In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 10769/11

In the matter between :

Raymond Leisher	First Applicant
Moneybox Investments 173 (Pty) Ltd	Second Applicant
RowanTree 17 (Pty) Ltd	Third Applicant

and

Enver Mohamed Motala N.O.	First Respondent
John Douglas Michau N.O.	Second Respondent
Preetha Dabideen N.O.	Third Respondent
Cast Arena Trade and Invest 121 (Pty) Ltd	Fourth Respondent
SBT Trust (Pty) Ltd	Fifth Respondent
Park Village Auctions and Property Sales CC	Sixth Respondent
Master of the High Court, Durban	Seventh Respondent

Judgment

Lopes J

[1] On the 1st February 2010 this court granted an order provisionally winding up Ciconia Properties (Pty) Ltd ('the company'). That order was made final on the 23rd March 2010. Pursuant to the liquidation, the first, second and third respondents were appointed as liquidators of the company.

[2] The second meeting of creditors was held on the 6th October 2010. A resolution was passed at that meeting authorizing the liquidators to sell the movable and immovable property owned by the company. An auction sale of five immovable properties belonging to the company was held on the 24th March 2011. The sale of these properties at the auction was not finalized, and on the 7th April 2011 the first applicant ('Leisher'), who claims to be an erstwhile director of the company, concluded a private treaty to purchase the properties for R72 000 000.

[3] Pursuant to the conclusion of the private treaty, Leisher paid a deposit of R10 800 000 to the liquidators. Leisher was, however, unable to raise the balance of the purchase price and the private treaty was cancelled by the liquidators, and the properties were thereafter sold to the fourth respondent ('Cast Arena') for the sum of R70 050 000, again by private treaty.

[4] On the 16th September 2011 Leisher's attorneys demanded return of the deposit of R10 800 000, but the liquidators maintained they were entitled to withhold it in terms of a clause in the private treaty entitling them to do so and to hold the deposit as 'rouwkoop'. Expenses (agent's commission, advertising costs, bank charges and VAT) had been deducted from the deposit and the remaining sum was R10 711 976,04.

[5] Leisher then brought this application initially seeking the return of the deposit in the sum of R10 711 976,04, as well as interdicting and restraining the liquidators from transferring the immovable properties into the name of Cast Arena. The interdict was to operate pending an application for an order declaring that the second meeting of creditors was null and void, ordering the return of the deposit (and expenses paid), and setting aside the sale of the immovable properties to Cast Arena.

[6] The matter came before K Pillay J as an urgent application on the 29th September 2011, and an order by consent between the parties was granted. That order provided, inter alia, that :-

a) further affidavits were to be filed in the application;

b) the deposit of the sum of R10 711 976,04 would be held in trust pending the final determination of this application;

c) interdicting the liquidators from transferring the five immovable properties prior to the 31st October 2011;

d) failing Leisher :-

    i) signing a written offer for the immovable properties in a sum greater than R70 050 000; and

    ii) obtaining the written consent of Cast Arena for the cancellation of the sale agreement concluded by that company with the liquidators; and

    iii) providing bank guarantees for a purchase price acceptable to the appointed conveyancers;

by the 28th October 2011, the transfer of the immovable properties into the name of Cast Arena could be registered.

[7] Pursuant to the order of K Pillay J, Leisher made an offer to the liquidators on the 5th October2011 which was rejected by them on the 7th October 2011. As no subsequent offer was made by the cut-off date, on the 2nd November 2011 Cast Arena demanded transfer of the immovable properties, which took place on the 12th December 2011.

[8] Procedural steps were then taken in respect of the application including the delivery of :-

a) replying affidavits by Leisher;

b) an application for condonation of the late delivery by the liquidators of their supplementary answering affidavit;

c) an application for condonation of the late delivery by Leisher of his supplementary replying affidavit;

d) an application by Leisher to interdict the transfer of the immovable properties to Cast Arena;

e) an application for leave to intervene in the main application by Moneybox Investments 173 (Pty) Ltd and Rowan Tree 17 (Pty) Ltd as concurrent creditors of the company. In respect of both companies, Leisher is the chairman, a shareholder and the operating mind;

f) affidavits responding to the application for leave to intervene;

g) a further application for condonation by the liquidators for their failure to deliver the affidavits timeously;

h) replying affidavits by Leisher, Moneybox and Rowan Tree. (These were handed in by counsel for those parties at the end of the oral argument and were not referred to or considered in argument.)

[9] The issues which I am required to decide are :-

a) was the second meeting of creditors and the resolutions passed at that meeting invalid because of either :-

(i) a failure properly to notify the relevant parties of the meeting; or

(ii) the fact that it constituted a meeting of creditors only and did not purport to be, nor was it, a meeting of members?

b) If that is the case then :-

(i) am I precluded, notwithstanding such a declaration, from setting aside the transfer of the immovable properties to Cast Arena?

(ii) Did the order of K Pillay J on the 29th September 2011 constitute sufficient authority to enable the liquidators to pass transfer of the immovable properties to Cast Arena?

c) Was Leisher misled by representations made during the conclusion of the agreement leading to the order granted by K Pillay J, which were sufficient to enable him to have that agreement and the order set aside?

The Second Meeting of Creditors

[10] Ms *Dippenaar* SC, who appeared for Leisher submitted that the resolutions passed at the second meeting of creditors were invalid because :-

a) the meeting was not properly convened; and

b) the meeting was one of creditors only, and not a members' meeting.

[11] Ms *Dippenaar* drew my attention to the distinction between creditors and members and submitted that the publication in terms of Regulation 8 (for a meeting of members) was defective.

[12] Procedural aspects which are relevant here include the authority of the liquidators and the calling of the meeting. In that regard s 386 of the Companies Act, 1973 ('the Act') provides that :-

'(3) The liquidator of a company -

a) in a winding-up by the Court, with authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;

… shall have the powers mentioned in subsection (4).

(4) The powers referred to under subsection (3) are -

…

h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof.'

[13] It is common cause between the parties that no directions were given by the Master in this regard.

[14] With regard to the procedure for calling such a meeting, s 412 provides :

'(1) In any winding-up of a company, meetings of creditors and members or contributories shall, save as otherwise provided in this Act, be convened and held in the following manner :

a) in the case of meetings of creditors, as nearly as may be in the manner prescribed for the holding of meetings of creditors under the law relating to insolvency; and
b) in the case of meetings of members or contributories, in the manner prescribed by regulation.'

[15] S 40(3)(b) of the Insolvency Act, 1936 provides :-

'(b) The trustee shall convene the second meeting of creditors by notice in the *Gazette* and in one or more newspapers circulating in the district in which the insolvent resides or his principal place of business is situate.'

[16] R 8(2) of the Regulations for Winding-up and Judicial Management of Companies Forms and Fees provides :-

'8(1) a general meeting of the company or contributories of the Company under section 386(1)(d) of the Act shall be summoned by the liquidator by notice in the *Gazette* as prescribed in regulation 7(1) and by sending a notice by post of the time and place of the meeting to every person who is a member or contributory of the company.'

[17] R 7(1) provides that notice in the Gazette must not be on a date less than 10 days before the date upon which the meeting is to be held and shall state the time when and the place where the meeting is to be held.

[18] In the present matter, the second meeting of creditors was held on the 6th October 2010. Notice of that meeting was given as follows :-

(a) publication in the Government Gazette on the 17th September 2010, the preamble to which notice stated :-

'Meetings of creditors, members or contributories of the said estates or companies will be held on that dates and at the times and places mentioned below … for giving the trustees or liquidators directions concerning the sale or recovery of any parts of the estates or assets of the companies …'

The preamble also records that meetings in a place where there is a Master's Office will be held before the Master, and elsewhere before the magistrate. The actual notification recorded that the meeting would be at 10.00am on the 6th October 2010;

(b) a registered letter was sent to Mr Richard Bate on the 9th September 2010 giving him notice of the second meeting of creditors, and recording the necessity for his attendance in terms of s 414(a) of the Companies Act, 1973. (It is common cause that Mr Richard Bate was a shareholder and director of the company.);

(c) to all known creditors (including Moneybox, Rowan Tree, Leisher and Absa) by registered mail;

(d) by publication in 'Beeld' in Afrikaans on the 17th September 2010 of a notice addressed to 'Krediteure en Lede', and by publication in the Natal Witness on the same day of the 'Notice of Second Meeting of Creditors'.

[19] It is common cause that at the second meeting of creditors a resolution was passed authorizing the liquidator to dispose of any immovable property of the company by public auction, private treaty or public tender upon such terms and conditions as the liquidator in his sole and absolute discretion shall determine.

[20] But was this meeting properly convened? The notice addressed to Mr Richard Bate purported to be a notice only relating to a meeting of creditors and not one of members. Similarly the publication in the Natal Witness referred only to creditors and not members. The letter to creditors (including Moneybox, Rowan Tree, Leisher and Absa) referred only to a creditors' meeting, and not to a meeting of members. The letter, however, included copies of the resolutions to be considered at the meeting.

[21] As the minutes of the second meeting of creditors was signed by Mr Richard Bate as a creditor only, it was submitted by Ms *Dippenaar* that there has not been sufficient compliance with the Act. Substantial compliance in this regard is insufficient.

[22] Mr *Wickens* for Moneybox and Rowan Tree submitted that Moneybox as a member did not receive proper notice of the members' meeting. The fact that Leisher was effectively the alter ego of Moneybox and that he received notice of the creditors' meeting does not suffice. This is because he is a layman who may have decided to wait for an announcement of the members' meeting. Any decision taken by attendees at the meeting were qua creditors and not qua members.

[23] In this regard both counsel placed reliance on *Griffin and others v The Master and another (Commins and another Intervening)* 2006(1) SA 187 (SCA). In that case the court considered the requirement of the provisions of s 386(3) read with s 386(4) of the Act, requiring the authority of meetings of creditors and members in order for a liquidator to be granted the powers mentioned in subsec 386(4). A stereotyped form which was headed 'First Meeting of Members and Creditors' was signed by the Master with the words 'qq creditors' having a line drawn through them and in handwriting below that the word 'Member' was written underneath. The court held that in those circumstances the resolution could only

have been one taken by a member and was not one also taken by creditors. It therefore followed that at the first meeting no creditors had given the liquidator the authority which she required.

[24] Whether or not the second meeting of creditors in this matter constituted a meeting of creditors and members, or of creditors only, is a matter of fact to be deduced from the evidence before me.

[25] The minutes of the meeting are headed '**Second** … meeting of creditors/contributories/members …'. The resolutions are adopted on behalf of 'creditors, contributories and members' by G Veenstra (it is common cause, however, that she represented the company's principal creditor.)

[26] That it was a meeting of creditors is not disputed.

[27] The only members of the company were :-

a) Mr Richard John Bate who was a member of the company; and

b) Moneybox Investments which was, on Leisher's own version, a shareholder of the company.

[28] It is clear from the minutes of the second meeting that Bate signed in his capacity as a director of the company. In addition, John Douglas Michau ('Michau') representing the liquidators, confirms in his answering affidavit that

Bate adopted the liquidator's reports and resolutions in his capacity as a member of the company. He also reiterates that Bate attended the second meeting in his capacity as a member and director, and that his signature on page 4 of the minute was in both of those capacities. These allegations are confirmed on oath by Bate, in his confirmatory affidavit, dated the 20th January 2012. The confirmation by Bate (as principal member holding 90% of the shares in the company) may in any event be said to have ratified the action of the liquidators (See : *De Wet NO v Uys NO en Andere* 1998 (4) SA 694 (T).)

[29] On his own admission, Leisher is the alter ego of Moneybox. It is common cause that he received notification of the second meeting. In addition, as he claims to have been a director of the company, it was his duty to attend the second meeting without the necessity of notice having been given to him. In this regard see *S v Di Stefano* 1977 (1) SA 770 (CPD) and subsec 414(1)(a) of the Act.

[30] With regard to the distinction between creditors and members, in circumstances where :-

(a) Bate as a member of the company attended the second meeting and has confirmed that he signed the minutes of that meeting both as a representative of the creditors and as a member;

(b) the only other member was the second respondent. It was common cause that Leisher was not only the operating mind of that entity but also a director of the company, and, accordingly, statutorily obliged to attend the second meeting; and

(c) Leisher had notice of the meeting and in fact appointed a representative to appear in his stead (one Edeling), and neither Leisher nor the representative attended for reasons which are not dealt with in the affidavits;

I regard it as somewhat artificial to suggest that the second meeting did not constitute a meeting of both creditors and members. The purpose of publication in the Gazette and in newspapers with regard to both meetings of creditors and meetings of members was achieved in this instance because Bate attended the meeting and Leisher knew of the meeting and should have attended it. I accordingly find that the relevant parties were properly notified of the second meeting and that it constituted a meeting of both creditors and members. I am also of the view that the resolutions passed at that meeting gave the liquidators the power to sell the immovable properties of the company.

[31] Having made the above finding it is not necessary for me to determine whether I am precluded from setting aside the transfer of the immovable properties to Cast Arena, and whether the order of K Pillay J on the 29th September 2011 constituted sufficient authority to enable the liquidators to pass transfer of the immovable property to Cast Arena.

Leisher misled by representations

[32] The final question for me to decide is whether Leisher was misled by representations which were made during the conclusion of the agreement which led to the order granted by K Pillay J, and if so, whether those misrepresentations were sufficient to enable him to have that agreement and the order of K Pillay J set aside.

[33] The misrepresentation is alleged to be that Leisher was told that Cast Arena would agree to the cancellation of the sale agreement. It is Leisher's case that had he been aware that Cast Arena would not consent to the cancellation of the sale agreement he would not have concluded the agreement contained in the court order. It was submitted in argument that the matter of that misrepresentation should be referred for the hearing of oral evidence because if it is found that a fraud had been committed upon Leisher in that regard, it would vitiate the entire agreement.

[34] Mr *Wickens* submitted that this issue is not a consideration of the interpretation of the agreement but of an inducement which led Leisher into concluding the agreement and subsequent court order. That misrepresentation could have been innocent, negligent or fraudulent, and would entitle Leisher to resile from the agreement. The type of representation would only affect any claim for damages.

[35] Mr *Salmon* SC who appeared for Cast Arena submitted that there is no

evidence in the correspondence that Leisher was under any misapprehension with regard to the conclusion of the agreement. He further submitted that it was impermissible to lead evidence to contradict the terms of the order, and unless the applicants requested a variation or recission of the order, it stands.

[36] After the conclusion of the agreement and the order of K Pillay J on the 29th September 2011, Leisher deposed to his replying affidavit on the 28th October 2011. In that replying affidavit he sets out that he has been unable to comply with the conditions set out in sub-paragraph 8.2 of the order of court – i.e. obtaining the written consent of Cast Arena for the cancellation of the sale agreement which Cast Arena concluded with the liquidators. The reasons which he gives for the fact that he was misled is contained in sub-paragraphs 4.5 and 4.6 of his affidavit which read as follows :-

‘4.5 … The only reason that this condition was inserted in the consent order, was that representatives of the Fourth Respondent, IAN ROBERT WHITE, had informed me previously and *inter alia* in a letter dated 11 February 2011 that the Fourth Respondent did not wish to purchase the properties but only made an offer to protect the interest of IDJN JOINT VENTURE’S. I annex a copy of this email hereto as Annexure “EL”.

4.6 I was further informed that, if any higher offer was received, the Fourth Respondent would step back and allow the properties to be transferred to the new purchaser. I instructed my legal representatives on this basis and this was the reason for the said clause to be inserted in the consent order.

It has now transpired that the Fourth Respondent never had the intention to give its consent. Its agreement that the consent order be made an order of Court, was therefore given under false pretences.'

[37] The remainder of Leisher's replying affidavit appears to be confined to arguments relating to the validity of the resolution passed at the second meeting of creditors.

[38] With regard to the alleged misrepresentation, the correspondence annexed to the affidavits of the parties, and particularly the replying affidavit of Leisher and his supplementary replying affidavit are informative.

[39] On the 7th October 2011 the liquidators wrote to Leisher's attorneys setting out their objections to the re-drawn sale agreement submitted to them by Leisher's attorneys. They also confirm that the agreement of sale needed to include the special condition set out in sub-paragraph 8.2 of the consent order.

[40] Leisher refers to a letter dated the 3rd October 2011 in which his attorneys confirm that Cast Arena's attorneys Messrs Cox Yeats, had consulted with their client and agreed to the wording of sub-paragraph 8.2 of the consent order. They also state that Cox Yeats had instructed the liquidators' counsel to address the court regarding the consent of Cast Arena, which had been done.

[41] Cox Yeats replied to that letter on the 12th October 2011, referring to a meeting between themselves, Leisher and Leisher's attorneys. In that letter Cox Yeats confirm their discussion with the liquidators' counsel and their request that he convey Cast Arena's consent to the draft order and sub-paragraph 8.2. The letter records that they never requested the liquidators' counsel to communicate that Cast Arena in any way consented to the cancellation of the sale agreement. In support of this they pointed to the plain language of clause 8.2 which required that Leisher obtain the written consent of Cast Arena to the cancellation of the sale agreement.

[42] It is clear that initial negotiations between Leisher and Cast Arena after the grant of the consent order were unsuccessful. Leisher refers to a letter written by his attorneys to Cox Yeats on the 13th October 2011 recording that he contended that Cast Arena had not in fact cancelled the sale, and indicated that Cast Arena would only consider consenting to such a cancellation if an acceptable monetary offer was made to them. There is no indication in this letter of any misrepresentation by any party to Leisher, regarding the fact that Cast Arena had consented at the time of the grant of the consent order.

[43] Leisher then refers to a without prejudice letter dated the 13th October 2011 sent by his attorneys to Cox Yeats offering Cast Arena an amount of R2,5m to obtain the consent which they sought. That offer was rejected by Cast Arena.

[44] Whatever the intention of the parties may have been in agreeing to sub-paragraph 8.2 of the order of K Pillay J, any evidence of their intention and the prior negotiations with regard thereto remain inadmissible. In this regard see *Van Aardt v Galway* [2012] JOL 28349 (SCA), at paragraph 9.

[45] With regard to the submission that there had been a false representation which had induced Leisher to conclude the agreement leading to the order of K Pillay J, this is not supported either in the affidavits or in the correspondence. Although the suggestion is made by Leisher in sub-paragraph 4.6 of his replying affidavit that agreement to the consent order being made an order of court from Cast Arena was given under false pretences, no evidence is put up that this was the case. There is a suggestion in the correspondence that the liquidators' counsel may have represented to the court that the fourth respondent consented to cancel the agreement, but that has not been pursued in argument before me, the suggestion being that the 'legal representatives' of the liquidators had somehow contributed to any misunderstanding.

[46] The problem with a suggestion that Cast Arena had in fact consented to the cancellation of the agreement is that it flies in the face of the probabilities and the correspondence. It is inherently improbable that they would have recorded in an agreement, that it was a condition of any sale of the immovable properties to Leisher that he obtain their written consent, if they had already decided to give that consent. Why Cast Arena would reserve its rights to obtain transfer of the

properties into its own name after the 28th October 2011 (see sub-paragraph 8.3 of the order) if it had already consented to the cancellation of the agreement is not clear.

[47] It is also clear from the correspondence that Cast Arena deny any suggestion that the legal representatives of the liquidators in general, and the liquidators' counsel in particular, were given any assurance that Cast Arena would in fact consent to the cancellation of the sale agreement it had concluded. This is supported by the correspondence, in particular, where Leisher's attorneys make an offer of R2 500 000 to induce Cast Arena to cancel the sale agreement. That offer was rejected.

[48] With regard to any alleged representation made by counsel for the liquidators, in Cast Arena's answering affidavit in the application of the second and third applicants for leave to intervene, the allegation is made that counsel for Leisher withdrew the allegation that Leisher had been misled by counsel for the liquidators at the hearing on the 29th September 2011. In his reply to that affidavit Leisher ignores the contents of that paragraph completely. In those circumstances I accept what is stated by Michael Geoffrey Nichol on behalf of Cast Arena, and there would accordingly be no representation made by counsel for the liquidators which is relied upon by the applicants. Any suggestion then that the matter be referred for the hearing of oral evidence on the issue of any alleged misrepresentation accordingly has no basis in the affidavits, and I

decline to make any such order.

[49] I accordingly find that there is no basis on which it would be proper to set aside the sale of the immovable properties to Cast Arena.

<u>Leisher's deposit</u>

[50] There remains the question of what is to happen to the deposit made by Leisher in the first agreement of sale which he concluded with the liquidators. Mr *Lotz* SC for the liquidators submitted that it should form the subject of an action in order to determine the extent of the damages suffered by the liquidators and which they were entitled to keep. However, Mr *Lotz* readily conceded that any damages which the liquidators or the company may have suffered would be nowhere near the extent of the deposit withheld in the sum of R10 711 976,04. Indeed, in argument before me Mr *Lotz* could give no reason why the liquidators could not have easily calculated the damages suffered by them given their stance that the sale to Cast Arena should stand. Suggestions such as loss of interest, etc in order to determine any amount to be returned in terms of the Conventional Penalties Act, 1962 could long since have been calculated by the liquidators. In my view it is unjust that a large sum of money could have been withheld from Leisher without proper justification.

[51] The original agreement of sale concluded with Leisher was for R72 000 000. The subsequent sale to Cast Arena was R70 050 000. There was arguably

then a clear loss to the liquidators of the sum of R1 950 000.

[52] Subtracting the R1 950 000 from the remaining deposit of R10 711 976,04, a sum of R8 761 976,04 remains. On what seems a generous interpretation to the liquidators, if they suffered any further damages, the interests of justice would best be met were the sum of R8 000 000 to be returned forthwith to Leisher with the remainder to remain in trust pending the outcome of further litigation between Leisher and the liquidators for the determination of the liquidators' damages.

Costs

[53] With regard to the question of costs, save for the return of the deposit, the applicants have been unsuccessful. What is clear, is that the liquidators would not have returned the deposit to Leisher had it not been for these proceedings. Leisher having been successful in obtaining the return of some part of the deposit, and the liquidators and Cast Arena being successful in warding off the interdict and declaratory orders, it would in my view accord with justice were each party to pay their own costs. Those costs include the wasted costs occasioned by the adjournment of the application pursuant to the recusal of Swain J. The fourth respondent however, has been successful.

[54] I accordingly make the following order :

1. Pending a decision or agreement on the extent of the damages suffered

by the first, second and third respondents (as liquidators of Ciconia Properties (Pty) Ltd) as a result of the breach of the first sale agreement concluded between them and the first applicant, the first, second and third respondents are directed to repay to the first applicant the sum of R8 000 000 as a part repayment of the deposit made by the first applicant in the cancelled sale agreement dated the 7th April 2011;

2. the remainder of the applicants' application is dismissed;

3. the applicants and the first, second and third respondents are each to pay their own costs of the application including the wasted costs occasioned by the adjournment of the matter pursuant to the recusal of Swain J;

4. the first applicant is to pay the costs of the fourth respondent.