THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 857/2017

In the matter between:

MANTIS INVESTMENT HOLDINGS (PTY) LTD	**APPELLANT**
and	
EASTERN CAPE DEVELOPMENT CORPORATION	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT PORT ELIZABETH	**SECOND RESPONDENT**
W DE JAGER NO	**THIRD RESPONDENT**
C A SCHROEDER NO	**FOURTH RESPONDENT**

Neutral citation: *Mantis Investment Holdings (Pty) Ltd v Eastern Cape Development Corporation & others* (857/2017) [2018] ZASCA 95 (1 June 2018)

Bench: Ponnan, Swain and Dambuza JJA and Davis and Mothle AJJA

Heard: 22 May 2018

Delivered: 1 June 2018

Summary: Company in liquidation – issue of subpoenas by Master – set aside.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Mbenenge J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Ponnan JA (Swain and Dambuza JJA and Davis and Mothle AJJA concurring):

[1] This appeal has its genesis in a suretyship issued by a company previously known as Mantis Group Holdings (Pty) Ltd, now known as No 1 Watt Street (Pty) Ltd (the company in liquidation), in favour of the first respondent, the Eastern Cape Development Corporation, in respect of moneys loaned and advanced to the Bushman Sands Developments (Pty) Ltd (Bushman Sands).

[2] Bushman Sands was unable to repay the amount due to the first respondent and as a result it instituted action in the Eastern Cape Local Division of the High Court, Port Elizabeth (the high court) against the former and the company in liquidation claiming respectively repayment of the loan and enforcement of the suretyship undertaking in the amount of R19 357 645. Several defences were raised by the company in liquidation to the claim of the first respondent, but shortly before the commencement of the trial the appellant, Mantis Investment Holdings (Pty) Ltd, as the sole shareholder of the company in liquidation, successfully applied for its liquidation.

[3] The third respondent, W de Jager NO and the fourth respondent, C A Schroeder NO, were appointed the joint liquidators of the company in liquidation. At the second meeting of creditors held at the offices of the second respondent, the Master of the High Court, Port Elizabeth (the Master) on 19 July 2016 the claims of the appellant in the sum of R2 491 455 and the first respondent in the sum of R19 357 645, were admitted. Thereafter, on 4 August 2016 the appellant's attorney wrote to the liquidators setting out a list of persons and documents they desired to have subpoenaed. That request was forwarded by one of the joint liquidators to the Master, who on 12 August 2016 and in compliance with the request, summoned a number of employees (past and present) of the first respondent to appear before him on 24 August 2016.

[4] Aggrieved by this turn of events, on 14 September 2016 the first respondent launched an application in the high court seeking to review and set aside the subpoenas issued by the Master. The application succeeded before Mbenenge J, who subsequently granted leave to the appellant to appeal to this court.

[5] In arriving at his conclusion, Mbenenge J identified the issue for determination thus:

> 'At the hearing before me the issue for determination crystallized to one of interpretation and procedure. It was contended, by Mr Buchanan for the applicant, that after the applicant's claim was, despite opposition from the second respondent's camp, allowed as proven by the first respondent without the second respondent invoking the provisions of s 44(7) and asking for an interrogation, the appropriate procedure for revisiting and expunging a proved claim is that set out in s 45(3), which has not been complied with in the instant matter; the issuing of subpoenas without compliance with the requirements of s 45(3) has rendered the issuing of the subpoenas unlawful. Mr Beyleveld, for the second respondent, argued to the contrary, pointing out that, upon its proper construction, s 44(7) accords the second respondent the right to interrogate a creditor who has proved a claim for purposes of determining "sufficient facts to convince the liquidator to then invoke the provisions of s 45(3)," which is not where the impugned proceedings are at this stage.'

The learned judge then proceeded to a consideration of ss 44(7) and 45(3) of the Insolvency Act 24 of 1936. However, as I shall attempt to show, there is an antecedent question that ought to have occupied the attention of the high court. As that question is

dispositive of the appeal, it is unnecessary to consider whether that court was correct in its interpretive exercise. This should not be construed as an endorsement of the correctness of the high court's approach on that score.

[6] The very essence of our Bill of Rights is that an individual should not be subjected to unreasonable intrusions on their liberty or the privacy of their person, property or effects. The Master has no reservoir of power outside the statutory instruments that authorise an intrusion upon those rights and thus no general authority to make an order that impinges on those rights. A subpoena, even one at the hands of the Master, is a significant invasion of the rights of an individual and must therefore be exercised within certain clearly defined limits.

[7] The request from the appellant's attorney to the co-liquidator for the employees of the first respondent and for all documents relating to the grant of the loan facility to be subpoenaed was forwarded by the latter to the Master. The request itself was unmotivated. Although no statutory provision was alluded to in support of the request, one would have been forgiven for thinking that it is to the provisions of the Insolvency Act that one had to look. Nor was there any articulation in the request as to the source of the envisaged power to be exercised by the co-liquidator or the Master. In simply forwarding the request to the Master, the co-liquidator did not bring an independent mind to bear on the application. Rather, he appears to have contented himself in acting as no more than a mere conduit.

[8] In acceding to the request of the co-liquidator, the Master invoked ss 415 and 417 of the Companies Act 61 of 1973. Neither the Master nor the liquidator, who forwarded the request to the Master, deposed to affidavits in this matter. It is thus unclear what the legal basis was for the request to the Master or why the latter thought that ss 415 and 417 of the Companies Act found application. But, even if those provisions did apply, as Berman J pointed out in *Foot v The Master*:[1]

[1] *Foot v The Master* unreported judgment delivered on 23 July 1993 in the Cape Provincial Division, cited with approval in *Laskarides v German Tyre Centre (Pty) Ltd (In Liquidation) and others NNO* 2010 (1) SA 390 (W) at 393F-394A. See also P M Meskin *Insolvency Law* (1990) Service Issue 49 at 8-7.

'Now to oblige a person, not an officer or director of a company in the course of being wound-up, to appear at a public enquiry held to enquire into the business and affairs of that company is a serious matter, not one lightly resorted to. It is an obligation, the performance of which is demanded under threat of imprisonment if not carried out, it is an invasion of an individual's privacy which is countenanced only under specific conditions and specific circumstances. It requires a person to "bare his soul" in public, and a person who is authorised to require the attendance of such a person for the purposes of interrogation must of necessity invoke this authority and exercise this power circumspectly, after due and proper consideration as to the need for such interrogation, the aim, ambit and purpose thereof and to ensure that the person concerned is not called for the examination on matters extraneous to the enquiry. That person, in this case the master, in considering whether to require the attendance of a particular person at an enquiry in terms of s 415 of the Act, must apply his mind to what may lawfully and relevantly be required of a proposed "interrogee" by way of oral evidence and delivery of books and records and other documentation. He (the master) is not the tool or agent of the liquidator, obliged to carry out the latter's instructions; the master may take advice and may consult the liquidator, but calling for the attendance of a person at an enquiry under s 415 of the Act, he is his own man, performing a duty and exercising a right imposed and granted him by statute and he is required to bring an independent mind on the need for an enquiry and for an interrogation to be conducted thereat and as to the manner in which this is to be carried out.'

[9] None of those considerations appeared to weigh with the Master, who performed a mere rubber-stamping function in this case. It follows that the subpoenas could not stand and they were correctly set aside by the high court.

[10] In the result the appeal is dismissed with costs.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellants:	T Strydom SC (with him T Mkhwanazi)
	Instructed by: Ndobela & Lamola Incorporated, Pretoria Honey Attorneys, Bloemfontein
For Respondent:	GJ Marcus SC (with him JB Currie)
	Instructed by: Adams & Adams, Pretoria Phatshoane Henney Attorneys, Bloemfontein