REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 25059/2011

In the matter between:

CHRISTOPHER PETER VAN ZYL N.O.	**1st Applicant**
JURGENS JOHANNES STEENKAMP N.O.	**2nd Applicant**
MARC BRADLEY BEGINSEL N.O. **[in their capacity as the duly appointed liquidators of Black River Development (Pty) Ltd (in liquidation)]**	**3rd Applicant**

and

THE MASTER OF THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT, CAPE TOWN	**1st Respondent**
AIK CREDIT PLC	**2nd Respondent**

JUDGEMENT: 5 APRIL 2013

BOZALEK, J:

[1] The applicants, the liquidators of a company known as Black River Development (Pty) Ltd ('*Black River*'), seek to review the decision of the Master of the High Court ('*the Master*') in terms of which she refused to expunge the proven claim of the second respondent, AIK Credit PLC ('*AIK*'), a company registered in

Mauritius, in the liquidated estate of Black River. The Master does not oppose the application but AIK does so.

[2] Ultimately the core issue in this matter requires resolving the tension between the principle that, once there has been a *concursus creditorum,* no creditor in a liquidated estate can take steps to improve its position to the prejudice of other estate creditors, on the one hand and, on the other, the principle that temporary non-compliance with the provisions of Regulation 10(1)(c) of the Exchange Control Regulations, which requires Treasury approval of any transaction involving the export of capital, does not present a bar to the validity or enforceability of a claim based on such a transaction.

[3] Determination of this issue first requires, however, a setting out of the transactions which underlie AIK's claim, the history of the litigation which led to Black River's liquidation and the several phases in the proving of a claim by AIK in Black River's estate.

BACKGROUND

[4] In February 2008 the South African Reserve Bank (*'SARB'*) approved an intended loan of R50mil from Four Elements Protected Cell Company ('*Four Elements*), part of a foreign group of companies, to Queensgate Residential (Pty) Ltd ('*Queensgate Residential'*), a South African company part of the then Queensgate Group. That loan, however, for reasons which are not material, ultimately became a loan from AIK to Queensgate Wealth Manager (Pty) Ltd *('Queensgate Wealth')* pursuant to which an amount of €2 350 000.00 was loaned and advanced in terms of a written agreement.

[5] Two subsidiary companies within the Queensgate Group, Queensgate Waterkloof Property (Pty) Ltd ('*Queensgate Waterkloof*') and Queensgate Property (Pty) Ltd, which subsequently became Black River, stood surety for Queensgate Wealth's obligations to AIK. In terms of various agreements the responsibility for obtaining SARB approval for the loan rested upon Queensgate Wealth. As an illustration, clause 13 of the loan agreement between AIK and Queensgate Wealth recorded that the borrower (Queensgate Wealth) '*covenant(ed) that it had obtained the consent of the Reserve Bank of South Africa for the Loan from AIK and that such consent is unconditional*'.

[6] Shortly before the conclusion of the loan agreement between AIK and Queensgate Wealth the former sought a copy of SARB approval in respect of the proposed transaction. This was duly forwarded to AIK by Queensgate Wealth but upon examination it was found that the approval referred to Queensgate Residential and not Queensgate Wealth. In response to a query in this regard AIK was sent a letter confirming SARB's approval of the name change of the borrower to Queensgate Wealth and recording that SARB had amended its records to this effect.

[7] The application for SARB approval was effected by the borrower, through ABSA's Retail International banking branch, and not by AIK. Accordingly, when AIK granted the loan to Queensgate Wealth it believed that SARB approval which was required had been obtained in respect of the transaction. Unbeknownst to it, however, the original application reflecting Four Elements as the lender had not been revised to substitute AIK as the creditor. Furthermore, the new loan amount had also not been revised. In terms of the loan agreement AIK advanced the sum

of €2 326 500.00 to Queensgate Wealth on 17 April 2008 which loan was to have been repaid, together with an interest and costs, within six months.

[8] On 30 June 2008 Black River signed a deed of suretyship in terms of which it bound itself to AIK as surety and co-principal debtor with Queensgate Wealth in respect of the latter's indebtedness in terms of the loan agreement. Thereafter, on 22 July 2008, a surety mortgage bond was registered by Black River in favour of AIK. Similar arrangements were concluded between AIK and Queensgate Waterkloof.

[9] In April 2009 AIK applied for the winding up of the principal debtor, Queensgate Wealth, based upon its failure to repay the debt due under the loan agreement. One of the defences raised was that the failure to obtain the requisite Treasury consent to the transaction in terms of Regulation 10(1)(c) of the Exchange Control Regulations rendered the loan agreement null and void. The regulation provides as follows:

> *'10(1) No person shall except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose*
>
> *....*
>
> *(c) enter into any transaction whereby capital or any right to capital is indirectly exported from the Republic'.*

[10] This point was upheld by the Western Cape High Court per Zondi J who found that the loan agreement was indeed void by reason of the fact that the requisite permission had not been obtained from the Treasury. He held nevertheless that AIK was a creditor of Queensgate Wealth inasmuch as it enjoyed a remedy against it in the form of a *condictio* and accordingly was a

contingent or prospective creditor having *locus standi*. In May 2009 application was made for the liquidation of Black River. A provisional order of liquidation was granted on 4 June and a final order on 28 July 2009.

[11] In the meantime, no doubt in response to the point raised in the Queensgate Wealth liquidation application, AIK instructed attorneys to apply on its behalf to SARB's Exchange Control Department for approval of the original loan. In September 2009 SARB stated in a letter that it had noted the receipt of the loan in the amount of €2 326 500.00 by Queensgate Wealth from AIK. However, it was only in July 2011 that attorneys acting on behalf of AIK and the liquidator of Queensgate Wealth applied to SARB for the '*approval/ratification'* of the loan agreement. On 16 August 2011 a meeting was held at the offices of SARB's Financial Surveillance Department to discuss this application at which meeting an official stated that the loan '*may be regarded as having been regularised*'. This was subsequently confirmed by SARB upon its receipt of a minute of the meeting.

[12] Prior to Treasury approval of the loan being sought and ultimately obtained by AIK the process of proving claims in Black River's estate commenced. On 8 October 2009 the claim of AIK in the liquidated estate was admitted to proof in the amount of €2 580 495.00, an amount made up of the original sum loaned to Queensgate Wealth together with interest and costs. On 21 October 2009, however, AIK's attorney addressed a letter to the applicants notifying them that his client abandoned part of its claim as a result whereof it was reduced to €831 750.00 together with interest thereon. The reason for this abandonment was AIK's concession that this was the amount to which Black River's indebtedness had been limited in the surety

mortgage bond. In the original suretyship Black River bound itself as surety and co-principal debtor for Queensgate Wealth's indebtedness to AIK in terms of the Loan Agreement '*limited to the amount of the registered bond'* which would be in the amount of €831 750.00. In turn the suretyship mortgage bond recorded that whereas Queensgate Wealth was indebted to AIK in the sum of €831 750.00 and whereas Black River had entered into a deed of surety, Black River was indebted to AIK in the aforesaid sum and it bound certain property in Stellenbosch as a first mortgage in favour of AIK.

[13] Certain of the recordals in the surety mortgage bond arguably purported to extend Black River's indebtedness to AIK beyond the aforesaid figure but in the light of the abandonment by AIK of anything other than its claim for €831 750.00, it is unnecessary to consider the question of the precise ambit of the surety mortgage bond in this respect.

[14] On 11 May 2011 the applicants' attorney addressed a letter to the Master requesting that she expunge AIK's claim in terms of s45 of the Insolvency Act, No 24 of 1936 by reason of the fact that the underlying loan agreement was void for lack of Treasury approval in terms of Regulation 10(1)(c). In doing so they relied upon the judgments of Zondi, J in the Queensgate Wealth and Queensgate Waterkloof winding up applications. In response to these representations AIK's attorneys addressed a letter to the Master on 6 June 2011 disputing that there were any grounds for an expungement and relying on the judgment of the Supreme Court of Appeal in *Oil Well (Pty) Ltd v Protech International Ltd and Others* 2011 (4) SA 394 (SCA) which had been delivered on 18 March 2011. In that matter the Court held

that failure to obtain prior Treasury consent for an agreement hit by Regulation 10(1)(c) of the Exchange Control Regulations did not render such agreement void.

[15] A month later the applicants' attorneys responded to the above letter in a further letter addressed to the Master still contending that AIK's claim should be expunged. In the light of the *Oil Well* judgment they no longer maintained that the initial loan agreement or transaction was void but expressed the view that the transaction could not be '*enforced'* without the necessary consent from the Treasury being obtained. It was further contended that any *ex post facto* application for approval of the loan could not assist AIK since, if it was successful, '*AIK would obtain a right that it did not have as at the date of institution of the concursus and thereby become a creditor under circumstances where it was not previously a creditor to the substantial prejudice of other creditors of Black River'.*

[16] On 12 September 2011 the Master refused the applicants' request that she expunge AIK's claim. By this time Treasury approval had finally been obtained. Furthermore, the Master reasoned that the *Oil Well* judgment had in effect overruled Zondi, J's finding that the loan was invalid for want of approval in terms of Regulation 10(1)(c), and had found that it was not in the public interest that the Exchange Control Regulations be used as a means to escape from contractual relations. The Master appears also to have expressed doubt that the underlying loan required SARB approval in terms of Regulation 10(1)(c) as it did not amount to the '*export of capital'.*

LEGAL FRAMEWORK

[17] The review application is brought in terms of s151 of the Insolvency Act, read together with s339 of 1973's Companies Act, in turn read with Item 9 of Schedule of 5 of 2008 Companies Act.

[18] Section 151 reads as follows:

> *'…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 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 …'*

[19] It was common cause between the parties that the nature of the review before this Court is a wide one, the Court being entitled to have regard to the nature of the evidence placed before the Master and, if satisfied that such decision was wrong, to correct it and substitute same with that of its own. As was stated by the Supreme Court of Appeal in *Nel and Another NNO v The Master (Absa Bank Limited and Others intervening)*[1]:

> *'South African courts have long accepted that the review envisaged by s151 of the Insolvency Act is the "third type of review" identified more than 100 years ago in Johannesburg Consolidated Investment Company v Johannesburg Town Council … i.e. where Parliament confers a statutory power of review upon the Courts. In the Johannesburg Consolidated Investment Company case, Innes CJ stated... with reference to this kind of review, that a Court could*
>
> > *"…enter upon and decide the matter de novo. 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*

[1] 2005 (1) SA 276 (SCA) at para [22]

the additional privileges of being able, after setting aside the decision arrived …, to deal with the matter upon fresh evidence…"

[20] The applicants sought to have AIK's claim expunged in terms of s45 of the Insolvency Act which provides for the delivery by the officer presiding at a meeting of creditors to the trustee or liquidator of every claim proved against the insolvent estate together with every supporting document. Sub-section 3 thereof provides that if a trustee disputes a claim after it has been proved against the estate '*he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim'.* Thereafter the Master may confirm, reduce or disallow the claim after having provided the claimant an opportunity to substantiate his claim. It is not in dispute that the proper procedures were followed in this matter and that all parties were afforded an opportunity to make representations regarding the validity of the claim.

THE ISSUES

[21] The primary issue distilled in the course of argument was how to reconcile the *Oil Well* decision regarding the effect of a failure to obtain Treasury permission to enter into an affected transaction in terms of the Exchange Control Regulations (in this case the loan agreement) with the common law relating to the effect of a *concursus creditorum* in an insolvent estate. A secondary issue was raised, namely, whether the Exchange Control Regulations were applicable in the first place, AIK's argument being that the underlying transaction or agreement did not involve an export of capital or any right thereto. The final issue was whether costs should be awarded against the applicants in the event that their application to expunge was unsuccessful.

THE ARGUMENTS OF THE PARTIES

[22] On behalf of the applicants it was contended that the crucial provisions of the *Oil Well* judgment provide that, absent the required Treasury approval, a claim which otherwise requires such approval is not enforceable. It was further argued that a long line of authority has established that once a *concursus creditorum* has been established by a winding up order no creditor of the insolvent or liquidated estate can thereafter enter into any transaction regarding estate matters which prejudices the general body of creditors. Noting that the *Oil Well* decision did not deal with the context of an insolvency or winding up, applicants' counsel contended in effect that the ratio in *Oil Well* was of no assistance to AIK since it had not obtained SARB approval for the loan by the critical time of *concursus* with the result that its claim was unenforceable and fell to be expunged.

[23] Relying on the judgment in *Oil Well* and its antecedent case, *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A), Mr Duminy SC, who appeared together with Mr Edmunds, argued on behalf of AIK that Treasury approval in terms of Regulation 10(1)(c) does not create new rights. Rather the position is that the underlying transaction is not invalid and only in instances where Treasury consent is refused will a debtor be entitled to resist the claim on that ground. Since SARB approval was eventually obtained by AIK on 16 August 2011 there was no basis for the applicants to argue that the claim was unenforceable. AIK's counsel argued in the alternative that even if the claim based on the underlying loan agreement was unenforceable as at the institution of the *concursus,* AIK was nonetheless a preferent creditor in Black River's liquidated estate because the security mortgage bond passed by Black River was wide enough to cover the liability of Queensgate

Wealth to AIK in terms of the enrichment claim alluded to by Zondi J in the liquidation application.

ANALYSIS

[24] The principle that upon a *concursus creditorum* coming into existence in an insolvent estate no creditor may improve his position vis-à-vis other creditors has long been established in our common law. In *Walker v Syfret N.O.*[2] the Appellate Division stated as follows:

> *'The sequestration order crystalises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.*[3]
>
> *The effect of a winding up order is to establish a concursus creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'.*[4]

[25] This principle was endorsed by the Appellate Division in *Ward v Barrett NO and Another* and in *Durmalingham v Bruce NO*[5] *where*, after reference to *Ward v Barrett NO*[6] and *Walker v Syfret N.O.* the Court held:

> *'The position in the present case is, in my view, exactly the same. Whatever rights the respondent may have had against the insolvent prior to the insolvency the whole position was altered by the insolvency… The claim of each creditor has to be dealt with by the trustee as it existed at the date of the sequestration of*

[2] 1911 (AD) 141
[3] Per Innes J at page 166
[4] Per De Villiers CJ at page 160
[5] 1964 (1) SA 807 (D)
[6] 1963 (2) SA 546 (A)

the insolvent's estate. At that date, the respondent was merely a concurrent creditor insofar as the proceeds of realisation of the certificates relating to the International Bus are concerned. Assuming the correctness of the facts alleged in the declaration, the respondent was, at that date, entitled to claim rectification of the notarial bond so as to give him a preference in respect of such proceeds. The respondent's personal right against the insolvent could not be converted into a jus in rem under a registered bond. A mistake, moreover, can be rectified only so long as third parties are not injured thereby…' [7]

[26] The decision in *Oil Well* built upon the principle established in *Barclays National Bank Limited v Thompson* 1985 (3) SA 778 (A) where the Appellate Division was required to consider whether a foreign resident (the respondent) was entitled to recover funds in legal proceedings against a local bank (the appellant) based on a transaction in which it was common cause that prior Treasury approval had not been obtained in terms of Regulation 3(1)(e) of the Exchange Control Regulations. That regulation provides that no person could without Treasury permission *'make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person'.* The appeal concerned an application to amend granted by the trial court allowing the respondent to amend his particulars of claim to introduce a fresh paragraph alleging that subsequent to the transaction the Treasury had granted the respondent permission in terms of Regulation 3(1)(e) for payment of the claim. The appellant had objected to the proposed amendment on the basis that it was not competent in law since its effect would be to include a cause of action which had not existed at the time of issue of the summons.

[7] At 811 F – H

[27] The Appellate Division held that a plaintiff resident outside the Republic who has a claim sounding in money against a defendant who is an incola of the Republic and who seeks legal redress by instituting action against such defendant in a South African Court in whose area of jurisdiction the defendant is domiciled, will not incur any disability either in suing a defendant or in obtaining the Court's judgment in his (the plaintiff's) favour on account of the absence of Treasury permission, within the meaning of Regulation 3(1)(c) of the Exchange Control Regulation, for payment by the defendant to the plaintiff of the amount of the latter's claim. It held further that the presence or absence of Treasury permission is relevant only insofar as it may be necessary to consider whether, in making due performance of his legal and fully exigible obligation to the judgment creditor, the judgment debtor commits the criminal offence created by Regulation 22 of the aforesaid regulations.

[28] In reaching this conclusion the Court quoted with approval from the judgment of Van Winsen J in the case of *McConnel v SA Stevedores Service Company Holdings (Pty) Ltd and Another* 1976 (2) SA 126 (C) where the learned judge stated the following of the Exchange Control Regulations:

> *'The object of the regulations is the control of foreign exchange in the national interest. That aim is likely to be achieved just as effectively by securing Treasury approval, for example during the course of an action, or after judgment, as by securing it before the issue of summons.'*

At para H on page 794 Hoexter JA on behalf of the Court in *Barclays National Bank Ltd v Thompson* (supra) stated as follows:

> *'I am unable to accept the argument that Treasury exemption or permission is a fact which "entitles" the plaintiff to payment. This argument, as counsel for the plaintiff*

pointed out, confuses legal liability with performance. What entitles the plaintiff to payment is the existence of a valid claim reinforced (should the Court uphold it) by judicial decree. The presence or absence of Treasury exemption or permission is relevant only insofar as it may be necessary to consider whether in making due performance of his legal and fully exigible obligation to the judgment creditor the judgment debtor commits or does not commit the criminal offence created by reg 22. The commission or avoidance of the offence by the judgment debtor has nothing whatsoever to do with the independent existence of the plaintiff's claim and its due enforcement by the legal process.'

[29] Dealing with the argument that the effect of Regulation 3(1)(c) was to deny to plaintiffs residing beyond the Republic who could not obtain the necessary Treasury approval the right of access to our courts, Hoexter JA stated that the notion that such access could be denied by a purely administrative act *'unrelated to the administration of justice is, I think, repugnant both to ordinary notions of justice and to common sense'* adding that *'(b)earing in mind the purpose of the regulation there is, I consider, nothing in the language of regulation 3(1)(c) which even remotely carries such an implication. Embodied in the regulations is a criminal sanction which is designed to enforce compliance therewith. The penalty prescribed for non-compliance is a stiff one. In my view the Legislature was here content with the said criminal sanction as being sufficient to ensure compliance with reg 3(1)(c)*[8]*.* Finally the learned judge quoted with approval from the article in 1982 (99) SALJ at 125 – 135 by AC Beck where the author concluded: *'Treasury permission has no bearing on the jurisdiction of a court and, in fact, does not even constitute a defence to the action – it is merely a limitation on payment, which can be removed by the Treasury*

[8] At page 795 E – J

at any time, and there is no reason why the plaintiff should have to wait for this before obtaining a judgment.'

[30] In *Oil Well*, Harms DP on behalf of the Court stated as follows (at para 17):

'[17] Reliance on the Regulations in order to escape contractual obligations is not something new. However, as Steyn CJ said nearly 50 years ago, the Regulations are there in the public interest and not to provide "an unwilling debtor with a ready instrument for evading liability", or "to grant a selective moratorium to a particular class of defaulting debtors". Their purpose, said Trollip JA, is to enable the Treasury to exercise proper control over transactions effecting foreign currency, in order to protect the Republic's foreign reserves.

[18] Debtors remained undaunted and relied especially on Regulations 3(1)(c) to evade judgment. After a number of conflicting judgments this Court held, in spite of the peremptory language of the provision ("no person shall"), that the prior consent of the Treasury was not required in order to obtain a court order for payment…

……

[24] In search of the elusive interpretation or meaning expressed in the Regulations, it is necessary to reiterate that the object of the Regulations in general is to regulate and control foreign currency, and the object of Regulation 10(1)(c) in particular is to "control foreign exchange in the public interest and to prevent the loss of foreign currency resources through the transfer abroad of assets held in South Africa". The Regulations are, accordingly, for the public interest and not to protect any private interests. They were adopted for the sake of the Treasury and not for the sake of

disgruntled or disaffected parties to a contract. This is apparent from the penalty provision …'

Finally, Harms DP concluded[9]:

'This does not mean that in the in the absence of Treasury consent the transaction is enforceable without more. Parties who enter into a contract that may conceivably be hit by the Regulations are, unless the contract provides otherwise (in this case it did not provide otherwise), both obliged to take the necessary steps to obtain the Treasury's consent (something expressly agreed to by the parties). This must be so because of the supposition that the parties negotiated in good faith and intended to enter into an effective contract. There is nothing preventing the Treasury from consenting to a transaction ex post facto, a necessary corollary of the judgment in Barclays National Bank Ltd v Thompson (supra). This means that the transaction absent consent is not void at the behest or election of one of the parties to it. A party faced with a claim based on a transaction which that party believes is covered by the Regulation can therefore not rely only on the lack of consent to avoid the claim. The defendant may in appropriate circumstances file a dilatory plea pending the determination by the Treasury of its application for the necessary consent. Once the Treasury refuses to grant consent, the defendant would be entitled to resist that claim on that ground. Furthermore, if performance took place without consent, neither party may claim restitution. It would then be for the Treasury to invoke regs 22A, 22B and 22c to undo the effect or proposed effect of the transaction.'

[31] By parity of reasoning I consider that a claim by a creditor against an insolvent estate cannot be rejected for the sole reason that it is based upon a transaction requiring Treasury approval in terms of s10(1)(c) but which approval has at the relevant time neither been obtained nor refused. To hold otherwise would lead to

[9] At para 25

'greater inconveniences and impropriety', the phrase used by Voet as referred to in *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274, and deliver a windfall advantage to competing creditors in the estate. It ignores the fact that the underlying transaction, the loan agreement, was not void and that Treasury approval therefor could still be sought.

[32] On behalf of the applicants' Mr Goodman SC argued that a failure to expunge the claim in the circumstances of the present matter would allow AIK to convert a non-enforceable claim as at the date of the winding up of Black River to an enforceable claim thereafter by the obtaining of Treasury consent, thereby disturbing the *concursus*, altering the rights of other creditors to the prejudice of the general body of creditors and was accordingly impermissible. Although *Oil Well* may appear to suggest that the claim is temporarily unenforceable until such time as Treasury permission is obtained for the underlying transaction that statement must be seen in context. As applicants' counsel himself observed the decision in *Oil Well* in no way sought to address the application of the principle which it confirmed in the context of a winding up.

[33] To hold that a claim by a creditor based on a transaction in respect of which Treasury approval has not been obtained is irrevocably unenforceable because a *concursus creditorum* intervened before such approval was sought would, I consider, produce an arbitrary and inequitable result not intended by the regulations. The argument that until Treasury consent is obtained the transaction is not enforceable and that allowing the claim will impermissibly disturb the *concursus creditorum* is based, in my view, upon a narrow reading of para 25 of the judgment in *Oil Well*

where Harms DP stated that this does not mean that in the absence of Treasury consent the transaction is enforceable *'without more'*. Significantly, in the same passage, citing *Barclays National Bank Ltd v Thompson,* he goes on to state that, this does not mean that the transaction, absent consent, is void at the behest or election of one of the parties thereto. At best an affected party may file a dilatory plea pending the determination by the Treasury of the application for the necessary consent.

[34] The argument for the applicants relied heavily on the principle that the rights of other creditors should not be prejudiced by anything done post *concursus* since the positions of the parties are frozen as at that date and their rights and obligations are determined on that basis. I consider, however, that it is a misconception to view *ex post facto* Treasury approval as an interference with the position obtaining at the *concursus creditorum* and therefore of no effect. This view appears to be based on the assumption that without Treasury consent AIK's claim is invalid and on the premise that the underlying transaction was void. As the leading decisions on the effect of the Regulations have made clear, there is nothing preventing SARB from affording the relevant transaction the necessary consent *ex post facto*. At best for the competing creditors as at *concursus creditorum* they had no more than a *spes* that the transaction underlying AIK's claim would ultimately not receive Treasury consent in which event the claim might be unenforceable. Applying the principles in *Oil Well* and *Barclays National Bank Ltd* in an insolvency context must, in my view, of necessity lead to the recognition of a claim whose only defect is that Treasury consent has yet to be obtained in terms of Regulation 10(1)(c) of the Exchange Control Regulations, notwithstanding that a *concursus creditorum* has intervened.

Should such consent be thereafter refused a different situation arises and argument may then arise as to the validity of the claim. That question, however, does not require to be addressed in the present matter since Treasury consent was ultimately obtained prior to the Master taking her decision not to expunge the claim.

[35] As was made clear in *Oil Well* until such time as Treasury consent has been granted or refused the party wishing to avoid the transaction can do no more than file a dilatory plea in response to an action enforcing the transaction. As the Supreme Court of Appeal has held, until such time as Treasury approval is in fact refused there is no defence to the claim, nor is it conditional. Since Treasury approval was ultimately obtained by AIK there is, in my view, no basis in law for the applicants to argue that AIK's claim must be treated as unenforceable.

[36] Given the view that I take of this matter it is unnecessary to consider AIK's alternative arguments, namely, that the Regulations were of no application in the first place and further that even on the applicants' version that the loan was unenforceable at the institution of the *concursus*, AIK was a preferent creditor in the Black River estate by virtue of the security mortgage bond being wide enough to cover the liability of Black River to AIK in terms of an enrichment claim.

[37] In the result and for these reasons the application falls to be dismissed.

COSTS

[38] There remains only the question of costs. Section 151bis of the Act, entitled '***Cost of Review'*** provides as follows:

> '*If the Court reviewing any matter referred to in s151 confirms a 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'.

[39] In Van Zyl N.O. v The Master and Another 1991 (1) SA 874 (E) the purpose of this statutory provision was described as follows (at 880B – C):

> *'Section 151bis seems to me to have been designed to discourage persons - including trustees in insolvent estates (Wynne and Godlonton NNO v Mitchell and Another NNO; Wynne and Cornish NNO v Mitchell and Another NNO 1973 (1) SA 283 (e) at 292) - who may be aggrieved by any decision of the Master from lightly bringing that decision in review on the assumption that whatever the result of the review may be, the costs will come out of the estate. This will only happen if in the view of the Court good grounds exist for such an order. In the present case no such good grounds have been advanced or made out, and I see no reason why the general body of creditors should be mulcted in the costs of the applicant's unsuccessful application.'*

[40] On behalf of AIK it was argued that applicants took an immediate view that the first respondent's decision to recognise AIK's claim should be set aside and did not reconsider their decision when the *Oil Well* judgment was drawn to their attention nor even when they learnt that Treasury consent had been granted in respect of the loan. AIK contended furthermore, that the review application served primarily to protect the interest of another major proven creditor and was not undertaken in the interests of the general body of creditors.

[41] I do not consider, however, that there is substance in these contentions. In the first place it appears that prior to the launching of the application the liquidators

notified all creditors in the estate of the proposed step and called for any objections thereto to be made known. Nor does the allegation of bias towards the interests of another creditor appear to be borne out by the facts. Subsequent to the launching of the application that creditor's claim was itself expunged and set aside pursuant to an order of this Court. Without any further information on the subject it does not appear that the liquidators stood to gain any advantage from the outcome of the present application. There is also nothing to suggest that the course which they adopted in launching the review application was not done on the basis of legal advice and what must be borne in mind, furthermore, is that the view which they took of the matter was, at the least, reasonably arguable. In the circumstances I see no warrant for ordering that the applicants pay the costs of this application, let alone for making a punitive order such as a special costs orders against both the liquidators and their attorneys *de bonis propriis* on an attorney and client scale as was initially sought by on behalf of AIK.

[42] For these reasons the following order is made:

1) *The application is dismissed;*
2) *The costs of both the applicants and the second respondent shall be costs in the winding up of Black River Development (Pty) Ltd (in liquidation).*

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L. J. BOZALEK

JUDGE OF THE HIGH COURT

For the Applicant:	***Adv R Goodman SC***
As instructed by:	***Edward Nathan Sonnenbergs***
	Ref: Ms J Langford
For the 1st Respondent:	***n/a***
As Instructed by:	***n/a***
For the 2nd Respondent:	***Adv W Duminy SC et Adv M Edmunds***
As Instructed by:	***Scheibert and Associates***
	Ref: Ms H Cronje