Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 12036/2013

AFRICAN NATIONAL CONGRESS Applicant

v

JURGENS JOHANNES STEENKAMP N.O. First Respondent

HASSEN KAJIE N.O. Second Respondent

(in their capacities as the duly appointed joint trustees of the insolvent estate of the Kebble Buitendag Investment Trust)

ANNA FRANCINA VENTER N.O. Third Respondent

RAINOTES BANTUBONKE NDUNA N.O. Fourth Respondent

JOHANNES FREDERICK KLOPPER N.O. Fifth Respondent

(in their capacities as the duly appointed joint trustees of the insolvent deceased estate of Roger Brett Kebble)

A. K. AMOS N.O. Sixth Respondent

THE MASTER OF THE WESTERN CAPE

HIGH COURT, CAPE TOWN Seventh Respondent

Court: Justice J Cloete

Heard: Tuesday, 29 April 2014

Delivered: Friday, 30 May 2014

JUDGMENT

CLOETE J:

Introduction

[1] The applicant seeks an order expunging the claim of the trustees of the insolvent deceased estate of Roger Brett Kebble (*'the Kebble trustees'*) of R14 432 576.64 which was proven in the insolvent estate of the Kebble Buitendag Investment Trust (*'the KBIT'*) on 25 July 2007.

[2] The third to fifth respondents, who are the Kebble trustees, oppose the relief sought. The first and second respondents (*'the KBIT trustees'*) abide the court's decision but have placed certain relevant facts before the court on affidavit. The sixth respondent (a magistrate at Stellenbosch who presided at the creditors meeting at which the claim was proven) and the seventh respondent (the Master) also abide.

[3] The Kebble trustees contend that:

3.1 the applicant has no *locus standi* to seek the relief;

3.2 the application is a mischievous and misguided attempt by the applicant to escape liability in the action instituted against it on 21 January 2008 by the KBIT trustees in the South Gauteng High Court (*'the pending action'*) to set aside dispositions totalling R627 286.50 which were allegedly made to the applicant by the KBIT (duly represented by the late Kebble) between 30 May 2005 and 10 June 2005, in terms of s 26(1)(b) of the Insolvency Act 24 of 1936 (*'the Insolvency Act'*); and

3.3 even if granted, the order sought will not assist the applicant in the pending action.

Background

[4] The late Kebble (*'Kebble'*) passed away during September 2005. Following his death certain companies which he controlled were liquidated. His deceased estate was sequestrated on 25 April 2006, and the Kebble trustees were appointed by the Master on 11 September 2006.

[5] According to the Kebble trustees, insolvency enquiries were held into the affairs of certain of those companies as well as Kebble's estate. These were either accompanied or followed by forensic investigation. The results indicated, in broad

terms, that Kebble had defrauded the JCI Group and Randgold of approximately R2.76 billion. The JCI Group has proved claims in the Kebble estate totalling some R80 million and Randgold has proved claims totalling approximately R2.68 billion.

[6] Further, the forensic investigation indicated that, of the defrauded funds, Kebble, either personally or through entities controlled by him (one of which was the KBIT) made donations, and paid certain expenses, of both the applicant and the ANC Youth League (*'the ANCYL'*) and purchased motor vehicles and made donations to members of the applicant and the ANCYL. Kebble paid an amount of R14 432 576.64 to the KBIT, and from there channelled R562 286.50 to make donations and pay expenses of, amongst others, the applicant. [The reason for the discrepancy between the amounts of R562 286.50 and the claim of the KBIT trustees of R627 286.50 is unclear, but it is common cause that the KBIT trustees claim R627 286.50 in the pending action.]

[7] The KBIT was provisionally sequestrated at the instance of the Kebble estate on 11 May 2007 and a final order was granted on 11 June 2007. The KBIT trustees were appointed by the Master on 21 August 2007. The effective date of the KBIT's sequestration is 11 May 2007 in accordance with s 10 of the Insolvency Act.

[8] The first creditors meeting of the KBIT estate was held before the sixth respondent on 25 July 2007. The Kebble trustees submitted their claim of

R14 432 576.14 in terms of s 44 of the Insolvency Act and it was admitted to proof by the sixth respondent.

[9] During January 2008 the KBIT trustees instituted the pending action against the applicant in the South Gauteng High Court. They seek an order setting aside the dispositions made to the applicant on the basis that they were dispositions without value in terms of s 26(1)(b) of the Insolvency Act, having been made in the two year period prior to the KBIT's sequestration. It is common cause that, in accordance with s 26(1)(b) aforesaid, if the KBIT trustees are able to prove that the dispositions were so made, the applicant will have to prove that, immediately after they were made, the KBIT's assets exceeded its liabilities, in order to avoid the dispositions being set aside. The applicant is defending the pending action. In short, it denies that any such payments were made to it and that, if it is found that they were so made, the payments do not constitute dispositions without value as contemplated by s 26(1)(b).

This court's jurisdiction and the applicant's locus standi

[10] In the present proceedings the applicant seeks to expunge the proven claim of the Kebble trustees in the insolvent estate of the KBIT on two main grounds, namely:

10.1 the claim does not comply with the requirements of s 44(4) of the Insolvency Act in that the Kebble trustees failed to prove the claim by

means of an affidavit by a person fully cognisant of the nature and particulars of the claim;

10.2 in any event, the cause of action in the claim documentation of the Kebble trustees is bad, or, at the very least, is suspected by the applicant not to be genuine on reasonable grounds, and the proven claim should thus be expunged.

[11] In advancing these contentions, the applicant proceeds from the premise that it is an *'interested person'* in the insolvent estate of the KBIT. The interest alleged by the applicant was initially based on two grounds, namely that it had become a creditor of the insolvent estate of the KBIT after its sequestration (this has fallen away) and that in any event it has a *'substantial interest'* in the estate. The applicant now persists on the latter ground only.

[12] The *'substantial interest'* is alleged to lie in the advantage which the applicant stands to gain in the pending action in the South Gauteng High Court if the claim is expunged. The only proven claim in the KBIT estate is that of the Kebble trustees. If their claim is expunged then no claims would have been proven against the KBIT estate. No further claims will be capable of being proven because those claims would have long since prescribed. Accordingly, the KBIT estate will have no creditors. The applicant will thus, to all intents and purposes, be relieved of the onus to prove that, immediately after the dispositions were

made (in the event that such dispositions are proven) the KBIT's assets exceeded its liabilities. I will deal with this later in this judgment.

[13] The applicant contends that an additional advantage to it if the claim were to be expunged is that the KBIT trustees will lack the capacity to continue their litigation against it in the pending action, given that there will be no creditors to furnish them with instructions. Finally, it is contended that the applicant has a *'direct interest'* in the insolvent estate of the KBIT because the latter's trustees are litigating against it in the pending action.

[14] In claiming that it has *locus standi* the applicant does *not* rely on s 151 of the Insolvency Act (the review of any decision by the sixth respondent or the Master), nor does it place reliance on any other section of that Act. The applicant instead relies on the court's common law power of review.

[15] In *Millman and Another NNO v Pieterse and Others* 1997 (1) SA 784 (CPD) the court, in considering review proceedings by way of action under s 151, held as follows at 788G-789E:

> *'* *There is a strong presumption against the ouster or curtailment of the Court's jurisdiction. See* Minister of Law and Order and Others v Hurley and Another *1986 (3) SA 568 (A) at 584A-C. The mere fact that the Legislature has created an extra-judicial remedy is not conclusive of the question whether the Court's power has been restricted. It is in every case necessary to consider all the circumstances and then to determine whether a necessary implication arises that the Court's jurisdiction is either wholly excluded or at least deferred until the*

domestic or extra-judicial remedies have been exhausted. See Welkom Village Management Board v Leteno *1958 (1) SA 490 (A) at 502-3.'*

The Act contains no express provision ousting the Court's jurisdiction to hear actions for the expungement of claims admitted to proof at creditors' meetings…

The Legislature was doubtless aware that cases arise from time to time where the expungement of a claim admitted to proof is sought against the background of complicated factual disputes for which the application procedure on motion is clearly inappropriate. Can one impute to the Legislature the intention to exclude the Court's power to deal with such matters in actions and to insist on motion procedure being adopted (as required by s 151)? We do not think so. When one considers that there is a presumption operating the other way, with the need for clear provision to rebut that presumption, it is, in our judgment, plain that there is no basis for holding the Court's power, in an action to order the expungement of a claim admitted to proof, has been ousted by the Legislature.'

[16] Although in *Millman* the court was considering whether review proceedings on action were competent, the principle enunciated therein provides guidance on a court's common law power of review where extra judicial remedies already exist.

[17] The present application does not take the form of a review, but rather declaratory relief. I will however assume, without deciding, that this court has jurisdiction, given also that the matter was argued on that basis. The question which then arises is whether the applicant has *locus standi* as an *'interested person'* for the relief sought.

[18] The term *'interested person'* is not defined in the Insolvency Act, although the parties accept that the applicant's *'interest'* would have to relate to the KBIT estate.

[19] In *Attorney-General of The Gambia v N'jie* [1961] 2 All ER 504 at 511 the court held that:

> *'The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.'*

[20] In *Ex Parte Stubbs NO: In Re Wit Extensions Ltd* 1982 (1) SA 526 (WLD) at 528H-530B the court, in considering the term *'interested person'* in s 73 of the Companies Act 61 of 1973, held as follows:

> *'It seems to me to be obvious that in introducing into s 73 of the 1973 Act the phrase "interested person" the Legislature had in mind a person other than a member or creditor, and intended to widen substantially the class of people who could make the necessary application…It does not appear to me that anything turns on the difference between the phrase "interested person" in s 73 (6) (a) and the phrase "person who appears to the Court to have an interest" in s 420* [of the same Act]. *The distinction is more linguistic than real…*
>
> *In determining what the Legislature meant by the phrase "interested person", I agree with the view of MEGARRY J as expressed in the* Roehampton Swimming Pool *case* [(1968) 3 All ER 661 at 664E] *that there is not much assistance to be found in cases dealing with persons interested in something or other*
>
> *"for in the latter class of case there is a direct grammatical link with some specific subject-matter, and this, by reflection, helps to explain the nature of the interest."*
>
> *…By parity of reasoning, authorities such as those dealing with the interest which a person must have in the specific subject-matter of litigation in order to intervene therein are also not helpful…*

> *In the* Re Test Holdings *case* supra [*Re Test Holdings (Clifton) Ltd; Re General Issue & Investment Co Ltd* (1969) 3 All ER 517] *it was said that the expression "interested person" was a "phrase of great amplitude". I think that this is right. But it has its limits, and I cannot set them out more eloquently than did MEGARRY J in the* Re Roehampton Swimming Pool *case* supra *at 665E:*
>
> > *"The word "interest" is, of course, susceptible of more meanings than one; and, like so much of the English language, its meaning often has to be discerned from the context. In relation to making an order for the revival of a defunct company, it seems to me to be more probable that the word refers to a pecuniary or proprietary interest than that it embraces all matters of curiosity or concern. After all, those who are interested in companies are nearly always interested financially or in a proprietary way; the whole field is dominated by finance." '*

[21] In *Tongaat Paper Co (Pty) Ltd v The Master and Others* 2011 (2) SA 17 (KZP) at para [30] the court found that a person whose assets were sold by the trustee, but who was neither a creditor nor an objector to the liquidation and distribution account of the estate, fell within the ambit of "a person aggrieved" on the basis that he had *'a legal interest in the decision of the Master'*.

[22] Having regard to these authorities, it is my view that to find in favour of the applicant on this aspect would be to cast the net of *locus standi* too wide. First, the applicant denies that any payments were made by the KBIT, either to it or its members, or on their behalf. That being the case, it is difficult to conceive of any interest which it might currently have in the KBIT estate. Had it admitted the payments, or any of them, the situation might have been different. Second, and this follows from the first, on the applicant's own version there is no decision which has been made which has prejudicially affected its interests; but only one which, at best, might place an evidentiary onus upon it in the pending action. The

applicant currently has no financial or pecuniary interest in the KBIT estate; nor does it presently have any direct interest of any other kind. Its *'grievance'* lies solely in wishing to dispense with a statutory onus that will rest upon it *provided only* that the KBIT trustees prove that the dispositions were made. I thus find that the applicant lacks the necessary *locus standi* to seek the relief claimed. However, to the extent that I am wrong, I will also deal with the remaining issues in dispute.

Whether there has been compliance with s 44 of the Insolvency Act

[23] There is no dispute that the claim of the Kebble trustees which was admitted to proof meets the requirements of s 44(1) of the Insolvency Act, namely that it is a liquidated claim which is alleged to have arisen prior to the sequestration of the KBIT on 11 May 2007; and that the claim was proven timeously.

[24] The relevant portions of subsections 44(3) and (4) of the Insolvency Act read as follows:

> *'(3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim…*
>
> *(4) Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim…'*

[25] The applicant's complaint is two-fold. First, the affidavit submitted in terms of s 44(4) (which was deposed to by the fifth respondent) does not disclose the nature and particulars of the claim. Second, the affidavit does not set out any recognisable cause of action.

[26] The claim itself consists of various documents. I will highlight the most important ones. The first is the standard form affidavit deposed to by the fifth respondent, with various handwritten insertions (*'the proof of claim affidavit'*). The relevant portion thereof reads as follows:

> *'I, Johannes Frederick Klopper NO in my capacity as Trustee of Insolvent Estate of the late R B Kebble declare under oath and say:*
>
> *That I have personal knowledge of the facts hereinafter stated.*
>
> *That the Kebble Buitendag Investment Trust…whose estate has been sequestrated was at the date of sequestration and still is justly and truly indebted to the said creditor* [i.e. the Kebble estate] *in the sum of* [R14 432 576.64] *being for monies paid into bank account from R B Kebble.*
>
> *That the said debt arose in the manner and at the time set forth in the account hereunto annexed…*
>
> *That no other person besides the said…insolvent is liable for the said debt or any part thereof.'*
>
> [and that no security is held]

[27] The second document is a power of attorney executed by the Kebble trustees in favour of one Cindy Adriaanse authorising her to prove the claim on their behalf.

Other formal documents follow, including the Master's certificate of appointment of the Kebble trustees. Reference is made in certain of these documents to an annexure C. That annexure is an affidavit deposed to by Cristina Von Eckardstein, a forensic accountant who investigated the affairs of both the Kebble and KBIT estates. It is now common cause that Von Eckardstein's affidavit itself has nothing to do with the claim of the Kebble trustees against the KBIT estate, but instead relates to a different entity, having been inadvertently and erroneously attached to the proof of claim affidavit (which the KBIT trustees provided to the applicant during the course of trial preparation in the pending action). Annexed thereto is a schedule detailing payments made by the late Kebble to or on behalf of the KBIT, spanning the period 1 March 2000 to 19 September 2005, and totalling a net amount of R14 432 576.64; as well as bank statements of both the late Kebble and the KBIT reflecting these payments.

[28] Accordingly, although the incorrect affidavit of Von Eckardstein was included in the claim documentation, what was nonetheless before the sixth respondent at the creditors' meeting on 25 July 2007 was the following:

28.1 a proof of claim affidavit deposed to by one of the Kebble trustees, being duly authorised thereto; who had personal knowledge of the facts stated therein; who confirmed that the KBIT estate was justly and truly indebted to the Kebble estate in the sum of R14 432 576.64; and who confirmed that the debt arose in the manner and at the time *'set forth in the account hereunto annexed'*; as well as

28.2 a schedule of payments made by the late Kebble to or on behalf of the KBIT over the period 1 March 2000 to 19 September 2005 for exactly the same amount of R14 432 576.64, as well as bank statements verifying each such payment made.

[29] These facts are confirmed under oath by the Kebble trustees in these proceedings, who also confirm that:

29.1 the claim is one as contemplated by s 44(4) of the Insolvency Act; and

29.2 given that the claim of the Kebble trustees is a claim other than one based on a promissory note or other bill of exchange, Form C was utilised.

[30] Form C to the First Schedule to the Insolvency Act reads as follows:

> ‘ *FORM C*
>
> *AFFIDAVIT FOR THE PROOF OF ANY CLAIM OTHER THAN A CLAIM BASED ON A PROMISSORY NOTE OR OTHER BILL OF EXCHANGE*
> *(SECTION FORTY-FOUR (4))*
>
> *In the Insolvent Estate of*…….. .
> *Name in full of creditor*…….. .
> *Address in full*…… .
> *Total amount of claim*……..*£*…… .
>
> *I,* ……..*declare under oath*

solemnly and sincerely declare

(1) That ……., whose estate has been sequestrated, was at the date of sequestration, and still is, indebted to……..... in the sum of …….. for ……

(2) That the said debt arose in the manner and at the time set forth in the account hereunto annexed.

*(3) That no other person besides the said …… is liable (otherwise than as surety) for the said debt on (*sic*) any part thereof.*

(4) That I have/not ……/…… the said has not, nor has any other person, to my knowledge on my behalf received any security for the his said any debt or any part thereof, save and except ……..

…….....

Signature of declarant……..

Sworn before me on the ……day of

Solemnly declared

……..at……....

……

Commissioner of Oaths'

[31] A comparison between Form C and the proof of claim affidavit shows that the latter corresponds substantially with the former. In addition, the payment schedule which is included in the claim documentation (albeit purporting to be an annexure to Von Eckardstein's affidavit) sets forth the amounts allegedly paid by the late Kebble to or on behalf of the KBIT. It should therefore have been clear to the reader of the claim documentation that the proof of claim affidavit, and the various supporting documents, were aimed at establishing proof of a claim by the Kebble trustees against the KBIT estate in terms of s 44(4) of the Insolvency Act. In addition, the bank statements to which I have referred themselves

independently reflect the payments made, and funds received, as detailed in the payment schedule.

[32] Furthermore, s 45 of the Insolvency Act provides as follows:

> ***'45 Trustee to examine claims***
>
> *(1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.*
>
> *(2) The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.*
>
> *(3) If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim…'*

[33] On 23 August 2012, some five years after the claim had been proven, the applicant's attorney wrote to the KBIT trustees, alleging that it was invalid and advising that the applicant would object to its inclusion in the estate liquidation and distribution account. This was followed by another letter from the applicant's attorney on 11 October 2012 calling upon the KBIT trustees to dispute the claim in terms of s 45(3) of the Insolvency Act, and to further request the Master to expunge and disallow the claim.

[34] The KBIT trustees in turn called upon the Kebble trustees for representations as to why the claim should not be expunged. Such representations were duly made.

Included therein were new affidavits by the fifth respondent and Von Eckardstein. The fifth respondent explained his error, and further that Von Eckardstein had indeed initially deposed to the correct affidavit although he was no longer able to locate the original or a signed copy thereof. Von Eckardstein, in deposing to the correct affidavit in support of the claim, explained how the claim arose, and relied upon the same schedule of payments and bank statements to prove the amount claimed.

[35] Having considered these, and having obtained independent legal advice, the KBIT trustees were satisfied with the explanation of the Kebble trustees. They also examined the claim documentation and Von Eckardstein's (correct) affidavit, and were similarly satisfied that the KBIT estate is indeed indebted to the Kebble estate in the amount claimed.

[36] The applicant's response to this is merely that: (a) the explanation of the KBIT trustees '[does] *not take the matter much further*'; and (b) the KBIT trustees did not disclose to the applicant precisely what representations had been made to them by the Kebble trustees before the commencement of this litigation. Notably, the applicant does not attack the explanation of the KBIT trustees for their decision not to request the Master to expunge the claim. Furthermore, given that the applicant was not an *'interested person'* in the KBIT estate, there was no reason for the KBIT trustees to have provided the applicant with the details of any representations made to them by the Kebble trustees.

[37] The applicant relies on *Marendaz v Smuts* 1966 (4) SA 66 TPD in support of its submission that the claim should be expunged due to non-compliance with s 44(4) of the Insolvency Act. In my view, the applicant's reliance thereon is misplaced. First, the facts in that case are entirely distinguishable from those in the present matter. Second, that court's finding appears rather to support the case of the Kebble trustees. At 72C-E it was held that:

> *'The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided for in s 44(3) of the Act, or as to when he should resort to the calling of evidence as provided for in s 44(7).'*

[38] The applicant places reliance on two authorities in support of its argument that the claim of the Kebble trustees is bad in law. The first is *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) at para [23] where the court held:

> *'It follows that the submission by first and second respondents' counsel that, once a bank has unconditionally credited a customer's account with an amount received, the bank is required to pay the amount to the customer on demand, even where the customer came by such money by way of fraud or theft, is not correct. If stolen money is paid into a bank account to the credit of the thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.'*

[39] The second is *Gainsford NO and Others v Gulliver's Travel Bruma (Pty) Ltd* 2009 JDR 0570 (GSJ). In that case the plaintiffs, the duly appointed liquidators of a company, had instituted action against the defendant in terms of s 340 of the Companies Act 61 of 1973 read with s 26(1)(b) of the Insolvency Act for the setting aside of alleged dispositions without value. Coincidentally, the late Kebble was one of the persons who made payments to the defendant on behalf of the company concerned. The court found that the plaintiffs' action fell to be dismissed with costs because, on the uncontroverted evidence, it was never the intention of Kebble and the other person who made the payments that the monies would become the property of the company. For this reason, it was irrelevant whether the source of the funds from which the payments were made was lawful or unlawful.

[40] However, regard must also be had to the findings in *Trustees, Estate Whitehead v Dumas and Another* 2013 (3) SA 331 (SCA). In that case the insolvent, Whitehead, had run an unlawful investment scheme. He induced the first respondent, Dumas, to pay money into his bank account in order to participate in the scheme. Whitehead was exposed while the money was still in his account and his estate was provisionally sequestrated. As a result, the money paid by Dumas was placed under the control of Whitehead's trustees. Dumas instituted an action for enrichment against the bank where the money was placed and the High Court found in his favour. It was held, on the basis of the decision in *Nissan*, that because Whitehead had obtained the money by fraud, he had no right to it. As such, Whitehead (or rather his trustees) had no claim against the bank for the

money. The Supreme Court of Appeal disagreed, and held that the investment transaction, although fraudulent, was not the determining factor. Once the funds had been paid into Whitehead's account the bank had become their owner by *commixtio* and Whitehead acquired a contractual right to the payment which, upon his sequestration, was transferred to his insolvent estate, and thus his trustees. Accordingly, the bank had not been enriched and Dumas had no claim to repayment on that basis. His claim lay in delict against the trustees, based on Whitehead's fraudulent misrepresentation. At para [15] the court held:

> *'Where, as in this case A causes the transfer of money from his bank account to the account of B, no personal rights are transferred from A to B; what occurs is that A's personal claim to the funds that he held against his bank is extinguished upon the transfer and a new personal right is created between B and his bank. Ownership of the money – insofar as money* in specie *is involved – is transferred from the transferring bank to the collecting bank, which must account to B in accordance with their bank-customer contractual relationship. This is so even where A was induced to enter into an agreement through B's fraudulent misrepresentation. In that case A will have a claim for delictual damages against B to compensate him for his loss but will not be able to claim a re-transfer of the credit from the bank. And if B is subsequently sequestrated the claim will lie against B's estate because an insolvent's personal right to credit falls into his estate upon sequestration.'*

[41] The court also pointed out at para [21] that the circumstances in *Nissan* were different, because there the court was dealing with funds that had been paid into an incorrect bank account and thereafter withdrawn by the payee, knowing that he had no claim to it. That is not the position in the present matter.

[42] In my view, the applicant is effectively asking this court to decide in advance, as it were, whether the claim of the KBIT trustees in the pending action is bad in law, given the source of the funds from which payments were allegedly made by the KBIT to the applicant and/or its members. Such a decision would have to be made purely on the basis of an inelegantly formulated claim contained in an affidavit submitted for proof at a creditors meeting. It would be inappropriate for me to accede to the applicant's request. At this stage it is sufficient for me to find, which I do, that the claim of the Kebble trustees against the KBIT is one which is, for purposes of proof of the claim, recognisable in law.

[43] Having regard to the aforegoing, I am persuaded that the Kebble trustees duly proved their claim: (a) by affidavit in a form corresponding substantially with Form C; and (b) the proof of claim affidavit was made by a person fully cognisant of the claim, who set forth therein the facts upon which his knowledge of the claim was based as well as the nature and particulars of the claim. I accept that the manner in which the claim was formulated by the Kebble trustees (and in particular, the fifth respondent) was somewhat inelegant. However, the standard required is not that of a pleading in terms of rule 18 of the uniform rules of court. In the circumstances the fifth respondent's oversight in annexing the incorrect affidavit of Von Eckardstein is immaterial, and does not affect the validity of the claim of the Kebble trustees, which, I am satisfied, complies with the requirements of s 44(4). However, even if I am wrong, in my view, the steps taken by the Kebble trustees thereafter were sufficient to have remedied any defects in the claim documentation initially submitted, as is evidenced by the subsequent decision of

the KBIT trustees declining to request the Master to expunge and disallow the claim.

Whether the relief sought will assist the applicant in the pending action

[44] S 26(1)(b) of the Insolvency Act provides that:

> *'(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –*
>
> *(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities…'*

[The KBIT estate was sequestrated on 11 May 2007. The alleged dispositions were made during the period 30 May 2005 to 10 June 2005.]

[45] What is thus required of the applicant in the pending action, provided of course that the dispositions are proven, is to show that, immediately after each disposition was made, the assets of the KBIT exceeded its liabilities. The relevant dates would therefore span the period 30 May 2005 to 10 June 2005, which is almost two years prior to the date of sequestration of the KBIT.

[46] Furthermore, the Kebble estate became a proven creditor of the KBIT estate on 25 July 2007, more than two years after the last disposition was allegedly made to the applicant. The applicant's counsel nonetheless sought to persuade me that

the liabilities of the KBIT at the date of its sequestration would constitute some sort of *prima facie* evidence which would assist the applicant in discharging the evidentiary onus which might come to rest upon it in the pending action.

[47] To my mind, this submission is fallacious. First, there is no evidence to suggest that, were the claim of the Kebble trustees to be expunged, the assets of the KBIT would otherwise have exceeded its liabilities immediately after the alleged dispositions were made. Second, the payment schedule which forms part of the claim documentation reflects payments made by Kebble to or on behalf of the KBIT *subsequent* to the date of the last disposition alleged on 10 June 2005, totalling R1.9 million (over the period 14 June 2005 to 19 September 2005). Accordingly, the claim of the Kebble trustees against the KBIT estate *includes* amounts paid by Kebble to or on behalf of the KBIT *after* the alleged dispositions were made to the applicant.

[48] In these circumstances, I agree with the submission of counsel for the Kebble trustees that, even if the claim is expunged, that will not assist the applicant. It will be theoretical and will have no practical effect. The expungement of the proven claim will have no bearing on the outcome of the pending action.

Costs

[49] Counsel for the Kebble trustees urged me to award costs against the applicant on a punitive scale. Although there is no reason why costs should not follow the result, I am not persuaded that a punitive costs order is warranted. To my mind,

the application was misguided and ill-conceived; however, that does not equate to *male fides* on the applicant's part.

Conclusion

[50] **In the result the following order is made:**

The application is dismissed with costs, including all reserved costs orders.

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J I CLOETE