REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **23968/2015**

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

Date: **WHG VAN DER LINDE**

In the matter between:

Constantia Insurance Company Limited	**Applicant**
And	
Master of the High Court, Johannesburg	**First Respondent**
Van den Heever, Willem Theodore, N.O	**Second Respondent**
Koka, Jerry Sekete, N.O	**Third Respondent**

Judgment

Van der Linde, J:

Introduction

[1] This is an application for declaratory orders to the effect that the Master of the High Court has no power to consider a response by a liquidator to a creditor's substantiation of its claim in terms of s.45(3) of the Insolvency Act 24 of 1936, in response to a liquidator's report to the Master under that section, after the second meeting of creditors[1] of Protech Khuthele Property Investments (Pty) Ltd (in liquidation),[2] when the Master is considering whether to reduce or disallow the creditor's proven claim.

[2] The background and the parties' competing contentions is as follows. The applicant is a creditor in the insolvent estate for which the second and third respondents ("the liquidators"[3]) have been appointed as provisional liquidators.[4] At the second meeting of creditors, the applicant proved three claims against the Protech estate. Thereafter, on 14 January 2015, the liquidators reported to the Master in terms of s.45(3) of the Insolvency Act that they disputed the applicant's claim, and advanced reasons for so disputing the claim.[5]

[3] The Master, as she was obliged to do under s.45(3) of the Insolvency Act if she were minded to reduce or disallow the applicant's claim, on 5 February 2015 afforded the applicant an opportunity to substantiate its claim and, to that end, provided the applicant with the report, and gave the applicant an opportunity to respond to it.[6] This the applicant did on 19 February 2015.[7]

[4] The Master then, without there being express provision for it either in the Insolvency Act, or in the Companies Act 61 of 1973, or the winding-up regulations made under that Act,

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[1] Held on 1 December 2014.

[2] Wound up by order of Masipa, J on 16 September 2014 for inability to pay debts.

[3] Actually, joint provisional liquidators appointed on 10 September 2014.

[4] Included in the answering affidavit is a request by the liquidators at paragraph 5 that the court authorises their opposition in terms of sections 387(3) and 386(5) of the Companies Act 61 of 1973, since they did not obtain permission form either the creditors or the Master.

[5] FA3, pages 23 to 40, i.e. 17 pages long.

[6] Page 41.

[7] FA5, pages 42 to 61, i.e. 19 pages long.

provided the liquidators with a copy of the applicant's substantiation of its claim, and afforded the liquidators an opportunity to respond to it.

[5] This the liquidators did by furnishing a voluminous response two months later on 24 April 2015.[8] In it, according to the applicant, they raised new matter that had not been dealt with before by either the applicant or the liquidator. The Master then invited the applicant on 7 May 2015 to deal with this second document emanating from the liquidators.[9] The applicant declined, saying that the Master had no power to invite that response, and in turn the liquidators no power to accept the invitation.[10]This attitude led to further exchanges, the liquidators contending that the Master is entitled to ask for clarification or comment,[11]the Master contending that she will consider "all relevant information",[12]and the applicant then launching the application.

[6] The applicant's argument focusses on the scheme of the Insolvency Act and sections 44 and 45 in particular. It submits that the principle of *audi alteram partem* (hereafter "*audi*") does not apply in the present matter, for two reasons. First, the liquidators are not persons who are potentially affected by the decision to be taken by the Master; and second, in any event, *audi* does not permit the filing of a document that the Act does not permit.[13] It contends that sections 44 and 45 of the Act envisage a speedy procedure to get the winding up process under way, and rely amongst others, Caldeira v The Master and Another for this proposition.[14] The applicant submits that there is no provision, certainly not expressly and not by implication either, that warrants any further exchanges between the parties. The Master must make her decision on the basis only of the liquidators' initial report and the applicant's response to it, according to its submission.

[8] FA6, pages 62 to 456, i.e. 394 pages long.
[9] FA 7, page 457.
[10] FA 8, pages 458, 459.
[11] FA 9, page 460.
[12] FA 10, page 461, and the
[13] Applicant's heads, paragraphs 29, 30, and 33.
[14] 1996(1) SA 868 (N) at 874F.

[7] The liquidators accept that there is no express provision for the exchanges beyond the liquidators' report and the subsequent creditor's substantiation. But they say that the legislation here assigns a quasi-judicial function to the Master; that unless excluded expressly or by necessary implication, *audi* applies to s.45(3);[15] that there was, compliant with that principle, nothing preventing the Master from inviting from the liquidators a response to the applicant's submission; that there was, *a fortiori*, nothing preventing the liquidators from accepting that invitation; and that, by the same token, there was nothing preventing the Master from inviting the applicant to respond to the liquidators' response.

[8] Before attempting to resolve these competing contentions, it is necessary to set out the relevant legislative framework and also, briefly, the transformation of the concepts of legitimate expectation and *audi* from common law to constitutional law. This is necessary for two reasons. First, administrative law is now virtually completely fused with constitutional law,[16] but neither the applicant nor the respondents relied on or referred to section 33 of the Constitution or to the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[9] Second, in the post-constitutional era the interpretation of legislation, including pre-constitutional legislation, has become centrally informed by the Constitution and the values that found it.[17]The general overarching principle remains that words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity. But now, statutory provisions must be interpreted purposively; they must be properly contextualised; and all statutes must be construed consistently with the Constitution.

[10]The point has relevance when one considers whether the pre-constitutional statutes ought to be interpreted according to pre-constitutional norms pertaining to the absence or

[15] Here they rely on National Director of Public Prosecutions and Another v Mohamed NO and Ohers, 2003 (4) SA 1 (CC) at paragraph 48. See the respondents' heads of argument, paragraph 1.
[16] See Cora Hoexter, Administrative Law in South Africa, 2nd ed, page 29, footnote 179. The authors says that there remains only a carve-out for the review of the decisions of private bodies.
[17] Cool Ideas 1186 CC v Hubbard and Another, 2014(4) SA 474 (CC) at paragraph [28].

presence of *audi*, or whether one simply looks to section 33 of the Constitution and its semi-codification in the Promotion of Administrative Justice Act 3 of 2000 for an answer to the question whether in given circumstances *audi*, or fair procedure, applies.[18]

The legislative background

[11]Sections 44 and 45 of the Insolvency Act provide as follows (emphasis supplied):

"44. ***Proof of liquidated claims against estate***

(1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

(2) deleted by Act 101 of 1983.

(3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: Provided that the rejection of a claim shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of section seventy-five; and provided further that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that

[18] This is not to suggest that the two positions need always, or even only sometimes, be juxtaposed. They could conceivably be conflated by appropriate interpretation.

meeting the affidavit and other documents mentioned in sub-section (4), he shall be deemed to have tendered proof of his claim at that meeting.

(4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty-three, the amount at which he values the security. The said affidavit or a copy thereof and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than twenty-four hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidences of his claim within the prescribed period: Provided that if a creditor has proved an incorrect claim, he may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose, correct his claim or submit a fresh correct claim.

(5) Any document by this section required to be delivered before a meeting of creditors at the office of the officer who is to preside at that meeting, shall be open for inspection at such office during office hours free of charge by any creditor, the trustee or the insolvent or the representative of any of them.

(6) A claim against an insolvent's estate for payment of the purchase price of goods sold and delivered to the insolvent on an open account shall not be admitted to proof unless a statement is submitted in support of such claim showing the monthly total and a brief

description of the purchases and payments for the full period of trading or for the period of twelve months immediately before the date of sequestration, whichever is the lesser.

(7) The officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.

(8) If any person who wishes to prove or who has at any time proved a claim against the estate is absent from a meeting of creditors the officer who presided or who presides thereat, may summon him in writing to appear before him at a place and time stated in the summons, for the purpose of being interrogated by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, and if he appears in answer to the summons the provisions of sub-section (7) shall apply.

(9) If any such person fails without reasonable excuse to appear in answer to such summons or having appeared or when present at any meeting of creditors refuses to take the oath or to submit to the said interrogation or to answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected.

(Section 44(4) substituted by section 15 of Act 16 of 1943)

(Section 44(3)(4) and (6) substituted by section 11 of Act 99 of 1965)

(Section 44(2) deleted by section 4 of Act 101 of 1983)

45. ***Trustee to examine claims***

(1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.

(2) The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.

(3) <u>If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law</u>, but subject to the provisions of section seventy-five."

[12] By virtue of s.66 of the Close Corporations Act 69 of 1984, the laws mentioned or contemplated in item 9 of schedule 5 of the Companies Act, 71 of 2008, apply to the liquidation of a close corporation. The said item 9 of schedule 5 provides that chapter 14 of the old Companies Act continues to apply to the winding-up and liquidation of companies. Regulation 18 of the regulations made for the winding-up and judicial management of companies, published under GN R2490 in *GG* 4128 of 28 December 1973, and with reference to the Companies Act 61 of 1973 (the previous Companies Act) provides as follows:

*"18. **Claims disputed by liquidator**.—<u>A liquidator, who under section 45 (3) of the Insolvency Act, 1936 (Act 24 of 1936), read with section 339 of the Act, disputes a claim, shall furnish to the Master in duplicate the reasons for disputing the claim and shall at the same time—</u>*

<u>(a) forward a copy of the said reasons to the creditor and request him to furnish his reasons to the Master within 14 days or such longer period as the Master may on application allow, why his claim should not be expunged or reduced</u>; and

(b) report to the Master in writing the steps taken by him in this regard."

[13] As will have been seen above, there is no provision, neither in s.45(3) of the Insolvency Act, nor in regulation 18 the winding-up regulations, for further submissions to the Master by either the liquidator or the creditor, beyond the one each for which s.45(3) of the Insolvency Act provides.

[14]The liquidators argue however that, since the principle of *audi* inheres in our legislative order, including the Insolvency Act, and despite there being no express provision for the further submissions that they have made to the Master, and that the Master has now invited the applicant to make, the *audi* principle, if it does not compel these, at the very least permits them and certainly does not preclude them. According to the liquidators, since the Master's decision is of a quasi-judicial nature their right to be heard permits these further steps.

<u>*Audi alteram partem* and legitimate expectation</u>

[15] The liquidators' argument is an extension of the classic presentation of the *audi* principle in our law, developed as it was in Administrator, Transvaal and Others v Traub and Others.[19] The development in Traub was the infusion into our pre-constitutional law of the concept of *"legitimate expectation."* Before this infusion, the state of our law on *audi* was that where a statute empowered a public official to make a decision of a quasi-judicial nature that could potentially affect the rights or liberties of an individual prejudicially then, unless *audi* was expressly or by implication excluded, the individual had the right to be heard.[20]

[16]Traub changed this position. First, it held that the right to be heard was not limited to the case where the individual could potentially be affected in her existing rights or liberties. Corbett, CJ referred to local provincial division decisions that had, on the authority of English law development, imported the legitimate expectation extension into our law. The learned

[19] 1989 (4) SA 731 (AD).
[20] Cabinet for the Territory of South West Africa v Chikane and Another, 1989 (1) SA 349 (A) at 379G.

judge held that there was a need in this country for such a development.[21] Thus the Appellate Division introduced into our Administrative Law the doctrine that an individual was entitled to be heard before an administrative decision was taken in respect of which, in the particular circumstances of the case, she had a legitimate expectation of being heard.[22]

[17]Traub went further. It held that the entitlement or otherwise to *audi* was not dependent on whether the nature of the administrative act was judicial, quasi-judicial or purely administrative, as was conventionally the case.[23] Specifically, in the pre-Traub era the *audi* principle was applied only the first two cases; not the third. The learned judge held that that distinction was unhelpful and had in any event been rejected in its country of origin. He held instead that *"… the Court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned."*[24]

[18] The doctrine of legitimate expectation has, since its reception here, carried with it a duality: it was whether the doctrine meant only that it applied to afford the individual the right to be heard; or whether it applied also to afford the individual a positive outcome of the hearing. Despite persistent pressure for its extension to incorporate also the second aspect, this has not occurred. A recent authoritative and pointed identification of where it fits appears in a footnote of a judgment by Cameron, J in the Constitutional Court:[25] *"The current position in our law is that where a party has a legitimate expectation he or she is entitled to procedural fairness. That is, an opportunity to be heard before an adverse decision is made. Our courts have expressly left open the question whether a legitimate expectation may give rise to a substantive benefit. See for example Bel Porto School Governing Body and Others v Premier*

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[21] At page 761E.
[22] It is also, perhaps more simply, put as follows: *"Is there any particular reason why fairness would require someone to be given a hearing before a decision is made in a particular case?"* See Cora Hoexter, op cit, page 395 in fin, 396.
[23] At page 762F.
[24] At page 763I.
[25] Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others, 2013 (4) SA 262 (CC), at footnote 7. See also the discussion of this judgment by M Murcott in 2015 PER, vol 18, no 1, *"A Future for the Doctrine of Substantive Legitmate Expectation? The Implications of Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal."*

of the Western Cape Province and Another [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 96 and South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) at para 15. For a detailed discussion of substantive legitimate expectation see Duncan v Minister of Environmental Affairs and Tourism and Another 2010 (6) SA 374 (SCA) at para 13."

[19] As Cameron, J points out legitimate expectation in our law may take the form of so-called procedural legitimate expectation, or substantive legitimate expectation. In the case of the former, the expectation is that one will be heard before a potentially prejudicial decision will be taken. In the case of the latter, the expectation goes further; it is not only that one will be heard before the potentially prejudicial decision will be taken, but also that the decision will be favourable.[26] At present then, our law acknowledges the former, not the latter.

[20] If the doctrine of legitimate expectation served, pre-Constitution, to extend the circumstances in which *audi* was to find application, did the advent of a constitutional democracy and with it the fundamental right to just administrative action[27] so vindicate the doctrine that its raison d'être fell away?

[21]On the contrary, ss.3(1) and 3(2)(a) of the national legislation expressly anticipated by s.33(3) of the Constitution, PAJA, expressly provide (emphasis supplied):

3(1) *"Administrative action which materially and adversely affects the rights <u>or legitimate expectations</u> of any person must be procedurally fair.*

[26] See generally, Cora Hoexter op cit page 426, sub nom *"Procedural and substantive legitimate expectations."*

[27] S.33(1) of the Constitution of the Republic of South Africa, 1996: *"**33. Just administrative action***
(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration."

3(2)(a) A fair administrative procedure depends on the circumstances of each case." Consequently, Cora Hoexter predicts that the *"… popularity of the legitimate expectation doctrine is unlikely to wane in future…"*.[28]

[22] The advent of the Constitution and PAJA initially raised the question whether the common law of the review of administrative action continued to exist side by side with the new constitutional administrative law; and the Supreme Court of Appeal held that it did.[29] The Constitutional Court rejected this notion, explaining that there is one system of law, all aspects of which derived its force from the Constitution.[30]

[23] It is thus now well accepted that s.33 of the Constitution incorporates and expands common law principles of administrative law. It is also accepted that PAJA is the indicated vehicle for the enjoyment and enforcement of the constitutional entitlement to just administrative action.[31] There is thus one system of law; and therefore one system of administrative law which, leaving aside the principle of legality, is currently codified in PAJA. The principle of *audi alteram partem*, and with it its embodiment of fair process, reposes within PAJA. In my view it is therefore unhelpful to go down the path of enquiring whether s.45(3) of the Insolvency Act excludes *audi alteram partem*.

[24] It is necessary now to consider the process established by s.45(3) of the Insolvency Act, whether PAJA applies to it, and if so what the effect is for the present case.

[25]Ss.3(1) and 3(2)(a) of PAJA have been quoted above. *"Administrative action"* is defined in PAJA. One may accept that the Master, when acting under s.45(3), is an organ of state which exercises a public power or performs a public function which adversely affects the rights of a person, and has a direct, external, legal effect. The first question that arises here is whether the liquidators' rights are affected.

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[28] Cora Hoexter op cit, page 421.

[29] Commissioner of Customs and Excise v Container Logistics (Pty) Ltd, 1999(3) SA 771 (SCA).

[30] Pharmaceutical Manufacturers Association of SA and Another: in re Ex Parte President of the Republic of South Africa and Others, 2000 (2) SA 674 (CC) at paragraph 44.

[31] Bato Star v Minister of Environmental Affairs, 2004 (4) SA 290 (CC) at paragraph 22; Pharmaceutical Society of South Africa v Tshabalala-Msimang, NO, 2005 (3) SA 238 (CC) at paragraph 95.

[26] I will assume, without deciding, that the liquidators' rights are potential affected. I do so on the basis that the liquidators represent the insolvent estate, and that in that capacity they have the duty, and the right, to resist the acceptance by the Master of unmeritorious claims that might have been proved at the second meeting of creditors. The Master's decision, if it is to accept the proven claim despite the liquidators' resistance to it, could be seen as adversely affecting those rights in a manner which has a direct, external legal effect.

[27] I will assume too that the Master's decision could potentially affect the legitimate expectations of the liquidators. I do so on the basis that since the Master's decision could potentially be to accept a proven claim despite the liquidators' resistance against it at the meeting of creditors, the liquidators have a legitimate expectation of being heard before the decision is taken.

[28]The consequence of the above is that under s.3(1) of PAJA the process under s.45(3) has to be procedurally fair, and under s.3(2)(a) of PAJA, what is procedurally fair depends on the circumstances of each case. I proceed then to consider this, the final, question. In doing so, I consider first the procedure as it presents in s.45(3), and thereafter the manner in which it has unfolded in this case.

<u>A fair administrative procedure?</u>

[29] The first observation relevant to this question that s.45(3) expressly makes provision for a process whereby both protagonists are afforded the right to be heard. In the case of the liquidators, it takes the form of the report in writing which they are required to make, if the dispute the acceptance of the claim. It is significant that this report would come after s.45(2), in terms of which the liquidators are obliged, after the meeting of creditors at which the contested claim will have been proved, to examine *"… all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed."*

[30]One is entitled to accept then that when the liquidators submit their written report to the Master under s.45(3), they will be fully equipped to make out their case for disallowance of the claims.

[31]It is also relevant to bear in mind that the report to the Master under s.45(3) could conceivably have been preceded by an examination of the creditor under s.44(7) of the Insolvency Act. This is an opportunity designed to interrogate the creditor about the legitimacy of the claim. At such an opportunity the liquidators would be able to obtain relevant information which they could place before the Master in their report under s.45(3).

[32]The second observation relevant to the question whether the procedure envisaged in s.45(3) is fair, is the consideration referred to by Levinsohn, J (then) in Caldeira. The learned judge pointed out[32] that s.44 has laid down a procedure for the proof of claims in a manner that was *"relatively simple and expeditious."* This fits the object of the legislature in moving the winding-up of the estate forward. The decision by the Master under s.45(3) is not the final word on the issue. The party aggrieved by the decision may, amongst others, review it under s.151. Also, the Liquidation and Distribution Account may be challenged.

[33]The point here is that the legislature did not intend for the decision under s.45(3) to represent a final and definitive determination of the validity of the creditor's claim. That is why the Master, and not the High Court, decides the issue.

[34]Moving on to the facts of this case, the first observation is that the liquidators do not suggest in their answering affidavits that this case has any special feature that places it outside of the ordinary, vanilla, objection in terms of s.45(3). They argue[33]that the *audi* principle applies and that therefore they had the right to place the additional material before the Master. But they do not deal with the fact that the section already gives them the right to place material before the master.

[32] At 873 in fin.
[33] At pages 477 paragraph 7 and following.

[35] They argue also that if the creditor had the last say in the matter, *" … a creditor would be able to lie, misstate facts or present false evidence in substantiation of a claim and the liquidator would be powerless to inform the Master of the true state of affairs."* But they have not made out a case that in this instance any of these hypotheticals find application.

[36] Finally, they refer to regulation 3 of the Insolvency Act regulations provision is made in regulation 3(2) for the trustee in similar circumstances to *"…submit his remarks thereanent to the Master in writing…"*. In argument counsel for the liquidators conceded, in my view correctly so, that these regulations do not apply to winding-up of close corporations. The winding-up regulations apply, and as has been pointed out above, they do not provide for a liquidators' reply.

[37] It is understandable why there is a distinction. The minister likely considered that the administration of an insolvent estate of an individual is likely to be less comprehensive than that of a company or close corporation. That would explain why language such as *"remarks"* is used. If the same procedure were employed in winding-up, the issue may have become substantially overburdened. Already in the present matter one saw the liquidators' reply come to 394 pages, whereas the liquidators' initial report was 17 pages, and the applicant's substantiation, 19 pages.

[38] In sum, in my view s.45(3) envisages a procedure that is procedurally fair, all things being equal. In this case, no facts or circumstances are disclosed that rendered the procedure there laid down procedurally unfair. It follows that the applicant is entitled to the relief it sought in the amended draft order handed up during the hearing.

[39] There remain the questions of the authorisation sought by the liquidators, and the applicants request that they pay costs *de bonis propriis*. I accept that the liquidators have not in their answering affidavit explained why authorisation should be granted. But this is a case in which the facts speak for themselves. The legal issue involved is novel, so both counsel conceded; and the submissions made on behalf of the liquidators were lucid and

helpful. I will therefore grant the liquidators the authorisation sought; the estate is to pay the costs of the application. Costs of two counsel were warranted; the liquidators employed only one, but Silk.

[40] In the result I make the following order:

(a) The second and third respondents are authorised to oppose the application.

(b) The Master of High Court is obliged to decide the second and third respondents' application to expunge the applicant's proved claim in Protech Khuthele Property Holdings (Pty) Ltd (in liquidation), in terms of section 45(3) read with section 158 of the Insolvency Act, 24 of 1936, regulation 18 of the Regulations for the Winding-Up and Judicial Management of Companies promulgated in Government Notice R2490 of 28 December 1973, and section 339 of the Companies Act, 61 of 1973, based on the second and third respondents' report to the Master dated 14 January 2015 and the applicant's substantiation dated 19 February 2015, but to the exclusion of the further document delivered by the second and third respondents on 24 April 2015.

(c) The second and third respondents are ordered to pay the costs of this application in their representative capacity, including the costs occasioned by the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 5 May, 2016
Date judgment: 13 May, 2016