IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 17429/2015

23/7/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

SIGNATURE .... DATE 21/7/2015

In the matter between:

JUNG-FU TSAI	**APPLICANT**
and	
ADVOCATE W SEKETE *N.O*	**FIRST RESPONDENT**
The Master of the High Court	
(Pretoria)	
IVOR LANCELOT VAN DIGGELEN *N.O*	**SECOND RESPONDENT**
JAYANT DAJI PEMA *N.O*	**THIRD RESPONDENT**
THE REGISTRAR OF DEEDS (PRETORIA)	**FOURTH RESPONDENT**
SUNSET POINT PROPERTIES (PTY) LTD	**FIFTH RESPONDENT**
COENRAD JOHAN LAMPRECHT	**SIXTH RESPONDENT**

JUDGMENT

BASSON, J

[1] The applicant is the sole shareholder and co-director of a company which in turn is the sole owner of a farm described as the remainder of the Farm Klipeiland no 524 (in liquidation). (I will refer to this farm as "the property.) The second and third respondents are the provisional liquidators. The first respondent is the Master of the High Court (Pretoria – "the Master"). The sixth respondent is Mr Lamprecht the sole creditor of the applicant.

[2] Acting in terms of section 386(2A) and 386(2B) of the 1973 Companies Act,[1] and section *80bis* of the Insolvency Act[2] the second and third respondents sought authorisation from the Master to sell the property by way of public auction.

[3] Before the Master could take a decision in this regard a written offer to purchase the said property was received by the provisional liquidators (on 13 February 2015). Subsequently a further recommendation for approval of the

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[1] Section 386(2A) and 386(2B) of the Companies Act 61 of 1973 reads as follows: *"(2A) At any time before a general meeting contemplated in subsection 1 (d) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.*

(2B) The Master may thereupon authorise the sale of such property or any portion thereof on such conditions and in such manner as he may determine: Provided that if such property or a portion thereof is subject to a preferential right, the Master shall not authorise the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing."

[2] Section 80bis of the Insolvency Act 24 of 1936 reads as follows: Sale of movable or immovable property on authorization of Master: *"(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.*

(2) The Master may thereupon authorize the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorize the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale."

sale by way of private treaty was made to the Master (on 24 February 2015). On 4 March 2015 the first respondent authorised the sale of the property by private treaty. It is this decision made by the Master that would be the subject of a review yet to be instituted by the applicant.

[4] The applicant brought an application to interdict and restrain the second and third respondents (the provisional liquidators) from signing all such documents as may be necessarily required to give effect to the transfer of the property into the name of the 5th respondent pending the final resolution of an application that the applicant will institute in the future to review and set aside the decision by the Master to grant the aforesaid authorisation in terms of section 386(2B). The applicant further seeks an order that in the event such documents have already been signed, the 4th respondent (the Registrar of Deeds) be interdicted from giving effect to the actual registration of the transfer.

The *locus standi* of the two liquidators

[5] At the commencement of the argument, a point *in limine* was raised on behalf of the applicant disputing the lawfulness of the appointment of the two liquidators in light of the common cause fact that the Master did not subsequent to the discharge of the provisional liquidation order re-appoint the second and third respondents as liquidators.

[6] In essence it was submitted that, although it is accepted in the founding affidavit that the second and third respondents are *de facto* exercising their powers as joint provisional liquidators, it is not admitted that they are exercising their powers *ex lege*. In any event, so it was submitted, a party is entitled at any time to raise an objection against the legal status of a party.

[7] In order to place this point in its proper context it is necessary to briefly refer to the events that preceded the order placing the applicant under final winding- up.

[8] The applicant was placed under provisional liquidation on 24 April 2012 with 5 June 2012 as the return date. On the return day the matter served before Makgoka, J who discharged the provisional winding-up order with costs. The matter was taken on appeal and the matter served before the Supreme Court of Appeal ("SCA") on 3 September 2014. Judgement in the matter was handed down on 19 September 2014. The SCA set aside the order of the High Court and "substituted" the order with an order placing the applicant under final winding- up.

[9] The second and third respondents were appointed by the office of the Master as joint provisional liquidators on 16 May 2012. Although the order of Makgoka, J was substituted by the SCA the Master did not subsequently make a second appointment of the liquidators.

[10] In light of the fact that the liquidators were not appointed (or re-appointed) after the order of the High Court was substituted by the SCA, the applicant now raised the point that they have no *locus standi in judico* (as the liquidators of the applicant). It was submitted on behalf of the applicant with reference to the matter in *MV Snow Delta Serva Ship Ltd* v *Discount Tonnage Ltd*[3] that once an *interim* order is discharged the status of the company (the applicant in this matter) was reinstated and remained as such until the SCA granted the final liquidation order. Once that order was granted it necessitated the appointment of new liquidators. In this regard it was submitted that the effect of not re-appointing liquidators after the SCA had placed the applicant under final liquidation has the consequence that the second and third respondents are unable to act as liquidators and consequently not empowered to sell the property for an amount of R 17 500 000.00.

[11] The Court in *MV Snow Delta Serva* confirmed that once an interim order is discharged, it cannot be revived by the noting of an appeal:

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[3] 2000 (4) SA 746 (SCA).

"[6] It is convenient at the outset to say something about the judgment of Selikowitz J. The *ratio* of the decision was based on *SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C), where Corbett J had held that the granting of interim relief as an adjunct to a rule *nisi* is to provide protection to a litigant pending a full investigation of the matter by the court of first instance. *Once that interim order is discharged, it cannot be revived by the noting of an appeal. This approach was and still is generally accepted as correct.*[4] Dissenting views were, however, expressed in *Du Randt v Du Randt*1992 (3) SA 281 (E) and *Interkaap Ferreira Busdiens (Pty) Ltd v Chairman, National Transport Commission, and Others*1997 (4) SA 687 (T). The essence of these judgments was that Corbett J had failed to have regard to the common-law rule as received by our Courts that an appeal suspends the execution - or, in the words of Rule 49(11), the operation and execution - of an order (cf *Reid and Another v Godart and Another* 1938 AD 511). Unfortunately, the criticism was based upon a misunderstanding of the concept of suspension of execution. For instance, an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side (*Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) at 190B - C). Any other conclusion gives rise to an unacceptable anomaly: If an applicant applies for an interim order with notice and the application is dismissed, *he has no order pending the appeal*;[5] on the other hand, the applicant who applies without notice and obtains an *ex parte* order

[4] My emphasis.
[5] *Ibid.*

coupled with a rule *nisi* and whose application is eventually dismissed, has an order pending the appeal."

[12] I am in agreement with the principles as set out by the SCA in *MV Snow Delta Serva* that once an interim order is discharged, the effect thereof is that the application is effectively dismissed. I am also in agreement that the power to appoint a liquidator vests in the Master and that the Court has no power to appoint a liquidator.[6]

[13] The issue raised by the point *in limine* in this Court, however, deals with a different principle: Although the interim order was discharged by the High Court, the SCA subsequently "*substituted*" the order of the High Court with an order placing the applicant under final winding-up. The question arises whether the order of the SCA has the effect of "reviving" the appointment of the provisional liquidators as from the date of the order by Makgoka,J.

[14] Unfortunately I have not been referred to any case law pertinently dealing with this point. In all fairness to counsel for the respondent it must be pointed out that the respondent had received no prior warning that this point would be raised at the commencement of argument. In fact, Mr De Koning submitted that the respondent was effectively ambushed particularly in light of the statement made in the founding affidavit to the effect that it is accepted that the second and third respondents are *de facto* exercising their powers as joint provisional liquidators. To a question from this Court as to why this point was not raised earlier, the Court was informed that the validity of this point was not appreciated until now. Be it as it may, the point has now been raised and concerns the *locus standi in judico* of the second and third respondents.

[15] I have already referred to the fact that the SCA has substituted the order of the High Court with an order placing the applicant under final winding-up. What is the effect of a substitution? It was submitted that the order by the Supreme Court of Appeal is a substitution *nunc pro tunc* meaning that the

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[6] *Ex Parte Bowman: In Re International Rock Products (Pty) Ltd* 1985 (1) SA 70 (W) at 72F – I.

order (of the SCA) applies retroactively to correct an earlier order as if it had been made on the earlier date. The liquidators were appointed by the Master on 16 May 2012 and were therefore at the time of the order of the High Court (5 June 2012) the duly appointed liquidators. It follows in my view that the substitution of the order by the SCA effectively restored the position to what it was at the time of the granting of the order including the fact that the two liquidators have been duly appointed by the Master. In the event the *point in limine* is dismissed.

Merits of the application

[16] At the outset I must point out that it is accepted that the second and third respondents as liquidators of the company owe a duty to the company to ensure that its assets are realised to the best possible advantage of the company. It is also trite law that any surplus assets available (after payment of the costs incurred in the winding-up and of the claims of creditors) must be distributed[7] by the provisional liquidators amongst the members according to their rights and interests in the company.[8] It is also accepted that a director's powers in respect of the company ceases once a company has been placed in liquidation.[9]

[17] The applicant alleged that the property has a value of R64 million and that the application made by the second and third respondents to the Master to sell the property for R 17 500 000.00 by private treaty is not in the best interest of the applicant. It was further submitted that neither the second and third respondents in their capacity as liquidators of the company nor the Master would entertain any representations by the applicant regarding the consent sought by the second and third respondents for the sale of the property. It is this decision by the Master to permit the second and third respondents to sell the property by private treaty for a purchase price of R

[7] Section 342(1) of the 1973 Companies Act.

[8] *Cronje NO and Others v Hillcrest Village (Pty) Ltd and Another* 2009 (6) SA 12 (SCA) at paragraph [25].

[9] Section 353 of the 1973 Companies Act. This is subject to the exceptions provided for in section 353(2)(a) and (b) of the 1973 Companies Act.

17 500 000.00 (which the applicant claims is well below the true market value of the property) that the applicant seeks to review in due course.

[18] The applicant accordingly claimed that its rights have been violated in the following respects: (i) Firstly, the sixth respondent's claim against the company has not yet been proved. (ii) Secondly, in his capacity as the sole shareholder of the company, he has been prejudiced in that the company's sole asset is not being dealt with to the best possible advantage of the company and consequently of its shareholder. (iii) Thirdly, the applicant, notwithstanding the fact that he is the sole shareholder of the company, has not been afforded any right to make representations either by the second and third respondents in their capacity as liquidators of the company, or by the Master prior to his decision on 4 March 2015. The latter point seems to form the crux of the matter.

[19] The applicant therefore submitted that it has a *prima facie* right in that he has a right as a sole shareholder of the company that the company's property be dealt with to the best possible advantage of the company and that he has the right to any surplus assets available after payment of the creditors of the company. In this regard the applicant submitted that he had a right to be heard by the Master prior to the decision of 4 March 2015 having been taken. The applicant further submitted that there is a reasonable apprehension of irreparable harm if the agreement of sale is concluded at the price well below the true market value of the property. It was also submitted that the balance of convenience favours the granting of interim relief should the applicant ultimately succeeds in the review application, but should the sale agreement be implemented, as the proverbial horse will already have bolted. Lastly the applicant submitted that it has no other satisfactory remedy.

[20] I have already pointed out that the applicant is seeking an interim interdict pending the final determination of the review of the Master's decision of 4 March 2015. It is trite that in order to succeed the applicant is required to establish a *prima facie* right, a reasonable apprehensive of irreparable harm if

the interim relief is not granted, that the balance of convenience favours the granting of interim relief and the absence of any other satisfactory remedy.[10]

[21] I am mindful of the nature of these proceedings and of the fact that the applicant only needs to establish a *prima facie* case open to some doubt.[11]

The value of the property

[22] Before turning to the merits of the application it is necessary to briefly refer to the following two issues that prominently featured in the papers. Central to the applicant's case is the claim that that the property has a value of R 64 100 000.00. In support of this allegation the applicant attached a sworn valuation by Ryle Valuation Services ("Ryle") dated 3 February 2015 which indicates that this is the current open market value of the property. With reference to this valuation, it was contended on behalf of the applicant that the proposed sale price of R17, 500,000.00 is below value and should the property be sold for this price it will be highly prejudicial to him in that the balance that will be available for distribution to himself as a shareholder in terms of section 342(1) of the 1973 Companies Act will be far less than it would be if the property was sold for R 64 100 000.00.

[23] The provisional liquidators strongly criticised the Ryle valuation and set out in great detail in the answering affidavit why the valuation relied on by the applicant is fatally flawed. I do not intend to repeat the criticism in detail. Suffice to point out that I am in agreement with the submission that, if regard is had to the valuation by Quality Valuations CC ("Quality") and relied on by

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[10] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[11] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D): *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."*

the provisional liquidators, the valuation relied on by the applicant cannot be favoured over the one relied on by the respondents.

[24] For example, the valuator (Mr Ryle) notes in the Certification of Valuation that he did not consult with a geotechnical engineer regarding soil conditions and also did not undertake a structural survey of the buildings. He points out that geotechnical conditions will materially affect a valuation.

[25] The respondents also point out that the statement by the valuator that bulk services are available up to street level is patently incorrect in light of the information contained in an affidavit deposed to by a professional engineer to the effect that for the moment and the foreseeable future no water supply is available for Cultura Park E8. The submission is made on behalf of the respondents that, without bulk water supply being available presently for the property and the foreseeable future, the development of the township cannot be implemented.

[26] More in particular, the Ryle valuation does not deal with the existing land claim against the property which will materially affect the valuation of the property. The respondents also took issue with the valuators estimation of the development costs in the amount of R 182 236 660.00 in light of the fact that the valuator is neither an electrical engineer nor a civil engineer and therefore has no authority for this calculation. The respondents submitted that the estimated development costs of R242 857 015.35 is more accurate and referred to the fact that more reliance should be placed on this calculation as it was prepared by professional engineers.

[27] With reference to the valuation prepared by Quality Valuations CC it was submitted on behalf of the respondents that the open market value of the property is estimated at R20 million and the forced sale value to be R13 million. In this regard it was submitted on behalf of the respondents that if it is accepted that the property's open market value is R20 million, a purchase price of R17,500 000.00 is fair.

[28] Apart from the fact that I am persuaded that the Ryle Valuation can be subjected to critique in that it is fundamentally flawed, there are further reasons as to why the court should be reluctant to rely on the Ryle valuation and accept the applicant's contentions in respect of the true value of the property. (i) Firstly, the Quality Valuation relied on by the liquidators was obtained at the instance of the applicant in the course of the winding- up application. In this regard the provisional liquidators point out in the answering affidavit that the Quality valuation was submitted to Mr Huang (who represented the applicant at the time). The invoice for the valuation was submitted by Mr Mulder of Quality Valuations. Mulder was subsequently informed that the applicant did not intend settling the invoice as it was not satisfied with the valuations and that he (the applicant) required a valuation in excess of R 80 000.00 per hectares and if Mulder was prepared to increase the valuation of the property to their satisfaction then the invoice would be settled. In order to satisfy himself that the valuation that he had submitted was reasonable, Mulder consulted with an associated professional valuator who informed him (Mulder) that he was in agreement with the valuation as submitted. The invoice remains outstanding and due and owing by the applicant. (ii) Secondly, the court was also referred to the fact that the applicant had produced evidence of an offer to purchase the property at a purchase price of R 65 000 000.00. This alleged offer to purchase was subsequently exposed to be a fabrication and a sham.

<u>No claim has been proven against the company</u>

[29] The applicant also states in the founding affidavit that no claim has been proven against the company and that until such time as the sixth respondent submits his claim, there are no creditors. It is also alleged that if the sixth respondent did not succeed in proving a claim, alternatively should he succeed in proving a claim and the applicant makes payment of that claim in full, the liquidators would have no reason to dispose of the property in the first instance, provided that all administration expenses, including liquidators' fees are paid. The applicant further tenders to make payment of such costs.

[30] This averment by the applicant is patently at odds with what is contained in the papers and in light of what has already been found to be the factual position in previous litigation involving the sixth respondent (the only creditor) and the applicant. Furthermore this averment essentially amounts to a denial of the final liquidation order granted by the SCA. In this regard the SCA in *Lamprecht v Klipeiland (Pty) Ltd*[12] placed the applicant under final winding-up by substituting the order of the North Gauteng High Court (in terms whereof the court discharge a provisional winding- up order with costs).

[31] Of importance to this application are the following facts and findings recorded by the SCA in its judgment. The SCA expressly dealt with the claim by the appellant (the sixth respondent in this application) that he was to be paid R6 million as remuneration for a project under the agreement. This contract was subsequently terminated and the appellant regarded this as a repudiation of the agreement which he accepted. Based on the alleged repudiation or cancellation of the contract, the appellant demanded the R6 million from the respondent as his compensation. A final demand for payment was served in terms of section 345 (1)(a) of the 1973 Companies Act. As no payment was forthcoming, the appellant instituted motion proceedings to have the respondent wound- up.

[32] The respondent raised numerous points *in limine, inter alia,* that the appellant had not proved that his claim was *liquid*. More in particular the respondent denied that it had agreed to pay the sixth respondent a sum of money and averred that he had agreed to pay the appellant in kind. When the matter initially served before Ranchod, J he declined to deal with the provisional winding -up and instead referred the matter to oral evidence. Whilst oral evidence was led the parties on 20 March 2012 reached an agreement which was made an order of Court by Kruger AJ in terms whereof the respondent admitted and conceded that the appellant is in fact a creditor within the meaning of section 345(1)(a) of the 1973 Companies Act. With reference to this order, which the SCA held is valid, the Supreme Court of appeal

[12] (753/2013) [2014] ZASCA 125 (19 September 2014).

reiterated the principle that, in order to meet the threshold laid down in section 345(1)(a), three essential requirements must be met: The first requirement is that the applicant is a *creditor* of the respondent for an amount of not less than a R100.00 which must be due and payable: "*In other words, the debt must be liquid.*"[13] The SCA concluded that the jurisdictional requirements as set out in section 345(1)(a) have been met in this instance and that the section 345(1)(a) demand was served on the respondent.

[33] The effect of this judgement therefore is to settle the dispute as to whether the claim of the sixth respondent is liquid. In fact, the SCA concluded that "*the respondent is either being ingenious in denying that he knew what he signed and agreed to, or that he was plainly dishonest with the court and appellant. This conduct is reprehensible and deserving of censure.*"[14] It is clear from the founding affidavit that the applicant is persisting with his claim that there are no creditors and that, in any event, the claim of the sixth respondent is not liquid in that, at best for the sixth respondent, his claim is one sounding in damages consequent upon a cancellation of an agreement.

[34] I am in agreement with the sentiments expressed by the SCA that this conduct of the applicant to continue disputing his indebtedness and the liquidity of the claim is "reprehensible". There can, in my view, be no doubt in light of the findings of the SCA that the sixth respondent is a creditor and that the debt is liquid. To persist with raising the same arguments in the current applicantion, the applicant is clearly attempting to disavow the order (by consent) by Kruger, AJ but, more importantly, the findings of the SCA to the effect that the sixth respondent not only is a creditor, but that the debt is liquid. Any attempt in the present application to dispute these findings is not only disingenuous but plainly dishonest.

[35] Does the applicant have a *prima* facie right? Although it is accepted that the applicant has the right to share in the surplus assets (*dies credit*), this right to

[13] Paragraph [15] of the judgment.
[14] *Ibid* ad paragraph [13] of the judgment.

share in any surplus will only become enforceable after confirmation of the liquidators liquidation and distribution account in terms of section 408 of the 1973 Companies Act (*dies venit*) at which time he will obtain an enforceable *ius in ersonam ad rem acquirendam.*[15]

[36] Does the applicant have a right to be heard before the Master may take a decision in terms of sections 386(2A) and 386(2B) of the 1973 Companies Act? This question directly impacts on the prospects of success in the envisaged review application. The applicant submitted with reference to correspondence that it was conveyed to the Master that it wished to place certain facts before the Master prior to him taking a decision regarding the recommendation to sell the property. More in particular the point is made that the applicant has inspected the file content at the Masters office but was unable to locate any documents indicating that any steps had been taken by the liquidators to obtain the necessary consent to sell the property. It was also brought to the attention of the Master that the shareholder of the applicant has a direct and material interest in the property. The averment is also made that the applicant is deliberately being kept in the dark and that it is severely prejudiced.

[37] It is accepted that a person aggrieved by the Master's decision authorising a sale is, in principle, subject to review by this Court.[16] It is, in any event, not

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[15] *De Leef Family Trust and Others v Commissioner for Inland Revenue* 1993 (3) SA 345 (A): "*The Court remarked further that it was important to bear in mind, as to the vesting of an unconditional right in the holder thereof, the distinction between dies cedit (ie the time has come when the right is due or owing) and dies venit (ie the time for the enjoyment of the right has arrived so that possession, delivery or transfer of its subject-matter could be claimed). The Court also pointed out that a share in a joint stock company was a ius in personam, the ownership of which passed by cession and that one of the principal rights carried by a share was the right to participate, on liquidation of the company, in the distribution of the assets of the company.*
Held, that the second and fourth appellants already had, on 3 April 1983 when the special resolution to wind up the company voluntarily was adopted, a vested right (dies cedit) to participate equally in the distribution of the surplus assets of the company on its liquidation, but that dies venit would only occur after confirmation of the liquidator's liquidation and distribution account by the Master in terms of s 408 of the Companies Act when the liquidator was obliged in terms of s 409 to proceed with the distribution of the assets: the second and fourth appellants would then have enforceable iura in personam ad rem acquirendam to obtain transfer of the fixed property in their own names, provided that it had not been realised to liquidate debts and was available for distribution." (Quoted from the Headnote.)

[16] Henochsberg on the Companies Act: *"It is submitted that the Master's decision authorising the sale is subject to review by the Court at the instance of any person aggrieved by such decision … It is*

disputed that the sole shareholder of the applicant will have *locus standi* to bring the envisaged review application.

[38] It was, however, submitted on behalf of the applicant that the Master had a duty to afford the applicant an opportunity to make representations prior to it (the Master) taking the decision to authorise a sale by private treaty. The fact that such an opportunity was not afforded entitles the applicant – so it was submitted - to challenge the decision.

[39] By way of comparison the Court was referred to *Friedland and Others v The Master and Others*[17] where the Court held in the context of an enquiry under sections 417 and 418 of the 1973 Companies Act that a prospective witness does have the right to be heard on the question whether he should be summoned by the Master. However, the Court made it clear that this right to be heard is not unlimited: The first limitation appears to be contained in section 417 itself. Section 417(7) expressly stipulates that the application under 417 is in itself private and confidential unless the Master or the Court directs otherwise. The Court endorsed the view held by Schreiner J in *Ex parte Liquidators Ismail Suliman & Co (Pty) Ltd* 1941 WLD 33 that should the application to summon a person to attend for examination come to the attention of the person to be summoned before the order to summon him had been made, such person would have the necessary *locus standi* to oppose the application to summon him and he should be afforded the opportunity to be heard on that question. The learned Judge said at 34:

> "It seems to me that the Court can take into account the hardship upon a witness in deciding whether to make an order under s 155 or not. It may be that a strong case of oppression must be made out before the Court will deny to a liquidator the rights given under s 155, assuming that the requirements of the section are satisfied; but even if this is so, a witness must have *locus standi* to make out such a case. If he could

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submitted that "a person aggrieved", in this context, would include a member or a creditor of the company."

[17] 1992 (2) SA 370 (W).

move to set an order aside, he can equally oppose the grant of an order in the first instance if he happens to have had notice of the application…."[18]

"For the reasons I have already given I consider it to be clear that the prospective examinees before such an enquiry do not enjoy, with regard to the question whether or not they should be summoned before such an enquiry, all of the rights generally comprehended when the maxim *audi alteram partem* fully applies. They are not entitled to prior notice. It is only if they happen to learn of an approach to the Master by the liquidator, and only if they claim the right to be heard before the Master has made his decision, that they may acquire a right to be heard in terms of the *Ismail Suliman & Co* case. But those are not the only limitations. There are others. I am not now in a position to define the limitations exhaustively."[19]

[40] The Court therefore made it clear that this right to be heard in the context of section 417 and 418 is *not* enjoyed by a party to the full extent of the rights usually understood as being afforded when the *audi alteram partem maxim* applies.[20] It therefore appears from this judgment that prospective witnesses are not entitled to prior notice and it is only in circumstances where they happen to learn of an approach to the Master that they may acquire a right to be heard and even then the right to be heard appears to be limited. In the context of section 317 and 318 the applicant must show that -

"(1) he has approached the Master and asked to be heard before the Master had made the relevant order; (2) that he had something relevant to say to the Master relating to:

(a) the question of jurisdiction; or

(b) the question of hardship to, or oppression of, himself; or

(c) possibly some other circumstance that could be regarded as

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[18] *Ibid* at page 375H – 376 A.

[19] *Ibid* at 378E – F.

[20] *Ibid* at 376C.

unusual, special or exceptional, and as calling for consideration before the decision to grant the order is made."[21]

The application to review failed in the matter of *Friedland* because the applicants have succeeded in only showing (1).

[41] I am mindful of the fact that this application served before this Court by way of an urgent application and that a detailed exposition of the law regarding whether the applicant can claim a right to be heard before the Master may take a decision in terms of section 386(2B) of the 1973 Companies Act may not be warranted. However, in so far as it is necessary to consider the applicant's prospects of success in the envisaged review application, I will briefly consider the following:[22] (i) Does the applicant have a right to be heard (*audit alteram partem*) before the Master may take a decision in terms of section 386(B) of the 1973 Companies Act? (ii) If not, will the applicant have a right to be heard if it comes to his attention that a recommendation has been submitted to the Master and the Master has not yet made a decision? (iii) If the applicant has such a right, what are his prospects of success in succeeding with a review of the decision of the Master?

[42] In considering whether the applicant has a right to be heard prior to the decision having been made, it is necessary to have regard to the empowering provisions in terms of which the administrative act was taken. Having regard to section 386(2B) I am not persuaded that the applicant has - as a general right – the right to be heard *prior* to the Master taking a decision in terms of section 386(2B) of the Companies Act: Firstly, this section does not afford the applicant such a right. More in particular, this section does not provide for *prior* notice to the applicant of the fact that a recommendation is to be submitted to the Master. Secondly, it is accepted that liquidators are afforded certain rights in respect of the winding -up of the company and that

[21] *Ibid* at 379H – 380A.
[22] The Court in *Ferreira v Levin NO and Others; Vryenhoek and others v Powell NO and Others* 1995 (2) SA 813 (W) made it clear that a preliminary assessment of the merits of the applicant's case is required.

effectively the company is placed in the hands of the liquidators under the supervision of the Master and the Court. Some of these powers may only be exercised after the Master has granted his authorisation such as in the case of the sale of the property. The Master will exercise a discretion taking into account the recommendation and it is only after he has satisfied himself as to the merits will a decision be made. Implicit thereto is the fact that the Master will not simply accept and rubberstamp the recommendation without proper consideration. Because the provisional liquidators have been seized with the financial affairs of the company, it may be accepted that the Master may place considerable weight on the recommendation of the liquidators (provided of course that the Master must still exercise an independent discretion before approving the recommendation). I should, however, point out that from the papers it does not appear that the Master did not properly consider the documents that have been forwarded to him. This may partly be due to the fact that the applicant has not deemed it fit to request written reasons from the Master. Thirdly, I am also of the view that the applicant claim that he had a legitimate expectation that he would be heard prior to a decision having been taken.[23] In arriving at this decision I have taken cognisance of the decision in *Walele v The City of Cape Town and Others*[24] where the point was specifically discussed whether an owner of a neighbouring property (Mr Walele) had the right to be notified of building plans before they were approved by the City of Cape Town. In that matter Mr Walele submitted that he was not notified of the proposed building nor given an opportunity to be heard in relation to it. He therefore submitted that the administrative action was procedurally unfair, arbitrary and capricious and therefore fell to be set aside. Of importance is the following statement by O'Regan (ADCJ – writing for the minority):

> "[123] We must be careful, in construing section 3(1), to bear in mind that it is the key provision in PAJA that gives effect to the right

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[23] See in this regard for a full exposition of the applicable principles: *Walele v The City of Cape Town and Others* 2008 (11) BLCLR 1067 (CC) particularly at paragraphs [27] *et seq*.

[24] *Ibid.*

entrenched in section 33(1) of the Constitution, which provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair." There is no challenge to the constitutionality of section 3(1) of PAJA in this case. Yet even in the absence of a challenge, our duty is to interpret section 3(1) in a manner that is consistent with the constitutional right. Section 39(2) of the Constitution requires a court, when interpreting legislation, to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights. *That administrative action be procedurally fair is therefore an important constitutional right which we should seek to protect. Yet, the Constitution does not require a knee-jerk response of affording a right to a hearing in every case regardless of the context or the circumstances of those affected.*[25] There are countervailing considerations of equal importance to the interpretation both of section 33 of the Constitution and section 3(1) of PAJA as I mentioned in *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*:

> "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."[26]

[43] If it is accepted in light of the *Friedland* decision that at the very least the applicant had a right to be heard before a decision was taken in light of the fact that the process came to the applicant's attention prior to the decision having been taken, the question then arises what the prospects of success in the envisaged review application are? In the envisaged review application the

[25] My emphasis.
[26] Footnotes omitted.

applicant will have to show that the Master decision was wrong or erroneous or misdirected.[27] The factual material that was before the Master must be considered together with his reasons. I have already referred to the fact that the applicant in this matter has not, prior to launching this application obtained the Master's reasons for endorsing the recommendation. In fact, the Court simply does not know what the Master took into account in arriving at a decision and what weight was attached to the documents that were attached to the recommendation. In the absence of the reasons for arriving at a decision the Court can only speculate as to the reasons for the Master arriving at a decision.

[44] The applicant has indicated that the review will be brought in terms of the Promotion of Administrative Justice Act ("PAJA").[28] In terms of section 5 of PAJA any person who has been adversely affected by administrative action and who has not been given the reasons for such action may request that the administrator concerned furnish written reasons.[29] I am in agreement that without the Master's reasons it is not possible to determine whether the

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[27] *Al-Kharafi & Sons v Pema NNO* 2010 (2) SA 360 (W): *"[11] A court hearing a review application under s 151 sits both as a court of review and a court of appeal to reconsider the ruling or decision of the master. That does not mean that the court may disregard the factual material before the master or the master's reasoning. It is only where the master, in granting his approval, has erred or misdirected himself based on the material placed before him, that the court can, on review and/or appeal, go further and decide the matter de novo. It is by reference to what was placed before the master that the correctness or otherwise of the master's decision is to be judged. If, based on what was before the master, there was no error or misdirection on the master's part, then that is the end of the matter. It is not open to parties to introduce the new material that they seek to place before this court, and argue on the basis of what was not before the master that the master erred or misdirected himself. The approach is to consider the factual material placed before the master, together with the master's decision and his report, and to consider whether, in the light of that material, the master erred or misdirected himself in any material respect. If any basis for interfering with the master's decision does appear ex facie the documents before the master, as read with his decision and rulings, then the reviewing court may reconsider the matter based on the material before it."*

[28] Act 3 of 2000.

[29] "***5 Reasons for administrative action***

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."

Master erred or misdirected himself as regards the materials that served before him when he took the impugned decision.

[45] In any event, if regard is had to what was before the Master (even in the absence of his reasons) when he took the decision, I am of the view that the applicant has not demonstrated any prospects of success: The following was placed before the Master by the provisional liquidators in the recommendation for permission to sell the property by private treaty: (i) The description of the property and the fact that the property is the property of the company in liquidation; (ii) That Mr Lamprecht (the sixth respondent) is the main creditor and supports this application; (iii) The reasons for the urgency to sell the property; (iv) The fact that the creditor's claim against the estate is in the amount of R12 million; and (v) Various attachments: The consent of the creditor; a letter regarding a possible land claim on the property; sworn affidavits by the provisional liquidators; a copy of the agreement of sale; a draft of the Master's consent in duplicate; a certificate of appointment and lastly the court order . Also attached to the recommendation is the valuation of the property by Quality Valuations. I have already referred to the fact that the sworn valuation attached to the applicant's papers cannot be relied on. That sworn valuation that was presented to the Master was the one attached to the applicant's own papers in the Application to Liquidate the Company. The applicant now seeks to impugn the decision of the Master by reference to a sworn valuation prepared by Ryle which is dated 3 February 2015. This valuation was not before the Master when he took the decision and the applicant is not permitted to introduce it now and to argue on the basis thereof that the Master erred or misdirected himself.

[46] The applicant also baldly asserts that the Master was biased or that there is a reasonable suspicion of bias and that the Master has failed to take into account relevant considerations. The applicant has not made an attempt in the papers to show where the Master demonstrated bias or what facts give raise to a reasonable suspicion of bias on the part of the Master.

[47] Accordingly, the applicant's prospects of success in the envisaged review application are insufficient for purposes of obtaining an interim interdict. In addition, the balance of convenience is against the applicant because the granting of the interim interdict will only delay the winding-up of Klipeiland and cause further expenses which Klipeiland cannot afford. In the premises the balance of convenience does not favour the applicant. Lastly, the applicant does not address the absence of another satisfactory remedy at all in the founding affidavit. Absent an interdict, the applicant is not left without a suitable remedy: The applicant does not address the issue as to why a claim for damages will not be a suitable alternative remedy to the interim relief claimed.

[48] The second and third respondents seek the dismissal of the application with costs on the scale as between attorney and own client. I am in agreement with the submission that the application is without merit and was brought precipitously and constitutes a perpetuation by the applicant of the type of litigation that the Supreme Court of Appeal has already condemned. In the event I am in agreement that a punitive cost order falls to be made against the applicant.

[49] In the event the following order is made:

1. The application is dismissed with costs on an attorney-client scale such costs to include the costs of two counsel.

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Attorneys for the Plaintiff: AFZAL LAHREE ATTORNEYS

Attorneys for the second and third respondents: GERHARD BOTHA & PARTNERS INCORPORATED

Counsel for the second and third respondents: LW DE KONING SC

ADV CP WESLEY

Application was heard on: 5 May 2015

Judgment was delivered on 23/7/2015 2015