

SOUTH AFRICA / JUDGMENT

Mantis Investments Holdings v De Jager N O (696/2022) [2023] ZASCA 134; 2024 (3) SA 431 (SCA) (18 October 2023) [2023] ZASCA 134

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Mbatha, Kathree-Setiloane, Keightley,
Unterhalter

CASE / FILE NUMBER

696/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No. 696/2022

In the matter between:

MANTIS INVESTMENTS HOLDINGS (PTY) LIMITED FIRST APPELLANT

ADRIAN JOHN FAULKNER GARDINER SECOND

APPELLANT

and

WERNER DE JAGER N.O.

FIRST

RESPONDENT

CAROL-ANN SCHRÖDER N.O.

SECOND RESPONDENT

Neutral Citation: Mantis Investments Holdings v De Jager N O (696/2022)

[2023] ZASCA 134 (18 October 2023)

Coram: PONNAN and MBATHA JJA, KATHREE-SETILOANE, KEIGHTLEY and UNTERHALTER AJJA

Heard: 16 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11:00 am on 18 October 2023.

Summary: Sections 44 and 151 of the Insolvency Act – Master's decision admitting a creditor's claim against a company in liquidation stands unless set aside on review in terms of s 151 thereof. Section 31 of Insolvency Act – in an action to set aside a collusive disposition – no entitlement to contest a proved claim of creditor.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makanda (Beneke AJ) sitting as a court of first instance:

The appeal is dismissed with costs.

Kathree-Setiloane AJA (Ponnan and Mbatha JJA, Keightley and Unterhalter AJJA concurring):

- [1] Werner de Jager, the first respondent and Carol Ann-Schröder, the second respondent (the liquidators), are the duly appointed joint liquidators of No. 1 Watt Street (Pty) Ltd (Watt Street).[1] Mantis Investment Holdings (Pty) Ltd (Mantis), the first appellant, is a shareholder in Watt Street. Mr Adrian John Faulkner Gardiner (Mr Gardiner), the second appellant, is a director of both Mantis and Watt Street.[2]
- [2] The appellants appeal against the judgment and order of Beneke AJ in the Eastern Cape Division of the High Court, Makanda (the high court) in which it, inter alia, made an order that the appellants are not lawfully entitled to contest the claims proved by the Eastern Cape Development Corporation (ECDC) in the liquidation proceedings of Watt Street. The matter before the high court proceeded by way of a special case in terms of rule 33(1) of the Uniform Rules of Court.
- [3] The special case has its genesis in an action, which the liquidators instituted against the appellants to set aside a collusive disposition of the assets of Watt Street. The agreed facts which form the background to the action are that, during 2005, ECDC advanced certain monies to Bushman Sands Development (Pty) Ltd (Bushman Sands). Watt Street bound itself as surety and co-principal debtor, with Bushman Sands, to ECDC.
- [4] As a result of the failure of Bushman Sands to repay the loan to ECDC, the latter instituted an action in the Eastern Cape Division of the High Court, Gqeberha (Gqeberha high court)[3] against Watt Street and Bushman Sands for, inter alia, payment of the amount of about R19 million (the ECDC action). Watt Street defended the ECDC action.

- [5] Shortly before the commencement of the trial in the ECDC action, Mantis, represented by Mr Gardiner, brought an application in the Gqeberha high court,[4] for the liquidation of Watt Street. Mantis contended, in this application, that it was a creditor of Watt Street for an amount of about R2.5 million arising from certain unsecured and interest free loans advanced to Watt Street, without specified repayment terms. In November 2014, the Gqeberha high court placed Watt Street in final winding-up.
- [6] ECDC and Mantis proved claims against Watt Street in terms of s 44[5] of the Insolvency Act 24 of 1936 (the Act). Despite Mantis disputing the claim of ECDC, it was proved and accepted by the Master of the Gqeberha high court (the Master). Mantis' claim was also accepted by the Master.
- [7] The liquidators' cause of action to set aside what it describes as a collusive disposition is premised on s 31 of the Act.[6] The liquidators pleaded, inter alia, as follows in the particulars of claim:
- ‘(a) The appellants had embarked upon a restructuring of Watt Street which resulted in the disposal and transfer of its assets, and a declaration and payment of a dividend in an amount exceeding R64 million from Watt Street to Mantis, as its shareholder;
- (b) The appellants effectively denuded Watt Street of all its significant assets despite being aware that there existed an actual or contingent liability due by it to ECDC;
- (c) As a result, Watt Street was not in a position to meet its obligations to pay an amount purportedly owing to ECDC;
- (d) The disposal and transfer of assets and the declaration and payment of a dividend, had the effect of prejudicing the creditors of Watt Street and, in particular, ECDC;
- (d) Watt Street, Mantis and Mr Gardiner intended to defraud ECDC by deliberately prejudicing and frustrating its claims against Watt Street, such that there is no prospect of any dividend to be paid in Watt Street; and
- (e) As parties to the collusive disposition, Mantis and Mr Gardiner are jointly and severally liable to make good the loss caused to Watt Street and are obliged to pay a penalty in the amount of R64 million for its benefit.’
- [8] The liquidators accordingly sought an order: (a) setting aside the disposal and transfer of the assets and the declaration and payment of a dividend in an amount of not less than R64 million in terms of s 31 of the Act; (b) that the said sum be paid to the liquidators of Watt Street; (c) declaring that Mantis is to forfeit any claim it may have against Watt Street; (d) for payment of compensation and a penalty in the sum of R64 million; and
- (e) for costs.

- [9] In answer, the appellants filed a plea in which they admitted that ECDC had proved a claim against Watt Street in the amount of about R19 million. They, however, denied that the amount claimed (or any lesser amount) was due, owing, and payable to ECDC. They also denied that the restructuring, rationalization and declaration of a dividend constituted a collusive agreement which prejudiced the creditors of Watt Street, and more particularly ECDC. The appellants furthermore pleaded that, from time to time, Bushman Sands (the principal debtor) had effected payments to ECDC and continued to do so.
- [10] The liquidators filed a replication in which they contended that: (a) the Master's decision to admit ECDC's claim constitutes an administrative act which exists as a fact and has legal effect until set aside; (b) neither of the appellants sought to review the Master's decision; (c) consequently, any determination in the action that ECDC does not have a claim against Watt Street is precluded. In answer, the appellants filed a rejoinder in which they contended that they are not bound, in the action, by the decision of the Master to admit the claim, as it was made in the context of a claim by ECDC against Watt Street. They also contended that in law, it was incumbent upon the liquidators to establish, as a prerequisite to a claim based on a collusive

disposition

that, at the date of the institution of the action, ECDC was, and is, a creditor of the company in liquidation.

- [11] Two questions arose, namely whether the appellants were entitled to: (a) contest the claim of ECDC as against the principal debtor (Bushman's Sands); and, (b) revisit the indebtedness and quantum of ECDC's claim against the surety. On 1 December 2020, the high court made an order separating those issues from the remainder of the issues in the action.[7]
- [12] Having heard argument, the high court found that the decision of the Master to accept a claim under s 44 of the Act constitutes administrative action, which exists and continues to have legal consequences until and unless it is reviewed and set aside in terms of s 151 of the Act.[8] Relying for support on the decision of *Bester NO and Others v CTS Trailers (Pty) Ltd and Another*,[9] it concluded that '[a]bsent 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'. [10] The high court accordingly made the following order:

'1.The [appellants] 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 hereinafter as “the company in liquidation”) as set out in paragraphs 7.3, 7.4, 7.5, and 7.6 of the particulars of claim read with paragraphs 6 and 7 of the [appellants'] plea, and read further with the [respondents'] replication and the [appellants'] rejoinder and the [respondents'] surrejoinder filed of record;

2. The [appellants] are not lawfully entitled to continue to contest the claims proved by 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 [appellants] plea, and further read with the [respondents'] replication, the [appellants'] rejoinder, and the [respondents'] 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 utilized, shall be borne by the appellants.'

[13] The appeal against the order of the high court is before us with the leave of this Court. In my view, the appeal can be disposed of on a narrower basis than that foreshadowed in the pleadings. Both the appellants and the liquidators appeared to accept this during argument in the appeal.

[14] Section 44[11] of the Act deals comprehensively with the procedure for the proof of liquidated claims against an insolvent estate. In *Caldeira v The Master and Another*, Levinsohn J said that '[t]he proof of claim procedure enables creditors to prove their claims in a relatively simple and

expeditious fashion'. [12] More recently in *Breda N O v Master of the High Court, Kimberley*, [13] this Court observed that: '[a] presiding officer does not adjudicate upon the claim as a court of law, is not required to

examine a claim too critically and only has to be satisfied that the claim is prima facie proved'.

[14] Put differently, the Master must examine the proof of claims' documents to determine whether they disclose prima facie the existence of an enforceable claim.

[15] Where a Master admits a claim, the Master cannot subsequently alter that decision. [15] This does not, however, mean that the Master's decision to admit the claim is conclusive and payable out of property of the insolvent estate. That is so because, at this stage, the admission of the claim is provisional. This means that it is open to the liquidator to dispute the claim by following the procedure envisaged in s 45(3) of the Act which provides:

'If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, . . . reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five'.

[16] If the liquidator is dissatisfied with the Master's decision to admit the claim of a creditor, he or she may apply to court to review it in terms of s 151 of the Act which provides:

'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: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve.'

[17] A liquidator may not review the decision of the Master to admit the claim, unless the liquidator has followed the procedure contemplated

in s 45(3) of the Act, which is peremptory.[16] A creditor who has unsuccessfully objected to the Master's decision to admit the claim, may take the Master's decision on review in terms of s 151 of the Act.[17] The Master's decision to reject a creditor's proved claim may also be taken on review by the aggrieved creditor. However, where no steps are taken to review the Master's decision to admit or reject a proved claim, that claim becomes conclusive and enforceable in law against the company in liquidation. In that event, the Master's decision would stand.

[18] As the appellants, in the present matter, did not challenge the Master's decision to admit ECDC's claim in terms of s 151 of the Act, the Master's decision stands. The consequence is that ECDC is factually and legally a creditor of the company in liquidation. The appellants had a tailor-made remedy in terms of the Act to review the Master's decision but did not do so.

[19] The legislature has provided parties in the position of the appellants with a suite of statutory remedies. In argument, the appellants

appeared to accept that reliance on the common law as the basis to assert a claim, is bound to result in an incongruity with the overall scheme of the Act. Any decision on that claim could notionally be at odds with the decision of the Master to admit such claim to proof, where, as here, the Master was not cited nor afforded an opportunity to defend his or her decision. It follows that in circumstances such as the present, a litigant, in the position of the appellants, who is aggrieved by a decision of the Master to admit to proof a claim against an insolvent estate, would be restricted to the remedy of a review under s 151 of the Act.

[20] Several consequences arise from the final winding-up of a company. Foremost is the creation of a concursus creditorum, the effect of which was described by this Court in *Walker v Syfret* N O:[18] '... the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into

consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

[21] ECDC is a creditor with a proved claim that is enforceable against Watt Street. That decision has not been set aside on review. It therefore stands. The appellants, however, seek to avoid this legal consequence by contending that it is incumbent on the liquidators to establish, as

a pre-requisite to their claim that, at the date of institution of the action ECDC was, and is, a creditor in respect of the amount claimed. To require this of the liquidators, in the face of ECDC's pre-existing proved claim, is to negate the comprehensive set of measures in the Act to protect creditors.

[22] In the result, the appeal must fail. I make the following order:

F KATHREE-SETILOANE

ACTING JUDGE OF APPEAL

Appearances

For the appellants: A Beyleveld SC

Instructed by: BLC Attorneys, c/o Wheeldon Rushmere & Cole Inc, Grahamstown

Symington De Kok, Bloemfontein

For the respondents: RG Buchanan SC

Instructed by: Tabata Smith Inc, c/o Nettletons Attorneys, Grahamstown

Webbers, Bloemfontein

[1] Watt Street was formerly known as Mantis Group Holdings (Pty) Ltd.

[2] Mantis and Mr Gardiner are referred to collectively as 'the appellants' in the judgment.

[3] Case No. 1165/2012.

[4] Case No. 3805/14.

[5] Section 44 of the Insolvency Act, in relevant part, provides: '44 Proof of liquidated claims against estate

(1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct. . . .

(3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: Provided that the rejection of a claim shall not debar the claimant from proving

that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of section seventy-five: and provided further that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in subsection (4), he shall be deemed to have tendered proof of his claim at that meeting.

- (4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty-three, the amount at which he values the security. The said affidavit or a copy thereof and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than twenty-four hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidences of his claim within the prescribed period: Provided that if a creditor has proved an incorrect claim, he may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose correct his claim or submit a fresh correct claim.
- (5) Any document by this section required to be delivered before a meeting of creditors at the office of the officer who is to preside at that meeting, shall be open for inspection at such office during office hours free of charge by any creditor, the trustee or the insolvent or the representative of any of them.
- (6) A claim against an insolvent's estate for payment of the purchase price of goods sold and delivered to the insolvent on an open account shall not be admitted to proof unless a statement is submitted in support of such claim showing the monthly total and a brief description of the purchases and payments for the full period of trading or for the period of twelve months immediately before the date of sequestration, whichever is the lesser.
- (7) The officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.

- (8) If any person who wishes to prove or who has at any time proved a claim against the estate is absent from a meeting of creditors the officer who presided or who presides thereat, may summon him in writing to appear before him at a place and time stated in the summons, for the purpose of being interrogated by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, and if he appears in answer to the summons the provisions of subsection (7) shall apply. (9) If any such person fails without reasonable excuse to appear in answer to such summons or having appeared or when present at any meeting of creditors refuses to take the oath or to submit to the said interrogation or to answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected.'

[5] Section 44 of the Insolvency Act, in relevant part, provides:

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- (1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

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- (3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: Provided that the rejection of a claim shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of section seventy-five: and provided further that if a creditor has twenty-four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in subsection (4), he shall be deemed to have tendered proof of his claim at that meeting.
- (4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section eighty-three, the amount at which he values the security.

The said affidavit or a copy thereof and any documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than twenty-four hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of opinion that through no fault of the creditor he has been unable to deliver such evidences of his claim within the prescribed period: Provided that if a creditor has proved an incorrect claim, he may, with the consent in writing of the Master given after consultation with the trustee and on such conditions as the Master may think fit to impose correct his claim or submit a fresh correct claim.

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- (6) A claim against an insolvent's estate for payment of the purchase price of goods sold and delivered to the insolvent on an open account shall not be admitted to proof unless a statement is submitted in support of such claim showing the monthly total and a brief description of the purchases and payments for the full period of trading or for the period of twelve months immediately before the date of sequestration, whichever is the lesser.
- (7) The officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.
- (8) If any person who wishes to prove or who has at any time proved a claim against the estate is absent from a meeting of creditors the officer who presided or who presides thereat, may summon him in writing to appear before him at a place and time stated in the summons, for the purpose of being interrogated by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, and if he appears in answer to the summons the provisions of subsection (7) shall apply.
- (9) If any such person fails without reasonable excuse to appear in answer to such summons or having appeared or when present at any meeting of creditors refuses to take the oath or to submit to the said interrogation or to answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected.'
- [6] Section 31 of the Insolvency Act provides: '31 Collusive dealings before sequestration

- (1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.
- (2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.
- (3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

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- (3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.'

[7] Order of the Eastern Cape Division of the High Court, Makhanda: De Jager N O and Another v Mantis Investments Holdings (Pty) Ltd and Another

[2021] ZAECHGHC 120.

[8] See para 16 below.

[9] Bester N O and Others v CTS Trailers (Pty) Ltd and Another [2020] ZAWCHC 169; 2021 (4) SA 167 (WCC).

[10] Bester paras 21-27. Although Bester deals with a decision made by the Master in terms of s 46 of the Insolvency Act and not s 44, it affirms the principle that, a decision taken by the Master in terms of the Insolvency Act has legal consequences until set aside.

[11] See fn 6 above.

[12] Caldeira v The Master and Another 1996

(1) SA 868 (NPD) at 873H-874F.

[13] Breda N O v Master of the High Court, Kimberley [2015] ZASCA 166.

[14] Ibid para 23.

[15] Ben Rossouw Motors v Druker NO and Others 1975

(1) SA 821 (W) at 823; [1975] 1 All SA 311 (W) at 314.

[16] Estate Jeewa v The Master and Bukhsh (1927) NLR 86; Estate Wilson v Estate Giddy, Giddy and White and Others 1937 AD 239.

[17] Noord-kaaplandse Ko-op Lewendehawe Agentskap Bpk v Van Rooyen and Others 1977

(1) SA 403 (NC) at 406-407.

[18] Walker v Syfret NO 1911 AD 141.

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