

**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☐ / No ☒
- (2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
- (3) REVISED: Yes ☐ / No ☒

In the matter between:

ERF 9[...] AND 9[...] MEADOWDALE (PTY) LTD

Applicant

And

NATIONAL EMPOWERMENT FUND

First Respondent

MASTER OF THE HIGH COURT

Second Respondent

KAPLAN, H N.O.

Third Respondent

NDYAMARA, AN N.O.

Fourth Respondent

NGOBNI, GN N.O.

Fifth Respondent

**CK INSOLVENCY, RESTRUCTURING AND
RECOVERY PRACTITIONERS (PTY) LIMITED**

Sixth Respondent

THE SHERRIF, JOHANNESBURG CENTRAL

Seventh Respondent

STANDARD BANK OF SA LIMITED

Eighth Respondent

In re the matter between:

NATIONAL EMPOWERMENT FUND

Applicant

and

MASTER OF THE HIGH COURT

First Respondent

KAPLAN, H N.O.

Second Respondent

NDYAMARA, AN N.O.

Third Respondent

NGOBNI, GN N.O.

Fourth Respondent

**CK INSOLVENCY, RESTRUCTURING AND
RECOVERY PRACTITIONERS (PTY) LIMITED**

Fifth Respondent

THE SHERRIF, JOHANNESBURG CENTRAL

Sixth Respondent

STANDARD BANK OF SA LIMITED

Seventh Respondent

and in the matter between

NATIONAL EMPOWERMENT FUND

Applicant

and

MASTER OF THE HIGH COURT

First Respondent

KAPLAN, H N.O.

Second Respondent

NDYAMARA, AN N.O.

Third Respondent

NGOBNI, GN N.O.

Fourth Respondent

**CK INSOLVENCY, RESTRUCTURING AND
RECOVERY PRACTITIONERS (PTY) LIMITED**

Fifth Respondent

THE SHERRIF, JOHANNESBURG CENTRAL

Sixth Respondent

STANDARD BANK OF SA LIMITED

Seventh Respondent

ERF 9[...] AND 9[...] MEADOWDALE (PTY) LTD

Eighth Respondent
(to be joined)

PRINCE HENRY PHAWENI

Ninth Respondent

Coram: Du Plessis AJ

Heard on: 12 August 2024

Decided on: 2 October 2024

JUDGMENT

DU PLESSIS AJ

[1] This application was enrolled on my opposed motion roll, but it was unopposed on the day of the hearing. Due to the nature of the dispute and the situation with the first respondent's attorney, I felt it prudent to reserve judgment and give brief reasons for granting the order as sought.

[2] The applicant, Erf 9[...] and 9[...] Meadowdale (Pty) Ltd (hereafter referred to as "Meadowdale") and the first respondent, the National Empowerment Fund (hereafter "the NEF"), are both creditors in the estate

of Hollywood displays (Pty) Ltd (hereafter "Hollywood Displays"). Hollywood displays are in liquidation in the hands of the 3rd and 4th respondents.

- [3] On 8 August 2018, the NEF launched a review to set aside the confirmation of the liquidation, distribution and contribution accounts and declare the NEF as a secured creditor in the estate of Hollywood Displays. The 2nd to 5th respondents filed a counter application for a declaratory order to, in short, declare that the liquidators are entitled to issue a writ of execution against the NEF. These issues were settled, and a settlement agreement was signed in March 2023.
- [4] On 16 October 2023, the NEF delivered an application to have a settlement agreement made an order of court. It did so without citing Meadowdale as a party. The settlement agreement drastically reduced the NEF's contribution to the estate, which reduced the dividend paid to Meadowdale and other creditors.
- [5] On 14 November 2023, Meadowdale delivered an application to be joined to the application to make the settlement agreement an order of court, together with a counter application to have the settlement agreement set aside or declared void ab initio and of no force and effect.
- [6] What was before me on the day of the hearing was an application to intervene in the application to make the settlement agreement an order of court and a counter-application to declare the settlement agreement void ab initio. Meadowdale also sought a punitive cost order.
- [7] The NEF filed a notice of intention to oppose. However, it has not delivered an answering affidavit, replying affidavit, heads of argument or a practice note. An email attached to the practice note shows that on 15 February 2024, the NEF emailed the attorneys previously involved to inform them that their firm had not been appointed to the panel of attorneys and that,

thus, they had no mandate. This attorney informed the applicants of this. The NEA had no legal representative on record.

[8] The 4th and 5th respondents gave notice of their intention to oppose the joinder application on 25 April 2024. However, they have not filed an answering affidavit, heads of argument or practice note and have accordingly not properly opposed the matter or placed anything in issue.

[9] It is on this basis that I proceeded and heard counsel for Meadowdale. I perused the papers to ensure that the applicant made out a case of the order sought. I am so convinced for the short reasons set out below.

Decision

[10] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner*¹ the court clarified that if the applicant shows that it has some right affected by the order issued, permission to intervene must be granted. This is because an order should not be granted against the party without affording such a party a pre-decision hearing. *Peermont Global (KZN) (Pty) v Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom*² stated it is the mere possibility that a sufficient legal interest exists, and it is not necessary for the court to positively determine that it does exist. This implies that the allegations made by the intervening applicant must constitute a prima facie case or defence.

[11] Furthermore, a creditor has locus standi to intervene in applications for sequestration and/or liquidation at any stage and does not need to establish an additional legal or other interest.³ This case is at least similar to that.

¹ 2017 (5) SA 1 (CC) para 10.

² [2020] 4 All SA 226 (KZP) para 18.

³ *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 (5) SA 596 (GSJ) at para 30.

[12] Meadowdale thus demonstrated a direct and substantial interest in the subject matter of the action in that the litigation may be prejudicially affected by the court's judgment.

[13] As for the request to declare the purported settlement agreement entered into between the NEF and Ndyamara N.O. void ab initio, the following: the estate of Hollywood Displays is in liquidation. Ndyamara N.O. and Ngobeni N.O. are liquidators tasked with winding up the estate. Kaplan N.O. was originally also appointed as a liquidator but has since passed away. He has not been replaced.

[14] Before Kaplan NO's passing, a contribution of about R3,2 million was sought from the NEF. The NEF took this decision on review. Meadowdale was cited as one of the respondents but did not oppose it as the liquidators were opposing. This review was settled between the NEF and Ndyamara N.O., for R1,5 million. This reduced the amounts due to all creditors, including Meadowdale.

[15] This was not a competent decision in terms of s 386 of the Companies Act 61 of 1973 (hereafter the "old Companies Act"), as the liquidators' power does not include the power to settle a review or reduce the contribution payable to creditors. The liquidators also did not obtain such authority by the meetings of creditors or from the Master's directions (in terms of s 387 of the old Companies Act). The only powers that the liquidators were granted in terms of s 402 of the old Companies Act were to hire attorneys and counsel to institute or defend any action or legal proceedings of a civil nature on behalf of Hollywood Displays and to abandon legal action which had been instituted to recover debts. This did not include concluding a settlement agreement.

[16] Furthermore, s 382(1) of the old Companies Act requires that when two or more creditors have been appointed, they shall act jointly in performing their functions. Ndyamara N.O. did not act jointly with the other liquidators.

These allegations were put to Ndyamara N.O., and he provided no evidence to the contrary. Meadowdale's version is thus uncontested.

[17] A further problem is that the vacancy that resulted from Kaplan N.O.'s passing has not been replaced in terms of s 377 of the old Companies Act, nor did the Master direct that the remaining two liquidators can wind up the estate without the vacancy being filled. Thus, the fact that Ndyamara N.O. acted on his own makes his act contrary to the legislation, and a nullity.⁴

[18] A further argument supporting Meadowdale's contention that the settlement agreement is null and void is the case of *Eke v Parsons*⁵ where the Constitutional Court stated that a settlement agreement may only be made an order of the court if it is competent and proper. To be competent and proper, the agreement must be related to the litigation, not be objectionable, and hold some practical or legitimate advantage. For an agreement not to be objectionable, its terms must be capable of being included in a court order. It must thus accord with the Constitution and the law and not be at odds with public policy.

[19] In the winding up of companies, liquidators occupy a position of trust. Liquidators are required to act in the best interests of creditors. A liquidator must be independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice.⁶ In *Receiver of Revenue, Port Elizabeth v Jeeva*,⁷ the court approved the principle that it is of utmost importance that liquidators, as officers of the court, maintain an even and impartial hand between the individuals whose interests are involved in the winding up. This duty is then towards the whole body of stakeholders, the whole body of creditors, and the court to make themselves thoroughly acquainted with the company's affairs. This

⁴ *Cooper v The Master* 1996 (1) SA 962 (N) at 968F.

⁵ 2016 (3) SA 37 CC.

⁶ *Standard Bank v The Master of the High Court* [2010] ZASCA 4.

⁷ 1996 (2) SA 573 (A) at 578F-H.

means that a party who has an interest in the winding up, such as a creditor, may expect that the liquidator seized with the widening up will strictly observe the requirements of procedural and substantive fairness and that he will be seen to be doing so. I agree that the settlement that lowered the contribution amount to R1,5 million without consulting the creditors is a breach of the position of trust and fails to regard the interests of all creditors equally.

[20] This also goes against s 122 of the Insolvency Act 24 of 1936 (and s 408 of the old Companies Act) that provides that the confirmation of the Master is final and that only a court can reopen it. Ndyamara N.O. thus did not have the power to reduce the amount prescribed by statute unilaterally, and in trying to do so with a settlement agreement, circumvented legislation. The settlement agreement is thus objectionable. For these reasons, no valid settlement agreement came into existence.

[21] Meadowdale asked for a punitive cost order since the NEF attempted to make a settlement agreement an agreement of court that Meadowdale warned to be unlawful. They also did not agree to join Meadowdale in the application to make the settlement agreement an order of court. While the (in)action of the NEF leaves much to be desired, I am not convinced that it warrants the cost order sought.

Order

[22] The following order is made:

1. Erf 9[...] and 9[...]3 Meadowdale (Pty) Ltd is granted leave to intervene as the Eighth Respondent in the proceedings brought under case number 2018/29383;
2. The settlement agreement entered into by the National Empowerment Fund and AN Ndyamara N.O. on or about 13 March 2023 is void *ab initio* and of no force or effect;

3. The National Empowerment Fund is to pay the costs of the matter on scale B, including the costs of two counsel.

WJ du Plessis

Acting Judge of the High Court, Johannesburg

For the Applicants:

L Hollander & A Ashton instructed by Darryl Furman & Associates