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

CASE NO: 13377/13

In the matter between:

APPLEMINT PROPERTIES 45 (PTY) LTD **(registration number: 2006/032086/07)**	First Applicant
EMERALD GREEN COMMUNICATIONS (PTY) LTD (**registration number: 2004/005796/07)**	Second Applicant
RIETSPRUIT CRUSHES (PTY) LTD **(registration number: 1997/010711/07)**	Third Applicant
THE WISHY FAMILY TRUST **(IT 845/87)**	Fourth Applicant
PENGUIN MINING & PLANT (PTY) LTD **(registration number: 2002/012794/07)**	Fifth Applicant
GIDEON AIR (PTY) LTD **(registration number 2003/009339/07)**	Sixth Applicant
DARRYL HENDRICKS	Seventh Applicant
DKB RESIDENCE TRUST **(IT T3781/97)**	Eighth Applicant

and

THE MASTER OF THE HIGH COURT, **KWAZULU-NATAL DIVISION,** **PIETERMARITZBURG**	First Respondent
FIRST RAND BANK OF SOUTH AFRCA LIMITED **t/a WESBANK**	Second Respondent
PIERRE DE VILLIERS BERRANGE NO	Third Respondent

AND in the matter of a review in terms of s 151 of the Insolvency Act, 1936 (Act 24

of 1936) of certain decisions by the Master rejecting the claims of the Applicants at the first meeting of creditors in an insolvent estate and approving the claim of the Second Respondent.

ORDERS

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1. The decision of the first respondent at the first meeting of creditors on 8 November 2013 to reject the first, second, third, sixth, seventh and eighth applicants' claims is reviewed and is hereby set aside.

2. The matter is referred back to the first respondent for reconsideration of the first, second, third, sixth, seventh and eighth applicants' claims. In reconsidering such claims the first respondent is to give consideration to invoking the provisions of section 44(7) of the Insolvency Act 24, 1936.

3. The decision of the first respondent to approve the claim of the second respondent in the amount of R32 132 884.95 is reviewed and set aside only to the extent that the amount of the claim is reduced to the sum of R 22 132 884.95.

4. The second respondent's application to strike out is dismissed with costs.

5. The costs of this application including the costs consequent upon the employment of two counsel are to be paid by the insolvent estate of Grant Logan Wishart.

JUDGMENT

HENRIQUES J

Introduction

[1] This is an application in terms of s 151 of the Insolvency Act 24 of 1936 (‘the Insolvency Act') to review and set aside decisions taken by the first respondent at the first meeting of creditors of the insolvent estate of Grant Logan Wishart (‘the insolvent’) held in Pietermaritzburg on 8 November 2013.

[2] The applicants seek to review and set aside the first respondent’s decision to:

(a) Reject seven claims lodged by the eight applicants[1]; and

(b) Admit and approve a claim by the second respondent, FirstRand Bank of South Africa Ltd trading as Wesbank (‘FRB’).

[3] In addition, they seek orders directing the first respondent to:

(a) Approve the claims of the first to the eighth applicants; and

(b) Reject the claim of the second respondent, FRB (the “FRB claim”).

[4] The application is only opposed by the second respondent, being FRB. The basis for such opposition is set out in the answering affidavit. In addition FRB has challenged the *locus standi* of the applicants to institute these review proceedings, to review the approval of FRB’s claim and by way of notice had indicated that at the hearing of the application, it would seek to strike out certain paragraphs of the applicants’ affidavits.

Issues for determination

[5] This court is required to determine whether the application to strike out ought to succeed, whether the applicants have *locus standi* to institute these review proceedings in terms of section 151, *locus standi* to challenge the approval of FRB’s claim and the costs of the review application.

Relief Sought by the Applicants

[1] The notice of motion refers to seven claims lodged by the eight applicants. However, the applicants in paragraph [3] of their heads of argument have indicated that they are not pursuing the relief sought in paragraphs 1.1.4 and 1.1.5 (the claims of the fourth and fifth applicants) read with paragraph 2 of the notice of motion.

[6] The relief sought by the applicants as set out in the notice of motion was the following:

'1. That the following decisions made by the Master of the High Court, KwaZulu-Natal Division, Pietermaritzburg at the first meeting of creditors in the insolvent estate of Grant Logan Wishart (Master's Ref N156/13) (the insolvent) on 8 November 2013 be and are hereby reviewed and set aside:

1.1 The decisions to reject the claims of each of the Applicants, particulars of which are as follows:

1.1.1. The claim of the First Applicant, in the amount of R 30 547,27
(Claim No 4)

1.1.2. The claim of the Second Applicant, in the amount of R 1 602,40
(Claim No 5)

1.1.3. The claim of the Third Applicant, in the amount of R 250 000
(Claim No 6)

1.1.4. The claim of the Fourth Applicant, in the amount of R 350 000
(Claim No 7)

1.1.5. The claim of the Fifth Applicant, in the amount of R 86 374,65
(Claim No 8)

1.1.6. The claim of the Sixth Applicant, in the amount of R 475 000
(R 275 000 plus R 200 000)
(Claim No 9)

1.1.7. The joint claim of the Seventh and Eighth Applicants, in the amount of R 45 million
(Claim No 10)

1.2. The decision to admit and approve the claim of the Second Respondent, in the amount of R 32 132 884,95.
(Claim No 2)

2. That the Master be directed to admit and approve each of the claims of the Applicants, as set out in paras 1.1.1 to 1.1.7, above, as duly proved in the insolvent's estate in terms of the provisions of s 44 of the Insolvency Act, 1936 (Act 24 of 1936).

3. That the Master be directed to reject the claim of the Second Respondent.

4. That the costs of the application be paid by the estate of the insolvent as part of the costs of administration thereof, alternatively that such costs be paid by any party opposing the application.

5. That further or alternative relief be granted to the Applicants.'

Common Cause Facts

[7] It is common cause that the estate of the insolvent was finally sequestrated on 30 September 2013 in terms of orders made by this court under case number 9293/13 at the instance of FRB.

(a) The first respondent duly convened the first meeting of creditors by publication of a notice in the *Government Gazette* in terms of s 44(1) of the Insolvency Act for the proof of their claims against the insolvent estate and for the election of a trustee or trustees.

(b) The meeting was convened to take place on Friday, 8 November 2013 at the first respondent's offices in Church Street, Pietermaritzburg. Each of the applicants lodged their claims with the first respondent more than 24 hours before commencement of the first meeting of creditors and as a consequence met the requirements of s 44(3) of the Insolvency Act.

(c) The first meeting of creditors was presided over by an assistant master, Ms K. Padayachee. All of the applicants were represented at the first meeting of creditors by attorney Andries Geyser of Venns Attorneys, Pietermaritzburg.

(d) Each of the claims was presented for proof and each claim was assigned a number on a list of claims.

(e) The second respondent's claim was allocated Claim No 2.

(f) The first applicant's claim was allocated Claim No 4.

(g) The second applicant's claim was allocated Claim No 5.

(h) The third applicant's claim was allocated Claim No 6.

(i) The fourth applicant's claim was allocated Claim No 7.

(j) The fifth applicant's claim was allocated Claim No 8.

(k) The sixth applicant's claim was allocated Claim No 9.

(k) The seventh and eighth applicants' claim was allocated Claim No 10.

(l) The third respondent attended the meeting as provisional trustee of the insolvent estate. The applicants' claims were rejected by the first respondent at the first meeting of creditors held on 8 November 2013.

(m) FRB's claim was admitted by the first respondent at the meeting of creditors on 8 November 2013. The claims of the applicants were opposed because of the close connection between the insolvent and each of the applicants and it was submitted that such claims were not bona fide or genuine.

(n) The applicants objected to the approval and proof of the second respondent's claim as the claim was in the sum of R32 132 884.95. The applicants contend

that FRB had a pledge over an aircraft as security for its debt and such security was realised for an amount of R13 489 392 and this amount was not taken into account when the claim was approved and admitted.

(o) The reasons for the rejection of the applicants claims and the approval of FRB's claims is set out in a letter of the first respondent dated 21 November 2013[2], received by the applicants' attorney of record in December 2013.The first respondent recorded in such letter that the 'claims were examined on the face of the documents submitted."

[8] At the outset it is necessary to deal with the application to strike out. This application must be viewed in the light of the fact that these are review proceedings and the applicants supplemented their founding affidavit on receipt of the record. In addition, mention was made of the fact that not all the relevant documentation formed part of the review record submitted by the first respondent.

Application to strike out

[9] The second respondent gave notice of an application to strike out dated 1 December 2014. The notice indicates that at the hearing of the main application, the second respondent would apply in terms of rule 23(2) of the Uniform Rules of Court to strike out the following paragraphs, namely, paragraphs 11.3, 12.1, 13.1, 14.1, 15.1 and 15.2 of the applicants' supplementary founding affidavit and paragraphs 9 and 10 of the applicants' replying affidavit.

[10] The basis proffered by the second respondent to have these paragraphs struck out are two fold namely, that the paragraphs in the supplementary founding affidavit contained new allegations which were not included in the affidavit of proof of claim filed by the applicants and secondly, that the applicants raise new matter in paragraphs 9 and 10 of the replying affidavit.

[11] Rule 23(2) reads as follows:

'Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of

[2] Pages 209 to 210 and 225 to 226 of the record.

paragraph *(f)* of subrule (5) of rule 6, but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.'

[12] The court has a discretion which must be exercised judicially and the key consideration in the exercise of that discretion is one of prejudice. A matter which is scandalous or vexatious can at the discretion of the court be struck out of a pleading only if the court is satisfied that the applicant for the striking out will be prejudiced in the conduct of his defence if such strike out would not be granted.[3]

[13] In order to decide whether this court should exercise its discretion and strike out the offending paragraphs it is necessary to set these out in detail. Paragraph 11.3 reads as follows:[4]

'The claim comprises rentals or residential space, the provision of lunches and the payment of insurance premiums on behalf of the insolvent. In para 28.1 I erroneously refer to this claim as one for services rendered. I apologise for such error. The claim is for the items as set out in the invoices.'

[14] Paragraph 12.1 relates to the second applicant's claim and reads as follows:[5]

'This claim comprises monies lent and advanced and/or expenses paid on behalf of the insolvent by the Second Applicant.'

[15] Paragraph 13.1 reads as follows:[6]

'This claim relates to an advance of R 250 000 by the Third Applicant to the insolvent.'

[16] Paragraph 14.1 reads as follows:[7]

'This claim comprises a loan of an amount of R 350 000 by the Wishy Family Trust to the insolvent.'

[17] Paragraph 15.1 reads as follows:[8]

'This claim was for an amount of R 86 374,65.'

[18] Paragraph 15.2 reads as follows:[9]

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[3] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 337A-C.
[4] See pages 214-215 of the Record.
[5] See page 215 of the Record.
[6] See page 216 of the Record.
[7] See page 217 of the Record.
[8] See page 219 of the Record.

'The claim comprised or arose from the monies lent and advanced by the Fifth Applicant to the insolvent, alternatively was made up of expenses paid on behalf of the insolvent by the Fifth Applicant.'

[19] Paragraph 9 reads as follows and comprises various subparagraphs:[10]

'9.1. I became a director of the First Applicant on 5 August 2013.

9.2. The First Applicant is the registered owner of the immovable property situated at 16 Hilton College Road, Hilton.

9.3. The improvements on the property include what is styled Brookfield Farm House. That comprises a number of self contained cottages. Each cottage has a name assigned to it.

9.4. Mr Wishart hired from the First Applicant three such units called Jade, Lavender and Terracotta.

9.5. The purpose of such tenancy was to provide Mr Wishart and his family with a home to live in.

9.6. The terms of the tenancy included an obligation on the part of Mr Wishart to pay a portion of the electricity consumed at the premises, as well as a levy.

9.7. In addition thereto Mr Wishart would be provided with lunch by the establishment, Brookfield Farm House, the cost of which would be debited to him and recouped from him together with the monthly rental.

9.8. The claim amount is made up as is set out in the statement of account dated 31 August 2013 which was attached to the claim. The rental in respect of the premises as explained in 9.6, was R8 500,00 per month, including VAT. The rental for June and July had been paid but the rentals for April, May and August 2013 remained unpaid. The balance of the amount owed was made up of the other charges being lunches and insurance which were separately invoiced.

9.9. The Master's reason for rejecting this claim was that the quantum of the claim could not be established. The matters raised on behalf of the Second Respondent, clearly are misplaced and had nothing to do with the quantum of the claim. The quantum of the claim was fully documented in terms of the statement of account and invoices attached to the claim which I verified.

9.10. As is quite evident from the claim as well as the supporting documents, this claim relates to rentals and a lease and had nothing to do with a loan.'

9.11. The attempt by the Second Respondent to create some kind of confusion with regard to the claim, is misplaced.

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[9] See page 219 of the Record.
[10] See pages 369–370 of the Record.

9.12. During the relevant period, that is to say, from April to August 2013,I advised the First Applicant with regard to its administration and had first hand knowledge of particularly the arrangements between it and Mr Wishart concerning the letting of the particular premises to Mr Wishart. With regard to the preparation of invoices and statements of account rendered by the First Applicant to Mr Wishart, such invoices and statements of account, were prepared under my supervision.

9.13. The First Applicant runs a kitchen at Brookfield Farm House. It supplies meals including lunches to visitors and guests. It also in this instance, supplied lunches to Mr Wishart. The amounts in respect of lunches relate to lunches supplied to Mr Wishart. These are charged out on a monthly basis as a lump sum.

9.14. The amounts in respect of insurance, relate to a portion of the insurance premiums paid by the First Applicant to its insurance brokers Graham Kippen Insurance Brokers of Hilton in respect of the contents of the particular units occupied by Mr Wishart and his family.

9.15. The Eskom charges relate to a fixed recovery for the electricity consumed in the three particular units.

[20] Paragraph 10 likewise comprises various subparagraphs and reads as follows[11]

10.1 The Master's reason for rejecting this claim was that on the face of the documents before the Master the amount on the affidavit and the amount on the vouchers differed.

10.2 This claim was for an amount of R 1 602,40.

10.3 Such amount comprised payments in respect of an internet facility for the period May 2013 to August 2013.

10.4. As previously explained, the claim was made up of the following amounts:

Invoice 161	R 815,10	
Invoice 171	R 763,80	
Invoice 179	R 256,50	(less payment of R 233 reflected on the Accounts Receivable Transactions due)
Balance	R 1 602,40	

[11] See pages 371–373 of the Record.

10.5 The Assistant Master's finding that the amount on the affidavit and the amount on the vouchers differed, was therefore manifestly wrong.

10.6 I was first appointed as director of the Second Applicant on 12 June 2010. All the transactions on which this claim is based took place during the period of my directorship of the Second Applicant.

10.7 Since I was appointed as director of the Second Applicant, its administration was conducted under my supervision. I also have first hand knowledge of the nature of the particular claim. The Second Applicant has internet facilities which it in turn makes available to Mr. Wishart. Mr. Wishart's use of such facilities, forms the subject of periodic invoices, copies of which I have already referred to. The claim constitutes the outstanding balance of the amounts invoiced to him by the Second Applicant.

10.8 The Second Applicant has paid certain charges in respect of the internet facilities which it enjoys from its service provider. The amount forming the subject of the claim, is in fact Mr. Wishart's share of the use of such facilities, which, as explained, had been invoiced to him, on a regular basis. "

Legal principles relating to the application to strike out

[21] In *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others*[12] the following is stated regarding the application to strike out and is relevant to this matter:

'Mr. *Van der Spuy's* submission is that this sub-rule was meant to be exhaustive and that no striking out application which is brought on any ground other than those mentioned, can succeed. He submits that the word "may" was not intended to empower the Court to entertain a striking out application on other grounds; the intention was merely to give the Courts a discretion and not to make it obligatory to strike out matter which is scandalous, vexatious or irrelevant. I agree with Mr. *Van der Spuy* that the use of the word "may" merely indicates that the Court has a discretion but, in spite thereof, the sub-rule was, in my view, not intended to be exhaustive. The Court still has an inherent jurisdiction to grant relief where the Rules of Court make no provision therefor.'[13]

[22] The Supreme Court of Appeal ('SCA') in *Beinash v Wixley*[14] held as follows:

'What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.'

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[12] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others* 1974 (4) SA 362 (T) at 368F-H.
[13] *Neal v Neal* 1959 (1) SA 828 (N).
[14] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-C.

[23] The offending paragraphs that the second respondent seeks to strike out does no more than to elucidate and correct certain errors in the founding affidavit relating to the claims of the applicants that were rejected.

[24] In exercising my discretion as to whether or not to strike out the offending paragraphs, consideration must be given to the nature of these proceedings and whether or not the offending paragraphs prejudiced the second respondent. In light of the fact that these are review proceedings, a measure of latitude should be allowed to the parties to ventilate the issues, provided there is no obvious prejudice to the other party if additional facts are incorporated in the replying affidavit.

[25] There is in my view no prejudice to the second respondent if the offending paragraphs are not struck out. The second respondent is aware of the nature of the applicants' claims that were rejected, and the additional facts provided in the replying affidavit, sets out some background information regarding the claims. At the end of the day, these additional facts are, in my view, not prejudicial to the second respondent. In addition, the applicants are not pursuing the claims referred to in para 14.1 and 15.1[15] and there can thus be no prejudice to the second respondent. Accordingly, the application to strike out is refused, with costs. There is no reason to depart from the usual rule in relation to costs, and the successful party is entitled to its costs.

Locus standi and Grounds of Review

[26] Before dealing with the grounds of review, it is necessary to deal with two aspects raised. Firstly in relation the *locus standi* of the applicants and the challenge raised by both the applicants' and the second respondent to the respective knowledge of the deponents to the affidavits and the claims submitted.

[27] The review is one in terms of s 151 of the Insolvency Act which reads as follows:

'Subject to the provisions of section *fifty-seven* any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the

[15] Claim no 7 and no 8.

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…'

[28] The SCA has authoritatively dealt with reviews in terms of s 151 of the Act in *Nel & another NNO v The Master* (*Absa Bank Ltd & others intervening*).[16] In such judgment Van Heerden AJA writing for a full unanimous court stated that the review envisaged by s 151 of the Insolvency Act is the review recognised in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*[17] namely, that a court could enter upon and decide the matter *de novo,* and, 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.[18]

[29] 'A person aggrieved' for the purposes of s 151 of the Insolvency Act is someone who is injured or wronged in his rights or interests. The term a person aggrieved is capable of a wider meaning in that it also includes a person who has a legal grievance as well as a trustee who may also institute review proceedings in terms of this section.[19]

[30] In my view, having regard to the authorities referred to, the applicants clearly fall within the category of a person aggrieved and are accordingly entitled to institute these review proceedings in relation to the rejection of their claims by the first respondent. However, I agree with the submission that in order for the applicants' to challenge the claim of FRB they have to succeed in having at least one of their claims admitted in order to have *locus standi* to challenge the admission and approval of FRB's claim.

[31] A further matter which warrants attention is whether the applicants' are correct in the submission that the representative of FRB did not have personal knowledge of the facts deposed to nor did the representative have personal knowledge of the claim. FRB also takes a similar view in relation to Sinclair.

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[16] *Nel & another NNO v The Master* (*Absa Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA).
[17] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.
[18] *Johannesburg Consolidated Investment* supra at 117; *Nel v The Master* supra para 22.
[19] *Francis George Hill Family Trust v South African Reserve Bank & others* 1992 (3) SA 91 (A) at 102C-D; *Jeeva & another v Tuck NO & others* 1998 (1) SA 785 (SE) 792G-J; *Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C).

[32] As correctly pointed out by Galgut AJ in *R v Varachia*:[20]

'In my view the words "fully cognizant" in sec. 44 (4) do not mean that the deponent to an affidavit of proof of claim must have personal knowledge of each transaction. No firm employing hundreds of employees could ever prove a claim in an insolvent estate if a director or secretary or manager could not make the affidavit from the information contained in the books. It would be impossible in proving claims in insolvent estates to file affidavits from all employees past and present and who had been concerned in every portion of each transaction. I am of the view that the words "fully cognizant" in the section should be read as "fully informed", and therefore in so far as this aspect of the matter is concerned, that the claim has been properly proved.'

[33] The deponent to the affidavit on behalf of the applicants, Mr ML Sinclair (Sinclair), sets out the basis upon which he acquired knowledge in respect of each of the claims and the documentation he had regard to when compiling the affidavits in respect of each claim. I am therefore satisfied that he is fully cognizant and has knowledge of the claims as is required by s 44(4) of the Insolvency Act. A similar view pertains in relation to FRB's deponent.

[34] At the meeting of creditors, a claim must be proved to the satisfaction of the presiding officer who, must either accept or reject the claim.[21] The presiding officer performs a quasi-judicial function and must exercise an independent judgment as to whether or not to admit or reject a claim.[22]

[35] It is not the duty of the presiding officer to look at the claim cursorily but to scrutinise it to see if ought to be admitted. The presiding officer should focus on the essential allegations of the claim and not look for purely technical or formal defects. The claim need not to be proved on a balance of probabilities, prima facie proof of the claim is sufficient.[23]

[36] If the claim on the face of it is bad, the presiding officer is entitled to reject it; conversely if prima facie proof of the claim is produced the presiding officer should

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[20] *R v Varachia* 1958 (4) SA 529 (T) at 532D-G.
[21] Section 44(3) of the Insolvency Act.
[22] *Aircondi Refrigeration (Pty) Ltd v Ruskin NO & others* 1981 (1) SA 799 (W) at 804A-B.
[23] *Aspeling & another v Hoffman's Trustee* 1917 TPD 305 at 307-8; *Hassim Moti and Co. v Insolvent Estate M Joosub and Co.* 1927 TPD 778 at 781; *Ben Rossouw Motors v Druker, N O & others* 1975 (1) SA 821 (W) at 825E-F.

then admit the claim. [24] The presiding officer should not, unless the claim is bad, reject the claim without hearing the evidence of the creditor in terms of s 44(7) of the Insolvency Act which reads as follows:

'The officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.'

[37] In the founding affidavit, the applicants contend that the first respondent should not have rejected the claims outright, alternatively, in the event of uncertainty the first respondent ought not to have rejected them without invoking s 44(7) of the Insolvency Act. The applicants' further argue that the nature, amount and particulars of each claim have been established for a court to exercise its powers of review and to admit the claims. The second respondent on the other hand argues that each of the applicants' claims on the face of it is bad and accordingly the first respondent was entitled to reject each claim without having to invoke the provisions of s 44(7) of the Insolvency Act.[25]

[38] It is therefore necessary to look at each claim as it was submitted to determine whether the first respondent was correct in rejecting the claim without invoking the provisions of s 44(7) of the Act.

The first applicant's claim (Claim 4)

[39] In the affidavit in support of the claim, Sinclair records that he is the director of the first applicant and has control of the books and records of the first applicant. On examination of the records it was established that the insolvent was indebted to the first applicant in the sum of R30 547.27 which amounts were reflected on the ledger sheet. In his founding affidavit Sinclair records that these amounts were owed in respect of services rendered to the first applicant.

[40] In the supplementary affidavit, Sinclair records that he erroneously referred to the claim as services rendered when in fact it comprised of rentals for residential

[24] *Aspelilng* supra; *Ilsley v De Klerk, N.O. & another* 1934 TPD 55.
[25] *Ben Rossouw Motors* supra at 825E.

space, provision for lunches and payments for insurance premiums paid on behalf of the insolvent.

[41] The first respondent in rejecting the claim advanced the following reasons for doing so:[26]

'Claim 4: on the face of the documents before me, the quantum of the claim could not be established. The claim was rejected because it appeared to be an unliquidated claim.'

[42] The first applicant contends that the amount is a liquidated claim for a fixed sum of money which is supported by invoices comprising a breakdown as to how the amount is computed. The documents put up supporting the claim sufficiently particularised the substance and nature of the amount claimed and accordingly the claim ought not to be rejected.

[43] The second respondent objects to the claim recording that the property in respect of which the rent is claimed has not been identified, likewise the insurance and other expenses. The first respondent joins issue with the second respondent in respect of the inconsistency regarding the description of the claim. In addition, there is no indication of how the rental is arrived at and whether the lease agreement was written or oral.

[44] In respect of the amount allegedly owing to Eskom, it is unusual for the amount to be 'in such a round number'. The rental invoices do not refer to the insolvent but instead refer to 'Rent Jade, Lavender and Terracotta'. Insofar as insurance is concerned it is not suggested that the first applicant is an insurance company and why the insolvent would be indebted for insurance. Likewise, it is not clear how the amount claimed for lunches is calculated.

[45] The second respondent also contends that the documentation of the first applicant discloses that it is a VAT vendor. Notwithstanding this, certain of the invoices on which it relies do not reflect VAT. Those that do include VAT are for the same amount as those that exclude VAT and the same applies to the insurance invoices. The second respondent accordingly contends that the first respondent was correct in rejecting the claim as same was badly formulated.

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[26] See letter dated 21 November 2013 at pages 209-210 of the Record.

The second applicant's claim (Claim 5)

[46] In the founding affidavit, Sinclair records that the claim is for an amount of R1 602.40 in respect of monies lent and advanced to and/or expenses paid on behalf of the insolvent.

[47] The first respondent in rejecting the claim advanced the following reasons for doing so:[27]

'Claim 5: On the face of the documents before me, the amount on the affidavit and the amount on the vouchers differed, the claim was rejected.'

[48] The second applicant explains the amount claimed as follows in the heads of argument:[28]

'Para 4.1 of the affidavit deposed to by Mr Sinclair makes it clear that only R 23,50 in respect of Inv 179, forms part of the claim. That being the case, the sum total of Inv 161, Inv 171 and a portion of Inv 179, makes up the total amount of the claim, namely R 1 602,40 (R 815,10 + R 763,80 + R 23,50).'

[49] The second applicant therefore contends that the first respondent committed a misdirection by rejecting the claim. The claim relates to monies advanced and/or expenses paid on behalf of the insolvent which is perfectly 'apt in the circumstances'. The essence of the claim is that the second applicant defrayed certain expenses on behalf of the insolvent.

[50] The second respondent objects to the claim and records that since Sinclair cannot state what amount relates to monies lent and what amount relates to expenses paid confirms his lack of knowledge regarding the claim. According to the second respondent the claim the second applicant sought to prove in the meetings of creditors was for internet facilities and not for monies lent and advanced.

[51] According to the second respondent the certificate refers to the principle business of the second applicant as relating to retail trade, except for motor vehicles and motor cycles, and repair of personal and household goods. The second applicant is not described as conducting an internet business.

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[27] See letter dated 21 November 2013 at pages 209-210 of the Record.
[28] See para 21.3. of the Applicants' Heads of Argument.

[52] The second respondent also records that Sinclair has not produced any contract in respect of providing internet services to the insolvent. There is also no allegation of how the amount is arrived at nor is there any indication of the terms on which the second applicant provided internet facilities to the insolvent.

The third applicant's claim (Claim 6)

[53] In the affidavit in support of the claim, Sinclair records that the claim for R250 000 relates to a loan advanced by the third applicant to the insolvent. A Standard Bank statement is attached which records that the amount of R250 000 was paid to the insolvent on 19 June 2009 and the reference is recorded as a 'loan'.

[54] The first respondent in rejecting the claim advanced the following reasons for doing so:[29]

'Claim 6: On the face of the documents before me, the amount on the affidavit and the amount on the vouchers differed, the claim was rejected.'

[55] The third applicant contends that the first respondent's rejection of the claim, namely that the amount in the affidavit and the amount in the vouchers differed is not intelligible. The reason is that the claim is clearly recorded in the founding affidavit for the sum of R250 000, and, the detailed ledger account of the third applicant and the bank account record the amount as a loan.

[56] The second respondent records that the description 'LOAN' does not indicate what this means and accordingly the reference to loan is not only hidden but is also unclear. The second respondent also alleges that *ex facie* the claim affidavit and the supplementary affidavit, the claim became prescribed by no later than 18 June 2012.

[57] The business of the third applicant is described as mining and quarrying and has nothing to do with money lending. Insofar as the interrupting of prescription by an acknowledgement of liability is concerned, it is recorded that there is no indication when the acknowledgement occurred or whether it occurred before or after the claim had prescribed.

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[29] See letter dated 21 November 2013 at pages 209-210 of the Record.

[58] Attached to the third applicant's claim is a letter dated 5 November 2013 wherein the insolvent confirms his indebtedness. The second respondent submits that this letter is dated after the claim had prescribed and therefore cannot interrupt the running of prescription and accordingly the first respondent correctly rejected the claim.

The fourth and fifth applicants' claims (Claims 7 and 8)

[59] In the heads of argument no submissions are made with regard to these claims and accordingly the fourth and fifth applicants have abandoned these claims.

The sixth applicant's claim (Claim 9)

[60] The claim is for a total amount of R475 000 in respect of money lent and advance to the insolvent by the sixth applicant in the sum of R275 000 on 23 May 2013 and R200 000 on 19 August 2013 respectively. The insolvent sent a letter, dated 5 November 2013, in which he confirmed his indebtedness to the sixth applicant for the total amount of the claim.

[61] The first respondent in rejecting the claim advanced the following reasons for doing so:[30]

*'*Claim 9: the claim was rejected because the cause of action was not clearly stipulated and the supporting documents were not attached.'

[62] The sixth applicant contends that the cause of action in respect of the claim is clearly stated as a loan and that there is no requirement in s 44 of the Act that any document should be attached to the claim.

[63] The statement by Sinclair that he personally participated in the granting of the loan is sufficient and cannot be ignored. It is also contended that the first respondent could have invoked the provisions of s 44(7) of the Insolvency Act if it was not satisfied with the claim and having not done so, the inference to be drawn is that the first respondent was satisfied with the claim.

[64] The second respondent records that Sinclair does not state whether the loan was effected orally or in writing, nor are there any minutes of meetings attached in

[30] See letter dated 21 November 2013 at pages 209-210 of the Record.

support of the claim. On Sinclair's own version, he is not a director of the sixth applicant and it is not clear what he means when he says he personally participated in the granting of the loans. Accordingly it was submitted that the first respondent correctly rejected the claim.

The seventh and eighth applicants' claim (Claim 10)

[65] In the affidavit in support of the claim, it is recorded that the claim relates to an agreement of sale of shares in a company known as Eurocoal (Pty) Ltd by the seventh and eighth applicants to the insolvent for a total purchase price of R50 000 000.

[66] The seventh applicant records that the insolvent paid the sum of R48 062 500 to the trustees of the eighth applicant on 5 March 2007 and such payment was made by a company known as Borneo Investment Group Incorporated. This payment was set aside as being a disposition without value and that the amount in the court order as amended was reduced to R45 000 000. The insolvent failed to pay the purchase price of the shares to the eighth applicant and was therefore indebted to Sinclair and the eighth applicant in the sum of R45 232 397.26.

[67] The first respondent in rejecting the claim advanced the following reasons for doing so:[31]

'Claim 10: the claim was rejected because the cause of action was not clearly stipulated and the supporting documents were not attached.'

[68] The seventh and eighth applicants contend that on a prima facie level the claim has been adequately set out in the affidavit deposed to by the seventh applicant. The effect of the court order is that liability for the amount of R45 000 000 accrued which is contended constitutes the insolvent's indebtedness to the seventh and eighth applicants, and accordingly the claim should not have been rejected.

[69] The second respondent records that the claim is misconceived in that there is no evidence that the proof of claim affidavit is an affidavit in that the commissioner of oaths did not print his/her full name below the commissioner's signature. Accordingly there has been a non-compliance with s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and therefore there is no proof of the claim.

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[31] See letter dated 21 November 2013 at pages 209-210 of the Record.

[70] The second respondent also questions the court order (annexure ‘C’) and annexes a court order annexure ‘AA6’ to the answering affidavit. The second respondent records that no judgment was granted against the seventh applicant and that the judgment was granted against the joint trustees of the eighth applicant of which the seventh applicant is one.

[71] The second respondent also records that the allegation that 10 per cent and 40 per cent shares in Eurocoal were sold is incorrect and that the sale related to 5 per cent and 45 per cent which allegations are admitted by the seventh applicant. It is also recorded that there are conflicting affidavits regarding the sale of the shares and that the monies are owed by the Logan Trust and not the insolvent. The second respondent also alleges that the claim prescribed by March 2010.

[72] A rescission application is pending to rescind the judgment in respect of the order setting aside the payment exceeding R45 000 000 as a disposition without value by Eurocoal and since this application has not been finalised, the seventh and eighth applicants are precluded from seeking to prove this claim.

The decision to admit and approve the Second Respondent’s claim

[73] The applicants also seek to review and set aside the first respondent’s decision to admit a claim by the second respondent in an amount of R32 132 884.95.The second respondent had a pledge over an aircraft as security for the debt and such security was realised in the amount of R13 489 392 which was not taken into consideration when the claim was admitted.

[74] The second respondent admits it received an advanced dividend of R10 000 000 and claimed that such payment had taken place in terms of a practice designed to stop the generation of interest. The second respondent further contends that the dividend was paid on a provisional basis and remains dependant on the claim being confirmed in the liquidation and distribution account. Having regard to the authorities referred to in the heads of argument,(Mars) there appears to be a sound basis for the practice. The second respondent is however prepared to have its claim reduced to R22 132 884.95 if so required by the court.

[75] As mentioned earlier, the first respondent performs a judicial duty when she presides over a meeting of creditors and claims are produced before her. In each instance the first respondent is expected to thoroughly scrutinise a claim to see whether prima facie the debt ought to be admitted. The duty of the first respondent is not merely to look at the claim cursorily but to examine it carefully and establish whether or not it should be admitted.[32]

[76] In *Aircondi Refrigeration (Pty) Ltd v Ruskin NO & others*[33] Nicholas J said the following about a proof of a claim at a meeting of creditors:

'From these provisions it appears that there are two elements in the proof of a claim:

(a) The submission of an affidavit in the prescribed form; and

(b) the satisfaction of the officer presiding at the meeting that it is valid

. . .In regard to *(b)* the presiding officer performs a *quasi*-judicial function. . . .As such he must exercise an independent judgment. Unless a claim is on the face of it bad, he should not reject it without hearing the creditor's evidence under ss (7).'

[77] There is nothing in the reasons advanced by the first respondent to suggest that she applied her mind and considered invoking s 44(7) of the Insolvency Act. It is trite that the exercise of public power by a functionary such as the first respondent should not be arbitrary. The first respondent performs an important function in the consideration of claims and is in the best position to consider the applicants' claims and in particular, whether an interrogation of such claims should be called for in terms of s 44(7) of the Insolvency Act.[34]

[78] In my considered view, it is in the interests of justice that this matter be referred back to the first respondent for proper consideration. The papers contain numerous factual disputes which dictate that this is the most expedient route to follow in this matter. The first respondent can consider and apply her mind as to whether s 44(7) of the Insolvency Act should be invoked.

[79] If the first respondent considers invoking the provisions of s 44(7) of the Insolvency Act, the complaint of the second respondent regarding the applicants

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[32] *Aspelling* supra.
[33] *Aircondi Refrigeration* supra at 803H – 304B.
[34] *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg & others* (2007/463) [2008] ZAGPHC 185 (24 June 2008).

claims referred to earlier in this judgment can be fully ventilated. This may or may not shed light on the nature of the claims and may or may not clarify the complaints of the second respondent regarding the validity or otherwise of the applicants' claims.

[80] This is not a matter where this court should substitute its findings regarding the applicants' claims as to whether or not the first respondent correctly rejected the claims. The first respondent's reasons clearly indicate that she did not apply her mind fully to each of the claims and accordingly it is desirable to refer the matter back to the first respondent for reconsideration.

[81] Insofar as the applicants' objection to the admission of the second respondent's claim is concerned, for reasons already mentioned, I agree with the submissions that the admission and approval of this claim was based on a judgment obtained. There can be no fault with this finding by the first respondent. In addition, authorities appear to be ad idem that the applicants are "persons aggrieved" for purposes of establishing their *locus standi* to institute review proceedings against the refusal by the first respondent to admit and approve their claims.

[82] The next issue raised in opposition by the second respondent is the issue of the applicants' *locus standi* to seek this relief. The second respondent submits that until such time as a claim of the applicants is admitted, the applicants' have no standing in the matter. In order for the applicants to challenge the claim of FRB, they must succeed in having at least one of their claims admitted in order to have locus standi to challenge the admission and approval of FRB's claim. I agree that until such time as they are "creditors" they do not have the necessary *'locus standi'* to review and set aside the decision of the first respondent to admit and approve the second respondent's claim.

[83] It must follow that I do not agree with the submission that to find they have no *locus standi* in that respect negates the constitutional rights recognised in s 34 of the Constitution of access to the court. In any event this is not an appropriate matter given the facts to determine that issue.

[84] I am of the view that the decision to admit the second respondents' claim is unassailable despite the reasons advanced by the applicants'. There can be no

complaint that the decision to admit the claim was correct on the facts of the matter. However, the amount of the claim falls to be reduced to R22 132 884.95. Despite the amount derived from the sale of the aircraft, the dividend advanced by the joint liquidators was in the sum of R10 million, this is not disputed.

[85] The reduction in the amount of the admitted claim is not at the behest of the applicants' as I am of the view, there are sound reasons for doing so. This court can reduce the FRB claim to an amount which is not disputed.[35] There is also the limited concession contained in the second respondent's answering affidavit[36] and further amplified in their heads of argument[37] and practice note[38] submitted.

Costs

[86] Insofar as the costs occasioned by the unsuccessful application to strike out, this has been dealt with in the judgment.

[87] The applicants submit if successful, FRB ought to be mulcted in costs. FRB on the other hand submits that the applicants ought to bear the costs of the application and the costs ought not to come from the insolvent estate.

[88] Section 151bis of the Insolvency Act reads

> "Costs of review
>
> If the court reviewing any matter referred to in section one hundred and fifty-one confirms any decision, ruling, order or taxation of the Master or officer referred to in that section the costs of the applicant for the review of that matter shall not be paid out of the assets of the estate concerned unless the Court otherwise directs."

[89] As regards the costs of the review application, the applicants have been substantially successful in this matter although they have abandoned certain of the relief set out in the notice of motion. In addition, likewise FRB has also been

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[35] Section 45(3) of the Insolvency Act; *Garlicke's Wholesale v Magistrate of Sutherland* 1926 CPD 267; *Rabinowitz v De Beer NO* 1983(4) SA 410 (T) at 412 E-F
[36] See pages 270 to 272 of the record
[37] Para 38
[38] Para 7.5.

substantially successful in that this court has confirmed the ruling of the first respondent to admit the claim. The review of the ruling relates to the amount of the claim only. There accordingly is no reason why costs should not follow the result and such costs consequent on the employment of two counsel be paid by the estate of the insolvent. Given the facts of the matter and the nature of the orders granted, it seems to be the fairest order to issue.

Conclusion

[90] In the result, for the reasons dealt with hereinbefore, I make the following orders:

[90.1] The decision of the first respondent at the first meeting of creditors on 8 November 2013 to reject the first, second, third, sixth, seventh and eighth applicants' claims is reviewed and is hereby set aside.

[90.2] The matter is referred back to the first respondent for reconsideration of the first, second, third, sixth, seventh and eighth applicants' claims. In reconsidering such claims the first respondent is to give consideration to invoking the provisions of section 44(7) of the Insolvency Act 24, 1936.

[90.3] The decision of the first respondent to approve the claim of the second respondent in the amount of R32 132 884.95 is reviewed and set aside only to the extent that the amount of the claim is reduced to the sum of R 22 132 884.95.

[90.4] The second respondent's application to strike out is dismissed with costs.

[90.5] The costs of this application including the costs consequent upon the employment of two counsel are to be paid by the insolvent estate of Grant Logan Wishart.

HENRIQUES J

Case Information

Date of hearing:	5 December 2014
Date of judgment:	21 December 2018

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