ARE THE RIGHTS OF BUSINESS EMPLOYEES PREFERRED MORE THAN THE RIGHTS OF DOMESTIC EMPLOYEES?

Gungudoo v Hannover Reinsurance Group (Pty) Ltd (585/11) [2012] ZASCA 83 (30 May 2012) Revisited

1 Introduction

This case note examines, *inter alia*, the effect of a sequestration order on the debtor and relevant stakeholders such as creditors, shareholders and other interested parties (see s 20 read with s 9, 10, 11, 12, 17, 19, 21, 23, 37 and 38 of the Insolvency Act 24 of 1936 (hereinafter "the Insolvency Act"). The case note further discusses certain requirements for the application of a sequestration order in South Africa (s 9, read with s 10–12 of the Insolvency Act) in light of the judgment in *Gungudoo v Hannover Reinsurance Group Africa* ((585/11) [2012] ZASCA 83 (30 May 2012) (hereinafter "*Gungudoo* case"). This case raised some pertinent questions regarding the application and serving of a sequestration order on the debtor, in terms of the Insolvency Act (s 9(4A), 11(2A) and 11(4)). For instance, such questions include first, whether the creditors' or respondents' application for compulsory sequestration was instituted or disputed on reasonable grounds (*Gungudoo* case par 2 and 17–29), and secondly, whether the creditors or respondents had properly notified the debtors' or appellants' employees of the sequestration proceedings in accordance with the Insolvency Act (s 9(4A), 11(2A) and 11(4); and *Gungudoo* case par 33–43). In light of this, the case note explores whether the appellants or debtors' domestic employees were also entitled to be served with a sequestration order. This is done to expose the legislative flaws and other constitutional challenges associated with the judgment in the *Gungudoo* case. To this end, the relevant legislation (such as the Employment Equity Act 55 of 1998 (Employment Equity Act), the Basic Conditions of Employment Act 75 of 1997 as amended (Basic Conditions of Employment Act), and the Labour Relations Act 66 of 1995 as amended (Labour Relations Act)) as well as other related recent cases will be briefly analysed in this article.

2 Overview of the facts

The South Gauteng High Court of Johannesburg (HC) granted a final sequestration order of the joint estate of Shaun (first appellant) and Ayesha Gungudoo (second appellant) who were married in community of property. This occurred after Hannover Reinsurance Group Africa (Pty) Ltd (first

respondent) and Hannover Reinsurance Africa Ltd (second respondent) had filed an urgent sequestration order of the appellants' joint estate upon the respondents' discovery between July and August 2009 that Mr Gungudoo had taken a number of allegedly unauthorised "short positions" in the equity market, which resulted in a loss to the respondents of R9,5 million (*Gungudoo* case par 4). Short sales differ from the usual "long sale" of stocks where an investor buys stock in the expectation that it will increase in value. In a short sale the investor will sell short if he believes that a stock is overpriced and expects its price to decline (*Gungudoo* case par 4). Put differently, short selling is a practice which involves selling securities or assets, such as derivatives by the seller without owning them at the time of the transactions, with the intention of buying them back at a later stage, but at a much lower price (Chitimira "The Inherent Challenges in the South African Anti-Market Abuse Enforcement Framework in Relation to Selected Market Abuse Practices that Occurred During the Global Financial Crisis" 2014 *MJSS* 60–71; and Chitimira "The Regulation of Market Manipulation in Australia: A Historical Comparative Perspective" 2015 18(2) *PER Journal* 112, 118 and 119–134). Accordingly, naked short selling occurs when a seller agrees to short sell a security within a stipulated period without taking prior measures to repurchase it at a later stage (Chitimira 2015 18(2) *PER Journal* 118 and 120).

Usually, the investor identifies an overpriced stock which he does not own and sells it at a higher price before buying it back at a lower price to take advantage of the expected decline in the price of that stock (*Gungudoo* case par 5). The investor facilitates the actual transfer of the stock to the buyer by borrowing the stock temporarily from the owner through a broker. Once the investor is in possession of the stock, he sells it in the market and pays the proceeds of the sale to the lender as collateral. Thereafter, the investor will buy the stock back at an expected lower price than the price for which it had been sold, and returned the stock to the lender, who in turn will repay the collateral (*Gungudoo* case par 5). The difference between the price paid for the stock by the investor and the amount of the repaid collateral represents the investor's profit. Nonetheless, if the share price does not decline as expected, the investor will incur a loss. Accordingly, in the *Gungudoo* case the respondents later uncovered Mr Gungudoo's short selling transactions and decided to close them immediately, but they incurred losses in the process (*Gungudoo* case par 5). Consequently, the respondents confronted Mr Gungudoo about the short selling losses, since he was the Senior Investment Manager of the respondents' Investment Unit responsible for managing the investment assets valued at about R3,4 billion (most of these assets were invested in listed equities and corporate bonds). In other words, Mr Gungudoo was the only person authorised to instruct stockbrokers on these investments (*Gungudoo* case par 5–6). Thereafter, Mr Gungudoo suddenly resigned on 4 August 2009 without prior warning. The respondents' auditors (Deloitte) later identified another potential loss to the second respondent of R23 million, flowing from Mr Gungudoo's alleged misrepresentations to Sanlam Private Investments (Pty) Ltd (*Gungudoo* case par 6).

As a result, the respondents launched semi-urgent proceedings to sequestrate the appellants' joint estate in the HC on 20 August 2009. The

respondents alleged that they had incurred initial losses of R9,5 million, and further claims could still be uncovered, since Mr Gungudoo's affairs were still under investigation (*Gungudoo* case par 7). The respondents also alleged that Mr Gungudoo had without authorisation used their assets to conclude short trading in the equity market for the benefit of his close corporation, called Shaneil (notably, Mr Gungudoo was the only member of this close corporation). Owing to this, the respondents suffered losses of about R41 million. As a result, the respondents successfully launched a semi-urgent application to sequestrate the appellants' joint estate in the HC.

On the other hand, Mr Gungudoo filed his answering affidavit on 30 August 2009 and alleged that his short sale transactions were done with the respondents' authority since 1995. Be that as it may, Mr Gungudoo produced no proof to support his assertion (*Gungudoo* case par 8). Subsequently, the senior managers of the respondents' Investment Committee made affidavits, denying that: (a) the practice of short selling was part of their investment strategy; (b) they were aware that Mr Gungudoo was employing short selling in his trading (*Gungudoo* case par 8).

During the period between January 2007 and June 2009, the respondents discovered that Mr Gungudoo had transferred shares and cash to the value of about R27 million from their brokers, Barnard Jacobs Mellet (BJM) and Sanlam Private Investments (Pty) Ltd (SPI)'s broker accounts to Shaneil close corporation. Furthermore, the respondents uncovered that Mr Gungudoo had used their assets as collateral to conclude short sale transactions for the benefit of his close corporation (see *Gungudoo* case par 10). In addition, the respondents ascertained that Mr Gungudoo had made three other share transfers (such transfers included the shares of Goldfields, Absa and Cape Empowerment companies) from their broker accounts into the accounts of third parties, resulting in a further loss of R16 million (see *Gungudoo* case par 11).

The respondents argued further that Mr Gungudoo concealed the aforesaid share transfers from the Investment Committee by disguising them to look like inter-group business deals, using encryption codes so that it appears that Shaneil close corporation was a public company (Shaneil close corporation was falsely described as a public company by the use of the word "Limited", and its registration number – 97/055477/06 ended with the suffix "06" which is used for public companies; (see *Gungudoo* case par 13–14) or a subsidiary of the respondents. For instance, according to the "securities borrowing agreement" which was obtained from BJM on 18 August 2009, Mr Gungudoo had falsely indicated that Shaneil Financial Management Limited and Compass Insurance Company Ltd were part of the respondents (see *Gungudoo* case pars 11 and 12).

Eventually, the HC granted the final sequestration order in favour of the respondents. Nonetheless, the appellants appealed to the Supreme Court of Appeal (SCA) on the basis that: (a) the creditors or respondents' application for compulsory sequestration was not disputed on reasonable grounds (*Gungudoo* case par 2 and 17–29); (b) the respondents had failed to make out a case for relief in their founding papers; and (c) the creditors or respondents had not properly notified the debtors' or appellants' employees of the sequestration proceedings in accordance with the Insolvency Act (s

9(4A), 11(2A) and 11(4); and *Gungudoo* case par 33–43). These and other concerns raised in the *Gungudoo* case will be briefly discussed under the sub-headings below.

3 Synoptical analysis of the judgment

The decision of the HC to grant a final sequestration order in favour of the respondents was opposed by the appellants in the SCA (however, the appellants did not oppose the fact that they were insolvent). The appellants argued that: first, the respondents' application for compulsory sequestration was not disputed on *bona fide* and reasonable grounds (*Gungudoo* case par 2 and 17–29); second, the respondents had failed to make out a case for relief in their founding papers; and lastly, the respondents had not properly notified the appellants' employees of the sequestration proceedings in accordance with the Insolvency Act (s 9(4A), 11(2A) and 11(4); and *Gungudoo* case par 33–43).

With regard to the second ground, the SCA held that the respondents had successfully indicated in their founding affidavit that they had hastily brought sequestration proceedings against the appellants, after discovering some irregular transactions (*Gungudoo* case par 17). The SCA also held that the respondents had stated in their founding affidavit that further investigations into the appellants' transactions and dealings could uncover more claims (*Gungudoo* case par 17). It is submitted that the SCA correctly decided that the respondents had successfully provided details of additional claims in their replying affidavits which were filed with the leave of the Court. Accordingly, the granting of the provisional and final sequestration orders against the appellants by HC was objectively justified because it relied on the available evidence (see further *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) par 21; and the HC did not require further proof of the appellants' insolvency in terms of s 12(2) of the Insolvency Act, since it was satisfied with the adduced evidence which showed that the appellants were actually insolvent).

On the first ground, the SCA held that the respondents were required only to establish a single claim in excess of R100 in accordance with the Insolvency Act (s 9(1), read with (2); and see further *Gungudoo* case par 18). The SCA further held that the respondents had successfully instituted liquidated claims (*Kleynhans v Van der Westhuizen NO* 1970 (2) SA 742 (A) 749E and 750A–B, where it was held that a liquidated claim occurs when the amount is fixed by agreement or an order of court) involving the misappropriation of cash and shares against the appellants (see *Samsudin v De Villiers Berange NO* [2006] SCA 79 (RSA) par 35, where it was stated that misappropriation of Mitrajaya Holdings Berhad shares had given rise to a delictual claim for damages). On the other hand, it is submitted that the SCA correctly decided that the appellants had failed to adduce and prove facts which could have constituted good defences against all the respondents' liquidated claims on reasonable and *bona fide* grounds (*Helderberg Laboratories CC v Sola Technologies* 2008 (2) SA 627 (C) par 23; and *Gungudoo* case par 18, 14, 16, 27, 28 and 29).

In relation to the third and last ground, the SCA noted that the appellants argued that: (a) the respondents did not serve the sequestration application on the appellants' employees before obtaining the provisional order (this allegedly violated s 9(4A)(a)(ii) of the Insolvency Act; and see further *Gungudoo* case par 30); (b) the respondents did not act in accordance with s 11(2A) of the Insolvency Act by neglecting to notify the appellants' employees of the extensions and the actual return day of the provisional order (see Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* (2012) 53–59, for further discussion on the meaning and application of rule *nisi* and the provincial and/or final sequestration order in South Africa; and see further *Gungudoo* case par 30); (c) the respondents did not ensure that the sheriff of the HC had complied with his obligation to establish whether the employees were represented by any trade unions, and if there was a notice board inside the appellants' premises for the purposes of complying with section 11(4) of the Insolvency Act. In a nutshell, the appellants argued that the failure on the part of the respondents to comply with all the aforesaid peremptory provisions of the Insolvency Act nullified both the provisional and final sequestration orders that were granted against them by the HC (*Gungudoo* case par 30 and 31). To this end, these and other related arguments are briefly discussed below.

The appellants argued that their seven employees (one security guard, two other security guards who are also drivers, three domestic workers and a bookkeeper-administrator) were not served with both the provisional and final orders for the sequestration of the appellants' joint estate (*Gungudoo* case par 31 and 33). Each of these employees filed affidavits confirming their employment with the appellants. However, none these employees provided any interest in the sequestration proceedings, or claimed to be employed in any business of the appellants (*Gungudoo* case par 31).

Therefore, it is prudent to determine whether the relevant provisions of the Insolvency Act (see s 9(4A)(a)(ii), 11(2A) and 11(4)) also applied to the stated employees of the appellants (*Gungudoo* case par 31 and 33). It is further important to investigate whether the aforesaid provisions were peremptory or directory in nature (*Gungudoo* case par 31 and 33). Section 9(4A)(a)(i) and (ii) of the Insolvency Act provides that:

> "the petitioner must furnish a copy of the petition – (i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and (ii) to the employees themselves – (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or (bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition".

The SCA held that the aforesaid section was introduced in order to require the petitioner to provide a notice to the relevant registered trade union and the debtor's employees before a provisional order is granted (notably, s 9(4A) was introduced by s 2 of the Insolvency Second Amendment Act 69 of 2002 (Insolvency Second Amendment Act); and *Gungudoo* case par 34 and 35). Moreover, the SCA held that section 11(2)(A) of the Insolvency Act requires that a copy of the rule *nisi* should be served on the relevant trade

union and employees of the debtor. Likewise, section 11(4) of the Insolvency Act, provides that the sheriff is obliged to establish whether the employees are represented by a registered trade union and to determine whether there is a notice board inside the employer's premises to which the employees have access when serving the rule *nisi* (notably, s 11 was substituted by s 3 of Insolvency Second Amendment Act; and *Gungudoo* case par 34 and 35). Notwithstanding the possible wide application of the aforesaid provisions, the SCA held that these provisions applied only to employees who are employed in the business of the employer (business employees; and *Gungudoo* case par 41). The SCA also held that the appellants' submission that the respondents failed to comply with section 9(4A), 11(2A) and 11(4) of the Insolvency Act did not invalidate both the provisional and final sequestration orders that were granted against the appellants by the HC (*Gungudoo* case par 41). Furthermore, the SCA held that the appellants' argument that section 9(4A), 11(2A) and 11(4) of the Insolvency Act are peremptory, and not directory, need not be considered (*Gungudoo* case par 42). The SCA also held that the provisions of the Insolvency Act, as amended (s 9(4A), 11(2A) and 11(4)), and the Companies Act 61 of 1973, as amended (hereinafter "the Companies Act 1973"); and see s 346(4A) which was introduced by s 7 of the Insolvency Second Amendment Act, as well as s 346A which was introduced by s 8 of the Insolvency Second Amendment Act) requiring a notice to be given to the company's employees only before the provisional sequestration order and/or the service of the winding-up order is granted on such employees respectively (*Gungudoo* case par 35).

The term "employee" is broadly defined to include: "(a) any person, excluding an independent contractor, who works for another person or for the State, and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer ..." (s 213 of the Labour Relations Act 66 of 1995 as amended (LRA); and *Sibiya v Amalgamated Beverages Ltd* (2001) 22 ILJ 961 (LC)). A similar definition is provided in section 1, read with section 83A of the Basic Conditions of Employment Act 75 of 1997, as amended (Basic Conditions of Employment Act), and section 1 of the Employment Equity Act 55 of 1998, as amended (Employment Equity Act). The LRA requires an employer who is facing financial difficulties that may result in sequestration or winding-up to notify a consulting party (see s 197B read with s 189(1) of the LRA; and notably, s 197B was introduced by s 50 of the Labour Relations Amendment Act 12 of 2002). The term "consulting party" is not defined in the LRA. Nonetheless, the SCA held that this term refers to business employees, since section 189(1) of the LRA provides for aspects of operational requirements, dismissals, collective agreements and workplace forums which are usually associated with such employees, rather than domestic employees (*Gungudoo* case par 36–38). The SCA also stated section 346(4A) and 346A of the Companies Act 1973 (*Hendricks NO v Cape Kingdom (Pty) Ltd* 2010 (5) SA 274 (WCC); Meskin *Henochsberg on the Companies Act* (1994) 724) and s 9(4A)(a)(i), (ii)(aa) and (bb), and 11(2A)(a), and (b) of the Insolvency Act applied only to business employees (*Gungudoo* case par 39–40). No similar provisions are provided for in the Companies Act 71 of 2008 (see s 79–82 of the Companies Act 2008).

Notwithstanding the fact that the terms "petition" and "employee" are not defined in the Insolvency Act, except for the definition contained in section 98A(5) of the same Act (see s 2), it is submitted that the SCA erred by narrowly interpreting the term "employee", and excluding other categories of employees such as domestic employees. It is further submitted that the definition of "employee" contained in the LRA, the Basic Conditions of Employment Act and the Employment Equity Act are wide enough to include other categories of employees, such as domestic employees of any employer (accordingly, the seven employees of the appellants should have been regarded as "employees" for the purposes of the Insolvency Act, s 9(4A), 11(2A) and 11(4)). Put differently and despite the fact that the seven employees were not employed in the appellant's business operations *per se* (*Gungudoo* case par 41), it is suggested that the SCA should have indicated that the respondents were obliged to notify these employees of the sequestration proceedings in accordance with the Insolvency Act (see s 9(4A), 11(2A) and 11(4), read with s 10; and *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) par 14 and 27). It is also submitted that the SCA erred by failing to treat the provisions of the Insolvency Act (s 9(4A), 11(2A) and 11(4)) as peremptory provisions (*Gungudoo* case par 42). In other words, the SCA should have investigated whether the relevant provisions of the Insolvency Act were fully complied with by the respondents before dismissing the appellants' application to have the decision of the HC set aside. This approach was recently followed in *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* (2015 (2) SA 526 (hereinafter "*EB Steam* case"); and see par 7 and 9), where the SCA held that a proper service of a final winding-up order should be provided to all the relevant employees in terms of section 346(4A) of the Companies Act 1973 (Ndou "Keeping Employees in the Loop" 2015 *Without Prejudice* 16 16–17). The SCA also held that the provisions of section 346(4A) of the Companies Act 1973 were peremptory, and the Court will not grant a final winding-up order if such provisions are not complied with by the relevant parties (*EB Steam* case par 7 and 9; Ndou 2015 *Without Prejudice* 16–17; also see related comments in *Maharaj v Rampersand* 1964 (4) SA 638 (A) 646C–D; *Hendricks v Cape Kingdom* 2010 (5) SA 274 (WCC) par 38 and 45; and *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) par 4).

Nonetheless, it is prudent to note that different views and approaches have been adopted in various South African courts to date, regarding the question of whether or not the relevant provisions of the Insolvency Act are of peremptory or directory nature (for instance, see *Nkisimane v Santam Insurance Co Ltd* 1978 (2) SA 430; (A) 433H–434E; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) par 13; *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) par 22; *S v Mthimkhulu* 2013 (2) SACR 89 (SCA) par 9; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 18; *Chiliza v Govender* 2013 (4) SA 600 (KZD) par 1, 10, 11 and 13; and *Stratford v Investec Bank Limited* (CCT 62/14) [2014] ZACC 38 (hereinafter "*Stratford* case")). Some authors also argue that the service of the petition on the South African Revenue Service (SARS) is peremptory, while the requirement for the service of the provisional sequestration order is not peremptory (Smith *Annual Survey of South African Law* (2013) 591–593). Moreover, it is

submitted that section 12 of the Insolvency Act does not require the courts to consider the non-service of the provisional sequestration order when determining whether or not to grant the final sequestration order (Smith *Annual Survey* 591–593; also related discussions by Magid *et al Meskin: Insolvency Law and Its Operation in Winding-Up* (1990) loose-leaf par 5.20; and Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) par 9.1). However, despite these divergent views, it is submitted that the SCA erred in the *Gungudoo* case by excluding domestic workers from the scope of the definition of employees that are required to be served with both the provisional and final sequestration orders as stipulated in the Insolvency Act (s 9(4A), 11(2A) and 11(4); and *Gungudoo* case par 41–42).

4 Evaluation of legislative and constitutional implications

It is submitted that the approach employed by the SCA in the *Gungudoo* case has some negative legislative and constitutional implications on the meaning and application of both the provisional and final sequestration orders in South Africa.

4 1 Evaluation of legislative implications

With regard to legislative implications, it is submitted that the verdict in the *Gungudoo* case was incorrect in as far as it overlooked, or removed domestic employees from the scope and application of the Insolvency Act (see s 38, read with s 9(4A), 11(2A) and 11(4); and *Gungudoo* case par 41–42). Put differently, despite the fact that the term "employee" is not expressly defined in the Insolvency Act, it is submitted that the SCA in the *Gungudoo* case erred by failing to consider that the wording of some provisions of the Insolvency Act refers to all employees, including domestic employees (see s 38, read with s 9(4A), 11(2A) and 11(4); and *Stratford* case par 32–34). Accordingly, it is suggested that the Insolvency Act should be amended in order to enact an adequate definition of the term "employee" that applies to all the categories of employees. Although section 12 of the Insolvency Act does not expressly require the courts to consider the non-service of the provisional sequestration order when determining whether or not to grant the final sequestration order (see earlier remarks in par 3 above), it is suggested that the SCA in the *Gungudoo* case erred by failing to interpret the relevant provisions of the Insolvency Act as peremptory in nature (see s 38, read with s 9(4A), 11(2A) and 11(4); and *Stratford* case par 38–40).

It is also submitted that the verdict in the *Gungudoo* case was grossly inadequate and incorrect since it failed to interpret the relevant provisions of the Insolvency Act in light of other related provisions of other legislations, such as the LRA, the Basic Conditions of Employment Act and the Employment Equity Act. In other words, as earlier stated (see par 3 above), the SCA in the *Gungudoo* case should have noted that the definitions of the term "employee" which are contained in the LRA (s 213, read with s 78), the Basic Conditions of Employment Act (s 1 read with s 83A), and the Employment Equity Act (s 1) are applicable to all the categories of employees. It is also argued that the verdict of the SCA in the *Gungudoo*

case discriminated against the rights of domestic employees, and violated the relevant provisions of the LRA (see s 7). Nonetheless, some provisions of the LRA that relate to the employees' right to receive relevant information (disclosure of information, see s 16 of the LRA) from their employers do not apply to domestic employees (s 17 of the LRA). This flawed *status quo* in the LRA could have negatively influenced the verdict of the SCA in the *Gungudoo* case (see par 35–38 and 41–42).

It is further submitted that the verdict of the SCA in the *Gungudoo* case (see par 35–38 and 41–42) violated the relevant provisions of the Basic Conditions of Employment Act (s 78 and 79, read with s 30) that outlaws discrimination in the various rights of all the employees in South Africa. Likewise, the verdict of the SCA in the *Gungudoo* case (see par 35–38 and 41–42) violated the relevant provisions of the Employment Equity Act (s 5 and 6 read with s 51) that prohibits the unfair discrimination of employees, by excluding domestic employees from the scope of application of the Insolvency Act (see s 38 read with s 9(4A), 11(2A) and 11(4)). Moreover, the verdict of the SCA in the *Gungudoo* case (see par 35–38 and 41–42) violated the relevant provisions of the Employment Equity Act (ss 18 and 25) that entitles all employees (including domestic employees) to receive adequate relevant information in relation to their employment or employer to enable them to make informed decisions. Accordingly, it is submitted that the SCA in the *Gungudoo* case should have considered the basic principles of statutory interpretation which, *inter alia*, stipulate that, when interpreting any statute, the words in a statute, must be given their ordinary grammatical meaning unless doing so could result in an absurdity (*Stratford* case par 20). It is further submitted that the SCA in the *Gungudoo* case should have interpreted the relevant provisions of the Insolvency Act (s 9(4A), 11(2A) and 11(4)) purposively and contextually to avoid any discrepancies on part of the domestic employees (*Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (hereinafter "*Cool Ideas* case") par 28).

4 2 Evaluation of constitutional implications

Notably, the decision of the SCA in the *Gungudoo* case (see par 35–38 and 41–42) in relation to section 9(4A), 11(2A) and 11(4) of the Insolvency Act was only applicable to business employees. It is submitted that this flawed approach violated some constitutional rights of the domestic employees who were excluded from the scope of application of the Insolvency Act (see s 38 read with s 9(4A), 11(2A) and 11(4); *Gungudoo* case par 35–38 and 41–42; and *Stratford* case par 18–34 and 38–40). Such rights include, *inter alia*, the right to equality (s 9 of the Constitution of South Africa, 1996 (hereinafter "the Constitution"), the right to dignity (s 10 of the Constitution); the right to fair labour practices (s 23 of the Constitution) as well as the right to have access to courts (s 34 of the Constitution).

The Constitution is the supreme law of land and any conduct, law or interpretation of the law which is not consistent with the Constitution is invalid (s 2 of the Constitution). Moreover, it is stated that the State (including all the organs of the State) must respect, protect, promote and fulfil the rights in the Bill of Rights (s 7(1) and (2) of the Constitution).

Likewise, the Constitution stipulates that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (s 39(1) and (2)). In light of this, the discussion below unpacks whether or not the decision in the *Gungudoo* case was held in accordance with the Constitution.

It is submitted that the SCA's narrow interpretation of the relevant provisions of the Insolvency Act (s 9(4A), 11(2A) and 11(4)) in the *Gungudoo* case indirectly discriminates against domestic employees and violates their right to dignity (s 10 of the Constitution; and *Stratford* case par 9, 10 and 16, read with par 18–34 and 38–40). The Constitution obliges all the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation (s 39(1) and (2)). In this regard, the SCA in the *Gungudoo* case should have interpreted the relevant provisions of the Insolvency Act (s 9(4A), 11(2A) and 11(4)) in accordance with the Constitution (*Stratford* case par 19), or adopted any other reasonable interpretation that promotes the spirit, purport and objects of the Bill of Rights (s 39(1) and (2)). Moreover, it is argued that there is an inter-relationship between the right to dignity and one's identity and/or work (*Affordable Medicines Trust v Minister of Health of RSA* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) par 59 (hereinafter "*Affordable Medicines* case"); and *Stratford* case par 19, 22 and 35). Consequently, it is submitted that the narrow interpretation of the term "employee" by the SCA in the *Gungudoo* case negatively affected the domestic employees' identity and right to dignity (s 10 read with s 39(1) and (2) of the Constitution).

The decision of the SCA in the *Gungudoo* case (par 35–38 and 41–42) also negatively affected the domestic employees' right to equality (s 9 of the Constitution). This decision also discriminated against domestic employees by denying them a chance to exercise their right to be treated equally before the law and/or to have equal protection and benefit of the law in South Africa (s 9 of the Constitution; and *Stratford* case par 9 and 16).

It is further submitted that the decision of the SCA in the *Gungudoo* case (par 35–38 and 41–42) infringed upon the domestic employees' right to fair labour practices (s 23 of the Constitution), and the right to have access to courts (s 34 of the Constitution). In other words, the failure on the part of the SCA in the *Gungudoo* case to consider the rights of the domestic employees in its final verdict deprived such employees of their opportunity to find alternative jobs, seek legal recourse in the courts and/or make other alternative arrangements (*Stratford* case par 9, 16, 34 and 37; *Berrange v Hassan* 2009(2) SA 339 (N) 353; and De Clercq *et al Insolvent Estates* (2011) 33).

5 Concluding remarks

In light of the decision in the *Gungudoo* case (pars 35–38 and 41–42), it is clear that when the courts interpret the provisions of any legislation, or make any decision, they must do so in accordance with the Constitution (s 39(1) and (2); and see par 3 and *4 2* above). Put differently, the SCA in the *Gungudoo* case should have adopted a reasonable interpretation that

promotes the spirit, purport and objects of the Bill of Rights (s 39(1) and (2)). It was also noted that, when interpreting the provisions of the Insolvency Act, the courts should consider the relevant provisions of other related legislation (see par 3 and *4 1* above). In this regard, it was noted that the verdict in the *Gungudoo* case was grossly inadequate and flawed because it failed to interpret the relevant provisions of the Insolvency Act in light of other related provisions of other legislations such as the LRA, the Basic Conditions of Employment Act and the Employment Equity Act (see related remarks in par *4 1* above). It was further stated that the decision of the SCA in the *Gungudoo* case (par 35–38 and 41–42) discriminated against the domestic employees' rights to equality (s 9 of the Constitution), dignity (s 10 of the Constitution); fair labour practices (s 23 of the Constitution) and access to courts (s 34 of the Constitution; and see as well related remarks in par *4 2* above).

Given this background, it is submitted that the SCA in the *Gungudoo* case (par 35–38 and 41–42) should have interpreted the relevant provisions of the Insolvency Act (s 9(4A), 11(2A) and 11(4)) in light of the Constitution, related legislation and other relevant cases, such as the *EB Steam* case (par 7 and 9) and the *Stratford* case (par 9, 10 and 16, read with par 18–34 and 38–40), to avoid indirectly preferring one class of employees (business employees) over the other class of employees (domestic employees).

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