

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL PROVINCIAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: AR438/2012

In the matter between:

CODIX TRUST

JOHANNES JACOBUS DICKS N.O

LEONE DICKS N.O

vs

STOCKOWNERS CO-OPERATIVE
(in liquidation)

BRIAN KURZ N.O.

ANDRIES GEYSER N.O.

LEBOGANG MORAKE N.O.

RALPH LUCHMAN N.O.

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT

FIFTH RESPONDENT

APPEAL JUDGMENT

MADONDO J

Introduction

[1] This is an appeal against the judgment of Radebe J upholding the Respondents' exception to the Appellants' Particulars of Claim on the ground that they lacked an averment necessary to sustain a cause of action in that the Appellants had not pleaded and proved compliance with the provisions of section 215(1) and (5) of the Co-Operatives Act, 91 of 1981 (the Act), requiring everyone who has a claim against the liquidated co-operative to give notice to the liquidator of the co-operative (in liquidation) of the action or intended action against the co-operative. It was the Appellants' contention that since the relief they seek are declaratory in nature such notice was and is not a requirement.

Parties

[2] First Appellant is a trust duly registered in terms of the Trust Property Control Act, 1988 (the first Plaintiff in the court *a quo*).

[3] Second and Third Appellants are Jacobus Johannes Dicks and Leone Dicks respectively, both trustees of First Appellant, cited herein in such capacities, as “nominee officio”.

[4] First Respondent is Stockowners Co-Operative Limited (in liquidation), a co-operative duly incorporated pursuant to the Co-Operative Act, 1981(the First Defendant in the Court *a quo*). First Respondent was finally liquidated on 30 June 2004 and Second to Fifth Respondents were in terms of section 195(1)(a) of the Act appointed as its joint liquidators.

Factual Background

[5] During the period July 2002 to November 2002 First Respondent was the sole shareholder of a company, Stocklush (Proprietary) Limited, which conducted an abattoir business, under the name “Meadow Meats”, selling livestock of its members on commission. First Respondent supplied Meadow Meats with as much livestock as the latter required at preferential terms and it in fact managed the business affairs of Meadow Meats.

[6] The abattoir business of Meadow Meats was not profitable and it was wholly dependent on the continued support from First Respondent and its members. During October 2002 Meadow Meats was trading at a loss and it became insolvent. First

Respondent similarly experienced severe financial difficulties and also traded in insolvent circumstances. It was then totally dependent on the continued support of its members and loans from the Land and Agricultural Development Bank to fund its trading activities. In order to make it appear as if First Respondent was financially sound, it allegedly overstated the value of Meadow Meats in its financial statement.

[7] Meadow Meats was then offered for sale to First Appellant and as a consequence on or about 19 November 2002 and at Vryheid, First Appellant and First Respondent entered into agreement of sale (annexure "A" to Particulars of Claim) in terms of which First Respondent sold to First Appellant the only two shares in Meadow Meats for the consideration of R2.00 and business and assets for R10 million. Meadow Meats bound itself as surety and co-principal debtor with the First Appellant for the fulfilment of the obligations of First Appellant to First Respondent.

[8] The essential terms of the agreement between the parties were: First Appellant was to pay to First Respondent R10 million by means of 117 monthly payments of R147, 950-00. Secondly, First Respondent would, for a period of ten years, provide Meadow Meats with as much livestock as Meadow Meats required at the reduced prices and, thirdly, First Respondent would allow Meadow Meats a fourteen (14) days interest free credit facility on all livestock purchased up to an amount of R10 million. This was done in order to enable Meadow Meats to generate profits at the rate of R147, 950-00 for a period of 117 months.

[9] First Respondent performed its contractual obligations for a period of 16 months and Meadow Meats generated profits of R2, 367,200-00 during such period. However, in breach of the agreement First Respondent, as from 16 April 2004, failed to perform its contractual obligations, which resulted in Meadow Meats failing to

generate the contemplated profits. As a consequence of the alleged breach by First Respondent, Meadow Meats lost profits for the period of 101 months, totalling R14,942,950-00.

[10] On 14 February 2003 Meadow Meats and Second Appellant, in his personal capacity, signed a suretyship agreement as sureties and co-principal debtors in favour of the Appellants (annexure “B” to Particulars of Claim).

[11] First Respondent was provisionally liquidated on 16 April 2004 and it was finally liquidated on 30 June 2004. Second to Fifth Respondents were appointed as joint liquidators in terms of section 195(1)(a) of the Act. Due notice was published in the Government Gazette no. 26780 and a local newspaper on 17 September 2004 in compliance with section 197 of the Act.

[12] On or about 16 February 2007 Meadow Meats, and the First Appellant entered into a written agreement (annexure “C” to Particulars of Claim) in terms of which Meadow Meats ceded all its rights, title and interest in all claims that it had against First Respondent for damages arising from First Respondent’s breach of its contractual obligations it owed to Meadow Meats.

[13] On 11 April 2007 the Appellants (Plaintiffs in the court *a quo*) instituted an action against the Respondents (Defendants in the court *a quo*) wherein they claimed the following relief:

“ MAIN CLAIM

(a) An order declaring that the agreements, annexures “A” and “B” hereto, are void ab initio.

CUMULATIVE CLAIMS TO MAIN CLAIM ALTERNATIVELY, CLAIMS b and c.

- b. Alternative to a, an order declaring that the Plaintiffs are not obliged to pay in excess of R5,2 million to the defendants pursuant to the agreement, annexure "A" hereto.
- c. Cumulative to b, an order declaring that any amount still owing by the first Plaintiff to the defendants had been, or is, set off by the claim that Stocklush (Pty) Ltd, trading under the name Meadow Meats, had against the defendants and which it ceded to the first Plaintiff.
- d. Costs of suit, including the costs of two counsel.
- e. Further or alternative relief."

[14] On 19 April 2007 the Respondents delivered a Notice to Defend. On 5 June 2007 the Respondents excepted to the Appellants' Particulars of Claim, after having given notice to the Appellants in terms of Rule 23(1) on 14 May 2007, on the grounds that the Appellants had not complied with the provisions of section 215(1) and 215(4) in that they had not given notice to the Second to Fifth Respondents, in writing, of the action or intended action within a period of 120 days after the date of publication of the notice referred to in section 197 of the Act. Nor had the Appellants made an averment in their Particulars of Claim that effect had been given to the provisions of section 215(2) or (3) of the Act. The Respondents contended that absent any such averments the Appellants were precluded from proving a claim against First Respondent in terms of the provisions of section 215(5) of the Act.

[15] The Appellants failed to take any steps to remove the cause of complaint but delivered a notice in terms of Rule 30 instead, averring that the Respondents were not entitled to serve a notice to remove the cause of complaint in terms of Rule 23(1).

[16] The Appellants allege that the agreement “annexure A” to the Particulars of Claim is null and void in that it is in breach of section 38 of the Companies Act No. 61 of 1973 (the Companies Act) which provides that no financial assistance to purchase the shares of a company may be given by the company itself. Secondly, that the real purchase price of the shares was not R2, 00 but R10 million allocated for the fixed assets and loan accounts, and finally, that First Respondent was not the owner of the assets referred to in the agreement, Meadow Meats was the owner thereof. However, for the purposes of this appeal it is not necessary to delve into the merits of the Appellants’ claim.

[17] It is the contention of the Respondents that, as a condition precedent to the institution of the proceedings, the Appellants were obliged to allege and plead compliance with the provisions of section 215 in their Particulars of Claim, and that their failure to do so had the effect of rendering their plea excipiable. In their submission, the Appellants aver that by the reason of the nature of the relief sought in their Particulars of Claim they were not obliged to plead and prove compliance with the provisions of section 215 and its subsections.

[18] It has been submitted on behalf of the Appellants that the failure to give notice required in section 215 does not fetter the Appellants’ right to approach the court and have their matter properly ventilated. Mr Louw for the Appellants has argued that notice in terms of section 215 is required only if the case is suspended in terms of section 190 of the Act.

[19] Mr Rall SC for the Respondents has argued that section 215 is wide enough to encompass liquidated and unliquidated claims, subsection (5) is the catch all. Compliance with the provisions of section 215 is, in all instances, a requirement, and

the failure to plead and prove compliance with the section renders the Particulars of Claim excipiable. However, it is common cause between the parties that this appeal mainly turns on the interpretation of section 215 of the Act.

Issues

[20] The essential issues for determination in the present case are:

(a) Whether on proper construction of the provisions of section 215 of the Act the Appellants were obliged to plead and prove compliance with the provisions of the said section, as a condition precedent to the institution of the proceedings in this case.

(b) Whether the Appellants' failure to give the required notice in terms of section 215(1) and (5) was an essential ingredient of their cause of action and definitive.

[21] Section 215 provides:

“(1) Any person who has a claim against a co-operative being wound up, excluding a claim against a member's fund, shall within 90 days after the date of publication of the notice referred to in section 197 lodge with the liquidator a sworn or solemn statement specifying the amount of the claim and the prescribed particulars relating to the claim together with supporting documents (if any): Provided that if a member for any reason whatsoever does not want to claim against a members' fund to proceed he shall inform the liquidator in writing thereof.

(2) The liquidator may admit or refuse to admit the co-operatives liability for the amount of a claim referred to in subsection (1) or may admit to co-operatives' liability for any portion of such an amount.

(3) Any person aggrieved by a decision taken by a liquidator under subsection (2) in connection with his claim may within 30 days after he was notified of such decision, and the registrar may after consideration of the grounds of the appeal and the liquidators reasons for his decision confirm the decision, or set the decision aside and order the liquidator to admit the claim or to admit it to the extent determined by the registrar.

- (4) (a) any person referred to in subsection (1) who has failed to lodge his claim with the liquidator within the period mentioned in that subsection, may thereafter with the consent of the registrar lodge his claim with the liquidator within a period of 30 days after the termination of the said period.
- (b) The provisions of subsections (2) and (3) shall mutatis mutandis apply in respect of a claim referred to in paragraph (a).
- (5) The provisions of this section shall not prevent a creditor from proving a claim against a co-operative in any court, but no person shall institute an action to prove a claim against a co-operative being wound up or proceed with any such action which has been suspended in terms of section 190 unless he has lodged his claim with the liquidator within the period mentioned in subsection (1) or with the consent of the registrar, within the further period mentioned in subsection (4), or his otherwise given notice to the liquidator in writing of the action or intended action within a period of 120 days after the publication of the notice referred to in section 197.”

Purpose of section 215

[22] Before determining whether or not notice in terms of section 215 (1) of the Act is a requirement in this case, I propose first to determine the purpose of the provisions of the section in question and the nature of the claims to which they apply. The fundamental principle in statutory interpretation is that the purpose of the Legislation must be determined and applied in the light of the spirit, purpose and objects of the Bill or Rights in the Constitution, for the Constitution is *lex fundamentalis* against which all conduct and law must be measured and tested. See *section 2 of the Constitution of the Republic of South Africa, 108 of 1996 (the Constitution)*.

[23] Section 39(2) of the Constitution provides:

“When interpreting any legislation and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.”

[24] In *S v Lawrence*; *S v Negal*; *S v Solberg* 1997(4) SA 1176(CC) at 1198 para 52 Chaskalson P said:

“The purpose of the particular legislative provisions has ordinarily to be established from their context, which will include the language of the statute and its background.”

[25] The intention of the legislation must essentially be gathered from the language used. The ordinary meaning must be attached to the words. The most important rule of interpretation is to give words their ordinary and literal meaning, and meaning must be assigned to every word. See *Union Government* 1917 AD 419; *Volschenk* section 215 46 TPD 486; *Keyter v Minister of Agriculture* 1908 NLR 522; *Association of Amusement and Novelty Machine Operators v Minister of Justice* 1980(2) SA 636(A).

[26] The provisions of section 215 imposing an obligation to give notice of a claim or contemplated claim to the liquidator were, in my view, designed to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, in the interests of the general body of creditors, the nature and validity of the claim contemplated and how to deal with it – whether to dispute or settle or acknowledge it. See also *Randfontein Extension Ltd v South Rand Fontein Mines Ltd and others* 1936 WLD 1 at 3; *Umbongintwini Land and Investment Co (Pty) Ltd (in liquidation) v Barclays National Bank Ltd* 1987(4) SA 894(A) 910

Nature of a claim contemplated in section 215

[27] The provisions of section 215 are, in fact, aimed at providing a simple and quick procedure for the lodging and adjudication of uncontroversial liquidated claims against the co-operative in liquidation. However, Mr Rall for the Respondents has submitted that reference to a claim in section 215(5) includes liquid and illiquid claims. He went on to argue that the word “claim” is not qualified by the word

“unliquidated” and that therefore, ordinarily, this would mean either a liquidated or an unliquidated claim.

[28] In the requirement, in section 215(1), that a person who has a claim against the liquidated co-operative must lodge with the liquidator a sworn or solemn statement, a reference to the words “specifying the amount” of the claim presupposes that a claim contemplated in section 215(1), (4) and (5) is one involving a liquidated amount in money. A liquidated amount in money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. In *Fatti’s Engineering Co. (Pty) Ltd v Vendick Spares (Pty)Ltd* 1962(1)SA 736(T), a claim for a specific sum of money in respect of work done and material supplied was held to be a liquidated amount of money. The approach of the Transvaal Provincial Division has been followed by the courts of several other divisions, but in certain Cape decisions and in Natal a narrower test has been adopted, viz. that a claim for a liquidated amount in money is a claim based on obligation to pay an agreed sum of money or so expressed that the ascertainment of the amount is a mere matter of calculation. See *Leymac Distributors Ltd v Hoosen and Another* 1974(4) SA 524(D); *Consolidated Fish Distributors (Pty) Ltd v Sergeant, Sergeant, Jones, Valentine and Co.* 1966(4) SA 427(C) 430F SA; *Fire and Accident Insurance Co. Ltd v Hickman* 1955(2) SA 131(C) at 132H; *Botha v W Swanson and Company (Pty) Ltd* 1968(2) PHF 85 (CPD) per Corbett J.

[29] A requirement in section 215(1) that a sworn or solemn statement specifying the amount of the claim must be accompanied by the prescribed particulars relating to the claim together with supporting documents, also presupposes that the claim contemplated in the section must be so expressed that the ascertainment of the

amount is a mere matter of calculation. This requirement also qualifies the claim contemplated in section 215(1) as a liquidated one.

[30] The essential question for decision is whether the prayer for a declaratory order a claim contemplated in section 215(1) and (5) of the Act. It has been submitted on behalf of the Appellants that the prayer for a declaratory order is not a claim of the creditor and that the type of the relief sought in the main and alternative claims in the Appellants' Particulars of Claim are not claims as is contemplated in section 215. The Appellants' main claim is a claim for a declaratory order declaring the agreement (annexure "A") and the suretyship to be null and void *ab initio*. In the first alternative claim the Appellants allege that although the market value of the assets and business of Meadow Meats did not exceed R5.2 million as a result of misrepresentation by the First Respondent, First Appellant undertook to pay R4,8 million in excess of what it should have paid for the assets and business of Meadow Meats. Accordingly, the Appellants seek an order declaring that First Appellant is not obliged to pay in excess of R5.2 million for the assets and business of Meadow Meats to First Respondent. In the second alternative claim the Appellants seek an order declaring that the claim by first Respondent be extinguished by way of set-off against the ceded claim. The relief sought in the main claim as well as in two alternative claims are non-pecuniary, but declaratory in nature and hence unliquidated.

[31] Upon proper constitution section 215 of the Act does not allow a liquidator to receive, consider, adjudicate upon and dismiss unliquidated claims. The liquidator cannot, for instance, examine all available and documents relating to the insolvent estate for the purpose of determining whether the claimant is entitled to the relief sought. Nor does section 215 clothe the liquidator with power and authority to make

declaratory orders which are special, relief falling within the ambit of section 19 of the Supreme Court Act, 59 of 1959. See also *Preston v Vredendal Co-Operative Winery Ltd* 200(1) SA 244(E) 248B.

[32] Section 19(1)(a)(iii) of The Supreme Court Act 1959 only empowers the High Court, at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding, that that person cannot claim any relief consequential upon the determination. See also *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (6) SA 205 (SCA) 213 B-E. The court also retains its common-law power of making declaratory orders in proper circumstances. See *Geldenhuis and Neethling v Bedithin* 1918 AD 426; *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1956(1) SA 34(SR) at 35E. The declaration of rights procedure is an extra-ordinary remedy available only when relief cannot be obtained in any other manner. However, the granting of the order sought in this regard depends entirely on the discretion of the court.

[33] It appears from the language employed in section 215 that the claim contemplated therein is one of a liquidated amount in money within the meaning of section 215(1). This can be equated with a claim for a fixed, certain or ascertained amount or thing. Where the legislative words used are clear and unambiguous as in the present case the court should give effect to what the legislature has said, and not try to cover eventualities that the legislature for whatever reason omitted to cover by extending the meaning of the legislation beyond that of the words used. See *Greenshields v Willemburg* (190) 25 SC, 568; *R v Kirk* 1914 CPD 564 at 567.

[34] In *casu*, the purpose is not broader than the initial textual meaning of the legislation and it therefore follows that the need for extensive interpretation does not

arise. In the premises, reading unliquidated claims into the provisions (as Mr Rall has submitted) would, in my view, defeat the purpose of the section to have all the claims of specified amount of money and prescribed particulars accompanied by supporting documentation (if any) dealt with expeditiously and resolved by the liquidator of the co-operative in liquidation without resorting to litigation or judicial process. The words “a sworn or solemn statement” specifying the amount of the claim and the prescribed particulars relating to the claim together with the supporting document’s should be construed as excluding unliquidated claims including claims for declaratory relief. The conclusion that the claim contemplated in section 215 is a liquidated one finds support in section 215(2) which states that the liquidator may admit or refuse to admit the co-operative’s liability for the amount or any portion of an amount of a claim referred to in subsection (1). Also subsection (5) of the section states that no person may institute an action to “prove a claim”...The claim contemplated herein is, obviously, a claim referred to in subsection (1). Had the intention been to include the unliquidated claim the subsection would have been worded differently, for instance, no person may institute an action to “prove any claim”.

An obligation to comply with the provisions of section 215

[35] It has been argued on behalf of the Appellants that section 215 does not debar them from instituting the present action. Secondly, even if it were to bar access to a court, it is not for the Appellants to allege and prove that they have complied with the provisions of section 215(1) and (5) in particular. The first part of the section subsections (1) to (4) deals with internal adjudication of claims against the liquidated co-operative, and the second part with the external adjudication of claims.

[36] Though section 215(5) states in clear and uncertain terms that the internal dispute resolution procedures provided in subsections (1) to (4) do not prevent a creditor from proving a claim against a liquidated co-operative in any court it proceeds to provide that “no person may institute an action to prove a claim against a liquidated co-operative or proceed with any such action which has been suspended in terms of section 190 unless he has lodged his claim with the liquidator within the period mentioned in subsection (1) or with the consent of the registrar, within the further period mentioned in subsection (4) or has otherwise given notice to the liquidator in writing of the action or intended action within the period of 120 days after the date of publication of the notice referred to in section 197.”

[37] It is abundantly clear from the provisions of section 215(5) that a person who intends to prove a claim in court against the liquidated co-operative or to proceed with an action suspended in terms of section 190 must have lodged his claim with the liquidator within the period mentioned in subsection (1) or if he acts with the consent of the registrar within the further period mentioned in subsection (4) or has otherwise given a notice within the period of 120 days after the publication of the notice referred to in section 197.

[38] Section 190 provides:

“After the commencement of the winding-up of a co-operative:-

- (a) No civil proceedings to which the co-operative is a party shall be instituted or proceeded with until a liquidator has been appointed under section 195(1)(a);
- (b) Any attachment or execution put into force against an asset of the co-operative under a judgment given by a court before the commencement of the winding-up shall be void.”

No allegation has been made that the present action falls within the ambit of section 190 and therefore section 190 has no bearing on the determination of this

appeal and is consequently of no relevance for the purpose of this case. However, it is not in dispute that the Appellants did not lodge a claim within the period specified in subsection (1) nor have they lodged the claim within the period mentioned in subsection (4). Further, that the Appellants did not lodge their claim within the period specified in subsection (5).

[39] However, it is apparent from subsection (5) that for a creditor to prove a case in court against the liquidated co-operative, he must have either lodged a claim with the liquidator within the period mentioned in subsection (1) or (4) or has given notice within the period of 120 days after the publication of the notice in terms of section 197 of the Act. Apparently, the giving of such a notice is a condition precedent to the institution of the contemplated legal proceedings against a liquidated co-operative. Generally, where compliance with a statutory requirement is a condition precedent to the institution of an action, the Plaintiff must allege and prove that all the conditions precedent relating to the claim provided for in the relevant section or those other formalities have been complied with. See *Vester v Motor Vehicle Assurance Fund* 1978(3) SA 691(A) at 697B-H; *Dladla v President Insurance* 1982(3) SA 198(W) at 201E-G. If the circumstances are such that it is not necessary for the Plaintiff to plead and prove compliance with the relevant statutory provisions, in my view, the Plaintiff must state so and briefly state the grounds upon which it relies for such a conclusion.

Non-compliance with provisions of section and the effect thereof

[40] It is not in dispute that the Appellants have not lodged a claim under subsections (1) or (4) or given a notice under (5) a claim. However, it is the submission of the Appellants that non-compliance with the provisions of section 215 of the Act and its subsections is not a complete bar to the Appellants' action. The

purpose of an exception alleging that a pleading lacks averments, that are necessary to sustain an action or defence is to dispose of the leading of unnecessary evidence at the trial. Such an exception must go to the root of the claim or defence. See *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956(1) SA 700(A) 706E; *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350(A), 2001(3)SA 986 (SCA); *Trustees for the Time Being of the Bus Industry Restructuring Fund v Break Through Investments CC* [2008] 1 All SA 23(SCA), 2006(1) SA 67(SCA).

[41] An excipient should make out a very strong case before he or she should be allowed to succeed. An excipient has the duty to persuade the court that upon every interpretation that the Particulars of Claim could reasonably bear, no cause of action was disclosed. See *Francis v Sharp* 2004(3) SA 230(C) at 237 D-I. It is therefore appropriate to except if the point of law raised will dispose of the case in whole or in part. A pleading is excipiable only on the basis that no possible evidence led on the pleadings can disclose a cause of action. See *McKelly v Cowan N.O* 1980(4) SA 525(Z) at 526D.

[42] In the present case failure on the part of the Appellants to plead and prove compliance with the statutory provisions in question was not an essential ingredient of the Appellants' cause of action, but a peripheral issue which should not have been allowed to bar the Appellants' access to justice and to have their claims properly ventilated. Proof that the Appellants had failed to plead and prove that they had complied with the statutory requirements of section 215 would make no difference whatsoever to the evidence to be led at the trial. All the averments in the Particulars of Claim would have to be proved in order to establish a major claim. In *Constantaras v BLE Food Service Equipment (Pty) Ltd* 2007(6) SA 338(SCA) it was held that where the upholding of an exception is definitive, in order to avoid

disposing of the Respondents' action, the proper order is to uphold the exception and grant the Respondent leave to amend the offending pleading within a specified period and not to dismiss the claim or grant judgment. See also Amler's Precedents of Pleadings, Seventh Edition P204.

[43] Mr Rall for the Respondents had argued that granting the Appellants' leave to amend their papers would not make any difference since the Appellants had not given the required notice. In the circumstances of the present case, the Appellant's failure to plead and prove compliance with the provisions of section 215 should and could have been dealt with by way of a special plea. However, for this issue to reach finality, I propose to determine whether the Appellants had an obligation in this case to plead compliance with the statutory provisions of section 215 of the Act before instituting legal proceedings against the Respondents. In my view, section 215 is capable of one construction only. The obligation to lodge a claim within the periods mentioned in subsections (1), (4) and to give notice within the period mentioned in subsection (5), after the appointment of the liquidator, is imposed upon a creditor who intends to institute proceedings for a liquidated claim. The subsection (5) does not cover the situation where a creditor intends to institute proceedings for an unliquidated claim. Had the Legislature intended to impose a similar obligation on such a creditor it could easily have provided therefor in clear terms.

[44] The provisions of section 215 providing for the notice to the liquidator are an administrative provision for the liquidator's convenience. See *Michaels v Wells* 1967(1) SA 46 (C) 53. The allegation of voidness of the contract on the basis of its illegality cannot be dealt with by the liquidators. But by court – no such power has been given to the liquidators. They have no discretion over matters other than money claims. The relief sought in the main claim, in the present case, as well as two

alternative claims is declaratory in nature and therefore not a liquidated claim. I have accordingly come to the conclusion that the provisions of section 215 of the Act do not find any application in the circumstances of the present case. The Appellants had therefore no obligation to comply with the said provisions.

Order

[45] In the result.

- 1) The appeal is upheld;
- 2) The order by the Court *a quo* upholding exception is set aside; and
- 3) Respondents are ordered to pay the costs of this appeal jointly and severally, the one paying the other will be absolved – such costs to include the costs incurred consequent upon the employment of two counsel.

KRUGER J

I agree, it is so ordered.

CHILI AJ

Date reserved on: 1 November 2013

Date delivered on: 10 December 2013

Appellants attorney: HOOYBERG ATTORNEYS

C/O Masons Incorporated

(ref: M Du Plessis /nb/10/H020/002)

Appellants counsel: P.F Louw SC / H Louw

Respondents attorney: Venns Attorneys

(ref: AL/welda/S137L)

Respondents counsel: Adv Rall SC