

SOUTH AFRICA / JUDGMENT

Knipe v Master, Free State High Court, Bloemfontein and Others (956/2014) [2014] ZAFSHC 145 (7 August 2014) [2014] ZAFSHC 145

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

956/2014

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 956/2014

In the matter between:-

JOHN DOUGLAS JANSE KNIPEApplicant

and

THE MASTER, FREE STATE HIGH COURT,

BLOEMFONTEINFirst Respondent

SCHAAPPLAATS 978 (EDMS) BPK (IN LIQUADATION)Second Respondent

JOHAN LOFTUS VILJOEN Third Respondent

SIMON MALEBO RAMPOPORO N.O.Fourth Respondent

CHAVONNE BADENHORST ST. CLAIR COOPER N.O.Fifth Respondent

OTTLIE ANTON NOORDMAN N.O.Sixth Respondent

JUDGMENT

BY: RAMPAL, J

HEARD ON: 26 JUNE 2014

DELIVERED ON: 7 AUGUST 2014

- [1] The matter came to court by way of motion proceedings. The applicant primarily seeks to have a decision of the first respondent reviewed and set aside. The decision concerned the second respondent and was made in favour of the third respondent only. The review application is opposed by the third respondent. The rest of the respondents abide.
- [2] The applicant, Mr John Douglas Jansen Knipe and a certain Mr André Knipe were shareholders in the second respondents, in other word Schaapplaats 978 (Edms) Bpk and another company known as Kameelhoek (Edms) Bpk. The third respondent was an appointed legal representative of the two companies. An application was launched to have the two companies liquidated. The provisional liquidation order was granted on the 30th August 2012. The fourth, fifth and sixth respondents were appointed by the first respondent as provisional liquidators.
- [3] The second respondents Schaapplaats 978 (Edms) Bpk and Kameelhoek (Edms) Bpk were finally liquidated on the 27th July 2013. See Knipe and Others v Kameelhoek (Edms) Bpk and Another 2014 (1) SA 52 (FB) – per Daffue J.
- [4] On the 25th September 2013 an application for leave to appeal against the final liquidation was dismissed. Mr JDJ Knipe and Mr A Knipe as shareholders took the matter to the SCA on the 27 October 2013. They sought leave to appeal. On the 5th January 2014 the SCA refused them leave to appeal.
- [5] The aforesaid liquidators convened in terms of section 386(1)(d) of the Companies Act of 1973 a general meeting of creditors. The meeting was scheduled for the 16th April 2014. The notice in terms of section 186 was published. Among others the notice appeared in two newspapers, Die Volksblad and Express in addition to the Government Gazette. Over and above those three media of communication the fourth respondent saw to it that the notice of the proposed meeting was mailed to the creditors of the second respondent, interested parties as well as the shareholders such as the applicant.
- [6] The notice was drafted as follows in Afrikaans:

*“ALGEMENE VERGADERING VAN DIE MAATSKAPPY, KONTRIBUANTE EN KREDIETEURE:
KAMEELHOEK (EDMS) BPK (IN LIKWIDASIE)*

Meestersverwysingsnommer: B111/2012.

Gehou te word om 09:00 op Dinsdag 16 April 2013 voor die Meester van die Hooggeregshof, Old Southern Life Gebou, h/v Maitland- en

Aliwalstraat, 3de vloer, Bloemfontein.

Redes vir die vergadering:

Vir die verkryging van opdragte van die lede, kontribuante en krediteure, indien toepaslik, met betrekking tot 'n dispuut

tussen twee stelle lede met betrekking tot sekuriteit op die plaas en die quantum daarvan, Om algemene opdragte wat nodig is in hierdie boedel aan die likwidateure te gee rakende die beheer neem van die bates, Vir 'n ondervraging in terme van Artikel 417 van die Maatskapywet CBS COOPER, p/a Cooper Trust, Reidstraat, Westdene, Bloemfontein, 9301.

Tel. 051 4480096.”

[7] The English version thereof was set out in annexure “D2”. It reads as follows:

*“GENERAL MEETING OF THE COMPANY, CONTRIBUTORIES AND CREDITORS OF:
KAMEELHOEK (PTY) LTD (IN PROVINSIONAL LIQUIDATION)*

Master’s Reference Number B111/2014

To be held at 09:00 on Tuesday, 16 April 2013, before Master of the High Court, Old Southern Life Building, C/o Maitland and Aliwal Streets, 2nd Floor, Bloemfontein.

Reasons

for the meeting:

To obtain directions from members, contributories and creditors if applicable in regard to a dispute between two sets of members in respect of security at the farm and the quantum thereof. Give General directions that may be necessary in this estate for the purpose of the Provisional liquidators securing the assets, For the holding of an enquiry in terms of section 417 of the Companies act.

CBS COOPER, C/o Cooper Trust,

14 Reid Street

Westdene

BLOEMFONTEIN

9301

Tel. 051448 0096”

[8] The meeting was indeed held on the 16th April 2014 and conducted as a general meeting in terms of section 386, Companies Act 61 of 1973. The proceedings for the meetings were recorded. The minutes were attached to the founding affidavit as an annexure “B”, vide page 34 – 41 of the record. Annexure “B” revealed that during the course of the general meeting the third respondent’s claim was tabled before the meeting; that the third respondent’s claim had been lodged with the first respondent against two business enterprises: namely Schaapplaats 978 (Edms) Bpk as well as Kameelhoek (Edms) Bpk; that the first respondent found that the third respondent’s claim had been proven and allowed it; that the first respondent accepted that the third respondent had rendered legal services to the two business enterprises as an attorney and that the monetary value of such legal services had

been quantified by the third respondent as R12625875,04.

- [9] There were a number of grounds on which the review application was founded. Among others, it was contended that the general meeting was not convened for the purpose of proofing claims of creditors. That was the principal ground on which the decision of the first respondent was attacked.
- [10] I deemed it expedient to deal with the aforesaid principal contention first. Section 386(1)(d) of the Companies Act 61 of 1973 empowers a liquidator of a company to convene a general meeting of a company, its creditors and contributors for the purpose of obtaining their authority or sanction in respect of any matter or for such purpose as the liquidator may consider necessary. A meeting contemplated in the section is a general meeting. See Henochsberg on the Companies Act 71 of 2008, vol 2, APP1-182:
- [11] Section 364, Act 71 of 1973 makes provision for the first meeting of creditors. It empowers a liquidator to convene the first meeting of creditors. Among others, a liquidator may convene the first meeting of creditors for the purpose of calling upon creditors to prove their claims against a company concerned, subsection 1(a)(ii) read with section 366, Companies Act 1973, Henochsberg supra APP1-130 – 134 and APP1-136 to 147, Insolvency Law, Meskin p 7-6 – 7-8.
- [12] A general meeting of creditors cannot, in terms of section 386(1)(d) Companies Act 1973, be convened for the purpose of proving claims of creditors - Law of Insolvency, Meskin p 7-2, 7-8(1).
- [13] It is permissible for a liquidator to simultaneously convene a meeting of creditors as both a general meeting and as a first meeting of creditors. However, where a liquidator chooses to do so, the dual character of such a meeting must be expressly mentioned, the meeting convened and advertised as such – De Hart NO v The Master 1971
- (3) SA 366 (O) on 374. I hasten to point out that, in this instance, the meeting was convened as a general meeting and nothing else but a general meeting – anx “x”, anx “d” and anx “e”.
- [14] It is incumbent upon a liquidator whose duty it is to convene a general meeting in terms of section 386(1)(d) to expressly mention in a notice whereby a general meeting is convened, the business of the meeting, that is to say: the matter(s) in respect of which creditors’ direction will be sought – Essop v The Master and Another 1983 (1) SA 926 (C) at 932C – E; Insolvency Law, Meskin p 7-2, 7-9.
- [15] Where, as in this instance, directions were sought and granted and claims of creditors proven and accepted which were not specifically

mentioned in an advertised notice of that general meeting as part of the business to be transacted at such a general meeting, such

directions, resolutions or proofs of claims were regarded as invalid. They were invalidated because some creditors would not have had proper notice of all the matters to be discussed to enable them to decide whether to be present or not – Ex Parte Meer: In Re: Indent Wholesalers v Meer's Retailers (Pty) Ltd 1950 (3) SA 780 (D) at 785; Marques and Another v De Villiers and Another NNO 1990 (4) SA 415 (W) on 418 – 422.

[16] In casu the applicant was notified about the general meeting. However he was not notified about the intended proof of claims of creditors. He sent his attorneys to attend the general meeting on his behalf. Neither he nor his attorney had any inkling that proof of creditors' claims would be on the agenda for deliberations. They and other creditors were unaware that creditors could submit their claims against the second respondent to the first respondent before a specified deadline. Of all the creditors, uninformed and ignorant the only exception was the third respondent. He was notified beforehand by the sixth respondent to submit his claim to the first

respondent. Such an invitation was, however, not courteously, let alone statutorily, extended to anyone else. Such conduct was, in my view, highly objectionable and disturbingly irregular. It was heavily loaded with a cargo of prejudice.

[17] A few unsavoury things emerged from the conduct of some of the respondents. Firstly, the third respondent was unfairly preferred at the expense of the rest of the creditors and exclusively selected to submit his claims. Secondly, the first respondent unfairly overruled the legitimate objections raised as regards the procedural irregularities concerning the third respondent's claim.

Thirdly, section 386 was misapplied.

[18] On the proven averments or allegations of fact the following findings are justified:

18.1 That section 386 makes no provision for the proof of claims at a general meeting convened in terms of section 386(1)(d) Companies Act 61 of 1973;

18.2 That the provisions of the 1973 Companies Act read together with the provisions of the 1936 Insolvency Act make it clear that the creditors' claim can only be proven in terms of section 364 read together with section 366 of the Companies Act at an exclusive meeting of creditors and not at an inclusive general meeting;

18.3 That notice of the general meeting convened by the respondent liquidators in this matter did not indicate that the meeting had been convened for the purpose of having the claims of the creditors proven;

18.4 That any resolution or decision adopted at the general meeting in respect of an item that was not specifically mentioned in the notice of the meeting as advertised was irregular;

18.5 That any authority, sanction or direction sought and obtained in respect of an item or matter irregularly placed on the agenda and discussed was null and void;

18.6 That even if it was permissible to prove the creditors' claim at the general meeting, the mere fact that no notice to that effect was given to the interested parties rendered its lodging unprocedural;

18.7 That since the meeting was not convened for the purpose of proving claims, proof of the third respondent's claim, and its ultimate acceptance by the first respondent, was accordingly invalid.

[19] I turn now to the case of the third respondent. He opposed the application for the review of the decision of the master on the grounds that the master had lawfully accepted and allowed his claim as a creditor of the second respondent. It was his further contention that the general meeting at which his claim was proven was regularly convened and that the matters that were discussed at that meeting were regularly placed on the agenda for deliberations. It will be recall that that meeting was convened in terms of section 386(1)(d) of the Companies Act 61 of 1973.

[20] Apart from the aforesaid grounds of resistance the third respondent took a number of preliminary points against the applicant's

review application. All in all there were seven preliminary points taken by the third respondent. In dealing with those points, I shall not follow the third respondent's sequence.

[21] As regards the first preliminary points the third respondent contended that the applicant was not entitled to bring this application in terms of section 151 of the Insolvency Act, 24 of 1936 because, so contended the third respondent, the second respondent was not liquidated on the grounds that it was unable to pay its debts but on the grounds that it was just and equitable to have the company liquidated.

[22] Section 386(1)(d) of the Companies Act, 61 of 1973 provides that a liquidator in any winding up shall have, among others, power to summon any general meeting of the company or the creditors or contributors of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purpose as he may consider necessary.

[23] Although section 386(1)(d) grants powers to the liquidator as regards a great variety of matters in respect of which she or he may seek authority or sanction of interested parties such as shareholders, creditors or contributors, it does not, however, carte blanche empower him to withhold matters in respect of which she/he intends seeking their authority or sanction or direction.

[24] Section 41 of the Insolvency Act, 24 of 1936 provides that:

"The trustee of an insolvent estate may at any time and shall, whenever he is so required by the Master or by a creditor or creditors

representing one-fourth of the value of all claims proved against the estate, convene in the manner prescribed by subsection (3) of section forty, a meeting of creditors (hereinafter called a general meeting of creditors) for the purpose of giving him directions concerning any matter relating to the administration of the estate and shall state in such notice the matters to be dealt with at that meeting.” (my own emphasis)

- [25] In the instant matter the general meeting of everybody was convened in terms of section 386(1) of the Companies Act, 61 of 1973 and not in terms of section 41, Insolvency Act 24 of 1936. In the insolvency statute there is no provision akin to the aforesaid provision in the company statute. In other words, in the Insolvency Act there is no provision similar to section 386(1)(d) of the Companies Act. The omission suggests that the legislature purposefully wanted to draw a distinction between insolvent companies on the one hand and insolvent individuals on the other hand.
- [26] The case of the applicant was that the decision of the master was improperly taken at an all-inclusive general meeting convened in terms of section 386(1)(d), Act No. 61/1973. At that meeting the third respondent's claim was proven, allowed and accepted. The applicant was aggrieved. The dissatisfaction of the applicant was two-fold. Firstly, he asserted that proof of claims by creditors of the second respondent was not reflected on the agenda as one of the matters to be discussed at the meeting. Secondly, he also asserted that proof of claims of creditors can only be properly considered at an exclusive first meeting of creditors convened in terms of section
364. Therefore, the applicant contended that he was aggrieved by the decision of the master and that he was accordingly entitled to challenge that decision in terms of section 151 of the Insolvency Act, 24 of 1936.
- [27] It was common cause that the second respondent was liquidated on the ground that it was just and equitable to have the business enterprise wound up. At the time the liquidation proceedings were initiated it was not averred that the second respondent was unable to pay its debts. The essence of the winding up proceedings was underpinned by the averment that the business enterprise was so bedevilled by endless relational problems among its shareholders that it had become very difficult, if not impossible, to have its business operations conducted in a commercially sound and healthy manner.
- [28] That was the position then. Now the position is apparently no longer the same. The financial position of the second respondent has somehow deteriorated since then. At the time this review proceedings were initiated the value of its liabilities exceeded that of its assets. The second respondent was re-evaluated two or so years ago. As on the 30th August 2012 the second respondent's valuation figure was R17950000,00 – vide annex “1”, the consolidated balance sheet of Kameelhoek (Edms) Bpk and Schaapplaats 978 (Edms) Bpk (APK). The contention of the applicant that the second respondent's liabilities exceeded its assets at the time the review application was argued was not seriously denied, if at all. To ignore what is on the strength of what once was does not appeal to my sense of justice. One has to be

realistic in adjudicating a dispute of this nature given the peculiar circumstances of the matter at hand. Behind the current application there is a long history of expensive litigation and irreconcilable personality clashes which have had an adverse financial impact on the second respondent's coffers. In this unfolding drama of a costly series of litigation, a stage has been reached where it can be said that, notwithstanding the

original basis on which the second respondent was then liquidated, the second respondent has since also become unable to pay its debts.

[29] The subsequent inability of the second respondent to pay its debts brought the second respondent within the ambit of section 339 of the Companies Act, 61 of 1973. It reads as follows:

"In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act."

In turn the section created the connective platform between the two statutes the one dealing with liquidation of insolvent companies and the other the sequestration of insolvent individuals. Where a company facing winding up proceedings becomes unable to pay its debts the provisions of the law relating to insolvency should be applied – section 339. The fact of the matter is that the second respondent is currently unable to pay its debts.

[30] I am not persuaded that the third respondent's objection that the applicant was precluded from invoking the provisions of section 151, Insolvency Act, 24 of 1936 was well taken. The second respondent's financial position has, with the passage of time, deteriorated to a point where it is now unable to pay its debts. Through section 339, Companies Act, 61 of 1973 the applicant was entitled to invoke the remedy of section 151 of Act 24 of 1936 provided he had locus standi in iudicio. For the purpose of dealing with the third respondent's first point in limine I assumed that the applicant had locus standi in iudicio, a point to which I shall return later.

[31] The decision of the first respondent was the cause of the applicant's grief or complaint. An aggrieved person is anyone,

"... who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

I may add, a man whose rights have been thereby violated. See Insolvency Law, Meskin on p. 15-13 Henochsberg on Company Act, 71 of 2008, Volume 2 on APP1-139; De Hart NO v Klopper and Botha NNO 1969 (2) SA 91 (T) on 99 – 100, Frances George Hill Family Trust v The South African Reserve Bank 1992 (3) SA 91A on 98 – 102; Janse van Rensburg v The Master 2004 (5) SA 173 (T) 180C – 181B; Geduld v The Master and Others 2005 (4) SA 46 (C) at 464A – 465F.

- [32] It would appear from the financial position of the second respondent as evidenced by the financial statements (anx “I”) that there would be a worthwhile surplus for its shareholders after the liquidation and distribution processes. Therefore, as a shareholder, the applicant certainly has an interest in the liquidation and distribution processes concerning the second respondent. I am therefore persuaded that the applicant accordingly has a sufficient legal interest to approach this court in terms of section 151 to ensure that the estate of the company is properly and regularly administered. See *Jacobs v Hessels* 1984 (3) SA 601 (T) at 604G; *Mookrey v Smith NO & Another* 1987 (1) SA 332 (C) at 335E; *Mookrey v Smith NO & Another* 1989
- (2) SA 707 (C) at 708I.
- [33] By virtue of such legal interest the applicant was, in my view, entitled to approach the court in terms of section 151, Act 24 of 1936 because, as I have already found, the first respondent in collaboration with the sixth respondent had, in contravention of section 364, section 386, Act 61 of 1973, administered the estate of the second respondent in an irregular manner. The actions of those two respondents at least culminated in the taking of an incompetent decision with very adverse impact on the legitimate interests of the second respondent, its shareholders, and the majority of its creditors and the applicant himself. I would therefore dismiss the third respondent’s first point raised in limine.
- [34] In the second place, the third respondent’s preliminary point was that the applicant did not have locus standi to bring this application. The objection is based on the allegation that the applicant was not a shareholder in the company, in other words, the second respondent. The applicant on the contrary asserted that he was a shareholder of the second respondent.
- [35] A share register of the company indicated that the applicant was a shareholder. The issued share certificates indicated that the applicant and his brother André Knipe were the majority shareholders of the second respondent – see anx “a1 – c8” which are to be found on pages 416 – 443 of the record. The averments of the applicant to the effect that he is a shareholder of the second respondent were also materially supported by the third respondent himself. On his own version the applicant is a 20% shareholder in the company.
- [36] See the share certificate read together with paragraph 3.4.2 and 3.4.7 of the answering affidavit which appears on pages 238 and 241 respectively. Therefore, according to the third respondent’s own papers, the applicant was a 20% shareholder of the second respondent.
- [37] In terms of section 1 of the Companies Act 71 of 2008 a shareholder is defined as follows:
- “...subject to section 57(1) means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated security register, as the case may be.”*

Section 50(4) of the Companies Act, 71 of 2008 provides that:

“A securities register, or an uncertificated securities register maintained in accordance with this Act is sufficient proof of the

facts recorded in it, in the absence of evidence to the contrary.”

See Henochsberg on the Companies Act, 71 of 2008, Vol 1, p 205 – 207; Marine & Trade Insurance Co Ltd v Van der Schyff 1972

- (1) SA 26 (A) at 37 – 38. The contention of the third respondent was, therefore, clearly inconsistent with the third

respondents own papers. The share registers and the share certificates on which the third respondent relied are clearly at variance with his own contention. The third respondent’s further contention that the applicant has since ceded his shares to the third respondent is also in conflict with the written agreement on which the third respondent relied. (Vide anx “d” and anx “e” p 453 - p 458 of the record.)

[38] In the light of the foregoing I am persuaded that the applicant was indeed a shareholder of the second respondent and accordingly had a locus standi. I would, therefore, dismiss the third respondent’s second point in limine.

[39] In the third place the third respondent preliminary point was that the general meeting at which the decision complained of was taken, had not yet been closed seeing that the interrogation process in terms of section 417 and 418 of the Companies Act 71 of 2008 was still pending.

[40] The contention of the applicant was that it was clear from the minutes of the proceedings of that meeting that the decision taken was not provisionally made subject to the continuation, at some point in the future, of the general meeting of 16 April 2014 which was convened in terms of section 386(1)(d). The fact of the matter is that the business that was transacted at that meeting was unconditionally concluded. A meeting was not postponed for any further deliberations. The claim of the third respondent was not allowed and accepted subject to the interrogation of the third respondent in terms of sections 417 and 418 as the third respondent contended. The decision of the master as regards the third respondent’s claim, was therefore an accomplished fact. Accordingly such decision immediately became reviewable in terms of section 151 of the Insolvency Act, 24 of 1936; Insolvency Law Meskin p 15-12(2) Henochsberg on Companies Act>, 71 of 2008, Vol 2, p APP1-139 and Insolvency Law Meskin p 9-12.

[41] In the fourth place the third respondent raised the preliminary objection that the applicant’s application was pre-mature seeing that the applicant did not follow the procedure as laid down in terms of section 45, Insolvency Act, 24 of 1936. The applicant attacked this objection. At paragraph 3.6 of the answering affidavit the third respondent alleged that:

“3.6.1 Voorts maak Artikel 45 voorsiening dat die Likwidateurs die bewese eise moet ondersoek en ingevolge Artikel 45[3] ‘n verslag aan die Meester moet voorlê as dit verkeerd of ongerymd sou wees – die Applikant het alreeds 12 maande kans gehad om hierdie remedie uit te put en aan die Likwidateurs bewyse en gronde kon verskaf het waarom my eise nie toegelaat moes gewees het nie en het versuim om dit te doen. Sien bladsy 35 en 39 van die stukke.

3.6.2 Enige aansprake wat die Applikant en die Knipe-kindere op die aandele mag hê is derhalwe prematuur en beskik hulle oor geen regte of magte om daarmee te handel nie. Dit spreek dus van self dat die Applikant oor geen regte of magte beskik het om my eise voor die Meester aan te val nie.”

[42] Section 45 empowers a liquidator to investigate a creditor's claim which has been proved and allowed at a meeting of creditors. The section contemplates a lawful and legitimate claim which has been allowed and accepted in terms of the provisions of the law of

insolvency during a proper meeting of creditors. The section does not apply to irregular claims proven, allowed and accepted at a general meeting of all interested parties in contravention of the provisions of the applicable legislation.

[43] A decision of the chair of a meeting of creditors whereby a claim is allowed and accepted cannot be amended or attacked at a subsequent meeting of creditors. Such a claim can merely be investigated further. It follows, therefore, that the claim of the third respondent unprocedurally allowed and accepted by the first respondent at an irregular meeting will not be re-visited at a subsequent regular meeting of creditors as the third respondent suggested. This is precisely where the prejudice to the body of the creditors lies. To the extent that the first respondent, contrary to the provisions of the applicable legislation, accepted and allowed the claim of the creditor at the general meeting such a decision cannot in terms of section 45 be reconsidered afresh. Only the merits of such a claim can be investigated and challenged by the liquidators only. See *Insolvency Law Meskin* p 9 – 12. In the instant matter, at least, one of the liquidators has apparently displayed undue preference to one of the creditors whose character and integrity has become questionable following the forced removal by the court of his name from the roll of partitioning attorneys.

[44] It followed, therefore, that the rights of the creditors unlawfully circumvented by the first respondent who pre-maturely allowed and accepted proof of the third respondent's claim at the wrong meeting and at the wrong stage of the liquidation process, were undermined.

[45] Section 44 of the Insolvency Act, 24 of 1936 makes provision for proof of a claim by a creditor in terms of subsection 3 thereof. Such a claim can be proven against the estate at the meeting of creditors. It has to be proven to the satisfaction of the chair of that exclusive meeting who has the power either to accept or to reject the claim. In the circumstances I am persuaded that the first respondent acted irregularly and contravened the provisions of the company legislation read with the provisions of the insolvency legislation by allowing the third respondent's claim to be proven and by eventually accepting the third respondent's claim contrary to the provisions of section 44 and contrary to the other provisions of the company legislation.

- [46] It is my finding that section 45, Insolvency Act 24 of 1936 did not apply. Accordingly no obligation rested on the applicant to follow the provisions of that Act before he applied to this court in terms of section 155, Insolvency Act, 24 of 1936. I am therefore inclined to dismiss the third respondent's fourth point in limine.
- [47] In the fifth place the preliminary point raised by the third respondent was that the applicant had failed to bring this review application within the reasonable time. The essence of the objection is that the applicant had waited for 12 months after the third respondent had proven his claim before he applied to this court for the review of the first respondent's decision. The applicant attacked this objection as well. Mr Pienaar, counsel for the applicant, put it as follows in applicant's heads of argument:
- "12.2 Wat die Derde Respondent egter nie aan die Agbare Hof openbaar nie is die feit dat die eis reeds deur die Eerste Respondent aanvaar en bewys is voor die verlening van die finale likwidasiebevel, welke opsigself strydig is met Artikel 364 van die Maatskappyyewet, 1973, welke bepaal dat die eerste vergadering van skuldeiser, met onder andere die doel om 'n eis te bewys, eers na die finale likwidasie belê kan word."*
- [48] The following undisputed facts have to be repeated. Firstly, the applicant applied to the Supreme Court of Appeal for leave to appeal against the final liquidation order. This application was dismissed on 5th February 2014. Secondly, on 5th March 2014, to be precise, merely thirty days later, the applicant caused this review application to be issued.
- [49] It stands to reason that before the SCA had entertained and disposed of the applicant's application for leave to appeal the applicant would have initiated these review proceedings on his own peril. In those circumstances there was always a possibility that the final liquidation order could be discharge on appeal. Had the applicants been successful with his application for leave to appeal and ultimately also on appeal, the review application would not have been necessary at all. I am not persuaded that the applicant was guilty of any unreasonable delay in this matter. I am satisfied that the current application was instituted within a reasonable time when the circumstances reasonably dictated that it be instituted. In my view there was hardly any delay to be condoned.
- [50] In the light of all this, I am persuaded that the third respondent's fifth preliminary objection cannot be sustained. I am inclined to dismissed it as well.
- [51] In the sixth place the third respondent preliminary point was that there existed a foreseeable factual dispute which made it undesirable for the applicant to have brought this matter to court by way of motion proceedings. There may well have been peripheral disputes in this matter. However, there existed no real factual dispute as regards the question whether the claim of the third respondent was properly proven, in accordance with the provisions of the applicable legislation. The facts and the circumstances in which the claim was proven the meeting at which it was proven the section which was used for the purpose as well as the section that were

circumvented are all material facts that are not in dispute. Accordingly I am not persuaded that there was any factual dispute on the material cornerstones of the applicant's claim as well as the avenue through which these review proceedings were instituted.

[52] In the circumstances I am also inclined to dismiss this objection of the third respondent. There was no substance in the point so taken.

[53] In the seventh place the preliminary point raised by the third respondent was that there was a conflict of interest. The objection had virtually no substance. I deem it unnecessary to deal with it at all. I would, therefore, dismiss it as well.

[54] Seeing that none of the preliminary points was well taken, the review application ought to succeed. I am satisfied that a proper case has been made out for the relief sought. In the facts, the applicant is entitled to such relief. In view of this conclusion coupled with the nature of relief sought, it becomes unnecessary to deal with the dispute concerning the substantive merits or demerits of the third respondent's claim against the estate of the second respondent (in liquidation). Such dispute is irrelevant to the question as to whether the claim of the third respondent was valid, procedurally proven and procedurally allowed and accepted in accordance with the provisions applicable to companies legislature read with those of the insolvency legislation.

[55] I have so far dealt with case 956/2014 only. As regards case 957/2014 concerning Kameelhoek (Edms) Bpk, cited there as the second respondent I deem it unnecessary to deal with it separately. The facts, issues and submissions were pretty much the same. Accordingly, my reasoning, the findings, the conclusions and the outcome have to be same there as here. The two matters were argued together as one. Everything said and done in connection with case 956/2014 applies to case 957/2014 with equal force. Accordingly the conclusion is also the same. The findings and the reasoning in case 956/2014 applies equally well to case 957/2014. In fact the two applications were argued together as one.

[56] The applicant has been successful. Because he has, he is entitled to the fruits of his success. There is no reason why he should be deprived of the fruits of his success in both matters. Therefore, the costs will follow success. The general rule of costs applies.

[57] Accordingly I make the following order:

57.1 The decision of the first respondent, whereby the third respondent's claim against the estate of the second respondent, Schaaplaats 978 (Edms) Bpk (in liquidation) was allowed and accepted at a general meeting on the 16th April 2013 which meeting was convened in terms of section 386(1)(d) of the Companies Act, 61 of 1973 has been reviewed in terms of section 151 of the Insolvency Act, 24 of 1936 and it is hereby set aside as null and void;

57.2 The costs relating to this review application shall be costs in the liquidation of the second respondent and accordingly such costs will be borne and paid by the second respondent as represented by the fourth, fifth and sixth respondents out of the liquidated estate of the second respondent.

57.3 This order applies to case number 957/2014 as well.

M. H. RAMPAL, AJP

On behalf of applicant: Adv. C. D. Pienaar

Instructed by:

Blair Attorneys

On behalf of third respondent: Adv. P. Zietsman SC

De Lange Du Plessis

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