IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **Civil Case No. 1683/13**

In the matter between:

GOVERNMENT OF THE KINGDOM OF SWAZILAND	**1st Applicant**
AMOS SHONGWE & 86 OTHERS	**2nd -86th Applicants**
and	
REUBEN MILLER	**1st Respondent**
THEO MASON	**2nd Respondent**
THE MASTER OF THE HIGH COURT	**3rd Respondent**
(PETERSTOW HOLDINGS LIMITED – IN LIQUIDATION)	**Intervening Party**

Neutral Citation: *Government of the Kingdom of Swaziland & 87 Others v Reuben Miller & 2 Others (1683/13) [2013] SZHC 248 (5th November 2013).*

Coram : M. DLAMINI J

Heard : 1st November 2013

Delivered : 5th November 2013

sequestration - contract with suspensive and resolutive conditions – effect thereof –interpretation of section 321(d) – literal meaning – not necessary for creditors to actually take a vote – sufficient to prove wishes - right of creditors to be represented by nominee of their choice – nominee their voice in legal proceedings –question of cost against liquidators – court to consider conduct of liquidators in opposing application or action – whether bona fide – where mala fide, court to mete out appropriate order of cost – application granted with cost de bonis propiis

Summary: Serving before me is an application under a certificate of urgency wherein the applicants who are the creditors of a subsidiary company placed under provisional liquidation seek to oust the holding company as a creditor of its subsidiary company and the appointed liquidators. The basis for the applicants' prayers is that the holding company had entered into an agreement with its subsidiary company to subordinate its loan advanced to its subsidiary company. The respondents ferociously opposed this application for a number of reasons.

The Parties

[1] The parties are described in the founding affidavit as:

[2] "*The applicant is the Government of Swaziland, represented by the Attorney General of the Kingdom of Swaziland, with Chambers at 4th Floor, Justice Building , Usuthu Link Road, Mbabane, acting herein in his capacity as the legal representative of the Government of the Kingdom of Swaziland.*

The 2nd and further applicants are Amos Shongwe and eighty six others whose names are set out in annexure "PD 3" hereto namely the list of proved former employees creditors of the Company referred to below. They are former employees of record whose details appear on the Notice of Motion.

The 1st respondent is Reuben Miller, an adult male liquidator residing in South Africa and who had failed to give notice in the Gazette of his appointment and address in Swaziland.

The 2nd respondent is Theo Mason, an adult male liquidator carrying on business in Swaziland at the offices of PriceWaterhouse Coopers in Mbabane.

The application shall be served, by agreement with the 1st and 2nd respondents, at the offices of their attorney Mr. E. J. Henwood.

The 3rd respondent is the Master of the High Court of Swaziland whose office is in Mbabane. No relief is sought against the Master who is expected to abide the decision of the above Honourable Court."

Brief resume

[3] On the 21st September 2012 a company by the name of Pieterstow Aquapower Swaziland (Proprietary) Limited (hereinafter referred to as Peterstow) registered and operating in Swaziland, was by order of this court, liquidated. Peterstow specialised as a manufacturer of hydraulic drills for use in the mining industries. The first and second respondents (hereinafter referred to as respondents) are its liquidators. It appears that during its operation, over the years, Peterstow, received loans of various amount of money from its holding company, Peterstow Holding Ltd (hereinafter referred to as the holding company) based in Mauritius. The total loan outstanding was E327,426,235.00. The holding company moved the application for liquidation against Peterstow as a creditor of Peterstow.

Intervening Party

[4] On the hearing date, Mr. Warring appeared and moved an application on behalf of the holding company. Like Peterstow, the holding company was liquidated in the same year, 2012. Mr Warring pointed out that it had a direct and substantial interest in the matter. Applicants sought to expunge from the list of creditors its client, the holding company whereas it had the highest claim against Peterstow. The Court without further ado, allowed the application by Mr. Warring on the basis that his grounds for intervening were common cause. It was guided further by **Gavin Khumalo & Others v Umbane Limited & Others (880/2013) [2013] SZHC 5, para 17** to the effect that a court should be loath in shutting its doors against a litigant.

Parties' contentions

Applicants

[5] The applicants contend that they are creditors of Peterstow. As creditors, they have a right to vote. However, their right was violated by the respondent on a meeting of 8th October 2013, being the second scheduled meeting according to the Insolvency Act No. 81 of 1955 wherein the respondents, including the 3rd respondent (hereinafter referred to as the Master) prevented them from voting on the basis that the holding company as one of the creditors of Peterstow was not represented. They contend that had they been allowed to exercise their right to vote, they would have accepted that an offer of E5 million by Mosengedi & Associates (Pty) Ltd to purchase the assets of Peterson.

[6] The applicants assert further that in terms of an agreement reflected in the financial statement of Peterstow prepared by its auditor *viz.* KPMG,

the holding company is not a creditor at all as matters stand.

[7] The applicants pray as follows:

> *"3. That the First Respondent, Mr. Reuben Miller, and the Second Respondent, Mr. Theo Mason, hereby be removed as liquidators of Peterstow Aquapower Swaziland Proprietary Limited (in Liquidation) (hereinafter referred to as the "Company") in accordance with section 321 (d) of the Companies Act, 2009 (hereinafter referred to as the "Act");*
>
> *4. That the 3rd Respondent be advised to give due regard to the wishes of the Applicant as creditor that Mr. Titus Mlangeni be appointed forthwith as the liquidator of the Company, upon furnishing the 3rd Respondent with the requisite security, in accordance with section 311 (2) read with section 316 of the Act.*
>
> *5. That the liquidator or liquidators of the Company, as the case may be, be and are hereby directed, in accordance with the wishes of the majority of creditors having voting rights, to forthwith accept the written offer by Mosegedi & Associates Proprietary Limited (copy attached as annexure "A" hereto – to be read as if incorporated herein) to acquire the assets of the Company for a purchase price of E5 000 000.00 (five million emalangeni), in accordance with section 328 (3) (h) of the Act."*

Respondents

[8] As already highlighted the respondents are seriously opposed to the

applicants' application. Learned Counsel on behalf of respondents has raised a number of defences both on preliminary and merits.

Points in limine

[9] On the first date of hearing *viz.* 31st October, 2013 the respondents objected to applicants' representation. It was submitted on behalf of respondents that Mr. C. Edeling who appeared on behalf of the 1st applicant failed to petition for its admission to this court following that he was from Lesotho jurisdiction. This was contrary to sections 5 and 30 of Legal Practitioners' Act No.15 of 1964. As against the second to the sixty eight applicants representation, it was contended that as appears on the Notice of Motion served upon them, the attorneys of record were Currie Boxshall – Smith Associates. Mr. Masuku was from the law firm of Masuku Howe & Nsibandze Associates and therefore, were not attorneys of record. For this reason, the two attorneys on behalf of applicants were not properly before court.

[10] Counsel for the holding company also stood up to apply for a postponement of the matter to the 5th of November, 2013 in order to file an answering affidavit. Quizzed on its failure to come to court fully prepared, he informed the court that he had been instructed some few hours ago.

[11] Learned counsel for the first applicant informed the court that his appearance was in terms of section 4 (2) which empowers both the Attorney General and the Director of Public Prosecutions to delegate their powers to any person to perform their duties. On the holding company application, applicants objected strenuously the application for a postponement. It was submitted on behalf of applicant that the

affidavit by holding party in support of its application to intervene was drawn with sufficient averments to have the matter argued on merits. There was nothing further to be deposed by the holding company. However, in reply, Mr. Warring strongly argued that the holding party now that its application to join had been granted had a right to be heard in full and it could not do so on the averment before court.

Ad merits

[12] On merits, on behalf of respondents, it was contended that:

- the holding company's claim was never subordinated.

- There was no vote on behalf of creditors and therefore, the averments that it was the wish of the majority of the creditors that the offer of E5million be accepted and that the respondents as liquidators be removed and substituted with Mr. T. Mlangeni was unsubstantiated.

- That the reason for accepting a E5 million offer in the presence of an offer for E17 500m defeats logic and therefore unreasonable.

Adjudication

Point in limine

[13] The issue before court is whether the two learned counsel on behalf of applicants were properly before court.

[14] Generally, it is expected of senior counsel from the Boleswa countries , South Africa, Namibia, England, Ireland, Scotland or Zimbabwe to petition for admission especially on their first appearance in the High Court in this Kingdom. This is in terms of Section 5 of the Legal Practitioners Act as pointed out by Mr. Flynn, learned senior counsel for the respondents.

[15] Mr. Flynn has pointed out that the Attorney General cannot delegate his powers to a person of Mr. C. Edeling's status by reason that Mr. C. Edeling is senior. The Attorney General can only delegate to any person who is junior to him. Counsel for 1st applicant cannot be said to exercise delegated power as he is too senior to have powers delegated to him. He can only be instructed to appear on behalf of the Attorney General, so went the submission on behalf of respondent. Those under instruction must comply with sections 5 and 30 of the Legal Practitioners' Act, it was so contended.

[16] A similar argument was advanced in the matter of the **King v Swaziland Independent Publishers (Pty) Ltd & Another (53/2010) [2013] SZHC 88** where it was said that the Director of Public Prosecutions could not delegate her powers to the Attorney General because their status stood at par following that their powers emanated from the constitution. As *in casu,* it was advanced on behalf of respondents that delegation envisaged downward mobility of power as opposed to a straight line or upwards.

[17] His Lordship **M.C.B. Maphalala J** at page 42 paragraph [69] stated before dismissing respondent's *point in limine* as follows:

"*Prima facie the Attorney General is not a subordinate officer of the Director; however, when he acts by virtue of delegated authority, he is in subordinate to the Director on the basis that he prosecutes in accordance with the special instructions of the Director."* (underlining my emphasis)

[18] Similarly *in casu*, this *point in limine* fails.

[19] Turning to Mr. Masuku's appearance, it is clear that there is an affidavit by Mr. L. Howe who deposed as follows:

> *"3. I am duly appointed representative of the 2nd and further applicants who are the 87 former employees and whose claims against the estate have been proved and accepted. I represented these creditors at meetings of creditors as appears from the annexures to the founding affidavits*."

[20] The respondents have prior dealt with Mr. Howe as evidence in correspondence by the respondents to Mr. Howe requesting him to verify a list and claim of the employees of Peterstow as creditors.

[21] From the above set of circumstances, it is clear that the office of Masuku, Howe & Nsibandze Associates is not a stranger in the liquidation process. Respondents in their answer did not dispute that Mr. Howe was the representative of the second to the eighty six applicants. It is correct that from the Notice of Motion, Currie – Boxshall- Smith Associates appears as Attorneys of records. However, nothing turns on this in the face of the above circumstances.

[22] In support of their application to have Mr. Masuku removed from appearing, the respondents referred this court to **Rogers Bhoyana Du**

Pont v Swaziland Building Society & 3 Others (66/2012) [2013] SZSC 35 where their Lordships declined to recognise counsel who was not of record. However, I must hasten to point out the facts of that case. In **Rogers Bhoyana Du pont** (*supra*) Mr. Nkosi appeared as counsel instead of Mr. T. Ndlovu who was attorney of record. His purpose was to seek for a postponement on the basis that he had just been appointed. The court, alive to the presence in court of Mr. T. Ndlovu, read in between the lines that this was a stratagem by appellant to secure a postponement. They refused to recognize Mr. Nkosi and called upon Mr. T. Ndlovu to appear as of record. Their fears were confirmed as Mr. T. Ndlovu stood up to withdraw from the proceedings.

[23] *In casu*, there is nothing amiss from Mr. Masuku's appearance. It is for that reason that I declined respondents' application, although Mrs. J. Currie was present in court but not robed. Mr. Masuku further informed the court that he was standing in for Mrs. J. Currie and was ready to proceed on the merits of the case. Looking at the exigency of the application, I was further guided by the *dictum* in **De Polo and Another v Dreyer & Others 1991 (2) S.A. 164** at 178 that:

> *"……it is preferable to try cases upon their true issues rather than upon technical points. The modern tendency in our court is precisely in that direction*."

[24] The holding company applied for a postponement in order to file a comprehensive affidavit. The applicant opposed this application on the basis that there was nothing new that had to be said by the holding company apart from what was already before court. The holding company persisted on its application.

[25] Guided by the principle of *audi alteram partem* which is not just the

right to be heard but to prepare ones' case fully, I allowed the postponement however not to the 4th November 2013 but to the following day at 10.00 a.m. Counsel was put to terms to file the following day at 8.30 a.m.

[26] On the following day when the matter resumed well after 11.00 a.m. Counsel for the holding company stood up to thank the court for granting the postponement but submitted that it would proceed on the papers already filed. On this, the fears of Mr. C. Edeling were confirmed. The application for a postponement was nothing but a dilatory tactic, worthy of disapproval by this court.

[27] Mr. P. Flyn, on behalf of respondents when the matter resumed on the following day raised another *point in limine*. He applied in terms of Rule 6 (18) that the matter be referred to oral evidence on the grounds hereinunder.

[28] Firstly, that Mr. Douglas Barrows who attested to a confirmatory affidavit on behalf of the applicant had contradicted himself on a material issue under oath. It was contended that Mr. Barrows deposed to an affidavit to the effect that the holding company had a *bona fide* claim against Peterstow. It was this affidavit by Mr. Barrows that led the court to issue an order of sequestration on 21st September 2012 against Peterstow. However, *in casu*, Mr. Barrow deposed that the very claim which led to sequestration of Peterstow was now non-existent. This was a serious contradiction which could only be cured by means of *viva voce* evidence, according to respondents.

[29] Secondly, respondents were in possession of evidence from the Master which would disprove applicants contentions. The applicants had deposed

that the creditors' wish was to have the offer of E5million accepted and the respondents be removed as liquidators. Since the applicants *in casu* failed to serve the Master of the High Court with the present application, the Master was unaware of such proceedings. Had she been duly served, she would have filed an affidavit refuting applicants' averments in this regard.

[30] The applicants again vociferously opposed the application for calling of *viva voce* evidence. They contended that applicants were on a fishing expedition because had there been *bona fide* disputes of facts, respondents would have applied that this court invokes the *Plascon-Evans* rule, a principle of our law which calls upon the court to believe the respondent's story where a *bona fide* dispute of fact exist, unless the respondent's story is far fetched. The effect would be to have the entire application dismissed.

[31] Having considered respondents' application and the opposition thereto, I dismissed respondent's application for reasons that would become apparent as I adjudicate on the merits of this case as I do not wish to burden this judgment any further.

Issues:

[32] The issues before me are mainly whether:

- there was any subordination agreement for the sum loaned and advanced to Peterstow by the holding company;

- it was the wishes of the creditors:

- to accept the offer of E5m;
- to have respondents removed as liquidators.

[33] The first poser is, "Is there a subordination agreement between Peterstow and the holding company?"

[34] Mr. Flynn on behalf of the respondents challenged the authority of the deponent to the founding affidavit in support of 1st applicant's application. He informed the court that the deponent thereof was incompetent to depose on behalf of the 1st applicant. For that reason, it is prudent to ascertain the status of Mrs. Phumelele Dlamini, the deponent to the founding affidavit on behalf of 1st applicant.

[35] Mrs Phumelele Dlamini is described as:

> *"... an adult woman and .. the Chief Executive Officer of Swaziland Investment Promotion Authority (hereinafter "SIPA") with offices situate at Mbabane and duly authorized to make this affidavit and bring this application on behalf of the 1st applicant. SIPA is statutory body established in terms of the Swaziland Investment Promotion Act No.1 of 1998 with the objects set out in that Act being mainly to promote and coordinate investment and implement government policy and strategies on investment."*

[36] It is not disputed on behalf of respondents that Mrs Phumelele Dlamini is the person at the helm of an institution vested with powers to "*promote, co-ordinate and implement government policy and strategies on investment*" in this kingdom. Further the lease agreement under which the first applicant has since become a creditor of Peterstow was

signed on behalf of the government by a representative from the institution headed by Mrs Phumelele Dlamini as fully appears in line 3 of the lease agreement. For these reasons, I find that Mrs Phumelele Dlamini is competent to depose to the founding affidavit on behalf of the 1st applicant and therefore her affidavit is admitted.

[37] First applicant avers at paragraph 32.1 page 15 of the book of pleadings:

> *"32.1 The claim of Peterstow Holdings Limited is a subordinated claim, as evidenced inter alia by the statement to that effect in the latest audited financial statements of the Company, a copy of which is annexed as "PD 2". I refer to the last sentence on the last page thereof*."

[38] Respondent answers on this averments at page 88 of the book:

> *"29.1 Whilst the financials do indicate that the claim of Peterstow Aquapower Holdings Limited has been subordinated, in fact that is not so.*

[39] In reply, the first applicant refers to the affidavit of Mr. Barrows.

[40] The applicants then attached a confirmatory affidavit from Mr. Barrows who at pages 137 – 138 gave a detailed account of the transactions leading to the claim by the holding company to be subordinated:

> *"2. I was involved in the events leading to the issue of the audited Financial Statements in respect of Peterstow Aquapower Swaziland (Proprietary) Limited for the year ended 30 June 2011, as signed off by KPMG on 17th October 2011.*
>
> *3. The facts set out below are in my own knowledge because I was*

involved in the process at the time.

4. *It was known long before 17 October 2011 that Peterstow Aquapower Swaziland (Proprietary) Limited (hereinafter "PSz") was technically insolvent in that its liabilities exceeded its assets. The auditors KPMG required that problem to be addressed by the holding company Peterstow Holdings Limited (hereinafter "PHL") whose claim against PSz was E298 881 743.00. That large debt of PSz to PHL resulted in the PSz balance sheet (or Statement of financial position) reflecting a shortfall of assets to liabilities of E109 404 618.00 which means that PSz was insolvent to the extent of E109 404 618.00.*

5. *The only way to restore PSz to insolvency would be for PHL to waive at least E109 404 618.00 of its claim, or to subordinate its claim in favour of the other creditors until the assets of the company, fairly valued, exceed its liabilities.*

6. *The first response of PHL was to address a letter to KPMG dated 20 July 2011 stating:*

"I confirm that Peterstow Holdings Limited will support Peterstow Aquapower Swaziland (Proprietary) Limited by not demanding repayment of all and any amounts payable by Peterstow Aquapower Swaziland (Proprietary) Limited to this company for a period of twelve months from the date of signing the statutory accounts for the year ended 30th June 2011.

I further confirm that Peterstow Holdings Limited will provide financial support to Peterstow Aquapower Swaziland (Proprietary) Limited, in the form of additional loan funding, to enable it to meet its commitments in the normal course of business, should the need arise, for a period of twelve months from the date of signing the statutory accounts for the year ended 30 June 2011."

7. KPMG were not satisfied and rejected that letter because it merely gave time to pay but did not waive any claims and did not subordinate any claims in favour of other creditors.

8. A number of meetings were then held, involving inter alia senior audit partners of KPMG from Durban, Mbabane, Mauritius and England and also involving the directors of both PHL and PSz and also involving Standard Bank. The upshot of those meetings was that all concerned agreed with KPMG's rejection of the PHL letter of 20th July 2011, and the directors of both companies agreed that PHL subordinates its loan to PSz, fairly valued, exceed its liabilities.

9. KPMG were, on the basis of that agreement, satisfied that the loan had indeed been properly subordinated and KPMG were then able to sign of the financial statements of PSz on 17th October 2011. Those financial statements correctly confirm, inter alia:

9.1 At page 6, in the director's report, that

"The holding company has agreed to subordinate its loan to the company in favour of the other creditors until the assets of the company, fairly valued, exceed its liabilities and to provide additional working capital on an ongoing basis."

9.2 At page 32, in note 18, that

"The loan due to the holding company has been subordinated by the holding company until such time as the Company's assets, fairly valued, exceeds its liability."

[41] Paragraph 5 of KPMG's financial statement at page 54 reads:

"*The holding company has agreed to subordinate its loan to the*

company in favour of the other creditors until the assets of the company, fairly valued, exceed its liabilities and to provide additional working capital on an ongoing basis.

[42] The respondents have refuted that the claim by the holding company was subjected to subordination as already highlighted. They demonstrate this by referring the court to a founding affidavit filed by the holding company in support of the application for liquidation under Case No.1474/2012 where Mr. Barrow deposed:

> *"9.2 Since the respondent's inception, various amounts have been advanced from time to time by the applicant to the respondent totalling in the order of E436 700 943.90.*
>
> *9.3 As at 30th June 2011, the amount owing by the respondent to the applicant as appearing in the applicant's audited financial statements stood in the sum of E379 669 361.00. since then further funds have been advanced, increasing the amount to E436 700 943.90.*
>
> *9.4 The respondent had hoped to commence generating substantial funds from various customers within the mining industry in Southern Africa and worldwide. This however was delayed for a number of reasons which are not relevant, save to the extent that it has frustrated the respondent's ability to generate its own income.*
>
> *9.5.2 The respondent is therefore simply unable to continue operating and as a result therefore the only practical avenue open to the respondent is for it to be liquidated. The applicant is genuine and bona fide creditor and indeed as the above*

Honourable Court can well appreciate, is the major creditor by far.

[43] This affidavit was deposed on 21st August 2012.

[44] It is respondents' submission that it is self defeating for Mr. Barrows to now state that the very claim which was *bona fide* and ground for liquidation is now extinguished. Further respondents reasoned that had the claim by the holding company been subjected to subordination, Mr. Barrows would have said so in his founding affidavit under Case No.1474/2012.

[45] These submissions contesting the existence of a subordinated claim agreement are deposed to by Mr. Reuben Miller.

[46] Mr. Miller has described himself as at page 77 paragraphs 1 and 2 as follows:

> "*1. I am a male Chartered Accountant of RMG Trust CC operating from 1st Floor Rosebank Terrace, North Block Sturdee Avenue Rosebank, Johannesburg, South Africa. The facts deposed to herein are save where specifically stated otherwise within my personal knowledge and are both true and correct.*
>
> *2. I am the Court appointed Liquidator of Peterstow Aquapower (Swaziland) (Pty) Limited (in Liquidation) having been appointed by an order of this Honourable Court on the 21st of September 2012 under case number 1474/2012."*

[47] From the above it is clear that Mr. Miller is a new comer into the life of Peterstow by virtue of his appointment as a liquidator in September 2012. He is therefore not privy to the internal affairs and transactions of

Peterstow prior to his appointment except by virtue of information sourced from records and persons.

[48] On the other hand, at page 137, it is stated of Mr. Barrows:

> *"1. I am a major male businessman residing in the United Kingdom and at all material times, I was a director of Peterstow Holdings Limited and Peterstow Aquapower Swaziland (Proprietary Limited.*
>
> *2. I was involved in the events leading up to the issue of the audited Financial Statements in respect of and Peterstow Aquapower Swaziland (Proprietary Limited for the year ended 30 June 2011, as signed off by KPMG on October 2011."*

[49] From the above assertions, it is clear that more weight should be given to Mr. Barrows averments. This is moreso because there were no further affidavits in support of Mr. Miller's depositions. It is not clear on what basis Mr. Miller as a liquidator who has been recently appointed could attest against evidence by the auditors of Peterstow in the absence of evidence that he was involved in the affairs of Peterstow before his appointment. His persistence to oppose the application in the face of Mr. Barrows calls for concern.

[50] On the submission that this court should accept the evidence by Mr. Miller following Mr. Barrows' two contradictory affidavits, I agree with Counsel for applicants that there is nothing contradictory in Mr. Barrows' affidavits for reasons demonstrated below.

[51] The present case is analogous to the case of **Bark and Another, NNO. v Boesch 1959 (2) S.A. 377.** The facts are briefly as follows:

[52] Eichienberger and Boesch formed a partnership for purposes of carrying out a baking and confectionary business. Upon its dissolution, the duo formed a company. They entered into a contract where Boesch would have a larger share of the assets and Eichienberger on the other hand would be paid the sum of £2.500 with interest backdated while the capital amount to be paid in a future specified date. This contract was, however, subject to the following conditions:

> "*should the said company …go into liquidation before the first day of February, 1957 on the ground that it is unable to pay its liabilities in full, then if it in fact pays only a dividend to its creditors in respect of the full amount of their claims, the said Eichenberger's claim against the said Boesch in the sum of £2,500 as set out in clause 7 hereof shall be waived in toto and the said Eichenberger shall have no further claim against the said Boesch*"

[53] The court, on examining the evidence before it, found that liquidation was as result of Mr. Boesch's action of attempting to escape the obligation under the contract. What is of relevance herein however, is the *ratio* that had the circumstances leading to liquidation not been tainted, should the resolutive condition have occurred, it would have resulted into a total waiver of the claim upon liquidation of the company.

[54] Conversely, should the resolutive condition fail to materialise, the contract between Eichienberger's estate and Boesch would for all intent and purpose be of force and effect and Boesch would have been obliged to pay the estate of Eichienberger who was deceased by the time of litigation.

[55] Applying this *ratio in casu*, when Mr. Barrows instituted the proceedings in September 2012 for liquidation of Peterstow, the loan agreement between Peterstow and the holding company was subsisting by reason that there was

no declaratory order against the assets of Peterstow. It follows therefore that his deposition to the effect that the "*applicant is genuine and bona fide creditor*" cannot be faulted.

[56] The reason is obvious, the suspensive condition "*until the assets of the company, fairly valued, exceed its liabilities and to provide additional working capital on an ongoing basis*" had not been fulfilled. Upon liquidation it became clear that it could not be fulfilled and thus the resolutive condition took effect. As it is trite that a resolutive condition once it materialise, renders a contract between parties extinct, *fortiori, in casu,* the loan contract between Peterstow and the holding company is extinct by virtue of the orders granted in September 2012 which declared a contrary scenario to the condition imposed by the parties i.e Peterstow and the holding company. The opposite situation is that instead of the assets exceeding the liabilities as envisaged by the parties under the agreement, the liabilities exceeded the assets.

[57] For the above reason, the submission that Mr. Barrows assertion that the claim is extinct should be rejected following his deposition in September 2012 that the holding company was a *bona fide* creditor of Peterstow thereby contradictory finds no support in law and therefore stands to fall.

[58] It follows further that calling Mr. Barrows to the witness stand would not in anyway disturb the probabilities as shown above of this case in terms of the *dictum* propounded by **Greenberg J. A**. in **Hilleke V levy 1946 AD 214** at page 219; cited with approval in **Daniel Gerliardus Roberts N.O. and 3 Others v Angel Diamond Mining (Pty) Ltd and 7 Others Civ. Case No.37/13** Appeal Court of Lesotho at page 13.

[59] I now consider the issues raised on the creditors.

[60] The respondents have contended that it cannot be said that the wishes of the creditors is to have the offer of E5million accepted and the liquidators be removed for the reason that none of the second to the eighty six creditors have deposed to an affidavit to such an effect.

[61] Firstly, the first applicant is a creditor preferred and concurrently and listed in the schedule of creditors. In the voice of SIPA who signed a lease agreement between government and Peterstow, has not only indicated its wish to have the offer accepted and the respondents removed but has advanced reasons thereof. Its wish as proved creditor cannot be ignored.

[62] Now the question borders on the majority. The question is whether Mr. Howe is competent to inform the court of the wishes of the creditors.

[63] **Hurwitz J.** in **Chenille Industries v Voster 1953 (2) S. A. 691** at 699 stated:

> "*Apart from the direct financial advantage resulting from sequestration, the Court must have regard, inter alia, to the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody and disposal of all assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and diminish the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds*."(underlining my emphasis)

[64] From the above *dictum*, the creditors exercise their right through representation by their nominee. The applicants are not disputing that Mr. Howe is the nominee of the creditors or put directly, the voice for the

creditors. They have not, correctly so, challenged Mr. Howe to file his power of attorney. They however are of the view that in such applications, the creditors themselves ought to have filed an affidavit. I do not think so in the circumstance of this case. Mr. Howe is the voice of the creditors and if he can do so in meeting scheduled in terms of the Act, his voice cannot be silenced when it is in the court of law representing the same creditors. What is worse herein is that even the Insolvency Act allows a nominee of the creditors to take a vote on their behalf. In the result the deposition by Mr. Howe on behalf of the second to the eighty six applicants is admitted as evidence.

[65] The respondents have submitted from the bar, minutes of the meeting held before the Master. Respondents' contend that the Master should be called to give *viva voce* evidence on what transpired in the meeting as per the minutes. The minutes are titled:

> *"FIRST COMMITTEE'S MEETING HELD BEFORE THE MASTER OF THE HIGH COURT IN TERMS OF SECTIION 329 (1) OF COMPANIES ACT NO. 8 OF 2009 ON THE 17TH OCTOBER AS PER RESOLUTION OF THE CREDITORS IN THE CREDITORS' MEETING OF THE 8TH OCTOBER 2013 TO DISCUSS AND REVIEW ALL POSSIBLE OFFERS MADE ON PETERSTOW."*

[66] The applicants in *contra* submit that the minutes handed refer to a committee's meeting whereas *in casu* the bone of contention is about the creditors meeting held on 8th October 2012.

[67] From its heading the submission by applicants' stand. Exhibit X is therefore irrelevant and therefore does not support the basis for calling of the master to give oral evidence.

[68] The respondents' have challenged the applicants' failure to serve the Master. The applicants have averred as reason for not serving the Master:

> "*8. The respondent is the Master of the High Court of Swaziland whose office is in Mbabane. No relief is sought against the Master who is expected to abide the decision of the Above Honourable Court*."

[69] I must point out that the view taken by applicants finds support from the *dictum* in **Cash Payment Services (Pty) Ltd v Eastern Cape Province 1991 (1) S. A. 324** at 353:

> *"More often than not independent tribunals, having done their duties … take the attitude that they will abide the decision of the court and leave the other matters to the interested parties to dispute before court."*

From the above dictum, the applicants followed a well established trend in law by expecting the Master not to contest the pleading.

[70] At any rate Counsel for the applicants informed the court that they subsequently served the Master on the 30th October 2013. I have no reason to doubt this information from not only an officer of this court but one who boasts of years of experience in the bar.

[71] The respondent drew the courts attention to the undisputed fact that on the 8th October 2013, there was no vote taken and therefore the prayers by applicant to have respondents as liquidators removed is unsubstantiated. The court is called upon to speculate that had there been a vote, the majority would have voted for the removal of respondents.

[72] In response, the applicants refer the court to section 321 (d) of the Insolvency Act 1955 which reads:

> *"d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, wishes him to be removed."*(underling my emphasis)

[73] The wishes of the creditors have been highlighted by Mr. Howe in his confirmatory affidavit as the Act indicates. The words of the legislature does not refer to voting. It refers to the wishes of those creditors entitled to vote. Had the legislature intended that the creditors take a vote, the legislature would have so enacted. The respondents have not submitted that this section has ambiguity. In the absence of any ambiguity demonstrated by the parties herein, I do not wish to deviate from the golden canon of interpretation of this section.

[74] It was further contended that the question of voting was never a subject matter in the meeting of the 8th October 2013. The court was referred in the answering affidavit to page 87 paragraph 28 as the events that unfolded on that day.

[75] The averments therefore read:

> *"28.1 On the meeting of the 28th October 2013, the deponent together with certain other creditors representatives in particular Mr. Zweli Jele and Attorney Luck Howe insisted that the liquidators and their legal representative withdraw from the meeting whilst they as creditors consulted on the issue.*

[76] From respondents own showing there was an issue at hand. It is for this reason that respondents immediately under the above paragraph depose:

> *28.2 I was therefore not aware of what was presented to the creditors and what resolutions were discussed."*

[77] Further, the averments on behalf of applicants of what transpired in the meeting are highlighted under paragraphs 26, 27, 28, 29 and 30 of the founding affidavit. The respondents in answer to these specific deposition state that they note the same and emphasise that there was no vote and therefore there is no basis for the prayers. They do not assert that it was not the spirit of the meeting and aspiration of the creditors to take a vote nor do they dispute that they together with the Master prevented the creditors from voting.

[78] Reading both paragraphs 28.1 and 28.2 reflects that the respondents do not dispute the averments by applicants that the creditors' wish was as defined by the applicants herein. Unchallenged deposition stand to be admitted as evidence and I duly do so.

[79] Lastly, the respondents submit that there is a higher offer of E17, 500 million on the table. It would not be in the best interest of the creditors to accept such an offer of three times less than the offer of E17,500 million. This offer, so went the submission on behalf of respondents, is all in fours with the national interest as pointed out by applicant in its founding affidavit.

[80] I agree with Mr. Flynn on behalf of respondents that the duty of a liquidator in such matters is to act in the best interest of the creditors.

One instance of such is to accept the highest offer.

[81] However, *in casu* the offer of E17,500 million only came on the 30th October 2013.

[82] The applicants have deposed that they have conducted a due diligence investigation upon the offer of E5 million and Mosegedi has successfully passed the same. We do not hear of the same in respect of the offer of E17,500 million except that it conforms to the national interest requirements as laid down by applicant.

[83] On the 8th October 2013 when the creditors intended to take a vote, this offer had not been presented to the creditors. Nor do we have evidence from the respondents that this offer was subsequently presented. It appears from the pleadings that this offer has been unveiled in these proceedings. It is not clear as to what prevented the liquidators herein to cause an urgent meeting to be called as soon as this offer was received on the 30th ultimo for the creditors' attention. The only inference, I am afraid, one may draw is that this offer is nothing else but designed to defeat applicant's application.

[84] I say this from the duty expected of liquidators towards the creditors. The wise words of the learned author **Van Zyl** in **Judicial Practice of South Africa 4th Ed**. at page **33** are apposite herein:

> "*The law exacts from an attorney uberrima fides – that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a vigorous accuracy in minitiae, a high sense of honour and incorruptible integrity, he must serve his client faithfully and diligently … he must in no way betray his client to the other side, either by secret correspondence or communication or in any other*

manner whatsoever."

[85] The above is also very true of liquidators as they stand in a fiduciary relationship with the creditors.

[86] Mr. Warring on behalf of the holding company aligned himself with the submission on behalf of respondents.

[87] He however, informed the court that should however, the court find that the claim by the holding company was subject to subordination it should declare the subordination agreement *void ab initio* by reason that it was illegal. The illegality emanated from the circumstance that a company which has been issuing loans of such high magnitude to its subsidiary company could not have waived such loan in the future. As the holding company was in liquidation in Mauritius, subordinating such claim meant that the creditors of the holding company would not be paid upon none repayment of the loan by Peterstow by virtue of the subordination agreement. In this way, the subordination agreement was illegal as it sought to defeat the claims of holding company in liquidation creditors. Once the subordination agreement is declared null and void *ab initio*, the loan agreement is revived and the holding company recognised as a creditor of Peterstow.

[89] This submission, with due respect to the leaned Counsel for the holding company is fallacious. In the absence of any evidence that subordination of the claim by the holding company was intended to defeat creditors' rights of the holding company and that the subordination agreement was entered after the holding company was sequestrated without the authority of its creditors under liquidation, it cannot stand.

[90] Mr. Warring further argued on behalf of the holding company that the court should consider section 26 of the Insolvency Act on dispositions without value. With due respect to learned counsel, I see no correlation between the issues at hand and the cited section. In these proceedings we are concerned with claims as debts owing and not the property of Peterstow, qualifying for disposition.

[91] The applicants have prayed for an order in terms of Rule 68.

[92] On a similar application for costs against a trustee of an insolvent, **Ludorf J** in **Attorney General, Transvaal v Roseman 1960 (1) S.A. 499** at 502 stated:

> "*The law on this aspect is clear and I have a very wide discretion*."

[93] The learned judge then went on to consider the conduct of the respondent in defending the matter. He states as follows:

> "*The respondent opposed these proceedings without a resolution of the creditors … And that is a factor that weighs with me because it would be unfair that creditors should be responsible for costs in a matter in which they were never consulted. Secondly the 1st respondent persisted in his opposition despite the strong dissociation by his co-trustee. Thirdly, the respondent raised a defence which was absolutely without foundation – a fact which he could have established by simply enquiry directed to the company known as General Motors … . thirdly, I am of the opinion that the respondent's conduct in these proceedings has been improper. The whole attitude disclosed in the papers of the respondent smacks of delaying tactics."*

[94] *In casu,* the respondent put up a resistance to the applicants' affidavit without verifying the facts of whether the loan claim by the holding company was subordinated from the director of both companies, Mr. Barrows. Even in the face of a confirmatory affidavit from Mr. Barrows narrating in detail the circumstances surrounding the subordination and confirming the resolutive condition, the respondents persisted in opposing the application. They relied on hearsay evidence and what exacerbated their case is that this hearsay evidence was not from the directors of any of the two companies herein. Their conduct, I am afraid falls far too short below of the standard expected of their office. Needless to mention the delaying tactic of the intervening party who sought leave to file further papers and came on the set date to argue its case based on the same papers whereas he had put up serious resistance against applicant's submission that the matter could proceed on the papers as they stood.

[95] In order to show its approval, this court must mete out an appropriate order as to costs.

[96] In the aforegoing, I enter the following orders:

1. Applicants application succeds.

2. The third respondent is hereby directed to expunge the claim by Peterstow Holding Ltd (in liquidation) from the creditors list.

3. The first and second respondents are hereby removed as liquidators of Peterstow Aqaupower Swaziland (PTY) Ltd (in

liquidation)

4. Mr. Titus Mlangenin is hereby declared the liquidator of Peterstow Aquapower Swaziland (PTY) Ltd (in liquidation) upon furnishing the third respondent with security in terms of section 311(2) and 316 of the Insolvency Act.

5. The liquidator of Peterstow Aquapower Swaziland (PTY) Ltd is hereby directed, in accordance with the wishes of the majority of creditors having voting rights, to forthwith accept the written offer by Mosegedi & Associates Proprietary Limited to acquire the assets of the Company for a purchase price of E5 000 000.00 (five million Emalangeni).

6. The first and second respondents and the Intervening Party are ordered, jointly and severally, to pay the Applicant's costs on the attorney and own client scale, one absolving the other, with First and Second respondents paying cost *de bonis propiis.*

7. It is directed, in terms of Rule 68 (2), that the taxing master on taxation is not to be bound by section H of the tariff (costs of counsel);

8. The liquidator is authorized to pay the said costs from the estate and to recover such costs from the First and Second Respondents and the Intervening Party.

M. DLAMINI

JUDGE

For the Applicants:	**S. C. C. Edeling – instructed by the Attorney General**
For 1st & 2nd Respondents:	**P. Flynn instructed by Cloete / Henwood - Associates**
Intervening Party:	**J. Warring**