IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: A230/2014

In the matter between:-

JOHN DOUGLAS JANSE KNIPE 1st Appellant
ANDRé BAZZET JANSEN KNIPE 2nd Appellant

and

OTTLIE ANTON NOORDMAN N.O. 1st Respondent
CHAVONNES BADENHORST ST CLAIR COOPER N.O. 2nd Respondent
SIMON MALEBO RAMPOPORO N.O. 3rd Respondent

CORAM: VAN DER MERWE, J *et* MOCUMIE, J *et* LEKALE, J

JUDGMENT BY: VAN DER MERWE, J

HEARD ON: 9 MAY 2016

DELIVERED ON: 2 JUNE 2016

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[1] The respondents in this appeal are the joint provisional liquidators of two companies, Kameelhoek (Pty) Ltd and Schaapplaats 978 (Pty) Ltd (the companies). The appellants, who are brothers, and their

three siblings are the shareholders of the companies. The court *a quo*, in essence, granted authority to the respondents to sell the assets of the companies. The appellants appeal against the judgment and order of the court *a quo*, with its leave.

[2] This matter forms part of extensive and protracted litigation in respect of the companies. Fortunately it is not necessary to burden any reader of this judgment with a full exposition thereof. The following background suffices for a proper understanding of this judgment.

[3] The companies were incorporated at the instance of the father of the shareholders of the companies. The companies are not insolvent. Each company carries the name of the farm that it owns. The value of these farms far exceeds any valuation of the liabilities of the companies. The companies have no tangible moveable assets. It is common cause that the cattle and game on the farms are not the property of the companies. The only possible other assets of the companies are rather nebulous claims related to the fact that the cattle and game were kept on the farms. It follows that the respondents were granted leave to sell the farms and, in effect, to liquidate the companies.

[4] Provisional liquidation orders in respect of the companies were made on 30 August 2012. They were made on the ground that it was just and equitable to liquidate the companies. The main underlying reason for the provisional liquidation orders in respect of the companies was the inability of the shareholders to get along. On

6 September 2012 the respondents were appointed as provisional liquidators of the companies. In terms of section 386(5) of the Companies Act 61 of 1973 (the Act), the Master of this court restricted the powers of the respondents to those set out in section 386(1) of the Act. Despite the repeal of the Act by the Companies Act 71 of 2008, the provisions of Chapter 14 of the Act remain of application, subject to exceptions not presently relevant. This is provided for in item 9 of Schedule 5 of Act 71 of 2008.

[5] The respondents gave notice of general meetings of the creditors and members of the companies in terms of section 386(1)(d) of the Act. These meetings, presided over by the Master, took place on 16 April 2013 and 5 June 2013 respectively, before the final liquidation of the companies. The notices of the meeting of creditors set out the reasons for the meeting. These reasons did not include proof of claims of creditors. Nevertheless, one Mr Loftus Viljoen was allowed to prove claims against the companies at the meeting of 16 April 2013. Mr Viljoen then proceeded to give instructions to the respondents. These instructions included that the respondents should continue to secure the cattle and game on the farms, on the basis that they somehow served as security for the alleged claims of the companies against the owners of the cattle and game.

[6] Final liquidation orders were made on 27 June 2013. The appellants' applications for leave to appeal against the final liquidation orders were refused and on 5 February 2014 their petition to the Supreme Court of Appeal suffered the same fate. Per letter dated 9 April 2014 the respondents recommended to the Master in

terms of section 386(2A) of the Act that the farms be sold. For reasons not necessary to state herein, the Master declined to authorise the sale of the farms. The application that served before the court *a quo* was consequently issued on 25 April 2014. By that date some of the shareholders of the companies had launched an application to *inter alia* review and set aside the decision of the Master to admit proof of the creditor's claims at the meeting of 16 April 2013 (the review application). When the respondents' application was launched, a date of hearing of the review application had not been set.

[7] The basis of the respondents' application to the court *a quo* was that it was necessary to sell the farms to provide for payment of the administration costs of the respondents. The main allegations in support of the application were the following. It was stated that because of the delay caused by the legal processes leading to the refusal of the petition, the respondents had by 25 April 2014 incurred administration costs in the amount of approximately R1,5 million. The respondents said that because of the pending review application, the Master was unable to convene first meetings in terms of section 364(1) of the Act and that therefore final liquidators could not be appointed before finalisation of the review application. In the meantime, so the respondents said, the administration costs would continue to escalate at the rate of approximately R125 000,00 per month. By far the greatest portion of the past and future administration costs related to the costs of an agent appointed by the respondents to safeguard the cattle and game on the farms.

[8] In their answering affidavits the appellants vehemently denied that these expenses were necessary and/or reasonable. The court *a quo,* however, found that the appellants could not be heard to dispute the quantum of the administration costs, mainly because of a settlement agreement entered into between the parties hereto on 26 November 2013. On the view that I take of the matter, it is not necessary to give further attention to the issue of the extent or reasonableness of the administration costs.

[9] The principal duty of a provisional liquidator is to look after the property of the company in liquidation and preserve the status *quo* until the appointment of a final liquidator. A provisional liquidator should therefore not be given powers to do what may amount to a liquidation of a company prior to the appointment of a final liquidator. For this reason our courts have repeatedly held that only in exceptional circumstances should authority be granted to a provisional liquidator to sell the assets of a company. See ***Ex parte* Klopper N.O., in re Sogervim SA (Pty) Ltd (in liquidation)(Sogervim SA intervening)** 1971 (3) SA 791 (T) at 797A-F and ***Ex parte* Paterson N.O., in re Goodearth Estates** 1974 (4) SA 281 (ECD) at 282F. This was recognised by the court *a quo.* It found that the past and future administration costs constituted exceptional circumstances justifying its order.

[10] Section 364(1) of the Act provides:

> "(1) As soon as may be after a final winding-up order has been made by the Court or a special resolution for a creditors' voluntary winding-

up of a company has been registered in terms of section 200, the Master shall summon-

(a) a meeting of the creditors of the company for the purpose of-

(i) considering the statement as to the affairs of the company lodged with the Master under section 363;

(ii) the proof of claims against the company; and

(iii) nominating a person or persons for appointment as liquidator or liquidators; and

(b) a meeting of the members of the company or, in the case where the winding-up concerns a company limited by guarantee, a meeting of the contributories in respect of that company, for the purpose of-

(i) considering the said statement as to the affairs of the company; and

(ii) nominating a person or persons for appointment as liquidator or liquidators, unless the company in general meeting, when passing a resolution provided for in section 349, has already disposed of the matters referred to in subparagraphs (i) and (ii)."

In a case such as the present, the appointment of the nominated person or persons as liquidator(s) is made by the Master in terms of section 369(2) of the Act.

[11] It was a material part of the case for the respondents that pending the finalisation of the review application, the Master was precluded from proceeding in terms of section 364(1), despite the refusal of the petition on 5 February 2014. In their answering affidavits the appellants on more than one occasion pertinently said that there was no reason why the first meetings of creditors and members and appointment of final liquidators could not have taken place already in

February 2014. It appears from the judgment of the court *a quo,* however, that at the hearing before it the appellants did not dispute this stance of the respondents. And it is clear from the judgment of the court *a quo* that it accepted that the pending review application precluded proceedings in terms of section 364(1). As I shall show, this view was wrong and amounted to a material misdirection.

[12] A creditor of a company in liquidation may only prove a claim at the first meeting of creditors summoned by the Master after a final liquidation order. See Blackman, Jooste and Everingham, **Commentary on the Company's Act**, Volume 3, at 14-329. At 14-349-350 the authors said:

> "Section 386(1)(d) empowers the liquidator to convene meetings of members or creditors or contributories to obtain their authority or sanction in respect of any matter. Meetings of creditors can be summoned by a liquidator only after the first meeting of creditors (summoned by the Master) has been held. This is because, until then, no creditor will have proved his claim against the company, and consequently no meeting of creditors can be held to decide upon anything. At that meeting the final liquidator is nominated. Thus, even where the Master does not exclude this power, the provisional liquidator will not be able to exercise it, unless, perhaps, there is some delay in the appointment of the liquidator after the first meetings of members and creditors."

This passage was quoted with approval in ***Ex parte* Van den Berg and Others NNO: in re Riviera International (Pty) Ltd (in liquidation) and Another** 2003 (6) SA 727 (W) at 734H.

[13] The notice of the meeting of 16 April 2013 rightly did not state that its purpose included proof of claims by creditors of the companies. Mr Viljoen had no right to prove his claims and the Master had no power or jurisdiction to admit proof of claims of creditors. It follows that the purported proof and admission of the Viljoen claims on 16 April 2013, was a nullity that should simply have been ignored. Even an order made by a high court that did not have jurisdiction, is a nullity and could simply be ignored. See **S v Absalom** 1989 (3) SA 154 (A) at 164E-G. This was no doubt applicable to the quasi-judicial proceedings before the Master. See **Aircondi Refrigeration (Pty) Ltd v Ruskin NO and Others** 1981 (1) SA 799 (W) at 804H and **Vidavsky v Body Corporate of Sunhill Villas** 2005 (5) SA 200 (SCA) at 207C-J. See also **The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & Others** 2012 (3) SA 325 (SCA) par [13] to [14].

[14] Therefore, by the time that the respondents launched their application, the first meeting of creditors and members and appointment of final liquidators should already have taken place. Only 10 days' notice of these meetings is required. It appears that the companies have only two possible creditors, Standard Bank and Mr Viljoen. The members of the companies are known and limited. One cannot enter into speculation that there may have been some unspecified obstacle or delay in respect of the first meetings in terms of section 364(1). Therefore, when the matter served before the court *a quo*, it should have regarded the appointment of final liquidators as imminent. The respondents did not pay their agent and the agent succeeded in managing its account in respect of

administration costs at least until the application was launched. The main concern then was the future administration costs. On this basis there were no exceptional circumstances justifying the sale of the farms by the provisional liquidators. The court *a quo* ought to have dismissed the respondents' application with costs.

[15] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with an order dismissing the application with costs.

C. H. G. VAN DER MERWE, J

I concur.

B.C. MOCUMIE, J

I concur.

L. J. LEKALE, J

On behalf of the appellants: Adv. S. Grobler
Instructed by:
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BLOEMFONTEIN

On behalf of the respondents: Adv. P. F. Rossouw SC
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