is authorised to issue such a warrant".

248 *Philip Business Services* at 556I–557B.

249 *Advance Mining* at 822A–822C; *Cooper* at 716B–716I; Meskin (2022) 5-26; Smith *et al* (2022) 158–159.

250 See *Cothill et Uxor v Cornelius* 2000 (4) SA 163 (hereinafter *Cothill*) at 166J–167D.

251 Meskin (2022) 5-25.

The phrase "reasonable grounds" in this context has been held to mean that:

> It seems to me that the words "reasonable grounds" imply an investigation of some kind. The question is how far he has to go in his investigation. It also seems clear that the reasonable suspicion which must exist must be an objective and not a subjective one, as far as the particular trustee or liquidator is concerned.[252]

Insofar as the observation was made above that, in transitioning from the 1916 Insolvency Act to the 1936 Insolvency Act, the element of "proof" in support of forming the reasonable suspicion of goods being concealed, was lost in the process. It does, however, seem that the Court has accepted that such proof is still required by necessary implication. This is evident considering the Court in *Bruwil* which pertinently noted that the trustee's subjective views and interpretation of the state of affairs are not sufficient in motivating a warrant in terms of section 69. The trustee's subjective suspicion must be pillared at least by objective certainty of some sort. The magistrate is therefore to look beyond the mere facts presented by the trustee and ought to insist that evidential confirmation of those facts be supplied by the trustee.

This safeguard of the magistrate exercising reasonable discretion as to whether or not to authorise the warrant is additional to the fiduciary duty further placed upon the trustee. As stated in chapter 1 hereof, the liquidator of a company

> […] is expected to be detached, independent, impartial and even-handed in his dealings and must also be seen to be so.[253]

It is, therefore, to be expected that a trustee setting out the proper factual basis upon which the relief in terms of section 69(3) is founded, is tasked with executing his or her duties with the degree of detachment, independence, and impartiality expected of him or her.

The application presented to the magistrate also compels the latter to exert reasonableness before issuing the section 69(3) warrant. The magistrate is to insist on facts supporting the opinions or deductions formed in the evidence relied upon, and not simply accept such opinions or deductions as proven facts.[254]

Seeing as applications in terms of section 69(2) are typically brought without notice to the parties affected thereby, the authority applies equally in this instance that in *ex parte* applications, a litigant is expected to display the utmost degree of good faith, which

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252 *Bruwil* at 711E–711F.

253 Joubert & Calitz "To be or not to be? The role of private enquiries in the South African insolvency law" (2014) 17(3) *PELJ* 898; see also *Standard Bank of South Africa v The Master of the High Court* 2010 (4) SA 405 (SCA) at 405D–405F.

254 Smith *et al* (2022) 158.

necessarily implies a full disclosure of all relevant facts by the party seeking the relief.[255]

### *3.3.3 Characteristics of section 69(3) warrants*

As one can discern from the wording of section 69(2), there are only a limited number of role-players involved in initiating a warrant in terms of section 69(3). Those role-players involved, are the trustee of the insolvent estate who brings the application, and the relevant magistrate clothed with the necessary jurisdiction to issue the warrant.

A further limitation that comes into play, is that section 69(3) requires a statement upon oath, in support of the issuing of a warrant. In considering said statement upon oath, the context of section 69 ascribes a specific meaning to such statement upon oath, and hence the following is to be considered: (a) It is not required for such an affidavit to have been deposed to by the trustee himself/herself; (b) It is not required that the statement upon oath needs to be reduced to writing in the form of a written affidavit. *Viva voce* statements made upon oath should therefore suffice; and (c) The application itself for the warrant of seizure in terms of section 69(3) need not be in writing either.

The above observations at (i) to (iii) are not of mere academic value, but represent instances where the court was faced with the question of the applicability of section 69, where either the statement was not made by a third party or the trustee, or the same was not done in writing. It was found that section 69 should find application in all such instances.[256]

It has been concluded that section 69(3) applications should be available to the trustee, free of restrictive formalities or burdensome applications. This is sensible considering that the remedy is one that is intended by the legislature to provide the trustee with a right to obtain speedy possession of estate assets where circumstances call for it.[257]

If one applies the finding that section 69 warrant applications have no prescribed formalities, do not require an affidavit deposed to by the trustee, and can even be initiated orally, it is logical that section 69(3) warrant applications can hold their inception from numerous other instances unrelated to the sequestration or liquidation proceedings

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255 *Cooper* at 717A–717B referring with approval to *De Jager v Heilbron* 1947 (2) SA 415 (W) at 419–420.

256 In the matter of *Advance Mining*, the s 69(3) warrant came about as a result of oral evidence given at a s 415 (of the Companies Act) public enquiry, during which testimony, evidence was given regarding the concealment of assets. See further *Snyman* at 1002G–1002H where a public enquiry was conducted a s 65 (of the Insolvency Act) and during which incriminating statements were made, justifying the granting of a s 69(3) warrant. The Court further referred, with approval, to the *Philip Business Services* judgment at 553I–553J, quoting therewith: "[s] 69(3) does not require that the 'statement made upon oath' should be made by the liquidator. The magistrate could have regard to the evidence given at the enquiry".

257 Meskin (2022) 5-25.

themselves. If it therefore happens that a liquidator, in the process of performing his or her duties, be it in related litigation or otherwise, comes to learn of any person having confirmed on oath that select assets are withheld from the insolvent estate, the liquidator is likely to utilise same in support of a section 69 application.

Section 69 warrants have also been found to have a wide scope of application. It entitles a trustee to obtain possession of assets suspected to belong to the insolvent estate — and not only from the insolvent himself but also from any third party that happens to be in possession of such assets.[258]

Lastly, due to technological advancements, it has further been established by the Supreme Court of Appeal that data being stored electronically (such as that being stored on a hard drive disc of a computer) is to be considered as falling within the ambit of the phrase "books and documents" referred to in sections 69(2) and 69(3) and are merely to be interpreted as taking on different forms, including in such a case, electronic data.[259]

### *3.3.4 Application of the* audi alteram partem*-principle to section 69(3) warrants*

An aspect that is not expressly clear in section 69, is whether or not there could exist circumstances where it would be necessary to afford advance notice to affected parties of an impending application in terms of section 69(2) where a section 69(3) warrant will be sought. One can imagine that the lack of such prior notice would likely be an ideal ground for review of such a warrant of seizure, granted that the legislature intended for such notice to have been given.

There are opposite views of the courts on this particular subject. First, there was the case of *Putter*[260] where the Court expressly acknowledged that, even within the prevailing context of section 69, and the objective of the legislature, the affected persons do have a right to be heard before issuing a warrant in terms of section 69(3). The Court stated:

> When a magistrate is called upon to issue a writ because property is being concealed obviously hearing the other party could frustrate the whole object of the provision. However, when a person is holding property openly and maintaining that such possession is lawful, the position must be different. I balk when it is suggested that a magistrate, on the say so of a trustee, may decide a legal issue without hearing both parties and the subsequent seizure of the property leaves the

258 *Venter v Avfin* 1996 (1) SA 826 (A) at 835A–835B.

259 *Le Roux* at 175E–175H: "That being the case, those books and documents, irrespective of the form they are in, are clearly within the contemplation of s 69 and are susceptible to seizure under a warrant in terms of that section. It can hardly be suggested, as counsel for the appellants submitted, that we should not take judicial notice of the technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed".

260 *Putter v Minister of Law and Order* 1988 (2) SA 259 (TPD) (hereinafter *Putter*).

absentee helpless to prevent its removal.[261]

This finding in *Putter* can be criticised for losing sight of the very purpose of section 69.[262] As already established, a magistrate exercising their discretion in terms of section 69(3) does not do so in determining any proprietary or possessory entitlement to the property. Section 69 solely enables the delivery of physical possession to the trustee of assets suspected to be insolvent estate assets.

The *Putter* judgment was considered to have been wrongly decided by later judgments, the most prominent of which is that of the *Kerbyn* judgment.[263] The latter stated as follows:

> In my view, the Legislature must have intended to exclude a right by the affected person to be heard. To afford such a right would, in many cases, defeat the very purpose of the section. There will also be cases in which the trustee or liquidator will not even be aware of the identity of the affected person. Furthermore, the very grounds upon which such a warrant may be issued are inconsistent with the existence of a right by the affected person to be heard. In my view, *Putter* […], which held that there was such a right, was wrongly decided and I agree with the contrary conclusion in *Philip Business Services CC v De Villiers* (*supra*).[264]

After certainty was given on the issue, namely that the *audi alteram partem* right was undoubtedly intended to have been excluded by the legislature in section 69, the principle found itself in a state of retrogression on this particular point when the Supreme Court of Appeal delivered its judgment in *Cooper*.[265]

The *Cooper* judgment was not decided unanimously and a rather extensive minority judgment was also delivered. The minority judgment shall also be discussed, considering its relevance to this discussion and the one to follow in paragraph 3.3.5 herein.

In *Cooper*, Smalberger JA veered off considerably from the once established (and well-motivated exclusion of the *audi alteram partem*-principle) in the context of section 69(3) warrants when Smalberger JA made the following remarks:

> Section 69(3) was clearly intended to strengthen the hand of a trustee in carrying out the obligation to take charge of all the assets belonging to an insolvent estate. Resorting to its provisions has the potential to infringe the rights of others in relation to both their property (at least to the extent of depriving them of something in their possession) as well as their privacy when it comes to search and seizure. In those circumstances, in my view, as a general principle, a warrant should not be issued without affording the person or persons affected, or likely to be affected (to the extent that their identities are ascertainable or reasonably ascertainable), an opportunity to be heard, unless it can be said that [section] 69(3) (the authorising provision)

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261 *Putter* at 261D–261E.

262 See the criticism levied in the minority judgment of *Cooper* at 722I–723E, two extracts of which read as follows: "The view taken in *Putter's* case appears, with respect, to have been based upon a misreading of s 69 […] With due respect, the provision does not require the magistrate to make findings of that kind or to decide a legal issue".

263 *Kerbyn 718 (Pty) Ltd v Van Den Heever* 2000 (4) SA 804 (WLD) (hereinafter *Kerbyn*).

264 *Kerbyn* at 813H–813I.

265 *Cooper v First National Bank of SA* 2001 (3) SA 705 (SCA) (hereinafter *Cooper*).

> excludes that right either expressly or by necessary implication.[266]

This reasoning of Smalberger JA clearly amounts to a *non sequitur* seeing as the premise upon which the whole further argument is based, namely that affected parties' right to prior notice is acknowledged and that advance notice must be given unless the legislature intended to exclude that right, is something which has already been decided upon in *Kerbyn*. The court in *Cooper* gave no indication that it considered *Kerbyn* to have been wrongly decided.

The *Cooper* judgment then muddled the water further by drawing a distinction between the instance of assets being concealed from the trustee on the one hand, and assets being unlawfully withheld from the trustee on the other hand. It was the court's reasoning that, in the former instance, the legislature clearly intended to exclude the affected party's right to be heard, but that in the latter instance, the court has to apply its discretion as to whether or not the affected parties have a right to be heard prior to the issuing of the section 69(3) warrant or not.[267]

This unjustifiably altered position was sharply criticised by Marais JA in the minority judgment of *Cooper*. As rightly stated by Marais J:

> Until the decision of *Putter* […], I cannot recall ever having seen any authority for the proposition that the giving of notice is a prerequisite to the exercise of a power to issue a warrant of the kind here in question.[268]

The criticism of the majority judgment of *Cooper* continued in saying that, if the giving of advance notice to the possessor is something to be left to the discretion of the trustee or magistrate (to decide on a case-by-case basis), that is an interpretation unlikely intended to have been ascribed by the legislature to section 69.[269]

Since the *Cooper* judgment, no court was called upon to clarify this issue further. On the aspect of prior giving of notice to potentially affected parties, the judgment of *Cooper* represents the current legal position. It is also accepted that, after the Cooper judgment, if the identities of the individuals retaining such assets are ascertained, or at least ascertainable, it is less likely that the court will sanction not giving advance notice to such persons of the trustee's intention of bringing such an application.[270]

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266 *Cooper* at 713D–713F; Bertelsmann *et al* (2019) 347; Meskin (2010) 5-26, quoting *Cooper* as authority for the proposition that the *audi alteram partem*-principle is to be respected when s 69(3) warrants are issued.

267 *Cooper* at 714F–714H.

268 *Cooper* at 719G–720A.

269 *Cooper* at 720F–720G.

270 Meskin (2022) 5-26.

Insofar as applications are to be made in terms of section 69(2), specifically where assets are unlawfully withheld from a trustee, the latter would be expected to pertinently address the issue of giving notice to affected parties, and if the same was not done, and to indicate extensively in its application why such prior notice is to be foregone in the circumstances. This would have to be done seeing as the right of third parties to be heard, even in matters such as section 69(3) warrants, remains of prime importance.

### *3.3.5 The capacity in which a magistrate acts in terms of section 69(3)*

As commented above, section 69(3) marked a critical departure from section 175 of the 1892 Act in that the authorising person has gone from being "the court" to being a "magistrate". This has caused the court to have considered the question if the application is granted in a judicial capacity or some other capacity, such as a magistrate acting in more of an administrative capacity.

In the *Philip Business* judgment,[271] the court remarked that:

> The steps in terms of [section] 69 to obtain a warrant have never been dealt with as an "application" as meant by the Magistrate's Court Act, 32 of 1944, or the Rules thereunder. In consonance with the magistrate holding many offices and performing even more duties, the application is not to a court or to a magistrate in the capacity as presiding officer in a court, but to a person who holds the office of a magistrate.[272]

The amendment of the wording from "the court" to "a magistrate" is one with pragmatic consequences. In accordance with the interpretation followed in *Philip Business*, it would be legally inappropriate to seek the court's assistance in terms of section 69(3), but one would need to approach a magistrate in a different capacity.

The issue came to be mentioned again in the matter of *Kerbyn*, where the Court stated that:

> It was also submitted that the warrants in the present case were issued by what was described in argument as the respective 'magistrate's courts' whereas the authority to issue such a warrant vests in what was described as a 'magistrate acting administratively'. In my view, there is no merit in that submission. The form in which the documents were cast and the place in which the magistrates performed their functions (assuming it was in a courtroom, although the evidence does not establish this) does not seem to me to be relevant. The question is rather whether the respective magistrates performed the functions that were required of them by the section.[273]

This view articulated in *Kerbyn* can be criticised for overlooking the finding made in *Philip Business* that magistrates indeed act in different capacities, particularly when issuing

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271 *Philip Business Services CC v De Villiers* 1991 (3) SA 552 (hereinafter *Philip Business Services*).
272 *Philip Business* at 556A–556B.
273 *Kerbyn* at 813J–814B.

warrants of this nature. Though one can always appreciate an approach of substance-over-form, this particular instance is distinguishable. A formal court application is subject to many constraints which an informal application to an administrative officer is not.

Compelling adherence to court procedure requires, in most instances, the appointment of a legal representative, subscribing to the Court Rules, a particular court's practice directives, and inevitably the incursion of legal costs which will ultimately prejudice the creditors of the insolvent estate.

Most importantly, Rule 55(3)(*c*) of the Rules of the Magistrate's Court reads as follows:

> (c) Any order made against a party on an ex parte basis shall be of an interim nature and shall call upon the party against whom it is made to appear before the court on a specified return date to show cause why the order should not be confirmed.

It is therefore not foreseen in terms of the Magistrate's Court Rules (regulating a creature of statute) that such court has the capability of granting final *ex parte* orders without affording the affected party the right to first be heard.

There have been suggestions in the past that the act of authorising and issuing a warrant in terms of section 69(3), actually amounts to a judicial act and not an administrative one, but the authority for this stance is dubious.[274] The counter-argument, that the act of issuing this type of warrant is rather an administrative act instead of a judicial one, is more convincing.[275]

If one considers this alongside the judgment of *Cooper*, where the Court said that in instances of assets being concealed from the trustee, the legislature clearly intended for prior notice to be excluded, it would be impossible within the confines of the Rules of the Magistrate's Court, in its judicial capacity, to grant such final relief, without notice to the affected party.

In addition to the above, it is in stark contrast with one another to hold in certain instances that section 69 is not intended to carry any prescribed formalities and can even be requested verbally (as the courts have done), yet on the hand for the court to stipulate that the remedy is only attainable by way of court application (a process which indubitably prescribes

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274 See Calitz "State regulation of South African insolvency law – an administrative law approach" (2012) *Obiter* 462: the statement is made that a s 69(3) warrant comes about as a result of a judicial act, but as authority for the statement, reference is made to *Le Roux v Magistrate, Mr Viana* 2006 JDR 0562 (W) in fn 33 thereof. However, such judgment was overturned on appeal in *Viana* SCA at 176A–176B: "It will be more productive I suggest that, rather than seeking to determine in what capacity the Judge was acting when he issued a warrant, the issue must be to determine whether the warrant was lawfully authorised". *Viana* SCA, therefore, clearly held that the court *a quo* had erred in considering whether or not the act of issuing the warrant was judicial or administrative in nature.

275 Templeton "Warrants in terms of section 69(3) of the Insolvency Act" (1999) *Judicial Officer* 94.

strict compliance with formalities before any relief can be granted).

The only sensible construction is that section 69 applications can be brought in any manner, shape or form, before a magistrate (a magistrate not sitting in a judicial capacity), and granted that it meets the statutory prescripts of section 69(2), the trustee is entitled to the relief provided in section 69(3).

Support in favour of this argument is to be found in the matter of *Naidoo v Kalianjee*, where the Supreme Court of Appeal was called upon to adjudicate certain alleged formalistic defects complained of in relation to a section 69(3) warrant having been issued. Arguably one of the most critical findings of the court was the following:

> Awkwardly phrased the warrant may well be, but it was clearly not issued in the process of civil litigation. As is clear from the provisions of clauses 2, 3 and 4 where reference is made specifically to [section] 69 of the Act, it was no more than a warrant issued under that section.[276]

The Court continued:

> Similarly, clause 5(a) is also anomalous but, again, it is an anomaly that is, in truth, without effect. The appellants' contention that this was, a provisional warrant is without merit… Indeed the use of the phrase "return date", while unfortunate, conveys no more than that any person affected thereby (the appellants in this appeal) could approach the court on that date to challenge the issue of the warrant if so advised.[277]

It is to be inferred from *Naidoo* that a warrant in terms of section 69(3) carries certain distinct characteristics, namely:

(a) Such warrants are not issued by a magistrate in a judicial capacity, but in a different capacity (be it administrative or otherwise) by virtue of the unique provisions of section 69;

(b) Seeing as section 69 clearly does not provide for the issuing of warrants on a provisional basis, is needs to be accepted by extension that any warrant issued under the auspices of section 69(3), is a final warrant of search and seizure; and

(c) Any reference to such an order being of an interim nature or ordering that costs are to be paid, is to be regarded as *pro non scripto*, considering that such provisions are *ultra vires*.

Considering the finding that warrants in terms of section 69(3) are indubitably final in nature, this will have the effect of limiting the number of remedies at the disposal of any aggrieved third parties. Third parties will however be entitled to initiate separate

276 *Naidoo* at 458B–458C.
277 *Naidoo* at 458E–458F.

proceedings at their discretion to retrieve assets seized in terms of this section.[278] Such appropriate relief could include, *inter alia*, vindicatory relief, review proceedings, prohibitory interdicts, declarations of rights, or any remedies preserving possessory rights.[279]

Since *Naidoo*, the finding that section 69(3) warrants do not amount to judicial proceedings has further been echoed in subsequent matters, such as in the case of *De Beer v Magistrate of Dundee*,[280] where the Court imposed certain additional restrictions upon the legitimacy of warrants, including therein that warrants should further subscribe to the affected persons' right to privacy, as a constitutionally enshrined right.[281] The correctness of including such additionally cumbersome requirements of validity upon warrants in terms of section 69(3) is however uncertain, seeing as:

(a) It is clear that the Constitutional Court authority relied upon by *De Beer* makes it clear, at the inception of the judgment, that the judgment concerns only warrants issued in the criminal law sense of the word;

(b) In *Naidoo*,[282] it has been expressly held that "a warrant under [section] 69 can neither be construed as being akin to a warrant issued under [section] 21 of the Criminal Procedure Act 51 of 1977, nor necessarily subject to the same limitations and restrictions attendant upon criminal warrants";

(c) As hitherto authorities such as *Bruwil*, *Kerbyn* and *Cooper* have demonstrated, section 69(3) warrants carry no consequence of a determination of any party's substantive rights. They simply place the element of physical possession in the hands of the liquidator, therefore fulfilling a vital function in the context of the insolvency law; and

(d) The extract from section 69(4) stating that "[s]uch a warrant shall be executed in a like manner as a warrant to search for stolen property" states that the only similarity between the section 69(3) warrant and a warrant for stolen property in the criminal context, is in the *execution* of such a warrant, and not in the *issuing* thereof.[283]

On the question of the official capacity of a magistrate granting a section 69(3)

278 Stander, A *Annual survey of South African Law* (2016) Annual Survey 464 at 473–474.
279 *Naidoo* at 457D–457E, referring with approval to the minority judgment of Marais JA in *Cooper*.
280 (2021) 1 All SA 405 (KZP) (hereinafter *De Beer*) [48].
281 *De Beer* [28]: "The courts examine the validity both authority under which a warrant is issued and the ambit of its terms restrictively, and in bearing that [s] 14 of the Constitution [of the Republic of South Africa, 1996] entrenches everyone's right to privacy, including the right not to have one's person, home, or property searched, possessions seized. [See *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC) para 76]".
282 *Naidoo* at 459F.
283 Evans, R *Juta's Quarterly Review of South African Law, JQR Insolvency* (2013 (4)) at par 2.4.

warrant, the *Naidoo* judgment can be seen as having given the certainty that such warrants are always of a final nature, not determinative of substantive rights, and not judicial proceedings.

### *3.3.6 Critique on the current application of section 69 in practice*

Considering all the above-mentioned observations in relation to section 69(3) warrants, it is necessary to evaluate if such legal findings (though often nebulous and contradictory in certain instances) are currently being properly incorporated and applied by the judiciary.

This analysis will be done at the hand of two recent judgments, namely *De Beer* and *Alba*,[284] the former being a paragon of ideal comprehension of the law applicable to section 69(3) warrants (save for the limited criticism expressed on *De Beer* above), and the latter being susceptible to sharp criticism, particularly on one front.

In the matter of *De Beer*, the pertinent issues in question were centralised around issues that the liquidator applied for a section 69(3) warrant where he clearly was not yet formally appointed by the Master of the Court as such, and further that the warrant in question was executed by individuals clearly not authorised by the warrant itself.

The Court in *De Beer* did, however, make critical observations regarding the nature of section 69(3) warrants. These observations included:

> It is common cause that the magistrate was approached in chambers with the application to authorise the issue of the warrant. Brent acting as Nel's attorney approached the magistrate with the application. No notice of the application was given to any person. The application was not enrolled for hearing. It took a form of a final order with no provision that an affected person could challenge it. The provisions of s69 stipulates that there be an application and a statement on oath. Nel's application was supported by an affidavit. It complied with the requirements of the provisions of s69. The applicants' complainant that they were not given any notice and had no means of opposing or challenging the issue of the warrant are matters of no moment. Further, the applicants contend that the application was made to the magistrate whereas Nel had not been authorised to launch such application by the creditors of Coinit or the Master or by leave of the court.[285]

The above-quoted passage makes it clear that the court was cognisant of the fact that the section 69(2) application was done without prior notice, in the chambers of a magistrate, not enrolled on the motion court roll, and was couched in the form of a final order, devoid of any opportunity for any affected person to show cause why such order should not be made final. Yet, irrespective of these considerations, the court nonetheless continued in affirming the warrant as valid.

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284 *De Beer* & *Alba* as above.
285 *De Beer* [21].

The court in *De Beer* concluded as follows:

> Nel applied for the [section] 69 warrant before the magistrate without having been granted authority either by the first creditors meeting or the Master or by the court. If he was a duly appointed joint provisional liquidator and he was acting with concurrence of the other joint provisional liquidators he would have been doing an act, which was part of his duties as a provisional liquidator. Leave in terms of [section] 368 is necessary in the case of civil proceedings. The application for [section] 69 warrant is not civil proceedings. There is no prescribed formal procedure to be followed, no rules for any hearing, no record of the proceedings is kept, no judgment with reasons is given, there is no appeal, and no order of costs can be made. It may be done ex parte or on notice depending on the circumstances of each individual case.[286]

This conclusion is illustrative of a sound understanding of the *Naidoo* judgment, which clarified, *inter alia*, that section 69(3) warrants are final in nature, do not amount to judicial proceedings, and can therefore not legitimately have an order for costs accompanied with it. The only remaining critique on the manner in which section 69 was applied, is that the applicant initiated the same by way of a notice of motion. If section 69 proceedings are not judicial in nature, as the court has resoundingly confirmed, it begs the question of why an applicant would reckon a notice of motion to be the appropriate form in requesting a section 69(3) warrant from a magistrate.

The process envisaged by section 69 is clearly *sui generis* in nature in that it is one which finds application in a vast array of different circumstances, seeing as the request for issuing a section 69(3) warrant by a trustee does not have to be in writing and can originate upon evidence at whichever forum, and given on oath by any person – something not shared by any other statutory or common law remedy.

The reference by *De Beer* to the fact that a section 69 application may be brought *ex parte*, depending on the circumstances, undoubtedly has its footing in the *Cooper* judgment,[287] however, this statement may still be criticised, as was done in the minority judgment of *Cooper*, on the basis that the legislature did not intend for notice to be given under any circumstances.[288] The *Alba* judgment, on the other hand, rendered after the *De Beer* judgment, painted a different picture entirely.

One of the points taken *in limine* in *Alba* was that the High Court was not the legally competent body to be approached as a court of first instance to issue a warrant in terms of section 69(3) – this being due to the legislature's choice of wording when using the term "magistrate", and same being a reference to the Magistrate's Court. The applicants referred to

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286 *De Beer* [48].

287 *Cooper* [26]–[28].

288 See [6]–[17] of the minority judgment of *Cooper*, specifically [13]: "The giving of notice of an application in terms of s 69 would deprive the remedy of its efficacy and serve as a stimulus to the very kind of action which it is designed to prevent."

numerous authorities addressing the inherent jurisdiction of the High Court, in support of the counterargument that the High Court was in fact legally competent as the court of first instance to hear such applications.[289]

The applicant's attempt in *Alba* at bringing section 69(2) applications within the High Court's jurisdiction, based on the latter's inherent jurisdiction encapsulated in section 169(1) of the Constitution,[290] is ultimately a sophism. It is an argument that evidently has no regard as to the true nature of section 69(3) warrants and why the legislature clearly intended for same to be issued by magistrates exclusively, and only in a specific capacity.

Considering the hitherto precedent discussed in relation to section 69, it is unclear why the *Alba* judgment was approached in the manner that it was. It is of concern that the notable judgments having propelled the interpretation of section 69 forward, such as *Cooper* and *Naidoo* (the latter having become the *locus classicus* on section 69(3) warrants in 2016) were not even addressed in *Alba* whatsoever.

When the applicant in *Alba* bolstered its argument in favour of the High Court's inherent jurisdiction, perhaps the respondents ought to have retorted with the *ratio* in *Naidoo*, to wit that an application in terms of section 69(2) does not amount to judicial proceedings at all, hence in actual fact, neither the Magistrate's Court nor the High Court has jurisdiction to hear such applications. It is done by a magistrate in a separate and distinct capacity. This has been the position even before the *Naidoo* judgment clarified it as such.[291] Such a response would have likely been dispositive of the entirety of the applicant's case in *Alba*.

The fact that the warrant in the *Alba* matter was not issued by a magistrate, more specifically in the capacity envisaged by the legislature, is a consideration of grave importance which was erroneously considered from a warped perspective as to a magistrate's function in terms of section 69(2).[292] If properly approached, and had there been due regard to the magistrate's function as intended by the legislature, this would have been the straw that broke the camel's back for the applicants.

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289 *Alba* [15]–[17].

290 Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

291 Zulman, RH, Warrant to take possession of property (2001) *Annual Survey of South African Law* 566: "Although it is true that a judgment upon which a warrant of attachment or execution is to be issued must be certain as to the amount of money to be paid or the act to be performed by the debtor, s 69 (3) does not require the magistrate to authorise the issue of a warrant, but merely to issue it and, accordingly, the granting of the warrant is not a 'judgment' in the generally accepted sense of the word, i.e. it does not have to be a judgment 'from which there can be gathered what money or thing the judgment debtor must deliver' as intended in *De Crespigny v De Crespigny* 1959 (1) SA 149 (N) at 151–2".

292 The *Alba* judgment clearly deviated from the preceding Supreme Court of Appeal judgments of *Viana SCA* and *Naidoo*, both of which authoritatively held that a s 69(3) warrant is not issued as a result of a judicial act.

The conclusion arrived at by the Court, was that section 69(3) warrants can be applied for in the High Court as a court of first instance (and concomitant thereto was the cost order that the respondent is ordered to pay the applicants' cost on a punitive scale).[293] It is submitted that this conclusion is clearly wrong as it flies in the face of the primary characteristic of section 69(3) warrants, namely that they are not judicial in nature. This erroneous conclusion may in the future serve as spurious authority justifying the bringing of such applications to a High Court as a court of first instance.[294]

Apart from the critique of *Alba*, there are however many other matters that stand to be criticised for the manner in which applicants instituted section 69(2) applications. Many of the judgments considered herein, including *Cooper*, *Putter*, and *De Beer v Hamman*,[295] all initiated section 69 proceedings by way of a formal court application under the style of a notice of motion. All things considered, these matters predate the *Naidoo* judgment, making such an errant premise more excusable.

In theory, there is no reason why warrants in terms of section 69(3) should not henceforth be applied for correctly, granted that the trustee and the magistrate both grasp the true nature of such warrant being requested to issue.

### *3.3.7 The potential restructuring of section 69, as proposed in the 2015 working document*

As referred to in chapter 2, there is currently the possibility of the eventual adoption of a unified Insolvency Act in South Africa. This is based on the 2015 working document, containing a draft Insolvency Bill.

It will be of value to also refer to the working paper in this discussion, particularly to examine the equivalent of section 69 in the working paper and to what extent it contributes or detracts from the legislature's intention.

The equivalent of section 69 is to be found in section 40 of the 2015 working document, and it reads as follows:

> 40(1) If the liquidator suspects that any book, document or record relating to the affairs of the debtor or any property belonging to the debtor is being concealed or otherwise

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293 *Alba* [18]: "I am of the view that s 69(2) of the Insolvency Act does not expressly oust the jurisdiction of the High Court. I am also not be reasonably inferred from the reading of the section that the High Court's jurisdiction is ousted by implication. It therefore follows that the High Court, having inherent jurisdiction, cannot refuse to hear a matter that is within its jurisdiction. In my view, the fact that the applicants did not apply to the Magistrate's Court cannot be used as an impediment to non-suit them".

294 This unsubstantiated finding in *Alba* was also quoted by authors such as Smith *et al* (2022) 158: "[s] 69(2) does not oust the High Court's jurisdiction to issue the warrant" – a conclusion that is clearly wrong in the circumstances.

295 (2005) ZAGPHC 71 (hereinafter *De Beer* HC).

> unlawfully withheld from him or her he or she may apply to the magistrate within whose area of jurisdiction such book, document, record or property is suspected to be or a magistrate who presided at a questioning in terms of section 52, 53 or 55, for a search warrant.
>
> (2) If it appears to a magistrate to whom such application is made on the ground of an affidavit, or evidence given at a questioning in terms of section 52, 53 or 55 or answers to questions contemplated in section 54(3)(b) that there is substantial reason to suspect that a book, document or other record relating to the affairs of the debtor or property belonging to the insolvent estate is being concealed in possession of a person or at a place or on a vehicle or vessel or in a container of whatever nature or is otherwise unlawfully withheld from the liquidator, within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the liquidator or a police officer to search a person, or place or vehicle, vessel or container mentioned in the warrant and to take possession of such book, document, record or property".

An important insertion to the draft section 40 which does not currently feature in the existing section 69 is that of "or evidence given at a questioning in terms of section 52, 53 or 55 or answers to questions contemplated in section 54(3)(*b*)". This contemplates the possibility of the trustee applying for a search and seizure warrant, not necessarily based upon documentary evidence or even a written affidavit, but based solely upon answers having been given by a witness at an enquiry conducted in terms of sections 52, 53, or 55.

The issue of the evidentiary value of answers given by witnesses at enquiries is a subject that is addressed in chapter 4, but given its express reference to, and overlapping with, warrants for search and seizure in section 40 of the draft working paper, some discussion here is necessary.

The added insertion in the draft working papers is clearly not an arbitrary one. The insertion is in actual fact to be welcomed as a well-conceived amendment, particularly considering the judgments of *Advance Mining*, *Snyman*, and *Philip Business Services* – all of which lent patent support to the notion that a warrant in terms of section 69(3) requires no adherence to strict formalities, and can by extension be granted based on oral evidence given at an insolvency enquiry.

The most recent authority on section 69 (*Naidoo* referred to above) also came about in part as a result of, *inter alia*, answers having been given by a witness at an insolvency enquiry.[296] The overlap between section 69(3) warrants and insolvency enquiries, which overlap is starting to show increasing frequency in practice, is something which has been recognised for a considerable time by courts – to such an extent that it was deemed to be worthy of potentially codifying the same in statute.

As one can reasonably postulate, having such additional rights separately recognised will undoubtedly aid the trustee in executing his duties efficiently. Practically speaking, this

296 *Naidoo* at 454A.

means that in a future application by a trustee for the authorisation and issuing of a warrant in terms of section 40(2) of the 2015 working document (assuming eventual enactment in its current form), the evidence given at an insolvency enquiry would be a separately acknowledged ground for obtaining a warrant for search and seizure.

Even if such warrants are obtainable based on evidence given at an insolvency enquiry, a magistrate would still be bound by the proviso "substantial reason to suspect" before a warrant in terms of section 40(2) would be authorised. Applying what was discussed under the judicial meaning of the phrase "reasonable grounds" in paragraph 3.3.2 above, it seems sensible that the same legal principles would apply *mutatis mutandis* in this case. This means that a magistrate would be remiss in his duties in authorising such a warrant based only upon the say-so of a witness, without enquiring further from the trustee if there is, at the very least, some further factual proof in the verification of the testimony rendered at the insolvency enquiry.

### 3.4 Analysis of applicable legal principles in English law

Whilst it is established in South African law that section 69 finds application to both natural persons and legal persons, the position is markedly different in England. In the latter legal dispensation, one finds both sections 234 and 365 of the Insolvency Act of England of 1986 being applicable. The former provides for the necessary taking of control of an insolvent company's property by way of a search warrant, and the latter provides for obtaining the same goal in the case of a natural person's insolvent estate (a "*bankrupt*", as it is dubbed in English insolvency law). Section 234 of the English Insolvency Act reads as follows:

> (1) This section applies in the case of a company where
> (a) the company enters administration, or
> (b) an administrative receiver is appointed, or
> (c) the company goes into liquidation, or
> (d) a provisional liquidator is appointed; and "the office-holder" means the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be.
> (2) Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder.
> (3) Where the office-holder—
> (a) seizes or disposes of any property which is not property of the company, and
> (b) at the time of seizure or disposal believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property, the next subsection has effect.
> (4) In that case the office-holder—
> (a) is not liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the office-holder's own

negligence, and

(b) has a lien on the property, or the proceeds of its sale, for such expenses as were incurred in connection with the seizure or disposal.

Section 365 of the English Insolvency Act reads as follows:

Seizure of bankrupt's property

(1) At any time after a bankruptcy order has been made, the court may, on the application of the official receiver or the trustee of the bankrupt's estate, issue a warrant authorising the person to whom it is directed to seize any property comprised in the bankrupt's estate which is, or any books, papers or records relating to the bankrupt's estate or affairs which are, in the possession or under the control of the bankrupt or any other person who is required to deliver the property, books, papers or records to the official receiver or trustee.

(2) Any person executing a warrant under this section may, for the purpose of seizing any property comprised in the bankrupt's estate or any books, papers or records relating to the bankrupt's estate or affairs, break open any premises where the bankrupt or anything that may be seized under the warrant is or is believed to be and any receptacle of the bankrupt which contains or is believed to contain anything that may be so seized.

(3) If, after a bankruptcy order has been made, the court is satisfied that any property comprised in the bankrupt's estate is, or any books, papers or records relating to the bankrupt's estate or affairs are, concealed in any premises not belonging to him, it may issue a warrant authorising any constable or prescribed officer of the court to search those premises for the property, books, papers or records.

(4) A warrant under subsection (3) shall not be executed except in the prescribed manner and in accordance with its terms".

The obvious parallel lies between the South African section 69 and the English section 365, whilst the English section 234 possibly has its closer equivalent in South African law in section 386(4)(*a*) of the Companies Act,[297] but as stated in the *Alba* matter, considering the function that section 386 fulfils, it would be inappropriate to substitute section 69 with section 386 because the two respective functions remain inherently different.[298]

One can notice the similarity between section 175 of the 1892 Companies Act and the above-quoted sections in the English legislation to the extent of the authority for granting warrants for search and seizure is intended therein to be granted by the court. In South African law this authority still vested with the court until the 1892 Companies Act, but this authority shifted away from the court to the magistrate, as first happened in section 129 of the 1916 Insolvency Act (quoted above).

Thereafter, section 129 of the 1916 Insolvency Act applied to both companies and natural persons, as is the case today under the auspices of section 69 of the 1936 Insolvency

297 S 386(4)(*a*) of the Companies Act: "(4) The powers referred to in [ss] (3) are- (a) to bring or defend in the name and on behalf of the company any action or legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in [ss] (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts".

298 *Alba* [21].

Act. As stated above, this authority is split in English law between two different Acts, depending on whether the insolvent is a liquidated company or a bankrupt.

For purposes of this discussion, both sections 234 and 365 of the Insolvency Act of England will be examined and compared with the observations drawn above from section 69 of the Insolvency Act of South Africa.

### *3.4.1 An examination of section 234 of the English Insolvency Act*

Despite the fact that the literal wording of section 69 is more closely related to the wording of section 365, it is rather the application of section 69 in practice that is more akin to the practical application of section 234, as will be demonstrated herein.

Similar to what can be seen in section 365, it is clear that both sections 234 and 365 only make provision for authorisation by way of a court order. On this point, differentiation from section 69 is clear.

Section 234 is a summary procedure that clothes the trustee with the authority to approach the court with the purpose of transferring property to the physical possession of the trustee of property which appears to be property to which the liquidated company is entitled.[299] Section 234 is clearly intended to afford a trustee a wide degree of aid, particularly in circumstances where the trustee is not necessarily in a position to positively affirm if certain property, books papers, or records are company property or not. In such a case the court has been shown to make an order to the effect that all such property is to be seized as a necessary cautionary measure, and that a dispute over such property (if alleged not to be company property) can be ventilated at a later stage.[300]

As discussed in paragraph 3.3.4 above, a subject of much debate in South African law on section 69, is the application (or not, as the case may be) of the *audi alteram partem*-principle. The same issue appears however to be less controversial in England, as it appears rather that in terms of English law, the right of an affected party to be heard, even in applications of this nature, is a given right. In this regard, the court in *First Express Ltd, Re*[301] accepted such a vested right by expressing it in the following terms:

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299 Ss 234(1)(*c*) & (2) of the Insolvency Act of England, 1986; *Ezair v Conn* (2020) BCC 865 (hereinafter *Ezair*) at 873.

300 *Green v Chubb* (2015) BCC 625 at 635: "At the present time it is not possible to decide which documents belong to the company, the joint receivers or the bank as they are not before the court. I shall order that documents belonging to the company be delivered up and if an issue arises in the future as to whether a particular document is company property the parties may have permission to apply".

301 (1991) BCC 782 (hereinafter *First Express*).

> I am firmly of the view that it was wrong for the application to be made ex parte.[302]

The Court continued:

> If the registrar had known the full story, I think it is most unlikely that he would have made an order ex parte. He would have directed that Mr Kravetz be served with the application and heard what he had to say.[303]

Lastly, the Court concluded on the validity of the order, as follows:

> I cannot say that on the evidence before me I am satisfied that the order was rightly made – certainly not in its existing form.[304]

It is also apt to state that a large part of the reasoning of the Court in *First Express*, in arriving at the conclusion that an *ex parte* application was inappropriate, was in the fact that the company's head, Mr Kravetz was a particularly *bona fide* and a co-operative individual whom, upon the evidence, could not have caused the reasonable person to infer that a disposition of property was imminent.[305]

This is to be contrasted with the position in South African law, as discussed in paragraph 3.3.2 above. As the court stated in matters such as *Advance Mining*, *Highstead Entertainment*, and *Kerbyn*, the validity of a section 69(3) warrant solely enquires about the facts as presented to the magistrate at the relevant time, and if based on such facts presented to the magistrate on oath, the magistrate was entitled to authorise the warrant, its validity cannot be faulted.

As per the stipulations of South African law, a third party affected by a section 69(3) warrant is simply to resort to whichever further means at its disposal to regain possession of assets erroneously thought to be company property but which in reality, is not.

A vitally important extract on the nature and scope of section 234, is to be found in the recent Court of Appeal matter of *Ezair*,[306] where the court stated:

> But the provisions of subss. (3) and (4) also confirm that an application under s.234 may not (and probably is not intended to) provide a definitive ruling about title nor is the possibility of such a ruling a pre-condition to the exercise of the power.[307]

The Court continued as follows:

> the purpose of the power conferred on the court is and remains as Lord Hoffmann explained in

302 *First Express* at 785; see also Sealy & Milman (2004) 245.
303 *First Express* at 786.
304 *First Express* at 787.
305 *First Express* at 785–786.
306 *Ezair* at 873.
307 As above.

> Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend CBC [2001] UKHL 58 at [26]-[28] that of enabling the office holder to carry out his statutory functions by placing the apparent property of the company under his control. The process does not therefore necessarily involve any determination of title and the final resolution of such a dispute may fall to be made in subsequent proceedings.[308]

This bears a striking similarity to the findings of *Bruwil*, *Kerbyn*, and *Cooper*, all of which found that the very essence of section 69 is to provide physical possession of property reasonably suspected to belong to the insolvent estate, and not to make any determinative findings as to ownership or even entitlement to the property.

With regard to the comparison between section 69 and section 234, the following is of relevance:

(a) Section 234 has a long-established right of prior notice by the company against which a search and seizure warrant is to be obtained, and only in limited instances may there be a deviation from the *audi alteram partem*-principle.[309] In South African law, however, as per the *Cooper* judgment, the legislature was deemed to have excluded such prior notice in instances of assets being concealed. In instances of assets being unlawfully withheld, however, the magistrate is to exercise his or her discretion as to whether or not a prior notification is necessary. The general grounds for exception to the *audi alteram partem*-principle to such applications in South Africa and England respectively, bear a close resemblance to one another (considering a juxtaposition of *Cooper* and *First Express*);[310]

(b) Both sections' interpretations have held, without any ambiguity, that the relief obtained, is solely aimed at attaining physical possession, absent any determination of ownership or entitlement to property;

(c) Regardless of the fact that neither section 69 nor section 234 are to be determinative of legal title to the property, English law has developed in a holistic manner, as illustrated by the English Court of Appeal in the *Ezair* matter. Particularly, the latter

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308 As above.

309 *First Express* at 785 stating that only an exception warrants a deviation from the *audi alteram partem*-principle, namely: "The only exception is when two conditions are satisfied. First, that giving him such opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made".

310 The exception to the application of the *audi alteram partem*-principle in s 69 applications has been set out in *Cooper* [28]: "Where the circumstances are such that the object and purpose of [s] 69(3) would be defeated by giving notice, or where the identity of the affected person is not known or cannot reasonably be ascertained, the giving of notice would, by necessary implication, be dispensed with".

court found that seeing as the disputed facts clearly illustrated that the insolvent company had no vested beneficial ownership in the property (for want of compliance with certain mandatory contractual notices) it was inappropriate to have called upon section 234, and the administrators ought to rather have first secured its contractual rights firmly (securing further the company's beneficial ownership in the property), and thereafter only resorted to section 234.[311] It is therefore not accurate to say that the merits of the claim to property is entirely irrelevant, as the court will necessarily have regard to it, especially where a dispute over such property surfaces in the papers within which the section 234 application is made;

(d) This development of section 234, allowing courts to have proper regard to the merits of disputing litigants' claims to property, coincides to a certain extent with the findings in the matters of *Advance Mining* and *Cooper,* which held that section 69(3) warrants are to be cautioned against where a dispute over the property is evident. In such a case, the trustee should not only disclose such a dispute when making an application to the magistrate, but also where possible, investigate and solidify the company's claim to the property in question before the section 69(2) application is made. A section 69(3) warrant which was obtained by a trustee knowing that the substantive claim to the property is handicapped in one way or another (such as the English matter of *Ezair* where the purchase agreement was not yet perfected) will undoubtedly have adverse ramifications in the following proceedings of third parties reclaiming such property from the possession of the trustee;[312] and

(e) On the interpretation of *Naidoo*, a warrant in terms of section 69(3), once authorised, is considered final and valid if based on the information presented to the magistrate, the latter is authorised to do so on the facts presented. As per the reasoning of *Highstead* and *Bruwil*, the question of validity depends on whether or not the magisterial discretion was properly exercised in the circumstances – not based on circumstances that unfolded after the fact. The *onus* in South African law is however less strict in this sense in that, unlike in English law, there need not be any addressing of issues relating to the value of assets being proportionate to the inconvenience or harm being caused by the execution of the warrant or about issues surrounding the

311 *Ezair* at 884–885: "They could, at the very start before commencing proceedings and certainly once Mr Ezair had made it clear in his witness statements that he was relying on the notice provisions, have executed an assignment of the 1999 agreement in favour of CSP and served a cl.6.2 notice".

312 *Cooper* [36]: "Not all the facts alluded to in para [30] were brought to the attention of the magistrate by the appellant when he applied for the warrant. Some of the information withheld was in my view material".

potential infringement of the rights of third parties. An applicant seeking to review an order authorising a warrant in English law would therefore have more grounds for doing so in comparison with a similar South African review application.

### *3.4.2 An examination of section 365 of the English Insolvency Act*

Section 365 is a remedy not often used in English law, and is considered to be a remedy of last resort, although section 365 does not expressly refer to it as such.[313]

Before delving into the technical nature of section 365, it is prudent to notice that the latter section requires a formal application to be initiated in court before a search and seizure warrant can be authorised. It is to be considered to envisage a judicial process, regulated by a Judge as a presiding officer of the court. This is in stark contrast to the South African position on section 69, which has held unequivocally that section 69(3) warrants are brought before magistrates (in a capacity other than a presiding officer of the court), and further thereto, do not amount to judicial process at all.

The reason why this remedy is considered to be one of last resort is that there exists first and foremost a duty upon the bankrupt to provide his or her trustee with all the relevant property, books, papers, or other records of which he or she has possession.[314] The trustee's need for calling upon section 365 is therefore necessitated by a preceding failure by the bankrupt to comply with his or her statutory duty to provide the trustee with the necessary information relating to his or her own affairs.

Some parallel may also be drawn here to section 69 which presupposes a prior attachment of property, albeit by the deputy-sheriff of the court in terms of section 19 of the Insolvency Act, having been attended to and despite such initial attachment, the trustee still has the reasonable suspicion that further assets are either being concealed or unlawfully withheld from the trustee.[315] Both legal systems foresee a first initial attempt at taking control of the insolvent estate by way of the ordinary prescribed procedure (and supposing the insolvent gives his full co-operation), but require an additional and somewhat intrusive remedy that can be called upon, as circumstances may require.[316]

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313 *Nicholson v Fayinka* (2014) WL 517664; *Lasytsya v Koumettou* (2020) BPIR 874 [22].

314 Ss 291, 305, 312, & 333 of the 1986 Insolvency Act of England read with *Hyde v Djurberg* (2022) WL 02703951 (hereinafter *Hyde*) [7].

315 The select extract from s 69(1) states: "but not before the deputy-sheriff has made the inventory referred to in [ss] (1) of [s] 19, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee".

316 See *Alba* [32] stating that non-compliance with s 19 prior to resorting to s 69, is not necessarily fatal to a s 69(3) application for an issuing warrant, and is a non-compliance that can be condoned if the

Although one may therefore consider this remedy to be a draconian one, it is deemed necessary for enabling the trustee to fulfil his functions efficiently.[317] Case law has entrenched certain requirements that an application for a warrant for search and seizure has to subscribe to before the same can be granted. The case of *Lasytsya*[318] conveniently listed such requirements,[319] deriving the same from the *locus classicus* on the subject, *Williams v Mohammed*,[320] same which entails the following:

(a) It needs to be established that there is a real risk that the property of the bankrupt may be dissipated, destroyed, or otherwise disposed of;

(b) The potential value of the property to be seized is in proportion to the intrusiveness of the remedy; and

(c) A balance is to be achieved between the need for the recovery of the assets by the trustee on one hand, and the protection of the rights of third parties to be affected by the execution of the remedy.

In support of the real risk of dissipation of assets (referred to in (i) above), the court had particular regard to the recalcitrant deportment of the bankrupt, particularly his diversion of funds to family members, failure to disclose business records and prominent assets, concealment of other assets and providing false information to trustees.

It is noteworthy that, with regard to the elements described in paragraphs (ii) and (iii) above, these are not matters having been considered in South African law under the provisions of section 69, whereas in the matter of *Williams* and the cases that followed, the English courts paid special regard to these factors, particularly the potential infringement upon the rights of third parties.[321]

The difference in approach between South Africa and England lies therein that the potential infringement upon the rights of third parties is not a deterrent to the authorising and issuing of a search and seizure warrant in South African law, whereas in England that is precisely the case. South African law does provide for the preservation of the rights of third parties, but admittedly does so in a manner placing said third parties at a decided disadvantage.

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circumstances justify it. See, however, a conflicting judgment in the preceding matter of *Cothill* at 166I–167C, stating that compliance with s 19 is a *conditio sine qua non* before a trustee may resort to s 69(3).

317 *Hyde* [31].

318 *Lasytsya v Koumettou* (2020) BPIR 874 (hereinafter *Lasytsya*).

319 *Lasytsya* [22].

320 (2012) BPIR 238 (hereinafter *Williams*) [6].

321 See *Williams* [6]–[7] & [25]–[27]; *Nicholson* [4] & [23]; *Lasytsya* [24]–[26]; *Hyde* [40].

As shown in South African law, a third party affected by the execution of a section 69(3) warrant, is to approach the court at its own expense and carrying the burden of proof in evincing its title in relation to the property so seized, seeing as the trustee is deemed to have met his or her burden of proof as soon as he or she satisfied the magistrate that there existed a reasonable suspicion that property was either concealed or unlawfully withheld form the trustee and the section 69(3) warrant was subsequently issued. After that point, the *onus* shifted to the third party.

One can discern noticeable differences in approach between section 69 in South African law and section 365 in English law, which can be summarised as follows:

(a) Section 365 requires the bringing of a court application, applying thereto a judicial discretion, exercised by a court, whereas section 69 requires no judicial discretion and does not prescribe adherence to any formalities whatsoever (save that a magistrate acting in terms of section 69(2) should at least form a reasonable suspicion that estate assets are either concealed or unlawfully withheld from the trustee). Section 69 does require some discretion to be applied, but the same is done by a magistrate upon being satisfied upon reasonable suspicion of either the concealment of- or unlawful withholding of estate assets;

(b) Section 365 requires satisfaction of not only the element of a reasonable suspicion of alienation, disposition or otherwise channelling of assets away from the insolvent estate (as one sees in section 69) but also requires addressing additional elements such as the value of property to be seized, in proportion to the inconvenience and hardship that will be caused by the intended seizure of assets and lastly, the detrimental effect the execution of the remedy will have upon third parties;

(c) After a warrant in terms of section 69(3) has been issued, section 69 inverts the burden of proof thereafter, and shifts such burden of proof to the aforesaid third parties in affirming their rights. Insofar as considering the rights of third parties within the context of section 365 however, the latter section places such burden of proof from inception (encompassing all the elements described in (ii) above) in the lap of the trustee applying for the remedy.

### 3.5 Considerations from UNCITRAL

In neither the recommendations nor the legislative guidelines published by UNCITRAL are there specific provisions as to the dealing with assets being either concealed or unlawfully

withheld from the trustee of liquidator, particularly not insofar as how such discretion is to be exercised, under which circumstances or by whom.

There is, however, reference to the status of such assets in relation to the date on which the insolvent estate is considered to be established. Such general suggested legislative provision, according to UNCITRAL, is to be found in Recommendation 314, which reads as follows:

> 314. The insolvency law providing for a simplified insolvency regime should specify that any undisclosed or concealed assets form part of the insolvency estate.[322]

In acknowledging that the suspected concealed or unlawfully withheld assets of an insolvent estate are to be considered as forming part of such insolvent estate, this is not to be considered in a vacuum. Chapter 2 of this work has set out extensively when it is rightly determined that the liquidation of a company has officially commenced.

Further reference was made in Chapter 2 to the legislative suggestions put forth by UNCITRAL, the essence of which stated that in any simplified insolvency regime, it is suggested that provision should be made for the commencement of liquidation of companies on a date earlier than the date of the court order confirming liquidation – typically the preceding date of issuing the liquidation application and notifying the insolvent of same.

Integrating these two concepts, specifically within the context of companies, it amounts thereto that a liquidator of an insolvent estate is to remain cognisant firstly of the precise date when the company's liquidation is deemed to have commenced, and against the backdrop of that starting point, secondly consider the return of assets that were in all probability to have become dissipated close in proximity before or after such date, seeing as it is particularly likely that assets would have, in all probability, started to become liquidated, transferred, encumbered or otherwise dissipated close to such date of commencement of liquidation.

If the trustee is therefore to effectively regain physical possession of concealed or unlawfully withheld assets to the insolvent estate through the remedy that any insolvency regime provides, the determination of the precise date of commencement of liquidation becomes a vital consideration, seeing as it is typically at that time when surreptitious dealings with the insolvent's property are likely to occur.

Even though, as Recommendation 314 states, the assets so concealed are to be considered as forming part of the insolvent estate, it is to be borne in mind that as the legal position currently stands in South Africa, this does not mean that the trustee initiating section

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322 UNCITRAL (2022) 18 [314] available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/msms_insolvency_ebook.pdf (accessed 25 October 2023).

69 proceedings is to be bound by the limiting provisions of section 386(4)(*a*) of the Companies Act, which dictates how a trustee is to resort to legal proceedings. Obviously, this is because section 69 is not to be classified as legal proceedings (as amplified in the *Naidoo* case).

For reasons already stated above under the comparative statutory provisions of English law, the position in England is markedly different as warrants of this nature are regulated in their system by the courts.

Whether the recovery of such concealed assets is done through the mechanism of court procedure or a *sui generis* procedure as in South Africa, it is clear that both systems have adequate measures in place to obtain possession of such assets (as assets forming part of the insolvent estate), as intended by the UNCITRAL guidelines.

### 3.6 Suggestions for law reform

The suggestions for law reform set out herein are based on the theoretical and technical exposition of section 69 of the Insolvency Act, in conjunction with sections 234 and 365 of the Insolvency Act of England, as well as the 2015 working document, as set out herein above.

As there have already been two judgments subsequent to the *Naidoo* judgment that display a misapprehension of the nature of section 69(2) proceedings, it is clear that there still remains uncertainty regarding such nature, and consequently its correct application in practice.

The instances in which this fundamental misunderstanding of section 69 manifests in a detrimental way, are evident in the following:

(a) Applications in terms of section 69(2) are still, to some extent, treated as judicial proceedings, meaning that they are initiated as formal court applications under a notice of motion. This unsubstantiated formalistic approach does not catalyse the process of taking control of the insolvent estate, but rather hampers it. The bringing of a court application is further a costly exercise (costs which will be borne by the creditors of the insolvent estate) and the bringing thereof to open court carries the risk that the possessors of the assets sought to be recovered, may be alerted as to the pending application, likely causing a rapid dissipation of assets;

(b) Inasmuch as section 69(2) applications are brought under the errant guise of judicial proceedings, the ripple effect of such misapprehension goes further. Many appropriate

instances may henceforth present themselves as prime opportunities for the incorporation of section 69, yet given such misapprehension, may not be called upon and ultimately prove to be an under-utilised remedy. For instance, oral testimony given at an insolvency enquiry may contain concessions regarding either concealment or withholding of insolvent estate assets, but the trustee present at such enquiry is unaware that the presiding magistrate can summarily be verbally requested (absent any written application) to issue a warrant in terms of section 69(3) for the recovery of such concealed or withheld assets;

(c) The fact that section 69 proceedings are treated as judicial proceedings further results in cost orders being granted by the same court issuing the section 69(3) warrant. As stated above, in the absence of any judicial proceedings, the concomitant cost order being made in terms of section 69(2) is entirely *ultra vires* and invalid, causing third parties to carry the consequences of cost orders that are to be borne by the insolvent estate; and

(d) In the *Alba* case, this misapprehension as to the nature of section 69 has further led to the legal precedent that the court acknowledged not only that these applications can be made in the Magistrate's Court, but also the High Court as a court of first instance under the faulty classification of such applications as judicial proceedings.

The matter of *De Beer v Magistrate of Dundee* on the other hand serves as a positive indication that the court has begun to interpret section 69(2) applications in the manner intended by the legislature, and as clarified in the *Naidoo* case. If this correct understanding of section 69 is perpetuated in the future, perhaps the utilisation of such applications will increase either in being made orally, as a collateral result of different proceedings during which, evidence was given on oath as to the whereabouts of insolvent estate assets, or simply upon an affidavit accompanied by a draft warrant in terms of section 69(3), provided by a trustee to a magistrate in chambers, outside of any judicial setting.

Such a wider scope of application of section 69(2) applications in practice, as truly intended by the legislature, will undoubtedly serve the trustee in taking effective control of the insolvent estate, especially considering that the same can be done on an urgent and informal basis, keeping the escalation of sequestration- or liquidation costs to a minimum. It must ultimately still be borne in mind that, insofar as the trustee's task of taking control of the insolvent estate is concerned, he or she is still at liberty to resort to an array of other, possibly equally appropriate remedies, including the common law interdict or anti-dissipation orders, where the trustee will also not carry the onus of proving aa well-grounded apprehension of

irreparable harm, as there already exists such a presumption in favour of the trustee.[323]

Insofar as the application of the *audi alteram partem*-principle in the context of section 69(2) applications is concerned, this issue remains an ambivalent one in South African law, mostly due to the *Cooper* judgment's finding. The ruling that assets being concealed on one hand, and assets being unlawfully withheld on the other are to be treated differently, has created much uncertainty on the subject as to whether or not the insolvent or third parties ought to be afforded the right to be heard before the issuing of a warrant in terms of section 69(3).

As rightly criticised in the minority judgment of the *Cooper* matter, this majority finding of the court suggests that the legislature intended for the above-mentioned two classes of assets to have been treated under different criteria when the court exercises its discretion in terms of section 69(2), and that could surely not have been said legislature's intention. In all the English authorities described hereinabove, there does not exist such a distinction as currently does in South African law.

Unless this legal position is rectified, in the interim this will cause trustees to henceforth need to draw a clear distinction first and foremost as to whether or not assets are concealed or unlawfully withheld. If it is the former instance, the question of affording prior notice to the insolvent or any third parties can be foregone and need not be addressed when making an application to the magistrate in terms of section 69(2). If it however happens to be unlawfully withheld assets (the whereabouts of which are known), the magistrate will need to be comprehensively addressed why prior notice should not be given to the insolvent or third parties before issuing a section 69(3) warrant.

As it is clear from the Insolvency Act's wording that there was not intended to be any differential treatment of section 69 applications based on the possession status or particular whereabouts of assets, there is certainly a call for legal uniformity in this regard. Until such uniformity is attained, trustees and liquidators will need to tread carefully in making it clear to the magistrate whether the assets are concealed- or unlawfully withheld from the trustee or liquidator. An error in this distinction will concomitantly cause further error in the application of the *audi alteram partem*-principle.

It is not suggested, however, that South Africa needs to strive for a blanket acknowledgement of the application of the *audi alteram partem*-principle in section 69 applications. Doing so will certainly have a compromising effect on the efficiency of the

323 Smith *et al* (2022) 160.

remedy, but further thereto, the fact that the recognition of the application of the *audi alteram partem*-principle has already permeated into section 69 applications (to a limited extent) through the *Cooper* judgment, is an unfortunate insertion into our legal system for which no valid precedent existed at the time.

Based on observations drawn from the judiciary's application of section 365 of the English Insolvency Act, there are elements in such an approach that would certainly benefit a trustee approaching a magistrate in terms of section 69(2). These elements are:

(a) A reference to the estimated value of the assets either concealed or withheld from the trustee would serve to strengthen the trustee's hand in applying for a warrant in terms of section 69(3), as this will underscore the extent of the creditor's interest in the application. If assets being unlawfully withheld from the trustee are estimated to be of substantial value, this may serve as a convincing factor to the magistrate in exercising his or her discretion to dispense with giving prior notice to the insolvent or third parties, as alerting them beforehand could likely expose the creditors to undue risk; and

(b) A greater effort could be made by trustees making applications in terms of section 69(2) to address the impact that a section 69(3) warrant is likely to have upon the rights of either the insolvent or other potentially affected third parties – as is in fact a mandatory element of compliance potentially affecting the validity of such warrants in England (as noted in *Williams* and the cases that followed). Even though this is not a requirement for validity for section 69(3) warrants, the law is clear that third parties affected by a section 69(3) warrant are entitled to approach the court afterward, relying upon whichever appropriate legal remedy to recoup possession of assets previously seized in terms of section 69(3). In order to avoid such reactive proceedings by third parties, the trustee addressing such third parties' rights proactively in the section 69(2) application can likely reduce the possibility of affected parties successfully reclaiming such assets from the trustee in the future.

There are also further aspects from the judiciary's application of section 234 of the English Insolvency Act, which could benefit South Africa's application of the section 69(3) warrant. Although the English courts have acknowledged that, much like the position in South Africa, these warrants are not intended to be determinative of the substantive rights of parties, the English Court of Appeal in the matter of *Ezair* has made some considerable strides in developing this remedy in a manner that strikes a proper balance in preserving the trustee's interests on one hand, and those of potentially affected third parties on the other.

Whilst section 69(2) applications make for an informal and expeditious remedy at the disposal of the trustee where physical possession is the prime consideration and substantive proprietary or possessory rights are of lesser concern, trustees are not to dismiss such rights as being irrelevant altogether.

The step that *Ezair* took forward in search and seizure warrants in England, lies therein that although it is not typical for applications of this nature to determine substantive rights to property, the court stated that it is also not barred from having regard thereto if specifically raised in the papers. The court cannot simply disregard such considerations when faced with them.

If a trustee is aware that a claim to the property by the insolvent estate would have otherwise been dismissed on whatever grounds were he or she to rely on ordinary civil motion or trial proceedings and still opts for utilisation of a section 69(3) warrant, all the while remaining reticent on such underlying defects to the claim to the property, ensuing proceedings brought by third parties will illuminate such defects, undo all that was done by the trustee and possibly lead to punitive costs payable by the insolvent estate.

It is suggested that this remedy can only be properly initiated if the trustee, at the very least, considers it reasonably possible (on the information available to him or her) that the insolvent has a claim to the property wherever so located (not measured against a *prima facie* case expected of a litigant in a civil case, but sufficient factual information to support a reasonable suspicion), alternatively where such a reasonable suspicion is formed for the very reason that information pertaining to the claim to such property is being purposefully withheld from him or her.

If therefore, through the trustee's investigation into the affairs of the insolvent, it comes to light that the insolvent's claim to the property is a dubious one where it appears that a third party could have a competing title to the insolvent's property, it would be advisable to first ascertain the merit of the insolvent's claim before a section 69(3) warrant is requested.

Information within the trustee's knowledge that gainsays such reasonable suspicion should be disclosed to the magistrate approached in terms of section 69(2) as being either of such an insignificant concern that it does not detract from the reasonable suspicion formed by the trustee or that it was of significant concern, but has been adequately addressed in the meantime by whichever appropriate steps were necessary in the given circumstances.

# CHAPTER 4: OBTAINING INFORMATION REGARDING THE AFFAIRS OF THE INSOLVENT COMPANY BY WAY OF PRIVATE ENQUIRIES

## 4.1 Introduction

The content of this chapter is limited in scope to include only private insolvency inquiries in the context of companies, reason being that a study into public insolvency enquiries of companies or enquiries into the insolvent estate of sequestrated individuals would require a length of study not provided for in this dissertation. This selected scope of study refers more specifically to private enquiries into the trade, dealings, and affairs of companies to determine the reasons for the company's ultimate demise. As such it provides an important mechanism in assisting the liquidator to gather information and ultimately to trace assets of an insolvent company.

As is the methodology in the preceding chapters, the subject matter as it exists in South African law is first discussed, namely the concept of private enquiries into the affairs of companies and the various characteristics of such private enquiries that make this an essential information-gathering tool. After a discussion of the legal position on companies' private enquiries in South Africa, the focus on each constituent subject in private enquiries shifts to a comparative study with the laws of England on each such subject.

The process of a private insolvency enquiry is considered to be a *sui generis* one.[324] It remains a valuable mechanism at the disposal of (typically) a liquidator or trustee in gaining insight into the financial affairs of an insolvent that led to its ultimate downfall. It is a process that facilitates the obtaining of information possible, as a vital objective, and it forgoes many ordinary rules of civil litigation.[325]

The conducting of such a private enquiry is supportive of the duty which rests upon the liquidator to examine the affairs and transactions of the company and to trace any threads of wrongdoing by any role-players in the management of the company.[326] Practically speaking, the liquidator is tasked with tracing the assets of the company, and ascertaining

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324 Blackman *et al* (2012) 14-449; *Rolls Razor* at 1396I–1397A.

325 Blackman at 14-449: "The examination is an extraordinary process, exercised usually, but not exclusively, at the instance of the liquidator, to enable the requisite information to be obtained. It is not a proceeding in the nature of a litigious proceeding between parties, the ordinary standards of procedure do not apply, and examinees are not in the ordinary sense witnesses and are not examined as such"; see also Delport *et al* (2022) APPI-256 affirming that the continued need for the utilisation of private insolvency enquiries is rooted in policy considerations demanding "a clear, facilitating, predictable and consistently enforced law and a protective and fertile environment for economic activity".

326 *Ferreira* at 1057G–1057I; *Bernstein* at 765H–765I.

how the company went about managing its liabilities. This necessitates an investigation by the liquidator — an investigation which is provided for in section 417 of the Companies Act.[327]

The rationale for allowing the liquidator to embark upon this particular route in obtaining the necessary information from the relevant individuals is rooted in the principles of English law, where it has been held that insofar as the liquidator is concerned,

> He usually comes as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation.[328]

The obligation of witnesses to cooperate with the liquidator, when being called to private enquiries, is indeed a public duty. For this reason, it is a duty not only resting upon the managerial staff most central to the company's business but also resting upon any unrelated third parties who may coincidentally be holding such knowledge, even if it be through no fault of their own.[329]

A witness being summoned to appear at an enquiry in terms of section 417(1) of the Companies Act is furthermore obliged to answer any and all questions put to him/her, irrespective of the possibility of such witness thereby incriminating themselves. Refusing to answer such questions amounts to a criminal offence.[330]

This is a statutory mechanism having been used for centuries to the date hereof to obtain vital information on the trade, dealings, and affairs of the company. As such, it still remains relevant in present times.[331] As stated by the English Court in *Singularis Holdings v*

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327 Blackman *et al* (2012) 14-452.

328 *Rolls Razor* at 1396H–1396I; Delport *et al* (2022) APPI-257; Blackman *et al* (2012) 14-452.

329 *Bernstein* at 770B–770C; *Ferreira* at 1076C–1076D: "[t]he holding of a s 417 enquiry is lawful and serves an important public purpose". See Blackman *et al* (2012) 14-452-1–14-453.

330 See s 418(5)(*b*)(*iii*)(*aa*) of the Companies Act. This is, however, taking into consideration that in light of the finding of *Ferreira* at 1062D–1062E, declaring the erstwhile s 417(2)(*b*) unconstitutional and causing the effect that witnesses are still compellable to answer questions that may incriminate them, but from a criminal perspective, such answers shall not be admissible as evidence against such person in any ensuing criminal prosecution. The court in *Ferreira*, however, expressly stated (at 1078B–1078D) that this finding does not extend similarly to ensuing civil proceedings.

331 See *Roering* at 464D–464E where the court underlined the historical significance and need for s 417 enquiries by stating that: "The necessity in bankruptcy proceedings for a means whereby liquidators or trustees can investigate the financial position of the insolvent company has long been recognised. It can be traced back to s 117 of the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict c 106), which provided that a bankrupt could be examined by the court touching all matters relating to his trade, dealings or estate or which may tend to disclose any secret grant conveyance or concealment of his lads, tenements, goods, money or debts". See s 155(1) of the 1926 Companies Act: "The court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to the indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, affairs, or property of the company".

*PricewaterhouseCoopers:*

> This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542, the authorities (including, among others, the Lord Chancellor and the Chief Justices) were given power to examine on oath persons who were suspected of having property (including debts) belonging to the debtor.[332]

It needs to be stated from the outset of this chapter that the content of this chapter is only applicable in relation to private insolvency enquiries into the trade, dealings and affairs of a company and not including close corporations. This is due to the judgment of Supreme Court of Appeal in *Nedcor Bank Ltd v Master of the High Court*[333] where the court held that:

> Assuming that the complexity of the procedures set out in [sections] 417 and 418 of the Companies Act is not warranted in respect of a close corporation, and for that reason the legislature excluded their application, it seems obvious that the simpler process entailed in [section] 152 enquiries, designed for individuals, should have been made applicable to close corporations.[334]

As one can accept that section 152 of the Insolvency Act is therefore the appropriate section within which a private insolvency enquiry is to be conducted in the context of the insolvent estate of a close corporation, this focussed discussion on the topic of sections 417 and 418 of the Companies Act does not therefore concern private enquiries into the affairs of insolvent close corporations.

The continued utilisation of private enquiries remains a vital mechanism for a liquidator in obtaining essential information relating to the trade, dealings, and affairs of an insolvent.[335] It often happens in practice that during these enquiry proceedings, the liquidator is enlightened about various questionable transactions such as void dispositions in contravention of section 341(2) of the Companies Act, or the occurrence of assets being concealed or unlawfully withheld from a liquidator (as was discussed in Chapters 2 and 3).

Therefore, it is important to be reminded that these mechanisms of obtaining control of the insolvent estate, as hitherto discussed together with private insolvency enquiries discussed herein, serve to reinforce one another and are not intended to be considered in a vacuum.

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332 (2014) UKPC 36 (hereinafter *Singularis*) [40].
333 [2002] ZASCA 54 (hereinafter *Nedcor*).
334 *Nedcor* [7]; Delport *et al* (2022) APPI-263–264.
335 See *Bernstein* at 766C–767D for a complete exposition on the imperatives achieved in ss 417–418; see also Steyn (2005) *CILSA* 415–416.

## 4.2 *Locus standi* in initiating private enquiries

### *4.2.1 The South African law perspective*

As stated in Chapter 1, the wording of section 417 is couched in wide terms in respect of the question of which person(s) can lawfully instigate section 417(1) private enquiries. As per the wording of the latter sub-section, there is no reference to the appropriate person or authority that is entitled to resort to the initiation of section 417 private enquiries. Section 417(1) of the Companies Act reads as follows:

> In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

In the absence of any definitive impediment on the persons suitable for initiating section 417 proceedings, it is accepted that this person will mostly be the liquidator, or failing his or her intervention, likely a creditor or typically anyone with a financial interest in the company, or in appropriate instances, even upon the insistence of a person holding no definitive financial or other interest.[336] A reference in section 417(6) to the phrase "[a]ny person" is further indicative thereof that the legislature foresaw section 417(1) enquiries not being instituted by a *numerus clausus* of individuals.[337] This was aptly affirmed in the Supreme Court of Appeal judgment of *Miller v NAFCOC Investment Holding*[338] where the court stated:

> The section [section 417(1)] does not envisage an application, much less an application from a limited category of persons-which is eminently sensible, for otherwise the Master would be unable to act unless he was given information from specified persons.[339]

Even if a person were to have no definitive pecuniary interest in the matter, the court in *Venter v Williams*[340] held that any person, creditor or otherwise, possesses a proverbial voice in bringing any conceivable irregularities of a company to the court's attention, which

336 Delport *et al* (2022) APPI-256, 260; Blackman *et al* (2012) 14-461–14-462.
337 S 417(6): "Any person who applies for an examination or enquiry in terms of this [s] or [s] 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned".
338 2010 (6) SA 390 (SCA) (hereinafter *Miller*).
339 *Miller* at 394D–394F.
340 1982 (2) SA 310 (N) (hereinafter *Venter v Williams*).

irregularities warrant further investigation.[341] It then also goes without saying that if a creditor can then apply to initiate a section 417(1) enquiry, other creditors of the company are furthermore entitled to attend- and participate in such enquiry.[342]

The authorities went further in clarifying that a liquidator requesting the initiation of section 417 proceedings need not necessarily be a final liquidator, but can also be a provisional liquidator.[343] This is sensible, considering that a provisional liquidator's main task is to ensure the effective taking of control of the insolvent estate.[344] This also means, by extension, that section 417(1) can find application, where there is only a provisional order for winding-up, and not yet a final order.[345]

An important feature of section 417(1) enquiries is that there is no express bar placed on the individuals that are entitled to question the examinee called to the enquiry. Even if the enquiry is authorised by the Master, the creditors attending such enquiry are equally entitled to question the examinee about the company's affairs, as would be the case for the Master or the liquidator. This was aptly expressed in the matter of *Smith v Master of the High Court, Free State Division, Bloemfontein*[346] where the court stated that:

> There can be no doubt that whenever a [section] 417 enquiry is called for, the liquidators, the court or the Master will be strangers to some of the intricate operations and affairs of the company in liquidation. Depending on the circumstances of each case, the information may lie in the exclusive domain of a creditor or some other party with an interest in the matter. Practically, it makes logical sense that the party in possession of the relevant information is best placed to interrogate a particular witness. To say that only the Master may interrogate witnesses because it is not explicitly provided for in [section] 417 is inconsistent with its purpose and would stultify the provision and the objectives confirmed in *Bernstein*.[347]

Although it is clear that the legislature intended section 417 to include many different potential applicants driving a private enquiry, there are some limitations intrinsic to section 417: first, these proceedings are not applicable in the case of a company having been placed under voluntary winding-up; and second, these enquiries may only be made in relation to an insolvent company that was wound up under circumstances where it was unable to pay its

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341 *Venter v Williams* at 313C–313H. See also *Lok v Venter* 1982 (1) SA 53 (W) (hereinafter *Lok*) at 57D. The position of *Venter v Williams* was also maintained in the matter of *ABSA Bank Limited v Wolpe* 2016 JDR 1646 (WCC) [45]–[46]; Delport *et al* (2022) APPI-256 – 256(1); see also Blackman *et al* (2012) 14-461.

342 *Trust Bank van Afrika v Van Der Westhuizen* 1991 (1) SA 867 (WPA) at 873E.

343 *Foot v Alloyex* 1982 (3) SA 378 (D) at 383F–383G.

344 S 391 of the Companies Act; ss 19(1) & 69(1) of the Insolvency Act; Meskin (2022) 4-54; Bertelsmann *et al* (2019) 199-211, 345.

345 Delport *et al* (2022) APPI-261.

346 [2023] ZASCA 21 (hereinafter *Smith v Master*).

347 *Smith v Master* [18].

debts.[348]

There is, however, still recourse for an interested party wanting to conduct a private insolvency enquiry into the affairs of a company not meeting the above exclusion criteria. It is not uncommon in such circumstances for the applicant to bring what is colloquially known in practice as a "conversion application" in terms of section 346(1) of the Companies Act to have a voluntary resolution effectively converted to a liquidation order by the court.[349]

It has been observed that resorting to this method of instigating private enquiries against companies may however prove to be more costly and more importantly, whereas a wide scope of potential parties may resort to utilising section 417(1), only a select class of persons will qualify to resort to section 346(1).[350]

Another potential solution to enquiring into the affairs of a company that has either placed itself into voluntary liquidation, or at the instance of creditors (in terms of either sections 350 or 351 of the Companies Act), or liquidation was sought on a ground other than section 344(*f*), is to be found in section 388 of the Companies Act. This alternative may be less costly, and it will be at the disposal of the same pool of applicants envisaged by section 417(1), in comparison with the more limited class of persons identified in section 346(1).[351]

The Supreme Court of Appeal has specifically approved this method of resorting to section 388 as a means to conduct a section 417 enquiry into a company's affairs. This was particularly so where a company was wound up voluntarily and was, in any event, unable to pay its creditors, and initiated voluntary liquidation proceedings in a surreptitious manner, and therefore ought to rather have its affairs investigated.[352]

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348 S 417(1) commencing with the phrase: "In any winding-up of a company unable to pay its debts […]". See also *South African Philips v The Master* 2000 (2) SA 841 (NPD) at 847G–847H; *Janse Van Rensburg v The Master* 2001 (3) SA 519 (WLD) at 522I–523B asserting that s 417(1) enquiries cannot be invoked in the instance of a company's voluntary liquidation, and can only be called upon in the instance of a preceding court order, founded upon an insolvent company that is unable to pay its debts.

349 The relevant extracts from s 346(1) reads as follows: "An application to the Court for the winding-up of a company may, subject to the provisions of this [s], be made- (a) by the company; (b) by one or more of its creditors (including contingent or prospective creditors); (c) by one or more of its members, or any person referred to in [s]103(3), irrespective of whether his name has been entered in the register of members or not".

350 O'Brien "The application of the statutory mechanisms providing for private enquiries in terms of the Insolvency Act and Companies Act in the winding-up of companies" (2002) *TSAR* 743–744.

351 O'Brien (2002) *TSAR* 743–744.

352 *Swart v Heine* 2016 JDR 0487 (SCA) [9]: "Once it became clear to the respondents that the financial status of the company required an investigation, they decided to launch an application under s 388 for leave to convene an enquiry in terms of ss 417 and 418 of the Act. This was especially so because the company had been voluntarily wound-up by the directors in circumstances where it was clear that such an enquiry was not only desirable but urgently warranted, because, as at the date of liquidation, the company had no movable or immovable assets. The directors of the company signed settlement agreements purporting to bind the company in circumstances where the company was already unable to

One can therefore conclude that within the South African context, the legislature intended for a company's trade dealings and affairs to be investigated if circumstances justified such investigation. To avoid a situation of creditors being prejudiced as a result of a liquidator shying away from his or her duties, these proceedings are fortunately at the disposal of any other person capable of displaying sufficient interest in the matter. In the following section, I consider the English law perspective on the issue of *locus standi* in initiating private insolvency enquiries.

### *4.2.2 The English law perspective*

As seen above in the quoted part of section 236 of the English Insolvency Act, the legislature's intention in limiting the scope of persons who can apply to court for initiating a private enquiry, is limited to that of the office-holder. The latter term is meant to include both instances of provisional- and final liquidation, and it is clear that this authority is not meant to be utilised by other interested persons such as creditors or contributors.[353]

These proceedings are considered to be particularly effective in England as well. Often the successful gathering of information at such private enquiries is indicative of the degree of success ultimately attained through asset recovery actions instituted by the office-holder afterwards.[354]

Although the clear language employed by the legislature, attempts have been made to widen the scope of potential applicants that can utilise the provisions of section 236 to the benefit of creditors. This was demonstrated in *James McHale Automobiles Ltd, Re*,[355] where a creditor sought relief under section 236 in circumstances where it was apparent that the liquidator was not of the intention of doing so. The crux of the court's finding, was as follows:

> It seems to me that in the provisions of the Insolvency Act 1986 which are now in force Parliament has, in a way that did not previously exist, specified and limited the classes of persons who may apply under [section] 236 and has at the same time extended the jurisdiction directly to the case of a voluntary liquidation.[356]

A curious point of contradistinction is to be noted herein, considering the scope of application of section 417(1) in South African law. In the context of South African law, it is

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pay its debts. In those circumstances the respondents were entitled to approach the court in terms of s 388"; see also Delport *et al* (2022) APPI-255.

353 Fletcher (2017) 685; Finch (2009) 534.

354 Parry *Transaction Avoidance in Insolvencies* (2001) 493.

355 (1997) BCC 202 (hereinafter *James McHale*).

356 *James McHale* at 205.

only possible to seek a private enquiry into a company's affairs granted that it is a company that was deemed unable to pay its debt and liquidated by court order. This limitation necessarily excludes companies that entered voluntary liquidation by way of a resolution. As one can gather, however, in the English context, this limitation is evidently absent, with the consequence that a company that entered voluntary liquidation in that jurisdiction will be susceptible to having its affairs investigated, if the circumstances justify it.

Interestingly, this limitation is not present in England, where the legislature has deemed it sensible to make provision for private enquiries to be convened, even where the company was liquidated by way of voluntary liquidation.[357] The limitation in section 417 of the Companies Act that only deals with the obtaining of information on companies that were unable to pay their debts is, one may argue, somewhat arbitrary. This is particularly true considering the point illustrated above that there may arise instances where there is a necessity to investigate the affairs of a company, even if said company was liquidated voluntarily or for a reason other than its inability to pay its debts.

It goes without saying that limiting the number of potential applicants capable of initiating private enquiries, specifically excluding the rights of creditors to do so (as is the case in England), naturally lessens the likelihood of abuse of such proceedings. By way of an example, one can imagine that a creditor initiating such proceedings may have more of a concern for its own individual interests, rather than that of the *concursus creditorum*.

The counter-argument however, is that clothing only the liquidator with such right to the exclusion of all others, may result in a liquidator exclusively controlling the process of taking control of the insolvent estate and leaving creditors with no rights of intervention in the pending private enquiry or initiating an enquiry of their own.

## 4.3 The issue of relevance, the constitutional right to privacy and abuse of section 417 proceedings

### *4.3.1 The South African law perspective*

Where a person is summoned to produce documents subsequent to a court application and such witness had no opportunity to peruse same, and was not even afforded the opportunity to address the Master or the Court before the witness summons was issued, the question arises as to what extent such actions could potentially amount to an unjustified infringement upon

[357] Snaith (1990) 515: "The power conferred by this [s] can be used in a voluntary or a compulsory liquidation. The [s] is essentially concerned with the power of the officeholder to obtain information".

such individual's basic rights in receiving adequate notice of court process involving such individual.

Section 417(1) is notably wide in scope as it clearly obliges adherence of any person either suspected to be in possession of the insolvent company's property or a person who is deemed to be capable of giving information concerning the trade, dealings, and affairs of the company. It is therefore intended to include a wide variety of individuals and sources of information from divergent sources.

There is, however, some limitation as to the extent of books, records, or documents that can be ordered to be produced, and this limitation is woven into section 417(3), and it also provides that the documents ordered to be produced must at least "relate to the company".[358] A witness being summoned to appear at an enquiry in terms of section 417(1) is otherwise obliged to adhere to being called as such, even if he or she should have some trepidation that he may incriminate himself at such an enquiry.[359]

The question as to the constitutional sustainability of section 417, weighed against the individual's constitutional right to privacy, was earlier considered in the advent of the democratic era in the matter of *Bernstein* where the court found that:

> The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributors' financial interests in the recovery of company assets must be weighed against this, peripheral infringement of the right not to be subjected to seizure of private possessions. Seen in this light, I have no doubt that [sections] 417(3) and 418(2) constitute a legitimate limitation of the right to personal privacy in terms of [section] 33 of the Constitution.[360]

The judgment of *Bernstein* was applied thereafter in the matter of *Gumede v Subel*[361] where the Supreme Court of Appeal considered this particular issue of the public interest in uncovering the trade, dealings, and affairs of a company versus the affected individual's right to freedom. The court stated:

> I do not accept the appellants' contention that, once a constitutional right is in issue, the person seeking to infringe it must show sufficient cause why that should be done. The proper approach is to determine whether there is reason to believe that the documents requested will throw light on the affairs of the company before the winding-up. If so, their relevance will in general outweigh

358 See s 417(3): "The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien".

359 Blackman *et al* (2012) 14-486.

360 *Bernstein* at 798F–798G. The preceding judgment of *Ferreira* was relevant to s 417(2)(*b*), declaring the latter [s] invalid with the Constitution (meaning that incriminating statements given at a s 417 enquiry are not admissible as evidence against the witness in subsequent criminal proceedings); however, *Ferreira* is not of relevance to the present discussion.

361 2006 (3) SA 498 (SCA) (hereinafter *Gumede*).

the right to privacy.[362]

One can gather that there appears to be a general recognition in law that once it appears that persons are able to provide information on-, or certain documents possibly exist that could potentially reveal information pertaining to the company's trade, dealings, and affairs, there exists a rebuttable presumption in favour of the public interest in attaining such information. This is considered to be of more substantial weight than the weight of the competing personal interests of the individuals being called upon to provide the necessary testimony or documents.

The question of the constitutional justifiability of insolvency enquiries counterweighted with the rights against self-incrimination and privacy, is certainly not one that has recently surfaced in case law. It was already decided in the matter of *Harksen v Lane*[363] where, in the context of public enquiries of individuals in terms of sections 64 and 65 of the Insolvency Act, such a constitutional consideration was considered. In this case, the court again favoured the public interest imperative ahead of the individual's right to privacy.[364] The same held true in the matter of *Parbhoo v Getz*,[365] relating to public enquiries in terms of section 415 of the Companies Act.

In balancing these two respective interests of the liquidator on the one hand, *versus* those of the potential witness on the other, there are some traces of such a balancing exercise being recognised in South African law, but this is scant.[366] Some traces of this balancing exercise are to be found in the judgment of *Ferreira* in the court *a quo*, but even in that instance the court stated that:

> I would not countenance any limitation unless such is absolutely necessary to counter the potential prejudice to the applicants. The preponderance of prejudice lies with the appellants [liquidators], largely because, it seems to me, if the present law should take its course, the threat to them is slightly more serious in its consequences than those which will result to the companies in the event of an interdict being granted. There is, however, only a marginal advantage to the appellants.[367]

It seems, therefore, that even in the event of a balancing of competing interests were to be undertaken, given the wording of section 417, courts would be slow to accept that the potential prejudice of witnesses outweighs the potential advantage of a liquidator in reconstructing his or her knowledge of the company's dealings unless extraordinary

362 *Gumede* at 505I–506A.
363 1998 (1) SA 300 (CC).
364 *Harksen* at 331D-332E.
365 1997 (4) SA 1095 (CC) (hereinafter *Parbhoo*).
366 Blackman *et al* (2012) 14-464-1, referring almost exclusively to English authorities.
367 1995 (2) SA 813 (WLD) at 842E–842F.

circumstances dictate otherwise.

The threshold to be crossed in convincing either the Master or the Court that a private enquiry is called for lies in the word "suspicion". If the facts presented to the Master or Court are so that it would cause one to suspect that an envisaged witness would be able to elucidate on the trade, dealings, and affairs of the company, the requirements of section 417 are deemed to be complied with, granted that the proposed enquiry is conducted within the ambit and purpose of section 417(1).[368]

Courts however still retain a duty to ensure that the law on the subject of section 417 continues to develop in this regard, and in particular that this mechanism is not used oppressively, vexatiously, or unfairly.[369] Even though a witness subpoena must be adhered to in general, a witness subpoena that came into being without proper consideration as to its necessity, but which was instead the result of being proverbially "rubber-stamped", will be set aside.[370] A further ground for setting aside such private enquiries would be where the court was clearly presented with misinformation or by the selective omission of relevant facts.[371]

If it is to be accepted therefore that a witness is in general obliged to provide the documentation requested, or testify as a witness as mandated, the flipside to the coin is whether the witness or creditor is, at the very least, entitled to peruse the information having been hitherto made available to the examiner. The answer to this question, however, appears to be in the negative.[372]

Equally unsurprisingly, a prospective witness is not entitled to be heard before the presiding officer's discretion is exercised to call them as such (contrary to the *audi alteram partem* principle), and further, they are not even entitled to any prior notice of such proceedings.[373] The authorities are furthermore not supportive of the notion of providing such information (in the possession of the liquidator or creditors) to a prospective examinee in

368 Blackman *et al* (2012) 14-463.

369 *Advance Mining* at 824E.

370 *Mantis Investment Holdings v Eastern Cape Development Corporation* 2018 (4) SA 439 (SCA) at 442B–442H.

371 See *Lok* at 60E–60F.

372 See s 417(7) of the Companies Act: "Any examination or enquiry under this [s] or [s] 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise". See also *Kotze v de Wet* 1977 (4) SA 368 (TPD) at 374H–375A; *Merchant Shippers SA v Millman* 1986 (1) 413 (CPD) at 418B: "There is good reason for the preservation of secrecy. This has long been recognised, both here and in England". See also *Leech v Farber* 2000 (2) SA 444 (WLD) (hereinafter *Leech*) at 454B–454C: "I have already indicated that, in my view, considerations of fairness do not demand that as a general rule all such information must be made available to the witness in advance". See also *Lategan v Lategan* 2003 (6) SA 611 (D&CLD) 611 at 625G–625H; Delport *et al* (2022) APPI-267.

373 *Friedland v The Master* 1992 (2) SA 370 (WLD) at 378D–378E.

advance, based on considerations of administrative fairness, warranting protection in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or section 33 of the Constitution.[374]

It is however widely accepted that the decision to convene an enquiry in terms of section 417(1) and 418 is not susceptible to a review application in the context of PAJA.[375] The rationale for this is, amongst other reasons, that the enquiry is in its very nature purely investigative in nature, and not holding any potential for affecting the rights of the examinees called.

As is demonstrated in English law, a court is to consider the appropriateness of oral testimony being absolutely necessary or if a witness ought to rather be requested, less burdensomely, to provide written responses and specific documentation sought. This consideration is known in South African law as well, but appears to be implemented with increased caution since there is a perceived risk that the objectives of the Companies Act will be undermined if witnesses are too readily excused from rendering oral testimony, particularly where irregularities are present such as fraud, mismanagement of the company's affairs, scantness of available documentation or uncooperative examinees.[376]

However, a concern that continues to linger in the context of private enquiries is the abuse of such enquiries by individuals utilising these processes for improper purposes. The potential for abuse of private enquiries is further exacerbated if one considers that section 418 of the Companies Act confers the court's authority to conduct these proceedings in select instances upon a commissioner. Section 418(2) reads as follows:

> (2) A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.

This means that the discretion as to the specific witnesses to be summoned to appear

374 See *Leech* at 452I–454A; *Nedbank v The Master of the High Court* 2009 (3) SA 403 (W) at 412F–413B.

375 Delport *et al* (2022) APPI-261 – 262 in discussion of the relevant case law on this subject.

376 See *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) at 635B–635D & 635H–636C: "A written interrogatory, in my view, would be appropriate where, for example, the information sought is merely formal in nature. A written interrogatory as a precursor to oral examination may in certain circumstances be appropriate. But where the liquidation of a company is prima facie the result of mismanagement or where fraud and theft on the part of the directors and other officers of the company appear to have led to the demise thereof, the submission of written questions will undoubtedly undermine the object and purpose of the enquiry […] The lack of co-operation by the applicants necessitated an oral interrogatory into the affairs of the second respondent".

before a private enquiry, is not a discretion necessarily resting with the court itself, but often with an official functionary appointed by the court. Even though the private enquiry remains to be considered as "the court's enquiry" for all intents and purposes,[377] there is a self-evident risk in having this discretion exercised by someone other than the same Judge who considered the section 417(1) application in the first instance.

In the case of an enquiry being conducted only in terms of section 417 by the Master, and the order of the latter authorising the enquiry was only done in terms of section 417, the Master is not entitled to delegate this authority to a commissioner envisaged in section 418 at a later stage. For a commissioner to lawfully take over this function, the order of either the Master, or the court would have to specify it as such.[378] A commissioner appointed in terms of section 418(2) does not act in a judicial capacity as such, but has been described as acting in a quasi-judicial capacity.[379] This is understandable, as he acts on a statutory appointment, derived from the court.

If there is an appointment of a commissioner to conduct such enquiry in terms of section 418(1)(*a*), this authorisation emanates from the court, but in such an event the enquiry is no longer technically conducted in terms of section 417(1) but in terms of section 418(1)(*a*). This is the position since section 417(1) is patently clear that such enquiry can only be validly convened by either the court or the Master. Consequently, a commissioner purporting to act in terms of section 417, is acting *ultra vires* and stands to have his or her appointment as such, set aside.[380]

There is some limitation, however, to the lawful authority of such a commissioner, appointed to preside over such an insolvency enquiry. Although such commissioner may issue witness subpoenas and call for witnesses at his or her own discretion, the authority to admonish defaulting or recalcitrant witnesses, such as by way of contempt of court proceedings or forcefully ensuring a witness' attendance at the enquiry by way of a warrant of arrest, is one which fortunately remains with the court, or a commissioner which also happens to be a magistrate.[381]

In maintaining the objective of section 417 to enquire into the trade, dealings, and affairs of an insolvent company, the question needs to be asked at what point this statutory mechanism of section 417 enquiries starts to transgress the very objective of such section and

377 Blackman *et al* (2012) 14-455; see also *Bernstein* [35].
378 *Engelbrecht v Master of the High Court, Free State Division, Bloemfontein* (2021) ZAFSHC 26 [14]–[16].
379 *Receiver of Revenue, Port Elizabeth v Jeeva* 1996 (2) SA 573 (AD) at 579I.
380 *Swart v Master of the High Court* 2012 (4) SA 219 (GNP) at 231B–231D.
381 *Van Der Berg v Schulte* 1990 (1) SA 500 (CPD) at 508F–508G.

becomes abusive or oppressive proceedings. It can easily be comprehended how these proceedings can become susceptible to abuse, specifically in instances where a liquidator foresees the possibility of imminent litigation and calls upon a section 417 enquiry with the intent not so much to investigate the insolvent company's affairs, but more towards supplementing the pending or envisaged civil litigation initiated by the liquidator.

Despite this potential of abuse arising in the event of overlap between the enquiries and pending or foreseen litigation involving the same or third parties, it has been a longstanding view that such overlap is unlikely to be indicative of improperly conducted section 417 enquiries.[382] The prime consideration remains whether or not the enquiry has been conducted for the purpose envisaged by the legislature, namely investigating the trade, dealings, and affairs of the company.

A wide range of objectives can resort under this purpose enshrined in section 417. This purpose can refer, *inter alia*, to investigate the possibility of fraudulent dealings or mismanagement of the company; recover assets for the estate; or to determine the validity of potential claims against the insolvent estate.[383]

One must remain mindful, in considering whether or not a certain authorised private enquiry constitutes an abuse of procedure (and essentially constitutes an invasive intrusion into an individual's rights) that oftentimes unusual proceedings may invariably call for an unusual invasion of people's rights. In *Botha v Strydom*,[384] the court commented:

> But I think the point has been made in many cases that these are not ordinary proceedings. The Legislature has deemed it necessary to authorise the constitution of enquiries of this nature and to deprive witnesses of many privileges which they might otherwise have enjoyed. This has been the case for many generations in the Insolvency Act and the earlier Companies Acts. The Legislature obviously recognises that there are often machinations which require exposure and that the only way that exposure can be obtained is by the drastic Draconian methods of these enquiries, to get people there, to get them to produce documents and to answer questions.[385]

It was highlighted in the Supreme Court of Appeal matter of *Roering v Mahlangu* that for private enquiry proceedings to be set aside, and an examinee to be excused from compliance with a witness subpoena, the same should amount to an abuse of the enquiry proceedings.[386] The short answer as to what then constitutes an "abuse", is that once it can be established that the enquiry is being convened for a purpose other than the one envisaged by

382 *Anderson* at 112A–112C.
383 *Kebble* at 575I–576B.
384 1992 (2) SA 155 (NPD) (hereinafter *Botha*).
385 *Botha* at 159I–160A.
386 *Roering* at 471B; Delport *et al* (2022) APPI-259.

the Act, an abuse is present.[387] A subpoena, once issued, however, remains valid and is to be obliged with until set aside upon good cause shown.[388]

The critical finding made by the court in the *Roering* case was that a private enquiry being conducted in parallel with ongoing- or contemplated court proceedings involving the same witnesses, does not in and of itself amount to an abuse of the enquiry proceedings in terms of section 417(1). An abuse in this sense of the word will only exist where it is manifestly clear that the enquiry is conducted to achieve a purpose other than the one contemplated by the Act.[389]

It appears as though *Roering* considered the possible advantage to be gained in further continued litigation against such witnesses called in section 417 enquiries, to be considered as more of an incidental- than the prime consideration. It is possible therefore for such an incidental advantage to exist, but this does not *per se* justify the inference that the core purpose for which such enquiry has been called is an illegitimate one.[390]

It does therefore not follow axiomatically that the possibility of the institution of legal proceedings or extant legal proceedings is indicative of an abuse of proceedings. Some differentiation would have to be drawn here between litigation that has not yet- or barely begun *versus* proceedings that have progressed to a relatively advanced stage, such as being particularly close to the trial date. In such latter instance, the possibility that the enquiry is a disguised abuse of proceedings becomes increasingly more likely.[391]

The South African courts are notably hesitant to refuse a liquidator, creditor, or other interest-bearing party the right to investigate the trade, dealings, or affairs of a company. Once given such right, the courts are reluctant to excuse witnesses from attendance at such enquiries absent an unequivocal case that the enquiry is conducted for an improper purpose or clearly amounts to an abuse of such proceedings.

The appropriate remedy at the disposal of an aggrieved witness summoned to such an

387 *Roering* at 470G; *Kebble* at 577A.

388 See the unreported matter of *Ngonyama v Lutchman* Case No 46000/2021 (Johannesburg) 20 October 2021 [12] confirming that there is no *prima facie* right to refuse to answer to a subpoena issued in terms of s 417(1) or s 418(2).

389 Delport *et al* (2022) APPI-259.

390 *Roering* at 471A–471B: "Once it is accepted that a permissible purpose in causing a witness to be summoned to an enquiry is to enable the liquidator to make an informed assessment of the merits of a potential claim or defence to a claim, it must follow that the fact that the individual concerned is a potential witness in other civil litigation, actual or contemplated, is neutral in determining whether the summons is an abuse". See Blackman *et al* (2012) 14-467–14-468.

391 See *Botha* at 160D: "The classic example being one where, at a late stage of litigation, which would be to say shortly before the trial of an action in which the liquidator featured as plaintiff and the person concerned as defendant, the liquidator, in order to obtain ammunition for that case, engineered an enquiry so as to be able to attack his opponent in another forum with a view to benefiting him in the imminent hearing of the action".

enquiry, capable of showing that same amounts to a clear abuse, is akin to either a review application[392] or an interdict, where irreparable harm can be proven.[393]

### *4.3.2 The English law perspective*

The authority to call for a private examination of officers of a company, or any person suspected of having knowledge on the possession of company property, information on the company's trade, dealings, and affairs, or persons suspected of being indebted to the company, is governed by the provisions of section 236 of the Insolvency Act of England, 1986, and is a provision also considered to be "drastic and far-reaching".[394]

The portions of section 236 of the 1986 English Insolvency Act that regulates these types of proceedings are specifically sub-sections (2) and (3), which read as follows:

> (2) The court may, on the application of the office-holder, summon to appear before it —
> (a) any officer of the company,
> (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or
> (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.
> (3) The court may require any such person as is mentioned in subsection (2)(*a*) to (*c*) to submit an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (*c*) of the subsection.

Not unlike the legal position in South African law, the English courts have a wide discretion in ordering that a section 236 enquiry is to be convened, yet it remains a discretion to be applied with circumspection and judicial caution, particularly in circumstances where the relevant office-holders had already commenced legal proceedings against such a witness.[395] The opinion of the official office holder is considered to carry some weight in the eyes of the court, but understandably the court will not accede to having the process used as a method of obtaining an advantage in unrelated litigation or as a lawful mechanism in advancing some oppressive agenda.[396]

In contradistinction with South African law, it is to be noticed that in English law the Master of the court does not have the authority to authorise private insolvency enquiries, but only the Court. However, the overarching purpose is nearly identical, as it also aims to

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392 Delport *et al* (2022) APPI-261.
393 See *Mondi v The Master* 1997 (1) SA 641 (NPD) at 645B.
394 Lightman & Moss (2011) 234.
395 *Re Atlantic Computers Plc* (1992) BCC 200 at 208B–209A: "[S] 236 of the Insolvency Act, 1986 (re-enacting statutory powers which go back to the last century) confers an extraordinary jurisdiction which is to be exercised with caution".
396 Finch (2009) 565; Fletcher (2017) 687; Snaith (1990) 516.

summon before the enquiry any officer of the company or an array of different persons who may have relevant information about the company regarding its formation, promotion, business, trade, dealings, or affairs or whereabouts of property of the company.[397]

It is generally accepted that conducting an examination in terms of section 236 is not in disharmony with the individual's right to privacy, but that the court is to always exercise its discretion in such a way as to be as least intrusive upon the prospective examinee's privacy as possible.[398] It has been held that what may reasonably be required must involve a consideration of what is required for the efficient conduct of the insolvency process in question.[399]

There are certain parameters outside of which the court will not allow section 236 proceedings to stray away, and these include:

(a) The cardinal purpose of the private enquiry is to be kept in mind when the court exercises its discretion to order the enquiry, and this purpose is to enable the office-holder to obtain as much information as necessary to "reconstitute the state of knowledge that the company should possess".[400] This barometer was however given a more purposive and expanded meaning by stating that the extent of documentation that may be summoned from a witness, is "all documents which the administrator reasonably requires to see to carry out his functions";[401]

(b) The court is to guard against the possibility of oppressing the contemplated witness and to that extent, a balancing exercise is to be done, weighing on the one hand the public policy demand for a company to be forthcoming in its dealings with creditors and on the other, the individual's personal interests.[402] To compel either attendance of a witness at an enquiry or compelling them to deliver documents to the liquidator, it

397 Fletcher (2017) 684.

398 *British & Commonwealth Holdings Plc (Joint Administrators)* (1992) AC 426 (hereinafter *British & Commonwealth Holdings*) at 429: "The purpose of [s] 236, namely, the reconstitution of the company's knowledge, accords with the principle of the right to privacy".

399 Lightman & Moss (2011) 232.

400 Finch (2009) 565; Fletcher (2017) 684–687, *Re Cloverbay Ltd* (1991) 1 All ER 894 (hereinafter *Cloverbay*) at 900E–900F. This also coincides with the South African position, see Blackman *et al* (2012) 14-465.

401 See *British & Commonwealth Holdings* at 427; Snaith (1990) 517; Lightman & Moss (2011) 237-238.

402 See *British & Commonwealth Holdings* at 433, describing the balancing exercise to take the following into consideration: "Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other". Lightman & Moss (2011) 239 stating that: "On the one hand, the court will wish to help the office-holder discharge his functions efficiently, expeditiously and in the interest of creditors, recognising that the office-holder is usually a stranger to the relevant events. On the other, the courts have long been aware of the potential for oppression in the use of such powers, and have sought to limit that potential through their approach to the exercise of discretion under the section".

goes without saying that the balance of convenience *versus* prejudice must weigh considerably in favour of the liquidator;[403]

(c) Typically, enquiry proceedings against third parties, external to the company, are more likely to be oppressive in nature than for such enquiry to be aimed at former officers of the company, seeing as such officers owe a fiduciary duty towards the company in any event;[404]

(d) The office-holder making the application in terms of section 236 needs to prove that the information sought, under the proposed order, is reasonably required. It is however not necessary to prove that such information is an "absolute need";[405]

(e) An order for an oral examination is more likely to be oppressive in nature as opposed to an order to merely produce documents.[406] If the court is of the opinion that an examinee possesses information of relevance that he or she ought to produce, however, the court reckons that such an examinee is also likely to be oppressed if the questioning is not regulated, the court may prescribe the precise extent of subjects upon which the witness may be enquired, and which subjects he or she may not be examined about;[407]

(f) As a further safeguard against the possible victimisation of witnesses being summoned at a private enquiry, the English courts have also held that it must be presented, at least, with *prima facie* evidence justifying the order, which evidence warrants substantial investigation, and is likely to yield prominent recoveries to the advantage of creditors.[408]

(g) English courts will also not condone the practice where the liquidator already has the documentation in his or her possession that he or she needs to reconstitute the company's affairs but nevertheless decides to call select examinees for the purpose of questioning them about such documentation and hoping to elicit incriminating

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403 Fletcher (2017) 686–687. See *Sandford Farm Properties Ltd, Re* (2015) WL 3875629 (hereinafter *Sandford*) [20] where the court stated that this balancing exercise amounts thereto that "in exercising the powers under s 236, the court must conduct a balancing exercise between helping the liquidator on the one hand and any potential prejudice to the person ordered to be examined, or to produce documents, on the other, the balance being 'loaded' somewhat in favour of the liquidator". See also Parry (2001) 496.

404 *Cloverbay* at 900J–901A; *Shierson v Rastogi* (2003) 1 WLR 586 at 596–597; Tolmie *Corporate and personal insolvency law* (2003) 229; Parry (2001) 497.

405 Lightman & Moss (2011) 238.

406 *Cloverbay* at 901C–901D.

407 Fletcher (2017) 688.

408 As above.

admissions from such examinees.[409]

Prior to the matter of *Cloverbay*,[410] English law applied the *Rubicon* test, which was described in *Sandford Farm Properties*[411] as follows:

> The latter test was a rule of thumb under which relief under [section] 236 would be withheld if office-holders had already commenced proceedings against, or definitely decided (mentally crossed the Rubicon) to proceed against, the proposed witness.[412]

The case of *Cloverbay* however departed from the rigid *Rubicon* test. With reference to (i) above, it was in the *locus classicus* English matter of *Cloverbay* where the Court of Appeal applied the test for initiating a section 236 enquiry in a particularly pragmatic manner with reference to the purpose of section 236. The principle espoused in said case is that the court is to remain mindful of the purpose of the proposed enquiry at all times. Such purpose is to afford the liquidator or administrator the opportunity to obtain as much possible information in reconstructing the affairs of the company before making any decision to institute legal action. It is for this reason that the court in *Cloverbay* found that:

> The administrators already have as much information as the company would have had even if it had not become insolvent. The administrators are seeking to use the statutory procedure to get information which the company, if solvent, would not have been able to obtain before deciding whether or not to pursue the proceedings against BCCI.[413]

With reference to (ii) and (iii) above concerning the balancing of interests and the duty of cooperation incumbent upon third parties, *Cloverbay* furthermore found that in the instance of third-party witnesses who would in any event not have owed any fiduciary duty towards the company (had it still been solvent) it would concomitantly be equally oppressive to now suggest that the same witness would owe such a duty towards the liquidator stepping in the proverbial shoes of the insolvent company.[414]

The *Cloverbay* decision was sharply criticised in the later matter of *British & Commonwealth plc v Spicer & Oppenheim*[415] for being too rigid and that it is not in accordance with the intention of the legislature to limit the extent of documentation sought to only information necessary to reconstruct the state of the company's knowledge. In this case,

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409 Milman & Durrant (1999) 20.

410 *Re Cloverbay Ltd* (1991) 1 All ER 894 (hereinafter *Cloverbay*).

411 (2015) WL 3875629 (hereinafter *Sandford*).

412 *Sandford* [21].

413 *Colverbay* at 902C–902D.

414 *Colverbay* at 902D–902F. The *Cloverbay* test was applied in the most recent matter of *Brittain v Ferster* (2022) WL 01443639 [69].

415 (1992) 4 All ER 876 at 884J–885A: "I am therefore of the opinion that the power of the court to make an order under s 236 is not limited to documents which can be said to be needed' to reconstitute the state of the company's knowledge' even if it may be one of the purposes most clearly justifying the making of an order". This dichotomy was also highlighted in *Roering* at 466B–467A.

the court held that in truth, the court's discretion is to remain an unfettered one but still to be exercised with caution and after a careful balancing of interests.

The Court of Appeal in the matter of *Shierson v Rastogi*[416] was also confronted with the issue of applying this proportionality test. In particular, the question arose to what extent the existence of separately instituted civil proceedings should serve as a deterrent to making an order in terms of section 236. The court held that:

> For my part I do not think it right to assume that the examination would be conducted in any way unfairly or oppressively. As Slade J said in *In re Castle New Homes Ltd* [1979] 1 WLR 1075, 1092 h the court in ordering an examination does not give carte blanche to the questions which may be asked of the witness at the examination, and if a particular line of inquiry is oppressive or if there are good reasons why particular questions should not be answered it is the right and duty of the court to limit the inquiry.[417]

One can see how much reliance is placed upon the court in limiting the scope of the enquiry proceedings, and not merely leaving matters in the hands of the office-holder and giving such initiator *carte blanche* in delving into the subject matter into depths which far exceed his need for reconstructing the company's affairs, but start venturing into terrain which is clearly oppressive.

The proportionality test was refined and expressed later in the matter of *Green v BDO Stoy Hayward LLP*[418] to also include all information necessary for the liquidator to carry out his functions and this was articulated as follows:

> The scope of [section] 236 has always been understood to extend to reconstituting the state of the company's knowledge, however it is now well recognised that the scope of the jurisdiction also extends to all documents which the liquidator may reasonably require to see to carry out his functions.[419]

This refined version of the *Cloverbay* test was further applied in the matter of *Green v Chubb*,[420] where the court was particularly sympathetic to the plight of a liquidator seeking to investigate the full extent of flow of monies in and out of a company *vis-à-vis* the company's working papers, which were kept with the company's auditors. Accordingly, the auditors were obliged to surrender such documents where the liquidator was able to show that he clearly needed the same in order to fulfil his functions as a liquidator.[421]

In the more recent matter of *The Official Receiver v Deuss*,[422] one can see how the

416 (2003) 1 WLR 586 (hereinafter *Shierson*).
417 *Shierson* at 601.
418 (2005) EWHC 2413 (Ch) (hereinafter *Green*).
419 *Green* [28].
420 (2015) BCC 625 (hereinafter *Chubb*).
421 *Chubb* [50]–[52]. See also Milman & Durrant (1999) 19 referring to *Cloverbay* with approval.
422 (2020) EWHC 3441 (Ch) (hereinafter *The Official Receiver*).

proportionality test of *Cloverbay* was applied. Although in this particular case, there were many factors weighing against the liquidator in his request for a public enquiry, one particularly prominent factor which caused the court to dig its heels in the ground in response to the liquidator's request, was due to the fact that the liquidator already had a civil claim pending against the very same witness. Compounded thereto, the court reckoned an enquiry would easily have caused a situation of the liquidator's line of questioning inappropriately spilling over into the merits of the pending claim.[423]

It becomes clear that in applying these principles relating to section 236, the English courts are particularly vigilant in disallowing a liquidator to embark upon an enquiry as a convenient avenue to strengthen his or her own position on behalf of the company. Essentially the courts want to prevent a situation where the liquidator facilitates a situation where he or she is merely enquiring witnesses with the purpose of having them (as potential future respondents or defendants) dilute their own legal positions or to embark upon a proverbial "*fishing expedition*" — something which would not have been sanctioned under any law had the company still been solvent.

Although the original version of the *Rubicon* test (which summarily disallowed the summoning of a witness against whom separate legal proceedings were foreseen or pending) was therefore gradually disposed of, there are still some remnants of it in present times in that courts still remain particularly wary to allow a section 236 enquiry against a particular examinee to continue where it is clear that separate legal proceedings against the same examinee are extant.[424]

One can gather a notably stricter threshold in English law that has to be satisfied before being allowed to proceed with an enquiry against officers of the company, even more, that of third parties, in comparison with the position in South African law.[425] Whereas in the latter legal dispensation, it is evidently sufficient to showcase a mere "suspicion" that any person is in possession of documentation clearly relates to the trade, dealings, and affairs of the company in order to be compelled to produce same,[426] the position in England dictates that something more is required.

In order to succeed in initiating a private enquiry in English law, not only must

423 *The Official Receiver* [69]–[70].
424 Lightman & Moss (2011) 241.
425 Delport *et al* (2022) APPI-258: The hitherto interpretation in South African law of the subject matter on which an examinee may be examined is circumscribed only as "concerning all matters … belonging to the company" and including under such description the investigating of all claims held by the company against whichever individuals, and gaining an idea as to the merits of such claims.
426 Blackman *et al* (2012) 14-486–14-487.

evidence first be produced in evincing transactions worthy of investigation, but it must also be clear that such information is necessary for the liquidator to obtain the necessary pieces of information to reconstitute the company's knowledge of the matter, or to place the liquidator in the position to effectively carry out his or her duties.[427] It is certainly not intended to serve as a stratagem to buttress the liquidator's evidentiary material in foreseen or pending litigation. In addition, Fletcher is also of the view that the liquidator must be able to show that there appear to be positive prospects of asset recovery for creditors before section 236 can be utilised.[428]

By contrast, if in the South African context, it can be shown that the documents sought, relate to the insolvent company in question, and not a different third-party entity, and further that there exists a suspicion that certain persons can give such information on the affairs of the company, there exists sufficient cause for such witnesses to be called or documents to be delivered to the liquidator.[429] The act of balancing competing interests in the South African context, as per the observations made in *Ferreira*, appears a more lopsided one. Such a balancing exercise seems to favour the liquidator (simply considering the hitherto case law), until extraordinary circumstances demand that such a witness ought to rather be shielded from the enquiry.

It can therefore be conclusively stated, in view of the earlier discussion, that in both distinct jurisdictions the issue of the relevance of documents sought from witnesses regarding the trade, dealings, and affairs of a company, is a pivotal one, which courts have shown a proclivity to favour over and above the individual's civil liberties (at least from a human rights perspective). The English courts however appear to be considerably more circumspect in balancing the very same competing interests (from a civil law perspective) before it will be satisfied to grant an order to convene an insolvency enquiry.

Apart from convincing a court that the information sought is necessary to reconstitute the company's affairs, the applicant carries the onus of proving a *prima facie* case that the specified respondent is capable of providing such information.[430] Thereafter, the court then carries out the balancing exercise of weighing the requirements of the officeholder against the extent of the burden imposed upon such respondent.[431]

This increased strictness in regulation in England is more apparent considering that in

427 See Snaith (1990) 515, stating that only a "suspicion" of certain facts shall suffice in ordering an examination of this sort.
428 Fletcher (2017) 687.
429 Blackman *et al* (2012) 14-487.
430 Tolmie (2003) 229; Fletcher (2017) 687.
431 Tolmie (2003) 229; Parry (2001) 496.

the South African context, section 418(2) creates the possibility of the court itself delegating its authority of calling for certain witnesses to a section 417 enquiry, to a commissioner. As is patently clear from the discussion above, section 236 of the English Insolvency Act plainly does not provide for such a delegation of authority, and it remains the court's mandate to regulate these enquiries throughout the entire process.

The English courts are furthermore disinclined to authorise these examinations unless the applicant can show that the examinee has previously refused to cooperate with the liquidator in surrendering the requisite information.[432] Such practice is certainly a sensible one, particularly from a perspective of curtailing legal costs that often escalate in private examinations. In addition, the application to court in terms of section 236 is to identify each respondent examinee against whom the relief is sought.[433] Examinees may even insist in advance on notice of the intended topics of the examination.[434] These elements in private enquiries are certainly not known in South African law.

Even though the English legal position on section 236 has clearly evolved from a rigid approach to a more inclusive and holistic approach, it is clear that in the English context, special care is taken to ensure that the liquidator maintains a position that does not deviate from the legislative objective of such enquiry. In this regard, the court is particularly alive to the position of the intended examinees to be called at the insolvency enquiry. The English courts have displayed express caution in the following respects:

(a) The application in terms of section 236(2) may only competently be brought by the office-holder and only specified individuals may be summoned to appear at the enquiry.[435]

(b) A liquidator may utilise the enquiry strictly for purposes of reconstructing the company's knowledge and by necessary implication, also to obtain the information necessary to fulfil his or her duties as an office-holder.

(c) Section 235(2) of the English Insolvency Act provides for an office-holder to request information from directors and certain related individuals to provide information relating to the company.[436] A call for a section 236 enquiry is likely to be more favourably

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432 See s 235 of the Insolvency Act containing the basis of the statutory duty of select individuals to oblige the requests of the office-holder (typically the liquidator) without the necessity of first obtaining a court order authorising same; Lightman & Moss (2011) 233.

433 Snaith (1990) 515.

434 Tolmie (2003) 228.

435 As above.

436 "(2) Each of the persons mentioned in the next [ss] shall — (a) give to the office-holder such information concerning the company and its promotion, formation, business, dealings, affairs or

considered if the office-holder can show that there were preceding attempts to obtain the relevant information through the mechanism of section 235(2), and such preceding attempts having proven unsuccessful.[437]

(d) A liquidator is not permitted to utilise the enquiry process in order to advance his or her own strategic position in relation to pending, ongoing or foreseen litigation. In fact, this is one of the most frequent manifestations of an abuse of process.[438] As was demonstrated in the Court of Appeal matter of *Shierson*, in the event of there being civil proceedings initiated against the prospective examinee by the office-holder, this is not *per se* indicative of oppressive conduct, but concomitantly a factor weighing against the ordering of an examination in terms of section 236.[439] Instead, one must consider if the enquiry is conducted for a proper purpose and importantly, the court plays a critical role in ensuring that the topics covered at the examination remain firmly within the confines of the liquidator's mandate in reconstructing the company's knowledge.[440] Where one can however clearly discern that the liquidator is utilising section 236 as a method of ameliorating his or her civil case pending against the very same witness, an abuse is evidently clear and the court will deny the enquiry to proceed.[441]

(e) Officers of the company are more readily considered to be appropriate witnesses to be called, whilst third parties external to the company are more likely to fall victim to abuse by these proceedings, as was displayed in the case of *Cloverbay*.[442] Since sections 235(2)–(3) of the Insolvency Act make it clear that certain individuals who stood in a sufficiently close fiduciary relationship with the company, owe a statutory duty of disclosure and cooperation towards the office-holder, it is sensible that the court would be

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property as the office-holder may at any time after the effective date reasonably require, and (b) attend on the office-holder at such times as the latter may reasonably require."

437 Lightman & Moss (2011) 233.

438 Lightman & Moss (2011) 240.

439 *Daltel Europe Limited (In Liquidation) v Hassan Ali Makki* (2004) EWHC 726 (Ch) [35]: "These passages show clearly that provided that the order for private examination is sought in order to provide the liquidators with information to enable them to carry out their duties as liquidators, especially getting in assets, and provided it is not conducted in a way designed to give them an unfair advantage in the litigation against the respondents, the existence of proceedings (even if they contain very serious allegations) is not a bar to the order". See also Parry (2001) 499.

440 *Rottman v Brittain* (2010) 1 WLR 67 (hereinafter *Rottman*) at 74: "It is in my judgment for the English court to control proceedings before the English court. It is for the judge dealing with the bankruptcy matter to exercise his discretion in allowing or not allowing incriminating questions to be put to and to be answered by Mr Rottmann".

441 *Chesterton v Emson* (2017) 12 WLUK 351 [57]–[59]. A similar clear instance of abuse by the liquidator to reinforce a pending civil case against a third-party auditor, was in *Re Sasea Finance Ltd* (1998) 1 BCLC 559.

442 This presumption by the court is supported further by s 235 of the Insolvency Act, which places a statutory obligation of cooperation with the office-holder upon certain individuals related to the insolvent company. See ss 235(2)–(3).

more inclined to allow examination of such individuals, and conversely, require additional satisfactory grounds from the office-holder to justify requiring the same degree of cooperation from individuals falling outside of the class of persons created by section 235(3).

(f) Ordering individuals to produce documents as made provision for in section 234 of the Act, *in lieu* of physically attending enquiries, are to be preferred as they are less likely to be abusive in nature.

(g) The envisaged enquiry must be shown to be likely for the benefit of creditors. Applicants requesting such an enquiry are to be adequately familiar with the company's affairs to be able to satisfy the court that some patrimonial benefit to creditors is reasonably likely to realise as a result of the conducting of such an enquiry.

(h) The private examination remains the court's examination and cannot lawfully be delegated to any lesser authority, such as the Master of the court or a commissioner (as made provision for in section 418(2) of the South African Companies Act).

It is manifestly clear that the regularisation of private enquiries is stricter in the English context than the South African one, specifically at the early stage thereof when the court is approached by the applicant to authorise the enquiry. It is at this early stage of the proceedings that the South African courts are perceived not to concern themselves with matters such as:

(a) the precise identity of the examinees intended to be called;

(b) whether or not the proceedings are likely to unduly inconvenience certain examinees more than others;

(c) if the enquiry will not give the initiator (be it the liquidator or other initiating party) an undue advantage in pending or foreseen litigation;

(d) if the information sought by the applicant cannot possibly be extracted in a less intrusive manner than to compel the examinee to attend a private examination; or

(e) lastly, the South African courts have not hitherto, in any judgment, limited the parameters within which the line of questioning at the enquiry are to remain confined to, and which subjects are to be entirely avoided.

## 4.4 The issue of privilege, the right against self-incrimination, and admissibility of evidence

### *4.4.1 The South African law perspective*

In a Constitutional dispensation where the right to remain silent is a recognised right of any accused person,[443] it must be considered to what extent an examinee called to a section 417(1) enquiry can be compelled to answer questions put to him or her.

The starting point in this discussion is to be found in section 417(2)(*b*) of the Companies Act, which is the statutory provision securing the examiner's right to compel an examinee's statutory obligation to answer questions posed at such a witness, even if such witness reckons the answer to the question so posed, might lead to incriminating himself or herself. Section 417(2)(*b*) of the Companies Act reads as follows:

> Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.

Section 417(2)(*c*) of the Companies Act, in conjunction with the abovementioned Constitutional Court matters of *Bernstein* and *Ferreira*, did bring about the consequence that such incriminating answers given during a witness's testimony in the section 417(1) enquiry, shall not be admissible in pending or ensuing criminal proceedings against the same witness, granted that the criminal offence in question is not one that relates to the administering or taking of the oath or affirmation itself, the giving of false evidence, the making of a false statement, or the failure to answer lawful questions fully and satisfactorily.[444]

Considering the mechanisms of protection incorporated in the abovementioned judgments of *Bernstein* and *Ferreira*, the court went further in comfortably stating that an accused, after his or her arrest and impending criminal trial is compellable as an examinee to appear at a section 417(1) enquiry, even if the effect may be that the prosecution attains some tactical advantage thereby. The effect is not so intrusive that the accused can say that his right to a fair trial in terms of section 35(3) of the Constitution has been unjustifiably impugned.[445]

In terms of section 418(5)(*b*)(*iii*)(*aa*) it is a statutory offence for a person to refuse to

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443 S 35(1)(*a*) of the Constitution.

444 Bertelsmann *et al* (2019) 454-455 referring to the matter of *Parbhoo*, which made a similar finding of unconstitutionality in relation to public enquiries in terms of ss 415(3)–(5) of the Companies Act.

445 *Mitchell v Hodes* 2003 (3) SA 176 (CPD) at 208B–209C.

answer a question so put to him or her, as an examinee requested to answer questions in terms of section 417(2). This is, however, still subject to the inescapable repercussions of legal professional privilege existing between the client and the legal representative, meaning that a witness cannot, under the guise of the above referred-to sections, be compelled to unveil information exchanged between attorney or counsel and their client. Thus, an examinee is entitled to withhold such privileged facts from the eyes of the enquiry, but it will have to be explicitly raised as an objection by the examinee.[446]

It appears clear from the authorities discussed that, in the context of private insolvency enquiries, the Constitutional Court has affirmed that a witness shall not be entitled to rely upon a right to remain silent to avoid self-incrimination when summoned as an examinee in terms of either section 417(1) or section 418(2) of the Companies Act. The legislature deemed the public interest function served by uncovering a company's dishonest and prejudicial dealings to outweigh such examinee's individual fundamental rights.[447]

As the remaining portion of this chapter demonstrates, the question is more intricate and problematic if one considers the potential consequences from a civil law perspective, differently stated, to what extent an examinee is exposed to civil repercussions, based on the content divulged in the incriminating statements given at a section 417(1) enquiry, and equally important, what the evidentiary status is of such preceding incriminating statements in separate civil process which may be initiated against the same examinee.

As can be discerned from the above-quoted portions of sections 417 and 418 of the Companies Act, whilst there is a clear bar against the use of evidence and admissions made during section 417(1) enquiries in ensuing or ongoing criminal proceedings (save for a limited group of offences), the legislature did not include a similar bar against the use of the same evidence and admissions in civil proceedings, nor did the Constitutional Court pronounce any findings of unconstitutionality in this regard.[448]

The general rule that has developed in this regard, is that a transcript containing the testimony provided by an examinee at a section 417(1) enquiry is admissible in principle, however, the inclusion thereof in the separate civil proceedings, is a matter of discretion to the presiding officer in such distinct civil proceedings.[449] It has been aptly summarised in the

446 Delport *et al* (2022) APPI-267; Blackman *et al* (2012) 14-481–14-482.
447 See Smith *et al* (2022) 195 for a discussion on the general relaxation of the entitlement to privilege, although such discussion is in the context of s 65 of the Insolvency Act, applying to natural persons.
448 Delport *et al* (2022) APPI-257; Bertelsmann *et al* (2019) 455.
449 Blackman *et al* (2012) 14-490–14-491; Delport *et al* (2022) APPI-265-266.

matter of *Du Plessis v Oosthuizen; Du Plessis v Van Zyl*[450] in the following terms:

> Hieruit volg dat die getuienis wat tydens die insolvensie-ondervraging afgelê is toelaatbaar is in geregtelike stappe ingestel teen die persoon wat daardie getuienis afgelê het. Dit kan egter nie opsigselfstaande dien as bewys van die feite waaroor daar getuig is nie; die bewyskrag daarvan sal deur die Verhoorhof beoordeel moet word.[451]

One is to therefore differentiate between the admissibility of the section 417 transcript in separate civil proceedings on one hand, and the veracity and evidentiary value to be ascribed to the facts contained in such transcript on the other hand. The veracity and evidentiary value can only be determined as a matter of discretion by the trial court adjudicating over the distinct civil proceedings. In practical terms, it was further noted that typically such a section 417(1) enquiry's transcript would be particularly useful in cross-examination of the witness and therefore exposing contradicting versions given by such a witness in the two distinct forums.[452]

It is not uncommon therefore for the court to rule that a transcript of evidence emanating from a section 417 enquiry may be used in civil proceedings after the fact.[453] Granted of course that the court is not to merely accept the content of the transcript as accurate, it is easy to postulate that if used correctly to test a witness' conflicting versions, the credibility of such a witness will likely be weakened thereby if he or she is unable to provide a plausible explanation for contradicting versions offered in the two distinct forums.

The next epithet of admissibility of evidence obtained in terms of section 417(1) enquiries, is that the evidence so obtained can only be used in ensuing or ongoing civil proceedings against the very same person that gave the testimony at the section 417 enquiry, and not against third parties external to the enquiry.[454] The initial compelling authority in this regard was in the case of *Simmons v Gilbert Hamer*[455] where the court, relying predominantly upon foreign law, stated that:

> Although there is no express provision in [sections] 115 and 117 of the 1862 Act to that effect, it has been held in England that the depositions of a witness at such an enquiry can be used against him as admissions by him. *Re Hercules Insurance Co., Pugh and Sharman's* case, 13 Eq. 566.
> […]
> In *North Australian Territory Co v Goldsborough, Mort & Co.*, (1893) 2 Ch. 381, it was held that answers given in an examination under [section] 115 never can be used as evidence or as proof, except for the purpose of contradicting a witness. In other words they can only be used as

450 1995 (3) SA 604 (O) (hereinafter *Du Plessis*).
451 *Du Plessis* at 621B–621C.
452 *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (4) SA 389 (D&CLD) (hereinafter *Cordiant Trading*) at 397F.
453 *Cordiant Trading* at 397I.
454 Blackman *et al* (2012) 14-450–14-451.
455 1962 (2) SA 487 (D) (hereinafter *Simmons*).

'evidence against' the witness who gave the evidence.[456]

Whilst observing the above applicable principles as to the admissibility of evidence obtained in section 417(1) enquiries, the ordinary rules applicable in the field of the law of evidence should also be maintained, particularly those dealing with hearsay evidence. In this regard, section 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988, which deals with the potential admission of hearsay evidence in select circumstances, finds equal application to this discussion surrounding the utilisation of a section 417(1) enquiry's transcript, should the latter contain any hearsay evidence. Should the prescripts contained in section 3(1)(*c*) therefore be complied with, the hearsay evidence contained in such transcript shall be similarly admissible as evidence.[457]

The issue of evidence given by a person at a section 417(1) enquiry and therewith incriminating therewith not himself, but a third party, is one that still surfaces. This became manifest in the Supreme Court of Appeal judgment of *O'Shea v Van Zyl*[458] where the deponent at the enquiry, Mr O'Shea, in his capacity as trustee of the O'Shea Family Trust, "made a number of statements against the interest of the trust".[459]

Considering that trustees in an *inter vivos* trust can only legally act jointly in the name of the trust, in conjunction with the fact that no evidence was led at the enquiry that Mr O'Shea had the requisite authority to make binding concessions on behalf of the trust, the concomitant result was that Mr O'Shea, given in his personal capacity, did not bind the O'Shea Family Trust with any incriminating statements aimed at the trust and accordingly such evidence was held not to be admissible against the trust. The court's conclusion was as follows:

> When Mr O'Shea gave evidence at the hearing no investigation was conducted into whether he spoke as the authorised representative of the trust rather than in his personal capacity. Despite his bombast there is no reason to conclude that he did.[460]

Between both the matters of *Simmons* and *O'Shea*, the lesson to be taken is not that individuals acting in representative capacities cannot bind the legal person which they represent, but rather the lesson is that when dealing with a witness called in a representative capacity, special care ought to be taken in ensuring that an examinee attesting in a representative capacity possesses the requisite authority to represent- and make binding

456 *Simmons* at 492D-492F.
457 *Van Zyl v Kaye* 2014 (4) SA 452 (WCC) at 472D–472F.
458 2012 (1) SA 90 (SCA) (hereinafter *O'Shea*).
459 *O'Shea* at 94C.
460 *O'Shea* at 97C–98B.

concessions on behalf of the represented legal entity before such individual continues in leading evidence, lest the consequence will be that all such evidence taken will be considered as having been given only in the individual's personal capacity.

Save for the necessary pre-emptive procedural formality of ensuring that an examinee is properly authorised to depose evidence on behalf of a legal person, there is no bar against utilising evidence given at a section 417(1) enquiry in separate pending or ensuing civil proceedings.[461]

### *4.4.2 The English law perspective*

Much like in South African law, the concept of privilege against an examinee's self-incrimination having been abrogated in the context of private enquiries has received consistent support in English law.[462]

Once a witness has been summoned to an enquiry, it is clear that he or she cannot refuse to answer questions, even if the result would lead to his or her incrimination.[463] Although it has been attempted to show that section 236 of the English Insolvency Act is offensive to the provisions of Article 6(1) of the European Convention of Human Rights, 1950, and that private enquiries amount to a violation of the examinee's right to a fair trial, this was found not to be the case.[464]

It was aptly affirmed in the Court of Appeal matter in *Bishopsgate Investment v Maxwell*[465] that the right against self-incrimination cannot be applied in this particular context and expressed in the following extract:

> It is plain to my mind — and not least from the Cork Report — that part of the mischief in the old law to deal adequately with dishonesty or malpractice on the part of bankrupts or company

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461 *Roering* at 471G–472A; *Commissioner, South African Revenue Service v Wiese* 2023 (1) SA 119 (WCC) at 139D–139E; Bertelsmann *et al* (2019) 465.

462 *Re Jeffrey S Levitt Ltd* (1992) 2 All ER 509 at 521B–522H held that an examinee was not entitled to rely on the privilege against self-incrimination, that privilege having been impliedly abrogated by the provisions of ss 235–236 of the 1986 Insolvency Act; Milman & Durrant (1999) 18.

463 Milman & Durrant (1999) 18 affirm that Parliament had clearly abrogated the right against self-incrimination in cases of an examination in terms of s 236.

464 S 418(3) of the Companies Act. See *Liquidator of Tay Square Properties Ltd, Noter* (2005) SLT 468 at 473: "The judge in proceedings in terms of s 236 is not being asked to adjudicate on evidence elicited by questions, or to reach any view, finding or conclusion, or to make any recommendation. The purpose of the s 236 procedure is to ascertain and record facts which might subsequently be used as a basis for steps to be taken by the liquidator […]. In my view therefore art 6 of the European Convention on Human Rights is not engaged by the current s 236 proceedings". See also *Funke v France* (1993) 1 CMLR 897 (ECHR) for a different preceding decision. Steyn (2005) 431, confirms that documentation that a witness is compelled to provide, as dictated by a separate enquiry such as insolvency enquiries, is not a violation of Art 6 of the European Convention on Human Rights. See further Milman & Durrant (1999) 18 for a discussion of Art 6 and its consideration in case law.

465 (1992) 2 All ER 856 (hereinafter *Bishopsgate*).

> directors. That was a matter of public concern, and there is a public interest in putting it right. As steps to that end, Parliament has, by the 1986 Act, greatly extended the investigative powers available to office-holders, with the assistance of the court, and has expressly placed the officers of the company, and others listed in [section] 235(3), under a duty to assist the office-holder.[466]

It was further held in the case of *Rottman*[467] that even the apprehension of one's self-incrimination in pending criminal proceedings cannot serve as a basis for refusal to answer questions put to an examinee in terms of section 236 enquiries.[468] It was reasoned by the court in that instance that there is no bar in principle that the transcription of the enquiry proceedings cannot be used in the criminal proceedings and that the criminal court is to exercise its discretion as to the admissibility of such evidence.

This position, however, changed considerably when the European Court of Human Rights in *Saunders v United Kingdom*[469] found that the concessions contained in the transcript emanating from a compulsory enquiry (such as a section 236 enquiry where an examinee is statutorily obliged to answer questions) are not to be used in subsequent criminal proceedings against the same examinee (as accused) and that such usage constituted a violation of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.[470]

The latter approach is nearly identical to the position in South Africa where the Constitutional Court in *Ferreira* and *Bernstein* pronounced in similar and no uncertain terms that such evidence given by an examinee at an insolvency enquiry cannot be used against such an examinee in later criminal proceedings.

When the question is however asked to what extent such transcriptions attained from a compulsory enquiry can be admissible as evidence against an examinee, different considerations apply. A statutory provision that finds application in this regard is section 433 of the English Insolvency Act:

> (1) In any proceedings (whether or not under this Act) a statement of affairs prepared for the purposes of any provision of this Act which is derived from the Insolvency Act 1985,
> (aa) a statement made in pursuance of a requirement imposed by or under Part 2 of the Banking Act 2009 (bank insolvency),
> (ab) a statement made in pursuance of a requirement imposed by or under Part 3 of that Act (bank administration), and
> (b) any other statement made in pursuance of a requirement imposed by or under any such provision or by or under rules made under this Act,
> May be used in evidence against any person making or concurring in making the statement.

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466 *Bishopsgate* at 876F–876G.
467 *Rottman v Brittain* (2010) 1 WLR 67 (hereinafter *Rottman*).
468 *Rottman* at 74. See also *Re London United Investments Plc* (1992) Ch 578 (1991) at 587–588.
469 (1997) BCC 872 (1996) (hereinafter *Saunders*).
470 *Saunders* at 888–889; Milman & Durrant (1999) 18; Parry (2001) 503.

It has been accepted, that such record of evidence is, in general, usable as evidence in subsequent proceedings against the person having deposed to evidence in the enquiry, as this is in line with section 433.[471] It was aptly stated by Parry that:

> It is unlikely that this case [*Saunders*] would have an impact on the use of such information in transaction avoidance proceedings, as these proceedings are not criminal in nature.[472]

The Court of Appeal in England in the case of *Re Arrows Ltd (No 4)*[473] held, with approval of the *Bishopsgate* matter, that evidence given by an examinee at a section 236 enquiry, is admissible against such a person. This is similar to the legal position in South Africa.

The first and most prominent instance when the English Court of Appeal had considered the question of applying immunity in favour of a witness, not in court proceedings *strictu sensu*, but in a tribunal which carried with it certain epithets akin to judicial proceedings, was in the matter of *Trapp v Mackie*.[474] The court listed ten *indicia* that may be compelling in evidencing that a tribunal is sufficiently related to judicial proceedings that it may be sensible to afford witnesses in such proceedings the requisite "immunity from suit".[475]

The legal position on this point has undergone a considerable change due to recent case law which emerged in the Court of Appeal, in the judgment of *Al Jaber*.[476] This case marked the first instance where the court was tasked with answering the legal question of whether absolute immunity was to be afforded to examinees being subject to a section 236 examination. This concept has been dubbed "immunity from suit", and this entails that:

> A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation […]. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity.[477]

The rationale for the application of such immunity to witnesses testifying in court was expressed by the court as follows:

> The reason for the rule is grounded in public policy: it is to protect a witness who has given evidence in good faith in court from being harassed and vexed by an action for defamation

471 Snaith (1990) 519.
472 Parry (2001) 503; see also Milman & Durrant (1999) 18 confirming that the rule of *Saunders* only applies to compelled evidence used in subsequent criminal proceedings, and not civil proceedings.
473 (1993) 3 All ER 861 at 869B & 874B.
474 (1979) 1 WLR 377 (1978) (hereinafter *Trapp*).
475 *Trapp* at 383.
476 (2022) 2 WLR 497 (2021) (*Al Jaber* above).
477 *Al Jaber* [49].

> brought against him in respect of the words which he has spoken in the witness box. If this protection were not given, persons required to give evidence in other cases might be deterred from doing so by the fear of an action for defamation. And in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were actuated by malice the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court even though this means that the shield covers the malicious and dishonest witness as well as the honest one.[478]

A prudent part of the court's argument in importing the protection of immunity from suit to section 236 examinations, is when it made reference to the matter of *Singularis Holdings v PricewaterhouseCoopers*,[479] particularly paragraph [11] thereof where the liquidation process was given a wide description — from the initial vestige of the *concursus* to the delineation of creditors' rights, all the way to the procedural steps that the liquidator is required to take in taking effective control of the insolvent estate.[480] On such wide interpretation of the concept of the liquidation process, the conducting of a section 236 examination, similarly falls to be categorised under the procedural steps executed by the liquidator, and such procedural steps naturally resort under the scope of judicial proceedings.

The court's argument went on to note that the principle of immunity from suit has enjoyed wide import into proceedings not necessarily amounting strictly to judicial proceedings but outside of it as well, including tribunals and related bodies with similar functions, as well as court reports and statements prepared by official receivers.

Premised on the court's reasoning that the section 236 examination enquiry forms a constituent part of the liquidation process (judicial proceedings), one that starts with a court order for winding-up and is supervised by the court and its various officials thereafter, the Court of Appeal came to the following conclusion:

> If Joanna Smith J [the presiding Judge in the court *a quo*] is right that the Sheikh's statements are not covered by immunity from suit, that creates a very curious situation: the judge clearly enjoys immunity from suit in respect of anything he or she says in the course of the section 236 examination; as I have said, the liquidator conducting the examination (or his representative) is protected from suit; and therefore, only the examinee is left exposed. It seems to me that the fact that both the judge and liquidator enjoy immunity, together with the very nature of the section 236 examination which I have already described, points to the section 236 examination, viewed in the context of the winding-up proceedings, as being the kind of judicial proceeding in which all participants are entitled to immunity.[481]

The end result is therefore that all participants in the judicial process, namely the presiding Judge, the liquidator, and the examinee are all covered under the protection afforded by the principle of immunity from suit. Excluding only one such individual for no

478 *Al Jaber* [54].
479 (2015) AC 1675 (PC).
480 *Al Jaber* [82].
481 *Al Jaber* [101].

apparent reason is certainly an arbitrary exclusion — so the court's reasoning goes.[482] Therefore, this further brings about the result that the testimony of examinees is protected in terms of immunity from suit to the extent that incriminating statements are elicited at a section 236 examination and as such are, in principle, inadmissible evidence in distinct civil proceedings against the same individual.

The judgment of *Al Jaber* has been subject to criticism, particularly considering the consequence of lessening the weight and utility of a section 236 private examination.[483] The further valid critique offered by Cooper is that the court's reasoning applied in this instance may likely lend itself to a further argument in future cases that other aspects of the insolvency process are to be similarly included under the umbrella of "judicial proceedings" and consequently also stand to benefit from the relieving effect of immunity from suit.[484]

Insofar as there may be some trepidation that immunity from suit granted as an absolute immunity to examinees in section 236 enquiries may lead to the enquiry losing its efficacy and affording evasive officers of the insolvent company a convenient safe haven to gain undue protection for their wrongdoings, the court in *Al Jaber* went further to state that:

> Therefore, even if the examinee enjoys immunity for any statements made in the section 236 process, that will not protect him or her from an action based on non-disclosure in breach of those duties to provide information and the liquidator will be able to rely on statements made in the section 236 examination as a result of section 237(1) and section 433 IA 1986. The liquidator may still obtain a remedy via that route.[485]

The provisions of section 237(1) of the Insolvency Act hold important enforcement mechanisms for the liquidator to take action in the recovery of assets or any debts owing to the company, as identified during an enquiry. As also provided in section 433 of the Insolvency Act, the court in *Al Jaber* also reiterated that any statement of affairs given by an examinee or a written statement deposed to, for example, one deposed to in terms of section 235, may still result in enforcement action taken by the liquidator.[486]

The application of immunity from suit to the domain of examinations in terms of

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482 *Al Jaber* [102].

483 See Cooper *et al* (2022) *ICR* 45.

484 As above.

485 *Al Jaber* [108].

486 Ss 237(1)–(2): "(1) If it appears to the court, on consideration of any evidence obtained under [s] 236 or this [s], that any person has in his possession any property of the company, the court may, on the application of the office-holder, order that person to deliver the whole or any part of the property to the office-holder at such time, in such manner and on such terms as the court thinks fit. (2) If it appears to the court, on consideration of any evidence so obtained, that any person is indebted to the company, the court may, on the application of the office-holder, order that person to pay to the office-holder, at such time and in such manner as the court may direct, the whole or any part of the amount due, whether in full discharge of the debt or otherwise, as the court thinks fit".

section 236 was considered for the first time in the matter of *Al Jaber*. As rightly and predictably noted by the court,

> affording immunity to statements made by the examinee may encourage him to speak freely and frankly, thereby facilitating the liquidator obtaining the information necessary to progress the winding-up.[487]

In order for section 236 enquiries to still carry some practical usability in terms of the further admissibility of evidence extracted from such proceedings, taking into consideration the newly acquired immunity from suit which safeguards examinees, the liquidator will need to effectively resort to the remaining enforcement mechanisms contained in the Act, lest this method of information-gathering is considerably denuded of its value.

## 4.5 Suggestions for law reform

### *4.5.1* Locus standi *in initiating section 417 enquiries*

As highlighted, the South African legal position in prescribing which individuals may instigate private enquiries is notably more inclusive in comparison with its English counterpart. Both the court and the Master are clothed with the authority to authorise these enquiries, and in addition, creditors are also authorised to initiate the enquiry in addition to the liquidator and for that matter, any other person capable of showing sufficient pecuniary interest in the matter. This stands in stark contrast to the provisions of English law that limits the initiation of these enquiries to only the liquidator, and he or she can only be authorised by the court to do so.

It is the writer's view that in the South African context, there stands to be no benefit from curtailing the number of persons authorised to commence private enquiries in the same manner one finds in English law. It often transpires in practice that the irregularities which permeated a company's affairs are often noticed first and foremost by the very same creditors prejudiced by such irregularities.

At the same time, there may exist many reasons why liquidators are not incentivised to resort to private enquiries to expose- and root out irregularities. These reasons may include, *inter alia*, insufficient free residue in the insolvent estate to fund private enquiries, lack of proof of irregularities, unwilling witnesses, or plainly liquidators who simply have no interest, for whatever reason, in advancing the interests of the *concursus creditorum*.

The markedly inclusive provisions ensconced in South African law are clearly

487 *Al Jaber* [106].

conducive to a system of healthy checks and balances where affected parties are afforded the opportunity to advance the interests of creditors collectively in circumstances where the liquidator is either negligibly or unknowingly in default of his or her duties.

*4.5.2 The court's role in preventing abuse of section 417 proceedings*

As categorically identified above, the South African courts are considerably less diligent in considering the prevailing circumstances in which it is requested to conduct section 417 enquiries. It may be advisable for courts to gradually implement stricter intervention in private enquiries of this nature, modelled on the English example, particularly with regard to:

(a) The precise identity of the witnesses intended to be called. This may become particularly problematic where the enquiry has been delegated to a commissioner in terms of section 418(2), and it thereafter becomes a matter of discretion left to the commissioner (not the court) which persons are to be called as examinees.

(b) Whether or not the proceedings are likely to oppress certain witnesses more than others. It appears that within the South African context, there is certainly not anything akin to the class of individuals identified in section 235 of the English Insolvency Act that dictates which individuals owe a statutory duty of cooperation towards the liquidator, and failing such duty, are likely to be subject to a section 236 examination, and by extension prescribing that individuals not included in the class identified in section 235 are consequently to be less likely ordered to be subjected to a private examination. This limitation is a sensible one as it will be particularly inequitable to require the same degree of cooperation from a director of a company and a party much further removed from the inner circle of management of the company.

(c) If the enquiry will not give the initiator an undue advantage in pending or foreseen litigation initiated. Courts are to be particularly cautious in this regard in the instance of section 417 enquiry proceedings initiated by creditors. It must be borne in mind that the enquiry has only one legitimate purpose and that is of reconstructing the company's knowledge, coupled with assisting the liquidator in executing his statutory duties. It is easy to postulate how a creditor, authorised to conduct the enquiry, may deviate from this purpose and venture into an enquiry that exclusively bolsters its own civil claim against the individual concerned.

(d) If the information sought by the applicant cannot possibly be extracted in a less intrusive manner. It is to be consistently considered by the court if it would not be less intrusive to

order certain individuals to rather produce documents and explicitly prohibit such individuals from being unduly subjected to a private enquiry, as one finds in section 234 of the English Insolvency Act.

(e) The South African Courts are certainly not of the predisposition of delineating the parameters within which the intended line of questioning in the enquiry is to remain confined to. Nothing however prevents the Court from incorporating such limitations and it would undoubtedly aid the peace of mind of many examinees if they were informed in their witness subpoenas that the court has authorised only a limited the scope of questioning they can expect to be confronted with at the enquiry. This may further achieve the very same result mentioned in the *Al Jaber* case of witnesses divulging information more freely and frankly henceforth.

(f) The Court is also to remain cognisant of the financial implications of the enquiry, which are to be felt by the *concursus creditorum*. As one is obliged to show in English law, the South African Courts ought to be alive to the reality that these proceedings are still to satisfy the requirement of being to the ultimate advantage of all creditors. An application to court which speaks of an array of persons to be questioned and questionable transactions to be investigated yet fails to disclose the eventual foreseen yield to creditors, is to be approached incredulously by the Court.

### *4.5.3 The admissibility of evidence obtained at private enquiries in civil matters*

The findings of the court in the English Court of Appeal in *Al Jaber* mark a drastic departure from the legal position of admissibility of evidence obtained at private enquiries in that the concept of immunity from suit has never applied to section 236 until now. This concept is certainly far from recognised in South African law.

As noted in the judgment of *Al Jaber*, the import of immunity from a suit applying to examinees in section 236 examinations will not necessarily dilute the efficiency of such enquiries; particularly considering the liquidator will still be left with some residual enforcement mechanisms contained in sections 237(1) to (2) and 433. of the English Insolvency Act.

The latter sections place the liquidator in the position of being able to recover assets owned by (and debts owed to) the insolvent estate as identified by any examinees in the course of a section 236 examination, irrespective of the literal content of the transcription *per se* being covered under the protection of immunity from suit. This provides for a balanced

equation in that the liquidator still has some residual enforceability and consequential value attainable from the section 236 enquiry, whilst simultaneously on the other hand, providing the examinee with the peace of mind to speak freely and frankly.

It is, however, in this regard where the South African Companies Act is manifestly lacking in comparison to the English Insolvency Act. The former plainly has no equivalent to sections 237(1) to (2) and 433 of the latter. If one were to therefore incorporate the concept of immunity from suit to section 417(1) enquiries, the result would be one far less balanced than the one extant in the current English law dispensation. In such an instance the result would be that none of the evidence contained in the section 417 transcription would constitute admissible evidence in civil proceedings, and further thereto, even considering incriminating concessions made in the enquiry by the examinee, the liquidator would have no residual statutory enforcement mechanisms to rely upon.

As was argued above therein, the suggested section 40 of the 2015 working document contains a commendable expansion to the existing rights of the trustee or liquidator in relation to private enquiries and a section 69(3) warrant that can be applied for as a direct result of evidence given by an examinee at a private enquiry, particularly insofar as it concerns the additional rights afforded to the trustee in terms of the envisaged section 40, in comparison to the existing section 69 of the Insolvency Act.[488] The relevant sub-section of section 40 reads as follows:

> (2) If it appears to a magistrate to whom such application is made on the ground of an affidavit, *or evidence given at a questioning in terms of section 52, 53 or 55 or answers to questions contemplated in section 54(3)(b)* that there is substantial reason to suspect that a book, document or other record relating to the affairs of the debtor or property belonging to the insolvent estate is being concealed in possession of a person or at a place or on a vehicle or vessel or in a container of whatever nature or is otherwise unlawfully withheld from the liquidator, within the area of jurisdiction of the said magistrate, he or she may issue a warrant authorising the liquidator or a police officer to search a person, or place or vehicle, vessel or container mentioned in the warrant and to take possession of such book, document, record or property. [Emphasis added]

The current wording of section 69(2) and (3) is not couched in such wide terms as section 40 of the said draft working paper. As section 69(3) reads, it is only upon a statement made on oath and upon a subsequent application by the trustee to a magistrate, that a warrant may be issued. In contradistinction, the proposed section 40 however goes further in adding an additional ground for issuing such a warrant, namely based on an examinee's evidence at a private enquiry, which evidence given by the examinee at the enquiry is suggestive of assets

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488 An apt cross-reference to be made in this regard, is to para 3.3.7 in Ch 3 above, namely the discussion surrounding the potential impact of the 2015 working document.

suspected of being concealed or withheld from the trustee or liquidator.

Should one therefore accept the hypothetical importation of immunity from suit to the benefit of examinees as an absolute immunity in private enquiries into South African law (as is currently the case in England) this will only be sustainable in South African law if the above quoted section 40 of the 2015 working document is simultaneously enacted therewith. The reason for this rationale is that if there is express residual authority contained in section 40 to the effect that a magistrate is empowered to issue a warrant for the search and seizure of assets (either concealed or unlawfully withheld from the trustee or liquidator) based on evidence given by an examinee at a private enquiry, then the immunity from suit enjoyed by such examinee will not denude the enquiry of its efficiency from the vantage point of creditors.

The advantageous result to all role-players would then be that the examinee would enjoy a general right of immunity from suit. However, should the examinee render testimony of such a nature that it is clear to the presiding magistrate that there are assets likely concealed or unlawfully withheld from the trustee or liquidator, this would constitute separate grounds in terms of section 40(2) for a warrant to be issued. The assets therefore identified in the course of an insolvency enquiry would be susceptible to being seized with immediate effect in terms of section 40(2).

Based on the current composition of the South African Companies Act however, hypothetically incorporating the concept of immunity from suit into South African law, private enquiries would be reduced to a method of reconstructing the company's knowledge, but rather incongruously, without any legal recourse of correcting any forms of wrongdoing identified in the process of the enquiry. Based on the composition of the Companies Act, read together with section 69(3) of the Insolvency Act in its current form, a liquidator would not even be entitled to request a warrant for the search and seizure of assets alluded to in the evidence given under oath by the examinee at the enquiry, as this would be in violation of the examinee's afforded right of immunity from suit.

The fact that the legislatures in both the South African and English insolvency laws have deemed it necessary to deprive examinees of their right against self-incrimination in the context of these enquiries (and having hitherto withstood Constitutional muster) speaks to the ultimate necessity of private enquiries and the vital public interest that is served therewith. It would certainly run perpendicular to such legislative intention if one were to have private enquiries reduced to a forum where incriminating facts are uncovered but ultimately,

unusable. This is precisely why judgments such as *Snyman*[489] illustrated the example of how efficiently a section 69(2) application can be made even during an insolvency enquiry.

As stated above however, the concept of immunity from suit is certainly a concept that could aid in bringing forth more co-operative and forthcoming examinees, however substantial amendment to the current insolvency laws would have to be implemented before this can be considered a productive course of action.

489 Discussed in para 3.3.3 above.

# CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

## 5.1 General

In this dissertation, I have evaluated specified statutory procedures provided for by insolvency legislation to enable the trustee or liquidator of an insolvent estate to trace assets of the estate with the view of swelling the assets of the estate to the benefit of the creditors. For this purpose, the selected research topics and aims set out in chapter 1[490] relates to three distinct statutory remedies that have been shown to be efficient mechanisms in obtaining such control of the insolvent estate.

The obtaining of effective control of the insolvent estate is a task left to the trustee or liquidator and one which poses a constant challenge. The propensity of insolvents to seek to preserve their own interests, or the interests of select creditors *in lieu* of the collective interests of creditors, has always lingered and will continue to linger indefinitely. As such, the trustee or liquidator is dependent upon the efficient functioning of the remedies at his or her disposal in order to counter this propensity.

In this dissertation, there were three distinct statutory methods discussed for obtaining control of the insolvent estate. Unless expressly stated otherwise, nothing in this dissertation ought to be construed as a critique of any other applicable remedies for the taking of control of the property of the insolvent estate, or as suggesting that such identified statutory remedies are superior for whatever reason or to be preferred to other remedies not studied herein.

The procedures identified in taking control of the insolvent estate for purposes of this study are described in chapter 1 hereof,[491] and are as follows:

(a) The recovery of company property disposed of as a void disposition within the meaning of section 341(2) read together with section 348 of the Companies Act, the possibility of such void dispositions being validated, how such established legal position of void dispositions and the procedure validation of void dispositions stand to potentially be influenced by the 2015 working document;

(b) The attaching and seizing of the insolvent estate's property (be it a natural person insolvent or a company insolvent) either concealed or unlawfully withheld from the trustee or liquidator by way of a warrant issued in terms of section 69(3) of the Insolvency Act; and

(c) The conducting of a private enquiry in terms of the provisions of section 417(1) and

490 Para 1.3.
491 Paras 1.2 (a)–(c).

418(2) of the Companies Act, summoning to such enquiry any person suspected of having information about such trade, dealings, and affairs of the company in question and the various legal principles regulating these types of enquiries.

The reason why these specific statutory remedies were selected for this dissertation, is that they are often times encountered in practice alongside one another. As was stated earlier, these three select statutory methods of obtaining control of the insolvent estate are not to be considered in a vacuum.[492] Inadequate recovery of assets during the attachment of the insolvent company's property often prompts a liquidator to request an enquiry into the trade, dealings, and affairs of a company, or information revealed during a private enquiry may likely reveal assets being concealed or unlawfully withheld from the liquidator.

By the same token, it often happens that the liquidator comes to learn either during attachment of property or private enquiries (but obviously not limited to these instances) that there have been void dispositions of property of the company's property after liquidation had already commended and are to be returned to the insolvent estate. The liquidator is also likely to discover, during the course of seizing assets or recovering void dispositions, that there are select individuals previously unknown to him or her that may be able to elucidate the financial affairs of the insolvent company.

The pattern of subtle interconnectedness among these statutory remedies is precisely what can be evinced in many of the case law under discussion in the preceding chapters.[493] The conceivable factual scenarios in which these three distinct statutory remedies are likely to complement, reinforce or inform one another, are innumerable. Though the preceding chapters examine these distinct statutory remedies individually, one is to remain alive to the factual reality of these remedies often drawing from one another in some way, shape, or form.

This study entailed a desktop- and literature study where I not only considered practical issues with already established procedures but also conducted a comparative study, mainly with reference to the position in England which jurisdiction also holds equivalents of such statutory remedies. This is particularly appropriate in this instance since it is submitted that a proper understanding of such English principles could enhance the understanding as well as consideration for further improvement of our current understanding and procedures in this regard.[494]

The objective of each chapter's study was one of comparative law. Each of the three

492 Para 1.1.
493 See *Naidoo* as a most recent example.
494 Para 1.2, specifically where the cases of *Vermeulen* & *Herrigel* are referenced.

distinct statutory remedies has an equivalent that bears a close resemblance to that of the insolvency laws of England. As has been remarked by our courts, reference to such laws of England is appropriate considering the strikingly close resemblance that they hold and from which our heritage of those laws is relatively obvious.[495]

The main body of the dissertation (chapters 2 to 4) consists of three chapters where I have considered the research topics described above from both a South African- and English law perspective. Upon consideration of each such topic in both respective jurisdictions, every chapter in the main body concludes with recommendations to firstly properly understand the current position, secondly to understand the problems related to them, and thirdly posing suggestions of possible ways of improvement of these established statutory remedies. Below I summarise my concluding observations and thereafter some recommendations for law reform.

## 5.2 Concluding observations

### *5.2.1 Void dispositions within the meaning of section 341(2) read with section 348 of the Companies Act*

As has been stated in Chapter 2, these statutory provisions in conjunction with one another bring about a certain retrospective effect when dealing with post-liquidation dispositions. This occurs in that liquidation of a company commences on the date that the application for winding-up is presented for issue by the Registrar of Court. This means that any disposition effected by the company after an application for winding-up has already been issued against it is axiomatically considered to be void unless a court order dictates otherwise.[496]

The voidness that paralyses dispositions carried out by the company after the commencement of liquidation is however only given effect on the precondition that a liquidation order is ultimately granted by the court. It would be an absurdity if a company's post-liquidation dispositions were to be considered void if, for some or other reason, a liquidation order did not place the company into liquidation at the end of the day.[497]

Granted however that the liquidation order is granted, the retrospective effect alluded to above takes effect. This means that once the order for winding-up is granted, all dispositions effected after the commencement of liquidation until the eventual date of court

495 Para 1.4.
496 Para 2.1.
497 As above.

order for winding-up, are considered void *ex lege*. This retrospectively identified period tainting all dispositions with voidness has been aptly referred to in English law as the "*twilight period*".[498] It is however still possible for dispositions carried out in the twilight period to be ordered as validated within the rider provision of section 341(2), granted that an application for such validation is successful.

It is in this regard where the two distinct jurisdictions of South Africa and England have each shown a markedly different approach in recent years when asked the legal question of which dispositions (although considered void *ex lege*) are nevertheless to be ordered as validated. As stated earlier regarding our heritage of insolvency laws from English origin, it comes as no surprise that many of the applicable legal principles, rules, and guidelines on the question of validation, have been imported from English law.[499]

The relevant factors in consideration of possible validation of void dispositions are most comprehensively set out in the case of *Lane*, where one will also notice in such case most of such factors originate from English law.[500] Those factors shall not be repeated herein, but suffice it to say that some of the factors are of an objective nature, whilst some are clearly of a subjective nature.[501] As an example, the question of a disposition towards a creditor benefitted the collective group of creditors, or if creditors were treated *pari passu* by the insolvent company, are determinable as objective truths or falsities. On the other hand, asking if the disponee had knowledge of the insolvent company's status or to what extent such disponee stands to be prejudiced if the void disposition is not validated, are manifestly subjective considerations.

Having identified all relevant considerations influencing the judicial discretion in validating void dispositions, the question then arises which of those considerations are of more or less value in relation to one another and if such considerations are to be satisfied in any particular order. The comparative study undertaken herein has in fact revealed that the approach in the two respective jurisdictions has gone in divergent directions insofar as the prioritisation of these relevant considerations.

Although there are certain cases in which South African courts have made it decisively clear that the *pari passu* principle and the ultimate benefit to the *concursus creditorum* are to remain paramount in considering whether or not to validate a void

498 Para 2.3.1.
499 As above.
500 *Lane* at 386D–387B.
501 Refer to paragraph 2.3.1 in Chapter 2, listing all the relevant factors discussed in the *Lane* judgment.

disposition,[502] there are singular others that attach considerable weight to the subjective considerations.[503] One particular subjective factor still heavily relied upon in the South African context, is whether or not the disposition in question was done in the *bona fide* continuance of the insolvent company's business.

It has been recently expressed in the South African courts that a transaction effected with the *bona fide* intent of continuance of the insolvent company's business, is likely to be accepted as passing muster in terms of requesting the validation of void dispositions.[504] Unfortunately, this assumption does not take cognisance of the likely possibility that even a transaction done with *bona fide* intent can still have the ultimate effect of prejudicing the general body of creditors. Logically speaking, the counterargument is rather persuasive as it is precisely the continuance of these transactions that probably led to the company's financial ruin in the first place.

In 2016 the Appeal Court of England signalled the first prominent and much-needed departure from the above position. It was the *Beavis* judgment where one can see the Appeal Court having criticised its own previous judgment of *Gray's Inn*. It was at this point that the legal position shifted to where the court stated that just because a transaction was done with benevolent intent in continuance of the company's business, is not to prompt the assumption that the transaction was beneficial to the *concursus creditorum*.

Building on this premise, there was also recent English case law that set out in a vivisectionist manner why the defence of "*change of position*" is unlikely to allow a beneficiary of these void dispositions to avoid the paralysing effect of this statutory provision.[505] This shows once more the court places a central and primary priority on the advancement of the collective creditors ahead of the individual concerns of select creditors. This is a sensible approach that aligns with the intention of the legislature.

If one were to adopt this strict approach consistently, the discretion exercised by the court when considering whether a void disposition is to be validated in accordance with the rider provision of section 341(2), would be a simple one. It would require the court to clinically consider the nett effect of the disposition on the remaining body of concurrent creditors before anything else. This, the court would be able to do with the benefit of hindsight, having regard to all subsequent events that followed the prohibited disposition. An affirmative or negative finding on the ultimate benefit felt by the remainder of the body of

502 See *Pride Milling* [33]-[36]; *Tanzer* at 478D-F.
503 *Excellent Petroleum* at 416B-423H.
504 *See Pride Milling* [26]-[28].
505 Para 2.4.

creditors would most likely dictate the fate of such disposition in being either validated or confirmed as void. All remaining subjective factors mentioned in *Lane* may still be relevant insofar as they are decisively shown to be conducive to the *concursus creditorum*, but that would be their limited and only function.

These principles espoused in *Beavis* are still applied henceforth as being the governing principles in validation applications.[506] The recent English authorities following 2016 have recognised the importance of first considering the actual nett effect of a disposition vis-à-vis the creditors of the insolvent before having regard to any other considerations. The efficiency of such objectively-centred approach is to be recognised as being one that best fits the legislature's intention of maintaining the fundamental *pari passu* principle.

One cannot gather, even from the most recent South African authorities, that there has yet been an acknowledgement of this strict order of priority to be maintained by courts in considering the discretion inherent in the validation provision of section 341(2). The refined and clearer approach as one sees in the recent English appeal case of *Beavis* has, rather unfortunately, not yet been recognised in South African law for the progressive leap forward that it represents on this subject. Even from the most recent Supreme Court of Appeal judgment of *Pride Milling* and the High Court case of *Symes*, it is apparent that the South African Courts still recognise the presumption of validation in the case of *bona fide* dispositions, as previously echoed in the *Gray's Inn* appeal case of England (the "old position" of England as was discussed in chapter 2).[507]

Aside from the aforesaid, there is also the current issue of the 2015 working document which must be considered, and how the landscape of section 341(2) in tandem with section 348 is to be affected, should the said envisaged Insolvency Bill eventually become the unified source of insolvency law for companies and natural persons. As discussed in Chapter 2,[508] the said working paper holds no equivalent to the existing section 348 of the Companies Act. Whilst it is true that section 348 also has no equivalent in the case of sequestration of natural persons, it has been held that in the context of companies, this immemorial statutory provision, with many near-identical predecessors in both English- and South African law, serves a recognised and commercially sound purpose.[509]

Should section 348 be omitted from the proposed Insolvency Bill, it goes without saying that the proverbial "*twilight period*" would effectively also be erased as a result of

506 Para 2.3.2.
507 Para 2.3.1.
508 Para 2.6.
509 Para 2.1.

such omission. With the twilight period erased, the concomitant effect is that voidness of dispositions in the context of companies would only commence on the date of the court order for winding-up and nothing sooner – akin to the position of natural persons in the case of sequestration.

### *5.2.2 Warrants for search and seizure of assets concealed or unlawfully withheld from the trustee or liquidator, issued in terms of section 69(3) of the Insolvency Act*

Differing from the previous discussion under paragraph 5.2.1 above, in the context of warrants for search and seizure of assets concealed or unlawfully withheld, this provision of the section 69(3) warrant applies to both natural persons and companies. As clarified in case law, this is mainly because there is manifestly no equivalent to section 69 contained in the present Companies Act.[510]

Warrants issued in terms of this section hold many epithets that distinguish them from say, an interdict, mandamus, spoliation, preservation order (Mareva injunction), or other related civil remedies that may be similarly applicable and at the disposal of a trustee or liquidator seeking the attainment of certain assets belonging to the insolvent estate. These distinguishing characteristics include:

(a) The section 69(3) warrant, based on the legislature's choice of wording, presupposes not giving advance notice to the persons holding the assets suspected of being concealed or unlawfully withheld from the liquidator or trustee;
(b) The application for these types of warrants is clearly intended to be directed at a magistrate, and not the court in the general sense of the word;
(c) The application made to a magistrate in terms of section 69(2) is not to be considered as resorting under the categorisation of judicial process at all, but is likely more closely related to an administrative process of sorts; and
(d) An application for a warrant in terms of section 69(2) does not need to not comply with any prescribed formalities. In actual fact, even though the application is made by the liquidator or trustee, the required statement made on oath need not be in writing and can be an oath deposed to by any person – not necessarily deposed to by the liquidator or trustee.

Despite the above characteristics being firmly established, most notably due to Supreme Court of Appeal cases such as *Naidoo* and *Cooper*, it still occurs that select

510 Para 3.1.

characteristics of section 69(3) warrants are misunderstood and misapplied in present times. To list but a few examples, it can be evinced in recent authorities that there are instances where there is support lent in applying for such warrants by way of court application, bringing the application to the High Court instead of a magistrate and conceding to claims of affected parties claiming entitlement to prior notice before applying for such warrant when in actual fact there exists no such right to prior notice to potentially affected persons.

Before considering the legal position of warrants of this nature in comparison to their counterparts in the laws of England, it has been concluded in Chapter 3 that there are fundamental aspects surrounding these warrants that are not yet hitherto properly understood and interpreted in South African law.[511] This misapprehension of section 69(3) warrants relates not merely to theoretical aspects of an inconsequential nature, but rather speaks to misunderstanding the remedy's primary characteristics as well as its ideal methods of implementation in practice, all leading to the dilution of the remedy's efficacious implementation.

It is only upon the foundation of a proper grasp of these essentials within the context of South African law that any meaningful legal comparison can be made. Differently stated, it is only once section 69(3) warrants are correctly understood and applied in local practice (something which is currently evidently lacking), that any value can be attained through the exercise of legal comparison with English sensibilities on these warrants.

By way of a comparative study, it has been shown that the legal position concerning the issuing of these types of warrants in South Africa and England respectively, differs in many respects.[512] Most notably, in England, the liquidator or trustee can apply for such relief only by way of court application. Another pertinent differentiation is that in English law, a mere suspicion on the side of the trustee of assets being concealed or withheld does not suffice in issuing such warrants. This suspicion needs to be founded on some objective evidentiary basis. This requirement is considerably more relaxed in South African law. The office-holder in English law is even required to satisfy the court in his or her application that the cost excursion of issuing such warrant *versus* the value to be attained by the attachment of the identified assets, will likely be for the benefit of creditors.

Additionally, in the English context, there is no presumption that prior notice to affected parties is to be foregone unless extraordinary circumstances dictate otherwise. It is quite the inverse presumption that one finds in English law which prescribes that as a general

511 Para 3.3.6.
512 Paras 3.4.1–3.4.2.

rule, prior notice is to be given to affected parties unless extraordinary circumstances justify otherwise.[513] A considerable portion of the judgments one finds in English law actually attributes much of its effort to analysing why such a particularly intrusive method of taking control of assets is justified and in what alternative, less intrusive manner, the trustee can attain the same goal.

This proactive consideration of the interests of third parties likely affected by the search and seizure warrant, counterweighted with the trustee's pressing interest in taking control of estate assets, is noticeably absent in the South African court cases dealing with the subject. Understandably this is because in the South African context, the trustee is only obliged to provide the magistrate with his or her own views and conclusions, not necessarily substantiated with objective evidence. If the trustee or liquidator chooses to do so, they can remain selectively reticent on the potential impact that such search and seizure could possibly have on the rights of third parties, yet still satisfy the statutory requirements for purposes of getting the section 69(3) warrant issued.[514]

It is only after the issuing of such a warrant that the *onus* shifts to the affected parties to take the necessary action in setting aside the section 69(3) warrant.[515] Most likely this will be done in the form of a review application[516] and on the basis that the warrant was issued in ignorance of the rights of affected third parties. This examination of the rights of third parties affected by section 69(3) warrants typically only gets attended to in the South African context after the harm is already done. At that point in time, the court is tasked with the review application and has to consider what information the trustee ought to have disclosed to the magistrate upon asking for the warrant's issuing in terms of section 69(3), and in the event of a clear non-disclosure of facts, whether or not such non-disclosure of facts was material in the circumstances or not.

Considering this problem of rights of third parties only being considered *ex post facto*, courts have voiced their opprobrium towards a trustee wilfully remaining silent on the rights of third parties, particularly where such third parties have previously declared to the trustee their conflicting rights to such assets, to which assets it appears the insolvent estate clearly has a lesser or no title.[517] It may be advisable for the trustee to therefore thoroughly declare such competing interests to the assets in question already at the time that the application in

513 Para 3.4.1.
514 Para 3.3.2.
515 Para 3.3.2.
516 See *Naidoo*.
517 *Cooper* above.

terms of section 69(2) is brought, even though such declaration may not, *strictu sensu*, be a statutory requirement in attaining the issuing of the warrant in terms of section 69(3).

### *5.2.3 The conducting of private enquiries into the trade, dealings, and affairs of a liquidated company in terms of the provisions of sections 417(1) and 418(2) of the Companies Act*

As stated in Chapter 4, this portion of the study encompassed only the conducting of private enquiries into the trade, dealings, and affairs of a company, to the exclusion of natural persons and close corporations – the insolvent estates of such entities being subject to private enquiries in terms of section 152(2) of the Insolvency Act.[518] Also excluded from the ambit of this study, is the conducting of public enquiries in terms of either section 415(1) of the Companies Act or section 65(1) of the Insolvency Act.

Although much has been suggested in the past about enquiries of this nature being seemingly draconian in nature, the continued existence of these enquiries has withstood Constitutional muster, most notably in the Constitutional Court cases of *Bernstein* and *Ferreira*, where it was held, *inter alia*, that the public interest of ensuring that companies maintain transparency towards its creditors regarding its dealings, is an interest that outweighs the individual's right to privacy. Despite the fact that an examinee is not afforded prior notice of a liquidator (or other parties with a vested interest) bringing an application to authorise such enquiry, the examinee not having access to the documents to be canvassed at the enquiry or even the subject matter the examinee is to be questioned about, these enquiries remain justifiable in a democratic society.[519]

The scope of individuals potentially affected by such a private enquiry is notably wide. As per the wording of section 417(1), there is no limitation on the persons being possibly summoned to such an enquiry.[520] From the company's innermost controlling minds to its external distant associates, any persons considered to be the unfortunate or unwilling holders of such knowledge pertaining to the trade, dealings, and affairs of the insolvent company, are all compellable as examinees at a private enquiry. If the applicant can show a suspicion that certain individuals are likely to provide information on the company's dealings, courts are inclined to order that they testify accordingly, granted that the discretion in calling the examinee is not exercised oppressively, vexatiously, or unfairly.

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518 Para 4.1.
519 Para 4.3.1.
520 As above.

A similarly wide scope to be mentioned is the potential applicants that are fit for applying to Court or the Master in authorising a private enquiry. Though one would typically expect a liquidator to make such an application, the Companies Act is not limited in this respect. It remains open to any person having a demonstrable pecuniary interest in the matter (most probably a creditor of the insolvent company) to bring such an application to authorise a private enquiry.[521] These enquiries can also be delegated to a commissioner in terms of section 418(2) of the Act.

Lastly, if it is the case that the liquidator seeking to summon a certain examinee to an enquiry, has already initiated separate civil proceedings against the same witness, this is not necessarily seen as a deterrent to the conducting of the enquiry. As stipulated in *Roering*, the test remains whether or not the private enquiry is conducted for a proper purpose in line with the legislature intention, or with an evidently improper or ulterior motive, and concomitantly amounting to an abuse of the process.

Through legal comparison, it is clear that there are inherent differences in the two respective legal systems when considering private enquiries as regulated in English law in section 236 of the English Insolvency Act.[522] In contradistinction with the above features apparent in private enquiries in South African law, in English law the following is apparent:

(a) The application to order a private enquiry can only be instigated by the office-holder (liquidator);

(b) The enquiry remains the Court's enquiry at all times. The Master has no authority to conduct these enquiries and there is certainly no possibility of a delegation of such authority to a lesser body such as a commissioner;

(c) If shown that it is likely that a certain individual is likely to possess information relevant to the company's affairs, that is not in itself proper justification in summoning such examinee to an enquiry. It is further required that the office-holder demonstrate what efforts have been exhausted in obtaining the required information from the examinee voluntarily and what less intrusive mechanisms are at the office-holders disposal to obtain the needed information;

(d) The English Courts are particularly sceptical once it is revealed that the proposed examinee is simultaneously a party to separate civil litigation with the same office-holder. Should this be the case, the court is duty-bound to enquire the extent of subjects which the office-holder intends to question the examinee about. If necessary, the court will

521 Para 4.2.1.
522 Paras 4.5.1–4.5.3.

adumbrate the boundaries within which the office-holder is to restrict his line of questioning. This is to ensure that the examinee is not being unduly submitted to a "trial run for cross-examination" and would therewith prejudice the examinee;

(e) In English law, one can see a holistic and balanced approach in weighing up the interests of the office-holder on one hand with that of the specific examinee to be summoned, on the other. Should it be that the interest of the former is of less consideration than the inconvenience that will be felt by the latter (even if it may be that the relevant individual is capable, in principle, of providing the information sought), the Court would be rather disinclined to allow the examination of such examinee; and

(f) Naturally, the English Court is always cognisant of the alternative remedy of section 234 (the English equivalent of a section 69(3) warrant in South Africa) at the disposal of the office-holder which enables the latter to obtain property or specific documents from specified individuals by way of court order without subjecting the individual to the undue prejudice of a private enquiry conducted in person. Insofar as section 234 is a viable alternative, the office-holder would have to explain why the inconvenience of a private enquiry is still preferred.

It is apparent that not only are there stricter sifting criteria in allowing a private enquiry to proceed in the context of English law, but there is also a more circumspect consideration of the interests of the examinee to be called to the proposed enquiry or other affected parties. Only once this has been given due consideration from both the perspective of the office-holder and the examinee or affected person, will the Court venture into deciding the appropriateness of the enquiry. As is a clear dichotomy with the position in South Africa, the only degree of inquiry made by the court into the position of the proposed examinee in the South African context, is if such person likely possesses the information sought by the liquidator. If answered in the affirmative, the examinee will be compellable to attend the enquiry.

In South Africa, should the examinee reckon the private enquiry process to be tantamount to an abuse of the process, the onus shifts to the affected examinee to convince the court that an abuse is present – an onus which as gathered in *Roering,* is an arduous one to meet. In pragmatic terms, one can also postulate the difficulty that the examinee would be faced with in these circumstances. The examinee is not entitled to a perusal of the application that was presented to the court, the liquidator is typically in possession of far more information than the examinee, and the liquidator cannot legitimately be compelled to provide any information to the examinee prior to the enquiry.

It is in the English context where the Court of Appeal has recently adopted a decisively liberal stance in favour of the examinee at private enquiries in terms of section 236(2) of the English Insolvency Act. As was made clear in the case discussion of *Al Jaber*,[523] examinees called to such enquiries currently benefit from the exception of "immunity from suit". Although it was typically only the remainder of the court officials and legal representatives that possessed such benefit, the Court of Appeal in *Al Jaber* saw no reason why the same absolute privilege ought not to be extended to examinees as well.

The result is that examinees being called to private enquiries in England can legitimately object to their testimony being used against them in subsequent civil proceedings under the principle of immunity from suit. This is a position in stark contrast with the one in South African law, where literally the opposite is still the legal position. Within English law, this does however not denude the liquidator of resorting to enforcement measures in respect of certain assets or interests divulged by examinees at the private enquiry. This would be done in terms of sections 237(1)–(2) and 433 of the same Act.

In the absence of any such residual enforcement mechanisms in the South African context with regard to particular assets or claims identified in section 417(1) enquiries, if one were to blindly incorporate the concept of immunity from suit into South African insolvency law without making simultaneous provision for additional enforcement mechanisms (akin to sections 237 and 433), it is likely that the efficiency of section 417(1) enquiries will have its value to the liquidator and creditors substantially reduced, if not erased entirely.[524] This is not to be interpreted as a denigration of the concept of immunity of suit, however, it is apparent from the example set by the legal position in England, that the adoption of such a concept is not something that can be integrated into private enquiries *in vacuo*.

## 5.3 Recommendations for law reform

The recommendations for law reform as set out herein are not in deviation from the suggestions for law reform already contained in the preceding chapters, and what herewith follows is merely a shortened and succinct summarisation of such recommendations for law reform.[525]

523 (2022) 2 WLR 497 (2021).
524 Para 4.5.3.
525 See 2.7, 3.6, and 4.5 for more comprehensive discussions on suggestions for law reform.

### *5.3.1 Recommendations in respect of the validation of void dispositions in terms of section 341(2) of the Companies Act*

As demonstrated, the voiding of dispositions post commencement of liquidation of a company is a concept with the potential of becoming an intricacy when considering the validation proviso contained in section 341(2) of the Companies Act. No two void dispositions are likely executed in identical circumstances and hence the divergent facts presented to the court in each set of circumstances, are expected to produce different conclusions.

Taking into consideration the degree of variance in prevailing facts motivating a validation order from case to case, together with the question of certain of such factors' presumably being of more weighty consideration than others, the question needs to be asked to what extent one can approach this legal discretion pertaining to the validation of void dispositions in a manner that is more structured, commercially sensible and in a way that attains increased legal certainty. Such a methodically definitive approach will leave practitioners and the commercial sphere with a rational expectation as to how the court will consider this discretion of validation of a void disposition henceforth.

Before presenting such a suggestion for law reform, it needs to be stressed that the discretion relating to the validation discretion will never be one that can be pinpointed with arithmetic certainty. As it was aptly remarked by the English case of *Bournemouth* this discretion is and remains of wide import, and one which the legislature "must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion". That being said, there were particular occurrences in case law where the court approached the validation discretion in a manner that would undoubtedly be of aid to all future cases involving the validation discretion.

It is important to distinguish at this juncture between factors identified in *Lane* insofar as they are inherently either subjective or objective in nature. Both such classes of factors have been considered in motivation either in favour of- or against the validation of void dispositions. Arguably the most influential objective considerations to have surfaced in hitherto case law are whether the void disposition served in prejudicing of the *concursus creditorum*, whether or not certain creditors were favoured to the detriment of others, or if creditors were treated *pari passu* despite the void disposition. The subjective factors having been considered by the court in motivating the validation of void dispositions include if the disposition was done in the *bona fide* continuance of the insolvent company's business, if the

same was an isolated disposition of formed part of a series of previous similar dispositions, and the prejudice felt by the disponee if the disposition is not validated.

Concerning the Appeal Court matter of *Beavis* in England (and the cases thereafter having approved of *Beavis*),[526] a considerable stride was made forward insofar as such case having unequivocally held that in the exercise of the validation discretion, the court must first and foremost satisfy itself as to the effect of the void disposition on the remaining body of creditors, irrespective of the subjective intention underlying it. This is an objective test. The nett effect of a disposition can be said to either have a contributory- or detracting effect on the patrimonial position of the insolvent estate, which is to be divided amongst concurrent creditors equally. A disposition therefore made by the insolvent company exclusively to one of its creditors, and in furtherance of the company's *bona fide* business affairs, may well benefit the *concursus creditorum*, despite appearing dubious at first glance.

The flip side of the coin is equally demonstrable. If the insolvent company, having gradually driven itself into financial ruin by conducting its business in a certain fashion, then continues to attend to further dispositions post commencement of liquidation in favour of certain creditors, such dispositions are unlikely to be shown to be dispositions that were objectively beneficial to the remaining body of creditors. Such dispositions can surely not be validated. On the other hand, isolated dispositions where the insolvent company simply starts benefitting certain creditors post commencement of liquidation, with the remaining creditors acquiring no benefit therefrom, require hardly any leap of thought that such dispositions cannot be validated under the same objective test.

The suggestion for law reform in this regard is that, when considering a disponee's application to have a void disposition validated within the context of section 341(2), the court ought not inundate itself with a myriad of factors that could serve in potentially validating- or voiding the disposition based on the side of the scale weighing heaviest. Instead, the more commercially sensible implementation of the validation discretion would be to approach the same by way of the primary consideration first and foremost, followed collectively by all remaining secondary considerations. This can be refined in the following terms:

(a) The primary consideration: It is to be objectively assessed what the nett position of the insolvent company was prior to the void disposition, compared to the nett position of the insolvent company not only immediately after the disposition, but in the ensuing period after the disposition. In so doing, the court would take into consideration not only the

526 Para 2.3.2.

company's position immediately prior to the disposition, but also its position thereafter up until the eventual order for winding-up made by court. If the company can at least be shown to have gained more of a patrimonial advantage as a result of the disposition, compared to the loss suffered as a result of the disposition *per se*, the validation order is to be considered viable unless extraordinary circumstances dictate otherwise. Concomitantly, if the value of the disposition exceeds the financial benefit ultimately obtained by the company as a result of the disposition, the result of the disposition cannot be shown to have benefitted the *concursus creditorum* and a validation order is to be refused;

(b) The secondary considerations: The secondary considerations ought to only become relevant should the primary consideration of validation be satisfied. Whether or not the void disposition was executed in the *bona fide* course of business, the disposition had the effect of advancing the interests of certain creditors above others, the disposition was part of a series of dispositions and not an isolated incident, the knowledge of insolvency on the side of the beneficiary and the prejudice suffered by the beneficiary if a validation order is refused are all factors that stand in motivation either in favour of- or against the argument of validation, and will remain relevant only in fulfilling a secondary and supportive function.

If the above suggestion for law reform is therefore implemented in South African law, the validation discretion could potentially be simplified in many respects. If an applicant to such validation application is aware that the evidence appended to the papers does not reflect a positive nett effect on the company's financial position, he would simultaneously be aware that his reliance can only be meaningfully aimed at showing exceptional circumstances favouring validation. Detailing the prejudice the applicant would suffer otherwise, colouring in the transaction as one in the *bona fide* continuance of business or that the applicant was ignorant of the company's insolvency are unlikely considerations to meet this required threshold.[527]

It is especially fortunate that regarding the discretion attached to validation applications (as demonstrated in the current English law position), the groundwork for this clear, clinical, and effective approach has already subtly been laid by the High Court in *Smith*. Although the latter case, unfortunately, did not reference any English authorities, there is definite indication that South Africa is to follow suit in attaining legal certainty on this

527 See *Smith* [51]–[53].

subject by continuing in the implementation of the above suggested refined version of the test applicable to validation in terms of section 341(2).

In addition to the aforesaid, the importation of prospective validation applications with regard to void dispositions is seriously to be considered for application in South African law, as is the case in the English counterpart.[528] In England, these applications are often brought in respect of a company intending to effect void dispositions, and obtaining the Court's sanctioning of the disposition before same is effected, even though the company's liquidation has already technically commenced.[529]

Such a prospective validation application would be particularly well-advised for a company that, despite an application for winding-up having been served upon it, remains of the headstrong conviction that it can trade itself out of insolvency. With such a transaction being shown to the court in advance to be in the interest of creditors generally, if validated by the court, provides much assurance to creditors that the transaction will not be voided in the future and eliminates the less favourable alternative of risking the company ultimately being wound-up and leaving the beneficiary creditor to deal with the aftermath of trying to validate the void disposition.

It is unsure why such prospective validation applications are not brought within the South African context. There is certainly nothing in the legislature's wording of section 341(2) that outright states, or even subtly suggests, that such applications can only be brought after the void disposition has taken place. One may reckon it is more sensible for the company itself, actively seeking to trade itself out of its impecunious position, to bring such an application to court instead of creditors being saddled with such responsibility after the fact. The creditors of such a company will, without exception, know considerably less about the inner machinery of the company in comparison to the directors of the company.

### *5.3.2 Recommendations in respect of warrants in terms of section 69(3) of the Insolvency Act, in search of property concealed or unlawfully withheld*

As stated in Chapter 3, the differences between a section 69(3) warrant and a section 234 or section 365 warrant, within South African and English law respectively, hold many differences from one another. In South Africa, these warrants are not considered as forming part of the judicial process, they require no formal application in writing, carry no prescribed formalities, and can be initiated by the liquidator or trustee upon a mere suspicion (albeit a

528 Para 2.7.2.
529 As above.

reasonable suspicion) that property is either concealed or unlawfully withheld. In all these respects, such warrants are markedly different.

As long as trustees or liquidators still resort to the section 69(3) remedy under the auspice of a formal court application, bringing such applications to either the Magistrate's Court or the High Court, or only bringing such applications upon a written affidavit by the trustee, the remedy's effectiveness will suffer as a result. It needs to be recognised that this remedy is not meant to be subjected to such formalities.

For as long as there is still a basic misapprehension as to the correct nature and procedure of section 69(2) applications, it is foreseeable that practitioners will resort to the remedy by way of inappropriate procedure and at the incorrect forum. This misapprehension will further snowball into spurious defences being raised and warrants ultimately being set aside on illegitimate bases. The *Alba* judgment[530] serves as an example of precisely how an erroneous understanding of the nature of the remedy, intended by the legislature as an efficient and expeditious remedy, can be deformed and misaligned into a drawn out and expensive blunder of the insolvent estate.

The *Cooper* judgment has introduced unnecessary division in the approach adopted to these warrants, particularly on the question of applicability of the *audi alteram partem* rule. The court's findings herein included that in the event of property being concealed, no prior notice needs to be given to potentially affected parties, whilst in the case of goods unlawfully withheld, prior notice ought to be given. Until the *Cooper* judgment, there was no authority supporting this divide, and this critique was also properly expressed in the minority judgment of *Cooper*.

Be that as it may, the *Cooper* judgment does provide support for the notion that there are instances in which prior notice is called for in the context of section 69(3) warrants and that affected parties may legitimately raise non-compliance with the *audi alteram partem* rule as a ground for setting aside these warrants. In English law, the recognition of this principle, even in the context of such warrants, is nothing out of the ordinary, and it may well be that through the judgment of *Cooper*, this recognition of the *audi alteram partem* rule has started to gradually permeate into the issuing of section 69(3) warrants in South Africa as well.

Based on where the *Cooper* judgment left section 69(3) warrants, a trustee or liquidator is to tread lightly when applying for the warrant in terms of section 69(2). If the assets in question are being concealed from the trustee, it can be accepted that the *audi*

530 As critiqued in para 3.3.6.

*alteram partem* rule is considered inapplicable. If, on the other hand, the property is not being concealed *per se*, but rather unlawfully withheld, the trustee or liquidator is obliged to either show that he has given prior notice of the application to affected parties or provide the magistrate with compelling reasons why prior notice should be dispensed with.

A trustee or liquidator should further be alive to the practical reality of a section 69(3) warrant. The issuing- and carrying out of a section 69(3) warrant will undoubtedly have consequences manifesting afterward. As has hitherto happened, affected parties may approach the court stating that they have been unduly prejudiced by the liquidator or trustee's issuing of such warrant, mostly due to the court not having been presented with all the relevant facts, which was a further collateral consequence of such third parties not having received advance notice of the trustee's intention of bringing such application. The question is then how one can go about issuing such warrants in a balanced manner that both advances the interests of the liquidator or trustee, whilst also preserving the rights of third parties potentially affected in the process.

By implementing certain measures at the inception stage of application for a section 69(3) warrant, one may attain such a balance by adherence to the following:

(a) In the case of property being unlawfully withheld (not concealed) from the trustee or liquidator, he or she is to have regard to the consideration of affording prior notice to affected parties. Should it qualify as an instance where such prior notice would be inappropriate for whatever reason, special care is to be taken in motivating why prior notice is to be dispensed with. This will lessen the likelihood of the warrant being set aside on this basis in the future;

(b) At the time of issuing these warrants, one is not to concern oneself with the legal entitlement or substantive rights over the property. As was made clear in the hitherto legal precedents, this remedy is only intended to obtain and conserve physical possession.[531] This does however not mean that such rights that others may have over presumed estate assets are irrelevant. In actual fact, if the trustee does not address the rights of competing parties over the assets concerned, chances are that same will be dealt with in subsequent proceedings, most likely in a review application or relief akin thereto;

(c) In the case of a trustee of liquidator being aware of third parties having previously declared an interest in the same property that the trustee is attempting to seize by way of section 69(3), this is undoubtedly to be declared to the magistrate upon making the

531 Para 3.3.1.

application in terms of section 69(2). If it comes to light that there is such a declared dispute over the property attached, and the court is to adjudicate over such a dispute on a later instance, the court will likely draw a negative inference from the trustee's initial election to remain reticent on the existence of such proprietary dispute at the initial instance of issuing the warrant;

(d) Although it is not technically required in South African law, it will also aid the feasibility of such application in terms of section 69(2) to further elucidate to the magistrate that the value of the property to be attached and seized, countered with the liquidation or sequestration costs, will still bring about adequate advantage to creditors;

(e) Trustees or liquidators are to thoroughly canvass the insolvent estate's legal entitlement to the property prior to resorting to the provisions of sections 69(1) to (3) as a means of obtaining physical possession of the property. As was highlighted by the English courts, where the trustee is presented with sufficient evidence in advance of a third party having a stronger legal title to the property than that of the insolvent estate, resorting to such a warrant is clearly inappropriate. The same rings true in the South African context. A trustee knowing that the insolvent estate's entitlement to the property is tainted in some way by virtue of the stronger legal title of another, can surely not harbour a *bona fide* suspicion that the property of the insolvent is being either concealed or unlawfully withheld.

It is not suggested that the manner in which South Africa approaches these warrants is to be entirely brought in line with the manner in which they are approached in English law. As was demonstrated, there are clear *indicia* that our legislature intended for these warrants to be readily and informally obtainable, absent rigid judicial process, as is the process in England pertaining to these types of warrants. The law is however not static and developments in case law dictate that such process be consistently monitored so as to ensure the continued efficient implementation of the remedy.[532] The remedy can certainly be utilised more efficiently if it is done firstly in the informal and expeditious manner as the legislature intended, and secondly, implemented in a manner that is conscious of the rights of potentially affected third parties.

As was aptly stated in the case of *Ezair*,[533] the court is obviously mindful of the fact that these warrants are not intended by their very nature to be the platform for adjudicating- and determining substantive legal title to property, but rather to afford physical possession of

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532 The *Cooper* & *Naidoo* judgments being examples of such development of the remedy.
533 Paras 3.4.1 & 3.6.

same to the trustee. That does not mean however, that the court would be correct in obtusely disregarding facts relating to title of the property when presented with such facts. This is precisely the sentiment that ought to be incorporated into South African law. By presenting such facts at inception to the magistrate, as far as they may be known to the trustee or liquidator, the court already has had due regard to the differing substantive claims to the property upon issuing the section 69(3) warrant. This in turn gives the warrant more credence, rendering it less likely to be set aside in future by aggrieved affected parties.

By the integration of the already established procedure in obtaining section 69(3) warrants, together with the above-suggested measures, one can ensure that the remedy is implemented in an expeditious and effective way as intended by the legislature and simultaneously maintain a balanced consideration towards the vested interests of affected parties, so as to prevent a situation where such third party-interests are later considered in unnecessary subsequent judicial proceedings.

### *5.3.3 Recommendations in respect of private enquiries into the trade, dealings, and affairs of the company in terms of sections 417(1) and 418(2) of the Companies Act*

As was commented on in Chapter 4, on the issue of *locus standi*, the notably inclusive provisions in South African law, there are clear advantages in allowing for a wider category of persons initiating enquiries of this nature. This ensures the protection of the interests of creditors in the minority of instances where the liquidator refuses to do so for unfounded reasons or is simply remiss in his or her duties.[534]

In South Africa however, there is a notably lower threshold in convincing the court that a section 417(1) enquiry is to be conducted, with evidently little concern as to the rights of attendees of such enquiry at this early stage in the process when the court is asked to authorise the enquiry. If such attendees reckon the enquiry to be conducted for an improper or ulterior purpose, it is for such affected party to approach the court in setting aside the summons calling for attendance at the enquiry. The court will not do so unless it is shown that the enquiry amounts to an abuse.[535]

In England, one sees a more proactive consideration of the rights of attendees before a private enquiry is authorised by the court. This is done by establishing that the necessity of the enquiry is not only warranted from the liquidator's perspective, but also from the attendee's perspective and upon the court being satisfied that the liquidator cannot obtain the

534 See 4.5.1 above.
535 *Roering* above.

necessary information in a less intrusive manner placing less of a burden upon the examinee.

One example of such potential abuse is the instance where there is litigation pending between the same liquidator and the witness being summoned to the enquiry. This won't always constitute an abuse and as rightly remarked in the case of *Roering*, the test in such an instance remains whether or not the enquiry is being conducted for an improper purpose or a legitimate purpose as intended by the legislature, namely to obtain information into the trade, dealings, and affairs of the company. In the event of the existence of concurrent legal proceedings pending between the same parties, the English courts have grown rather sceptical as to how such particular enquiries can still be considered proper. As stated above, it is not uncommon in such instances for the court to delineate which aspects the intended examinee may be questioned about and which aspects not.

The aspect in which there has recently developed the most significant split between the South African and English legal positions, is in relation to the admissibility of evidence in civil matters against the examinee having given such evidence. Since the recent Appeal Court of England judgment of *Al Jaber*, examinees are considered to enjoy the same immunity from suit as the remainder of court officials involved in the insolvency process. It has already been stated above why the adoption of such a position in South Africa will not be feasible – at least not without a further amendment to our insolvency laws which will have to provide for some alternate remedies in attaching assets identified in insolvency enquiries.

As discussed in Chapter 4, a prime example of such law reform that would serve to support the notion of immunity from suit in the South African context, is section 40 of the 2015 working document, which provides expressly for the issuing of a warrant for search and seizure (akin to the section 69(3) warrant) based specifically on evidence given by an examinee at a private enquiry. Only if there is such a residual authority to search for and seize assets identified at a private enquiry, will it be sensible to import the concept of immunity from suit into South African law.

In order to lessen the possibility of examinees in South Africa alleging that insolvency enquiries are conducted for an improper purpose (and essentially amounting to an abuse) the answer may lie in incorporating certain of the elements intrinsic to the English procedure. This may reduce the likelihood of an abuse of these proceedings being alleged in courts by examinees whose sources of complaints could have been saved had their interests simply been considered at the inception of the proceedings. These adaptions include the following:

(a) The liquidator is to exhaust all alternative measures of obtaining the necessary information from the intended examinees before resorting to a private enquiry. It is a

statutory obligation to adhere to such requests of a liquidator. The liquidator should be frank in disclosing which individuals he has sought such information from and which individuals he or she intends to call to the enquiry. If the liquidator has exhausted all alternative measures to obtain the information short of calling for an enquiry, this needs to be shown in the *ex parte* application seeking the authorisation of the private enquiry.

(b) The latter applies all the more in the case when dealing not necessarily with the company's inner circle of controlling minds or employees, but dealing with unrelated third parties external to the company. Whereas one naturally expects unconditional cooperation from the company's close affiliates, the same degree of cooperation cannot be expected from individuals who have only had limited contact with the company. As the English Courts made clear, in such circumstances it must be elaborately motivated why and to what extent information is sought by the liquidator from such unrelated individuals. Motivation of this sort provided in advance by the liquidator also lessens the likelihood of later setting aside such proceedings on the basis of constituting an abuse.

(c) The applicant to the application for the private enquiry is to show what information is sought for the purpose of either reconstituting the company's knowledge or such to obtain such information as is necessary for the liquidator to effectively carry out his or her functions. If the information sought can comfortably be categorised into either one of such alternatives, it will be difficult to show that the process amounts to an abuse.

(d) In the event of there being a civil process already instituted by the liquidator against the intended examinee, the latter will likely allege an abuse of the process. In order to counter such allegation in advance, the liquidator would likely be seen as all the more *bona fide* if he or she were to delineate the extent of subject material intended to be canvassed with the examinee in the application to the court. This would show that the subject matter of the private enquiry is not intended to overflow into the subject matter forming the basis of the separately instituted civil proceedings, or anything ancillary thereto.

(e) Supposing that the liquidator was to reveal that the intended examinee is already a party to pending civil litigation (pending or foreseeable litigation) against the insolvent estate, but does not divulge to court how the liquidator intends to limit such examinee's questioning at the enquiry so as to not unduly prejudice the examinee in the civil litigation, the court is fully at liberty to prescribe the necessary adequate limitations. An examinee being informed in advance that aspects pertaining to merits on whatever claims extant between him or herself and the insolvent will not be canvassed at the enquiry, will understandably make for a more co-operative examinee.

(f) As is also an element often neglected in applications for private enquiries in South Africa, applicants would also be well-advised to take the court into their confidence regarding the financial exposure to creditors caused by the enquiry *versus* the financial gain that is foreseen to result from the insolvency enquiry — as is required to be addressed in the English jurisdiction. Satisfying the court that the conducting of the enquiry will also likely benefit the collective interests of the creditors is not only a financially sound argument, but also speaks again to the *bona fide* intent accompanying such an application.

As was discussed in Chapter 4, the English Appeal Court case of *Al Jaber* is not reflective of the current position in South African law, meaning that in South Africa, evidence obtained during a private enquiry in terms of either sections 417(1) or 418(2) of the Companies Act are and remains permissible evidence for use in pending or future civil court proceedings against the same examinee having given such evidence at the enquiry. With this in mind, continued trepidation from examinees is to be expected in private enquiries.

By way of incorporation of distinct features of private enquiries as they exist in English law, as listed above, examinees can be shown by the relevant role-players that the enquiry is a necessary and essential mechanism needed to reconstruct the company's knowledge and for allowing the liquidator to perform his or her statutory functions, and that these need not be done in a draconian fashion.

These legitimate functions of the insolvency enquiry can be exercised in a manner that impugns as little as possible upon the rights of examinees. This will be apparent to examinees based on the manner in which the enquiry is conducted. An insolvency regime that clearly evinces such a balanced consideration of the interests of all relevant parties is likely to instil public confidence in the procedure, receive increasingly cooperative and forthcoming examinees, and ultimately provide useful information to the liquidator, all to the benefit of creditors.

## 5.4 Conclusion

It is apparent that in relation to all three above statutory mechanisms in taking control of the insolvent estate, there are ways in which the current *modus operandi* can be improved upon by borrowing select elements from their English counterparts. This is sensible if one is reminded of the court's observation that South Africa's inheritance of its insolvency laws from England, is an obvious one.

If the courts are so readily inclined to attach credence to the prescripts of the English

laws of insolvency, as they have indicated they are, there is a sound argument to make for the adoption of such provisions into our own laws, particularly when we are in the fortunate position of cherry-picking the elements in English law which would best suit our own current regime.

In the context of the test applied for the validation of void dispositions, the same principles as acknowledged in South African- and English law were restructured by the English judiciary in a particular order of preference which is commercially sustainable and sensible and in a manner that aligns with the advancement of the *concursus creditorum*. By implementing such an example set by England in the restructuring of the priority of the same elements in the newly organised order of preference into South African law, it is convincingly arguable that the legal position on the validation of void dispositions will be improved upon as being markedly more equitable and certain.

As argued herein, the time has also come to consider the importation of prospective validation applications in South African law, instead of always merely considering these validation applications retrospectively long after the company is past the point of resuscitation — in such instances one can imagine the difficulty faced by a creditor in proving how (if at all) the void disposition actually benefitted the company insofar as the welfare of its general body of creditors is concerned. Prospective validation applications on the other hand will, without exception, always be made at an earlier point in time when the company's prospects look considerably more favourable and will also demonstrate to remaining creditors that the company is of the *bona fide* intent of resurrecting itself into a solvent position once again.

In the context of warrants for search and seizure of property concealed or unlawfully withheld from the liquidator or trustee, there is much benefit to be gained from the implementation of select elements from English law, as explained above. This holds particularly true regarding the notably more inclusive provisions which are sensitive to the interests of third parties and other affected parties as one sees in England, in comparison to that of South African law.

Before one can however improve upon the remedy in this fashion by way of legal comparison, there will first have to be a consensus reached as to the true nature and procedure applicable to section 69(3) warrants. With the foundation of such a proper understanding of this efficient remedy in place, one can thereafter move towards the further improvement of the remedy in a balanced regime that not only serves the insolvent estate but also protects the interests of the many individuals who stand to be impacted by search and

seizure warrants.

In the context of private enquiries into the trade, dealings, and affairs of the insolvent company there are also numerous regards in which the remedy can be improved upon. Central to this improvement, however, is the proactive approach that would be required from the liquidator, the Master, and the Court. All of these role-players would have to consider the goal which the applicant seeks to attain in convening the enquiry and which examinees can assist the applicant thusly in a manner least intrusive as possible upon the examinee. These competing interests of the insolvent estate *versus* that of the examinee are to be served in a balanced fashion, as set out in the current English law approach. This would therefore require the Court and the Master in particular to have a cautious and critical view in considering applications in terms of section 417(1) of the Companies Act, and that they not hesitate to impose restrictions upon such enquiries, as and where necessary.

Apart from the various singular recommendations for law reform with regard to each of the above statutory remedies, one is to be reminded again that these remedies, although operating separately and independently from one another, one of them is oftentimes likely to be the result of another, or a remedy obtained may likely call for the institution of another one of the three remedies based on additional information obtained. Although not widely known, the Court has already expressly sanctioned an application for section 69(3) warrants not only as a result of- but even during an insolvency enquiry, yet this is so rarely taken advantage of by present-day practitioners.

Not only has one already seen such overlap between these remedies in hitherto case law, but select indications in the 2015 working document have also given an express indication of how section 69(3) warrants and private insolvency enquiries are expected to coincide with one another in the ordinary course of insolvency proceedings.

The uncovering of void dispositions post liquidation is dispositions which can be brought to the attention of the liquidator or creditors in innumerable different ways, including during the process of insolvency enquiries or in the process of attachment of other assets of the insolvent.

The process of administration of the insolvent estate is a constant fact-finding endeavour, but this does not need to be an unnecessarily drawn-out one. By the efficient- and consistently improving utilisation of these statutory remedies, the creditors' interests in the insolvent estate can be advanced in a manner that brings about results more efficient than in previous practices.

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