

iAfrica Transcriptions (Pty) Ltd/LAD

IN THE SOUTH GAUTENG HIGH COURT JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 21296/11

DATE: 2012/02/09

In the matter between:-

PELLOW N.O. ALLAN DAVID

First Applicant

MOHAMED N.O. MUSTAFA

Second Applicant

**(in their capacities as the former joint
liquidators of MKB Aviation (Pty) Limited)**

PELLOW N.O. ALLAN DAVID

Third Applicant

MAKHESE N.O. EPHRAIM

Fourth Applicant

**(in their capacities as the former joint
liquidators of MKB Cabinetry (Pty) Limited)**

PELLOW N.O. ALLAN DAVID

Fifth Applicant

MASEKO N.O. SMANGELE MARTHA

Sixth Applicant

**(in their capacities as the former joint
liquidators of Centrifugal High Trading 304
(Pty) Limited)**

PELLOW N.O. ALLAN DAVID

Seventh Applicant

MOTALA N.O. ENVER MOHAMED

Eight Applicant

MOLOTO N.O. LEBOANG MICHAEL

Ninth Applicant

MAYO N.O. HENRY

Tenth Applicant

(in their capacities as the former joint liquidators of MKB Property Developments (Pty) Limited)

PELLOW N.O. ALLAN DAVID

Eleventh Applicant

MOTALA N.O. ENVER MOHAMED

Twelfth Applicant

MASUTHA N.O. LUCAS

Thirteenth

Applicant

(in their capacities as the former joint liquidators of MKB Property Holdings (Pty) Limited)

and

**THE MASTER OF THE HIGH COURT
JOHANNESBURG**

First Respondent

MOLYNEUX-KILLIK, JONATHAN MICHAEL

Second Respondent

**MOLYNEUX-KILLIK N.O. JONATHAN
MICHAEL**

Third Respondent

MOLYNEUX-KILLIK N.O. JOHN PETER

Fourth Respondent

MOLYNEUX-KILLIK N.O., SONIA

Fifth Respondent

(the third, fourth and fifth respondents are cited in their capacities as the joint trustees of the Molyneux-Killik Family Trusts)

J U D G M E N T

WILLIS J:

[1] The applicants seek the following relief, viz. an order:

1. Reviewing and setting aside the decision of the first
10 respondent to remove:
 - 1.1 the first and second applicants as joint liquidators of
 MKB Aviation (Pty) Limited (in liquidation);
 - 1.2 the third and fourth applicants as joint liquidators of
 MKB Cabinetry (Pty) Limited (in liquidation);
 - 1.3 the fifth applicant as liquidator of Centrifugal High
 Trading 304 (Pty) Limited (in liquidation);
 - 1.4 the seventh, eighth, ninth and tenth applicants as the
 joint liquidators of MKB Property Developments (Pty)
 Limited (in liquidation);
 - 20 1.5 the eleven, twelve and thirteenth applicants as the
 joint liquidators of MKB Property Holdings (Pty) Limited
 (in liquidation).
2. That:
 - 2.1 the first and second applicants be reinstated as the
 joint liquidators of MKB Aviation (Pty) Limited (in
 liquidation);

- 2.2 the third and fourth applicants be reinstated as the joint liquidators of MKB Cabinetry (Pty) Limited (in liquidation);
- 2.3 the fifth applicant be reinstated as the liquidator of Centrifugal High Trading 304 (Pty) Limited (in liquidation);
- 2.4 the seventh, eighth, ninth and tenth applicants be reinstated as the joint liquidators of MKB Property Development (Pty) Limited (in liquidation);
- 10 2.5 the eleventh, twelfth and thirteenth applicants be reinstated as the joint liquidators of MKB Property Holdings (Pty) Limited (in liquidation).

[2] The applicants also seek a costs order against the respondents. The State Attorney has tendered the costs of the first respondent, including the cost of senior counsel on a party and party basis.

20 [3] The first respondent is the Master of the High Court. The first respondent had an application before him, brought by Mr Molyneux-Killik for the removal of these liquidators. For the sake of convenience, I shall hereinafter refer to Mr Molyneux-Killik as "Mr Killik". The Master granted an order removing the respondents from office as joint liquidators of the MKB Group, and also making an order that "the joint liquidators are hereby removed as the liquidators of AHI".

[4] The sixth, eighth and twelfth applicants do not persist with this

particular application. The attorneys acting for the applicants have withdrawn as the attorneys acting for Mr Motale N.O. It is not quite clear what his status is but I think I may fairly take judicial notice that there had been a lot of publicity relating to Mr Motale in the media, and I think at this stage I may safely make an order that does not have regard to him.

[5] The application was brought relying on the provisions of sections 379(1)(b) and (e) of the Companies Act 61 of 1973. Section
10 379(1)(b) of the Act provides that the Master may remove a liquidator if he fails "to perform satisfactorily any duty imposed upon him by this Act or to comply with the lawful demand of the Master or Commissioner appointed by the Court under this Act". Section 379(1)(e) provides that the Master may remove a person as liquidator if "in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned".

[6] There is, with respect, much smoke and mirrors in this particular application. At the end of the day, there is only one
20 material allegation upon which the Master applied his mind, and upon which he based his decision, and that is that Mr Pellow, the first applicant who is a director of Westrust (Pty) Limited, (which is a wholly owned subsidiary of Investec Bank Limited, the major creditor against all of the companies concerned having been placed in liquidation, namely the MKB Group) be removed as a liquidator of these companies in liquidation.

[7] Mr Killik, the applicant in the matter before the Master, was NOT a creditor of any of the companies in liquidation but had been a director of these companies.

[8] Without something more, this allegation (which is true) that Mr Pellow, is a director of Westrust (Pty) Limited which, in turn, is a wholly owned subsidiary of Investec Bank Limited, the major creditor against all of the companies in the MKB Group having been placed in liquidation is not sufficient to justify the conclusion that a
10 person is not suited to be a liquidator. There has been no allegation of misconduct or failure to satisfactorily perform duties on the part of Mr Pellow or any other liquidator.

[9] I agree with the judgment of Bertelsmann J, in a similar matter, namely *Allandale Planters CC and Another v The Master & Another* TPD (case number 20663-98) where he said:

"I do not believe that the fact that West Trust is Investec's wholly owned subsidiary, is in itself sufficient to conclude that the second
20 respondent is unduly influenced by the major creditor."

He went on to say:

"It must be remembered that the principal creditors always control or at least influence the appointment and conduct of liquidators and trustees in insolvencies, simply because of the fact that they are the principal creditors and are

consequently by law, empowered to exert the most influence upon the course of the liquidation."

[10] My brother Spilg, in a recent as yet unreported judgment (case number 2010/22522), in which Mr Pellow was also an applicant against the Master of the High Court as well, expressed himself in similar terms. This judgment has been reported as *Pellow N.O. & Others v The Master of the High Court & Others* 2012 (2) SA 491
10 GSJ. Broadly, I associate myself with the sentiments expressed by Spilg J in that judgment.

[11] I wish to emphasise that it should be understood, especially by the Master in future cases of this nature, that a liquidator is highly regulated by law, and that the scope for undetected malpractice is limited indeed. The law governs the position regarding secured, preferent and concurrent creditors.

[12] It is important in a liquidation that the actual process of
20 liquidation should be proceeded with expeditiously and competently. This would, no doubt, explain why Investec would wish to secure "their man" in the position. There is nothing wrong in that.

[13] A situation could arise whereby a corrupt liquidator disallows a claim by a creditor in order to give advantage to his client, which is another creditor. But one must remember (and this is the great

advantage of a developed system of law) that the facts would speak for themselves. In other words, where a liquidator disallows a perfectly valid claim in order to give advantage to a friend, a client of his own, *et cetera* that fact would readily become exposed. Of course, there would then be the scope not only for the removal of the liquidator but also for other serious consequences to ensue.

[14] I add this little homily: far too much “smoke and mirrors” is apparent in court applications in our country at the moment. Far too often irresponsible allegations are made when the law, if properly applied, would always protect people against malpractice, especially in a situation such as the present.

[15] I therefore conclude by referring to the well known case of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* 2008 (2) SA 24 (CC), especially at paragraph [110], that the decision of the first respondent was a decision which no reasonable decision maker would reach in the circumstances. The applicants are entitled to the relief that they seek. Save insofar as the notice of motion relates to the sixth, eighth and twelfth applicants, the relief is granted in terms of prayers 1 and 2 of the notice of motion dated 02 June 2011. The first, second, third, fourth and fifth respondents are jointly and severally liable, the one paying the other to be absolved, to pay the applicant's costs in this application, including all costs reserved to date.

[16] Before I adjourn, I record that I think it might avoid problems

of transcription if a draft order to be marked "X" were to be typed up during the lunchtime, reflecting precisely what I have ordered. I shall then, after lunch, at 14:00, simply say an order is made in terms of the draft. But, to summarise, the relief is that I grant is an order in terms of 1 and 2 of the notice of motion, excluding a referral to the sixth, eighth and twelfth applicants. The costs order would be as I set out above. The order relating to costs will refer to senior counsel. The draft marked "X" should reflect that.

10

Applicants' Counsel: *Adv. M. M. Antonie SC*
Applicants' Attorneys: Brooks & Brand Inc.
Respondents' Counsel: *Adv. J. Kaplan* (with him, *Adv. W. Bank*)
Respondents' Attorneys: Hirschowitz Flionis Attorneys

Date of hearing: 9 February 2012

Date of Judgment: 9 February 2012

20