

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 13107/2022P

In the matter between:

K[...] R[...]

APPLICANT

and

**SEALANDAIR SHIPPING AND FORWARDING
(PTY) LTD (IN LIQUIDATION *alternatively* IN
DEREGISTRATION)**

1ST RESPONDENT

N[...] M[...] NO

2ND RESPONDENT

ADRIAN VENGADESAN NO

3RD RESPONDENT

MF VALIE NO

4TH RESPONDENT

MASTER OF THE HIGH COURT, PIETERMARITZBURG

5TH RESPONDENT

EUGENE NEL NO

6TH RESPONDENT

REASONS FOR ORDER

E Bezuidenhout J

Introduction

[1] This matter came before me as an opposed matter on 9 October 2023. It was set down at the instance of the sixth respondent. The sixth respondent is the only respondent who actively took part in the proceedings. The notice of set down was served on the attorney of record for the applicant on 17 March 2023. The applicant failed to deliver a practice note and heads of argument. Her erstwhile attorneys, Naidoo Maharaj Inc withdrew on 20 July 2023 as her attorneys of record. On the day of the hearing, counsel, who had been instructed by the applicant's new attorneys, Mastross Naidoo Ori Inc appeared and applied for an adjournment, which was contained in a substantive application, issued and served on 6 October 2023.

[2] Counsel appearing on behalf of the sixth respondent, who had complied with all the practice directives by filing a practice note and heads of argument, indicated that the sixth respondent opposed the application. After hearing argument, I dismissed the application for an adjournment with costs and gave a brief judgment setting out my reasons.

[3] Counsel for the applicant had no instructions to argue the opposed motion and, in fact, had not even been provided with a set of the application papers. He requested to be excused, which request I granted. Counsel for the sixth respondent addressed me briefly, as he had submitted detailed heads of argument. I also indicated to him that I did not require him to argue the matter fully as I was satisfied on the papers that the applicant had failed to make out a case for the relief sought. I indicated that I would make the relevant order and that I would provide reasons should I be requested to do so. I made the following order:

‘1. The Application under case no. 13107/2022P is dismissed with costs on the attorney and client scale.

2. The costs referred to in paragraph 1 hereof shall include the costs of intervention and opposing the application under case no. 7719/2022P on the attorney and client scale.’

[4] On 12 October 2023, the applicant, now represented by Raneshan Naidoo and Associates, filed a notice in terms of Uniform rule 49(1), requesting reasons and

also filed a notice of application for leave to appeal. It contained seven grounds of appeal. Needless to say, the notice of appeal was filed without the applicant having had sight of my reasons for the order I made. On 14 December 2023, the applicant's attorney filed a notice of withdrawal as the applicant's attorney of record. These are the reasons for the order I granted under case no 13107/2022P on 9 October 2023.

Background

[5] There were three applications before me, namely:

(a) An application, issued on 28 September 2022 under case no 13107/2022P, in terms of which the applicant seeks the following relief (the review application): firstly, to review and set aside the fifth respondent's, the Master of the High Court's, confirmation of the liquidation and distribution account in the estate of the first respondent, Sealandair Shipping and Forwarding (Pty) Ltd (in liquidation alternatively deregistration) on 7 June 2022; secondly, the re-opening of the account; and thirdly, a direction that the second to fifth respondents convene a special meeting of creditors for the purposes of proving a claim by the applicant. The second to fourth respondents are the liquidators of the first respondent.

(b) An application, issued on 17 June 2022 under case no 7719/2022P, in terms of which the applicant sought to interdict the second to fourth respondents from making any payments and finalising the estate of the first respondent, pending the outcome of the review application which was to be instituted within 20 days of the confirmation of the rule (the interdict application). The matter was set down as an urgent application on 21 June 2022. No relief was granted on that day and the application was simply adjourned *sine die*. The second to fourth respondents, however, gave an undertaking that they would not make any distributions pending the finalisation of the review application.

(c) An application for leave to intervene in the interdict application (the intervention application). The application was brought by Mr E Nel NO, in his capacity as the trustee of the insolvent estate of Mr V KJ R[...] (the insolvent), the husband of the applicant, who was finally sequestered on 8 December 1999. The applicant opposed the intervention application and filed an answering affidavit to

which Mr Nel replied. The applicant subsequently cited Mr Nel as the sixth respondent in the review application.

Only the review application will be dealt with in these reasons, as the two other applications have in essence become moot.

[6] The sixth respondent set out, in his answering affidavit, a detailed timeline of the sequence of events, stretching over almost 27 years, which he prepared taking the applicant's version into account and which was also repeated in the chronology filed as part of the practice note and from which I will borrow extensively. Bearing in mind that the papers are to be determined on the sixth respondent's version in terms of the *Plascon-Evans* rule,¹ I will concentrate my efforts on what is set out by the sixth respondent and will only highlight some issues disputed by the applicant in reply.

[7] In 1997, the applicant allegedly lent her husband (the insolvent) the sum of just over R3 million, who then on-lent it to the first respondent, which meant that the insolvent in effect became a creditor in the books of the first respondent.

[8] On 30 June 1997, the first respondent allegedly 'ceded' to the insolvent a property described as the remaining extent of Portion 10 (a portion of Portion 1) of the Farm Doornfontein 92, Registration Division IR, Province of Gauteng (the Doornfontein property), allegedly to secure the alleged indebtedness owing to the insolvent in the sum of R3 million. The applicant states that the sixth respondent implies that it was a simulated transaction, which she denies.

[9] On 1 July 1997, the insolvent purported to cede his loan account in the first respondent, together with the Doornfontein property, to the applicant as security for the debt owing by him to her for monies lent and advanced.

[10] On 24 February 1998, the first respondent was provisionally liquidated and Mr GB Perry and Mr MW Lynn were appointed as joint liquidators. On 24 July 1998, the

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

insolvent's estate was provisionally sequestrated and finally sequestrated on 14 April 1999. On 8 December 1999, the applicant and the insolvent divorced. During May 2003, the second and final liquidation and distribution account was filed in respect of the insolvent's estate. The applicant pointed out that her claim against the first respondent, which had been ceded to her by the insolvent, was for that reason not accounted for in the insolvent's estate.

[11] On 15 May 2001, the first liquidation and distribution account in respect of the first respondent was signed by the liquidators. In it, reference was made to the Doornfontein property, which, according to the applicant, had been ceded to her by the insolvent prior to his sequestration. During November 2003, the second and final liquidation and distribution account in respect of the first respondent was signed by the liquidators. No reference was, however, made to the Doornfontein property.

[12] The sixth respondent stated that on 29 August 2013, Mr Perry acknowledged in writing a claim by the insolvent, accepting him as a creditor of the estate of the first respondent, and confirmed that it had not yet been proved. The applicant stated in her founding affidavit that the claim of R4 222 534, referred to by Mr Perry as the insolvent's claim, was in fact her claim and that he had accepted that there was a creditor, but had identified the wrong party. She and the insolvent had by this time reconciled and were dealing with Mr Perry jointly. The letter relied upon by the applicant was only addressed to the insolvent and made no reference to the applicant. It was attached as annexure 'M'.

[13] The applicant stated that in 2014, she contacted Mr Perry and offered to purchase the Doornfontein property (despite claiming earlier that the property was ceded to her). In a letter dated 4 March 2014, Mr Perry informed the insolvent and the applicant that he had received an unconditional cash offer which was double their offer. In her replying affidavit, the applicant now stated that it was in fact the insolvent who made the offer in 2013 to purchase the property and not her. She also stated that at that time, the insolvent was rehabilitated in terms of section 127A of the Insolvency Act 34 of 1936 (the Insolvency Act). On 28 March 2014, the insolvent and the applicant were informed by Mr Perry that the Doornfontein property would be sold on public auction.

[14] Things appeared to have gone quiet for many years and then on 28 March 2022, the joint liquidators gave notice in terms of section 406 of the Companies Act 61 of 1973 (the Companies Act) that the amended second and final liquidation and distribution account in respect of the first respondent would lie for inspection at the Master's office for 21 days from 8 to 29 April 2022. It came to the applicant's notice during March or April 2022. The Doornfontein property was now included and was dealt with in the amended account. On 8 April 2022, the applicant, through her attorneys, addressed a letter to the joint liquidators objecting to the account. Mention was made of a contention by the liquidators that the applicant's claim had become prescribed, which was regarded by the applicant as meaning that the applicant was inherently recognised as a creditor. On the same day, the applicant's attorney lodged an objection to the account with the Master in terms of section 407 of the Companies Act,² stating *inter alia* that Mr Perry, who was no longer a liquidator, had acknowledged and confirmed in his letter of 29 August 2013 that the applicant was a creditor of the estate in the amount of R 4.22 million (which is factually incorrect), which claim has not yet been proved by the Master. The Master was given until 19 April 2022 to respond to the objection.

[15] On 13 April 2022, the Master called upon the liquidators to respond to the objection, copying the applicant's attorneys. On 26 April 2022, the sixth respondent addressed a letter to the Master dealing with the objection to the account. He *inter alia* set out the background of the matter, which included the fact that the insolvent had admitted his claim against the first respondent and that it had been accepted by Mr Perry and had subsequently been set out in an affidavit by the insolvent's estate. The applicant simply stated in her replying affidavit, in response to these allegations, that the Master was confused, and referred to the sixth respondent as the liquidator of the first respondent, which he was not. On 19 May 2022, the applicant's attorneys addressed a letter to the Master enquiring about the liquidators' response to the objection and called for the Master to convene a special meeting of creditors for the

² Section 407(1) and (2) reads as follows:

'(1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.

(2) If the Master is of the opinion that such objection ought to be sustained, he shall direct the liquidator to amend the account...'

applicant to prove her claim. On the same day, the Master forwarded a copy of the sixth respondent's response to the objection to the applicant's attorneys, requesting them to comment within 14 days.

[16] On 2 June 2022, the period to comment on the response to the objection expired. The applicant stated that the Master's email had 'crossed' her attorney's email of 19 May 2022 and that they had mistakenly believed that they had responded. This was, however, not the case, as they had not addressed the contents of the sixth respondent's letter. Her attorney only realised the oversight on 9 June 2022.

[17] Meanwhile, on 7 June 2022, the Master confirmed the account. On 9 June 2022, the applicant's attorneys responded to the Master in relation to the sixth respondent's response of 26 April 2022 to the applicant's objection. In the letter, it was stated that the writer 'was unable to obtain instructions within the time frame provided'. No mention is made of crossed emails. It also again refers to a 'clear and unequivocal acceptance' of the applicant's claim by Mr Perry on 29 August 2013, which as I have pointed out above, is simply incorrect. On 14 June 2022, the Master responded by advising that the account had been already been confirmed on 7 June 2022.

[18] On 17 June 2022, the applicant brought the interdict application, and subsequently on 28 September 2022, some three months later, instituted the review proceedings. The applicant alleged that the Master, in its report filed in the interdict application, stated that it had dealt with the objection in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) but that the Master had failed to give her adequate opportunity to respond to the sixth respondent's letter. It is unclear whether the applicant is in fact suggesting that the time periods referred to in PAJA were applicable to the time she was given to respond by the Master. She also stated that the account was confirmed prior to the expiration of the time period she was given to respond. This is clearly incorrect as she was afforded 14 days from 19 May 2022, which expired, as mentioned above, on 2 June 2022. I will deal with this further below. The account was confirmed by the Master on 7 June 2022. Not much was said about the applicant's failure to institute her review application within 14 days as

required in terms of section 407(4)(a) of the Companies Act.³ The applicant did not address this delay and did not apply for condonation for the late filing of her review. The point was not raised by the sixth respondent and it is assumed that he simply wanted the review to be heard and finalized. The applicant's grounds of review in summary therefore appear to be directed only at the Master's failure to give her sufficient time to respond; at the Master's confirmation of the account before her time to respond had expired; and at the Master's failure to deal with her attorney's request to convene a meeting to prove her claim.

The sixth respondent's contentions

[19] It was submitted that the applicant has never, in 25 years, proved a claim in the first respondent's insolvent estate, nor has she taken any steps to enforce her rights. The applicant asserted that, on 29 August 2013, the first respondent's liquidator, Mr Perry, acknowledged her claim. It was submitted that annexure 'M' is unequivocal in that it acknowledges the insolvent's claim, in possession of the liquidator, in the sum of R4.22 million, which had not been proved before the Master. The sixth respondent stated that on 21 September 2015, the insolvent, notwithstanding the fact that his estate had been finally sequestrated, lodged a claim for R4.22 million in the first respondent's insolvent estate. This was before the sixth respondent's appointment as trustee in the insolvent's estate in December 2015. The applicant's case in reply in this regard is that this claim is a nullity as the affidavit was deposed to by the insolvent in 2015, and that the insolvent had no right to prove a claim by virtue of the provisions of sections 20 and 23 of the Insolvency Act. As mentioned above, the applicant, however, contended that the insolvent had been rehabilitated in 2013 through the effluxion of time.⁴ It does appear to me that the applicant, on more than one occasion, made statements in her replying affidavit which were contradictory to what was stated in her founding papers, which is concerning. It was submitted that section 44 of the Insolvency Act requires no more

³ Section 407(4)(a) reads as follows:

'The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit.'

⁴ Section 127A of the Insolvency Act provides for the automatic rehabilitation of an insolvent's estate after a period of 10 years from the date of the sequestration of his estate.

than that the deponent to a claim is to have personal knowledge of the facts on which the claim is based and, as essentially a witness, the fact that he is insolvent does not nullify the affidavit.

[20] As far as the applicant's objection is concerned, it was submitted that the sixth respondent responded to the Master in detail in respect of the objection, as trustee of the insolvent's estate and a proved creditor, and further because the liquidators were supine. It was apparent from his letter of 26 April 2022, attached as annexure 'T' to the founding affidavit, that the liquidator had in fact dealt with the objection. The sixth respondent had recorded that the liquidator correctly contended in his response to the applicant's attorney that the claim could not be amended to reflect the applicant's claim 'as her claim would have become prescribed'.

[21] It was also submitted that the sixth respondent's letter was transmitted by the Master to the applicant's attorneys on 19 May 2022, who were requested to comment within 14 days. The 14-day period expired on 2 June 2022 in terms of section 4 of the Interpretation Act 33 of 1957 and not on 8 June 2022, a point taken in the intervention application. I agree with this submission. The applicant's reply was not only late but she appears to not be entirely forthcoming about the reason for the delay in responding.

[22] As far as the applicant's reference to PAJA and the time periods for filing the review was concerned, it was submitted that the longer periods provided for in PAJA did not apply. I was referred to *Rustenburg Platinum Mines Ltd v CCMA*⁵ where it was held that the extended time periods in PAJA find no application where the legislature has elected to stipulate a time period for the bringing of the application, as it has done in section 407(4)(a) of the Companies Act.

The Master's report

[23] The Assistant Master, in her report, confirmed that she sent the applicant's objection to the second, third and fourth respondents and that they had duly

⁵ *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* [2006] ZASCA 175; 2007 (1) SA 576 (SCA) para 27. See also P Delport *Henochsberg on the Companies Act 71 of 2008* (November 2023, SI 33) at APPI-232(1) ('*Henochsberg*') where it is stated that the longer period for a review in PAJA does not apply.

responded to the objection. She then forwarded their response to the applicant's attorney, who did not respond. She emphasised that she has a statutory duty to act in the best interests of the general body of creditors and that proved creditors are being prejudiced by the delay, especially since the first respondent had been placed in liquidation almost 24 years ago. Proved creditors have been waiting for more than two decades to receive dividends. It appeared that the applicant was not a proved creditor. The Assistant Master stated that confirmation of the second liquidation and distribution account was in the best interests of the proved creditors and that she at all times acted in good faith.

Discussion and analysis

[24] The applicant applies in terms of section 408 of the Companies Act for the setting aside of the confirmation of the account and for its re-opening. Section 408(1)(c) reads as follows:

‘408. Confirmation of account. —When an account has lain open for inspection as prescribed in section 406 and—

. . .

(c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the Court within the prescribed time,

the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.’

[25] It was submitted on behalf of the sixth respondent that the application under the aforesaid section is an application *sui generis*, as is the application under section 407(4)(a) of the Companies Act. ‘It is not a review, and not even an appeal in the wide sense, limited to the facts which had been before the Master. It is indeed ... a

fresh application where new facts and in appropriate cases also oral evidence will be allowed.’⁶

[26] The requirements for an application of this nature have been stated in *Wispeco (Pty) Ltd v Herrigel NO*⁷ as follows:

‘The Act obviously contemplates that, unless a dividend has been paid to one or more creditors, an account can be reopened after confirmation by the Master. An application must, however, be specifically made to have the confirmation set aside and the account reopened for I think it has now been accepted that the Master's confirmation is both final and has the same effect as a judgment of the Court (see s 112; *Central Africa Building Society v Pierce NO* 1969 (1) SA 445 (RA) at 455H; *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D) at 604F). The Act does not indicate the grounds upon which such a reopening can take place and one must therefore have regard to those grounds that would justify the setting aside of a judgment of the Court. The Courts have accordingly looked to the common law for guidance, according to which it is necessary, in order to succeed in an application for reopening, to establish the existence of one of those grounds upon which *restitutio in integrum* would be granted (see *Mars Law of Insolvency in South Africa* 7th ed at 407; *Stewart's Assignee v Wall's Trustee (supra* at 246); *Ex parte Wagner* 1925 TPD 401; *Desai v Assignee, Estate Desai NO* 1935 CPD 503 at 513; *SA Clay Industries Ltd v Katzenellenbogen NO and Another* 1957 (1) SA 220 (W) at 223 - 224). Such grounds would include fraud. Fraud, if established, is, of course a good ground for setting aside a judgment or reopening an account. There is no suggestion in this matter that there has been any fraud on the part of the trustee. The only other ground would be *justus error*. *Mars (op cit* at 407) says this:

"Thus, error not caused by negligence, or just and probable, but not culpable, ignorance of a person's rights is such a ground, and consequently under certain circumstances a creditor might obtain relief against a confirmed account on establishing his ignorance that it was lying for inspection, but

⁶ *South African Bank of Athens Ltd v Sfier (also known as Joseph) and others* 1991 (3) SA 534 (T) at 536H-I.

⁷ *Wispeco (Pty) Ltd v Herrigel NO and another* 1983 (2) SA 20 (C) At 27D-28C.

the *onus* would be on him to show that his ignorance was justifiable, because it is the duty of a proved creditor to keep his eyes and ears open to inquire as to the fate of his proof, and *prima facie* his ignorance in the matter must be imputed to his own negligence."

In the *SA Clay Industries Ltd* case *supra* at 224 KUPER J stated:

"After confirmation and before the payment of a dividend the aggrieved person must show something more than ignorance and prejudice: he must show that his failure to object has been induced by *justus error* or by fraud... I have therefore come to the conclusion that in order to succeed the applicant must establish a ground for *restitutio in integrum* ".

The *onus* furthermore is on the applicant for the reopening of an account to establish one of the grounds for *restitutio in integrum* (see *SA Clay Industries Ltd* case *supra* at 224H; *Mars (op cit* at 407))

It seems to me, however, that such an applicant bears a further *onus*: he would have to show the Court that there is merit in the reopening of the account. A Court will not reopen an account if it cannot be shown that the applicant has some prospect of success of having the account varied or corrected (see *Desai v Assignee, Estate Desai NO* (*supra* at 513)). No purpose would obviously be served in merely reopening the account if it is likely to remain in the same form as originally drawn. The applicant must establish at least *prima facie* that the account is incorrect and would have to be amended.

Has the applicant in the present instance discharged the *onus* of establishing that good purpose would be served in reopening the account?'

[27] Counsel for the sixth respondent, Mr Van Rooyen, summarised the requirements succinctly as follows:⁸

⁸ See also *Henochsberg* at APPI-234(1) to APPI-234(2).

(a) an application must specifically be made to have the confirmation of the account set aside and re-opened, as it is accepted that the Master's confirmation is both final and has the same effect as a judgment of the court;

(b) in order to succeed in an application for re-opening, the applicant must establish the existence of one of the grounds upon which *restitutio in integrum* would be granted. Such grounds would include fraud and *justus error*;

(c) the onus is on the applicant who seeks the re-opening of an account to establish one of the grounds for *restitutio in integrum*;

(d) the applicant bears a further onus: she would have to show the court that there is merit in the re-opening of the account, as a court will not re-open an account if it cannot be shown that the applicant has some prospect of success of having the account varied or corrected. The applicant must establish, at least on a *prima facie* basis, that the account is incorrect and would have to be amended.

[28] It is in my view clear that there is no merit in re-opening the account and the applicant has furthermore not succeeded in satisfying any of the requirements set out above, in particular, she has failed to show that she has any prospects in succeeding to prove a claim, which *prima facie* appears to have prescribed. The applicant stated that the high court was not the forum to deal with the merits of her claim and that it should be dealt with at the meeting of creditors. This statement is obviously wrong. It is clear from the correspondence put up by the applicant that no mention was ever made of a claim by her. Mr Perry's letter cannot be clearer. He referred to the insolvent's claim, which is the only 'live' claim and which the sixth respondent is seeing through. The applicant's blatant disregard for the interests of the proven creditors is, to say the least, disconcerting.

[29] It was also submitted that the Master is the official entrusted with the administration of all insolvent estates and that its rulings deserve some deference. Reliance was placed on *Van Zyl NO v The Master*⁹ where it was held that 'where no

⁹ *Van Zyl NO v The Master* 2000 (3) SA 602 (C).

new facts have been placed before the Court, the Court should hesitate to substitute its own opinion for that of the Master...'. In my view, the Master acted in good faith and clearly acted correctly and in the interests of the proven creditors. There is furthermore, in my view, no prima facie evidence that the account is incorrect and that it should be amended.

[30] It was further submitted, with reference to *SA Clay Industries Ltd v Katzenellenbogen NO*,¹⁰ 'that where an applicant has been negligent his error cannot be *justus*'. I have referred above to the alleged reasons for the applicant's failure to respond to the Master timeously: the initial version being the apparent negligence for failing to respond to a 'crossed' email; the next version then became a scheduling issue. Whatever really happened, it clearly cannot be found to be *justus error*. Even if her attorney had responded timeously, the applicant's version of her alleged claim would in all likelihood have been rejected, quite correctly by all indications, by the Master and the account would still have been confirmed.

[31] As far as costs are concerned, it was submitted that the application is an abuse of process and so tainted with turpitude that it justified a denial of relief and a punitive cost order. I am of the view that the sixth respondent, who acts in the interests of the insolvent's estate, and who had to step in, clearly due to the supine attitude of the liquidators, should not be left out of pocket. It is for this reason that I exercised my discretion in respect of the issue of costs.

[32] It is for these reasons that I made the order referred to above.

E BEZUIDENHOUT J

Date of hearing:	9 October 2023
Date of order:	9 October 2023
Date of reasons:	1 February 2024

¹⁰ *SA Clay Industries Ltd v Katzenellenbogen, NO and another* 1957 (1) SA 220 (W) at 225A.

The reasons were handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 12h00 on 1 February 2024.

Appearances:

For the sixth respondent:

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