REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 3218/12

In the matter between:

CRAIG MACLEAN HATHORN N.O.	**First Plaintiff**
CHRISTOPHER PETER VAN ZYL N.O.	**Second Plaintiff**
DUDLEY BERNARD DAVIDS N.O.	**Third Plaintiff**

and

MICHAEL ALEXANDER COWAN	**Defendant**

Heard: **12 November 2012**
Delivered: **12 December 2012**

RULING

SAVAGE AJ

Introduction

[1] Africa Plastics Holdings (Pty) Ltd ("the company") was placed into liquidation on 13 February 2009, with the first to third plaintiffs appointed as joint liquidators ("the liquidators") of the company on 6 March 2009.

[2] On 21 February 2012 an action was instituted in the name of the liquidators by Carina van Niekerk ("CVN") Attorneys on behalf of a creditor of the company, Olampa (Pty) Ltd ("Olampa") against the defendant, Mr Michael Cowan ("Cowan"), who is a creditor and former shareholder and director of the company. In this action the plaintiffs seek *inter alia* an order that the registration of two Notarial General Covering Bonds in the total amount of R6,500,000.00 registered in favour of the defendant constitute dispositions of the company's property; an order setting aside the bonds; an order declaring the defendant to no longer be a creditor of the company; an order setting aside the confirmation of the First Liquidation and Distribution Account of the company; and payment of the amounts of R813,941,36 and R3,859,071.85 plus interest at the rate of 15.5% per annum.

[3] On 15 March 2012 Cowan filed a notice in terms of rule 30(2)(b) that the institution of the action is an irregular and/or improper step by virtue of the lack of any authority on the part of CVN Attorneys to have represented the liquidators given the lack of indemnity provided to the liquidators. On 10 April 2012, Cowan launched an application to have the summons set aside on this basis.

[4] It is common cause that at the time that the action was instituted, CVN Attorneys and Olampa had not provided the plaintiffs with an indemnity against costs in respect of the action in terms of s 32(1)(b) of the Insolvency Act 24 of 1936. This indemnity was only provided to the liquidators on 16 April 2012, approximately two months after institution of the action.

[5] S 32(1) of the Act provides that –

'(a) *Proceedings to recover the value of property or a right in terms of section 25(4) to set aside any disposition of property under section 26, 27, 30 or 31, or for the recovery of compensation or a penalty under section 31, may be taken by the trustee.*[1]

(b) If the trustee fails to take any such proceedings these may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.'

[6] In terms of s157(1) of the Act –

"*Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby*

[1] S 25(4) permits the recovery by the trustee of the value of property or rights disposed by the insolvent or former insolvent under certain circumstances. S 26 concerns dispositions without value made by an insolvent, s 27 concerns antenuptial contracts, s 30 undue preference to creditors and section 31 collusive dealings before sequestration.

done, which in the opinion of the courts cannot be remedied by any order of the courts..."

[7] On 17 April 2012 a notice of intention to amend the particulars of claim was filed by the plaintiffs in terms of which *inter alia* Olampa seeks to be introduced as the fourth plaintiff in the proceedings. In addition, the amendment of certain monetary values contained in the particulars of claim and certain other formal amendments are sought. Cowan filed a notice of objection to the notice to amend in which he stated that the indemnification required by s32(1)(b) had not been provided; CVN Attorneys was not authorised to institute the action or act on the plaintiffs' behalf; the summons is a nullity; and the proposed amendment is an attempt to circumvent the provisions of the Prescription Act 68 of 1969, depriving the defendant appeared prescription in the event of a fresh summons. Thereafter, an application to amend was launched by Olampa in the name of the plaintiffs.

[8] Two applications are therefore currently before this court:

8.1 In the first application, Cowan applies in terms of rule 30(1) for the setting aside of the action on the basis that it is an irregular and/or improper step given that CVN Attorneys lacked authority to represent the liquidators of the company given that no indemnity was provided to the liquidators before the action was instituted.

Cowan seeks an order of costs *de boniis propriis* in respect of this application.

8.2 In the second application, the plaintiffs apply for an amendment to the summons and particulars of claim to the effect that Olampa (Pty) Ltd ("Olampa") be joined as a fourth plaintiff in order to prosecute, as creditor of the company, the claim that the defendant be declared not to be a creditor of the company and the relief associated therewith.

Background

[9] On 20 February 2012, CVN Attorneys notified the liquidators of Olampa's intention to institute action against Cowan in terms of s 32(1)(b) of the Act, advising that Olampa indemnified the liquidators against all costs incurred in the litigation and requested that the liquidator sign a power of attorney authorising CVN Attorneys to proceed with the litigation. On 21 February 2012, before the liquidators had responded, CVN Attorneys issued summons in the action purportedly on behalf of the liquidators but with no indemnity provided to the liquidators. In correspondence, CVN Attorneys expressed the view that the claim for the impeachment of the dispositions prescribed at the latest on 6 March 2012 and therefore had to be instituted prior to this date.

[10] On 27 February 2012 the liquidators demanded that the action be withdrawn given that adequate indemnity had not been provided by Olampa and that section 32(1)(b) of the Act was therefore not applicable. CVN attorneys failed to withdraw the action pursuant to the liquidators' demand.

[11] On 15 March 2012 Cowan filed both a rule 7 notice disputing CVN Attorneys' authority to represent the liquidators and a rule 30(2)(b) notice in which it was stated that the institution of the main action was irregular and invalid. No response was received to these notices as a consequence of which Cowan launched the application to set aside the action.

[12] An indemnity was furnished to the liquidators in terms of section 32(1)(b) by Olampa after 16 April 2012. The liquidators however did not ratify the institution of the action.

[13] On 17 April 2012 CVN Attorneys delivered a notice of intention to amend the particulars of claim so as to introduce Olampa into the action as a plaintiff seeking additional relief. Cowan objected to the proposed amendments on the ground that these were impermissible in light of the fact that the proceedings are a nullity given the absence of the indemnity at the time that the action was instituted. On 16 May 2012 Olampa, in the name of the liquidators, launched an application seeking leave to amend

the particulars of claim pursuant to the notice. Cowan opposes this application.

Rule 30 application

[14] This court is granted wide powers in respect of rule 30 to determine what constitutes an irregular step and whether such step warrants proceedings being set aside. This includes circumstances in which the step taken may be set aside as a result of nullity. The court may overlook any irregularity which does not cause substantial prejudice to the other party. Proof of prejudice is however a prerequisite to success in an application in terms of rule 30(1).[2]

[15] The first issue to be determined in this matter is whether the provision of indemnity by a creditor to a trustee in terms of s32(1)(b) is a prerequisite and whether the failure to provide such indemnity when instituting the action result in the action being invalid or a nullity. S32(1)(b) of the Act is an unusual provision in terms of which a creditor is entitled to institute certain proceedings in the name of the trustee. The creditor is required to provide the trustee with an indemnity against costs, the effect of which is to insulate the trustee, and consequently the general body of creditors, from a risk of costs in respect of such proceedings.

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[2] Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Martinusen 1992 (4) SA 466 (W) at 469G

[16] In considering whether the provisions of s32(1)(b) are peremptory, Magid J in *Ex parte Harmse*[3] stated that –

> *'I am in respectful agreement with the manner in which Van den Heever J dealt with the concepts of peremptory and directory statutory provisions in Lion Match Co Ltd v Wessels 1946 OPD 376 at 380:*
>
> > *'In this connection those are unfortunate expressions; we are not concerned with the quality of the command but with the unexpressed consequences flowing from it...*
> >
> > *Ultimately the problem resolves itself into the question which was the intention of the legislator, and this intention must be derived from the words of the statute itself, its general plan and its objects.'*[4]

[17] In *Maharaj and Others v Rampersad*[5] Van Winsen AJA stated that:

> *"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In*

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[3] 2005 (1) SA 323 (N)
[4] At 328B-C
[5] 1964 (4) SA 638 (A) at 646 D-E

deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance."

[18] Olivier JA in *Weenen Transitional Local Council v Van Dyk*[6] put it as follows:

"*It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434 A – B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular*

[6] 2002 (4) SA 653 (SCA) 659 B-F

enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138 D – E, seems to be the correct one and does away with debates of secondary importance only."

[19] In *African Christian Democratic Party v Electoral Commission and Others*[7] O'Regan J concluded that a 'narrowly textual and legalistic approach to statutory interpretation is to be avoided' and doubted whether a statutory provision can ever be 'so peremptory that *eo nomine* compliance with it has to be preferred to realising its purpose'. The question to be determined was whether what was done constituted compliance with the statutory provisions viewed in the light of their purpose. In the interpretation of provisions of electoral legislation, the court held that these provisions had to be interpreted in the light of their legislative purpose within the overall electoral framework, and relevant constitutional rights and values.

[20] In determining whether the failure to provide indemnity at the time of instituting the action caused the action to be a nullity, the question is whether there has been compliance with the statutory provision viewed in

[7] 2006(3) SA 305 (CC)

light of its purpose[8] on the basis urged by Olivier JA in *Weenen Transitional Local Council* that a narrowly textual and legalistic approach is to be avoided.

[21] In support of the argument for Cowan that the proceedings are invalid, Mr Dickerson referred me to the matter of *Lupacchini v Minister of Safety and Security,*[9] in which proceedings instituted in the name of a trustee before appointment by the Master in terms of s 6(1) of the Trust Property Control Act 57 of 1988 were found to be invalid. This accorded with the decision in *Simplex (Pty) Ltd v Van der Merwe and Others NNO*[10] in which the court concluded that –

> '*S6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee (Honore's South African Law of Trust 4th ed 179). That whole scheme of the act is to provide a manner in which the master can supervise trustees in the proper administration of trust properly and s6(1) is essential to such purpose.*'

[22] That proceedings instituted by a trustee who has not been appointed as such by the Master are invalid, as in *Lupacchini*, accords with the provisions of s6(1) viewed in light of the purpose of the statute. It follows

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[8] African Christian Democratic Party v Electoral Commission and others at 317B-C
[9] 2010(6) SA 457 (SCA)
[10] 1996 (1) SA 111 (W) at 112 J-113C

therefore that a trustee not appointed by the Master may not act as a trustee and therefore lacks *locus standi* to institute proceedings.

[23] S32(1)(b) permits a creditor to sue where a liquidator elects not to do so and requires that the creditor insulate the liquidator from the costs of such proceedings. From the wording of s32(1)(b) it appears that the purpose of the provision is to permit proceedings to be launched by a creditor in the name of the liquidator. The purpose of the requirement of indemnity against costs is accordingly fundamentally distinct from the requirement that a trustee be appointed by the Master in order to act as trustee.

[24] It is the unexpressed consequences of the command which arise from the use of the word 'upon' in section 32(1)(b) in relation to the indemnity that stand to be determined. It was argued for Cowan that given that there exists no criminal or other sanction in the Act, the legislature must have intended the act to be nullity if proceedings are instituted in the absence of indemnity. I am satisfied that had the legislator intended the failure to provide indemnity at the outset of proceedings to result in the nullity of such proceedings, this intention should have been capable of being derived from the wording of the statute itself. I am not satisfied that it is; nor am I satisfied that such a finding would accord with the purpose of the statute.

[25] The second issue for determination is whether given the furnishing of the indemnity in April 2012, the provisions of s32(1)(b) can have retroactive effect. The indemnity was provided prior to the conclusion of the action at which point exposure to the risk of an order of costs may arise. As a result, there is no indication that either the liquidator or the general body of creditors was prejudiced by the provision of this indemnity after the institution of the proceedings. Furthermore, given that the purpose of the indemnity is to protect the trustee, and by extension the general body of creditors, against the risk of costs, once provided, the protection offered by the indemnity is in place, even if the indemnity was provided subsequent to the institution of the proceedings. In addition, I am satisfied in the circumstances of this matter that no person is harmed from a more generous interpretation of the provision that permits a conclusion that the provisions of s32(1)(b) have been complied with in circumstances in which the indemnity was provided after the action had been instituted.

[26] To this extent, I am satisfied that the purpose of the provision has been achieved, even with provision of the indemnity after the fact. There is nothing in the statute to suggest that such a conclusion is unjustified, or that it does not reflect the intention of the legislature, as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular.

[27] S157(1) of the Act provides that *'(n)othing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done...'*. It was argued that s157(1) cannot assist CVN Attorneys and Olampa in that the failure to provide the indemnity before instituting proceedings cannot amount to a *'formal defect or irregularity'* in that the provision of indemnity is a matter of substance. In this regard, reference was made to *Ex Parte Harmse*[11] in which Magid J (with Tshabalala JP and Van der Reyden J concurring) stated that 'a formal defect is one which relates to form or procedure rather than substance.'[12] Selke J in Ex parte Helps[13] put it this way –

> *'I am, therefore, inclined to think that the expression 'formal defect' ... comprehends something more than a defect relating to form merely, as distinguished from substance, that is to say, that it denotes some want of, departure from, prescribed or established form, whether or not that divergence affects the substance of the matter.'*

[28] I was also referred in argument by both counsel to the case of *Western Flyer Manufacturing (Pty) Ltd v Dewrance and Others NNO: In re: Dewrance and others NNO v North East Transport investments (Pty) Ltd (under judicial management) and Others.*[14] The facts of the matter before

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[11] 2005 (1) SA 323 (N)
[12] At 330E
[13] 1938 NPD143 at 147
[14] 2007(6) SA 459 (BHC)

this court are distinct from the facts in the Western Flyer case, in which an action was not brought in the name of the liquidators. It is apparent from the *obiter dictum* of Pistor AJ relating to the applicability of s157(1) that the judge considered -

> '(t)*he granting of an indemnity in terms of s 32 of the Act is clearly a prerequisite for the institution of any proceedings by a creditor in the name of the trustee. The failure to provide such an indemnity is therefore an irregularity. The question that needs to be answered is whether such an irregularity can be remedied in terms of section 157(1) of the Act'*.[15]

[29] A defect or irregularity is formal when it departs from prescribed or established form or procedure and does not affect the substance of the matter. To determine whether a defect is formal, the object of the section must be considered, including whether the omission has defeated that object (Mars The Law of insolvency in South Africa (9th edition) at 3.27). If the substance of the matter is the institution of proceedings by a creditor in the name of the liquidator, then the provision of indemnity is a formal requirement, something distinct from the substance of the matter.

[30] To the extent that the late provision of indemnity constitutes a 'formal defect or irregularity', there is no evidence of substantial injustice which

[15] At 468J-469A

has resulted as a consequence of the institution of the proceedings in this matter and therefore it follows that such proceedings are not invalid on this basis. This is so for two reasons. The first is that the indemnity was subsequently provided and there can therefore be no substantial injustice to the liquidator or any creditor as a result of the institution of the proceedings. The second is that the purpose of the indemnity is to protect the trustee, and by extension the general body of creditors, against costs, which has now occurred.

[31] CVN Attorneys raised prescription as the reason why proceedings were instituted without the indemnity having been provided, although in argument the point was not pursued and Mr Kantor referred me to the matter of *Duet and Magnum Financial Services CC v Koster.*[16] In that matter, the SCA held that in terms of s12(3) of the Prescription Act, a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises and not from the date on which the winding up commences or a liquidator is appointed. The onus is on the defendant to prove and pursue the issue of prescription. I am not satisfied that a defence of prescription has been shown to exist on the papers before me. Furthermore, no evidence has been placed before me to satisfy me that Cowan would suffer prejudice in this regard if the action were permitted to proceed. A plea of prescription in the action proceedings is clearly not precluded at any later stage and remains open to the defendant.

[16] 2010 (4) SA 499 (SCA)

[32] In the circumstances and for the reasons set out above, the action instituted by CVN Attorneys on behalf of Olampa is not invalid by virtue of the fact that the indemnity against costs was provided to the liquidators as trustees after the institution of the action proceedings in the matter. Accordingly the application to dismiss the action on the basis of an irregular step falls to be dismissed.

Amendment application

[33] In the application to amend the summons and particulars of claim, the plaintiffs seek *inter alia* to join Olampa as the fourth plaintiff in order to prosecute, qua creditor of the company, the claim for the defendant to be declared not to be a creditor of the company and the relief associated therewith. The plaintiffs claim that the introduction of a new party is justified with regard to the circumstances of the matter; there is no defect in the claim instituted; the provisions of the Prescription Act are not being circumvented; the application is made reasonably for the purposes of protecting the interest of the parties; and the respondent will not be prejudiced if leave to amend is granted, nor will any injustice be done by virtue of such amendment.

[34] Cowan opposes the application for amendment on the basis that given that the summons is a nullity, it falls to be set aside and cannot be cured

by the proposed amendments; the introduction of a new party in circumstances where the summons is a nullity is impermissible; the proposed amendment will not give rise to a *bona fide* triable issue between the parties; and the amendment is an attempt to circumvent the provisions of the prescription act 68 of 1969 and 'will deprive the defendant of a good plea of prescription in the event of fresh summons'.

[35] With regards to the issue of prescription, Cowan's attorney who was authorised to depose to the affidavit filed, stated that it was CVN Attorneys that had indicated that Olampa was reluctant to withdraw the action as it 'prescribes on 6 March 2012'. Consequently, if the amendment is permitted, this will deprive Cowan of a good plea of prescription, when the claim on Olampa's own version prescribed on 6 March 2012. This constitutes clear and substantial prejudice to Cowan and Olampa has cannot be found to have acted reasonably in the matter.

[36] Rule 28(4) permits any party seeking to amend any pleading or document to apply for leave to amend, where the notice to amend is opposed. The court has the discretion whether or not to grant the application, which discretion must be exercised judicially.[17] The primary object of allowing an amendment is 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'.[18] An amendment will not be allowed in circumstances which will

[17] Caxton Ltd v Reeva Forman (Pty) Ltd 1990(3) SA 547 (A) at 565G
[18] Cross v Ferreira 1950(3) SA 443 (C) at 447

cause the other party such prejudice as cannot be cured by an order for costs. Although a new cause of action or defence may be added by way of an amendment where that is necessary to determine the real issue between the parties,[19] this cannot occur if it would have the effect of resuscitating a prescribed claim.[20] However, even if it is shown that the plaintiff's claim as prescribed, an amendment will be granted if it appears to the court that it is only possible and not definite that prescription is the full answer to the plaintiff's case[21] in that a special plea may be raised in due course.

[37] I am satisfied that the amendments sought will permit a proper ventilation of the dispute between the parties and that there is no evidence before me to satisfy me that prejudice stands to be suffered by Cowan if the amendments sought are granted. Whilst the existence of prescription was raised by CVN Attorneys, no facts were placed before me by Cowan to substantiate a contention that the claim has prescribed. Cowan remains entitled to raise a special plea in this regard if necessary or appropriate and there is no reason as to why the amendments should not be granted as sought

[38] In the result, I make the following order:

1. The application in terms of rule 30 is dismissed with costs.

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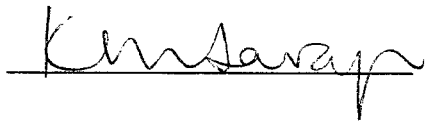
[19] Myers v Abramson 951 (3) SA 438 (C) at 449H – 450A
[20] Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 279B
[21] Cordier v Cordier 1984 (4) SA 524 (C) at 535I

2. The application to amend the plaintiffs summons and particulars of claim on the basis set out in the amended notice of motion is granted with costs.



K M Savage

Acting Judge of the High Court

Appearances:

For plaintiffs: A Kantor

Instructed by: Carina van Niekerk Attorneys

For respondent: J G Dickerson SC

Instructed by: STBB Smith Tabata Buchanan Boyes