

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No. 3203/2016

In the matter between:

EASTERN CAPE DEVELOPMENT CORPORATION	Applicant
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and

MASTER OF THE HIGH COURT, PORT ELIZABETH	First Respondent
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MANTIS INVESTMENT HOLDINGS (PTY) LTD	Second Respondent
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W DE JAGER N.O.	Third Respondent
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C A SCHROEDER N. O.	Fourth Respondent
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JUDGMENT

MBENENGE J:

[1] In pursuit of its statutory mandate and obligations to plan, finance, co-ordinate, market, promote and implement the development of the Eastern Cape Province and all its people in the fields of industry, commerce, agriculture, transport and finance,¹ the applicant advanced monies to a company known as Bushman Sands Developments

¹See section 3 of the Eastern Cape Development Corporation Act 2 of 1997.

(Pty) Ltd (Bushman Sands), which played a pivotal role in the development of the Bushman Sands Resort near Alicedale in the Eastern Cape Province.

[2] It came to pass that a company known as No 1 Watt Street (Pty) Ltd (previously known as Mantis Group Holdings (Pty) Ltd) (No 1 Watt Street) bound itself as surety and co-principal debtor with Bushman Sands for the due payment of such amounts as were payable by Bushman Sands to the applicant from time to time arising from the granting of a loan facility in December 2005 (referred to as the indicative term sheet).

[3] Bushman Sands became unable to re-pay the amount due by it to the applicant. This resulted in the applicant instituting proceedings before this Court based on the suretyship referred to above for payment of R19 357 645.40.

[4] No 1 Watt Street raised a plethora of contentions in pursuit of its defence to the action.² After pre-trial procedures had been complied with and the action involving the applicant and No 1 Watt Street enrolled for hearing on 17 November 2014, the second respondent launched an application for the liquidation of No 1 Watt Street. A provisional and final order of liquidation was granted, with the consequence that the action aborted.

[5] The third and fourth respondents were thereupon appointed as joint liquidators of No 1 Watt Street (hereinafter conveniently referred to as the company in liquidation).

[6] The applicant and the second respondent sought to prove claims at the first meeting of creditors or at an adjournment thereof. The second respondent disputed the applicant's entitlement to prove its claim on two bases. In the first place, the same defences raised in the aborted action (between the company in liquidation and the applicant) were raised and, second, it was contended that there had been non-compliance with section 359 of the Companies Act 61 of 1973.

[7] After hearing the applicant's claim, in due course, the first respondent made a ruling admitting the applicant's claim and thus rendering the applicant a creditor in the company in liquidation. It is trite law that the admission was provisional only³ and it

² Including the following namely, that certain suspensive conditions of the indicative term sheet had not been fulfilled; the indicative term sheet was void for vagueness; the Bushman Sand's liability towards the applicant had been extinguished by virtue of a written deed of release; No 1 Watt Street had been released as surety in terms of an oral agreement and that the relevant certificate of balance was not valid.

³ *Cachalia v De Klerk Noord Benjamin* 140 1952 (4) SA 672 (T); *Brenda NO v The Master of the High Court, Kimberly* (20537/2014) [2015] ZASCA 166 (26 November 2015) at para [23].

is available to the trustee to dispute the claim in relation to any aspect thereof, subject to the Master having the ultimate say in relation to such dispute apart from that of the Court.⁴ The admission has the effect of placing the onus of disproving the existence of the claim on the trustee.⁵

[8] The second respondent has adopted the stance that it is entitled through interrogation of the applicant's representatives or former representative to establish whether or not the previously accepted claim should be allowed to stand or expunged. During the stage of argument before the first respondent, the second respondent sought to dispute the applicant's claim on precisely the same grounds as were originally raised in the aborted action.

[9] The applicant, on the other hand, is of the view that the circumstances in which the company in litigation was placed under liquidation and the disposal of assets previously held by that company would be the subject of an enquiry of the applicant and it would be demonstrated that a number of assets of the company in liquidation were disposed of under circumstances which may give rise to further actions or applications to set aside inappropriate or voidable dispositions. The applicant has throughout been of the view that any attempt on the part of the second respondent to subpoena and interrogate employees and agents of the applicant (both past and present) in respect of precisely those defences not pursued in the aborted action would constitute an abuse of the process envisaged in the Companies Act and, *inter alia*, section 44 of the Insolvency Act 24 of 1936.

[10] The following extract from a letter penned on behalf of the applicant captures the essence of the applicant's contentions to the envisaged interrogation:

"We wish to record that any attempt to revisit and challenge our client's claim will be resisted on the following grounds:

1. Our client's claim has now been proved, notwithstanding objection thereto by Mantis. It is correct that the Insolvency Act makes it clear that notwithstanding the proof of a claim, the liquidator is entitled, under certain circumstances, to request the Master to revisit the validity of a claim already proved.
2. Nevertheless the circumstances under which this may occur is extremely limited and circumscribed. A liquidator must have a reasonable belief, based on facts ascertained by him, that the estate is not in fact indebted to the creditor concerned. Mere suspicion about the claim would not be sufficient.

⁴ *Spark v Palte Ltd* (2) 1956 (3) SA 27 (SR) at 30.

⁵ *Chappel v The Master and Other* 1928 CPD 289 291.

3. The procedure for disputing a claim is set out in the relevant regulations to the Insolvency Act, as read together with the Act itself.
4. In the present instance the liquidators are of course well aware that there was an action in the High Court in which pleadings were filed, discovery was made, and that action was due to be heard in the High Court.
5. A conscious decision was made by those in control of the company now in liquidation, not to proceed with their defence but to place the company in liquidation. It was suggested that this was for '*financial reasons*' but subsequent events have of course shown this to be entirely incorrect. The same personalities that were essentially in control of the company now in liquidation are of course also in control of Mantis Investment Holdings.
6. We record that it is entirely impermissible for Mantis now to seek to conduct the trial which they previously avoided, within the context of a belated challenge to our client's claim.
7. Any such procedure is in our view an abuse of process envisaged, *inter alia*, in section 44 of the Insolvency Act.
8. Moreover the liquidators would have to be satisfied that the defences raised by the company in liquidation, in the High Court, were good. The mere say so of Mantis is insufficient. Mantis chose not to proceed with those defences.

In the circumstances any subpoena to be served upon, officials of the ECDC, in a belated attempt to now challenge our client's claim, will be an abuse and our clients reserve the right to take appropriate steps to set aside any such subpoenas."

[11] The letter quoted above attracted the following response embodying the upshot of the second respondent's stance:

- "1. The claim of the ECDC was provisionally approved at the second creditors meeting and this much was confirmed by Mr Jogee at the meeting. Your Counsel was present at the meeting and no objection was made to this – presumably because an objection would hold no merit.
2.
 - 2.1. [Yours] and your client's contentions that our client, as an admitted creditor, is not entitled to interrogate you clients on its claims, are simply disingenuous. Our client's contentions are that your client has no genuine claims and this will become apparent from the interrogation.
 - 2.2 We point out that it is not only the validity of your client's claims that [are] disputed, but also the quantum.

- 2.3 The interrogation will establish to the liquidator that your client's claims have no validity or basis, and this is with respect, the purpose of an interrogation.
3. Our client accordingly persists with its dispute and defences to your client's claims, and we re-iterate that at no stage did our client abandon its defences to the claims.
 4. We point out that in terms section 65 of the Insolvency Act, a creditor is entitled to investigate the affairs of the insolvent, and investigating and interrogating a disputed claim is just that.
 5. Your contentions are accordingly rejected and we look forward to an interrogation.
 6. The liquidator has been forwarded with a list of persons and documents we require to be subpoenaed. With respect, if there was no basis for an interrogation then the liquidator and the Master (and your Counsel) would not have confirmed that our client may also request documents and persons of your client to be subpoenaed for purposes of an interrogation."

[12] Once the applicant was of the view that the second respondent had evinced a settled determination to proceed with the interrogation of certain persons involved, or previously involved, with the applicant, with a view to revisiting the aborted action and some or all of the defences raised therein,⁶ and the first respondent had issued the relevant subpoenas pursuant to a mere request by the second respondent, the instant proceedings were resorted to, with the applicant seeking an order reviewing and setting aside the subpoenas issued by the first respondent in respect of the company in liquidation for the persons mentioned in the notice of motion and the decision of the second respondent to issue the subpoenas. Costs are being sought against the second respondent and any further respondents opposing the application only in the event of such opposition.

[13] The second respondent is opposed to the grant of the relief sought by the applicant. Neither the first respondent (the Master of the High Court whose decision is also under attack) nor the third and fourth respondents (the liquidators) oppose the application.

[14] At the hearing before me the issue for determination crystallized to one of interpretation and procedure. It was contented, by Mr *Buchanan* for the applicant, that after the applicant's claim was, despite opposition from the second respondent's camp,

⁶ The second respondent is of the view that it is not revisiting a defence and believes that the company in liquidation was possessed of a valid defence which should be investigated.

allowed as proven by the first respondent without the second respondent invoking the provisions of section 44(7) and asking for an interrogation, the appropriate procedure for revisiting and expunging a proved claim is that set out in section 45(3), which has not been complied with in the instant matter; the issuing of subpoenas without compliance with the requirements of section 45(3) has rendered the issuing of the subpoenas unlawful.⁷ Mr *Beyleveld*, for the second respondent, argued to the contrary, pointing out that, upon its proper construction, section 44(7) accords the second respondent the right to interrogate a creditor who has proved a claim for purposes of determining “*sufficient facts to convince the liquidator to then invoke the provisions of section 45(3),*” which is not where the impugned proceedings are at this stage.

[15] Section 44 deals with “[p]roof of liquidated claims against estate.” To that end, sub-section 44(1) provides that any persons 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 prove that claim in the manner provided for in section 44. In terms of section 44(3) a claim made against an insolvent estate should be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding who should admit or reject the claim.

[16] Section 44(7) is of significance, and provides:

“(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 agent of a creditor whose claim has been proved, in regard to the said claim⁸.”

[17] On the other hand section 45(3) relating to the examination of claims reads:

“(3) 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

⁷ All references to sections 44 and 45 hereinafter must be construed as referring to the Insolvency Act.

⁸ My emphasis.

claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five”⁹

[18] Section 44(7) accords the second respondent, as a proven creditor, the express entitlement to request the presiding officer at any meeting of creditors to cause the applicant (and thus its representatives) to submit to an interrogation. But the question is- at what stage of the process is it appropriate to invoke the section?

[19] The following remarks by Van der Linde J in *Constantia Insurance Co Ltd v The Master of the High Court, Johannesburg and others*¹⁰ demonstrative of how sections 44(7) and 45(3) are related to one another are apposite:

“[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).”

[20] Upon a proper reading of section 44(7) the interrogation following the issuing of subpoenas is a step taken within the context of a duly and properly convened meeting of creditors. The four types of creditors’ meetings by means of which insolvents’ creditors establish their claims are the following:

- (a) first meeting, the purpose of which is to enable creditors of the estate to prove their claims against the estate and elect a trustee;¹¹
- (b) second meeting, the purpose of which is to enable creditors to prove their claims, receive the trustee’s report on the affairs and condition of the estate, and give the trustee directions in connection with the administration of the estate;¹²

⁹ *Ibid.*

¹⁰ 2016 (6) SA 386 (GJ) at paras [30] and [31].

¹¹ Section 40(1).

¹² Section 40(3)(a).

- (c) special meeting called either for proof of claims against the estate or for the purpose of interrogating the insolvent;¹³ and
- (d) general meeting, for the purpose of giving the trustee instructions concerning any matter relating to the administration of the estate.¹⁴

[21] As far as I could have ascertained, in this matter the impugned subpoenas were issued pursuant to a mere request embodied in a letter, which the first respondent granted without further ado, and at a time when the claim in question had already been proven, albeit provisionally. In this regard, it is well for us to remind ourselves of the remarks by Levinson J in *Caldeira v The Master and Another*.¹⁵

“The Insolvency Act 24 of 1936 has in s 44 laid down the procedure for the proof of liquidated claims against an insolvent estate. The proof of claim of procedure enables creditors to prove their claims in a relatively simple and expeditious fashion. In the instant case the applicant submitted his claim in the proper form and it was admitted and duly proved by the presiding officer. It was of course open to the liquidator to have requested the presiding officer at the meeting of creditors to call upon the applicant to submit interrogation in terms s 44(7). This was not done.

After claims are proved the Act in s 45 directs the officer who presided at the meeting to deliver to the trustee ‘every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim’. In s 45(2) the trustee is enjoined as follows:

‘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.’

Now it seems to me that the Legislature envisaged that the trustee, from records in his possession, would make an independent inquiry to determine whether the records of the insolvent estate refer to the indebtedness which is the subject-matter of the proved claim. Section 45(3) provides as follows:

‘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, 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, but subject to the provisions of s 75.’

This section enjoins the trustee, if he disputes the claim, to report to the Master his reasons for doing so. It seems to me that if a trustee disputes the claim he must have a

¹³ Section 42(2).

¹⁴ Section 41.

¹⁵ 1996 (1) SA 868 (NPD) at 873H - 874-F.

reasonable belief based on facts ascertained by him that the insolvent estate is not in fact indebted to the creditor concerned. Mere suspicion about the claim would not be sufficient. This belief would, I think, generally arise after the examination of the Company's records and the conclusion derived from the records that the indebtedness does not exist or has been extinguished. Of course, the facts giving rise to the belief may not necessarily be derived from the company's records, they could arise, for example, from the records of an interrogation conducted at the meeting of creditors. The Legislature, as I have said, intended that creditors of insolvent estates be permitted to prove their claims simply and expeditiously. Before the Master expunges a proved claim – a power which to some extent is far-reaching, he should apply his mind to the reasons given by the trust. The claim is not expunged simply on the request of the trustee.”

[22] Here, too, it is not available to the second respondent to seek to revisit a proven claim without an invocation of section 45(3). When the claim in question was still a subject of the meetings contemplated in section 44, and before proof thereof, section 44(7) was not invoked. Convening a meeting at this stage purely for the purpose of conducting an interrogation after the relevant claim has been proven would constitute an abuse of the process envisaged in sections 44 and 45.¹⁶

[23] In my view, therefore, nothing stands in the way to granting the relief sought by the applicant. There is also no reason why costs should not follow the result.

[24] I therefore grant the following order:

24.1 The subpoenas issued by the first respondent in respect of No 1 Watt Street (Pty) Ltd (in liquidation) for the following persons:

- (a) Mr N B Dlulane;*
- (b) Mr C Bierman;*
- (c) Mr J Uren;*
- (d) Mr A Radhakrishna;*
- (e) Mr M D Matshamba;*
- (f) Mr J Buchner;*
- (g) Ms G Maree;*
- (h) Mr M Lwana; and*
- (i) Mr S Mase,*

¹⁶ *Compore Marques and Another v De Villiers and Another* NNO 1990 (4) SA 415 (W).

are hereby reviewed and set aside.

24.2 The decision of the second respondent to issue the subpoenas set out in sub-paragraph 1 above is hereby similarly reviewed and set aside.

24.3 The subpoenas are void and of no force and effect.

24.4 The second respondent is directed to pay the costs of this application.

S M MBENENGE
JUDGE OF THE HIGH COURT

Counsel for the Appellant : *R G Buchanan SC*

Instructed by : Smith Tabata

Counsel for the First Respondent : *A Beyleveld SC*

Instructed by : BLC Attorneys

Date heard : 9 February 2017

Judgment delivered : 28 March 2017