

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 2022-035973

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2023-09-29

DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

THE MASTER OF THE HIGH COURT, PRETORIA

First Respondent

NGAKO SERUMOLA N.O.

Second Respondent

THEODOR WILHELM VAN DEN HEEVER N.O.

Third Respondent

DEBORAH LYNN KHAN N.O.

Fourth Respondent

SIMON MATELESHE SEIMA N.O.

Fifth Respondent

SUMAIYA ABDOOL GAFAAR KHAMMISSA N.O.

Sixth Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 29 September 2023.

JUDGMENT

POTTERILL J

Background

[1] The applicant, FirstRand Bank Limited [FirstRand] applied for the sequestration of the estate of Willem Abraham Nel. The provisional sequestration was granted on 7 February 2022 on an unopposed basis with the return date of 6 May 2022.

[2] On 4 May and 6 May 2022 various third parties made various payments to FirstRand in respect of the amounts owed by the insolvent.

[3] On the return date, the registrar to the Acting Judge that was to hear the matter, informed the parties that no oral argument would be entertained and the matter would be decided on the papers. The insolvent's legal advisors attempted to reach the Judge to advise that since payment had been made they would oppose the final sequestration. They however could not reach the Acting Judge and a final sequestration order was granted on 6 May 2022.

[4] As required in terms of section 40 of the Insolvency Act, 24 of 1936 [the Act] the Master convened a first meeting of creditors on 21 September 2022 at 9:00 at the Magistrate Middelburg.

[5] It is common cause that as the Master, Mr Serumola [the second respondent] was not at the Middelburg Court at 9:00 the first meeting was referred to Magistrate Gololo. Magistrate Gololo was tasked with civil trials and he informed all those present that he did not have the capacity to deal with the first meeting. He accordingly formally opened the meeting and then postponed it to 26 October 2022.

[6] Mr Serumola arrived at the Magistrate's Court around 10:00 and announced he was ready to start with the meeting. He decided to proceed with the meeting

despite objection thereto and it being postponed and did so because nobody would be prejudiced.

[7] At the meeting Mr Serumola rejected the claim of FirstRand because:

“Third, in applicant's version, Willem Abraham Nel (‘Nel’ or ‘the insolvent’) paid the amount that was owed to the applicant between 4 and 6 May 2022. Payment is not in dispute. As at 21 September 2022 the money was in the bank account of the applicant and has been there since at least 6 May 2022.”

and

“I admit that I rejected the applicant's claim on the basis that the debt was fully paid and there was insufficient evidence to suggest that the Nel still owed the applicant. The fact that the money was in the applicant's bank account after four months suggested to me that by conduct, the applicant had accepted.”

[8] Mr Seromula also admitted claims 3-10, finding they were lodged 24 hours before the advertised time of the meeting. He did so, because the attorney who represented the claimants, Mr Mendelsohn, orally submitted that the claims were lodged on 19 September 2022.

The issues

[9] FirstRand seeks to review the Master's decisions taken at this first meeting on 21 September 2022 in terms of 151 of the Act. It abandoned its first ground of review, the postponement of the first meeting, but persists with two grounds; the Master's rejection of FirstRand's claim; the acceptance of the claims not lodged timeously.

[10] Only the first respondent, The Master of the High [the Master] and the second respondent, Mr Ngako Serumola [Mr Serumola], the Master who took the decision, opposed this application. The third to sixth respondents, the insolvency practitioners,

did not oppose the review application

Point in limine

[11] In the answering affidavit the point is raised that the deponent did not have the authority to depose on behalf of FirstRand. In the heads of argument, the attack was changed to the deponent not having the right to institute legal proceedings on behalf of FirstRand.

[12] If the respondents wanted to attack the right to institute legal proceedings it should have utilised Rule 7. However, the complaint was that the deponent had no authority and it is trite that a deponent to an affidavit need not be authorised.

[13] Accordingly the point *in limine* is dismissed.

The rejection of FirstRand's claim

[14] As set out above Mr Serumola rejected the claim because he found that FirstRand's claim was extinguished.

[15] On behalf of FirstRand it was submitted that the debt was not extinguished simply because at the date of provisional sequestration the debt was not paid. The critical date to determine claims against the insolvent's estate is 7 February 2022, and not 6 May 2022 (the return date), or the date of the first meeting. Support for this submission is found in *Vather v Dhavraj*¹ where the following was said:

“ Sec. 44 (1) of Act 24 of 1936 provides:

'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, ... prove that claim in the manner hereinafter provided ...'

¹ 1973 (2) SA 232 (N) at 236A-E.

The wording of the above-mentioned section shows that the claim must be one which is in existence at the date of sequestration. The effect of an order of sequestration is to establish a concursus creditorum, and nothing can thereafter be done by any of the creditors to alter the rights of the other creditors.

'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order'

- per INNES, J.A., in Walker v Syfret, N.O., 111 AD 141 at p. 166, (see also, e.g., Ward v Barrett, N.O. and Another, N.O., 1963 (2) SA 546 (AD) at p. 552)

In view of the fact that the claims of creditors against an estate must be dealt with as they existed at the date of the order of sequestration it must follow that the reference to 'creditors' in sec. 123 (1) is a reference to those who had claims against the insolvent estate as at the date of sequestration."

[16] It was thus submitted that the payments to FirstRand were made after the sequestration of the insolvent's estate (i.e., after 7 February 2022). FirstRand submitted that a payment accepted after that date would constitute a voidable disposition or undue preference.

[17] This stance was confirmed in a letter by FirstRand's attorney to Mr Nel's attorney dated 13 May 2022 which relevant part reads as follows:

"4.1 It is evident from the payment affidavit that the payments did not originate from WA Nel but it is alleged that these payments

were made by various third parties, i.e. Tristate Contractors, Farm Rescue (Pty) Ltd, Highveld Cattle Farms, Highveld GRN and Annale Nel.

4.2 Our client has no knowledge of the origins of these funds; nor of the reason why these funds were paid to our client from these third parties on behalf of WA Nel. What is the relationship between the third parties and WA Nel (apart from Annale Nel whom we know is married to WA Nel)? What was the causa for these funds being paid by the third parties on behalf of WA Nel?

4.3 Our client is concerned that the payments originate from third parties who may be in financial difficulties and that the liquidators/ trustees of such third parties may lay claim to the funds paid to our client.

4.4 We record that our client cannot accept the payments in reduction of the debts of WA Nel unconditionally, and will not do so until it is satisfied as to the origin of and the reason/cause for these payments, and verified such information.

4.5 Our client therefore requires WA Nel to disclose the source of the funds, the reason for the payments and provide our client with the source documents evidencing the relationship between the third parties and WA Nel, as well as the causa for such payments being made by the third parties on behalf of WA Nel. In other words, our client needs to know that the causa for these payments as between the third parties and WA Nel was. Our client needs to be satisfied that these funds will not be claimed from it as a result of, for instance, questionable transaction/s which may be set aside under insolvency legislation.”

[18] This stance was reiterated in a letter dated 24 August 2022:

- “2. On 13 May 2022, we informed you that our client cannot accept the payments in reduction of the debts of WA Nel and will not do so until it is satisfied as to the origin of and the reason/causa for these payments, and verified such information.
3. ...
4. These payments were in any event made into the FNB account after the provisional sequestration of WA Nel on 7 February 2022.”

[19] It was further submitted that Mr Serumola not only incorrectly accepted the debt was extinguished when in fact payment was made after the sequestration, but he also critically investigated the claim. He did not apply the test as formulated in *Breda NO v The Master of the High Court Kimberley* (20537/2014) [2015] ZASCA 166 (26 November 2015) where in par [23] the following was found:

“[T]he presiding officer does not adjudicate upon the claim as a court of law, is not required to examine the claim too critically and only has to be satisfied that the claim is prima facie proved”.

[20] It was argued he exceeded his powers and should have merely accepted the claim if the claim was *prima facie* valid.

[21] On behalf of Mr Serumola it was submitted that the concern about the origin of the money was ingenious because FirstRand knew the origin of the money. Despite FirstRand stating it did not accept the money it did accept it and kept the money in the bank. The debtor acted validly through a third party and the third party performed validly. He was satisfied that there was insufficient proof that the debt was not paid. FirstRand's conduct showed it accepted the payment of the debt.

[22] It was also submitted that FirstRand is incorrect because the date has no bearing on the task of the Presiding Officer in deciding whether a debt was proved. The only time a date is relevant is the date the cause of action arose; it must be

before the sequestration. The *Vather*-matter expresses exactly that and not that a debt must be extinguished before the sequestration. The intention of this date is clear; to prevent more debts being incurred after sequestration.

[23] It was submitted that he did not critically evaluate the claim, but decided it on the *prima facie* evidence as required.

The acceptance of claims 3-10

[24] FirstRand set out that claims 3 to 10 were found on the file when the parties arrived at the Magistrates Court on 21 September 2022. On the day, there were no date stamps reflected on the claims to confirm when they were lodged. This was strange to Mr van Heerden who had enquired whether any claims had been filed and was informed that there were no claims filed. Some of the claims were from employees, but employees were never previously disclosed. When the FirstRand's representative pointed out that the claims were not lodged 24-hours before the time advertised for the meeting, the attorney who represented claimants 3 to 10, Mr Mendelsohn, simply stated that according to him, the claims had been lodged on 19 September 2022. He could provide no evidence to support this statement and did not state that he was the one that lodged the claims.

[25] In terms of section 44(4) of the Insolvency Act, the affidavit and other documents supporting the claim must be lodged not later than twenty-four hours before the advertised time of such meeting. If not done within that time-frame the claim cannot be admitted at the meeting. Late lodgement can only be done if the presiding officer is "*of opinion that through no fault of the creditor he has been unable*" timeously to effect the lodgement. Reliance was placed on *Sieradzki and Others v Brummer and Another* 1930 TPD 23 where a Full Court set out as follows:

"The Act (Act 32 of 1916) does not say that the presiding officer should exercise his discretion in the event of there being a possible prejudice to the creditor or to anyone else. The object of the time limit is clearly to enable persons interested to examine the claims before the meeting is held. No actual prejudice to the appellants can result in so far as the

admission or rejection of their claims is concerned, because they are only debarred, according to the section, from proving their claims at the meeting in question and they may prove their claims at any other meeting that might be advertised. There might be an indirect prejudice to them, it is true, in that they may be debarred from exercising their vote in the appointment of a trustee at the first meeting of creditors. But these are not matters which the presiding officer has to consider. The Act provides that he shall have a discretion to admit to proof the claims at that meeting if he is of opinion that through no fault of the creditor the evidences of the claim could not be delivered in proper time. The question of prejudice was, however, considered in the case of Graaff-Reinet Board of Executors and Another v. The Magistrate and Taute, N.O., (1917 CPD 332), where, under somewhat analogous circumstances, the Court ordered the presiding officer to admit proof of the claims. It is not necessary to deal with the decision in that case as each case has to be decided according to the circumstances proved."

and

In *Derby Shirt Manufacturers (Pty.) Ltd. v Nel, N.O. and Another, N.O.* 1964 (2) SA 599 (D) at 602E:

"The provision in sec. 44(4) that the affidavit or a copy of it be delivered not later than 24 hours before the advertised time of the meeting was not observed. That provision is clearly peremptory; it is expressly directed that 'failing which the claim shall not be admitted to proof at the meeting'. The presiding officer has no discretion save where the delay is shown to be 'through no fault of the creditor'."

In this matter, claims 3 to 10 were found on the file when the parties arrived at the Magistrates Court on 21 September 2022 (i.e., on the day of the meeting). On the day, there were no date stamps reflected on the claims to confirm when they were lodged.

[26] It was submitted that Mr Serumola plainly exceeded his statutory powers because at the first meeting the presiding officer does not have a general discretion to allow late claims. What is clear from the wording of section 44(4) is that it expressly records that no late claims shall be admitted to prove. This strict regime is necessary because section 44 (5) of the Act creates a mechanism to enable creditors to inspect and scrutinise claims submitted by others. This right ensures that claims can be objected to, or that proposed creditors can be interrogated in terms of section 44(7).

[27] The only exception to the strict regime imposed by section 44(4) is when a presiding officer is convinced that the lateness was not as a result of fault on the part of the creditor. No explanation for the lateness was provided and the presiding officer had no facts on which he could exercise his discretion and could not accept the claims that were lodged late.

[28] It was also put before this Court that when the record was filed, claims 3 to 10 suddenly reflected stamps by the “Family Law” division of the Middelburg Magistrates Court. No explanation is provided how these stamps are now on the claims.

The following submissions pertaining to the stamps were highlighted:

- “(1) Section 44 requires claims to be ‘submitted to the officer who is to preside at that meeting’. As such, even if the claims were somehow lodged at the family court on 20 September 2022, they were not lodged in accordance with section 44. The stamps are therefore not evidence of proper lodgement.
- (2) The second respondent does not explain the conflict between the submission made by the attorney representing proposed claimants 3 to 10 that the claims were lodged on 19 September, and the appearance of a 20 September 2022 date stamp.
- (3) The second respondent does not attempt to explain why the

date stamps were not noticed during the meeting (the date stamps appear on the first page of 7 different claims - it is inconceivable that they would have been overlooked during the proceedings - the date of lodgement was, after all, a topic of serious debate)."

[29] FirstRand thus submitted the claims were lodged irregular and they could not be admitted and proven.

[30] On behalf of Mr Serumola it was argued that FirstRand is capitalising on the gaps of the administration at the Middelburg Court. To him it is plain that different people received the claims, some were stamped and some not. He does not deny that the claims bore no stamps on the day of the first meeting. FirstRand had the onus to prove that the claims were submitted outside the 24-hour period and it did not do so. It was further submitted that Mr Serumola was thus correct in accepting the word of Mendelsohn that it was filed timeously. He did not accept Mr van Heerden's explanation about the enquiry and that there were no claims filed under oath.

Reasons for decision

[31] Section 151 of the Insolvency Act grants the High Court the power to review decisions, rulings, or orders made by the Master. It provides as follows:

"Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve."

The rejection of FirstRand's claim

[32] FirstRand lodged its claim on 20 September 2022 at the Middelburg Magistrates Court. It must be mentioned that FirstRand is a secured creditor of the insolvent. The claim, consisted of 16 items and was annexed to the founding affidavit as “FA18”. This claim is reflected in the record attached by the Master. It was never disputed that the claim was timeously lodged. In the supplementary affidavit the date stamp and time in manuscript is reflected on the attached claim.

[33] No payments can be made after the *concursum creditorum* which came into being when the provisional order was granted. FirstRand had the right to refuse acceptance of the payment and proceed to prove its claim. This is so, because the moment an order is granted the general body of creditors have to be taken into consideration and a single creditor cannot accept payment to the prejudice of the other creditors. The claim of FirstRand must be dealt with as it existed at the issue of the order on 7 February 2022.

[34] The argument that FirstRand is interpreting the *Vather*-matter incorrectly is rejected. It speaks for itself that a cause of action for a claim must arise before the date of sequestration, but the matter addresses when transactions for instance, payments to extinguish debts, can take place.

“No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order”²

[35] Mr Serumola did not only consider if there was a *prima facie* claim. He took into consideration all the surrounding facts and made a finding. He took note of the fact that payment was made, that FirstRand knew who the money came from and that FirstRand kept the money in the bank. He made a deduction that FirstRand's

² *Vather* matter *supra*

conduct showed that it accepted the payment, despite FirstRand stating it did not accept payment and then found there was no claim; he critically analysed and adjudicated the claim. This is contrary to the duty of the Master when deciding if there is a *prima facie* claim.

[36] The decision of the Master to reject the claim of FirstRand is to be set aside.

Admitting claims 3-10

[37] Section 44(4) of the Insolvency Act provides as follows:

“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 ...”

and s44(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.”

[38] The purpose of the time-limit in s44(4) thus becomes clear when read with s44(5); to allow claims to be inspected by other creditors. The Courts have interpreted s44(4) as peremptory leaving a presiding officer with no discretion to admit a claim that is lodged out of time.³

³ *Derby Shirt Manufacturers (Pty) Ltd v Nel, NO and Another* NO 1964 (2) SA 599 (D) at 602E

[39] FirstRand had enquired whether there were claims filed. Mr van Heerden confirms under oath that he was informed that there were no other claims. Some of the claims were now from employees who had not been disclosed previously. There were no date stamps on the claims.

[40] Where the date of the lodgement of the claim was disputed Mr Serumola could not accept the say-so of Mr Mendelson. He had no discretion to in fact accept the word of Mr Mendelson. If there were no date stamps there was no objective proof of the date of lodging the claims. The record now reflects that the claims were not lodged on 19 September, as averred by Mr Mendelson, but in fact the 20th. Strangely the claims are now stamped, but it clearly was not stamped on 21 September otherwise there would have been no debate about this at the meeting.

[41] Mr Serumola should have accepted that the claims were late. He could not exercise a discretion as to lateness because Mr Mendelson informed him the claims were lodged timeously.

The decision to accept the claim must be reviewed and set aside.

[42] I accordingly make the following order:

- 42.1 That the decision by the second respondent to reject the applicant's claim (annexure "FA19" to the founding affidavit) be reviewed and set aside, and that the applicant's claim be admitted.
- 42.2 That the decision by the second respondent to accept claims 3 to 10 be reviewed and set aside and that the claims be rejected based thereon that they were not lodged within the prescribed period.
- 42.3 That the vote on the appointment of final trustees be reviewed and set aside, and that the Master is directed to reconvene the first meeting of creditors only for the purpose of voting on the appointment of the final trustees.

42.4 That the costs of the application be paid by the first and second respondents, the one paying the other to be absolved, including that consequent upon the employment of two counsel.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 2022-035973

HEARD ON: 14 August 2023

FOR THE APPLICANT: ADV. J. VORSTER

INSTRUCTED BY: Werksmans Incorporated

FOR THE 1ST AND 2ND RESPONDENTS: Adv. N. Mathle-Ndlazi

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 29 September 2023