

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

Case No: 9961/12

In the matter between:

ADRIAN LESLIE FULLER

First Applicant

EMMA LOUISE FULLER

Second Applicant

HAROLD JOHN FULLER

Third Applicant

and

MARCEL EDWIN NEL N.O

First Respondent

COOKE FULLER FINANCIAL ADVISORS (PTY) LTD
(IN LIQUIDATION)

Second Respondent

THE MASTER OF THE HIGH COURT,
PIETERMARITZBURG

Third Respondent

JOY ANN FURZE COLLINS

Fourth Respondent

JUDGMENT

Delivered: 30/08/2013

MBATHA, J

[1] This is an application by the three former directors of a company styled Cooke Fuller Financial Division (PTY) Ltd presently in liquidation,

cited as the Second Respondent in the application. The First Respondent is the liquidator of the Second Respondent in his representative capacity. The main application by the three applicants is to secure a mandamus to compel the First Respondent to carry out his statutory duties and to properly investigate the claim of the Fourth Respondent in the estate of the Second Respondent. In addition a further order sought is a declaratory to the effect that the Fourth Respondent be declared not to be a creditor in the estate of the Fourth Respondent.

[2] The background to this application is that it concerns a claim in the sum of R1.5 million that Fourth Respondent lodged against the estate of the Second Respondent. This claim was proved and accepted at the meeting of creditors and this in turn led to an insolvency enquiry where the three applicants were required to testify before the Master. The interrogation duly commenced with the three Applicants being duly represented by counsel.

2.1 It is submitted by the Applicants that the First Respondent did not do his duty properly as required in terms for section 45(2) of the Insolvency Act¹. Section 45 (2) reads as follows which read as follows:

“The trustee shall examine all available books and documents relating to the insolvent estate for purposes of ascertaining whether the estate in fact owes the claimant the amount claimed”

It is clear from the wording of the Act² that the liquidators’ duties are peremptory. I was referred to various authorities including **Standard Bank of South Africa v The Master of the High Court and Others**³, regarding the obligations of the First Respondent. I accept that the liquidators must thoroughly acquaint themselves with the affairs of the company and suppress nothing that is material to the ascertainment of the truth.

[3] Claims against an insolvent estate are proved and dealt with in terms of section 44 and 45 of the Insolvency Act⁴. A basic requirement is that such a claim should be a liquidated one of which the amount is fixed and determinable to the satisfaction of the officer presiding at the meeting of creditors. After a claim has been proved in this manner the

¹ Act 24 of 1936, as amended.

² Act 24 of 1936, as amended.

³ 2010 (4) SA 405 (SCA).

⁴ Act 24 of 1936, as amended.

presiding officer delivers the claim and supporting documents to the trustee or the liquidator as the case may be, who then examines the claim and should he decide to disallow the claim he reports to the Master who then takes a final decision on the fate of the claim. Should the claim be disallowed by the Master the aggrieved creditor may prove his claim by way of action or in terms of section 151 of the Insolvency Act⁵, and bring an application to review the decision of the Master.

[4] The status of the present claim by the Fourth Respondent in the sum of R1.5 million is that it has been duly proved at a meeting of creditors and that the First Respondent has not decided to disallow this claim. The First Respondent filed an affidavit to this effect and explained that there are no funds in the estate of the Second Respondent and that at the enquiry evidence came to the fore in relation to, *inter alia* the claim by the Fourth Respondent and that he is still awaiting further documents and until then he is not in a position to form a proper view regarding the claim of the Fourth Respondent. *Quite clearly*, he says, further evidence needs to be heard to achieve this outcome. The mere admission of a claim does not ratify it. It must still be examined by the liquidator.

⁵ Act 24 of 1936, as amended.

[5] The complaint by the Applicants is that the First Respondent has not applied his mind to the obvious fact that even a cursory glance at the papers should have led to the conclusion that the Fourth Respondent has no valid claim in contract against the estate of the Second Respondent. The Applicants scoff at the suggestion by the First Respondent that the enquiry itself will assist him to make up his mind whether or not to disallow the claim. In any event it is clear from the letter addressed by the First Respondent to the Applicants' attorneys dated 13 September 2012 and appearing as annexure "AF-J" at page 111 of the papers that he regards the Fourth Respondent as a "proven creditor" and correctly points out that section 45(3) of the Insolvency Act⁶ does not require him to make any decision capable of being reviewed.

[6] In fact, section 45(3) requires a trustee or liquidator to act only in the event of him deciding not to allow a claim. Once the presiding officer has accepted a claim it remains a valid one until and in the event of the trustee or liquidator deciding not to allow it, and then, and thereafter, further subject to the Master then actually deciding to disallow the claim. The liquidators' function is to examine the affairs of the company. It has a duty to report to the creditors and the Master of the High Court.

⁶ Act 24 of 1936, as amended.

6.1 I accept the submissions made on behalf of the Fourth Respondent that the entire process is creditor driven and that certain functions are sanctioned by the Master of the High Court. The claim was proved without any form of objection thereto and it remains a proved claim. It does not end there, the Act⁷ has created mechanisms when objections can be lodged up to the time when the Liquidation and Distribution account lies for inspection.

[7] The aim of the first order prayed for in the Notice of Motion is therefore nothing more than an order that First Respondent be forced to disallow the claim. The order sought namely that the First Respondent be directed to do all this necessary, take all steps and conduct all investigations into the claim of the Fourth Responded and to report to the Master (Third Respondent) in the outcome of such investigations is not based on any legislative function of a liquidator or trustee. Put differently a trustee or liquidator cannot be ordered to do something that the law does not require him or her to do. Even if I am wrong in drawing this conclusion, the relief sought in the first order prayed for in the Notice of Motion seems superfluous as it is the second order prayed for that the

⁷ Act 24 of 1936, as amended.

Fourth Respondent is not a creditor in the estate of the Second Respondent. These two orders were initially not sought in the alternative, but were duly amended to be prayers in the alternative.

[8] The relief sought in the second order prayed for in the Notice of Motion that it be declared that the Fourth Respondent is not a creditor of the estate of the Second Respondent cannot be resolved on the papers. The Applicants alleged and attached documents that show persuasively that the contract that her claim against the estate of the Second Applicant is based upon was concluded with other entities. The Fourth Respondent in her affidavit attached documents (and in particular annexure "I" at page 342 of the papers" which certainly on the face of it appears as if her investment, the basis of her claim, was with the Second Respondent and not with other entities. Her affidavit sets out her understanding of the agreement with the Second Respondent from page 150 and onwards of the indexed papers and cannot simply be disregarded. I am therefore not in a position to determine on the papers whether or not the Fourth Applicant is a creditor of the Second Applicant.

[9] One would ordinarily in such an event at least give consideration to refer the matter for oral evidence. This is hardly a case where such a consideration should be extended to the Applicants. Firstly, it is the duty of the First Respondent to decide if he **is not going** to allow the Fourth Respondent's claim and, secondly, evidence is being heard at the enquiry that may enlighten the First Respondent in this regard. There is no reason why this Court should be saddled with an issue that is getting attention in the same way that it would get attention if the matter is referred for oral evidence. The submission made on behalf of the Applicants' that the Court can exercise its inherent jurisdiction in terms of section 19 of the Supreme Court Act⁸, cannot be applied to this case, at this stage of the proceedings in the liquidation process.

[10] A number of points *in limine* have been raised in the papers before me, however, in view of the fact that I am persuaded that the relief sought ought not to be granted I find it unnecessary to deal with these points.

⁸ Act 59 of 1959, as amended.

[11] I therefore make the following order:

- (a) The application is dismissed with costs, costs to include costs of two (2) counsel, if applicable.

MBATHA, J

Date of hearing: 23 August 2013

Date of Judgment: 30 August 2013

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