

SOUTH AFRICA / JUDGMENT

De Jager N.O and Another v Mantis Investments Holdings (Pty) Ltd and Another (3711/2018) [2021] ZAECGHC 120 (2 December 2021) [2021] ZAECGHC 120

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Beneke

CASE / FILE NUMBER

3711/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case no. 3711/2018

Date heard: 25 November 2021

Date delivered: 2 December 2021

In

the matter between:

WERNER DE JAGER

N.O.

First Plaintiff

CAROL-ANN

SCHRÖDER

N.O.

Second Plaintiff

and

MANTIS INVESTMENTS HOLDINGS (PTY)

LTD

First Defendant

ADRIAN

JOHN FAULKNER

GARDINER

Second Defendant

JUDGMENT

BENEKE, A.J.

Introduction

1 This matter has its origins in a trial brought by the plaintiffs to set aside a purportedly collusive disposition relating to a company in liquidation. The matter is defended by the defendants. The parties have referred a special case in terms of Uniform Rule 33(1).

Facts

2 The parties have agreed the following facts in the special case:

“2.1 The First and Second Plaintiffs have been appointed as liquidators of [the company in liquidation].

2.2 The company in liquidation was placed under provisional and final liquidation ... during November 2014.

2.3 During or about 2005 the Eastern Cape Development Corporation (“ECDC”) ... advanced certain monies to a company known as Bushman Sands Development (Pty) Ltd (“Bushman Sands”)

2.4 The company in liquidation bound itself as surety and co-principal debtor with Bushman Sands for the due payment of such amounts as were payable by Bushman Sands to ECDC.

2.5 A copy of the Deed of Suretyship, together with a “Term Sheet” referred to on Page 1 of the Deed of Suretyship, is annexed to the ... Defendants’ Plea

2.6 ECDC instituted proceedings in the High Court ... based on the aforesaid Suretyship for an amount of R 19,357,645.40, together with attorney and own client costs and together with interest on the capital sum.

2.7 The company in liquidation was the First Defendant in those proceedings, Bushman Sands being the Second Defendant.

2.8 The company in liquidation defended the aforesaid action

2.9 Notwithstanding having raised various defences to the claim by ECDC against a company in liquidation, and shortly prior to the commencement of the trial set down for hearing in November 2014, the First Defendant, represented by the Second Defendant, brought an application ... for the liquidation of the company in liquidation, the First Defendant contending that it was a creditor in the company in liquidation for the amount of R 2,491,455.00 arising from unsecured and interest free loans without specified repayment terms.

2.10 ... a ... final order of liquidation was granted in respect of the company in liquidation.

2.11 Pursuant to the aforesaid liquidation, both ECDC and the First Defendant proved claims. The First Defendant's claims were based on the alleged loans set out more fully above, whilst the claim of ECDC was in respect of the principal debt referred to more fully in Paragraph 2.6 above.

2.12 Notwithstanding opposition by the First Defendant, the claim of ECDC was proved and accepted by the Master of the High Court.

2.13 The First Defendant also proved a claim, which claim was also accepted by the Master of the High Court.

2.14 Neither the First nor the Second Defendants have instituted proceedings to set aside the acceptance of the claim of ECDC by the Master.

2.15 The First and Second Defendants sought to interrogate officials of ECDC with regard to the claim of ECDC against the company in liquidation, and to that end served subpoenas on various officials ... of ECDC.

2.16 An application was brought ... to set aside the aforesaid subpoenas. The application was successful and the subpoenas were set aside. A copy of the judgment ... is annexed [to the Special Case].

2.17 The judgment ... was taken on appeal to the Supreme Court of Appeal. The appeal was unsuccessful. A copy of the judgment of the Supreme Court of Appeal is annexed [to the Special Case]. As is apparent from the judgment the appeal was dismissed on a procedural ground, namely the failure of the liquidators to consider the propriety of issuing subpoenas and not the merits of the appeal (the merits of the original decision ...).

2.18 An interrogation of the Second Defendant, and the accountant of the First Defendant and the company in liquidation, has already taken place.

2.19 Subsequent to the decision of the Supreme Court of Appeal ... the First Defendant has not sought to pursue any further interrogation relating to the claims of ECDC, whether in terms of the Insolvency Act or otherwise.

2.20 Subsequent to the liquidation of the company in liquidation, the present proceedings ... have been instituted by the liquidators of the company in liquidation. The pleadings in that action have closed. The parties are in agreement that such pleadings may be referred to in order to determine the issues referred to more fully below.

2.21 Subsequent to the closure of the pleadings in that action, and by agreement between the parties, certain issues as reflected in the respective pleadings of the parties have been separated A copy of the Order granting such separation is annexed [to the Special Case]."

3 The issues have been defined by the parties as follows in the court order separating the issues:

“1. The issue whether the Defendants are lawfully entitled to revisit the indebtedness of ... the Company in liquidation ... as set out in paragraph 7.3, 7.4, 7.5 and 7.6 of the Particulars of Claim read with paragraphs 6 and 7 of the Defendants’ plea, and read further with the Plaintiffs’ Replication and the Defendants’ Rejoinder and the Plaintiffs’ Surrejoinder filed of record

2. The issue whether the Defendants are lawfully entitled to continue to contest the claim proved [by] the ECDC in the liquidation proceedings of the Company in liquidation, as set out in paragraph 7.7 and 7.8 of the Particulars of Claim, read with paragraphs 9 and 10 of the Defendants’ Plea, and further read with the Plaintiffs’ Replication, the Defendants’

Rejoinder, and the Plaintiffs’ Surrejoinder filed of record ...

4. The costs of [the application for separation].”

3.1 In respect of the issue at paragraph one of the court order:

3.1.1 The relevant portions of the particulars of claim are repeated in paragraphs 2.6 to 2.10 of the special case set out above.

3.1.2 In the plea, the defendants raise the following issues in answer to those allegations:

- (a) ECDC elected not to seek judgment against Bushman Sands, despite Bushman Sands being in a position to have paid, had any monies been due and payable by it to ECDC;
- (b) In that action, the company in liquidation disputed the liability to ECDC on the following bases:
 - (i) The deed of suretyship signed by the representative of the first defendant is not a valid and enforceable deed of suretyship, for want of enforceability of the indicative term sheet referred to in that deed. The indicative term sheet is contended to be (a) unenforceable due to failure of suspensive conditions, and (b) void for vagueness;
 - (ii) The first defendant was released from any obligations in terms of the deed of suretyship by virtue of a written deed of release concluded between it and ECDC;
 - (iii) Any liability of Bushman Sands to ECDC was extinguished in an agreement in terms whereof the loan account of ECDC in Bushman Sands (the basis of the claim) would be, and in fact was, converted into preferent shares in Bushman Sands, thereby extinguishing the liability in terms of the loan agreement.

These defences were and remain valid defences against any claim against the company in liquidation.

- (c) The first defendant was the only shareholder of the company in liquidation. The first defendant took advice to rationalize its holdings. The decision and implementation of the rationalization occurred without the first or second defendant being

aware of any claim by ECDC and without them foreseeing such a claim, as the company in liquidation had been released from the deed of suretyship. The first defendant took steps to rationalize its holdings. After restructuring the group of companies, the company in liquidation was devoid of assets and unable to fund its defence against ECDC's claim. The first defendant, as only shareholder, would have had to have funded the litigation. The first defendant, accordingly, resolved to liquidate the company.

3.1.3 In the replication, the plaintiffs aver that:

- (a) The company in liquidation bound itself jointly and severally as surety and co-principal debtor in solidum with Bushman Sands. The company in liquidation also renounced the benefits of the legal exception of excussion. Accordingly, ECDC did not first have to excuss Bushman Sands. Further, this defence is personal to the company in liquidation and may not be relied upon by the defendants.
- (b) The claim by ECDC has been proved and accepted by the Master in terms of the relevant legislation. The conduct of the Master amounts to an administrative act that exists as a fact and has legal effect until set aside. The defendants have not sought to set aside the Master's decision. Accordingly, it is not open to the current court to find that the ECDC does not have a claim against the company in liquidation.
- (c) The conduct by the defendants set out in the special case amounts to a waiver of their right to dispute the ECDC's claim.
- (d) The defendants are estopped from denying the validity of the ECDC's claim by virtue of their conduct as set out in the Special Case amounting to a representation that the claim by the ECDC was unassailable, which representation was believed by the plaintiffs,

which caused them to act (or not act) to their prejudice.

3.1.4 The defendants issued a rejoinder in the following terms:

- (a) The decision of the court a quo regarding the setting aside of the subpoenas was upheld by the Supreme Court of Appeal on a procedural point, and it declined to make a finding on the merits of the decision of the court a quo.
- (b) The recoverable amount stood to be reduced by all payments made by or on behalf of Bushman Sands or through realization of any security held by ECDC. The formulated claim against the defendants is not a claim based on accessory liability of a surety, but based on a purported collusive disposition. Accordingly, the defendants are entitled in law to raise the defences pleaded.

- (c) The defendants are not bound by the decision of the Master which was made in the context of a purported claim by ECDC against the company in liquidation. The plaintiffs are required to establish, as against the defendants, and as a prerequisite to a claim based on a collusive disposition that, as at the date of institution of the action and as at the date that judgment is sought, ECDC was and is a creditor for the amount of its claim or for any other amount and to prove the existence of other creditors as well.
- (d) An attempt to prevent the defendants from disputing the actual indebtedness owed to ECDC would be unconscionable, immoral and contrary to public policy, in light of the fact that ECDC may have been paid the full amount of the original loan and interest, and because it must prove the actual indebtedness. This would be inimical to the interests of the community at large, contrary to morality and social or economic expedience and contrary to public policy and the values enshrined in the Constitution of the Republic of South Africa.

3.1.5 The plaintiffs issued a surrejoinder in the following terms:

- (a) The decision of the court a quo, regarding the setting aside of the subpoenas, stands and the defendants are bound thereby. In any event, the defendants have not sought to further contest the claim of the ECDC or the decision of the Master.

3.2 In respect of the issue at paragraph two of the court order:

3.2.1 The relevant portions of the particulars of claim are repeated in paragraphs 2.11 and 2.12 of the special case set out above.

3.2.2 In the Plea, the defendants raise the following issues in answer to those allegations:

- (a) Notwithstanding the fact that the ECDC proved a claim against the company in liquidation, the defendants at all relevant times disputed and denied, and continue to dispute and deny, that the amount claimed under the civil case against the company in liquidation (and consequently the amount of ECDC's proven claim against the company in liquidation) constitutes any amount owing by the company

in liquidation in terms of the deed of suretyship read with the provisions of the terms sheet.

3.2.3 The replication, rejoinder and surrejoinder are all in the same terms as set out previously.

4 The contentions of the parties in the special case derive from what is set out in the pleadings and may be summarised as follows:

4.1 The plaintiffs contend that:

4.1.1 The claim by the ECDC has been proved and accepted by the Master. This is an administrative act that exists as a fact and has legal effect until set aside. The length of time that has elapsed since the admission of the claim means that it is not legally permissible to challenge that decision.

4.1.2 The attempt by the defendants to interrogate the ECDC's officials with regard to the indebtedness of the company in liquidation was set aside as an abuse of the relevant legislative provisions.

4.1.3 The defendants, having elected, on behalf of the company in liquidation, not to pursue its defences in the civil claim by ECDC, cannot now, and in these proceedings, revisit or pursue such defences.

4.1.4 The defendants have, by their conduct as set out in the special case, waived of their right to dispute the ECDC's claim.

4.1.5 The defendants are estopped from denying the validity of the ECDC's claim by virtue of their conduct as set out in the Special Case amounting to a representation that the claim by the ECDC was unassailable, which representation was believed by the plaintiffs,

which caused them to act (or not act) to their prejudice.

4.2 The defendants contend that:

4.2.1 The defences raised by the company in liquidation in the ECDC's civil claim against it were and remain valid defences against any claim against the company in liquidation. Accordingly, the defences remain available to the defendants.

4.2.2 The application for the liquidation of the company in liquidation arose because the company was factually insolvent and could thus not fund the litigation in the civil claim brought against it.

4.2.3 The defendants have, at all relevant times, disputed and denied, and continue to dispute and deny, that the amount claimed under the civil case against the company in liquidation (and consequently the amount of ECDC's proven claim against the company in liquidation) constitutes any amount owing by the company in liquidation in terms of the deed of suretyship read with the provisions of the terms sheet.

4.2.4 The claim against the defendants is not a claim based on the accessory liability of a surety, but on a purported collusive disposition.

The defendants may thus raise any defence against the plaintiffs including a defence that the amount claimed by the liquidators as owing to the company in liquidation is, in fact, not owing, and therefor not due and payable, with the result that the declaration of the dividend in no way prejudiced the ECDC, a purported creditor of the company in liquidation.

5 The parties agree that the costs occasioned by the separated special case are to include the costs of two counsel, where utilised.

Issues

6 From what has been set out above, it appears that the following issues must be decided:

6.1 What must be proved under the element of the cause of action arising from section 31 of the Insolvency Act 24 of 1936 (“the Insolvency Act”), which requires that the disposal “had the effect of prejudicing his creditors or of preferring one of his creditors above another”?

6.2 Are one or more of the following dispositive of the disputed element of the cause of action?

6.2.1 The Master’s decision accepting the ECDC’s claim against the company in liquidation;

6.2.2 The judgment of Mbenenge J, as he then was;

6.2.3 The conduct of the defendants, if, and insofar as, it amounts to waiver; and/or

6.2.4 The circumstances set out in the special case, if, and insofar as, it sustains a claim of estoppel.

The First Question: Prejudicing of creditors or of preferring one creditor above another

7 The relevant law relating to insolvencies applies mutatis mutandis to the winding up of insolvent companies.[1]

8 The Transvaal Provincial Division has held that the prejudice to creditors must be prejudice ultimately resulting at the time of the sequestration, and not prejudice occasioned by and immediately after the disposition.[2] Therefore, in order to be successful in a claim in terms of section 31 of the Insolvency Act, the liquidator must prove that the collusive disposition did have the effect of prejudicing the creditors or preferring one creditor above another[3] at the time of the sequestration.

9 “Creditor” is not defined in the Insolvency Act, but includes any person who is a creditor in the usual sense of the word.[4] Relevant examples of that meaning are as follows: In terms of the Insolvency Act 32 of 1916, a “creditor” was defined as any person who has a right to sue in his own name for a sum of money.[5] In terms of section 180ter(1) of the Companies Act 46 of 1926, a “creditor” was required to have at least a financial interest at that time vis-à-vis the company in liquidation.[6] In its use in section 311(2) of the Companies Act 61 of 1973, the word “creditor” was used in the widest sense and includes “all persons having any pecuniary claims against the company”.[7]

10 Accordingly, in order to be successful in a claim in terms of section 31 of the Insolvency Act, the liquidator must prove that the disposition did have the effect of prejudicing a person having a pecuniary claim against the company in liquidation, or preferring one person having a pecuniary claim against the company in liquidation above another, at the time of the liquidation.

11 From what has been set out above, it is apparent that, in order to be successful in their claim in the action, the plaintiffs must prove that (a) ECDC had a pecuniary claim against the company in liquidation at the time of the liquidation and (b) ECDC suffered

prejudice because of the disposition and/or other creditors of the company in liquidation were preferred ahead of ECDC because of the

disposition.

The Second Question: The Master's decision accepting the ECDC's claim against the company in liquidation

12 The presiding officer[8] and Master[9] may accept a proved claim against the company in liquidation even where it has been disputed.

13 Any person aggrieved by any decision of the presiding officer or the Master with reference to the admission of a claim may bring the same under review of a court.[10]

14 In addition, the decision by the Master to accept a claim under either section 44 or section 45 of the Insolvency Act constitutes

administrative action.[11]

15 As administrative action, the decision by the Master to admit a claim exists and continues to have legal consequences until and unless it is reviewed and set aside.[12]

16 An example of this occurred in *Bester NO and Others v CTS Trailers (Pty) Ltd and Another* 2021 (4) SA 167 (WCC). In that matter, it was held that:

"[21] First respondent does not dispute the fact that the Master granted approval to the liquidators to disregard the set-off."

Accordingly, Mr Van der Merwe submitted that s 46 of the Act comes into play, namely that the liquidators acquired the power to

'disregard (the set-off) and call upon the person concerned to pay the estate the debt which he would owe it but for the set-off and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place'. According to Mr Van der Merwe, the liquidators had done so with the result that first respondent was required to pay fourth applicant the debt it would have owed but for the set-off, in other words, the amount of R1,9 million which it purported to set off, and further that first respondent may prove the R1,9 million claim it has against fourth applicant in the ordinary course, as if no set-off had taken place.

[22] By contrast, Mr Melunsky contended that it was not relevant that the first respondent chose not to take the Master's decision on review, in that this decision was not binding on either first respondent or this court but was simply part of the liquidators' cause of action. Mr Melunsky submitted further that the Master's decision should be seen as no more than part of the liquidators' cause of action. In this connection he cited as support for this proposition the judgment in *Estate Engelbrecht v Engelbrecht* 1957 (3) SA 83 (N) at 86C – D:

'A strict reading of the section (s 46) means that the approval of the Master to the disregard by the trustee of the set-off and the right in the trustee to call upon the person concerned to pay the estate his indebtedness must be obtained before the trustee can disregard it and call upon the debtor (in this case the defendant) to pay his indebtedness to the estate.'

[23] This dictum asserts the uncontroversial proposition that permission from the Master is required before the liquidators can proceed to ignore a set-off, hardly authority for the submission that the decision of the Master does not have legal effect which requires some act on behalf of the party relying on set-off to set this decision aside.

[24] There are, however, clear legal consequences to the decision by a Master acting in terms of s 46 of the Act. This is reflected in *Bekker NO v BMW Financial Services SA (Pty) Ltd* [2006] JOL 17634 (T):

'Waar die toestemming van die Meester eers die reg verleen om 'n skulvergelyking te verontagsaam, kan ek nie sien hoe die versuim om dit te bekom as 'n formele gebrek beskou kan word nie. Die toestemming is nie 'n blote formaliteit nie. Dit het ingrypende

gevolge. As dit verleen is, kan 'n skulvergelyking negeer word. Klaarblyklik sal die Meester hom daarvan moet vergew is dat die

skulvergelyking nie in die gewone loop van besigheid plaasgevind het nie voor hy sy toestemming kan verleen. As toestemming verleen, of nie verleen word nie, sou sy beslissing op hersiening geneem kan word.'

[25] This judgment confirms that a decision by a Master is not 'a mere formality' but holds a 'profound legal effect'. The nature of the Master's decision brings into play the so-called Oudekraal Estates doctrine to the effect that a decision of an administrative nature such as that given by the Master is valid until set aside. See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1; [2004] ZASCA 48). The point is again captured by Cameron J in *Merafong City v AngloGold Ashanti Ltd* 2017

(2) SA 211 (CC) (2017 (2) BCLR 182; [2016] ZACC 35) para 36:

'Hence the central conundrum of Oudekraal, that "an unlawful act can produce legally effective consequences", is constitutionally

sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it. This leads to a logical corollary, which this court recognised in *Giant Concerts*, that an own-interest litigation may be denied standing "even though the result would be that an unlawful decision stands".'

[26] Moving more specifically to the present dispute, there is a passage in the Oudekraal judgment in para 36 which appears to be fatal to the first respondent's argument. It reads thus:

'It is important to bear in mind (and in this regard we respectfully differ from the Court a quo) that in those cases in which the

validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid

administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.'

[27] In summary, absent any challenge, which was not forthcoming, by first respondent to the Master's decision, even if the arguments presented by first respondent that set-off had occurred have merit, there is a fatal obstacle to its arguments. The liquidators were entitled to disregard set-off because of the application of s 46 of the Act, which applies as a consequence of the decision of the Master. This position remains so until and unless a successful review is brought by first respondent, which, by contrast, had done nothing to assail the Master's decision."

17 I associate myself with the judgment cited above, particularly paragraph 27: absent a successful application for the review and

setting aside of an acceptance of a claim, and even despite objections to the claim having merit, the decision of the Master to

accept a creditor's claim must stand.

18 The question then arises whether or not the decision is enforceable as against the world, rather than only as against the liquidators and the creditor in question.

19 In this regard, I find the decision of Lane and another v Harksen and others [1998] 4 All SA 7 (C) helpful. In this matter:[13]

"The application arose out of a written agreement of sale in terms of which Harksen, acting in the name of a company to be formed (which was ultimately the Second Respondent, "HEG") purchased a property. The relief sought was as follows: (i) that the acceptance by HEG of the benefits conferred upon it under the agreement of sale was collusive dealing and had to be set aside under section 31 of the Insolvency Act 24 of 1936 ("the Act"); (ii) that Harksen be declared as having been the purchaser of the property; (iii) alternatively, that the disposition in terms of which Harksen made R4,16 million available to HEG to enable it to pay the purchase price, be declared collusive dealing and/or a disposition without value as envisaged under section 26 of the Act.

The following points in limine were raised: (i) whether section 18(3) of the Act applies to an application brought by creditors in the name of trustees in terms of section 32; (ii) whether the application fell within the ambit of section 32 read with section 104(3) of the Act; (iii) whether

collusive dealing was possible in the circumstances; (iv) whether the disposition to HEG of the amount required for the purchase price was a disposition without value; and (v) whether the judgment in case number 4840/96 was binding on the parties, alternatively, binding in rem. (In case number 4840/96, the court had made a finding that Harksen was the sole beneficial shareholder of HEG.)”

In that matter, the court held as follows:

“5. Is the judgment in case no 4840/96 binding on the parties hereto, alternatively binding in rem?”

... in my view Farlam J's finding that Harksen is the sole beneficial shareholder of HEG is a finding which relates to status, is one in rem and accordingly binding on the world (see Spencer Bower & Turner Res Judicata at 213215). All findings necessarily incidental to the declarator are accordingly binding on the Hamburg creditors, which in my view is destructive of their case which is founded upon the contention that the initial purchase of the property was in itself a collusive dealing.”

20 I associate myself with the finding cited above. The acceptance of the Master of a claim, has the effect of declaring the holder of that claim a creditor. This is a finding which relates to status, is one in rem, and is, accordingly, binding on the world.

21 The question which then arises is whether or not the decision of the Master is binding on a court. In this regard, I find the matter of Sparks v Sparks 1998

(4) SA 714 (W) helpful:

“However, I do not understand the res judicata rule to require that the prior determination shall have been made by a civil court of law. Spencer Bower and Turner require a judicial tribunal which 'does not have to be a court of record, nor even known by the name of court at all'. According to the learned authors, 'It is enough if the alleged "judicial tribunal" can properly be described as a person, or body of persons, exercising judicial

functions by common law, statute, patent, charter, custom, or otherwise in accordance with the law of England . . . whether he or they be invested with permanent jurisdiction to determine all causes of a certain class as and when submitted, or be clothed by the State or the disputants, with merely temporary authority to adjudicate on a particular dispute or group of disputes.' Indeed English law encompasses High Courts, inferior courts, criminal courts, the court of the mayor of London, courts martial, medical tribunals such as the General Medical Council, arbitrators under the Workmen's Compensation Acts, arbitrators within such judicial tribunals for purposes of res judicata.

Our law of res judicata, reliant upon the Roman-Dutch authorities, focuses not so much upon the order made as upon the lis, the matter in dispute or question at issue, or the causa which is determined by the order. It is argued that where provision is made in the Act that an order of the maintenance court 'shall have the effect of a civil judgment of the magistrate's court' this is suggestive that such an order is not a civil judgment but merely one, to which effect is given

thereto as if it were. It is my view that s 5(4) refers to the judgment, ie the sententia, and not to the dispute or question which is decided upon. The Act here deals with the effect and enforceability of the order and

accordingly provides the mechanism therefor - in the same manner as a civil judgment and utilising the same powers. In my view, there is no indication, in either the Act or our authorities, that the question, that is the lis, which is decided in the maintenance court is not capable of founding res judicata.

In *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 178H the Appeal Court stated:

'The requisites of a valid defence of res judicata in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties and the same thing must have been demanded.'

It is not stated to be a requirement that the matter shall have been adjudicated upon before a civil court." [Footnotes omitted]

22 I associate myself with the finding cited above. The acceptance of the Master of a claim, the effect of which is to declare the holder of that claim a creditor, is one in rem, and is binding on the world, including this court.

23 The question of the equity of enforcing the Master's decision regarding the status of a creditor against persons accused of

collusion in dispositions must be considered.

24 In this regard, the matter of *Molaudzi v S* 2015 ZACC 20 is instructive. In that matter, it was held that:

"[31] Section 173 of the Constitution provides:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

In terms of section 173, each superior court is the master of its own process. Jafta J stated in *Mukaddam*:

"It is apparent from the text of the section that it does not only recognise the courts' power to protect and regulate their own processes but also their power to develop the common law where necessary to meet the interests of justice. The guiding principle in exercising the powers in the section is the interests of justice."

[32] Since res judicata is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand.

Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a

case-by-case basis. Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice. Courts should not impose inflexible requirements for the application of this section. Rigidity has no place in the operation of court procedures.

[33] This inherent power to regulate process, does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties. This Court held in *South African Broadcasting Corp Ltd*:

“The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering

justice in a regular, orderly and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction.”

[34] The power in section 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have.

[35] This Court is empowered to vary orders in limited circumstances, essentially if the order was made in error, in terms of rule 42 of the Uniform Rules of Court, read with rule 29 of the Rules of this Court. The Court has recognised various exceptions to the *functus officio* and *res judicata* doctrines by effecting minor alterations to final orders in order to clarify their true intention or vary consequential matters. In addition, this Court has entertained an application for rescission of a final order on the grounds that it was based on a misapprehension of the law. However, the question of the full extent of this Court’s powers in this regard, has been left open. In *Baphalane Cameron J* explained:

“In invoking and applying rule 42, this Court has previously left open the question what power it may have as a court of final appeal to vary its past orders under the common law, or under its inherent power to protect and regulate its own process, or under its power to develop the common law, taking into account the interests of justice [in terms of section 173]. It has also left open the question whether section 172 of the Constitution confers additional powers on it to correct its own orders.” (Footnotes omitted.)

[36] In *Ka Mtuze*, this Court was faced with an application in terms of the common law “for reconsideration” of its earlier, final order.

The Court reiterated the position adopted in *Baphalane* that its power to revisit final orders or go beyond rule 42 has not been determined. The Court contemplated the possibility of reconsidering an earlier final order, but stated that if it had such power, it would only be exercised in exceptional circumstances:

“If the position were to be that this Court does have power outside of rule 29 read with rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it would be in accordance with the interests of justice to re-open a matter in that way. The interests of justice would require that that be done in very exceptional circumstances. However, even if this Court had power to entertain the application if the interests of justice so required, the applicant would have failed because a reading of his affidavit reveals no exceptional circumstances.”

- [37] The incremental and conservative ways that exceptions have been developed to the res judicata doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata.
- [38] In this matter, the interests of justice require this Court to balance the rule of law and legal certainty in the finality of criminal convictions, as well as the effect on the administration of justice if parties are allowed to approach the Court on multiple occasions on the same matter, against the necessity to vindicate the constitutional rights of an unrepresented, vulnerable party in a case where similarly situated accused have been granted relief. As in this case, the circumstances must be wholly exceptional to justify a departure from the res judicata doctrine. The interests of justice is the general standard, but the vital question is whether there are truly exceptional circumstances.” [Footnotes omitted]

25 I associate myself with what has been set out above. This Court may develop or relax the doctrine of res iudicata (insofar as it may be applicable to judgments in rem – which I, for present purposes assume, without deciding, it is) or reconsider final judgments only if the interests of justice so demand. Whether it is in the interests of justice to do so must be determined on a case-by-case basis. The power in section 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. Fundamentally, the power should only be exercised in exceptional circumstances. If no exceptional circumstances are shown to exist, the court should not deviate from the existing application of the principle. Such exceptional circumstances will include situations where the impugned final judgment would result in substantial hardship or injustice, and where there may be the necessity to vindicate the constitutional rights of an unrepresented, vulnerable party in a case.

26 In this matter, the Master accepted the proved claim of ECDC against the company in liquidation, despite it being disputed. The first defendant, had it still disputed the claim, ought to have brought the admission of the claim under review of a court either in terms of section 151 of the Insolvency Act or in terms of the Promotion of Administrative Justice Act 3 of 2000.

27 As the decision by the Master to accept the claim of ECDC constitutes administrative action, the decision exists and continues to have legal consequences until and unless it is reviewed and set aside. There has been no successful application for the review and setting aside of the acceptance of a claim. Accordingly, and even despite the possibility of the objections to the claim having merit, upon which I make no finding, the decision of the Master to accept a ECDC's claim must stand.

28 The acceptance of the Master of ECDC's claim, has the effect of declaring ECDC a creditor of the company-in-liquidation. This is a finding which relates to status, is one in rem, and is, accordingly, binding on the world and this court.

29 Whilst I may develop or relax the doctrine of res iudicata or reconsider the final decision of the Master, I may only do so if interests of justice so demand. In the pleadings in the matter, the defendants allege that an attempt to prevent them from disputing the actual indebtedness owed to ECDC would be unconscionable, immoral and contrary to public policy, in light of the fact that ECDC may have been paid the full amount of the original loan and interest. The defendants contend that this would be inimical to the interests of the community at large, contrary to morality and social or economic expedience and contrary to public policy and the values enshrined in the Constitution. However, no facts have been agreed that would even suggest that the ECDC has been paid either in part or in full, neither have the parties agreed any facts which would suggest hardships other than what defendants in similar circumstances would ordinarily face. Further, the defendants are not unrepresented or vulnerable parties: they have, seemingly, throughout been represented by senior and exceedingly competent legal representatives.

30 I therefore find no cause to deviate from the principle that the decision of the Master that the ECDC is a creditor of the company in liquidation stands until set aside on review, and that the decision is binding on the trial court.

31 Given my findings on the first and second questions, it is unnecessary for me to answer the remaining questions as set out in paragraph 6 above. I, accordingly, decline to do so.

Relief

32 Given what is set out above, I propose to find for the plaintiffs.

Order

1. The defendants are not lawfully entitled to revisit the indebtedness of No 1 Watt Street (Pty) Ltd (previously known as Mantis Group Holdings (Pty) Ltd – and referred to hereinafter as “the company in liquidation”) as set out in paragraph 7.3, 7.4, 7.5 and 7.6 of the particulars of claim read with paragraphs 6 and 7 of the defendants’ plea, and read further with the plaintiffs’ replication and the defendants’ rejoinder and the plaintiffs’ surrejoinder filed of record;
2. The defendants are not lawfully entitled to continue to contest the claim proved by the ECDC in the liquidation proceedings of the company in liquidation, as set out in paragraph 7.7 and 7.8 of the particulars of claim, read with paragraphs 9 and 10 of the defendants’ plea, and further read with the plaintiffs’ replication, the defendants’ rejoinder, and the plaintiffs’ surrejoinder filed of record; and
3. The costs occasioned by the separated special case, including the costs of the application for separation, including the costs of two counsel, where so utilised, shall be borne by the defendants.

M. BENEKE

JUDGE OF THE HIGH COURT (ACTING)

Appearances: For the Plaintiffs

Adv. RG Buchanan SC

On the instructions of Smith Tabata Inc c/o Nettletons

For the Respondent

Adv. MR Hellens SC and Adv. A Beyleveld SC

On the instructions of BLC Attorneys c/o Wheeldon Rushmere & Cole Inc

[1] Item 9 of Schedule 5 of the Companies Act 71 of 2008 read with section 339 and the remainder of Chapter 14 of the Companies Act 61 of 1973.

[2] Bagus v Estate Moosa 1941 AD 63 at 73.

[3] Lane NO v Harksen

[1998] 4 All SA 7 (C) at 15.

[4] Compare section 2 of the Insolvency Act 24 of 1936 (“the Insolvency Act”), the definition of debtor.

[5] Scholtz v Sieff 1928 OPD 132.

[6] Simon v The Assistant Master 1964 3 SA 719 (T).

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- [7] Morris v Airomatic (Pty) Ltd t/a Barlows Airconditioning Co 1990 4 SA 376 (A) at 380, referring to Re Midland Coal, Coke and Iron Co [1895] 1 Ch 267 (CA) at 277.
- [8] If he is not the Master, in terms of the Insolvency Act, section 44(3) and (7).
- [9] The Insolvency Act, sections 44(3) and (7), and 45(3).
- [10] The Insolvency Act, section 151.
- [11] Pio v Essel N.O and others [2019] JOL 41960 (WCC) at [48].
- [12] MEC for Health, Eastern Cape v Kirland Investments 2014 (3) SA 481 (CC).
- [13] Taken from the head note:
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