REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42552/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30 April 2014

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In the matter between:

ALAIN RIVALZ CHEVREAU DE MONTLEHU Applicant

and

HENRY MAYO N.O First Respondent
(in his capacity as joint liquidator of Chevreau Construction (Pty) Limited (in liquidation)

SUMAIYA ABDOOL GAFAAR KHAMISSA N.O Second Respondent
(in her capacity as joint liquidator of Chevreau Construction (Pty) Limited (in liquidation)

CHEVREAU CONSTRUCTION (PTY) LIMITED (in liquidation)	Third Respondent
STARSPAN INVESTEMENTS (PTY) LIMITED (in liquidation)	Fourth Respondent
REUBEN MAPHAHA (in his capacity as The Master of the High Court)	Sixth Respondent

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J U D G M E N T

KATHREE-SETILOANE, J:

[1] This matter concerns a review of the Master of the High Court's ("the Master") decision, under s 151 of the Companies Act 61 of 1973 ("the Companies Act"), to admit to proof a claim by the fifth respondent, Starspan Investments (Pty) Ltd ("Starspan") in terms of s 44 of the Insolvency Act, 24 of 1936 ("the Insolvency Act") read with s 339 of the Companies Act, in the insolvent estate of Chevreau Construction in the amount of R1 577 432,70. The Master is cited as the sixth respondent in the application. The applicant, Mr Alain Chevreau De Montlehu, is the sole shareholder, member and director of Chevreau Construction, which was voluntarily wound up on 2 September 2011 by way of a special resolution lodged with the Companies and Intellectual Property Commission on 6 September 2011. The first, second and third respondents are the joint liquidators of Chevreau Construction ("the joint liquidators").

[2] At a special meeting of creditors held on 5 October 2012, the Master admitted to proof two claims lodged by Starspan against the estate of Chevreau Construction in the amount of R1 577 432, 70 and R173 479, 40, respectively. The latter claim is not disputed, and is not a subject of this review. The former claim is, however, disputed on the basis raised in the grounds of review, which are inter alia that: (a) the claim is disputed and is not due by Chevreau Construction; (b) the Master was not placed in possession

of the relevant facts and information relating to the dispute in respect of the claim, and he did not apply his mind to the matters in issue; (c) the Master did not have proper regard to the supporting documents in regard to the claim form; (d) the Master did not scrutinise Starspan's disputed claim or call for any evidence or submissions relating to the dispute prior to or at the special meeting of creditors held on 5 October 2011, and (e) Starspan's claim was lodged late, with reference to section 44 (1) of the Insolvency Act.

[3] The applicant accordingly seeks an order reviewing and setting aside the decision of the Master to admit the claim. He also seeks an order declaring that Starspan's claim in the insolvent estate of Chevreau Construction, in the amount of R1 577 432,77, be expunged from the estate of Chevreau Construction on the basis that it should not have been admitted to proof by the Master. Starspan and the joint liquidators, on behalf of Chevreau Construction, oppose the review application. The Master does not oppose the review application, but he has filed two reports in which he explains his reasons for admitting to proof the claim of Starspan against the insolvent estate of Chevreau Construction.

[4] This application for review is preceded by two related and pending applications, which are connected to it, and give rise to the background of this application. On 29 June 2012, the joint liquidators brought an application under case number 2012/24633, against Zemprop CC ("Zemprop") and Premium Hotel and Property Investments (Pty) Limited ("Premium Hotel"), in terms of which they sought to set aside the transfer of immovable property by Chevreau Construction to Zemprop and Premium Hotel in terms s 341 of the Companies Act ("the application under case number 2012/24633") Zemprop and Premium Hotel raised a number of defences, the most notable being that at the date of the launching of the application, Starspan had not proved any claims in the estate of Chevreau Construction at the second meeting of creditors held on 11 May 2012, and that Starspan's claim of R1 577, 432. 77 was still disputed, both in that application and in the arbitration proceedings which had to recommence. The joint liquidators are represented by Darryl Furman & Associates ("Furman") in the application under case number

2012/24633. Furman also represented Starspan in the arbitration proceedings.

[5] Consequent upon the application under case number 2012/24633, the applicant in the current application together with Zemprop and Premium Hotel launched a counter-application, on 13 August 2012, in which they sought an order staying the winding up of Chevreau Construction in terms of s 354 of the Companies Act ("the counter-application") on primarily the same basis as raised in the application under case number 2012/24633, namely that Starspan had not proved any claims in the estate of Chevreau Construction, and that Starspan's claim for the amount of R1 577 432,70 was disputed in the counter-application and the arbitration proceedings which had to recommence.

[6] The joint liquidators and Chevreau Construction are parties to the application under case number 2012/24633 and the counter-application. The stay of the winding up of Chevreau Construction is sought pending the finalisation of the arbitration proceedings that were launched by Starspan against Chevreau Construction to determine the validity of the claim, which is in issue in the current application. It was specifically as a result of the counter-application that Starspan sought to prove the claim which is in issue in the current application at the special meeting on 5 October 2012.

[7] The applicant, in the current application contends that the special meeting of creditors of Chevreau Construction, on 5 October 2012, was initiated and the disputed claim was submitted in order to defeat the counter-application and "avoid having the disputed claim tested and proven in a fair and impartial manner". The respondents contended in the answering affidavit, in the application under case number 2012/24633, that there were no proven creditors, and that for this reason, the relief sought in the application ought not to be granted. Starspan was, however, advised by its legal representatives that this contention was not dispositive of the relief sought in the application, but that out of caution Starspan should prove its claim against Chevreau

Construction at a special meeting, which Starspan convened for this purpose on 5 October 2012.

Nature of a review under s 151

[8] It is against this background that I proceed to deal with the grounds of review raised by the Applicant. This review is before me pursuant to s151 of the Insolvency Act which provides:

"Subject to the provisions of section fifty seven any person aggrieved by any decision, ruling, order or taxation of the Master by or 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."

[9] The nature of a review as envisaged in s 151 of the Insolvency Act was discussed in *Al-Kharafi & Sons v Pema NNO*[1] where the court observed as follows:

"A court hearing a review application under s 151 sits both as a court of review and a court of appeal to reconsider the ruling or decision of the master. That does not mean that the court may disregard the factual material before the master or the master's reasoning. It is only where the master, in granting his approval, has erred or misdirected himself based on the material placed before him, that the court can, on review and/ or appeal, go further and decide the matter *de novo*. It is by reference to what was placed before the master that the correctness or otherwise of the master's decision is to be judged. If, based on what was before the master, there was no error or misdirection on the master's part, then that is the end of the matter. It is not open to parties to introduce the new material that they seek to place before this court, and argue on the basis of what was not before the master that the master erred or misdirected himself. The approach is to consider the factual material placed before

[1] 2010 (2) SA 360 (W) paras 11.

the master, together with the master's decision and his report, and to consider whether, in the light of that material, the master erred or misdirected himself in any material respect. If any basis for interfering with the master's decision does appear *ex facie* the documents before the master, as read with his decision and rulings, then the reviewing court may reconsider the matter based on the material before it."[2]

[10] Although a court considering a review application under s 151 of the Insolvency Act, against a decision or ruling of the Master, sits both as a court of review and appeal and may determine the matter *de novo*, it may only do so if there is a basis to impeach the Master's decision in relation to whether in light of the factual material placed before the Master, together with his report he erred or misdirected himself in any material respect.

Time limitation for proof of claim

[11] I deal first with the ground of review that it was not competent for the Master to admit Starspan's claim as it was proved outside the time periods stipulated in s 44(1) of the Insolvency Act. The applicant contends, in this regard, that the second meeting of creditors of Chevreau Construction took place on 11 May 2012, almost five months prior to the special general meeting at which the claim was proved. This meeting took place on 5 October 2012, the contention thus advanced is that Starspan did not seek leave from the Master to prove its claim late, as contemplated in the proviso of s 44(1) of the Insolvency Act, and for this reason the admission of the claim by the Master falls to be reviewed and set aside.

[12] Proof of claims against companies in liquidation is regulated by s 44 of the Insolvency Act by virtue of s 339[3] read with 336 of the Companies Act.

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[2] See *Cooper & Others NNO v SA Mutual Life Assur Society* 2001 (1) 967 (SCA) para 11; *Greub v The Master* 1999 (1) SA 746 (C) at 751D-E para 21. 1998 (4) SA 212 (C) para 21 at 219; *Talacchi v The Master* 1997 (1) SA 702 (T) at 706I- 707A; *Millman NNO v Pieterse* 1997 (1) SA 784 (C) at 788I-789D

[3] Section 339 of the Companies Act 61 of 1973 provides:
"Law of Insolvency to be applied *mutatis mutandis*
In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatatis mutandis* in respect of any matter not specifically provided for by this Act.".

Section 44(1) which inter alia regulates the period within which a claim must be proved, provides:

"(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 of any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct."

In terms of s 44(1) of the Insolvency Act the proof of claim may be effected at any time before the final distribution of the estate in terms of s 113[4] of the Insolvency Act, but subject to the provisions of s 104[5] of that Act. However, if

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[4] Section 113 of the Insolvency Act provides:
"**Distribution of estate and collection of contributions from creditors**

(1) Immediately after the confirmation of a trustee's account, the trustee shall give notice of the confirmation in the *Gazette* and shall state in that notice according to the circumstances, that a dividend to creditors is in course of payment or that a contribution is in course of collection from the creditors and that every creditor liable to contribute is required to pay to the trustee the amount for which he is so liable.

(2) If any contribution is payable, the trustee shall specify fully in that notice the address at which the payment of the contribution is to be made, and shall deliver or post a copy of the notice to every creditor liable to contribute.

(3) Immediately after the confirmation of a trustee's account the trustee shall in accordance therewith distribute the estate or collect from each creditor liable to contribute the amount for which he is liable."

[5] Section 104 of the Insolvency Act provides:
"**Late proof of claims**

(1) Subject to the provisions of section 95 (2) and section 98A (3), a creditor of an insolvent estate who has not proved a claim against that estate before the date upon which the trustee of that estate submitted to the Master a plan of distribution in that estate, shall not be entitled to share in the distribution of assets brought up for distribution in that plan: Provided that the Master may, at any time before the confirmation of the said plan permit any such creditor who has proved his claim after the said date to share in the distribution of the said assets, if the Master is satisfied that the creditor has a reasonable excuse for the delay in proving his claim.

(2) A creditor of an insolvent estate who proved a claim against that estate after the date upon which the trustee submitted to the Master a plan of distribution in that

the proof of claim is not effected at the first or second meeting of creditors, or at a special meeting of creditors within the period of three months after the conclusion of the second meeting of creditors, it may occur only at such special meeting if the Master or the Court grants leave, and on payment of such amount to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct. This statutory injunction regarding time for proof of claims is incorporated for the specific purpose of ensuring that the administration of the estate is concluded expeditiously.[6]

[13] The late proof of claim, therefore, results in certain qualifications of the creditor's right to participate in a particular distribution by the trustee.[7] This is clear from s 104 of the Insolvency Act, in terms of which a creditor who has not proved a claim against an estate, before the date on which the trustee submits to the Master, a plan of distribution in the estate, is not entitled to share in the distribution of assets brought up for distribution in that plan. The Master may, however, any time before the confirmation of the plan, permit such creditor who has proved his claim after the said date to share in the distribution of the assets, if the master is satisfied that the creditor has a reasonable excuse for his delay in proving his claim[8].

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estate and who was not permitted to share in the distribution of assets under that plan, in terms of subsection (1), shall be entitled to be awarded under any further plan of distribution submitted to the Master after the proof of his claim, the amount which would have been awarded to him under the previous plan of distribution, if he had proved his claim prior to the submission of that plan to the Master: Provided that the Master is satisfied that the creditor had a reasonable excuse for the delay in proving his claim; and provided further that any creditor who was aware that proceedings had been instituted under section *twenty-six*, *twenty-nine*, *thirty* or *thirty-one* and who delayed proving his claim until the court had given judgment in those proceedings, shall not be entitled to share in the distribution of any money or the proceeds of any property recovered as a result of such proceedings.

(3) If any creditor has under subsection (1) of section 32 taken proceedings to recover the value of property or a right under section 25 (4), to set aside any disposition of or dealing with property under section 26, 29, 30 or 31 or for the recovery of damages or a penalty under section 31, no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full."

[6] Meskin, *Insolvency Law*, [Issue 3] para 9.2.
[7] Meskin, *Insolvency Law,* [Issue 3], para 9.2.1.
[8] The provisio to section 104(1) of the Insolvency Act.

[14] The first to fifth respondents submit, however, that the proviso to section 44(1) has no application to the question of fixing the time period within which creditors of a company are to prove their claims, as s 366(2) of the Companies Act applies. They contend that although s 339 read with s 366(1) of the Companies Act makes the provisions of the Insolvency Act applicable to the proof of claims against a company under liquidation, s 366(2) of the Companies Act makes provision for the time period within which creditors of a company are to prove their claims thus excluding the application of the proviso to s 44(1) of the Insolvency Act to a company in liquidation. The respondents finds support for this contention in the unreported judgment in the matter of *Stone & Stewart v Master of the Supreme Court*[9], in which Fleming J asking "[d]oes the Companies Act set an outer-limit for the proof of claims?, answered thus:

"To my mind it does. Whether it does so by exhaustively spelling out a period of time or whether it does so by authorising the master to take steps in this regard, is immaterial. The Companies Act touches upon the topic. It serves as authorisation for the operation of an effective and binding date for the proof of claims. In insolvency there may be one, two, three or four meetings, by various names such as second meeting or special meeting. But whatever meeting is held, the creditor is subject to the three month limit set out in s 44(1). Under the Companies Act there may be a similar number of meetings and I will assume they can have similar names. But the limit for proving claims is different. Section 366 says that the Master "may" lay down a limit. There is no pre-determinable limit as to the proof of claims. But the Companies Act governs the limit. It says that the limit will be as created by the Master and accordingly not a fixed always – effective three month period.

The applicant was accordingly fully entitled to prove his claim at the meeting concerned. He was not subject to the limit at all as things stand. For that reason then he was wrongly debarred from proving his claim. But the remedy was not to take the Master's decision on review nor to ask this court's leave in terms of section 44(1) of the Insolvency Act. His remedy was to get the presiding officer to a correct view of the law.

The application is dismissed." [10]

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[9] Transvaal Provincial Division, case number 8828/87, 15 October 1987,
[10] *Stone & Stewart* at pp 2-3

[15] Section 366 of the Companies Act entitled "Proof of claims" provides:

> "(1) In the winding-up of a company by the court and by a creditor's voluntary winding-up –
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> (a) The claims against the company shall be proved at a meeting of creditors *mutatis mutandis* in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency;
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> (b) ...
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> (c) ...
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> (2) The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved."

I remain un-persuaded by Flemming J's interpretation of s 366(2) of the Companies Act for the following reasons. In terms of s 336(1) of the Companies Act, whether the winding-up is by the Court or is a creditors' voluntary winding-up, proof of creditors' claims must be in accordance *mutatis mutandis* with the relevant provisions of the Insolvency Act, i.e. both procedural and substantive[11]. Section 366(2) provides that the Master, may on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved. On a proper interpretation of s 366(2) a liquidator may apply to the Master to fix a time or times within which creditors are to prove their claims in order to participate in a distribution under a particular account lodged with the Master before such proof. The use of the conjunction "or" between the words "[t]he Master may, on the application of the liquidator fix a time or times within which creditors of the company are to prove their claims" and "otherwise be excluded from the benefits of any distribution under any account lodged with the Master before those debts are proved" calls for the two parts of the section to be read conjunctively. When read as such, it is

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[11] Meskin, *Henochsberg on the Companies Act*, Issue 13, 778, Vol 1; *Swaanswyk Investments (Pty) Ltd v The Master and Another* 1978 (2) SA 267 (C) at 270

clear that the purpose of s 366(2) is not to prevent proof of a claim after the time fixed by the Master, as contemplated in the proviso to s 44(1) of the Insolvency Act, but rather as expressed by Professor Meskin:

"[T]o prevent the holding up of distribution under an account lodged with the Master as a result of proof of claims after such lodgement (e.g. by creditors who elect not to prove until it is established that there is to be a distribution): for such proof would necessitate an amendment of the account. Thus, if the Master fixes a date, claims may be proved before and after such date (subject to compliance with the requirements for late proof); but once an account is lodged with the Master, i.e. after such date, claims proved after such date are excluded from the distribution under such account if they are proved after the account was lodged. The fixing of the date by the Master is only to serve as a warning to creditors who have not proved their claims that if an account is lodged before they prove them, they will be excluded from the distribution under it."[12]

[16] Consistent with this interpretation is the finding in *Trans-Drakensberg Bank Ltd v The Master Pietermaritzburg and Another*[13], where the court held in relation to s 179(2) of the Companies Act, 46 of 1926, which is the counterpart to s 366(2) of the Companies, 61 of 1973, that s 179(2) does not prevent a creditor from proving its claim after the date fixed by the Master nor does it exclude from the benefit of distribution certain debts proved after the date fixed by the Master. Debts proved after the date fixed by the Master can still share in a distribution under an account lodged with the Master after such debts were proved. Significantly, the Court in *Trans-Drakensberg* found that it is not the date fixed by the Master that is of importance as regards sharing in a certain distribution, but rather the date when an account was lodged with the Master.[14]

[17] The Court in *Trans-Drakensberg* went on to hold that the Master has a discretion under s 179(2) of the Companies Act, 46 of 1926, (the counterpart to s 366(2) of the Companies Act, 61 of 1973) to extend formally, and as

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[12] *Henochsberg on the Companies Act,* Issue 20, Volume 1, p787; Meskin, *Insolvency Law,* Issue 8, pp 9-18 and 9-19, para 9.5.
[13] 1966 (1) SA 821 (N) at 824.
[14] *Trans-Drakensberg* at 824 H.

regards claims in general, a date fixed by him under that section, not to prove that claim but for it, though proved late, to share in the distribution.[15] This interpretive approach was endorsed in *Townsend v Barlows Tractor Company (Pty) Ltd and Another*[16] in relation to s 366(2) of the Companies Act, 61 of 1973. These cases make clear that once an account is lodged, claims proved after that date are excluded from the distribution under such account, and that a date fixed for proof of claims in terms of s 366(2) of the Companies Act cannot be extended to enable late claims to be proved.[17]

[18] Thus by virtue of the provision of s 366(2) of Companies Act, which deals with the consequences of late proof of claims in the winding-up of companies, the proviso to s 104(1) of the Insolvency Act which allows the Master in a sequestration to permit a claim proved late to participate in a liquidation and distribution account already lodged (provided the Master is satisfied that the creditor has a reasonable excuse for his delay in proving his claim, and that the plan of distribution has not been confirmed), has no application to the proof of claims in winding-up of companies.[18]

[19] For these reasons I consider the finding of Fleming J in *Stone & Stewart*, that the proviso to s 44(1) of the Insolvency Act has no application to a proof of claim in a winding-up in light of the provisions of s 366(2) of the Companies Act, to be clearly wrong. To arrive at the conclusion that Fleming J did, would require reading the words of the section that precede the conjunction "or" disjunctively from the words of the section that appear after it, and in the process to completely ignore the latter. This is a flawed approach to the interpretation of s 366(2) as it does not give effect to its purpose, which is to prevent the holding up of distribution under an account lodged with the Master, as a result of proof of claim after lodgement of such account by for instance a creditor who elects not to prove his or her claim until it is established that there is to be a distribution.

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[15] *Trans-Drakensberg* at 824 B-D.
[16] 1995 (1) SA 159 (W) at 164-165 ((unaffected by the reversal of this case on appeal: *Barlow Tractor Co v Townsend 1996 (2) SA 869 (AD)* at 879-880.
[17] 1996 (2) 869 AD at 165 G-H.
[18] 1996 (2) 869 AD at 165 C-H

[20] Similarly, I see no merit in the first to fifth respondents contention that to interpret s 366(2) of the Companies Act in the manner contended for by the Applicant and endorsed by the Court, would result in an inconsistency because if both the proviso to s 44(1) of the Insolvency Act, and s 366(2) of the Companies Act apply to proof of claims in a winding-up, then proof of claims in a winding-up would be subject to two time limitations, first under the proviso to s 44(1) of the Insolvency Act, and second under s 366(2) of the Companies Act. I disagree completely. As demonstrated, the two sections are functionally different, and have different objectives. Section 366(2) of the Companies Act is a special provision intended to enable participation in a distribution under a particular account. It is has no application to the late proof of claims in general, which is governed by the proviso to s 44(1) of the Insolvency Act[19] by virtue of the operation of s 366(1)(a) of the Companies Act."[20] Simply put, its objective is to nullify an attempt by a creditor to delay proving his or her claim until a lodged account shows that a distribution is to occur[21]. The proviso to s 44(1) of the Insolvency Act, on the other hand, is to prevent proof of a claim after the expiration of a period of three months as from the conclusion of the second meeting of creditors, except with leave of the Court or the Master. The overall purpose of the proviso to s 44(1) of the Insolvency Act is to ensure that the administration of the estate is concluded expeditiously.

[21] Section 366(2) of the Companies Act only applies, where on application of the liquidator the Master fixes a time within which creditors of a company are to prove their claims in order to participate in the distribution under an account already lodged with the Master before the debts are proved. Clearly, the category of creditors envisaged in this section, are those who

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[19] Section 42(1) of the Insolvency Act also applies by late proof of claims. It provides:

"**42 Special Meeting of creditors**

(1) After the second meeting of creditors the trustee shall convene by notice in the *Gazette* a special meeting of creditors for the proof of claims against the estate in question whenever he is thereto required by an interested person who at the same time tenders to the trustee payment of all expenses to be incurred in connection with such meeting."

[20] Meskin, *Insolvency Law*, Issue 8, p 9-19, footnote 2, where Meskin also expresses doubt that Fleming J's holding in Stone & Stewart is correct.

[21] Meskin, *Insolvency Law*, Issue 8, para 9.5, p 1-19.

have not already proved their claim before the liquidation and distribution account has been lodged. Importantly, in this regard, once the Master fixes a date on application of the liquidator, under s 366(2) of the Companies Act, a notice of the date is published in the Government Gazette and a circular is addressed by the liquidator to all creditors who have not yet proved their claims.[22] As indicated, the fixing of a date by the Master on application of the liquidator serves as a warning to creditors who have not proved their claims, that if an account is lodged before they have proved such claims, they will be excluded from the benefit of any distribution under that account. It is intended to cause them to prove their claims by the date fixed by the Master should they wish to benefit from the distribution of the account lodged before their debts are proved, and prevent them from holding up distribution under an account lodged with the Master.

[22] Accordingly, I am of the view that the proviso to s 44(1) of the Insolvency Act, and not s 366(2) of the Companies Act, applies to the late proof of claims in a winding-up of a company. Thus, in so far as Starspan sought to prove its claim at a special general meeting, which was held almost five months after the conclusion of the second meeting of creditors, which took place on 11 May 2012, it was required under the proviso to s 44(1) of the Insolvency Act to seek leave of the Court or the Master to prove its claim , and pay such sum of money as directed by the Court or Master to cover the costs occasioned by the late proof of the claim.

[23] It is common cause that Starspan did not seek the leave of the Court or the Master to prove its claim at the special general meeting which was held almost five months after the conclusion of the second meeting of creditors. The applicant contends that Starspan's claim was time-barred and ought not to have been admitted by the Master, and that for this reason alone the decision of the Master to admit the claim falls to be set aside on review. The respondents argue that the failure of Starspan to seek leave of the Master to prove its claim, at the special general meeting which was held on 5 October

[22] 1966 (1) SA 821 (N) at 825 D-G.

2012, does not vitiate the Master's decision to admit the claim, as it can be implied from his conduct that Starspan had his leave to prove its claim late. They accordingly urge the court not to adopt a formalistic approach to the failure of the Master to grant leave to Starspan to prove its claim almost five months after the conclusion of the second meeting of creditors. I do not agree with the respondent's contention, since to imply that the Master granted leave to Starspan to prove its claim outside the time specified in the proviso to s 44(1) of the Insolvency Act, would treat with derision the peremptory nature of the statutory injunction, characterised by the use of the word "shall"[23], in the proviso to s 44(1) of the Insolvency Act regarding late proof of claims, the general purpose being to achieve the expeditious administration of the estate.

[24] More significantly, the Master in his report to the Court does not say that it can be implied from his conduct that by admitting the claim he granted leave to Starspan to prove its claim outside the time specified in the proviso to s 44(1) of the Act for proof of claims. Instead, he expressly states:

"My consent as a Presiding Officer is not required for either the lodging or proving of a claim more than three months after the expiration of the second meeting of creditors, such as it relates to a company in liquidation. Regard had been had to the unreported judgement of the Transvaal Provincial Division decision, on 15 September 1987, in the matter of *Stone and Stewart v Master* of the Supreme Court, which held that the proviso to Section 44(1) of the Act has no application in the winding-up of a company in liquidation."

[25] In light of the Master's express disavowal that his consent was required for the proof of a claim more than three months after the second meeting of creditors, it can hardly be implied that Starspan had the Master's leave to prove its claim at a special general meeting that was held almost five months after the conclusion of the second meeting of the creditors, and in direct contravention of the strictures in the proviso to s 44(1) of the Insolvency Act. The Master erred in admitting a proof of claim that was time-barred by reason of the failure of Starspan to have sought leave from either himself or the

[23] *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A).

Court. The correct thing to have done, in the circumstances, was to grant Starspan leave before admitting its claim to proof. This was not done, and as such Starspan's claim did not accord with the statutory requirement in the proviso to s 44(1) of the Insolvency Act, that leave must be sought from the Master or the Court where it is lodged three months after the conclusion of the second meeting of creditors.

[26] Section 44(1) is a peremptory requirement that demands exact compliance before the Master admits a claim to proof three months after the conclusion of the second meeting of creditors. It cannot, in my view, be said that in spite of the Master's non-compliance with the statutory requirement in the proviso to s 44(1) of the Insolvency Act, the object of the provision, which is to ensure the expeditious administration of the insolvent estate, has been achieved.[24] In the circumstances, I find the Master's decision to admit the claim falls to be set aside side. My finding under this ground of review is dispositive of the issues in this application. I, accordingly, consider it unnecessary to make a finding on the other grounds of review raised by the Applicant.

[27] In the result, I make the following order:

(i) The decision of the sixth respondent made at a special general meeting of the creditors of the fourth respondent held on 5 October 2012, in which he admitted a claim lodged by the fifth respondent in the insolvent estate of the fourth respondent in the amount of R1, 577, 432.70 is set aside.

(ii) The fifth respondent's claim in the insolvent estate of the fourth respondent in the amount of R1, 577, 434. 70 is expunged from the fourth respondent's estate on the basis that it should not have been admitted by the sixth respondent.

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[24] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

(iii) The first, second, third and fifth respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

F KATHREE-SETILOANE
JUDGE OF HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Hearing:	03 March 2014
Date of Judgment:	30 April 2014