BACKGROUND

The matter arises from a property syndication scheme conducted by the Dividend InvestmentcGroup, which consisted of Div-Vest Holdings (Pty) Ltd and its two wholly-owned subsidiaries.
A property syndication is an investment scheme that facilitates the sale of a property, or a number of properties, to a group of investors who become, directly or indirectly, part owners of the property. The Dividend Investment Group promoted a number (approximately 70) of property syndications.

A typical property syndication was structured so that members of the public acquired 100% of the shareholding in a holding company. The holding company usually acquired about 85% of the shareholding in a property-owning company. A promoter company would hold the remaining 15% of the shareholding. The property-owning company would acquire a commercial property with funds borrowed from the holding company and in some instances, a financial institution. The scheme was promoted so as to give the impression that the property would be sold at a profit. In this scenario, the property-owning company would than service its loans to the holding company. The profit would then be declared and distributed as a dividend to the shareholders in the holding company and the remaining minority shareholder, in most instances the promoter company.

City Capital (“the applicant”) asserts that it has acquired the minority shareholding (of Div-Vest Holdings) in the property-owning companies and that it is a creditor of those companies because it made loans to them.
The three holding companies, Blue Beacon Investments 52, Div-Hold Income 12 and Div-Hold 11, applied for the winding-up of the property-owning companies Div-Prop 11 (Pty) Ltd and Div-Prop 12 (Pty) Ltd. The shareholding in Div-Prop 12 was structured so that 45.5% of the shares were held by Blue Beacon Investments 52 (Pty) Ltd (“Blue Beacon Investments 52”) as one of the holding companies; 44.5% by Div-Hold Income 12 (Pty) Ltd (“Div-Hold Income 12”) as the other holding company; and 10% allegedly by City Capital (this is in dispute; however, this issue was not under consideration in this judgment). The shares in Blue Beacon Investments 52 were held by 89 investors and in Div-Hold Income 12, by 125 investors. The shareholding in Div-Prop 11 was

structured so that 90% of the shares were held by Div-Hold 11, the holding company; and 10% allegedly by City Capital (this is in dispute; however, this issue was not under consideration in this judgment). The shares in Div-Hold 11 were held by 201 investors. Provisional winding-up orders were granted, following which the Master of the High Court appointed Mr Cooper N.O and Mr Appies N.O as provisional and then final liquidators of Div-Prop 11.Mr Cooper N.O and Mr S Ahmed N.O were appointed as the provisional and then final liquidators of Div-Prop 12.

Thereafter, the respective boards of directors of Blue Beacon 52, Div-Hold Income 12 and Div-Hold 11 each adopted resolutions in terms of s 129(1) of the Companies Act 71 of 2008 ("the Act") placing these companies in business rescue. The same business rescue practitioner was appointed in respect of all three companies. In June 2014, the business rescue practitioner applied to court for an order discontinuing the business rescue proceedings and placing all three companies in liquidation, in terms of s 141(2)(a)(ii) of the Act, as well as an order declaring that these entities, together with Div-Prop 11 and Div-Prop 12, be declared a single entity, as contemplated by ss 20(9), 22, 141(2)(c) and 141(3) of the Act. Section 20(9) of the Act gives the courts a general statutory discretion to pierce the corporate veil and disregard the separate legal personalities of the various entities. Section 22 of the Act prohibits reckless trading, whilst s141 of the Act empowers the business rescue practitioner to investigate the affairs of the company that is under business rescue.

The five companies were part of an unsustainable syndication scheme which had engaged in reckless trading and defrauded members of the public. The use of the companies, or the acts by or on behalf of them, constituted an unconscionable abuse of their juristic personality, justifying an order that they should not be regarded as juristic persons as contemplated in s 20(9) of the Act. The corporate identity of the five companies had not been maintained, their financial affair were not kept apart, and funds flowed to and from the various companies as investors were paid dividends promised to them. It was contended that the five companies had to be treated as a single entity and the liquidators of Div-Prop 11 and Div-Prop 12 should be appointed as the liquidators of the Dividend Investment Scheme because they had extensive knowledge of the scheme, had already incurred costs, and their appointment was to the advantage of creditors.

The court a quo ordered that the five separate companies, all of which had been finally wound up,

were declared a single entity as envisaged by sections 20(9), s 22, 141(2)(c) and 141(3)of the Act, and termed henceforth as the “Dividend Investment Scheme”, further that the respondents would be the liquidators of same. At the time of the order, the respondents had already been appointed as liquidators in the winding-up of two of the five companies. The court a quo also ordered that the previously appointed liquidators of the separate liquidated entities as the final liquidators of the consolidated single entity.

The court a quo’s order which was appealed was not complied with, owing to a dispute between the parties, which resulted in the present litigation. After the order was granted, a dispute arose between the respondent and the Master as to whether a first meeting of creditors had to be held in the estate of the ‘new’ single entity (the Dividend Investment Scheme).

The Master’s position was that the Dividend Investment Scheme was a separate and distinct legal entity, and the fact that it had been declared a single entity by the court a quo did not prevent him from exercising his power to summon the first meeting of creditors in terms of s 364 of the Companies Act 61 of 1973 (“the 1973 Act”); and that all interested parties, including investors, creditors and shareholders could in this way nominate and vote for liquidators of their choice, in the single consolidated entity.

The respondents’ stance was that the process of liquidation in relation to Div-Prop 11 and Div-Prop 12 included the single entity, which merely had to continue due to the fact that if the liquidation had to start afresh, numerous practical problems would arise. A first meeting of creditors had already been held in the Div-Prop 11 and Div-Prop 12 estates at which members and creditors (including the holding companies) had already proved claims, certain resolutions were adopted, and the respondents had already been appointed as liquidators of those two companies. They had already commenced with s 417 and s 418 enquiries under the 1973 Act.

The respondents contended that in these circumstances, there would be uncertainty about the status of: the claims proved and the resolutions adopted at the first meeting of creditors; the s417/418 enquiries; and their appointment as liquidators of the two companies. The dispute could not be resolved, and the respondents applied to the Western Cape High Court for an order directing the Master to comply with the previous order of Western Cape High Court.

This dispute regarding the appointment of the liquidators came before the court in the form of a new application, pursuant to which an order was issued directing compliance with the previous order granted.

City Capital (the applicant) launched a counter-application in the court a quo in which it sought the reconsideration and setting aside of both the orders in their entirety. The court a quo dismissed this counter application. In essence, it held that the part of the original court order ordering the appointment of the original liquidators as the liquidators of the new company was a necessary consequence in light of the other orders in the judgment and that read contextually, this order did not constitute the appointment of liquidators contemplated in Chapter 14 of the 1973 Act;and that as a result, the December order was not impugnable.

This resulted in an appeal being lodged, and leave to appeal was granted by the Supreme Court of Appeal. The Supreme Court was called upon to decide whether the court did in fact appoint liquidators and whether this decision was legally defensible.

HELD

In a unanimous judgement delivered by Schippers AJA:

1. It was held that section 20(9) of the Act provides a statutory basis for piercing the corporate veil. A court is allowed to disregard the separate juristic personality of thecompany *where its incorporation, use or an act performed by or on its behalf 'constitutes an unconscionable abuse of the juristic personality of the company as a separate entity'*
2. The SCA then defined unconscionable conduct, in terms of its ordinary grammatical meaning – "Showing no regard for conscience….Unreasonably excessive …. egregious, blatant …. unscrupulous". It was held that it would be "undesirable to attempt to lay down any definition of 'unconscionable abuse" and further, "it suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of s20(9) of the 2008 Act, includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts".
3. It was accepted that s20 of the Act is silent about the appointment of liquidators, and that the authority to do so rests with the Master. The SCA unequivocally stated that there is nothing in either s 20(9) or any of the other provisions of the Act which authorises a court to appoint liquidators. Further, s367 of the 1973 Act makes it clear that the Master appoints

liquidators for the purpose of conducting the winding-up of a company.

4. It was held that the Master's office controls every stage of the administration of companies under winding-up. The SCA stated that "although the South African insolvency system is creditor-driven and the majority of creditors have the right to elect liquidators, their choice of liquidator is subject to the Master's approval and the exercise *of the functions of liquidators is subject to the Master's control."*
5. The SCA rejected part of the original order of the court a quo, which had the effect of ordering the appointment of the original liquidators as the liquidators of the new company (the single entity), and held that the order was so open-ended and vague as to render it incompetent.
6. It was held that, the Master having appointed the respondents as the liquidators of the Dividend Investment Scheme, in terms of s 367 read with s 375(1) of the 1973 Act was the correct procedure to follow. The SCA found that this appointment is valid and binding throughout the Republic and that the respondents have the necessary authority to act, further that all the respondents' acts as liquidators are valid.
7. The SCA declared that the Master's decision to appoint the respondents as liquidators of the Dividend Investment Scheme constitutes administrative action as defined by PAJA. As such, the decision by the Master is valid and stands until reviewed and set aside. The applicant did not found a case for review of the decision, nor did it seek a review of the Master's decision in its papers. As such, the SCA could not review the decision to appoint the previous liquidators as liquidators of the consolidated company (the Dividend Investment Scheme).
8. Accordingly, the SCA held that because the Master's appointment of the respondents as liquidators of the Dividend Investment Scheme remains unaffected, the finding that the decision of the court to appoint liquidators for the Dividend Investment Scheme and the further order directing compliance with this directive, would have no practical result. This is a ground for dismissal of the appeal. However, the SCA refrained from dismissing the appeal on this ground, as the court a quo, in its order sought to re-affirm these previous orders. The SCA therefore chose to set this order of the court a quo aside, due to its logical inconsistency, rather than dismissing the appeal for its lack of practical effect.

VALUE

This case outlines the status of decision of the Master in appointing a liquidator when companies are wound up. The decision deals decisively with who has the requisite authority to appoint liquidators under the Companies Act of 1973, the provisions of which still apply in cases of

windingup. The decision makes it clear that a court has no authority to appoint liquidators, and that this discretion rests solely with the Master.

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