REPORTABLE
Case number: 440/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

NEDCOR BANK LIMITED **APPELLANT**

and

THE MASTER OF THE HIGH COURT (PRETORIA) **FIRST RESPONDENT**
J F KLOPPER N O **SECOND RESPONDENT**
M W LYNN N O **THIRD RESPONDENT**
G C GAINSFORD N O **FOURTH RESPONDENT**
S E LEHAPA N O **FIFTH RESPONDENT**
J M DAMONS N O **SIXTH RESPONDENT**
P E JACKSON **SEVENTH RESPONDENT**
VARIOUS CREDITORS **EIGHTH - 48TH RESPONDENTS**

CORAM: **NIENABER, SCOTT, CAMERON, MTHIYANE JJA and FRONEMAN AJA**

DATE OF HEARING: **14 SEPTEMBER 2001**
DELIVERY DATE: **27 SEPTEMBER 2001**

Summary: Interpretation of s 40(2) of the Insolvency Act 24 of 1936 - method of computation of time - whether statutory method prescribed in s 4 of the Interpretation Act 33 of 1957 or the "clear days" method applicable - how s 4 of the Interpretation Act is to be applied to s 40(2) of Act 24 of 1936

JUDGMENT

MTHIYANE JA

MTHIYANE JA:

[1] The question to be answered in this appeal is whether the first meeting of creditors of Plascon Group Limited (in liquidation) ("the company in liquidation") was properly convened by the first respondent ("the Master") in terms of s 40(2) of the Insolvency Act 24 of 1936 ("the Act"). The section requires that the notice convening the meeting be published on a date not less than ten days before the date of the meeting.

[2] The relevant portion of the section reads:

> "The master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held."

[3] The background to the present appeal is as follows. On 7 July 2000 the Master caused to be published in the Government Gazette a notice to convene the first meeting of creditors of the company in liquidation on 17 July 2000. Some 48 or more creditors including the appellant, who was represented by an attorney, attended the meeting. The appellant, one of the major creditors, objected to the holding of the meeting on 17 July on the ground that the notice period fell short by a day. The appellant's attorney claimed

that the appellant was, as were the other creditors, entitled under the section to be given notice of ten clear days before the meeting.

[4] The presiding officer representing the Master at the meeting rejected the contention that the meeting had been irregularly convened and ruled that adequate notice had been given and that, even if this were not the case, the appellant had not been prejudiced: the appellant was present and represented at the meeting and it was still open to the appellant to file whatever claims it might have at any of the subsequent meetings. The appellant's riposte was that having not filed its claims by then, it was precluded from nominating and voting for a liquidator of its choice at the purported first meeting on 17 July and therein, so the argument went, lay the prejudice. The purpose of the meeting was to enable the creditors to file claims and to nominate a liquidator or liquidators. Although the appellant's contentions were rejected by the presiding officer she nevertheless agreed to have the meeting adjourned to 24 July 2000 to enable the appellant to take her ruling on review.

[5] On 19 July 2000 the appellant launched an application in the Transvaal Provincial Division seeking an order reviewing and setting aside the Master's decision that the first meeting of creditors had been properly convened and a *declarator* that the meeting had been irregularly convened. The eighth respondent ("the respondent") opposed the relief sought in the court below and on appeal. (The Master abides the decision of the Court.) The matter came before De Klerk J who rejected the appellant's contentions and found that proper notice had been given by the Master in terms of s 40(2) of the Act. The appellant's application was dismissed and in the exercise of his discretion the learned judge made no order as to costs. Leave to appeal was refused. The matter comes before us with leave granted by this Court on petition. The appeal is against the order dismissing the application.

[6] The appeal turns on the correct interpretation of s 40(2) of the Act and the essential issue in this Court, as it was in the Court *a quo*, is which method of computation is to be adopted in reckoning the ten day period mentioned in the section. Three methods

can conceivably be employed in the circumstances of this case to determine a period expressed in a number of days:

i. the statutory method enacted by s 4 of the Interpretation Act 33 of 1957 ("the Interpretation Act");

ii. the civilian method; and

iii. the "clear days" method.

Cf , generally, Joubert (ed) *The Law of South Africa* vol 27 paras 225, 227 and 229.

Both sides contended for the first method; in the alternative, the appellant contended for the third; neither side contended for the second. Although both the appellant and the respondent sought to rely on the statutory method, as being applicable to s 40(2) of the Act, they differed on how it should be applied.

[7] The relevant section of the Interpretation Act reads:

> "4 Reckoning of number of days - When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless

> the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday."

[8] For the appellant it was submitted that on a proper construction of the Interpretation Act the above provision can only be applied by reckoning forward, taking the day of publication of the notice (7 July) as the first day. And if that day is excluded in accordance with s 4 of the Interpretation Act, the day of the meeting (17 July) would constitute the tenth and last day. But because of the use of the word "before" in s 40(2) of the Act the 17th July must also be excluded. The last day was therefore 16 July which happened to be a Sunday and was a day short.

[9] For the submission that the section can only be applied by reckoning forward reliance was placed on the remarks made by Gardiner JP in *Miller v Malmesbury Licensing Court and Another* 1929 CPD 209 at 218, who when dealing with a provision (s 5 of Act 5 of 1910) similar to s 4 of the Interpretation Act, said that the section was easy to apply where one was reckoning forward but that it was no simple matter when

one was reckoning backwards. The learned judge did not elaborate on the difficulties he envisaged in reckoning backwards.

[10] With due deference to the Judge President I have not been able to find anything in the language of s 4 of the Interpretation Act to cause me uneasiness about reckoning backwards. The section does not prescribe whether the reckoning should be forward or backwards. All the legislature has done is to mention the first day and the last day, and has left it open to the courts to determine which is which. It follows, therefore, that the first and the last days are to be established solely by reference to the language of the statutory provision under consideration and with due regard to the circumstances of each particular case. Normally one would reckon forward but in a given case it may well be that reckoning backwards is the more appropriate method in order to give effect to the intention of the legislature.

[11] In the present matter the crucial date is the date of the meeting (17 July). It is the date "before" which the notice must be published. Everything that has to be done under

the Act, such as the filing of claims and the nomination of liquidators, must take place "before" this date. This would therefore be an appropriate case for reckoning backwards. Reckoning backwards from that day, the first day being excluded under the statutory method of computation, the reckoning proper would commence on 16 July and end on 7 July, being the tenth and last day, which is included. On this basis in terms of the statutory method the ten days would have elapsed before the date of the meeting as required by s 40(2) of the Act. Once the approach is adopted that the calculation is to be done backwards, the appellant's argument that the word "before" precludes the inclusion of the 17th July in the calculation becomes irrelevant.

[12] When reckoning days in a statutory provision a Court is enjoined to apply the provisions of s 4 of the Interpretation Act unless there is something in the language or context of the particular provision repugnant to such provision or unless a contrary intention appears therein. Having regard to all the factors in this case the appellant has not established, and I have not been able to find, anything either in the language or

context of s 40(2) of the Act to suggest that the application of s 4 would lead to a repugnancy justifying a departure from the method of computation prescribed in the Interpretation Act. In the interests of legal certainty such departure is not readily to be assumed by the court. A little more than three decades ago it was said in this Court:

> "[d]ie wenslikheid van regsekerheid bring mee dat binne die geldingsgebied van die gewone siviele metode nie ligtelik daarvan afgewyk kan word nie. Dieselfde moet geld, sou ek reken, wat die statutêre metode betref, waar dit soos hier gaan om 'n voorgeskrewe tydperk van 'n bepaalde aantal dae. In so 'n geval kan ook van daardie metode nie afgewyk word nie, tensy daar duidelike ander blyke van 'n ander bedoeling voorhande is. In albei gevalle moet by twyfel die algemeen geldende metode gevolg word" (per Steyn CJ in *Mutual Fire and General Insurance Co Ltd v Fouche en 'n ander*; *AA Mutual Association Ltd v Tlabakoe* 1970(1) SA 302 (A) at 316 B - C).

This reasoning is in my view applicable to the present case.

[13] Counsel were in agreement that if the statutory method of computation prescribed in s 4 of the Interpretation Act was applicable there was no basis for invoking the civilian method of computation. Under the civilian method the day of the publication (7 July) would be included as the first day and the tenth day would end at midnight on 16 July.

See *Joubert v Enslin* 1910 AD 7 at 36 - 37. On the view which I take of the matter it is not necessary to consider the civilian method of computation.

[14] As an alternative to his argument on the statutory method of computation counsel for the appellant submitted that by its use of the word "before" in s 40(2) of the Act the legislature had thereby indicated that the "clear days" method of computation was applicable to the interpretation of the section. The "clear days" method of computation requires the effluxion of the full number of specified days before the advent of the day upon which the competency question arises. See Joubert (ed) *The Law of South* Africa *supra* para 230. Applied to the present matter, both the first day (that is the date of publication) and the last day (the day of the meeting), would be excluded. Ten "clear days" before the meeting would mean that the meeting would at the earliest take place only on 18 July. For this submission counsel relied on a number of earlier cases dealing with the giving of notice, and in which the "clear days" method of computation was applied. See e g *Miller v Malmesbury Licensing Court v Another supra* ("at least four

days"); *Ex Parte Catsavis* 1941 WLD 81 ("not less than three weeks"); *Ex Parte Schoeman* 1943 OPD 197; *Ex Parte Douglas* 1964(4) SA 385 ("not less than six weeks"); *Ex Parte Curry* 1965(1) SA 392 (C) ("not less than six weeks"); *Cohn v Cohn* 1965(3) SA 203 (O); *Schoeman v Moller* 1950(3) SA 41 (O); *Loxton v Loxton- Loxton v Holder* 1942 TPD 201 at 203 ("at least" eight days "previous to the day of trial"); *Sowden v ABSA Bank Ltd v Others* 1996(3) SA 814 (W) at 819 D - E ("not later than two weeks"). Most of the above cases dealt with statutory provisions containing the expressions "at least", "not less than" and "before" but significantly these decisions are based on and reflect a strong influence of English authorities. In one of them (*Ex parte Catsavis supra*) Schreiner J remarked that the decision in *Miller v Malmesbury Licensing Court and Another*, *supra*, created a difficulty for him because s 5 of Act 5 of 1910 was held not to apply where the period was fixed by reckoning backwards. With some reluctance the learned judge found himself bound to follow the then established practice, based on the English authorities. I do not think that this Court is bound to

follow these decisions. *Cf Minister of Police v Subbulutchmi* 1980(4) SA 768 (A) at 773 H. On the contrary, if the legislature intended that the "clear days" method of computation be applied, it would have done so explicitly.

[15] For the above reasons I am of the view that s 4 of the Interpretation Act is the appropriate method of computation to be adopted in the interpretation of s 40(2) of the Act and I find that the Master gave proper notice of the first meeting of creditors.

[16] It is accordingly unnecessary to consider the argument that any discrepancy in the calculation of days did not result in any prejudice or "substantial injustice" within the meaning of s 157(1) of the Act.

[17] The appeal is dismissed with costs.

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K K MTHIYANE
JUDGE OF APPEAL

NIENABER JA **)Concur**
SCOTT JA **)**
CAMERON JA **)**

FRONEMAN AJA)