

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) ~~REVISED.~~

DATE 17/05/06. *Wesley J. Gray*
SIGNATURE

CASE NO: 7026/05

In the matter between:

P G BISON LIMITED

Applicant

and

JOHANNESBURG GLASSWORK (PTY) LTD
(In liquidation)

First Respondent

SCHMIDT, MALCOLM, NO
(In his capacity as the appointed
liquidator of the First Respondent)

Second Respondent

THE MASTER OF THE HIGH COURT
(PRETORIA)

Third Respondent

J U D G M E N T

JAJBHAY, J:

[1] The applicant in its Notice of Motion seeks the following relief against the respondents:

- “1. *The Third Respondent’s dismissal of the Applicant’s proved claim, a copy of which is P4(a), in the Estate of the First Respondent, with Third Respondent’s reference T2565/02, in terms of section 45 of the Insolvency Act, 24 of 1936 (as amended) (“the Insolvency Act”) be hereby reviewed and set aside.*
2. *The Third Respondent’s confirmation of the First and Final Liquidation and Distribution Account in the estate of the First Respondent with Third Respondent’s reference T2565/02, be hereby reviewed and set aside.*
3. *The Liquidation and Distribution account in the estate of the First Respondent with Third Respondent’s reference T2565/02 be hereby reopened in terms of section 111 of the Insolvency Act.*
4. *Costs of suit, only in the event of opposition.”*

[2] For ease of reference I shall refer in this judgment to the second respondent as the liquidator, the third respondent as the Master and the first respondent i.e. Johannesburg Glassworks (Pty) Ltd (in liquidation) as (“*the company*”). The present application is opposed by the company as well as the liquidator. The Master has indicated that he will abide the decision of this Court.

[3] In broad outline, the case made out by the applicant in its founding affidavit may be summarised as follows:

- 3.1 The first and final liquidation and distribution account of the company was confirmed by the Master on 21 October 2004 in terms of section 408 of the Companies Act. The applicant was advised thereof, on 19 January 2005.

3.2 According to the applicant, on 14 February 2002, by arrangement with the applicant, and in terms of a written loan agreement, (Annexure P4(a)), Investec Private Bank loaned to Kenbow (Pty) Ltd ("Kenbow") as borrower the amount of R4 million. This loan to Kenbow was guaranteed by the applicant who signed a suretyship in favour of Investec in respect of the loan.

3.3 Simultaneously with the above transactions, the company signed:

3.3.1 a suretyship in favour of the applicant together with certain other companies, in terms of its resolution "*for all amounts which are now and which will from time to time be and become owing by Kenbow (Pty) Limited from whatsoever causes arising without restriction*";

3.3.2 a cession and pledge of claims in favour of the applicant and the companies mentioned in Schedule A in terms of the resolution of the companies' directors.

3.4 At the time of the signing of the loan, suretyship and cession Kenbow and the company had severe cash flow and financial problems resulting in their auditors issuing mandatory letters in terms of section 424 of the Companies Act to the effect that their

continued trading would be reckless and negligent in terms of the aforesaid section.

- 3.5 Kenbow and the company were by their own admission trading in insolvent circumstances at the time.
- 3.6 The applicant alleged that an amount of R4 million was paid by Investec to Kenbow in terms of the loan agreement.
- 3.7 An amount of R1 086 000,00 was paid by Investec directly to the applicant in respect of the trading account between the applicant and Kenbow which amount was then owing to the applicant by Kenbow and only the balance of R2 929 140,00 was paid to Kenbow. In these circumstances, the applicant referred itself as a creditor of Kenbow, which shared a similar fate as the company, and was also liquidated in June 2002, approximately four months later.
- 3.8 In terms of a letter communicated by the applicant, on 30 January 2002, the above was a pre-condition of the loan, to Kenbow.
- 3.9 The applicant's response to these allegations made by the respondents constitutes a bare denial.

3.10 The company was wound-up by special resolution that was passed on 5 June 2002.

3.11 The liquidator's report in terms of section 402 of the Companies Act indicates that the company was hopelessly insolvent at the time of its winding-up.

3.12 In these circumstances, the liquidator contended that the suretyship which underlies the cession and the cession itself, constituted a disposition; and the company received no value for the suretyship and the cession.

[4] The liquidator rejected the applicant's claim under the following circumstances:

4.1 As early as 25 January 2003, the liquidator advised the applicant that its claims against the company were defective and constituted voidable dispositions or preferences.

4.2 The liquidator's report and notice of the second general meeting of creditors held on 13 May 2003, received by the applicant stated in response to the applicant's claim in an amount of R3 991 000,00:

"It would appear that the basis of such claim (together with any supporting security) constitutes a voidable disposition and should the creditor submit its claim same will be challenged accordingly."

4.3 The applicant contended that it attended the second meeting and proved two claims at such meeting. However, for the purposes of the present application the applicant only relies on the first claim i.e. P4 (a). It is common cause that only the first claim, being claim number 23 was "*proved*". This appears from the minutes of the proceedings held before the presiding officer.

4.4 The claim (P4 (a)) was expunged and this decision is now the subject-matter of the review.

[5] In this claim, the applicant relies on:

5.1 the suretyship executed by the company in its favour on 12 February 2002;

5.2 a general covering cession of debtors of the company.

[6] The liquidator disputed the applicant's claim in its section 402 report contending that it was a voidable disposition (section 26 of the Insolvency Act).

[7] Before considering the merits of this application it is necessary to dispose of a procedural matter raised on behalf of the company and the liquidator. The point taken is that the application for the review of the Master's decision expunging the applicant's claim in terms of section 45 of the Insolvency Act is out of time. It was contended that a period of more than fifteen months (4/12/2003 - 18/3/2005) have elapsed between the applicant being notified by the Master in a letter stamped 04/12/2003 of the expungement of its claim in terms of section 45(3) of the Insolvency Act. In all that time, the applicant took no steps to judicially review the Master's decision. It was accordingly contended that the applicant has thus delayed unreasonably in coming to court on review and on that ground alone the applicant should be non-suited. The applicant contended that the Master did not notify the applicant of this fact. It did not receive the communication referred to by the respondents.

[8] According to the evidence before me, the applicant was represented by Attorneys Routledge-Modise. In terms of the several letters communicated between the applicant's attorneys and the liquidator on the one hand and the Master on the other, it appears as if the applicant's attorneys did not receive notification of the Master's decision set out in a letter dated 4/12/2003. This was communicated to the Master on 23 February 2004. From the various correspondences, it appears that during November or December 2003, a letter was forwarded from the Master to the applicant. The applicant's postal address was utilised. It was contended on behalf of the respondents that this letter was forwarded by registered mail. The stamp on the document relied

upon by the respondents that this letter was sent by registered mail is not clear. I am not satisfied that this letter was in fact forwarded by registered mail to the applicant's attorneys.

[9] In terms of a letter dated 8 October 2003, the applicant's attorneys set out the following:

"On 13 March 2003 and at the Johannesburg Magistrate's Court, representations were made to the Presiding Officer in terms whereof the claim of our client was proven. After addressing a letter to the liquidator, Mr M. Schmidt of Resolution Trust Company (Pty) Limited, a telefax was forwarded to our offices annexing a copy of a registered letter which had apparently been posted to our client on 8 September 2003, in terms of which our client was advised that the claim had been disputed in terms of Regulation 18 of the Winding-up and Judicial Management of Companies, as read with Section 45(3) of the Insolvency Act, No. 24 of 1936, as amended and Section 339 of the Companies Act, No. 61 of 1973, as amended."

It is clear from this letter, that as early as 8 October 2003, the applicant received the relevant notification.

[10] Then, on 1 December 2003, the applicant addressed a further submission to the Master in support of its claim. By its own admission, the applicant's attorney was on 30 September 2003 in possession of the liquidator's letters of 8 September 2003 accompanying the application to expunge. To my mind, it is clear from these letters, that the applicant's allegation that it was not aware of the application to expunge are demonstrably unfounded. It is clear that at the very latest, on 23 February 2004, the applicant's attorney had knowledge of the expungement of its claim. However it took no steps to institute review proceedings. The applicant's

attorneys commenced its action in response to a letter from the liquidator dated 19 January 2005, which letter was forwarded as a courtesy that the Master had confirmed the first and final liquidation and distribution account.

[11] The letter communicated by the applicant's attorneys on 5 April 2004, some six weeks after the applicant had been informed by the liquidator's attorney that the applicant's claim had been expunged is further proof of the applicant's approach in dealing with this matter. Here, there is no reason to assume that the information from the liquidator's attorney that the applicant's claim had been expunged was in fact incorrect. Although the Master did not respond to this letter, it is clear from the contents of the letter written by the applicant's attorneys that the understanding that the applicant's claim had been expunged was prevalent. The applicant's attorneys set out that:

"Given this, it seems to us with great respect that the joint liquidator's approach to you for relief is entirely misconceived. It is only the court which is vested with the competence to impeach the suretyship upon which our client's claim is based. Until that occurs, we would with great diffidence submit that the matter must be approach on the basis that the suretyship stands quite unimpeached and that any claim derived therefrom cannot, as a matter of law, be expunged pursuant to the joint liquidator's objection."

On this basis alone, the applicant ought to have approached this Court to review the Master's decision.

[12] In my view, on this ground alone, read with the provisions of section 7(1) (a) and (b) of the Promotion of Administrative Justice Act No. 3 of 2002 the application should be dismissed. The applicant has failed to establish any

basis for the unnecessary protraction in the institution of the review proceedings. As a result of this protraction, the other creditors have suffered undue prejudice.

[13] However, if I am incorrect in my determination of the point *in limine*, I believe that the applicant should not succeed on the merits either. I now deal with the merits of the application. The first and final liquidation and distribution account of the company was confirmed by the Master on 21 October 2004 in terms of section 408 of the Companies Act. The applicant was advised thereof on 19 January 2005. The account having been confirmed by the Master is final and cannot be reopened, save where the court authorises the reopening. *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (AD) at 627. Henochserg *On the Companies Act: Meskin* (Volume 1, p 865) sets out the statement of law regarding what is required in an application for the reopening of an account to succeed. An applicant must “*show something more than ignorance and prejudice: he must show that his failure to object has been induced by Justus error or by fraud*”. Kuper J in *S A Clay Industries Ltd v Katzenellenbogen NO 1957 (1) SA (W)* at 224; *Wispeco (Pty) Ltd v Herrigel NO 1983 (2) SA 20 (C)* at 25-27.

[14] In addition to the aforesaid, the applicant must also show that:

“There is merit in the reopening of the account. A court will not reopen an account if it cannot be shown that the applicant has some prospect of success of having the account varied or corrected. No purpose would obviously be served in merely reopening the account if it is likely to remain in the same form as originally drawn. The applicant must

establish at least prima facie that the account is incorrect and would have to be amended."

See *Wispeco* above at page 28.

[15] The applicant contended that the Master acted *ultra vires* his powers by disallowing the applicant's claim for suspecting it to constitute "... a disposition as defined by sections 26 to 31 of the Insolvency Act". The applicant contended that only a court may set aside dispositions in terms of sections 26, 29, 30 and 31 of the Insolvency Act, and until a properly proved claim, which is not under any other attack but that it may be a voidable disposition, has been set aside by a court of competent jurisdiction, the claim remains, for all intents and purposes, in terms of the insolvency law, a valid and enforceable claim. In pursuance of this contention, the applicant relies on the matter of *Netherlands Bank of SA v Stern, NO, and Another* 1955 (1) SA 667 (W) at page 674B-E where Williamson J set out the following:

"It may very well be that the pledge of the bills in question as security for the 1,505 pounds and 6s. 9d. debt to the Bank was a voidable preference which could be set aside. But in the case of a trustee or liquidator any such transaction between an insolvent or bankrupt company and a creditor stands until proper proceedings are taken to set it aside. The trustee or liquidator must accept the legal position as he finds it and give effect to it unless he succeeds, by proceedings brought in the proper way, in setting it aside. The 'proper way' seems to be by way of action duly instituted; see Clark v Paterson's Trustee, 1913 TPD 489 at p492, Mars on Insolvency, 3rd edition page 195. A fortiori a creditor in the position of the second respondent must accept the legal position as he finds it until he or the trustee or liquidator succeeds in the proper way in setting the disposition aside."

The above quotation must be considered in its proper context. In considering the above quotation by Williamson J, one must have recourse to section 45(3) of the Insolvency Act. This section provides as follows:

“It 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 75.”

[16] This section enjoins the trustee, if he disputes the claim, to report to the Master his reasons for doing so. It seems to me that if a trustee disputes the claim he must have a reasonable belief based on facts ascertained by him that the insolvent estate is not in fact indebted to the creditor concerned. A Master is entitled to expunge a proved claim. Thereafter, where a person is 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, this aggrieved person may bring the decision ruling order or taxation under review by the court and to that end may apply to the court by motion, after notice to the Master or the presiding officer, as the case may be and to any person whose interests are affected, (section 151 of the Insolvency Act). See *Caldeira v The Master and Another* 1996 (1) SA 868 (NPD) at 874F-I; *Talacchi and Another v The Master and Others* 1997 (1) SA (TPD) 702.

[17] In the present matter, it is clear from the letters communicated as well as the meetings that were held between the applicant and the liquidator, that the liquidator reported the dispute in writing to the Master. Thereafter, the applicant made several representations to the Master with regard to the liquidator's dispute of the applicant's claim. The Master thereafter formed his view and "*reduced and disallowed the claim*" in other words he expunged the claim. In doing so, the Master was carrying out his administrative duty. See *Caldeira v The Master and Another* above at 868.

[18] It is important to note that the Master did not purport to invalidate or set aside the suretyship and cession (the disposition). The Master merely expunged the proved claim as he was obliged to do. Now, the applicant is at liberty to "*establish its claim at law*" by instituting an action. It is important to note that the Master has not "*impeached*" the suretyship. The Master has expunged (reduced, disallowed the claim) from the list of proved claims. See *Netherlands Bank of S A v Stern NO and Another* above at 673G.

[19] For the above reasons, the Master did not act *ultra vires* his powers by disallowing the applicant's claim. The applicant further contended that "*having regard to the nature and contents of the record of the proceedings, which is constituted of the document and material which served before the Master, at the time he made his decision to disallow the applicant's claim, it is clear that he did not properly apply his mind to the issue before him, in that the contents of the document and the material do not justify his decision*" (paragraph 20 of the applicant's heads of argument). In terms of a report in

terms of section 402 of the Companies Act by the liquidators that was submitted at the second general meeting of creditors held on Tuesday 13 May 2003, the following note was set out:

- “5. *It is pertinent to advise that P G Bison Ltd contend a claim in the amount of R3 991 000,00. It would, however, appear that the basis of such claim (together with any supporting security) constitutes a voidable disposition, and should the creditor submit its claim, same will be challenged accordingly.*”

The applicant stated that it attended the second meeting and proved “two claims” at such meeting. It is now agreed that one claim only i.e. P4 (a) was proved. It is this claim which has been expunged and which is the subject-matter of the review.

[20] In this claim the applicant relies on: The suretyship executed by the company in its favour on 12 February 2002; a general covering cession of debtors of the company. The liquidator disputed the applicant’s claim in its section 402 report contending that it was a voidable disposition (section 26 of the Insolvency Act). It is noteworthy that despite the applicant’s knowledge that the liquidator disputed the claim from the outset; and proclaimed this fact to all the creditors in its report to the second meeting; as well as the liquidator’s persistence in this stance both at meetings between the parties and in the correspondence; and furthermore with knowledge of the application in terms of section 45 of the Insolvency Act, the applicant adopted a supine attitude for almost twelve months until informed of the confirmation of the account. The applicant failed in its founding papers to disclose important

correspondence between the parties. This was drawn to my attention by the liquidator. The applicant was informed in no uncertain terms that:

"It is the suretyship which constitutes the disposition to which I (the Master/Liquidator) was objective and not the alleged 'loans' which applicant contends were made by Kenbow to the company."

Thereafter, at the request of the applicant's attorneys, the liquidator met with Hennie Eloff, one of the liquidators of Kenbow. The underlying intention of this meeting was to convince the applicant of the invalidity of its claim and the reasons therefore. Various other meetings were held between the applicant's attorneys and the liquidator wherein the validity of the claim was discussed. It is clear that the applicant was at all times made aware of the liquidator's reasons for refusing to admit the applicant's claims. Therefore, to my mind, the applicant's statement that it had *"no knowledge as to why applicant's claims were dismissed by third respondent (the Master)"* is simply not true. The correspondence that was exchanged between the parties indicates clearly that the applicant was afforded an opportunity *"to be heard"*.

[21] In his report, the Master sets out the following:

2. *On the 14th December 2003 I expunged the claim of the applicant being claim no. 23 in the amount of R2 991 780,20 in Johannesburg Glassworks (Pty) Ltd. (in Voluntary Liquidation) ('J G').*
3. *I expunged the claim for the following reasons:*
 - 3.1 *It seems that the claim of P G Bison Limited is founded on a deed of suretyship dated 12 February 2002 guaranteeing the obligations of Kenbow (Pty) Limited (now in liquidation) to Investec Bank in respect of monies*

lent and advanced by it to the company and in terms of which P G Bison Limited bound itself as surety and co-principal debtor to Investec for the loan obligations of Kenbow (Pty) Limited.

- 3.2 *There appears to be no pre-existing nexus between J G and the Applicant and therefore it appears that the suretyship could constitute a disposition as defined by Section 26 to Section 31 of the Insolvency Act.*
- 3.3 *The validity of the claim therefore appears to be under suspicion and I therefore expunged the claim. (Vide Marendaz v Smuts 1966 (4) SA 73 TPD at 73D-E.)*

[22] There are several correspondences communicated by the liquidator to the Master as well as the applicant's attorneys which emphasise that the liquidator "*had always been of the opinion that the applicant's alleged claim as well as its security, constituted a disposition as provided for in terms of section 26 to 31 of the Insolvency Act*". In a letter dated 5 November 2003, the liquidator informs the applicant's attorneys that:

"For the past 15 months you have contended otherwise, and repeatedly claimed that such contention was substantiated by counsel's opinion obtained by you. For whatever reasons, and despite numerous requests made by the writer, you refused to make such opinion available.

At the meeting held at your offices on Monday 2003.11.03 a copy of an opinion was given to the writer. It must be stated, with utmost respect, that this opinion is patently defective for the following reasons:

1. *The opinion deals specifically with the relationship and transactions between P G Bison Ltd (PG) and Kenbow (Pty) Ltd (in liquidation) (Kenbow).*
2. *No reference whatsoever is made to Johannesburg Glassworks (Pty) Ltd (in liquidation) (Glassworks).*
3. *The substance of the opinion is based on the trading relationship between PG and Kenbow, and as you are no doubt*

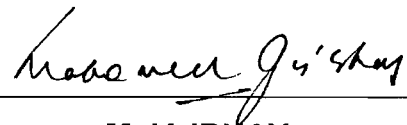
aware, there was neither a trading relationship between PG and Glassworks, nor between Kenbow and Glassworks.

4. *The opinion also deals with the tripartite transaction between PG, Kenbow and Investec Bank Ltd, which transaction in no way whatsoever affected or benefited Glassworks.*

For the reasons stated above the opinion in no way changes the writer's mind and it is still believed that your client's claim constitutes a disposition. At the meeting the writer undertook to consider the opinion and thereafter revert to you. Furthermore, it was promised that once a decision has been made, the writer would make himself available a round table discussion, and same is hereby supposed."

Thereafter, the liquidator is at pains to explain each and every query raised on behalf of the applicant. It cannot be said that the Master's decision was either capricious or arbitrary as contended for by the applicant. Therefore, his decision is not one that should be either reviewed or set aside. In fact, there is in existence a rational connection between the decision arrived at, and the material that was before the liquidator as well as the Master.

[23] In all of the above circumstances, the application is dismissed with costs.



M JAJBHAY

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT Adv L Halgryn

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COUNSEL FOR RESPONDENTS Adv N Kades SC

INSTRUCTED BY Webber Wentzel Bowens Attorneys

DATE OF HEARING 10 May 2006.

DATE OF JUDGMENT 17 May 2006.