IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54706/2013

18/6/2015

In the matter between:

UNONKALA ARCHITECTS (PTY) LIMITED Applicant

and

(1)	REPORTABLE:	~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~ / NO
	17/06/15 DATE	SIGNATURE

THE MASTER OF THE HIGH COURT PRETORIA First Respondent

WILLIAM SEKETE NO Second Respondent

LAND & AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA Third Respondent

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JUDGMENT

Tuchten J:

1 This is a review of a decision by the first respondent (the Master) to admit to proof a claim by the third respondent (the Land Bank) against Westside Trading 570 (Pty) Limited (in liquidation) (Westside). The review is opposed only by the Land Bank.

2 Westside was provisionally wound up on 25 January 2012. The order was made final on 17 September 2012. Westside had borrowed money from the Land Bank to fund a property development and had provided security through a mortgage bond and sureties. Westside defaulted on the loan. The Land Bank commenced an action against Westside and the sureties on 26 April 2012. As Westside was under provisional winding-up order when the action was commenced, the action against Westside itself was ineffectual. This later (at some unspecified date) led to the claim against Westside being withdrawn but the claims against the sureties are still being pursued.

3 The Land bank attempted to prove a claim against Westside at the first meeting of creditors but its claim was rejected. At the second meeting, the Land Bank submitted an amended claim. The presiding officer at the second meeting was an assistant Master. The claim as formulated was anything but elegant but I am satisfied that the affidavit and the documents submitted with it established that the Land Bank's claim which it sought to prove arose from an alleged settlement agreement (the settlement), said to have been concluded between the Land Bank and Westside on 13 February 2009 together with mora interest at the prescribed rate then applicable, ie 15,5% per annum. The terms of the settlement are contained in a letter written by the Land Bank to Westside dated 13 February 2009.

4 The settlement recites that the indebtedness of Westside to the Bank had been settled in the sum of R82 million, although the amount of the loan balance was at that stage almost R95 million. It goes on to say that

> [Westside] has undertaken to repay Land Bank on conclusion of the transaction with the third party interested in buying the development and with whom a Deed of Sale has been signed.

5 The Land Bank had taken the attitude that the loan advance to Westside had fallen outside the Land Bank's mandate and was not prepared to advance further sums to Westside. Westside therefore needed to find further funding. The settlement went on to say

> [The Land Bank] appreciate the efforts made by [Westside] in finding alternative finance, but it is imperative that the outstanding balance of the loan be repaid in full by the end of April 2009. An extension of this deadline may be granted by the Bank at its sole discretion.

6 On behalf of the applicant it was argued that the settlement was conditional upon the sale of the development to the third party. This was not one of the grounds of review raised in the applicant's founding affidavit. The attack there made, which was not pursued in

argument, was that there was no proof that the respective signatories were authorised to conclude the settlement.

7 One must read the settlement in its context and with regard to what was known to the parties at that stage. I think that a businesslike approach would be to read the two passages I have quoted as providing not that the entire settlement would be conditional on the sale to a third party but that the Land Bank granted time to Westside until the end of April 2009 to pay the settled indebtedness, with any further indulgences being purely a matter within the Land Bank's discretion.

8 The duty of a presiding officer in relation to claims submitted to proof at a meeting of creditors arises from s 44 of the Insolvency Act, 24 of 1936, made applicable to liquidations of companies by s 339 of the Companies Act, 61 of 1973. Such a claim must be proved by way of affidavit, which must set out, inter alia the "nature and particulars of the claim".[1] The presiding officer at the meeting at which the claim is sought to be proved must scrutinise and carefully consider the claim. But the presiding officer does not adjudicate the claim as in a court of law and should not examine the claim too critically or require more than *prima facie* proof. In that sense the admission by the presiding

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1 Section 44(4)

officer is provisional because under s 45(3) the trustee (or liquidator in relation to the winding up of companies) has power to dispute the claim.[2] Unless the claim is bad, the presiding officer should not reject it without hearing the creditor's evidence under s 44(7). A creditor who submits his claim to proof is entitled to have his claim considered without any evidence except his own under s 44(7).[3]

9 Applying these principles, I think that the claim *prima facie* is unconditional and establishes that Westside is indebted to the Land Bank in the sum of R82 million together with mora interest.

10 It seems that at the meeting, in the course of argument on its behalf urging the presiding officer to reject the Land Bank's claim against Westside, the applicant put up to the presiding officer a copy of the Land Bank's summons in its action against (as it appeared at that time) Westside and the sureties. The presiding officer refused to consider the contents of the summons on the ground that it was extrinsic evidence. I think that the presiding officer was correct in this regard; the summons was not part of the documentation put up by the Land Bank in support of its claim. As I have pointed out, a creditor is entitled to have his claim examined without any evidence except his

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2 Judgment of Roper J reported in *Cachalia v De Klerk NO and Benjamin NO* 1952 4 SA 672 T 675E-G

3 *Aircondi Refrigeration (Pty) Ltd v Ruskin NO and Others* 1981 1 SA 799 W 804A

own. In fact however, the summons does show that one of the several alternative claims in the action was a claim based on the alleged settlement of Westside's indebtedness in the sum of R82 million plus mora interest.

11 A third attack on the decision of the Master was to the effect that the presiding officer ought to have found that the Land Bank's claim as submitted had prescribed. There is no obligation on a person making a claim to adduce facts to defeat a potential defence of prescription before the case of prescription has been made. In a court of law, this is regulated by s 17 of the Prescription Act, 68 of 1969:

> (1) A court shall not of its own motion take notice of prescription.
> (2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.

12 I think that unless the formulation of a claim itself demonstrates ineluctably that the claim has been extinguished by prescription, a presiding officer should not reject a claim because by a process of inferential reasoning, it may be that prescription has taken place. It cannot in my view be said that the present claim itself demonstrates that it has been extinguished by prescription. Westside from time to

time made admissions of liability, the provisional and final winding up orders may have interrupted the running of prescription and, finally, the period of prescription applicable may be thirty years under s 11(a)(i) of the Prescription Act (not three years as assumed by the applicant) because the Land Bank asserted that its claim was secured by a mortgage bond.

13 I emphasise that the presiding officer was not called upon to determine whether the claim was good. He was required to consider whether the claim was, on the face of it, bad. The presiding officer found by implication that the claim was not bad.

14 The present review is brought under s 151 of the Insolvency Act. While the court may in the exercise of these powers of review enter upon and decide the matter *de novo*, the court cannot uphold the review unless it is satisfied that the functionary below was clearly wrong.[4] It follows from what I have said that I do not think that it can be said that the presiding officer was clearly wrong.

15 I make the following order: The application is dismissed with costs.

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[4] *Nel and Another NNO v The Master (ABSA Bank and Others intervening)* 2005 1 SA 276 SCA para 24

NB Tuchten
Judge of the High Court
17 June 2015

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