DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

25/6/2015
DATE

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

Case No.: 25965/2012

In the matter between:

JOHAN FRANCOIS ENGELBRECHT N.O.	**First Applicant**
DEON MARIUS BOTHA N.O.	**Second Applicant**
ALLAN DAVID PELLOW N.O.	**Third Applicant**
BAREND PETERSEN N.O.	**Fourth Applicant**

and

KHULUBUSE CLIVE ZUMA	**First Respondent**
ZONDWA ZOYILISE GHADDAFI MANDELA	**Second Respondent**
SHESHILE THULANI NGUBANE	**Third Respondent**
SULLIMAN BHANA	**Fourth Respondent**
FAZEL BHANA	**Fifth Respondent**

JUDGMENT

THE PARTIES

1. The first applicant is **JOHAN FRANCOIS ENGELBRECHT** N.O., an adult male insolvency practitioner acting in his official capacity as one of the provisional liquidators of the Pamodzi Group of Companies of Phula Lodge, 117 Swawelpoort, Pretoria.
2. The second applicant is **DEON MARIUS BOTHA** N.O., an adult male insolvency practitioner and director of Corporate Liquidators, with principal place of business at 2nd Floor, Gilde Building, 1068 Arcadia Street, Hatfield, Pretoria. He is also a provisional liquidator of the Pamodzi Group of Companies.
3. The third applicant is **ALLAN DAVID PELLOW** N.O., an adult male insolvency practitioner of 15 Girton Road, Parktown, Johannesburg. He is also a provisional liquidator of the Pamodzi Group of Companies.
4. The fourth applicant is **BAREND PETERSON** N.O., an adult male insolvency practitioner of 9th Floor, Wale Street Chambers, 33 Church Street, Cape Town. He, too, is a provisional liquidator of the Pamodzi Group of Companies.
5. The four applicants are acting jointly in the pursuit of the relief they claim against the respondents. When they are referred to in this judgment otherwise than as the 'applicants', they will be identified as 'the liquidators' if the two former provisional liquidators are included in the reference.

6. When the Pamodzi mines were originally placed in provisional liquidation, the Master appointed the four applicants together with two other provisional liquidators, Messrs Motala and Gainsford. The latter were removed prior to the institution of the present proceedings. The Court enquired at the commencement of argument whether they might have any direct interest in the outcome of the application. The two persons were approached at the Court's request by the applicants' legal representatives. The court was given the assurance that both were aware of the application and of the date upon which it was enrolled. Neither expressed any interest to be joined or to attend the hearing.
7. The first respondent is **KHULUBUSE CLIVE ZUMA**, an adult male businessman residing at 22 Taunton Street, Somerset Park, Umhlanga. The first respondent was the chairman of the board of directors of the now insolvent company Aurora Empowerment Systems (Pty) Ltd. ("Aurora").
8. The second respondent is **ZONDWA ZOYILISE GHADAFFI MANDELA**, an adult male businessman residing at 11884 Maseli Street, Orlando West, Soweto. The second respondent was a director of Aurora.
9. The third respondent is **SHESHILE THULANI NGUBANE**, an adult male businessman residing at 404 Road 6, Chesterville LOC, Durban. The third respondent was a director of Aurora.
10. The fourth respondent is **SULLIMAN BHANA**, an adult businessman residing at 30 Royal Houghton Estate, 22 Third Street, Houghton, Johannesburg. The fourth respondent was, at all relevant times, involved in the management of Aurora's affairs.

11. The fifth respondent is **FAZEL BHANA**, an adult businessman residing at 30 Royal Houghton Estate, 22 Third Street, Houghton, Johannesburg. The fifth respondent was, at all relevant times, involved in the management of Aurora's affairs.

THE RELIEF SOUGHT

12. The applicants, as provisional liquidators, sought an order extending their powers to allow them to pursue the present litigation, which order was duly granted.
13. The applicants apply for a declaratory order that the respondents, jointly and severally, the one to pay the others to be absolved, be declared liable for all debts and liabilities owed by Aurora to the Pamodzi Group of Companies, as provided in section 424 of the Companies Act 61 of 1973, read with section 77 and Schedule 5 of the Companies Act 71 of 2008.
14. The Pamodzi Group of Companies comprises Pamodzi Gold (Orkney) (Pty) Ltd; Pamodzi Gold East Rand (Pty) Ltd; Nigel Goldmining (Pty) Ltd; The Grootvlei Proprietary Mines Ltd; Consolidated Modderfontein Mines 1979 (Pty) Ltd and Consolidated Modderfontein Mines Ltd. All these companies are in provisional liquidation, the provisional orders having been extended over the past few years from time to time.
15. Unsurprisingly, the applicants also seek a costs order in the event that their prayers are granted.

THE FACTUAL BACKGROUND

16. The applicants must establish the facts upon which they rely to prove fraudulent or reckless conduct on the part of the respondents on a balance of

probabilities: *Philotex (Pty) Ltd and others v Snyman and Others; Braitex (Pty) Ltd and others v Snyman and Others* 1998 (2) SA 138 (SCA) at 142G – J; even though recklessness is not lightly to be found: *Strut Ahead Natal (Pty) Ltd v Burns* 2007 (4) SA 600 (D&CLD). In the light of the fact that the respondents argue, with considerable emphasis, that factual disputes permeate the papers to such an extent that not even a robust approach could allow the Court to dispose of the matter on paper, it is necessary to delve into the facts upon which the applicants rely for the relief they seek; and to determine whether the relevant occurrences are indeed matters of dispute or not. In the following paragraph only the uncontested, uncontestable or common cause facts will be dealt with.

16.1 The fourth respondent has known the third respondent for some thirteen years and has known the second respondent since the latter was a child;

16.2 A meeting was held between the third, fourth and fifth respondents during 2003 to discuss potential future business transactions;

16.3 The fourth, fifth and the first respondents met in 2004/5;

16.4 During about February 2009 the first, third, fourth and fifth respondents met in the Beverley Hills Hotel in Durban. The first and third respondents wanted to embark on business on a large scale which would require extensive funding which they sought from the fourth and fifth respondents;

16.5 The fourth and fifth respondents were tasked to find the necessary funds. They were already acquainted with one Dato Rajah Shah ("Shah"); and a Malaysian equity fund known as AM Equity Ltd (BV) ("AME");

16.6 Fourth and fifth respondents invited Shah to come to South Africa and the respondents met with him during about March 2009. They discussed business to be conducted through Aurora, to which Shah and AME would contribute finance, first and second respondents *'the necessary political connections'* and fourth and fifth respondents financial and management acumen;

16.7 A listed entity would be acquired to own shares in Aurora and thereby hold equity in this company. The acquisition of a listed entity was a condition precedent – as testified to by the third respondent in his answering affidavit at par 25.6 – which AME required to be fulfilled before any funding would be advanced;

16.8 Shah would and did become a member of Aurora's board of directors;

16.9 Fifth respondent was tasked with finding a listed entity that could be acquired for the purpose of reverse listing Aurora on the JSE;

16.10 Fourth and fifth respondents did not wish to become directors of the newly established company but would procure finance and act as consultants against remuneration for their efforts;

16.11 First respondent would be chairman of the board, second respondent managing director and third respondent executive director together with Shah;

!6.12 On the 20th March 2009 Pamodzi Gold Orkney (Pty) Ltd was placed under provisional liquidation by this Court;

16.13 On the same date the Master appointed the second and third applicants as provisional liquidators of this company together with Mr Enver Mohamed Motala ("Motala");

16.14 On the 23rd March 2009 the powers of these three provisional liquidators were extended by an order of this Court to enable them to deal with the assets of the Pamodzi Gold Orkney company;

16.15 On the 17th April 2009 Consolidated Modderfontein Mines Ltd; Consolidated Modderfontein Mines 1979 Ltd; The Grootvlei Proprietary Mines Ltd; Nigel Goldmining Company (Pty) Ltd and Pamodzi Gold East Rand (Pty) Ltd and Pamodzi Gold Ltd were all placed under provisional liquidation.

16.16 On the same day, the Master appointed the four applicants together with Motala and Gavin Cecil Gainsford ("Gainsford") as joint provisional liquidators in all the companies. They were granted extensive powers to deal with the assets and business of the companies by the High Court. It is common cause that the return dates of the provisional liquidation orders were extended from time to time during the relevant period when the events that lead to the current litigation occurred;

16.17 All the companies were found to be insolvent to an extent that precluded any thought of the provisional liquidators being able to return them to profitability by continuing to trade in insolvency;

16.18 It was therefore decided to find a single buyer for all the mines, if possible, and thereby achieve the best possible return for the *concursus*

creditorum. Standard Bank was instructed to attend to the process of finding a preferred bidder. At the time, the insolvent mines employed several thousand miners;

16.19 The respondents had, in the meantime, identified Redwood Timber Merchants Limited ("Redwood") as their first potential business venture and began to negotiate during May 2009 for its acquisition. The shares in this company were held by the Naas Grimbeeck Family Trust, which in turn was controlled by Mr Naas Grimbeeck. He was an old acquaintance of the fourth and fifth respondents;

16.20 A meeting to discuss the possible sale of the Redwood shares was held between all the respondents and Mr Grimbeeck and his advisers at Mr Grimbeeck's house during May 2009. A purchase price of R 100 million was considered, which was to be paid principally from Redwood's profits over the two years following the conclusion of the agreement. The company's profits were guaranteed by the seller to run to R 30 million annually;

16.21 An agreement was drawn up by a firm of attorneys, which provided that the Redwood shares would be transferred against payment of the purchase price in full or the issue of Vendor Shares by Cenmag Limited, to the full value of the purchase price. The seller of the Redwood shares was to hold the share certificates as security for such payment and the performance of all the purchaser's obligations. Only then would the effective date of the transaction arrive and ownership of the shares be transferred to the purchaser, Aurora. The agreement was signed on the 3rd June 2009;

16.22 During about May 2009 Aurora made an offer for the acquisition of 71% of the shares in Cenmag Limited, a listed entity, a transaction engineered by the second, fifth and third respondents. The intention was to reverse list Redwood by Cenmag acquiring shares in Aurora which in turn would have acquired the Redwood shares;

16.23 The owners of the Cenmag shares were a certain Farkas, a Ms Greenblatt and a close corporation known as Blaf Investments CC. An agreement was drawn up between Farkas and Greenblatt and Blaf Invetments CC, in which it was recorded that Farkas' and Greenblatt's shares would be sold to Blaf Investments which would in turn sell the shares to Aurora as eventual purchaser. The effective date was the 1st March 2009. Certain third parties held pre-emptive rights to some of the shares sold as minority shareholders and the transaction was subject to the suspensive condition that these parties waived their rights before 31 August 2009, the date upon which the sale of Blaf's shares to Aurora had to be finalised. The total purchase price payable by Aurora to the sellers amounted to R 6 140 515, 50 (Six million one hundred and forty-thousand five hundred and fifteen Rand and fifty cents). This sum was payable fifteen business days after the finalisation of any transaction with the minority shareholders to enable Aurora to acquire the shares in respect of which the third parties held a pre-emptive right;

16.24 There is no allegation in the respondents' affidavits that the purchase price was ever paid or that any shares were transferred into Aurora's name. On the contrary, the majority shareholders of the Cenmag shares

withdrew from that transaction by way of a public announcement on the 11th January 2010. Efforts to revive the transaction came to nought;

16.25 (According to the second to fifth respondents' answering affidavit the respondents continued to search for a listed entity that could be acquired to comply with the AME conditions for funding. The next listed company that was identified was Labat Africa Limited, which was to be acquired through a transaction with Link Private Equity and Investments (Pty) Ltd. This agreement was only concluded in July 2010;)

16.26 A further agreement was entered into on the 6th August 2009 for the acquisition of Bayete Minerals (Pty) Ltd, the shares of which were held by Silver Meadow Trading (Pty) Ltd and Mattino LLC jointly. The purchaser was Itekane Trading 253 (Pty) Ltd, a subsidiary of Aurora according to the sales agreement. The transaction was subject to a due diligence investigation being performed and the purchase consideration being transferred in cash and by the transfer of Aurora shares in lieu thereof. This transaction had no effect upon the dealings Aurora had with the liquidators;

16.27 During about June 2009 Aurora entered into another agreement with one Hart for the acquisition of the shares in Primrose Gold Mines (Pty) Ltd. The sale was subject to certain conditions relating to due diligence and contracts of service to be entered into with key staff members. Transfer of the shares would only be effected once the purchase price had been paid in full. This transaction, too, had no effect upon Aurora's involvement with the companies in provisional liquidation;

16.28 During the period between their appointment and the end of June 2009 the liquidators were confronted with numerous problems arising from the huge debts owed to a variety of creditors and to their employees by the insolvent mines. It was imperative to dispose of the mines while they were still holders of their mining licences and could conceivably become fully operational again if they were acquired by a knowledgeable purchaser possessed of sufficient funds to rescue them. The liquidators had to borrow money in the meantime to enable them to care for the mines. An amount of R 45 million was lent and advanced by the Industrial Development Corporation in respect of Pamodzi's Fee State Operation together with another R 5, 8 million paid by the IDC directly to insurers. R 50 million was lent by another major creditor, HVB Bank, in respect of the East Rand mines and Orkney. These transactions were sanctioned by the Court on the 28th May 2009;

16.29 The liquidators called for tenders for the acquisition of the mines. The original deadline for the submission of tenders was 2nd June 2009. Standard Bank prepared an information memorandum for potential purchasers in respect of the Modderfontein, Nigel and Grootvlei mines;

16.30 Pursuant to the tenders the Free State operations were successfully sold to Harmony Gold Mines Ltd;

16.31 The call for tenders for the insolvent mines caused Aurora's directors, including Shah, to become interested in their acquisition. Aurora investigated the state of their business and their probable value with the assistance of a mining expert, Dave Stander, who provided a surface assessment of the value and state of the mines;

16.32 On the 27th July 2009 Aurora submitted a binding offer signed by the second respondent to the lead liquidator, Mr Motala. This document was Annexure JFE 21 to the applicants' founding affidavit and will be referred to in this judgment as "the first bid". Its content was the subject of considerable contestation during argument and it will be analysed in some detail below. According to the third respondent the fifth respondent had at that stage already been given a verbal undertaking by Shah prior to the delivery of the first bid that AME would make US$ 100 million available for investment purposes;

16.33 In the meantime the workers on the East Rand mines went on strike in August 2009;

16.34 The fifth respondent requested Shah and AME to provide confirmation of AME's willingness to fund the project, proof of which was required by the liquidators on the advice of Standard Bank. A letter dated 14th September 2009 was received by the first respondent on behalf of Aurora, written under the letterhead of AME, signed by Shah, confirming the availability of the sum of R 200 million for acquisition of the Orkney gold mine. The funds were said in this missive to be made available '*...either through subscription of shares by us in Aurora or its nominee or through an underwriting agreement to be concluded between ourselves and Aurora or its nominee due to Aurora securing the preferred bid for the Pamodzi Gold Orkney (Pty) Ltd....*'

16.35 On the 1st October 2009 Aurora presented its second bid document to the liquidators for the acquisition of the Pamodzi Gold mines on the East Rand, again signed by the second respondent, and offering a total of R

350 million for the mines. This sum was determined, according to the respondents, after a meeting with the German and US representatives of HVB in late September 2009. According to the third respondent the applicants, the respondents and Ms Du Toit of Standard Bank attended this meeting. There were regular discussions between representatives of these entities regarding several issues that arose in connection with the preparations for Aurora's takeover of the insolvent mines. Shah was at that stage in South Africa, inspected the mines and participated in the discussions with an eye to securing the financing of the proposed acquisition.

16.36 The terms of this second bid document will likewise be discussed later in this judgment;

16.37 On the 8th October 2009 AME provided a letter confirming the availability of funding to the chairperson of the Aurora board of directors, recording that R 350 million would be made available to acquire the East Rend gold mines and undertake capital investments '*... against either a subscription in shares in Aurora or its Johannesburg Security Exchange (JSE) listed nominee through an underwriting agreement between Aurora and ourselves on confirmation of Aurora securing the preferred bid...*"

16.38 Both bids were accepted by the liquidators,

16.39 On the 15th September 2009 Aurora moved onto the Orkney mine and on the 15th October 2009 onto the East Rand mines;

16.40 The parties concluded what was called an INTERIM TRADING AND CONTRACT MINING AGREEMENT in respect of each mine. In terms of these contracts it was recorded that *inter alia*:

(i) The parties intended to effect a compromise in respect of the East Rand gold mines; failing which they would enter into a sale of the insolvent companies' assets to Aurora;

(ii) Aurora would commence mining of the mines as the agent of the liquidators in order to protect the assets;

(iii) Aurora would inject cash into the business of the insolvent companies;

(iv) Aurora had employed mining expert David Stander for a period of five years to provide the necessary technical know-how to run the mines;

(v) Aurora would commence mining against a fee and would provide care and maintenance for the mines;

(vi) Such care and maintenance would include payment of: wages and salaries of the mine employees; of the hostel fees; of water and electricity to the mine houses; of rates and taxes and service charges; of electricity and security services; of all premiums of all insurance policies; of reasonable repair and maintenance; of the costs of maintenance and upkeep of the slime dams; of the sewage pumped; of the fees of experts other than Stander, if such needed to be employed; of pumping of water and of miscellaneous expenses;

(vii) The proceeds of all gold mining activities would be paid into a specified bank account;

(viii) Negotiations would be entered into with the major creditor with an eye to paying off the latter's loan;

(ix) The mining areas of all mining operations undertaken by Aurora would be rehabilitated;

(x) Aurora would be responsible for the physical security of the mines;

(xi) The agreement was to last as an interim arrangement pending a compromise or a sale of assets until 12 January 2010, unless the dead line was extended by agreement for a period of no longer than 90 days after 12 January 2010;

(xii) Aurora would comply with all applicable legislation and regulations and protect the mining rights;

(xiii) Aurora would keep proper accounting records;

(xiv) Aurora would maintain all operating equipment; and keep it insured;

(xv) All mining operations would be conducted in a safe and professional fashion by Aurora;

(xvi) Aurora warranted that it had the necessary skill and expertise to conduct mining operations;

16.41 Other than the ITCMA agreements no other formal contract was entered into, although such was envisaged according to the third respondent.

16.42 Aurora obtained R 15 million through the efforts of the fourth and fifth respondents, who entered into loan agreements with members of their families and members of the community;

16.43 The third respondent alleged in his answering affidavit on behalf of the second to fifth respondents that the Malaysian funding would become available in December 2009. This date, the third respondent advised, was envisaged in order to enable the Aurora directors to finalise the transfer of the mining licences and the section 311 compromise that was planned;

16.44 The funding that was expected from Shah or AME did not materialise. The respondents were able to fund the initial operations from the loans obtained by fourth and fifth respondents from members of their families and the community for the first month or so after taking over the insolvent mines. Thereafter the funds ran out;

16.45 While still waiting for the funds to be made available, the liquidators applied to court in December 2009 for an extension of the provisional liquidation orders so that the transaction with Aurora could be finalised, as payment of the loans promised by the funders was still expected according to the respondents. The extended return date was set for the 30th April 2010;

16.46 On the 28 November 2009 the Department of Mineral Resources issued a notice to the mine management at Grootvlei mine to cease operations at all shafts because of the unsafe condition of the hoist system on all shafts. The notice to cease operations was prompted by an accident causing a fatality at this mine. After extensive negotiations

the Department was persuaded to withdraw the notice by converting it to a compliance order in terms of section 55 of the Mine Health and Safety Act 29 of 1996 as amended. The compliance period was two weeks from date of the order;

16.47 In November 2009 another fatality occurred at the mines and a second notice to cease operations in terms of section 54 of the Mine Health and Safety Act was served upon the mine management under the control of Aurora. Again extensive negotiations took place during which, the third respondent alleges, the liquidators requested the respondents to bring their political connections into play to keep the mines open. Eventually only the part of the mine where the fatality had occurred was closed down while the rest of the mines were allowed to continue operations. In the answering affidavit prepared on behalf of the second to fifth respondents the third respondent expresses the view that, had it not been for the political clout exercised by some members of the Aurora board of directors, the Department of Mineral Resources would have shut the insolvent mines down;

16.48 During December 2009 the R 50 million loan the applicants had secured from HVB Bank was due for repayment. As no funds were available, arrangements had to be made with Aurora and the bank to effect payment of the sum of R 3, 5 million in interest to roll over the loan. The purchase price payable by Aurora for the mines was to be reduced by this sum once financing had been arranged;

16.49 In January 2010 the workers went on strike again because they did not receive a bonus. An arrangement was made in February 2010 to pay a *pro rata* bonus;

16.50 On the fifth February 2010 the liquidators received a letter from an attorney Smit, allegedly confirming that he held R 20 million in his trust account to fund the Aurora transaction through a compromise in terms of section 311 of the old Companies Act. This letter was false;

16.51 During February 2010 the liquidators were informed by the insolvent companies' insurance brokers that the respondents had cancelled several insurance policies, *inter alia* the bullion in transit policy, and had failed to pay the premiums of others on due date, being the 15th February 2010. The applicants' attorneys addressed a letter to the respondents demanding immediate payment of the outstanding premiums, which letter was dated the 27th February 2010;

16.52 On the 9th March 2010 the applicants' attorneys of record followed up their letter in this respect, recording that the earlier demand had not been complied with. A later letter, dated 19th April 2010, recorded that the respondents had failed to maintain any insurance policy as a result of non-payment of the premiums and a failure to engage with the brokers, who had signified their intention to terminate their association with Aurora;

16.53 On the 2nd March 2010 already, however, the attorneys had written to the respondents with reference to an earlier letter dated 25 January 2010, demanding compliance with the reporting and accounting obligations that the ITCMA agreements imposed upon the respondents

in respect of their management of the insolvent mines, which it was alleged the respondents had failed to observe. The respondents were placed in *mora* and were informed that failure to comply with the demand within seven days might lead to the cancellation of the ITCMA agreements;

16.54 Also on the 2nd March 2010 the liquidators addressed a letter to AME through their attorneys in which they recorded that AME's funding had been a major factor in selecting Aurora as the preferred bidder and demanding compliance with the undertaking to provide the money;

16.55 On the 15th March 2010 the mine manager of the East Rand operations, Mr Bezuidenhout, was suspended by the respondents, pending a disciplinary enquiry;

16.56 Shah travelled to South Africa as a result of the letter addressed to him by the liquidators' attorney dated 2nd March 2015 and held a meeting with the liquidators and the respondents in Johannesburg. While he was at the East Rand mining operations, another strike occurred on the 18th March 2010. Shah was held hostage by some angry miners together with Mr Stander of management. He left the next day and returned a month later to inform the parties that he was withdrawing from the transaction on behalf of AME because South Africa was unsafe. Second to fifth respondents argue that by so doing, AME reneged on the commitment to provide funding to Aurora;

16.57 AME replied on the 29th March 2010 to the attorneys' letter of the 2nd march 2010 claiming that Aurora had not fulfilled the conditions set out in the letters of 14 September 2009 and 8th October 2009, namely the

subscription in shares of Aurora or a nominated member of the JSE. In addition it was claimed that Aurora had failed to meet other conditions such as corporate governance of an acceptable standard; lack of financial transparency, lack of integrity of management staff and the failure to supply financial information and accounting reports;

16.58 During this period the relationship between the liquidators and the respondents took a turn for the worse. On 12 March 2010 the applicants' attorneys wrote to the respondents and demanded a reaction to media reports that polluted mine water was being dumped into the Blesbokspruit and that the environmental enforcement authorities had raided the Grootvlei mine. Urgent remedial action was demanded if there was any truth to the allegations;

16.59 On 31st March 2010 another letter followed, repeating the demand for an explanation regarding the pollution of the Blesbokspruit and a further allegation that Aurora had failed to pay the mineworkers for three months. Again an immediate reaction was demanded. It should be added at this juncture that according to the third respondent, Coin Security, the company responsible for safety arrangements at the mines, had not been paid by Aurora since February or March 2010. Hulley and the first respondent made some payments out of their pockets to them, but they withdrew in July 2010, to be replaced at the third respondent's behest by Vusisiwe Security;

16.60 Meanwhile, as testified by the third respondent in the second to fifth respondents' answering affidavit, the East Rand mines closed down their operations and were put on care and maintenance, with the

pumping of water being the only activity still conducted. It is emphasized in the second to fifth respondents' answering affidavit that none of the respondents ever returned to the mines after March 2010;

16.61 During April the fourth and fifth respondents' ties with Aurora were severed because of their failure to procure funding for the company. Press reports suggested that they had received significant sums from the mining operations while workers had not been paid. It must be pointed out, however, that the deponent to the second to fifth respondents annexes an inchoate written agreement to the answering affidavit in terms of which fifth respondent was appointed as advisor to the Aurora group of companies at a remuneration of R 100 000,00 per month from January 2010 to March 2010; and at R 200 000, 00 per month thereafter. Although he further asserts that fifth respondent was acting in this capacity while negotiations with a funder were conducted in June 2010, it is unclear whether the terms contained in the document were implemented, as the court's copy is not signed by the fifth respondent;

16.62 On the 6th April 2010 an accusation of asset stripping was levied against the respondents by the applicants based on information that had surfaced in the media;

16.63 On the 15th April 2010 the liquidators commenced an audit of the management accounts that had been supplied irregularly and demanded co-operation from the respondents to finalise the process urgently;

16.64 On the 20th April 2010 the respondents requested an extension of the deadline for the compliance with their financial commitments toward the liquidators until the end of May, recording that they were in negotiations with a new potential funder. This person was a Mr Lines, described by the second to fifth respondents as a wealthy American businessman. The proposed transaction fell through in June 2010;

16.65 Although officially no longer involved with Aurora, (as to which see sub-paragraph 16.61 above); the fifth respondent procured another potential funder, Global Emerging Markets Equity Fund Ltd, which expressed interest in funding the acquisition of the mines through a purchase transaction involving the Labat shares owned by Aurora. While negotiations were still being conducted, the public comment upon the Aurora involvement in the mines became increasingly negative, especially after a certain Brad Wood was contracted to assist with security enforcement and admittedly killed four alleged illegal miners. The funding by Global Emerging Markets Equity Fund Limited came to nought barring an US$ 2 million transaction in respect of Labat shares;

16.66 The next potential buyer of the distressed assets of the insolvent mines was Shandong Gold Group Co. Ltd, one of the world's largest gold producing companies. In a letter to the applicants dated 28 November 2010 the said company's chairperson confirms that US$ 100 million had been set aside for a proposed transaction with Aurora in respect of the insolvent mines. A series of negotiations followed with Chinese representatives inspecting the mines and e-mails and letters being exchanged over a period of several months while meetings were

conducted in China and Germany with the creditor bank. Apparently Mr Motala, the first respondent and Mr Hulley played a leading role in this endeavour. They accompanied a South African trade delegation to China and flew to Germany to negotiate with HVB Bank;

16.67 Motala and Gainsford were removed from their office on the 21st May 2011 by an order of this court.

16.68 On 26 May 2011 the applicants cancelled the agreement with Aurora, effectively ending the involvement of Shandong Gold. It should be underlined at this stage that the respondents maintain that the transaction with Shandong Gold was close to finalisation, but no draft agreements with this entity, or supporting affidavits by their representatives have been filed in confirmation of this assertion.

16.69 In the same month the Master authorised an insolvency enquiry into the affairs of the insolvent companies, which was presided over by adv Wayne Gibbs. After the present applications had been launched the court authorised the disclosure of the full record of the enquiry to all the parties;

16.70 The provisional liquidation orders were extended from time to time while a purchaser or funder for the acquisition of the mines was sought;

16.71 From January 2011 Aurora embarked upon a surface "clean up' by collecting all the surface ore that was to be found and sending it to the refinery, extracting gold in the process;

16.72 The respondents allege that large scale theft of ore occurred throughout the relevant period by Zama-Zamas and that other assets

were stripped by thieves. Numerous complaints to the police had no positive effect;

16.73 Mr Hulley is referred to by the respondents as an Aurora director at all relevant times. He disputed his directorship and as he has not been joined in these proceedings, no further comment is necessary in this regard;

16.74 Aurora was liquidated on 4 October 2011 through an application brought by an unpaid creditor;

16.75 In November 2011 the applicants proved two claims against Aurora in liquidation. The first was admitted to proof at the first meeting, couched as a claim for R 122 million described as being in respect of breach of contract, cancellation and restitution, but in fact reflecting a claim for payment of the proceeds of gold sales conducted by Aurora;.

16.76 The second claim was rejected when it was first presented by the presiding officer as being illiquid. It was for the sum of R 1,7 billion in respect of depreciation and loss of assets of the Pamodzi mines while under the control of Aurora as managed by the respondents. This claim was compromised by Aurora's liquidators, duly empowered by a creditor's resolution to do so and admitted to proof in terms of section 78 (3) of the Insolvency Act 24 of 1936;

16.77 The respondents contend that these claims are inadmissible for the purposes of a determination of liability on their part in terms of section 424 of the Old Companies Act 61 of 1973;

16.78 In pursuit of i.a. the present application, the applicants signed a fee and mandate agreement with Aurora's provisional liquidators, which in effect

indemnified the latter in respect of the attorney's fees. The attorney, Mr Walker, has acted for the applicants in these proceedings throughout. The respondents suggest that this arrangement is untoward and compromises the independence of Aurora's liquidators, thereby tainting the proof of applicants' claims against Aurora and the respondents. The first respondent sought to review the admission of the claims on 23 February 2015, prior to the hearing of the present application. The review application failed because of the first respondent's lack of standing to review the decision to admit the claims;

16.79 The applicants eventually sold the insolvent mines in April 2012 for R 70 million, a sum substantially less than the purchase price agreed with the respondents some years earlier;

16.80 Ms Du Toit, who had prepared the commercial information pack for the provisional liquidators, testified during the inquiry before adv Wayne Gibbs that she had attempted to contact AME at the office indicated on its letterhead. According to Standard Bank's Kuala Lumpur office that address is a chat room or a public internet station. She testified further that prior to acceptance of Aurora's bid by the liquidators she repeatedly called for further information on the funder before any contract was signed, but that her advice was not met with any enthusiasm by the contracting parties. Her testimony contributed to the inquiry's chairperson's comment in his report that he doubted the very existence of Shah and AME. As this evidence is in dispute the matter will be dealt with on the basis of the respondents' version.

The applicable legislation

17. The parties are *ad idem* that the Old Companies Act 61 of 1973 applies to the present dispute. Section 424 of this Act reads as follows:

> ***424. Liability of directors and others for fraudulent conduct of business.***
> *(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.*
> *(2) (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.*
> *(b) For the purposes of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.*
> *(3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.*
> *(4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.*

Applying the law to the facts

18. The respondents were represented by two legal teams, the first respondent having instructed his own attorney and counsel. As will become apparent

later, the first respondent's situation does indeed differ from that of the other respondents. In what follows all the respondents will be referred to as 'the respondents', unless it is necessary to identify the first respondent as such.

19. The applicants rely upon section 424 for the declaratory orders they seek that the respondents should be held personally liable for Aurora's debts owed to the insolvent companies. They must consequently provide proof on a balance of probabilities that all five respondents are individually guilty of intentional deceit; or are each in his individual capacity guilty of reckless conduct of Aurora's business. Recklessness may consist of blameworthy conduct characterised by a failure to take any due care in the management of a company that results in detriment to the company and others and exhibits a high degree of disregard for the standards observed by honest and diligent men of affairs. It may, however, also be demonstrated by a similarly uncaring and careless failure to attend to the company's business or to prevent foreseeable harm from being caused by failing to take reasonable preventative measures against such eventualities: *Cronje NO v Stone en 'n Ander* 1985 (3) SA 597 (T).

20. In seeking to establish that the respondents are guilty of fraud the applicants rely primarily upon the content of the bid documents prepared by the respondents – or on their behalf at their behest – which were presented to the applicants at the commencement of the negotiations to acquire the Pamodzi mines for Aurora. Because of the significance these documents have assumed the first is quoted in full. The second is couched in similar terms and will be quoted only to the extent that it differs from the earlier one.

AURORA EMPOWERMENT SYSTEMS

27 JULY 2009

Ref no: SBT/LIQ/001

SBT TRUST (Pty) Ltd

33 Bath Avenue

Rosebank

Attention: Mr. Enver Motala

Dear Sir

Binding Offer: Pamodzi Gold Orkney (Pty) Ltd (In provisional Liquidation)

Aurora Empowerment Systems (Pty) Ltd, a specialist investment vehicle established to make strategic investments in a diversity of categories in the Sub-Saharan African region.

The Board of Directors (BOD) has been well constituted and balanced in that:

Mr. Khulubuse Zuma (Chairman)

Mr. Zondwa Mandela (Managing Director)

Dato' Raja Zainal Alam Shah (Executive Director) Malaysia

Mr Sheshile Ngubane (Executive Director)

Mr. Abdulla Belhoul (United Arab Emirates) UAE

Non-Executive Director will be appointed on the 1st August 2009

The company is a South African based BEE company

Aurora Empowerment Systems (Pty) Ltd purchased 71% (seventy one percent) being the controlling interest of Cenmag Limited, a public company listed on the Johannesburg Stock Exchange (JSE).

This was in line with the BOD strategic acquisition program, and thus allowing for more transparency as well as the highest level of Corporate Governance associated with a listed company.

The BOD make the company a global player in the truest sense since, the Malaysian Director and Shareholder has been knighted by the king as Sir ('Dato') as well as being a seasoned and respected banker, setting up not only Maybank (Malaysia's largest bank) but also, Al-Rajhi Bank, Saudi Arabia's largest Islamic bank.

Aurora's acquisition of the largest Sawmill in the Southern Hemisphere, Redwood Timber Merchants Limited, with its timber concessions has propelled the company to the forefront of global timber supplies with the core focus being The Gulf and Far-Eastern Markets.

Aurora with its strong links to the Gulf and Far-East is positioning itself as a major player in the commodities supply market.

Aurora's mission statement: to be a major contributor in the main stream of the Southern Africa economy: To not only assist in the job creation initiatives, but to also preserve existing employment opportunities at grass-root as well as national level.

With the current Pamodzi Gold Orkney Operations (PGOR) being a major source of employment in the North-West Province, it is imperative that an operator with a long term view enters the fray in order to resuscitate PGOR.

Aurora also realizes that PGOR is the largest employer in the area where the official unemployment rate already exceeds 40% (Forty Percent)

Aurora is the most suitable operator in that it will recruit the most experienced management as well as necessary technical expertise to maximize stakeholder interest which in turn will ensure long-term sustainability and stability.

Aurora is of the firm belief that the key to PGOR existence in the short and medium term and survival in the longer term is a Capital investment program. This to be in the form of completion of shaft 2 high grade area as well as the planned completion or upgrade of shaft 1 and shaft 3 pillars respectively. This, together with the increase in volumes of shafts no.4 and shaft no 7, which consists of lower grade material, will be a major contributing factor.

The current shaft 7 which is a major contributor to PGOR income stream and is currently unable to sustain the area is of definite need of shaft satellite pillars, this being part of Aurora's expansion and upgrade programme. The life of the Mine will therefore also be increased to 2025.

The drop in shaft no.3 Ore grade and ultimately income is as a result of the depletion of the pillars which would make the end of the mine of shaft 3, 2010.

Aurora will replace new blocks and satellite shaft pillars which will result in a sharp increase in production as well as the life of the mine.

The research and Development team of Aurora have estimated an amount of ZAR 150 000 000(one hundred and fifty million) would be required as short-term Capex to ensure the sustainability and enhance long term life of Mine expectancy of PGOR

The above examples are to illustrate that the key to the Life of the Mine as well as sustainable profitability is the driving force to secure long term Employment at PGOR.

Structure of offer

Aurora will not retrench any of the permanent employees of PGOR being approximately 1500(one thousand five hundred) employees.

Aurora will re-employ with new packages and under acceptable terms and conditions in line with current market remuneration packages all staff of PGOR.

Aurora's Social and Labour plan (SLP) will include an aggressive share incentive scheme which will be implemented by Price Waterhouse Coopers.

This will incentivize the current as well as future employees at company level as well as group level.

The share incentive scheme will ensure a sense of belonging as well as reward staff financially.

Aurora believes in empowerment in the true sense of the word.

Aurora Gold Orkney Community Trust (AGOCT) will be formed with the sole purpose of uplifting the community, This will include, as a matter of priority, a Health care services plan.

Apart from this being provided by in-house company clinic facilities, it is imperative that hospitals and mobile clinics be accessible to the community at all times.

AGOCT will provide in-house funding for program such as:

Housing development for first time home-owners.

Bursaries for dependants of staff members,

Subsidies on tertiary as well as secondary education for dependants of employees.

Aurora is of the firm belief that the basic human right is the right to own home.

This we will vigorous endeavour to make sure each employee has.

Aurora understands that it will acquire the environmental rehabilitation liabilities associated with the purchase of PGOR.

In this regards Aurora will implement a strict Environmental Protection plan.

An EMP committee will be set up solely with the task of Environmental Rehabilitation with the knowledge that we have a responsibility to preserve the status of the environment.

Sufficient resources will be provided to ensure that environment risks are minimized and public welfare is protected during and long after our mining activities have stopped.

Aurora will be a firm supporter of the Conservation trust.

The capital requirements for expansion, which we have envisaged at ZAR 150 000 000 (one hundred and fifty Million Rands Only) will be invested in much needed development of new blocks and upgrading of existing blocks.

Aurora hereby tenders an offer of ZAR 215 000 000(Two Hundred and Fifteen Million Rands) for PGOR.

This offer will be either for the assets of PGOR or in terms of section 311 of the insolvency act.

Aurora will engage into a management agreement with the joint Liquidators of Pamodzi Gold Orkney to manage PGOR from the 1st September 2009 whereby all profits, if any will be shared on a 50/50 basis. Losses are for the sole account of Aurora.

The above offer is subject to the following:

Conditions Precedent

The mining license being transferred to Aurora Empowerment systems.

PGOR are in possession of a new order Mining Rights which will be transferred to Aurora in the event of a section 311 compromise not being pursued.

Aurora task team is allowed full access to all facilities and operations whilst formal DME approvals are in progress. This includes but not limited to shaft inspection by Aurora's designated mining and geological experts, meetings with employees and recruitment of further necessary expertise as well as any other access to ensure the smooth transition.

Aurora being able to formally commence mining operations by not later than 1st November 2009, this due to the fact that any further delays could cause asset quality deterioration which in turn could result in Aurora having to incur additional and unanticipated Capex costs.

JSE approval of the transaction.

Payment Terms

Aurora will raise via a rights issuance and vendor placing in its Johannesburg Stock Exchange (JSE) listed company an amount of ZAR 200 000 000 (Two Hundred Million Rands).

Aurora will pay in cash the amount of ZAR 15 000 000(Fifteen Million Rands).

We also attach a copy of the Standard Bank High Level Due Diligence pack in respect of Pamodzi Gold Limited, which we considered carefully in preparing this offer (Attachment A):

We await your positive reply

Zondwa Gadaffi Mandela

Managing Director'

21. The second bid is couched in largely identical terms as the first. It records that Mr Hulley has been appointed as a non-executive director, but omits the name of Mr Abdullah Belhoul as a non-executive director. It underlines that Aurora is well capitalised to fund the second offer.

22. In the discussion that follows, it must be borne in mind that the first respondent apparently did not participate in the preparation of the bid documents and may have been unaware during the period June 2009 to November 2009 of the serious problems that existed in Aurora's management of the mines from the outset. Where reference is made to 'the respondents' in respect of any occurrence prior to November 2009 the first respondent is not included in that collective.

23. There are several statements contained in the two bid documents that do not represent the true state of Aurora's affairs. Aurora had not acquired any shares in Cenmag and did not control this listed company. Its directors had, without having invested a single cent in the former, concluded a contract for the acquisition of the majority shareholding that was entirely dependent upon funds being provided by outside parties, either in cash or in shares in another company. The statement that this acquisition was '*... in line with the BOD's strategic acquisition program...*' turning the company into a ' *.. global player ...*' is the figment of an overactive imagination. Aurora was hardly doing any business at all at this moment.

24. The further claim that Aurora had acquired ' *the largest saw mill in the Southern hemisphere ...* ' is similarly devoid of factual content. Again, a contract had been entered into without any financial wherewithal whatever and its implementation was similarly dependent upon finding outside investors prepared to fund the transaction. The assertion that Aurora had been '*...propelled into the forefront of global timber supplies...* ' was and remained untrue.

25. Aurora had no strong links to the Gulf States or the Far East and had no share whatever in the global commodities supply. It had no capital at all – other than the sum of R 15 million borrowed by the fourth and fifth respondents from members of their family and the community at about the time Aurora took over the running of the mines. Aurora was unable to invest in any venture, let alone fulfil the promises to keep the work force of the insolvent mines in employment over the short and medium term or maintain the mining operations of the companies that were in dire financial straits. The fact that the first respondent contributed R 35 million at a later stage did not change that position.

26. The statement in the second bid document that Aurora was sufficiently liquid to enter into the transaction was also false. Aurora was in fact already insolvent at that stage.

27. It is necessary to observe in this context that not one of the respondents had any personal experience of mining activities. There is no evidence of any inspection or due diligence that was conducted by the respondents other than to consult Standard Bank's team that assisted the applicants in introducing the mines to the market. Reliance was placed upon the opinion of Mr Stander, who is a mining expert, but not one of the respondents appears to have acquainted himself with the mines themselves other than in the most cursory fashion.

28. The respondents' approach to financing the promises made in the bid documents demonstrates a surprising lack of acumen, insight or care. The statement ' *Aurora will raise via a rights issue and vendor placing in its Johannesburg Stock Exchange (JSE) listed company an amount of ZAR*

200 000 000 (Two Hundred Million Rands) ...' is a far-fetched and factually entirely unwarranted claim. Aurora did not possess or control any listed company at that stage, let alone a listed entity with sufficient equity to attract 200 million Rand on a rights issue. It has remained unexplained on what financial foundation the promise would be realised that the management of the mines would be conducted by Aurora on the basis that profits would be shared equally with the liquidators, while all losses would be carried by Aurora.

29. By the same token it is unclear how the respondents would finance the capital expenditure of at least R 150 million in the short term. The '*Research and Development team of Aurora...*' has also not been identified, nor have any documents, facts or figures been produced that would substantiate the existence and activities of such team.

30. The document further records that large scale – and therefore very costly - socio-economic projects would be undertaken, again without any indication how such funds would be generated other than by investor funds.

31. This investor was said to be AME, allegedly a company based in Malaysia, one of whose directors was Shah, who also served on the Aurora board of directors. AME provided two letters referred to above confirming its intention to provide R 200 million for the acquisition of the Orkney mine and R 350 million for the acquisition and capitalisation of the Pamodzi Gold East Rand operations. Both letters confirmed that the .funds would be made available against a subscription of shares in Aurora or its JSE listed nominee. It has never been disputed that these conditions attached to the offer made by AME. These conditions Aurora, at that stage an empty shell, was patently unable to

fulfil. It is a matter for comment that not a single document evidencing any detail regarding the proposed investment, the manner and fashion of its execution, its terms and conditions, guarantees or particulars of appointments to the board or staff of the intended listed entity has been referred to in the entire saga of Aurora's involvement with the insolvent companies. Apart from Shah having allegedly inspected the mines, AME does not appear to have conducted any investigation into the mines or Aurora's capacity to administer them prior to the letters having been drafted in September and October 2009.

32. As was stated above no funds were forthcoming from AME at all. By the time the liquidators' attorneys sent a letter of demand to AME, serious problems had developed on the mines. There had been two fatalities caused by underground accidents, threatened closure of the mines' entire operation and labour unrest because of shortfalls in the remuneration of the workforce. After having received the attorneys' letter demanding compliance with their undertaking, AME through Shah met with the liquidators and thereafter formally communicated its withdrawal from the project because of Aurora's failure to comply with the conditions to facilitate a rights issue or transfer its shares to the investor. To these alleged breaches were added '*...the poor state of the* (mines') *assets, woeful corporate governance, lack of transparency of financial affairs and integrity of management staff...*' and lack of essential financial information and detailed accounting reports as reasons for AME's refusal to fund the transactions.

33. In the light of the above facts there can be little doubt that AME was fully justified in refusing to commit millions to a project that never progressed from grand dreams to hard fact. The assertions made in the bid documents lacked

any foundation in reality. The respondents committed Aurora to expenditure totalling R 550 million for the acquisition of assets that were at that stage already in serious prolonged financial distress without the company having a single cent to its name. Aurora was insolvent from the moment the offer for the Pamodzi mines was accepted and never emerged from that condition.

34. The respondents either did not appreciate the very grave implications of the offer the directors made, or did not care about the consequences that a fanciful and ill-founded approach to the transaction must have. The lives of thousands of miners and their dependants would and must be directly affected by any agreement entered into concerning the insolvent mines. Other than money lent from the community and funds to the tune of R 35 million contributed after the offer by the first respondent, the respondents and Aurora had nothing to offer the provisional liquidators that could have contributed to the rescue of their insolvent charges. What gold was mined was certainly not enough to fund the operations of the mines and according to the applicants, millions earned by the short-lived production under Aurora's management have been left unaccounted for – although this claim is in dispute.

35. The respondents must have appreciated at all times that they would be unable to meet the conditions AME had set before any funding would be forthcoming. Aurora could never offer any equity in its shares and never controlled a listed entity with sufficient financial muscle to meet the obligations they undertook before the AME deal collapsed. The entire project was and remained a pipedream – with disastrous consequences for many individuals who depended upon the fulfilment of the promises the respondents made without any prospect of being able to keep them.

36. The respondents must have known from the first moment that they would wreak havoc in the miners' lives through their actions, yet they pressed ahead. In doing so they were neither honest in respect of the undertakings made in the bid documents, nor did they act at any stage as prudent and reliable businessmen. Their disregard for the consequences of their actions, both in respect of the insolvent companies and in respect of the mines' workforce, was indisputably reckless.

37. This disregard for the consequences of their actions was demonstrated further when the AME transaction fell through. The third respondent's assertion that none of the respondents ever visited the mines again after March 2010 has never been disputed. Apart from one or two payments made out of first respondent's own resources at the insistence of Solidarity, the workforce was abandoned and left destitute.

38. After the AME transaction fell through the mines went into an accelerated decline. The mines were put into care and maintenance at the end of March 2010. Assets were lost, either by theft, as the respondents would have it, or by unlawful actions on their part, as the applicants allege. The respondents did next to nothing to alleviate the plight of the miners or the continued decay of the mines, other than to attempt to find new funders, without success.

39. The respondents repeatedly state in their answering affidavits, and did so also during argument, that they reasonably expected their efforts to secure funding to come to fruition and that their actions are justified by this reasonable expectation. This argument is fallacious. As has been demonstrated above the respondents could never have been under the impression that they had met the conditions AME had imposed for the funding to be advanced. After

the end of March 2010 the steadily worsening condition of the mines nullified any realistic prospect of finding a financial fairy godmother to supply the funds Aurora had committed itself to invest.

40. The respondents argued that the Shandong Gold transaction was on the verge of being consummated when the applicants cancelled the Aurora contract and that the latter are therefore solely to blame for the failure of the project. Apart from the respondents' say-so there is nothing to support this assertion on the papers. As is the case with all the other transactions that failed, the respondents have presented no supporting affidavit, no documents, no letters, no memoranda of understanding or draft agreements to bolster their stance. Transactions that are entered across borders for millions of Rand are not concluded orally. If Shandong Gold had been seriously interested in Aurora's proposition there would be a paper trail. Absent the same the mere allegation of imminent success cannot be accepted.

41. Had the respondents' approach to concluding the original transaction been reckless – if not fraudulent -, their management of the mines and their inaction after March 2010 to attend to the ever-worsening situation of the mines was no better. Their complete disregard for the consequences of their failure to implement the original transaction is inexplicable other than that they could not care at all about the damage they had caused. They should have – as should the liquidators – acted to limit further losses at the latest by terminating the agreements for the acquisition of the mines no later than March 2010 at the very outside and placing the mines on auction, if no other purchaser could be found.

42. To the above failures must be added the fact that the respondents did not honour the ITCMA agreements at all. They failed to manage the mines properly, they failed to account to the liquidators, they failed to maintain the workforce, they failed to ensure the mines safety – in short, they are guilty of numerous breaches of the agreements.

43. To sum up: The second to fifth respondents are guilty of wilful deception by presenting the bid documents containing numerous false assertions to the liquidators. They are further guilty of reckless management of Aurora's affairs from the inception of the ITCMA agreements to the date of cancellation thereof. The applicants are therefore entitled to the order they seek against them both on the basis of fraudulent misrepresentations in the bid documents and on the grounds of the reckless conduct of the insolvent companies' business, see: *Fourie v Firstrand Bank Ltd and Another NO* 2013 (1) SA 204 (SCA).

44. It should be added that the fourth and fifth respondents made common cause with the second and third respondents in their opposition to the application and never denied that they had been deeply involved in Aurora's management even after the purported cancellation of their contract with the insolvent company. Other than the first respondent they never claimed to be entitled to separate or special consideration on the grounds of having had a lesser degree of involvement with the guiding of the company's affairs than the other directors or managers. The fourth to fifth respondents must therefore be held liable in equal measure as the second and third respondents.

45. The first respondent is in a slightly different position from the other respondents. It is common cause that he was not involved in the day to day

management of Aurora's business. He was not directly involved in the negotiations with the liquidators and was informed from time to time by the other respondents or Hulley about the state of affairs. His position must therefore be judged in the light of his personal circumstances and knowledge of the Aurora affairs: *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (w) at 165F – 166F. It is not suggested, however, that he was not fully informed of the serious problems that developed almost from the outset in Aurora's management of the mines. He must have known of the difficulties that arose toward the end of 2009 and cannot have been unaware of the Department of Minerals and Energy's notice to close down the Grootvlei mining operations in November of that year. It is not disputed that political clout was exercised to have this order ameliorated. The first respondent was clearly one of the two directors who could bring political connectivity to the table and must therefore have known of the crisis that confronted the proposed transaction. In addition, he was prevailed upon to make R 35 million of his own funds available to tide the ailing business over. At least some of these funds were devoted to the payment of security services. He did know, therefore, that the mine assets were at risk It was therefore at the very latest during November of 2009 that he was aware of serious trouble in Aurora's affairs. He participated in the efforts to find new funders once the AME transaction fell through. He has not denied being aware of the increasing volume of negative reports appearing in the media about Aurora's involvement with the insolvent mines. He met with Solidarity's representatives who informed him of the miners' plight, persuading

him to make a contribution to their salaries. He was put upon inquiry at the latest at the end of 2009 and cannot be heard to protest his ignorance of the true situation after that date. His failure to act once he knew of the dire state of affairs is clearly a reckless disregard of his duties as a director. If he really did not know, it is because he deliberately chose not to be informed. Such an approach constitutes recklessness – see *Stone v Cronje, supra,* at 609F to 615J - and the first respondent should therefore be held liable for all losses that were incurred on or after the 1st December 2009.

The report of the inquiry's chairperson

46. The chairperson of the inquiry conducted in terms of sections 417 and 418 held in his report that the first respondent should be exonerated of all liability because of his justifiable ignorance of Aurora's affairs. Not surprisingly, the first respondent adopts the stance that the court should accept this finding. Reliance for the submission that the court should regard itself as bound by the chairperson's finding was placed upon the decision of *Anderson and Others v Dickson and Another NNO (Intermenua (Pty) Ltd Intervening)* 1985 (1) SA 93 (NPD) at 110 I to 111 F. This judgment is not in point as it deals with judicial intervention in the conduct of the inquiry, not with the notion that the chairperson's report could be regarded as binding upon a court of law.

47. The chairperson's report is no more than exactly that – a report, an expression of an opinion on matters that were investigated by the commission of inquiry. It is inadmissible unless it contains *verbatim* evidence given by a witness, against whom such evidence might be admissible. The report is certainly not binding upon a court of law.

48. There is therefore no impediment to a legal conclusion being drawn based upon the evidence presented before the court that differs from the recommendations contained in the inquiry report.

Did the provisional liquidation of the mines cause the loss of the mining rights?

49. The insolvent companies all were holders of mining rights. The first respondent submits that the companies lost these rights upon their provisional liquidation. Reliance is placed in this respect upon section 56 (d) of the Mineral and Petroleum Resources Development Act 28 of 2002 ('MPRDA'), which determines that any right, permit or permission granted or issued in terms of the Act shall lapse upon the holder thereof being '*..liquidated or sequestrated..*'. The same applies in terms of sub-section (c) upon deregistration of a company, see *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 (6) SA 403 (GP); but see *Newlands Surgical Clinic v Peninsula Eye Clinic (Pty) Ltd* [2015] 2 All SA 322 (SCA). Once lost by deregistration, the former case held, the right does not revive upon the company or close corporation being restored to the register. The application of the *ratio* of the Supreme Court of Appeal decision may lead to a different result.

50. It is clear, however, that the Legislature intended the mining right to lapse once a corporate entity or an individual holder's ability to deal with such right was finally terminated. As to the finality of deregistration (if no application is made for restoration to the register) see *Miller and Others v NAFCOC Investment Holding Co Ltd and others* 2010 (6) SA 390 (SCA). It is for this reason that the definition of a 'sequestration order' in section 1 of the

Insolvency Act 24 of 1936; or of a 'winding-up order' in section 1 of the Companies Act 61 of 1973 has not been adopted by the MPRDA. Both the aforesaid acts specifically extend the meaning of the word describing the final demise of the holder's control of his, her or its affairs to the provisional order preceding the relevant individual's, or corporate entity's commercial end. The fact that the law giver has not included a similar definition in the MPRDA is a clear indication that the lapsing of a mineral right only occurs upon final liquidation or sequestration. It is clear that any provision that would cause the loss of a mining right upon the granting of a provisional order of sequestration or liquidation would lead to administrative chaos and could cause severe and irrevocable commercial damage and prejudice to shareholders, employees and creditors alike. No final liquidation or sequestration is granted without prior service of the relevant papers upon the entity concerned, whereas provisional liquidation or sequestration orders being granted upon *ex parte* applications are not uncommon at all. More often than not, these orders are set aside on or before the return day. To allow mining rights to lapse after a provisional order had been granted would invite grave injustice.

51. It is therefore only a final liquidation order that will lead to the loss of a mining right. The applicants as provisional liquidators were therefore the lawful holders of the insolvent companies' mining rights.

Could the provisional liquidators have lawfully transferred the mining right?

52. The first respondent argues that the transfer of the mining rights the companies held could not be effected unless and until the Minister of Minerals and Energy had granted her written consent to such transfer. Absent thereof, the argument runs, there never was any agreement to transfer the mines to

Aurora. The successful transfer of the mining rights is described by the first respondent as a condition precedent which was never fulfilled and hence there never was an enforceable agreement.

53. The clauses that are described as conditions precedent in the bid documents do not support this assertion:

> *The mining license being transferred to Aurora Empowerment systems.*
>
> *PGOR are in possession of a new order Mining Rights which will be transferred to Aurora in the event of a section 311 compromise not being pursued.*
>
> *Aurora task team is allowed full access to all facilities and operations whilst formal DME approvals are in progress. This includes but not limited to shaft inspection by Aurora's designated mining and geological experts, meetings with employees and recruitment of further necessary expertise as well as any other access to ensure the smooth transition.*
>
> *Aurora being able to formally commence mining operations by not later than 1st November 2009, this due to the fact that any further delays could cause asset quality deterioration which in turn could result in Aurora having to incur additional and unanticipated Capex costs.*

JSE approval of the transaction.

54. It is clear that any compromise in terms of section 311 could only be entertained once funding had become available. While funding was still expected to be made available the ITCMA agreements were entered into as an express interim measure. Aurora was appointed a *de facto* contractor in terms of section 101 of the MPRDA.

55. Inasmuch as the consent of the Minister was required for the lawful transfer of a mining right – which stage was never reached in the current saga – it only needed to be given within 60 days after the transfer to a competent holder, a provided for in section 11 (4) of the MPRDA, as amended.

The applicants' claims

56. The applicants rely on two claims that were proved at the first and second meeting of creditors. The enforceability of these claims is disputed by the respondents on the grounds that the claims are illiquid and should not have been admitted to proof at all. In addition, the proposition is advanced that proof of a claim at a meeting of creditors does not in itself establish the validity thereof.

57. The first claim is for the payment of a specific sum of money in respect of gold production that, according to the applicants, was not properly accounted for. As framed in the documents presented for proof of the claim, and accepted by the presiding officer, the claim is certainly liquid. That fact should in itself put an end to the objection against the applicants' *locus standi*. Whether the applicants will be able to prove the full amount of the claim is a different question, but if it is born in mind that section 424 of the old Companies Act 61 of 1973 does not require a creditor to prove any claim in insolvency to invoke the section it is clear that the objection to the recognition of the claim is ill-founded.

58. The second claim based upon the disappearance of the insolvent companies' assets may be difficult to quantify. As is apparent from the facts set out above, however, the assets disappeared on Aurora's watch, which renders the respondents at least *prima facie* liable for the damage, even if it is only on the basis that they failed to protect what had been entrusted to them. The claim, after initially being rejected as illiquid, was compromised by the Aurora liquidators in terms of section 78 (3) of the Insolvency Act 24 of 1936 and duly accepted to be proven, which is the consequence of compromising a claim in

this fashion. There can therefore be no doubt about the fact that the claim is duly recorded as such.

59. This is not the end of the applicants' obligation to establish the *quantum* that they may actually be entitled to. It must be born in mind that they have, for purposes of the present proceedings, sought no more than a declaratory order that the respondents are liable to them for such damages that may be proven at a later stage. As provisional liquidators they are not in the same position as a trade creditor seeking to prove the exact amount of a liability the nature and extent whereof should and would normally be within such creditor's ready knowledge. Hence the trade creditor can validly be expected to be able to prove the exact amount owing and due to her or him in the pursuit of relief in terms of section 424: *Retail Management Services (Edms) Bpk v Schwartz* 1992 (2) SA 22 (W) at 28. The provisional liquidators, even though they represent creditors, are not in the same position and can therefore lawfully defer the quantification of what may be due to them in their representative capacities to later proceedings and seek no further relief than a declaratory order that respondents are liable for damages still to be established later: *Cronje v Stone, supra; Terblanche NO and others v Damji and Another* 2003 (5) SA 489 (C).

60. It was further suggested that the proof of the applicants' claims was tainted because the Aurora liquidators had allowed themselves to be unduly influenced by the applicants and had surrendered their independence, particularly because they accepted the services of Mr John Walker, the attorney acting for the applicants, at the applicants' cost. There exists no factual basis for this allegation. As far as is known, no creditors other than the

applicants have proven claims in the Aurora insolvency. There is no suggestion that Aurora is possessed of any assets. No claims could therefore be endangered, and no creditors' rights could be prejudiced by this agreement. There is no merit in this complaint.

61. It must also be born in mind in this connection that a creditor need not prove a claim at a meeting of creditors at all in order to invoke the provisions of section 424 of Act 61 of 1973, indeed, it is not even necessary to liquidate a company before errant directors and managers can be held accountable for reckless or fraudulent conduct: *Mafeking Mail (Pty) Ltd v Centner (No1) 1995 (4) SA 603 (W).*

The alleged irresoluble disputes of fact

62. There are repeated references in the papers, and it was argued during the hearing, that there existed disputed factual allegations in the affidavits that would prove to be incapable of easy resolution without oral evidence. The conclusions that must be drawn from the chronology summarised in par 16. above proves the contrary. There is no material dispute about the salient facts and occurrences; least of all in respect of Aurora's indubitable insolvency and the root causes thereof: *Gainsford and others NNO v Tanzer Transport (Pty) Ltd* 2014 (3) SA 468 (SCA) at par [22] – [26]. The court experienced no difficulty in coming to the conclusions that were inevitable in the light of the common cause facts.

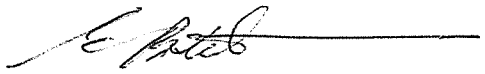
The following orders are therefore made:

1. The second, third, fourth and fifth respondents are declared to be liable, in terms of section 424 of Act 61 of 1973, jointly and severally, in their personal and private capacities, the one to pay, the others to be absolved, for all liabilities which the applicants may be able to establish, incurred by Aurora Empowerment Systems (Pty) Ltd to Pamodzi Gold Orkney (Pty) Ltd; Pamodzi Gold East Rand (Pty) Ltd, Nigel Goldmining (Pty) Ltd, The Grootvlei Proprietary Mines Ltd, Consolidated Modderfontein Mines Ltd and Consolidated Modderfontein Mines 1979 (Pty) Ltd; (all of which are in provisional liquidation);

2. It is further declared that the first respondent is liable, in his personal and private capacity, to the applicants for all of Aurora Empowerment Systems (Pty) Ltd's liabilities to all the companies in provisional liquidation listed in order 1. above, of which the applicants are the provisional liquidators, which liabilities arose on or after 1 December 2009; jointly and severally with the second, third, fourth and fifth respondents, the one to pay, the others to be absolved;

3. The respondents are ordered to pay the applicants' costs, jointly and severally, the one to pay, the others to be absolved. Such costs are to include the costs of two counsel.

Signed at Pretoria on this 25th day of June 2015.



E BERTELSMANN

Judge of the High Court