IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***3rd February 2017*** Signature: _____

CASE NO: 2016/23003

In the matter between:

PAPADOGIANIS: GEORGE	Applicant
and	
THE MASTER OF THE HIGH COURT, JOHANNESBURG	First Respondent
VAN DER HEEVER N O: THEODORE WILHELM	Second Respondent
MAKGATO N O: OLYMPUS MOHLATLEGO	Third Respondent
PAPADOGIANNIS: GRIGORIA CHAROULA	Fourth Respondent

JUDGMENT

ADAMS AJ:

[1]. This is an application in terms of section 151 of the Insolvency Act number: 24 of 1936 *('the Insolvency Act')* for an order:-

1. Setting aside the decision made by the first respondent on the 16th July 2015, at the conclusion of a meeting of creditors in the insolvent estate of the applicant, admitting the claim for R1,672,000.00 submitted by the fourth respondent;

2. Setting aside the decision of the first respondent made on the 6th June 2016, admitting the correction / reduction of the aforesaid claim submitted by the fourth respondent to an amount of R1,204,650.04; and

3. Recusing the first respondent as the commissioner for the purpose of taking evidence or holding any enquiry under the Insolvency Act in the insolvent estate of the applicant, and that a member of the Johannesburg Bar be appointed as the commissioner for the purpose of taking or holding any enquiry under the Insolvency Act in the insolvent estate of the applicant.

[2]. The first respondent is the Master of the High Court, Johannesburg, and the second and third respondents are the joint trustees of the insolvent estate of the applicant. The second and third respondents took no part in the proceedings before this court, and no relief is sought against them.

[3]. The applicant and the fourth respondents are married. On the 4th of August 2014 the fourth respondent caused a divorce summons to be issued against the applicant and the divorce proceedings are at present pending. On the 21st of April 2015 the applicant was finally sequestrated and his insolvent estate was placed in the hands of the first respondent.

[4]. The challenge by the applicant against the decisions of the first respondent is advanced on the following grounds:

(a) The fourth respondent does not have a claim against the insolvent estate of the applicant, and the said claim is a *'vexatious attempt to enforce a bogus claim'*, which ought to have been instituted in another forum.

(b) During the first and second creditors' meeting the applicant was not permitted to question the validity of the fourth respondent's claim, and the first respondent approved the claim of the fourth respondent without *'substantive proof'*.

(c) On the 9th of December 2015 the applicant had raised in writing an objection to the fourth respondent's claim in terms of section 111, read with section 112 of the Insolvency Act. The objection was communicated to the first respondent, who was also requested to expunge the claim, alternatively, to convene a further creditors' meeting in order to question the fourth respondent under oath.

(d) The first respondent had allowed the fourth respondent to prove her *'corrected claim'* without any substantive proof and without presenting all the relevant facts to the first respondent.

(e) The second and third respondents have failed to comprehensively inspect the claim of the fourth respondent.

(f) The second and third respondents are biased in favour of the fourth respondent, which bias is demonstrated, according to the applicant, by the fact that they initially opposed his application for a rescission of the order sequestrating him.

[5]. The application for the recusal of the first respondent is premised on the allegation that he is biased and has demonstrated, mainly by the fact that he initially opposed the applicant's application for a rescission of the sequestration order against his estate, that he would not apply an objective mind to the administration of the estate of the applicant. It was furthermore alleged by the applicant that the first respondent by admitting the claim by the fourth respondent without any *'substantive proof'*, suggests that the first respondent is biased against the applicant in favour of the fourth respondent.

THE BACKGROUND FACTS

[6]. Before dealing with the challenges raised by the applicant to the admission of the fourth respondent's claim (as corrected), it is necessary to set out the historical background to place the disputes in context. This is necessary because the relief claimed by the applicant also includes a prayer to the effect that the first respondent and / or any officer presiding at meetings of the creditors or inquiries be removed from their positions as presiding officers.

[7]. The applicant in his founding affidavit indicates that he has a great deal of distrust in the first respondent. Apparently this mistrust does not extend to or include the roles played by the second and third respondents, in the administration of the insolvent estate. There is no application for their recusal. This distrust has resulted in challenges being raised by the

applicant to the conduct of the first respondent, unsupported by any evidence.

[8]. On the 4th of August 2014 the fourth respondent commenced divorce proceedings against the applicant by the issue and service of a summons out of this court. Those proceedings are presently still pending. On the 11th December 2014 the fourth respondent obtained a Rule 43 interim order for *inter alia* maintenance of R20,000.00 per month per child and R15,000.00 per month maintenance of herself. There are 3 (three) children born of the marriage between the applicant and the fourth respondent, which means that in terms of the order *pendent lite* of the 11th December 2014, the fourth respondent was entitled to maintenance of R75,000.00 per month for herself and the two minor children. This order was rescinded and set aside on the 26th of November 2015, and the obligation on the part of applicant to pay maintenance fell away primarily due to the fact that the primary residence of the minor children were awarded to the applicant as part of the order rescinding the interim order of the 11th December 2014. On the 21st of April 2015, on an *ex parte* application by the applicant, the estate of the applicant was sequestrated and placed in the hands of the first respondent.

[9]. The claim by the fourth respondent against the insolvent estate of the applicant relates to maintenance payable by the applicant in terms of the interim order of the 11th December 2014 up to the 21st April 2015, that being the date of the final sequestration of the estate of the applicant. The portion of the claim submitted on behalf of the fourth respondent which relates to the arear maintenance amounts in total R305,878.91 after the correction / deduction. The balance of the claim, that being R898,771.13, was explained by the fourth respondent to relate to an amount which the applicant withdrew from a bond over her property without her consent.

[10]. The claim relating to the maintenance is objected to by the applicant on the basis that the order of the 11th December 2014 was rescinded, which, according to the applicant, means that no maintenance was payable in terms of that order. I disagree with that submission. In any event, the applicant himself admits that at the time of the sequestration of his estate he owed to the fourth respondent an amount of R201,000.00. So even on the applicant's own version, the fourth respondent at least has a claim against his estate for that amount.

[11]. As regards the claim for R898,771.13, the fourth respondent explained in her affidavits in support of both the original claim and the corrected claim that this is the balance of an amount which the applicant withdrew from a bond over her property. The bank statements of the fourth respondent confirm that this amount is owing to her. Applicant claims that this amount has been paid, but the documentary evidence indicates otherwise.

[12]. In any event, the issue of whether these claims should be entertained, as well as the validity of the claims themselves, were all issues to be objectively investigated by the duly appointed trustees.

[13]. The true nature of the present inquiry is simply this: did the first respondent err in admitting the claim of the fourth respondent without affording the applicant an opportunity to interrogate her as to the validity of the claim? In addition, did the first respondent err in admitting the claim of the fourth respondent in view of the fact that, in the opinion of the applicant, her claim is a vexatious attempt to enforce a bogus claim? It is to these issues that I now turn.

THE LAW AND THE APPLICABLE LEGISLATION

[14]. In *Nel and Another NNO v The Master (Absa Bank Ltd and Others Intervening)*, 2005(1) SA 276 (SCA), the court said:

> *'[22] In terms of s 151 of the Insolvency Act, read together with s 339 of the Companies Act*
>
> > ". . . any person aggrieved by any decision, ruling, order or taxation of the Master. . . may bring it under review by the Court . . .".
>
> *South African Courts have long accepted that the review envisaged by s 151 of the Insolvency Act is the* "third type of review" *identified more than a hundred years ago in Johannesburg Consolidated Investment Co v Johannesburg Town Council, where Parliament confers a statutory power of review upon the Court. In the Johannesburg Consolidated Investment Co case, Innes CJ stated, [1903 TS 111 at 117] with reference to this kind of review, that a Court could -*
>
> > ". . . enter upon and decide the matter de novo. It possesses not only the powers of a Court of review in the legal sense, but it has the functions of a Court of appeal with the additional privileges of being able, after setting aside the decision arrived at . . . , to deal with the matter upon fresh evidence . . . ."
>
> *[23] Thus, when engaged in this third kind of review, the Court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the Court's powers under this kind of review are "unlimited" or "unrestricted", this is not entirely correct. The precise extent of any "statutory review type power" must always*

depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the "ordinary" judicial review of administrative action . . . so that it combines aspects of both review and appeal, but it may also be narrower, "with the court being confined to particular grounds of review or particular remedies".'

[15]. 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 first respondent. That does not mean that I may disregard the factual material before the first respondent or his reasoning. It is only where the first respondent, in granting his approval, has erred or misdirected himself based on the material placed before him, that I can, on review and/or appeal, go further and decide the matter *de novo*. It is by reference to what was placed before the first respondent that the correctness or otherwise of his decision is to be judged. If, based on what was before the first respondent, there was no error or misdirection on his part, then that is the end of the matter. The approach is to consider the factual material placed before the first respondent, together with his decision and his report, and to consider whether, in the light of that material, the first respondent 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 first respondent, as read with his decision and rulings, then this reviewing court may reconsider the matter based on the material before it.

[16]. In *Marendaz v Smuts*, 1966 (4) SA 66 (T) at 72C-E the exercise of a discretion by a presiding officer to interrogate a claimant was described as follows:

'The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided for in sec. 44 (3) of the Act, or as to when he should resort to the calling of evidence as provided for in sec. 44 (7).'

[17]. In *Cachalia v De Klerk NO and Benjamin NO,* 1952 (4) SA 672 (T) at 675E-F the following was stated concerning the functions of the first respondent and / or a presiding officer appointed by him in deciding whether to admit a claim:

*'The admission of a claim by the presiding officer is in a sense only provisional, because under sec. 45 (3) the trustee may dispute the claim notwithstanding its admission by the presiding officer. Furthermore, the presiding officer does not adjudicate upon the claim as if he were a court of Law; he is not required to examine the claim too critically (*Hassim Moti & Co v Insolvent Estate Joosub & Co, *1927 TPD 778 at p 781), or to require more than* prima facie *proof (*Aspeling v Hoffman's Trustee, *1917 TPD 305 at p 307).'*

[18]. It is important to bear in mind the provisional nature of the determination by the first respondent relative to the admission of the fourth respondent's claim. The trustees, being the second and third respondents, were obliged to ascertain whether the estate owed the amount claimed by the fourth respondent and dispute the claim, if necessary. An interrogation may have been of assistance to the trustees to decide on the validity of the claim.

[19]. In my view, there is no evidence to suggest that the first respondent failed to properly fulfil his function.

[20]. The main challenge to the first respondent's decision to admit the claim of the fourth respondent, was that the first respondent accepted, without any supportive evidence, the said claim, which was also not disputed by the second respondent. This submission was made on behalf of the applicant on the following grounds: As regards, the claim relating to the arear maintenance, the objection was to the effect that the initial order in terms of which the applicant was obliged to pay maintenance was rescinded approximately 11 months later. Therefore, so the argument went on behalf of the applicant, no maintenance was payable under that order, which ought to have been regarded by the first respondent as void *ab initio*. I disagree with that submission for the simple reason that there is no logic in that conclusion. Secondly, as regards the claim relating to the amount withdrawn from the fourth respondent's bond account, the applicant makes the rather vague allegation that the fourth respondent *'cannot prove that the applicant withdrew the amount from the bond'.* This is factually incorrect as the fourth respondent confirms in her affidavit under oath that the money was withdrawn by the applicant. In any event, almost in the same breath the applicant claims that he repaid the amount withdrawn, which is denied by the fourth respondent. The point is this that the applicant, on his own version, confirms that the amount was withdrawn from the bond account and that he was liable to repay to the fourth respondent the said sum. Why else would he repay (allegedly) the amount?

[21]. In *Aspeling & another v Hoffman's Trustee,* 1917 TPD 305 at 307 the following was stated:

> *'The wording of the law is that the claim must be* "proved to the satisfaction of the presiding officer, who shall admit or reject the same." *I think that that means that when a debt, for instance, is proved before him, and it appears* ex facie *the documents that the debt is prescribed, he should reject it, because a prescribed debt cannot be proved against an insolvent estate.'*

[22]. The decision in Aspeling was followed in *Ilsley v De Klerk NO & another,* 1934 TPD 55 at 56-57 in which Solomon J stated:

> *'Now it appears to be the law that at the first meeting of creditors the presiding officer must see that* prima facie *proof of the various claims is produced and if that prima facie proof is not produced in respect of a particular claim he must reject it. This principle appears from the cases cited by Mr Heather, namely,* Aspeling and another v Hoffman's Trustee, *1917 TPD 305, and* Peach v Stewart NO and another, *1929 WLD 228. But unless the claim is on the face of it bad – for example, it may* ex facie *be prescribed – the presiding officer, in my opinion, should not reject it without hearing the creditor's evidence under sec. 42 (5). . . .'*

[23]. The presiding officer does not adjudicate upon the claim as a court of law, is not required to examine the claim too critically and only has to be satisfied that the claim is *prima facie* proved. The appropriate stage to determine whether the claim is valid or not is when the trustees examine the claims proved against the estate. The trustees are obliged to examine all books and documents in order to determine whether the estate owes the amount claimed. The trustees can of course ask for a creditor to be interrogated if the claim is questionable. In addition, in terms of s 45(3) of the Act if the trustees dispute the claim, they are obliged to inform the Master in writing and include their reasons for doing so. The Master may only disallow the claim after having afforded the claimant an opportunity to substantiate her claim. It is therefore clear that the determination of whether a creditor's claim is valid and enforceable, more appropriately falls within the powers and functions of the trustees.

[24]. I am not persuaded that the first respondent accepted the fourth respondent's claim without any supportive evidence. In her replying affidavit the fourth respondent states when she applied to the first respondent for a reduction of her claim, the relevant and necessary

supporting documentation was furnished in support of the claim. She also gave a full and detailed explanation and calculation of how the claim amount was arrived at. The aforegoing is confirmed by the applicant himself who attached copies of the affidavit in support of the application to reduce the claim, together with copies of the annexures to the affidavit, to his founding affidavit. There is no evidence, other than the *ipse dixit* of the applicant, to suggest that the first respondent failed properly to examine whether the claim of the fourth respondent is a valid one, nor that the first respondent erred in this regard in finding that the claim had *prima facie* been proved to his satisfaction.

[25]. I turn to consider the prayer that the first respondent be recused. The sum total of the grounds on which this relief is sought is that the first respondent opposed the applicant's application for a rescission of the sequestration order. This, according to the applicant, demonstrates that the first respondent cannot objectively perform his duties under section 65 of the Act. This is a bald statement which is not supported by any of the facts in the matter. There is no evidence to suggest that the first respondent was biased against the applicant.

[26]. I am therefore of the view that the applicant is not entitled to the relief prayed for in his Notice of Motion.

[27]. In the premises, the applicant's application stands to be dismissed.

COSTS

[28]. Mr Vetten, who appeared on behalf of the fourth respondent, argued that, given the entire absence of any merit in the application, as well as the lack

of *bona fides* as evidenced by the applicant's unclean hands, the application should be dismissed with costs to be paid *de bonis propriis* by the applicant's attorneys on the *attorney and client* scale.

[29]. The *mala fides* of the applicant has been aptly demonstrated, so it was submitted on behalf of the fourth respondent, by the fact that the applicant claims that certain sums were paid by him to the fourth respondent. By all accounts, this is factually incorrect. In her answering affidavit the fourth respondent unequivocally states that the applicant's claim that amounts totalling R1,010,000.00 was paid to her is false and should be rejected. She elaborates on this statement and demonstrates that these amounts were in fact paid to a third party pursuant to a sale of business agreement between the applicant and such third party. This, so it is alleged by the fourth respondent, shows and exposes the blatant dishonesty on the part of the applicant. These serious accusations levelled against him are not disputed by the applicant in his replying affidavit. In fact, these issues are not dealt with at all by him, and the inescapable conclusion to be drawn from this is that the applicant was in fact attempting to mislead this court.

[30]. I agree with the submissions by Mr Vetten that the aforegoing warrants a punitive cost order against the applicant. I am however not persuaded that the applicant's attorney should bear the brunt of the applicant's untruthfulness. The attorney acts on instructions and it would be unjust and unfair to lay at his door the indiscretions of his client.

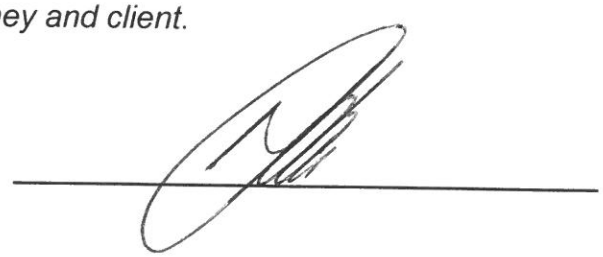
[31]. In the exercise of my discretion, I therefore intend awarding costs in favour of the fourth respondent against the applicant on the scale as between *attorney and client*.

ORDER

In the result, I make the following order:-

1. The application is dismissed.

2. The applicant shall pay the fourth respondent's costs of the application on the scale as between *attorney and client*.



L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	31st January 2017
JUDGMENT DATE:	3rd February 2017
FOR THE APPLICANT:	Adv J C Carstens
INSTRUCTED BY:	G D Ficq Attorneys
FOR THE RESPONDENT:	Adv D Vetten
INSTRUCTED BY:	John Joseph Finlay Cameron Attorney