

SOUTH AFRICA / JUDGMENT

Sithole N.O. and Others v Mulaudzi and Another (A286/2020) [2022] ZAGPPHC 476 (24 June 2022)

[2022] ZAGPPHC 476

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi, Madiba AJ, Ndlovane AJ

CASE / FILE NUMBER

A286/2020

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO: A286/2020

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
24
June 2022
In

the matter between:

OSCAR
JABULANI SITHOLE N.O.
First Appellant
(Second Respondent a
quo)
CHRISTOPHER
PETER VAN ZYL N.O.
Second Appellant
(Third Respondent a
quo)
SELBY
MUSAWONKE NTSIBANDE N.O.
Third Appellant
(Fourth Respondent a
quo)
And
MATTHEWS
TUWANI MULAUDZI
First Respondent
VIOLET
MABONTSI MULAUDZI
Second Respondent

JUDGEMENT

TLHAPI J

INTRODUCTION

[1] The joint trustees of the insolvent estate of the respondents, with leave granted by the court a quo, appeal the whole of the judgment and order of Maumela J of 11 May 2018, being an order in a reconsideration application brought by the appellants in terms of Rule 6(12)(c) of the Rules of Court.

[2] The respondents launched an urgent application, which was purportedly set down for 4 April 2017. The appellants contend that they learnt of the urgent application through a Mr Kruger who represented Old Mutual in another matter in which the respondents were involved. They were provided with a copy of the notice of motion as described in

annexure 'CZ5'. Instructions were given to their counsel to proceed to court on 4 April 2017 to seek indulgence to oppose the application. The respondents had also notified the appellants of the application by email dated 3 April 2017. Annexed to the said email was the notice of motion 'CZ5' and not the founding papers. On 4 April 2017 Counsel informed the appellants that the application had not been enrolled on that day.

[3] On 6 April 2017 an email from the respondents informed the appellants, in particular Mr Van Zyl, the second appellant that he had breached a written undertaking not to proceed with the second meeting of creditors, which he had convened for the 11 April 2017. The respondents informed them that they would proceed with the urgent application which would be enrolled for the 14 April 2017. The respondents proceeded to obtain an order despite the appellants informing them that no founding papers had been served on them or annexed to the email of 3 April 2017. Their attorneys approached the registrar's office to obtain a copy of the founding papers from the court file and, despite a diligent search in the records office the file could not be located. The appellants obtained a copy of the court order.

[4] Consequently, the subject of the reconsideration before Maumela J was the following order granted by Mothle J on 18 April 2017, and I quote the relevant prayers granted:

"3. That the appellants are granted leave to bring this application as a matter of urgency

.....

4. Interdicting the first, second, third and fourth respondents or any other person acting on their behalf from proceeding with the creditors' meeting of the 11 April 2017 or any other special or general meeting or any other process pending the outcome of the s381 enquiry into the Trustees fitness to hold office;

5. Interdicting the first, second, third and fourth respondents or any person acting on their behalf from proceeding with the creditor's

meeting of the 11 April 2017 or any other special or general meeting or process pending the outcome of the review application in case number 15616/2017;

6. Interdicting the first, second, third and fourth respondents or any other person acting on their behalf from proceeding with the creditors meeting of the 11 April 2017 or any other special or general meeting pending the outcome of the application for the expungement of claims lodged with the first respondent."

[5] The following order was granted by the court a quo by Maumela J in the reconsideration application;

"1. The application for the court to set aside creditors meeting is granted.

2. The application for the appointment of trustees for the estate of the applicants to be set aside is refused.

3. The application for the court to order the removal from office of the trustees in the estate of the applicants is refused.

4. The trustees in the insolvent estate of the applicants are ordered to halt the process of the disposal of the estate pending the institution of a section 381 enquiry against the trustees.

5. The first respondent is ordered to institute a section 381 enquiry against the trustees in the insolvent estate of the applicant.
6. Costs shall be costs in the insolvent estate.”
- [6] It is contended by the appellants that the main ground in this appeal is that the court a quo erred and/ or misdirected itself, in not appreciating or taking into account that the relief granted was prejudicial to the creditors.
- [7] The respondents were in person and, they opposed the appeal, describing such opposition as a cross-appeal on the following grounds:
 - (i) That the appellants were not fit and proper to hold office as trustees and that they were irregularly appointed by the Master at a creditors meeting;
 - (ii) That there exists a pending part-heard enquiry in terms of s 381 of the Companies Act into their fitness to hold office and that there was another pending court case number: 15616/17 for their removal;
 - (iii) that the appellants were fraudulently appointed by the Master and are facing various serious charges, and cannot administer the insolvent estate till they were cleared.
- [8] Subsequent to the hearing of this appeal the respondents on 02 June 2022 filed a document titled “Further Submissions’ and the following annexures were attached :
 1. s174 & Acquittal Judgment of the Pretoria Specialised Commercial Crimes Court.
 2. Leave to Appeal: Constitutional Court.
 3. SCA 471/2021 corrected to 472/2021.
 4. SCA 185/2021 Order.

FACTUAL

BACKGROUND

- [9] The respondents were sequestrated by Cash Crusaders Franchising (Pty) Ltd and a final order under case number: 29047/2015 was granted on 27 May 2016. The application in the court a quo was launched by the respondents with the aim of interdicting a second meeting of creditors, a special meeting and or any general meeting being convened, including any process by the trustees, until such time as the complaints of impropriety against the first and third appellants, which were being investigated in an enquiry in terms of section 381 of the Companies Act 61 of 1973 was finalized. Also pending was the review application in which the appellants’ appointment was challenged. Further, the respondents intended expunging the claims already proved against the insolvent estate.

- [10] The respondents contended in their founding papers that the first and third appellant had to be removed because they were illegally and fraudulently appointed by the Master and, criminal charges had been laid against them for extortion, fraud and corruption with the Master and with the South African Police. The first appellant was accused of soliciting a bribe in order to engage a friendly sequestration. The first appellant had also through his attorneys undertaken not to oppose or defend any action taken by the respondents and would abide the decision of the court.
- [11] Further, respondents contended that they were not invited to the first meeting of creditors and that Ms Rossouw at the Master's office informed them that it was not necessary for them to be present, despite the officers presiding over the s381 enquiry expressing a view that it was not acceptable to hold a creditor's meeting in the absence of the insolvent. The Master had proceeded to make final appointments of trustees after the first meeting. The respondents annexed to their founding affidavit trails of emails sent to the Master's Office relating to complaints he had against Ms Rossouw and, documents presented by the first appellant relating to claims, which they disputed, which had been proved at a first meeting of creditors held on 15 November 2016..
- [12] The respondents contended that on being informed that there was a second creditors meeting convened for 11 April 2017, they immediately wrote to Ms Rossouw seeking an explanation why a meeting had been convened when there were matters which were still pending against the appellants.
- [13] The respondents also lamented the appointment of the second appellant, Mr Van Zyl who was either a director / employee of Mazzars, which was the company he had complained about regarding the first appellant.
- [14] The appellants contended that the litigation between the parties had a protracted history and the background is succinctly described in Counsel for the appellants' Heads of Argument as follows:
- "1. On 27 May 2016, Respondents were sequestered by an order granted by the Gauteng Division of this Honourable Court;*
2. An application for leave to appeal was refused, and Respondents thereafter applied to the Supreme Court of Appeal ("the SCA") for leave to appeal. On 9 November 2016, the SCA dismissed the application for leave to appeal, with costs. On 30 January 2017, Respondents' application for leave to appeal to the Constitutional Court of South Africa ("the Constitutional Court") against the final order of sequestration was similarly refused with costs. In December 2016, Respondents also launched an application in the SCA in terms of Section 17(2)(f) of the Superior Courts Act No. 10 of 2013 ("the Superior Courts Act"), requesting the President of the SCA to refer the decision of the Judges of the SCA back to the Judges for reconsideration and/or

variation of the earlier refusal by the SCA to grant Mr Mulaudzi leave to appeal. The Acting Judge President of the SCA dismissed the last mentioned application, with costs.

3. Undeterred by the afore going, and on 15 March 2017, the Respondents again made application for leave to appeal to the Constitutional Court, against the refusal of the reconsideration application. In an entirely separate application, Respondents applied to the North Gauteng High Court, as a court of first instance, for the setting aside of the sequestration order granted on 27 May 2016. An answering affidavit was filed in that matter. Respondents failed to file replying papers or further prosecute that application.
4. (.....)
5. On 15 November 2016, a first meeting of creditors was called by the Master of the High Court (“the Master”)

where a number of creditors (including Cash Crusaders) successfully proved claims against Mr Mulaudzi’s estate. The proven

creditors voted for the appointment of two trustees, and the Master appointed a third trustee, exercising his statutory powers to do so. On 20 February 2017, the Master issued the final certificate of appointment for the Trustees.

6. On 2 February 2017, the Respondents launched an application for an order “[t]hat the order and judgment of the above honourable court [the final order of sequestration] is rescinded and/or set aside” or in the alternative that “Applicants be declared rehabilitated insolvents” (“the Rescission b Application”). The Rescission Application was nothing other than an ill-founded attempt by the Respondents to prevent the Trustees and the Master from discharging their statutory duties, investigating the financial affairs of the Respondents, and recovering such assets as may be discovered in the course of such investigation. There was no basis in law for the relief sought by the Respondents in the Rescission Application especially in circumstances where his various applications for leave to appeal the final sequestration orders, have all been dismissed with costs. The Rescission Application was opposed, and answering affidavits filed. No replying papers were delivered, and the Respondents took no further steps to enrol the Rescission Application for hearing.
7. On 3 March 2017, the Respondents launched an application for an order to set aside the appointment of the Trustees and to also set aside the first meeting of creditors of 15 November 2016 and the decisions taken thereat (“the Review

Application”). The Review Application is a further desperate attempt by the Respondents to prevent the Trustees from discharging

their statutory duties and investigating the financial affairs of the Respondents, and recovering such assets as may be discovered in the course of such investigation. The Review Application was opposed by the Master of the High Court and the Trustees.

8.

9. On 18 April 2017, and under this case number 21848/17, Respondents obtained an order on an ex parte basis

interdicting the Master and the trustees from proceeding with the second meeting of creditors or any other meetings or processes (i) “pending the outcome of the Section 381 enquiry into trustees fitness to hold office” (details of the purported Section 381 enquiry are given below); (ii) “pending the outcome of the review application in case number 15616/2017” (referred to in paragraph 7 above); and (iii) “pending the outcome of the application for expungement of claims lodged with the Master” which so-called expungement application is referred to in paragraph 8 above. The Respondents sought and obtained this order without:

9.1. Effecting any service of the founding papers on the Respondents against whom the order was granted. Respondents had purported to set the same matter down for hearing on an earlier date, i.e. 4 April 2017; had served the notice of motion without any founding affidavit on the attorneys representing one of the creditors in Respondents’ insolvent estate;

9.2. Respondents were advised on no less than three occasions that they needed to serve the founding papers on the Respondents before moving the Court for any relief.

9.3. The first respondent then surreptitiously and without making any attempt to serve the founding papers on the trustees in any manner obtained the court order....

10.the trustees enrolled the matter in terms of rule 6(12)(c), seeking the reconsideration and discharge of the order granted on 18 April 2017. The Application in terms of rule 6(12)(c) was opposed by the respondents. On 5 May 2017, the court acting in terms of rule 6(12)(c) discharged the order of 18 April 2017”).

ISSUES

FOR DETERMINATION ON APPEAL

[15] This appeal is about the following:

- (i) whether the court a quo, erred in granting an order interdicting a second meeting of creditors or any meeting of creditors following upon the first meeting at the instance of the insolvent and not the creditors, and
- (ii) whether the respondents have satisfied the requirements for the grant of an interim interdict against the trustees.
- (iii) whether the court may order the Master to investigate the insolvent’s complaints in terms of section 381 of the Companies Act 61 of 1973 and whether such section is applicable to trustees;

(iv) whether the effect of the interim interdict granted in favour of the respondents has caused severe prejudice to the creditors of the insolvent estate, exacerbated by the plethora of litigation brought by the respondents.

APPLICABLE LEGAL PRESCRIPTS AND ANALYSIS

- [16] Although the respondents had much to say in their founding papers about their complaints and about the appellants not being fit and proper persons to be appointed as trustees, the notice of motion initiating the launch of the urgent application before Mothle J 'CZ5' annexed to the appellants answering affidavit, does not pray for setting aside of the appointments and removal of the trustees. The subsequent order 'CZ2' granted by him on 18 April 2017 also does not deal with such.
- [17] It is my view, that the complaints against the trustees only had relevance in as far as it had to be determined whether they had established grounds to justify the grant of an interim order, interdicting the second meeting of creditors, pending the finalization of the s381 enquiry and the review application under case number: 15616/2017. Having regard to the purpose of the reconsideration application it was erroneous for Maumela J to have stated in the opening paragraphs of his judgement that besides prayers for the setting aside of a creditors meeting, the court also had to determine the issue around the irregular appointment of the trustees and their removal as appears in orders 2 and 3 granted on 11 May 2018.
- [18] It is trite that after a final sequestration order is granted all assets (movable and immovable) of the insolvent fall into the insolvent estate. The insolvent estate vests first with the Master until a trustee/s is appointed. The purpose of sequestration is to place all the debtors' assets into the hands of the trustee/s appointed by the Master for a fair distribution of the assets / proceeds to the general body of creditors in order of preference. A concursus creditorum is therefore established after the final order of sequestration to deal with such process. The final order therefore crystallises the position of the insolvent, *Walker v Syfret* NO [1].

"The sequestration order crystallises the insolvent's position; 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".

In this regard and in summary, the argument for the appellants relied heavily on the principle that the rights of creditors should not be prejudiced by anything done post concursus, since the positions of the respondents are frozen, as at that date and, their rights and obligations are determined on that basis.

- [19] The appellants contend that nothing in section 40 of the Insolvency Act 24 of 1936 provides for the Master to give consideration to the complaints and desires of the insolvent. In terms of section 40(1) of the Insolvency Act the Master must publish and convene a first meeting of creditors in the Government Gazette after the final order of sequestration had been granted. The purposes for the meeting is for proving claims by the creditors and for the election by the creditors of a trustee/s,

[20] The appellants contend that section 40(3)(a) makes it peremptory for the Master to appoint a second meeting of creditors:

“After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and conditions of the estate and giving the trustee directions in connection with the administration of the estate.”

[21] The Master is not precluded from making any additional appointment of a trustee, as occurred in this matter. The duty of a trustee is to administer the insolvent estate on the directions of the creditors and Master. This much was understood by the respondents when they stated in their founding papers that the launch of the application was not intended to interfere or frustrate the process of administering their insolvent estate. In my view, in determining whether the insolvent may interdict a second meeting of creditors, the process unfolding in section 40 should be read with those sections that deal with the insolvent’s participatory role in the administration of the insolvent estate, as defined in sections 64, 65 and 66 of the Act. Section 64(1) obliges the insolvent to attend the first and second meeting of creditors:

“An insolvent shall attend the first and second meeting of creditors of his estate and every adjourned first and second meeting unless he has written permission of the officer who is to preside or who presided at such meeting granted after consultation with the trustee to absent himself. The insolvent shall also attend any subsequent meeting of creditors if required to do so by written notice of the trustee of his estate.” (my emphasis).

Sections 65 and 66 provide for the process of subpoenaing the insolvent or any person to be questioned by the officer presiding or the trustee and what will transpire should they fail to heed the subpoena. These processes are engaged in the interests of the general body of creditors. The respondents contend that they were not notified of the first meeting of creditors. In my view there are insufficient facts for me to establish when the Master convened the first meeting of creditors. In the absence of a report from the Master, I am not in a position to comment on whether or not the Master was obliged to invite the insolvent. What the Act provides is that the Master on receipt of the final order of sequestration shall immediately convene a first meeting of creditors. However, on their own version the respondents had knowledge of the second meeting of creditors and, instead of attending such meeting they launched an application to interdict the said meeting. When the second meeting was convened creditors, trustees and insolvents were by law obliged to attend. The Act makes it peremptory that they, as insolvents attend. They failed to attend and they were not granted permission to absent themselves by the presiding officer.

[22] In *Van Der Merwe and Others v UTI South Africa Proprietary Limited and Others*[2], at paragraph 12, the Court recognised the fundamental principle of insolvency law as follows:

“The fundamental principle of insolvency law is that all creditors are subject to its provisions, save in exceptional cases where statutes specifically provide otherwise. This fundamental principle is given effect to in two ways. Firstly, by the creation of a concursus creditorum in terms

of which the claims and rights of all creditors of an insolvent company are determined as at the date of insolvency, with the result that one creditor is not entitled to improve its position in relation to others after the date of the concursus. Secondly, by ensuring that every asset belonging to the insolvent company is properly realised by its liquidator so that the proceeds can be distributed amongst the company's creditors in the order preference

dictated by insolvency law and determined as at the concursus. So, it is then that section 391 of the old Companies Act obliges a liquidator to recover "all the assets and property" of the insolvent company, "all"

being a word of the widest possible import."

[23] In this instance the trustees were appointed, in the process that unfolded at the first meeting of creditors. It then became their primary responsibility to take charge of all property in the insolvent estate, keep an eye over its assets for the benefit of the general body of creditors under the watchful eye of the Master who retains overall supervisory powers. ;Jansen Van Rensburg NO v Cardio-Fitness Properties (Pty) Ltd[3].

[24] The process envisaged in the second meeting and other subsequent meetings, is to obtain a report from the trustee on its investigation of claims that were proved at the first meeting and a report on the status of administration of the insolvent estate, to receive instructions from the creditors on steps to be taken in the administration of the estate. Section 41 and 42 of the Insolvency Act allows the trustee to convene further meetings by publication in the Gazette or at the instance of the Master or creditor/s for further

directives on the administration of the insolvent estate. No room is created for the insolvent to play any role in this process of electing a trustee to protect his/her interests in the insolvent estate.

[25] In Ex Parte The Master of the High Court South Africa (North Gauteng)[4] the following was stated:

"The South African Insolvency system is creditor-driven. The majority of creditors in number or claims have the right to elect trustees and liquidators and to make decisions in respect of the manner in which assets falling into the estate or constituting property of a corporate body in a winding up should be dealt with. Nonetheless, their choice of a trustee is subject to the Master's approval and the exercise of their functions is subject to the Master's control."

[26] The insolvent is not without recourse to taking up issues of improper conduct of the trustee/s in their administration of the insolvent estate. The insolvent has a right to demand that action be taken against a trustee who fails to administer the insolvent estate in the interest of the creditors and not in the insolvent's interest. A trustee has a duty to account to the creditors, the insolvent and any other interested person on his/her administration of the insolvent estate. For example, they may file objections to a Liquidation and Distribution Account lying for inspection, and the Master is obliged to seek and an explanation from the trustee and to adjudicate over such objections.

- [27] The respondents are entitled to approach the Master or the court as provided for in section 60 of the Insolvency Act^{AME="_ftnref5">}[5], which can be used to seek the removal of a trustee.

It is my view that when the insolvent is engaging in such process, it should not have the effect of stopping the administration of the insolvent estate

otherwise this will gravely prejudice the interests of the creditors. If need be a creditors meeting may be called for by the creditors or convened by the Master to appoint another trustee. In other words, that a concursus creditorum was established by granting a final order of sequestration, in protecting the interest of the general body of creditors the process under section 60 should not halt the administration of the estate.

THE SECTION 381 ENQUIRY

- [28] It is common cause that the respondents sought the institution of a section 381 enquiry and the court a quo ordered the Master to do so. The appellants contend that the respondents failed to put up any facts in the affidavits relied upon which justified the holding of a section 381 enquiry and, for interdicting any of the trustees in continuing with their administration in the insolvent estate.
- [29] Annexed to the respondents' founding affidavit is annexure 'TM4' to annexure 'A', which is a notice dated 7 December 2016, to the respondents to attend an Enquiry convened by the Master in terms of section 152(1) and (2) of the Insolvency Act read with section 381 of the Companies Act 61 of 1973, commencing 6 November 2016. In the founding affidavit at paragraph 9 d, the respondents make no mention of section 152(1) and (2). They only mention that the enquiry was a sec 381 enquiry which was convened as a result of persistence on their part and they await the outcome.
- [30] The appellants aver that the Master held a section 381 enquiry at the Master's Office on 23 and 24 January 2017, where the Master questioned both the first respondent and Mr Sithole about the complaints lodged by the respondents. Mr Sithole filed a confirmatory affidavit. The appellants contend that the Master is under no obligation to disclose what happened thereafter, save to state that the Master appointed Mr Van Zyl the second appellant as an additional trustee.
- [31] It is not clear from the papers what the nature of the enquiries relating to the notice "TM4" calling for the respondents to appear before the Master on 6 November 2016 in respect of section 152 (1) and (2) of the Insolvency read with section 381 of the Companies Act was about. The same applied to meetings of the 23 and 24 January 2017.
- [32] Section 152(1) of the Insolvency Act provides:

"The Master may at any time direct a trustee to deliver to him any book or document relating or any property belonging to the insolvent estate of which he is a trustee."

152(2)

“If at any time after the sequestration of the estate of a debtor and before his Rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers to be desirable to obtain concerning the insolvent, or concerns his estate or the administration of the estate, or concerning any claim or demand made against the estate, he may by notice in writing, delivered to the insolvent or the trustee or such other personto furnish the Master or other officer before whom he is summoned to appear with all information within his knowledge concerning the insolvent or the insolvent's estate or the administration of the estate”

[33] Section 381(1) of the Companies Act 61 of 1973 provide:

“The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully

performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient”

Section 381 (2)

“The Master may at any time require any liquidator to answer any query in relations to the winding - up in which such liquidator is engaged, and may, if he thinks it fit, examine such liquidator or any other person on oath concerning the winding up;”

[34] In Walker v Syfret NO supra the position of the insolvent is crystallised by the final order of sequestration therefore, it is the interest of the general body of creditors which is paramount. The only right that the insolvent may have or exercise is to demand that the Trustees manage the administration of the estate not to serve or safeguard their interests as stated in their founding papers. As stated above, section 60 of the Insolvency Act is applicable.

[35] Therefore, in my view section 381 is not applicable in this instance as this provides only for an investigation of the liquidation of a company. Section 381 does not concern the trustees in the insolvent estate of the respondents who are natural persons. There is scant authority for this view of this view however, it is expressed in Christopher Peter Van Zyl v The Master of the High Court, Western Cape Division and Another.[6] In this matter the Master was enquiring into the conduct of Mr Van Zyl who was a liquidator in Asch Professional Services (Pty) Ltd. The enquiry was extended to 16 estates and the court found among these that two of the estates (“concerned trusteeships of the insolvent estates of natural person and were not susceptible to s381 of the Companies Act”).

[36] Furthermore, it is my view that if there is a pending review application, then still the administration of the insolvent estate cannot wait until the review is finalized, because that would not serve the purpose for which the final order was granted.

HAVE THE RESPONDENTS SATISFIED THE REQUIREMENTS FOR AN INTERIM
INTERDICTORY RELIEF?

[37] The requirements for the grant of an interim interdict are trite:

“(i) *the existence of a prima facie right;*

(ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is finally granted;

(iii) the balance of convenience favours the grant of an interim relief;

(iv) the applicant has no other satisfactory relief.”

[38] It was argued for appellants that the founding affidavit relied upon in the court a quo failed to satisfy the following:

- (i) in order to assess the presence a prima facie right the court a quo had to have regard to the facts alleged by the applicant together with those of the respondent which the applicant could not dispute and having regard to the inherent probabilities, determine whether the applicants were entitled to relief. In *Spur Steak Ranches Ltd v Saddles Steak Ranches*[7] it was stated that where on the probabilities such right existed then a further two stage enquiry needed to be engaged, to determine whether on the version of the respondent, serious doubt existed, having regard to the version of the applicant as to the existence of such right. Where there was serious doubt the applicant could not succeed.

In my view the nature of the process that unfolds after the final order of sequestration does not give an insolvent the right to interdict a second meeting of creditors, which is a process mainly for the benefit of the general body of creditors as already stated.

(ii) it was contended that the founding affidavit contained hearsay evidence. The affidavit should allege essential evidence equivalent

to such evidence which could be led at trial; *Mostert v First Rand Bank Ltd*[8]. Further the deponent failed to state that the allegations of fact were true on the basis of such knowledge and belief *Galp v Tansley NO*[9]. In this regard, the question is what primary facts were present before the court a quo, which justified the need to suspend the holding of a second meeting of creditors in order to launch an investigation against the

trustees. In motion proceedings, the affidavits are pleadings and evidence.

(iii) for the court to have regard to documents annexed to an affidavit the relevance thereof and the identification of the portions to which the court has to consider have to be fully explained, *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA*[10]. A litigant cannot assume that the court will take cognizance of the contents of the documents annexed without pertinently dealing with those parts, which are relevant in the affidavit.

[39] I do not intend to deal with all examples where no case is made out on the papers. It is common cause that the respondents annexed a number of documents to the founding affidavit. Under the heading “Why the Honourable Court Should Find in Our Favour” the respondents state as at paragraph 22 of their founding papers:

“..Sithole of Ngwenduna Trustees and his joint Trustee were illegally, irregularly and fraudulently appointed due to what I term "inside job" at the Master's office. The details relating to this are contained in various correspondences to which I referred above, where the above Honourable court will note how I was misled and lied to. hence the fraudulent appointments. For completeness I attach hereto various correspondence wherein Sithole solicits bribe and extorts payments from me, annexed hereto marked TM7. I also attach for ease of reference the fraudulent claims which were used to support Sithole's and his Co-Trustees appointment annexed hereto Marked TM8”

[40] Nowhere in the affidavit do the respondents explain the circumstances around which the bribe was solicited, and from who and to who's numbers these messages were exchanged, the dates on which these bribes were solicited. In as far as annexures under ‘TM8’ are concerned, there is no explanation why these claims which were presented at a creditors meeting were fraudulent, why these were not presented to the Master by the respondents as a complaint that they were fraudulent or to have same reviewed by the trustee.

In *Foize Africa (Pty)Ltd v Foize Beheer BV and Others*[11] Leach JA stated:

“[30] The court a quo, in purporting to exercise its discretion, stated that it did so in the light of ‘the attendant circumstances’ without in any way identifying what circumstances it took into account. But as the respondents objection was merely raised from the bar without any supporting affidavits, the only relevant circumstance then known appears to have been the existence of the foreign jurisdiction and arbitration clauses as most of the facts and circumstances as outline above which could have been relevant to the exercise of the court’s discretion had not been canvassed in the papers. As already mentioned, a party wishing to raise an arbitration or foreign jurisdiction clause as a reason to stay a court from exercising jurisdiction, should do so by way of a dilatory plea. As in motion proceedings, the affidavits serve as both pleadings and evidence, in a case such as this it would be necessary to place the relevant facts upon which reliance is placed before court by way of affidavit. This the respondents failed to do. By the same token, the appellant was not obliged to deal with a dilatory plea based on clause 10 until it had been properly raise. In light of this the court a quo was left in a position where apart from a few basic facts, it was not in a position to take an informed decision in exercising its discretion.

[31] That being so, this was clearly a matter in which the court a quo ought not to have taken a final decision at that stage on whether a South African court should exercise jurisdiction in respect of appellant’s proposed action. It was a matter which cried out for that issue to stand over for decision by the trial court.”

[41] In my view it does not seem to me that the court before was given sufficient facts for it to consider and to have a proper ventilation of the principles set out above. It was necessary for the trustees to be heard alternatively if the court was satisfied initially that the papers were served on the trustees and they had not opposed the application the court should have determined whether, at law a court could be called upon to interdict a second creditors meeting lawfully constituted in terms of the Insolvency Act. >

[42] Having regard to the consequences following upon the grant of a final sequestration order, the court a quo (the reconsideration application before Maumela J) was given a second opportunity to consider whether it was lawful to interdict a second creditors meeting, at the instance of an insolvent and, whether the court was competent to order that section 381 inquiry be convened.

[43] A reading of the court a quo's judgment paragraphs 14 -18 seems to suggest that the interests of the respondents need to be protected; that the trustees also need to avail themselves of the audi alteram rule and be cleared from allegations of impropriety and that they may only proceed to administer the insolvent estate after they have been cleared. With respect, the reasoning in paragraphs 14-18 is misplaced in that it totally ignored the consequences of the sequestration

order. The sequestration order has not been rescinded, the respondents have not been rehabilitated and, in my view, the respondents as insolvents clearly lacked locus standi to bring an application interdicting the trustees in their administration of the insolvent estate.

[44] Given the view that I take of this matter, the appeal must be upheld.

[45] It is appropriate at this stage to mention that the appeal was confined to the proceedings in the court a quo. Therefore, further submissions dated 2nd June 2022 as described in paragraph 8 above have no relevance in this appeal.

[46] In the result the following order is made:

1. Appeal is upheld.
2. The order of 11 May 2017 is set aside.
3. Costs to be costs in the sequestration.

JUDGE OF THE HIGH COURT

I agree,

MADIBA AJ

ACTING JUDGE OF THE HIGH COURT

I agree and It is so ordered.

NDLOKOVANE AJ

APPEARANCES

FOR THE APPELLANTS

: ADV. A.C. OOSTHUIZEN SC

INSTRUCTED BY

: ASHERSON ATTORNEYS

FOR THE FIRST AND SECOND RESPONDENTS : IN PERSON

HEARD ON

: 09 February 2022

DATE OF JUDGMENT

: 24 June 2022

[1] 1911 AD 141 at 160

[2] 2014 ZAKZDHC 61(17December 2014).

[3] 2014 ZAGPJHC 40(4 March 2014)

[4] 2011 (5)SA311 (GNP) at paragraphs 28 and 29

[5] The Master may remove a trustee from his office on the ground— (a) that he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee or has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney; or (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or (c) that he is mentally or physically incapable of performing satisfactorily his duties as trustee; or (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors has requested him in writing to do so; or

(e) that, in his opinion, the trustee is no longer suitable to be the trustee of the estate concerned.

[5] The Master may remove a trustee from his office on the ground—

- (a) that he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee or has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney; or
 - (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or
 - (c) that he is mentally or physically incapable of performing satisfactorily his duties as trustee; or
 - (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors has requested him in writing to do so; or
 - (e) that, in his opinion, the trustee is no longer suitable to be the trustee of the estate concerned.
- [6] Unreported Case Number 16839/2018 at para 1 (30 April 2020)
- [7] 1996
- (3) SA 706 (c)
- [8] 2018
- (4) SA 443 (SCA)
- [9] 1966
- (4) SA 555 (C)
- [10] 1999
- (2) SA 279 (T)
- [11] 2013
- (3) SA 91 (SCA) at [30] and [31]

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