IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 16766/13

In the matter between:

KARL & SARAH PROPERTIES (PTY) LIMITED	Applicant
and	
MICHAEL JOHN LANE N O	First Respondent
HILMI DANIELS N O	Second Respondent
MFLV TRADING (PTY) LIMITED (IN LIQUIDATION)	Third Respondent
MADS FINN LINDVIG VIUFF	Fourth Respondent
LIZZIE ANNIE VIUFF	Fifth Respondent
MASTER OF THE HIGH COURT	Sixth Respondent
MAGISTRATE P ANDREWS	Seventh Respondent

Court: GRIESEL J

Heard: 14 April 2014

Delivered: 30 April 2014

JUDGMENT

GRIESEL J:

[1] The applicant, Karl & Sarah Properties (Pty) Limited, launched the present application, seeking wide-ranging relief against the various respondents herein. The first and second respondents are the liquidators of the third respondent, MFLV Trading (Pty) Limited (in liquidation) ('the company'), in their capacity as such ('the liquidators'). The fourth respondent, Mr Mads Viuff, was the sole director of the company, whereas the fifth respondent, Mrs Lizzie Viuff, is his mother, who is a loan creditor of the company. The Master has been joined *ex officio* as the sixth respondent, with the magistrate who presided at a second meeting of creditors of the company being the seventh respondent.

[2] The application is being opposed by the liquidators who have, in turn, launched a counter-application against the applicant. The other respondents abide the court's decision.

Factual background

[3] The company, which was previously known as Maxabella (Pty) Limited, was prior to its liquidation engaged as a developer in the construction of upmarket homes for clients in the Western Cape. It also owned two immovable properties at the Arabella Estate, between Kleinmond and Bot River.

[4] On 9 November 2007 the company concluded a written building contract with the applicant, for the construction of a house on the property of the applicant near Hermanus at a contract price of approximately R10 million. In the course of the contract, a dispute arose between the parties, which dispute was submitted to arbitration. In its

statement of claim, delivered on 12 April 2010, the applicant claimed payment of damages from the company in an amount of R3 647 438,42.

[5] On 30 April 2010, Mr Viuff, as sole director of the company, passed a resolution to change the name of the company from Maxabella (Pty) Limited to MFLV (Pty) Limited. This change was duly registered on 18 May 2010 without the knowledge of the applicant.

[6] In the interim, on 27 January 2010, the company transferred one of its properties to Mr Viuff and his wife for a purchase price of R5,739 m. The purchase price was allegedly discharged by set-off against the loan account of his mother against the company. On 1 March 2010, the company transferred its second property to Mr Viuff's father-in-law, Mr Dahl, for a purchase price of R3,876 m, again allegedly discharged by set-off against the loan account of his mother.

[7] On 10 June 2010, the recently renamed company was provisionally wound up by this court under case no 12653/10, again without the knowledge of the applicant. The petitioning creditor was Mrs Lizzie Viuff, who claimed to be a creditor on loan account in an amount of R1 696 130, whereas her son, Mr Viuff, allegedly had a loan claim for R216 861 against the company. A final liquidation order was granted on 27 July 2010. Thus, in essence, this was a 'friendly family winding-up', as the applicant described it.

[8] The liquidators were provisionally appointed on 7 July 2010 and finally on 18 October 2010. In the meantime, on 9 September 2010, at a first meeting of creditors, the applicant presented a claim (claim 1) for R3 647 438,42, which is the full amount claimed in the pending

arbitration. The claim was, however, rejected on the basis that it was not liquidated.[1] No other claims were presented at that meeting.

[9] On 25 November 2010, at a second meeting of creditors, the applicant presented and proved a claim for R108 300 (claim 2), consisting of a liquidated portion of the larger claim 1 previously presented and rejected. This claim forms the subject of the counter-application, in which the liquidators seek an order reviewing and setting aside the decision of the presiding magistrate to admit the claim.

[10] Again, no other claims were presented at that meeting, which was thereupon adjourned to 17 February 2011. The second meeting of creditors was subsequently postponed on a number of occasions.

[11] During July 2011, the applicant applied to the Master for the holding of an inquiry in terms of s 417 of the 1973 Companies Act, which request was granted by the Master. On the eve of the first session of the inquiry, on 21 November 2011, the Viuffs launched an application under case no 23780/11, supported by the liquidators, to set aside the s 417 inquiry. This application was unsuccessful and subsequently the Viuffs as well as Mr Lane, the dominant liquidator, were compelled to testify before the commissioner.

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[1] In terms of s 44(1) of the Insolvency Act, 24 of 1936, only a liquidated claim, the cause of which arose before the sequestration of that estate, may be proved.

[12] After all this, Mr Lane addressed a letter to the Master on 15 December 2011, stating that they (the liquidators) had been advised that the second meeting of creditors had been adjourned to 29 March 2012. He proceeded:

> 'In our view, no purpose is presently being served by keeping that meeting open as, in our view, there is no business to conduct thereat.
>
> We request that you close this meeting as soon as possible and let us have your confirmation that this has been done.
>
> This will enable us to continue with our administration of the estate as a number of creditors have expressed an interest in submitting claims for proof. This can only be done once the second meeting of creditors is closed and a general and special meeting of creditors convened for the proof of further claims.'

[13] The Master acceded to this request by the liquidators and on 19 January 2012, without the knowledge of the applicant, the magistrate (the seventh respondent herein) prematurely reconvened and closed the second meeting of creditors, more than two months before the date to which it had been adjourned. This opened the way for the liquidators to convene a special and a general creditors' meeting in terms of ss 41 and 42 of the Insolvency Act for 8 March 2012, at which meeting the creditors who had previously 'expressed an interest in submitting claims for proof', namely Mr Viuff and his mother, duly proved their claims. Various resolutions were also adopted – in the absence and without the knowledge of the applicant.

[14] When the applicant's attorney arrived at court for the postponed second meeting, on 29 March 2012, she discovered that the matter had not been enrolled for that date as it had earlier been closed at the behest of the liquidators under the circumstances as outlined above. She

thereupon prevailed upon the magistrate to reopen the second meeting of creditors and to further postpone it. It was only at a much later date, on 29 April 2013, that the applicant's attorney discovered that a special and a general meeting of creditors had in fact been held on 8 March 2012 at which certain claims were proved and resolutions adopted. This was when a copy of the liquidators' response to the application for their removal was forwarded to them by the Master. These events form the subject of prayers 1-9 in the applicant's notice of motion, which was issued on 11 October 2013.

[15] Against this background, I find it convenient to deal first with the counter-application of the liquidators before considering the relief claimed on behalf of the applicant.

<u>Counter-application</u>

[16] As mentioned earlier, the liquidators seek an order reviewing and setting aside the decision of the presiding magistrate to admit the applicant's claim 2; alternatively, an order setting aside the Master's refusal to expunge claim 2.

[17] Apart from a number of procedural objections raised against the counter-application, the applicant argued *in limine* that the liquidators have failed to launch their counter-application without unreasonable delay and not later than 180 days after the date on which they became aware of the administrative action sought to be impugned, as required by s 7(1)(a) of the Promotion of Administrative Justice Act, 3 of 2000

(‘PAJA’).[2] (It was not disputed that the decision of the magistrate on 25 November 2010 to admit claim 2 amounts to ‘administrative action’.[3])

[18] On the facts of the present matter, it would appear that the period of 180 days commenced to run on 25 November 2010, as Mr Lane was present at the meeting when claim 2 was admitted. Within a week of that meeting, on 2 December 2010, C&A Friedlander, who had acted on behalf of the Viuffs, the company as well as (at certain stages) the liquidators, wrote to the applicant’s attorneys that they had called upon the liquidators to obtain the expungement of claim 2 on the basis that ‘the submission to proof of the claim was grossly irregular in that the claim was both disputed and unliquidated’.

[19] On 6 December 2010, the liquidators wrote to the arbitrator, seeking a postponement of the arbitration and mentioning, *inter alia*, that claim 2 ‘will have to be expunged’.

[20] The very next day, on 7 December 2010, Mr Lane addressed the Master, requesting him to expunge claim 2 for the reasons set out in his letter of even date addressed to the applicant’s attorneys.

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[2] ‘(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.’

[3] Cf *P G Bison Ltd v Johannesburg Glassworks (Pty) Ltd* [2008] 1 All SA 473 (W) para 3, 4 and 12.7; and *Steelnet (Zimbabwe) Ltd v Master of the High Court, Jhb & Others* [2008] JOL 21948 (W).

[21] On 19 July 2011, the liquidators again requested the Master to expunge claim 2. The Master's representative responded, on 26 August 2011, that the presiding officer at the Wynberg office had already 'approved' the claim, with the result that the Master was *functus officio*.

[22] This response caused C&A Friedlander, on 5 September 2011, to address the Master and the arbitrator, stating that they acted on behalf of the liquidators and that they 'are instructed to advise that our client is to bring an application to the Western Cape High Court for the review of the decision of the Magistrate Wynberg to admit the claim of Karl & Sarah Properties (Pty) Ltd on 25 November 2010 in the amount of R108 300 ("the review application")'. (In parentheses, it should be noted, as the applicant repeatedly pointed out, that the attorneys appear to have had an obvious conflict of interest insofar as they were at that stage representing not only the company in liquidation, its sole shareholder and director, and the petitioning creditor; but also the liquidators.)

[23] On the eve of the first session of the s 417 inquiry, on 21 November 2011, C&A Friedlander wrote to the applicant's attorneys, again stating that they had been instructed 'to brief senior counsel to move an urgent application to *inter alia*, review the master's decision regarding his failure to expunge your client's claim'. The application that was subsequently launched, however, did not seek the expungement of claim 2. In an affidavit in support of an application by the Viuffs to set aside the s 417 inquiry, Mr Lane reiterated that the liquidators 'remain of the view that the second claim ought to be expunged'.

[24] It thus appears that, notwithstanding their knowledge of the alleged irregular administrative action from Day 1 and notwithstanding their professed objective of assailing such action, the liquidators have delayed from 25 November 2010 to 14 February 2014, ie a period of more than three years, before launching the present counter-application. In these circumstances, it is clear to me that they have failed to comply with the mandatory provisions of s 7 of PAJA.

[25] However, in terms of s 9(2) of PAJA the court may extend the period of 180 days 'for a fixed period' on application by the person concerned 'where the interests of justice so require'.[4]

[26] In *Camps Bay Ratepayers' and Residents' Association v Harrison*,[5] these provisions were considered by the Supreme Court of Appeal, where Maya JA (writing for the court) said the following:

'Section 9(2) [of PAJA] however allows the extension of these time frames where "the interests of justice so require". And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.'

[27] *In casu*, the liquidators have not attempted to comply with these requirements, nor have they asked the court to invoke the provisions of s 9(2) of PAJA; in fact, they have not even referred to the provisions of

[4] Section 9(1) and (2).
[5] [2010] 2 All SA 519 (SCA) para 54 (footnote omitted).

PAJA. In these circumstances, it follows that the counter-application is fatally defective and falls to be dismissed for this reason alone. It is thus not necessary to consider the various arguments and counter-arguments relating to the merits of claim 2.

Prayers 1–9

[28] Turning to the main application, prayers 1–9 deal with the closure of the second creditors' meeting on 19 January 2012; holding of the special meeting of creditors on 8 March 2012; proof of the Viuffs' claims at that meeting; and holding of the general meeting of creditors on the same date and acceptance of resolutions at that meeting.

[29] The court's power to review and set aside all these proceedings is derived from s 151 of the Insolvency Act,[6] read with s 339 of the 1973 Companies Act. In *Nel & another NNO v The Master (ABSA Bank Ltd & others intervening)*,[7] the Supreme Court of Appeal (per Van Heerden JA) succinctly summarised the effect of these provisions:

'South African Courts have long accepted that the review envisaged by s 151 of the Insolvency Act is the "third type of review" identified more than a hundred years ago in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,[8] ie where Parliament confers a statutory power of review upon the court. In the *Johan-*

[6] '**151. Review** – Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected …'

[7] 2005 (1) SA 276 (SCA) paras 22 and 23.

[8] 1903 TS 111.

nesburg Consolidated Investment Co case, Innes CJ stated,[9] with reference to this kind of review, that the Court could

> "enter upon and decide the matter *de novo*. It possesses not only the powers of a Court of review in the legal sense, but it has the functions of a Court of appeal with the additional privileges of being able, after setting aside the decision arrived at . . ., to deal with the whole matter upon fresh evidence . . . "

Thus, when engaged in this third kind of review, the Court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred.'

[30] It follows that the court has the power to set aside *in toto* the proceedings at which the Viuff's claims were admitted to proof and to expunge those claims.

The reviewability of the closure of the second meeting of creditors on 19 January 2012 (prayers 1 - 3)

[31] Section 386(1)(d) of the 1973 Companies Act provides for the convening of a second creditors' meeting, while s 412(1) prescribes the manner in which such meeting is to be convened. This includes publication of the time and place of the second meeting in the Government Gazette and local newspapers, and notice to persons claiming to be creditors who have registered their names with the liquidator.

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[9] At 117.

[32] The obvious legislative intention is to ensure that all interested parties are given fair notice and opportunity in order to exercise their rights. It is intended to be an open and public meeting: as stated in s 39(6) of the Insolvency Act, '[t]he place where a meeting of creditors is held shall be accessible to the public…'.

[33] Once a second meeting of creditors has been duly convened, the presiding officer 'may, if necessary or desirable, adjourn the meeting from time to time', as provided in s 39(5) of the Insolvency Act. Where a meeting has been adjourned to a fixed date, it is axiomatic that the proper time for closing such meeting would be at the adjourned meeting, on the date as fixed. The second meeting in this instance having been adjourned in the presence, *inter alia*, of the applicant's representatives, they were legitimately entitled to expect that they would be afforded an opportunity to exercise their rights to be heard on the adjourned date. The seventh respondent could thus only lawfully and validly have closed the meeting on the date to which it had been adjourned. This follows, in my view, not only from the requirements of openness and publicity inherent in the applicable statutory provisions, but also from the right to procedurally fair administrative action, as guaranteed by s 3(1) of PAJA. Where the legislature has been at pains to ensure that a second meeting of creditors should be convened with due notice and publicity and should be accessible to the public, I find it inconceivable that such a meeting could thereafter lawfully be closed informally and without any notice to interested parties.

[34] I am accordingly satisfied that the premature closure of the second meeting of creditors by the seventh respondent is a decision, ruling or order of an officer presiding at a meeting of creditors which is irregular, invalid and unlawful. It accordingly falls to be reviewed and set aside under s 151 of the Insolvency Act at the behest of the applicant, who clearly is a person aggrieved by such decision, ruling or order. This appears to have been recognised by the seventh respondent: when the irregularity of the procedure was pointed out to her by the applicant's attorney on the date to which the meeting had originally been adjourned, she immediately set aside the earlier closure and postponed the second meeting once more.

[35] Once the premature closure of the second meeting is set aside in terms of prayer 1, prayers 2 and 3 should follow, ie that the second meeting be declared to remain open and ordered to proceed on the date to which it has been adjourned (currently 5 June 2014, to which it was adjourned on 30 January 2014).

The reviewability of the holding of and proceedings at the special and general meetings of creditors on 8 March 2012 (prayers 4 – 9)

[36] Special meetings of creditors for the proof of claims are convened in terms of s 42(1) of the Insolvency Act, which expressly provides:

'*After the second meeting of creditors* the trustee shall convene by notice in the Gazette a special meeting of creditors for the proof of claims against the estate in question whenever he is thereto required by any interested person who at the same time tenders to the trustee payment of all expenses to be incurred in connection with such a meeting.' (My emphasis.)

[37] General meetings are convened by a liquidator in terms of s 41 of the Insolvency Act. They are convened 'for the purpose of giving him (the liquidator) directions concerning any matter relating to the administration of the estate'.[10]

[38] It was submitted on behalf of the applicant that the special meeting held on 8 March 2012 was inherently invalid and unlawful because it was convened at a time when the second meeting of creditors had not yet been lawfully closed. It therefore did not occur *after* the second meeting of creditors, as prescribed by s 42(1) of the Insolvency Act. In the light of my findings as set out above, this conclusion is unavoidable. It must accordingly follow that the special meeting falls to be set aside as null and void (prayer 4); that the claims of the Viuffs that were admitted at that meeting likewise fall to be set aside (prayers 5 and 6); and that the general meeting held on the same date, together with the resolutions adopted thereat must suffer a similar fate (prayers 7 – 9). Invalidity of the special meeting necessarily invalidates the proof of claims at that special meeting and without claims having been validly proved there could not have been any lawful voting for the resolutions at the general meeting. Accordingly, once the special meeting is set aside, the general meeting and its procedures cannot stand.

[10] As stated in s 41.

[39] In the light of these conclusions, it is not necessary to deal with the applicant's alternative basis for assailing the validity of the Viuff's claims. Suffice it to say that it is by no means clear that the claims would inevitably have been admitted by the presiding officer, had the applicant been afforded the opportunity of interrogating the Viuffs with regard to the validity of such claims.

Prayer 10 - removal of the liquidators

[40] Section 379(1) of the Companies Act provides:

'(1) The Master may remove a liquidator from his office on the ground—

(*a*) . . .

(*b*) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

(*c*) . . .

(*d*) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors . . . has requested him in writing to do so; or

(*e*) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.'

[41] In addition, s 381(1) imposes upon the Master the duty *mero motu* to 'take cognizance of the conduct of liquidators' and where -

'. . . he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient'.

[42] On 29 November 2012, the applicant's attorneys addressed a substantive application to the Master in terms of s 379(1), calling upon him to remove the co-liquidators. This request was motivated with reference to the history of the matter, which was summarised in some 38 pages (without annexures). Having received the liquidators' response on 5 March 2013, the Master has to date failed to make a decision regarding this request. In his report to this court, the Master referred to the inquiry in terms of s 417 which had been authorised by him and explained that 'the Master felt to give this process a chance until it's finalized'.

[43] The inquiry has in the meantime been finalised and all the evidence led forms part of this record. There can, accordingly, no longer be any impediment to the Master making his decision and no such impediment has been pointed out to me. Moreover, s 6(2)(g) of PAJA empowers the court to judicially review an administrative action if the action concerned consists of a failure to take a decision. Clearly the Master is under a duty to make a decision one way or the other in terms of the statutory provisions referred to above; he cannot simply ignore it, nor does he claim to be entitled to ignore it. In the circumstances, I am satisfied that the applicant is entitled to appropriate relief in the form of a *mandamus* to achieve this. I do not find it necessary, as requested by the applicant, to be prescriptive as to the facts to be taken into account by the Master in making his decision, save to require such decision to be made

within one month from the date of this judgment. The Registrar will be requested forthwith to convey this order to the Master.

Costs

[44] No reason has been advanced as to why costs should not follow the result. The applicant has asked that the liquidators be ordered to pay the costs *de bonis propriis*. On a conspectus of the evidence as a whole, I am satisfied that such an order is justified. Not only was the applicant obliged to come to court as a result of the liquidators' conduct, but it was obliged to oppose the abortive counter-application. Moreover, as pointed out by the liquidators, the company has no assets (save for its potential claims against the Viuffs), with the result that it would be unfair to expect the successful applicant eventually to contribute to the costs of unsuccessful opposition to its claims.

Order

[45] For these reasons, an order is granted in the following terms:-

1.1 The seventh respondent's closure of the second meeting of creditors of the third respondent on 19 January 2012 is reviewed and set aside.

1.2 It is declared that the second meeting of creditors in the winding up of the third respondent remains open and will proceed on the date to which it has been adjourned, namely 5 June 2014.

2. **The special meeting of creditors in the winding-up of the third respondent, held on 8 March 2012, is declared null and void and the seventh respondent's admission of the fourth respondent's claim for R13 244 049.95 and the fifth respondent's claim for R216 861.48 at such special meeting is reviewed and set aside.**

3. **The general meeting of creditors in the winding-up of the third respondent held on 8 March 2012 as well as the resolutions approved at such meeting are set aside.**

4. **The sixth respondent is directed to make a decision in the application submitted to the Master 29 November 2012 for the removal of the first and second respondents as co-liquidators of the third respondent, within ONE MONTH of the date of this order.**

5. **The counter-application is dismissed.**

6. **The first and second respondents are ordered to pay the costs of this application and the counter-application *de bonis propriis*.**

B M GRIESEL
Judge of the High Court