REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9670/2016

Before the Hon. Mr Justice Bozalek

Hearing: 20 – 21 September 2016
Judgment Delivered: 19 December 2016

In the matter between:

LAUREN SEARLL N.O.	**1st Applicant**
ELIOT OSRIN N.O.	**2nd Applicant**
JEFFREY FLAX N.O.	**3rd Applicant**
DAVID FRIEDLANDER N.O.	**4th Applicant**
QUINTIN HONEY N.O.	**5th Applicant**

In their capacities as joint executors of
Estate Late AARON SEARLL (Masters Ref. 6360/2010)

and

HENDRIK PETRUS HOUGH	**1st Respondent**
EUGENE NEL N.O.	**2nd Respondent**
GORDON NOKHANDA N.O.	**3rd Respondent**

In their capacities as the trustees of the
First Respondent's insolvent estate

THE MASTER OF THE WESTERN CAPE HIGH COURT	**4th Respondent**

JUDGMENT

BOZALEK J

[1] The issue in this application is essentially whether the estate of the late Dr Aaron Searll ('the estate' or 'estate Searll') who died in May 2010, can be wound up by his

executors without further objection from first respondent who seeks to assert, thus far unsuccessfully, a claim against the estate.

THE PARTIES

[2] Applicants are the five joint executors of estate Searll ('the executors') whilst first respondent is Mr Hendrik Petrus Hough ('Hough'). Second and third respondents are the trustees in Hough's insolvent estate whilst fourth respondent is the Master. Hough opposes the application brought by the executors and has filed a counter-application. By agreement he has joined a further respondent, namely, Seardel Investment Corporation Ltd ('Seardel'). Neither the Master nor Hough's trustees have played any active part in the application and counter-application.

THE RELIEF SOUGHT

[3] In the application the executors seek a wide range of relief in the following broad terms:

1. a declaration that Hough does not have locus standi to lodge an objection with the Master in respect of any liquidation and distribution account in estate Searll;

2. a declaration that Hough's objection to the first and final liquidation and distribution account in the estate is not a valid objection as contemplated by the Administration of Estates Act, 66 of 1965 ('the Act');

3. interdicting Hough from lodging any further objections to any liquidation and distribution account in the estate;

4. authorising the executors to pay the creditors and distribute the estate amongst the heirs in accordance with a final account;

5. directing that in terms of the Vexatious Proceedings Act, 3 of 1956 ('the VPA') Hough may institute no legal proceedings in any superior or lower Court without the leave of that court or any Judge of the High Court.

[4] In addition to a punitive costs order, the executors sought certain ancillary relief which is not presently relevant.

[5] In his counter-application Hough seeks the following relief:

1. the reviewing and setting aside of decisions taken by the Master on 16 March 2016, namely, refusing a postponement of the second meeting of creditors of Hough's insolvent estate, allowing that meeting to proceed and recording certain resolutions by the creditors;

2. setting aside the aforesaid resolutions which directed the trustees of Hough's insolvent estate to withdraw civil proceedings instituted by him in five separate High Court cases;

3. setting aside the trustees' decision to carry out those resolutions and/or the withdrawal of the civil proceedings in question.

[6] In the alternative Hough seeks a declaration that the creditors' resolutions and trustees actions in question are null and void and of no force and effect.

[7] The voluminous set of papers to which the application and counter application have given rise covers a broad sweep of events including considerable litigation but ultimately there are a few, if any, material disputes of fact, the issues being largely of a legal nature. It is necessary to give a brief chronology of events in order to make sense of the parties' submissions.

CHRONOLOGY

[8] In May 2009 Seardel and two related entities, which I shall refer to collectively as Seardel, instituted action against the late Dr Aaron Searll ('Searll'), a former director of Seardel. The action related to five claims which Seardel alleged they had against Searll, inter alia, for the alleged theft of corporate opportunities by him in breach of fiduciary

duties he owed to Seardel at the time that such opportunities were allegedly unlawfully appropriated by him.

[9] By agreement between the parties, the action was referred to a confidential arbitration which commenced in May 2011.

[10] One of the claims related to a property known as Reeds House in Observatory, Cape Town, and itself had a lengthy history going back to 1967 when Searll acquired indirect control of a company, Desiree Lingerie Holdings Ltd ('Desiree'). In that same year Searll acquired a controlling interest in Reeds House (which later became Reeds House CC), the then owner of the Reeds House property.

[11] At that time the property was being used by a subsidiary of Desiree and the shares would, in the normal course, have been purchased by it. The opportunity to acquire the Reeds House property belonged to Desiree but, allegedly in breach of his fiduciary duty as a director of Desiree, Searll acquired the property for himself. By 1978 Seardel had acquired 100% of the issued shares in Desiree, which then became its wholly owned subsidiary. Accordingly, any claim of Desiree, including the claim against Searll for the theft of the opportunity to acquire the Reeds House property, vested in Seardel and/or its subsidiaries.

[12] When Seardel asserted its claim against Searll it was concerned that he might contend that its claim in respect of the Reeds House property was still held by Desiree. Although Seardel disputed such contention it was advised, as a precautionary measure, to acquire the potential claim against Searll from Desiree which had subsequently changed its name to Metamin Property Group Ltd ('Metamin').

[13] At that stage, in late 2010, Hough was a director of Metamin and, together with another one of his companies known as La Lucia Investments Ltd ('La Lucia'), were the major shareholders of Metamin.

[14] In March 2011 a written cession agreement ('the cession') was concluded between Seardel and Metamin in terms whereof Metamin ceded all its claims against third parties to Seardel which, in return therefor, paid an upfront amount of R50 000 for Metamin's ceded claims. This amount was duly paid by Seardel.

[15] Shortly after the conclusion of the cession, Hough disputed its validity (but without returning the money received) and claimed, inter alia, that he was not authorised to sign the cession on Metamin's behalf. Thus commenced years of litigation between, inter alia, Hough, Metamin and La Lucia on the one side and the executors and Seardel on the other. It is unnecessary to set out in any detail this litigation, and it will suffice to mention the main cases.

[16] In April 2011 Seardel launched an application in this Court against Hough, Metamin and La Lucia for an order declaring, inter alia, that the cession was valid and binding on the parties ('the Seardel application'). Oral evidence was heard before Veldhuizen J who granted an order against Hough with costs.

[17] In July 2013 Seardel applied for the liquidation of Metamin and La Lucia which application was opposed by Hough. Final orders of liquidation were granted in July 2014.

[18] In that same month Hough instituted an application to review the Master's decision not to sustain his objection against the liquidation and distribution account in estate Searll ('the objection application').

[19] In October 2014 Hough launched an application to remove second applicant, Mr Eliot Osrin ('Osrin'), as an executor of estate Searll. Shortly thereafter Hough contested the authority of the executors' attorneys, Messrs Edward Nathan Sonnenberg ('ENS'), to act on their behalf and in response the executors and Seardel launched an application in terms of Rule of Court 7(1) to confirm their authority.

[20] In November 2014 Seardel successfully applied for the sequestration of Hough's estate. In February 2015 Hough launched a business rescue application in respect of Metamin and La Lucia. In November 2015 Hough launched an application to review a decision taken by the Master at the first meeting of creditors in his insolvent estate.

[21] Many of these applications spawned interlocutory applications brought either by Hough, the executors or Seardel. Where, as was invariably the case, Hough's application or action was dismissed or an order unfavourable to him was made at the behest of the executors or Seardel, he sought leave to appeal and, when that failed, he petitioned the Supreme Court of Appeal ('SCA') for leave to appeal.

[22] I shall, where necessary, return to the details of some of these cases at a later stage. At this stage it suffices to state that the mainspring of all this litigation appears to be Hough's belief or his assertion that the claim against Searll, which after the latter's death lay against his estate, for the disgorgement of the profits earned between 1967 and approximately 2011 from the ownership of Reeds House, vested in Metamin. This appears to remain Hough's view notwithstanding the fact that the confidential arbitration between Seardel and estate Searll for the same lost or stolen profits was eventually resolved by a substantial settlement in favour of Seardel.

[23] Various issues arise in the present application and counter-application and, rather than list these, I propose to follow the structure followed by applicants' counsel in

grouping those related parts of the relief sought in either the application or counter-application together and determining them one by one.

[24] I shall then deal in sequence with the following issues:

1. whether the executors may now be authorised to pay the creditors and distribute the estate and, whether, as sought by Hough in his counter-application, the resolutions taken by the creditors in his insolvent estate to direct Hough's trustees to withdraw various civil proceedings and effecting those withdrawals should be set aside;

2. whether Hough should be declared a vexatious litigant in terms of the VPA;

3. the question of Hough's locus standi to lodge an objection in respect of liquidation and distribution account in estate Searll, the seeking of a declaration that his objection is not a valid objection and interdicting him from lodging any further objections to any liquidation and distribution account.

THE FIRST ISSUE – WHETHER THE ESTATE MAY BE DISTRIBUTED

[25] The basis of Hough's objection to the liquidation and distribution account in the estate was set out in a lengthy letter he wrote to one of the executors in April 2011, the essence of which was that it was his companies, Metamin and La Lucia, which enjoyed a claim against the estate for Searll's alleged theft of the corporate opportunity in respect of Reeds House CC.

[26] As mentioned, in the late 1960's Searll was a director of Desiree and bought a controlling interest in Reeds House CC in circumstances where the opportunity to acquire that controlling interest in truth belonged to Desiree. Desiree later became Metamin. However, it was Seardel that instituted proceedings against Searll in 2009 arising out of the alleged stolen corporate opportunity by which stage Seardel had acquired all of the shares in Metamin.

[27] According to the executors the effect was that Desiree's claim against Searll in respect of Reeds House CC lay in the hands of Seardel, and no longer in the hands of its wholly owned subsidiary, Metamin. Nonetheless, for the reasons previously mentioned Seardel acquired, by way of a cession agreement, any potential Reeds House CC claim from Metamin in order to cater for that risk.

[28] Hough controlled Metamin and was also a party to the cession agreement. It reads in part as follows:

> *'2.3 it may be contended by Searll that certain of the claims to be adjudicated upon in the Arbitration are held by the Cedent (Metamin) and not by the Cessionary (Seardel). The Cessionary disputes this contention and avers that all of such claims are held by the Cessionary in one or more of the plaintiff's in the Arbitration.*
>
> *2.4 the Cessionary nevertheless wishes, ex abundante cauteli, to acquire, inter alia, the Arbitration claim so as to cater for a finding in the Arbitration that any of their claims adjudicated upon in fact belonged to the Cedent (Metamin).'*

[29] The most important litigation for present purposes was that commenced by Seardel in the South Gauteng High Court against Hough and Metamin where the principal relief sought was a declaration that *'the out and out cession concluded amongst (Seardel) and (Metamin) and (Hough) … is valid and binding on the parties.'* The matter was transferred to this Court with two limited issues being referred to oral evidence, namely *'the basis on which the cession agreement … was delivered to the applicant (Seardel and/or its representative) and the authority of the third respondent (Hough) to have concluded such cession agreement on behalf of the first respondent (Metamin).'* Evidence was heard in April 2012 when various witnesses gave evidence on behalf of Seardel and were cross-examined by Hough. He himself did not testify.

[30] Veldhuizen J found in favour of Seardel holding, inter alia, that the Metamin cession was valid and binding on the parties. Hough unsuccessfully sought leave to

appeal the judgment. Thereafter he petitioned the SCA for such leave but his petition was refused in May 2013. It is thus the executors' case that Hough's claim against the estate based on the Metamin cession has no merit and it is pursuant to this view that in May 2011, Osrin an executor acting on behalf of the joint executors, rejected Hough's claim against estate Searll. Undeterred, on 14 March 2014 Hough duly lodged an objection to the liquidation and distribution account in estate Searll on the same basis in terms of sec 35(7) of the Act. This was after the executors had signed the first and final liquidation and distribution account in December 2013, lodging it with the Master and advertising it to lie for inspection.

[31] The Master did not uphold Hough's objection. In a letter to Hough dated 18 June 2014, the Master advised that he was of the opinion that the objection required him to decide factual disputes and complex legal matters and that he had no legal training to decide such matters. He continued: *'consequently the Master directs that this matter be taken to the Court of law to resolve the legal issues that are in dispute'*. The concluding paragraph of the letter reads:

> *'In terms of sec 35(10) of the Administration of Estates Act 66 of 1965 any person aggrieved by the Master's refusal to sustain an objection may apply by motion of Court within thirty (30) days from the date of the decision, for an order to be set aside the decision'*.

[32] Hough duly instituted the objection application in this Court seeking an order sustaining his objection to the account and setting aside the Master's failure to do so. He also sought an order declaring that the Metamin cession was '*void on the grounds of fraud'* committed by Seardel's lawyers, ENS.

[33] The respondents in that application, who included the executors, brought an interlocutory application demanding security for costs from Hough in an amount of more than R1mil on the grounds that the objection application was vexatious and reckless

and amounted to an abuse of the process of court. In November 2015 the interlocutory application was argued before Davis J who granted same, ordering Hough to put up security in the amount sought.

[34] This was by no means the only litigation between the parties at that time but it is presently unnecessary to set out the details of the further litigation save to refer to an application by Seardel in November 2014 for the sequestration of Hough's estate. That application was successful and a final order was made in August 2015 by Dlodlo J in this Court.

[35] There were two proved creditors in Hough's estate, Seardel and the executors of estate Searll, both of whose claims against Hough were based on taxed costs orders which they had obtained in one or other of the actions or applications instituted either by or against Hough and Metamin. Hough's sequestration had far reaching consequences for the various applications and actions which he had instituted in his bid to pursue his claim against estate Searll. Two such matters were pending in the Durban High Court and three in this Court but his insolvent estate was in no position to fund the litigation.

[36] What is more, the two proved creditors, Seardel and the executors of estate Searll, being to all intents and purposes the target of all this litigation, clearly had no interest in it being pursued by Hough's insolvent estate. At a meeting of creditors both creditors accordingly directed the trustees to adopt resolutions withdrawing the pending litigation which included Hough's application to set aside the Master's decision not to sustain his objection to the liquidation and distribution account in estate Searll.

[37] However, the trustees in Hough's insolvent estate first took advice from senior counsel regarding the proposed resolutions. Counsel furnished an opinion advising in favour of the adoption of the resolutions which would withdraw, inter alia, Hough's

aforesaid objection application. In so advising, counsel noted that the relief ultimately sought by Hough was the setting aside of the Metamin cession but that this question had been decided in proceedings before Veldhuizen J against Hough and Metamin, and that leave to appeal against that decision had thereafter been refused at every level. Counsel advised that Veldhuizen J's judgment was dispositive of the question of the validity and enforceability of the Metamin cession.

[38] It should be mentioned that prior to obtaining an independent opinion from senior counsel, the trustees' own prima facie view was that the litigation instituted by Hough should not be continued as *'there (was) no prospect of such litigation yielding any benefit for the insolvent estate'* and it *'would expose the creditors of the insolvent estate to a contribution'*. They were of the prima facie view that the litigation had no reasonable prospects of success.

[39] At the second meeting of creditors of Hough's estate, resolutions requiring the withdrawal of Hough's litigation were duly adopted and pursuant thereto Hough's objection application was withdrawn in April 2016. Those resolutions and the withdrawal of the litigation is now the subject of Hough's counter-application.

[40] The executors' case is simply that they should now be authorised to pay the creditors and distribute the estate in accordance with the first liquidation and distribution account in terms of sec 35(12) of the Act.

[41] Section 35 of the Act deals with liquidation and distribution accounts and provides as follows in relation to objections by interested parties to such accounts:

> *'(9) If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if, apart from any objection, he is of opinion that the account is in any respect incorrect and should be amended, he may direct the*

executor to amend the account or may give such other direction in connection therewith as he may think fit.

(10) Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.

(11) …

(12) When an account has lain open for inspection as hereinbefore provided and-

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in subsection (11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or

(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account…'

[42] Applying these provisions to the present matter it is clear that Hough's objection to the account was not sustained by the Master whereupon he applied by motion to the Court for an order setting aside the Master's decision. Those proceedings have been withdrawn, however, and there is no question therefore of the Court making any other order *'as it may think fit'*.

[43] It was argued on behalf of Hough, however, that the Master had neither sustained the objection nor dismissed it; rather he had given a *'direction in connection therewith'* and as such that direction stood until such time as it was set aside.

[44] In considering this submission one must have regard in the first place to the relevant letter written by the Master. His reference in the final paragraph to the

procedure in sec 35(10) is a clear indication that, in the words of the sub-section, he had refused to sustain Hough's objection. Notwithstanding the sentence *'consequently the Master directs that this matter be taken to the court of law (sic) to resolve the legal issues that are in dispute'*, I do not consider that this was a direction as contemplated in sub-section 9 but rather a reference to Hough's right in terms of sec 35(10) to take his objection to court for determination.

[45] That this was so is borne out by Hough's own papers in the objection application where he stated that it was brought by him *'as an aggrieved person envisaged by sec 35(10) of the AE Act'* and where he referred to his objection not having been *'sustained by the Master'*.

[46] On the assumption that the withdrawal of Hough's objection application by the trustees was a valid step, the question arises as to whether the unsuccessful objection initially lodged by Hough presents any bar to the executors proceeding to distribute the estate in accordance with the liquidation and distribution account. The situation that obtains in the present matter is not explicitly dealt with by sec 35(12) which does not cater for an application having been made to court to challenge the Master's decision, which application is later withdrawn. The scheme of sec 35(12) clearly provides, however, that where an unsuccessful objector has exhausted his remedy of applying to court, without success, then the objection process is brought to an end and *'the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account […]'*. Leaving aside for the time being Hough's counter-application seeking the setting aside of his trustees' decision to withdraw the litigation, including the objection application, in my view it is clear that the executors are entitled, without more, to proceed to distribute the estate in accordance with the liquidation and distribution account.

[47] It is appropriate to now turn to those portions of Hough's counter-application which bear on the relief sought by the executors in order to finalise the winding up of estate Searll. In his counter-application Hough seeks the reviewing and setting aside the rulings of the Master made on 16 March 2016 refusing a postponement of the second meeting of the creditors of his insolvent estate, allowing that meeting to proceed to business and his recording of the creditors resolutions requiring the trustees to withdraw five court actions brought by Hough including the objection application. He also seeks the setting aside of the decisions taken by the trustees to carry out those resolutions and withdraw the proceedings and, in the alternative, a declaration that the creditors resolutions and the trustees actions as aforesaid are null and void.

[48] The first point to be considered, one which was not taken by the executors is whether the counter-application is properly before the Court. This point was raised *mero motu* by the Court in the light of a judgment by Gamble J in an interlocutory application in one of the High Court matters referred to, namely, case 19457/2014, in which Hough, having cited the Master and the executors, sought the removal of Osrin from his position as one of the executors in estate Searll. In the interlocutory application the Court made an order directing Hough *'prior to lodging any further proceedings in the Western Cape High Court, whether by way of action or application, be it for interim, interlocutory or final relief, to obtain the written authorisation of the Judge President'*. The order was made on the basis of the Court's finding that Hough's interlocutory application itself was not bona fide, constituted an abuse of process and that Hough's behaviour was vexatious. In the interlocutory application Hough sought an order interdicting ENS from practising as attorneys on the basis that the firm, as opposed to its individual partners or members, did not hold a valid fidelity fund certificate to practice under the Attorneys Act. In his judgment Gamble J observed that the order he made was appropriate because of the fact that there were at least six matters pending before this Court in which Hough

was directly involved and it was necessary to protect prospective litigants against whom Hough might make further unnecessary and spurious claims and allegations.

[49] I was advised from the bar, and this was not disputed by Hough's counsel, that Hough had sought leave to appeal against the judgment of Gamble J but that this application had lapsed upon withdrawal of the litigation by the trustees with the result that the order of Gamble J aforesaid remains of full force and effect.

[50] By common cause Hough did not seek the written authorisation of the Judge President before launching his counter-application in the present matter. On Hough's behalf it was contended, on the strength of a dictum in *Pitje and Another v Joubert and Another* [2015] ZAGPPHC 747 (10 November 2015), that since his counter-claim was brought in response to the main application by the executors it was not hit by the provision of Gamble J's order, the reasoning being that the counter-claim involved defending or resisting the application which Hough was not precluded from doing.

[51] In *Pitje*, the Court held that where the applicant, the subject of an order in terms of the VPA, had been sued for eviction and had then brought at least one application arising from and in response thereto, he was not required to seek judicial permission to do so. The Court reasoned that an order in terms of the VPA did not require as litigant to seek judicial permission to defend or resist any application and that 'whatever had followed since the eviction application *'were as a result of the application for eviction brought against the applicant'*.

[52] I do not read this dictum to mean that no counter-application by a vexatious litigant ever requires judicial permission. If I am wrong in this regard, I must respectfully disagree. To allow a vexatious litigant to launch any counter-application or other legal steps in response to proceeding brought against him or her would defeat the entire

purpose of an order in terms of the VPA. It must be borne in mind that the litigant in question is not barred from bringing a counter-application, s/he must merely seek judicial permission to do so. The fact that it is brought in response to proceedings launched against him or her, will no doubt, be an important factor in the determination of the judicial officer who must decide whether to grant such permission.

[53] Although his counter-application was brought in response to the executors' application, in my view, it nonetheless falls within the terms of the order made by Gamble J. That order, whilst referring only to an action or application, must be purposively interpreted to include proceedings brought by way of counter-application. Accordingly, in the absence of written authorisation from the Judge President, Hough is precluded from bringing the counter-application and has no standing before the Court.

[54] It was common cause that no such written authorisation had been sought by Hough and no explanation for this omission was tendered. Hough did not even address the matter in his answering affidavit which served also as a founding affidavit to his counter-application, notwithstanding that the judgment of Gamble J was an annexure to the founding affidavit filed on behalf of the executors.

[55] Counsel for Hough submitted that should the Court be inclined to give effect to the relevant order made by Gamble J, he be put to terms to seek the necessary authorisation from the Judge President. In the absence of any reasons or explanation from Hough as to why he did not see fit to comply with the order I decline to accept this invitation. In any event, for the reasons which will follow I do not consider that any useful purpose will be served by allowing Hough such an opportunity.

[56] During argument Hough's counsel nevertheless intimated that his client would, *ex post facto,* seek permission from the Judge President. To date I have not been

advised by Hough's legal representatives of the outcome of any such application. Upon enquiry on 11 December 2016, the Judge President advised me that he too was unaware of any such application by or on behalf of Hough.

[57] Notwithstanding the conclusion which I have reached regarding Hough's lack of locus standi in relation to the counter-application I shall proceed to deal with it on its merits on the assumption that I could be wrong in this conclusion.

WHETHER THE MASTER'S DECISION TO POSTPONE THE SECOND MEETING OF CREDITORS IN HOUGH'S ESTATE ON 16 MARCH SHOULD BE REVIEWED AND SET ASIDE.

[58] In his counter-application Hough sought an order reviewing and setting aside virtually all of the business at the second meeting of the creditors of his insolvent estate on 16 March 2016. The starting point is the Master's decision not to grant Hough a postponement of the second meeting of creditors on 16 March 2016. The background to this decision was that the Master had granted two earlier postponements at the instance of Hough on 13 November and 14 December 2015. These postponements had been sought by him on the basis that he was reviewing, in the High Court, the Master's decision to admit to proof the claims of the two creditors in his estate, namely, Seardel and the executors of estate Searll. Such claims were based on taxed bills of costs obtained by these parties against Hough in the course of litigation.

[59] Even though the creditors' claims were based on taxed bills of cost Hough disputed them on the basis that they had been represented by ENS in those proceedings but had not been entitled to charge fees by reason of its failure to hold a fidelity fund certificate in its own name. This argument was dealt with by Rosenberg AJ in an interlocutory application in Hough's objection application when the executors and

Seardel invoked the provisions of Rule 7(1) after Hough contested ENS' authority to act. Rosenberg AJ duly granted an order ruling against Hough.

[60] Be all that as it may, Hough had instituted his second review application (disputing the admission of the creditors' claims to proof) but by 16 March 2016 the position was that the Master and the creditors had filed their answering affidavits and Hough's replying affidavit was long overdue. The matter had also not been enrolled for hearing. Accordingly the creditors resisted the postponement contending that the basis therefor advanced by Hough was spurious and that he was merely seeking to delay further action on the part of the trustees. The Master appeared to accept this argument and refused to grant the further postponement sought by Hough. Following on from this decision the creditors passed the resolutions requiring or directing the trustees to withdraw all litigation launched by Hough.

[61] Hough now contends that the Master's decision was irrational and arbitrary inasmuch as he had granted postponements on two previous occasions for the same purpose, namely, allowing the review application to be determined. In my view it is a fallacy to argue, as did Hough's counsel, that the Master was constrained by his previous decisions or, more accurately, by the reasons therefor, from refusing a postponement sought for similar reasons on 16 March 2016. Clearly the Master was required, on each occasion a postponement of the creditors meeting was sought, to exercise his mind anew based on the facts and circumstances as then presented to him. It is also clear from the transcript of that meeting, and that particular exchange, that in light of Hough's delays in moving the review application forward the Master had concluded that Hough was seeking to delay the insolvency process and therefore he should refuse a further postponement.

[62] It is of some interest to note that Hough immediately announced that he intended, within days, to review the aforesaid decision by the Master. In any event he did not do so, only bringing the review in his counter-application in the present matter upon receipt of the executors' compendious application for relief.

[63] It was also contended on Hough's behalf that the Master failed to give proper consideration to the question of the prejudice that such a decision would have for him, as against the limited prejudice to the creditors if the postponement was not granted. I can see no merit in this argument, however, Hough's very failure to file a replying affidavit suggested that he was dragging his feet with ulterior motives. It follows from this that the argument that the resolution thereafter taken by the creditors was tainted by the unlawfulness of the Master's conduct cannot be sustained.

[64] In my view no basis is made out in Hough's counter-application to review the Master's decision to refuse the postponement. Following that refusal and the passing of creditors' resolutions, the trustees withdrew all litigation instituted by Hough.

[65] Insofar as Hough seeks to review and set aside those resolutions and the trustees actions as well, regard must be had to the provisions of sec 53(3) and (4) of the Insolvency Act, 24 of 1936 which provide as follows:

> *'(3) Every resolution of creditors at a meeting of creditors and the result of the voting on any matter as declared by the officer presiding at the meeting, shall be recorded upon the minutes of the meeting and shall be binding upon the trustees in so far as it is a direction to him; no other direction of creditors shall be binding upon him.*
>
> *(4) Any direction by creditors which infringes the rights of any creditor may be set aside by the Court on the application of the creditor whose rights are affected or of the trustee with the consent of the Master.'*

[66] It is thus immediately apparent that the Insolvency Act does not make explicit provision for an insolvent, i.e. Hough, to set aside the directions by creditors. It is also relevant in this regard that, as previously mentioned, the trustees took advice from senior counsel on the merits of, inter alia, Hough's objection application, before recommending to the creditors that it be withdrawn. The trustees own prima facie view was that the litigation showed scant prospects of success and counsel confirmed this view in his advice.

[67] It is trite that the primary duty of trustees is to protect the interest of proved creditors and that the law regards creditors as the best judges of their own interests. See in this regard *Kanderssen (Pty) Ltd v Bowman NO*[1], where, per Franklin J, the Court held that:

> *'A resolution of creditors is not bona fide and may be set aside by the Court if it has been passed not in the honest belief that it was in the interests of the estate and for the benefit of the creditors, but for some collateral object, whether that object is a fraudulent one or not.'*

The Court also quoted with approval the following extract from the head note in *Ex Parte Winshaw* 1921 CPD 212:

> *'The right to determine the manner in which and the conditions on which the assets of an insolvent estate are to be realised rests with the creditors, and the Court will not interfere with their discretion unless it is satisfied that they are abusing that right.'*[2]

[68] One possible basis upon which it might be possible to find that the resolutions of creditors in the present matter were not bona fide would be if they were using their position as creditors to halt litigation against themselves which had reasonable prospects of success. That possibility, however, is belied by the fact that the trustees took independent advice from counsel on whether to pursue any litigation brought by

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[1] 1980 (3) SA 1142 (TPD) at 1146F.
[2] *Ibid* at 1146E.

Hough including, most notably, his objection application challenging the Master's failure to sustain his objection to the liquidation and distribution account in estate Searll. The basis for that objection lies at the very heart of the litigation between Hough, the executors and all other parties drawn into such litigation, namely, that any claim against estate Searll for the stolen corporate opportunity relating to Reeds House CC lay at Hough/Metamin's instance and that the out and out cession agreement in terms of which they divested themselves of any such claim was invalid and of no force and effect.

[69] Independent senior counsel advised the trustees, however, that the judgment of Veldhuizen J holding that the cession agreement in question was valid and enforceable was dispositive of the question. This was so because Hough's attempts to appeal that judgment were all unsuccessful. In an effort to circumvent this conclusion Hough had in the past contended that Veldhuizen J's judgment was not dispositive of the issue since it had not dealt with his allegation that the cession was obtained fraudulently. In their papers, however, the executors point out that during the trial before Veldhuizen J, and whilst cross-examining, Hough pertinently raised the question of fraud with attorney Pretorius, one of the two witnesses called by Seardel. Pretorius rejected any question of fraud on the part of his client and thereafter Hough failed to testify in the matter. Hough's cross-examination thus puts paid to any suggestion that the proceedings before Veldhuizen J did not contemplate a fraudulent, misrepresentation – based attack on the Metamin cession, and that his judgment is therefore not dispositive of the validity of the cession. In the circumstances it is clear that this further leg to Hough's case cannot be sustained.

[70] In his answering affidavit in the present matter, Hough contended for yet a further basis on which to attack the validity of the cession, namely, that whereas he was told,

prior to signing the cession that the executors may contend that Metamin held the Reeds House CC claim, in truth ENS knew that the executors had already made that contention and that this amounted to a fraudulent misrepresentation vitiating the cession. There is no substance to this point, however, since it is clear from Hough's cross-examination of Pretorius that he knew or had in mind the alleged factual basis for such an attack.

[71] On behalf of Hough, Mr van den Berg sought to rely on *Broodryk v Die Meester en 'n Ander*[3] for his contention that Hough was and remains a *'person aggrieved'* in terms of sec 35(10) of the Act. That case establishes that a person who, as an interested party, has filed a claim against the deceased's estate and is dissatisfied with the Master's treatment of his claim, can qualify as a *'person aggrieved'* in terms of sec 35(10) of the Act and will therefore have locus standi to apply for the setting aside of the Master's decision on his objection to the liquidation and distribution account.

[72] This position is not challenged by the executors, their case being that Hough has exhausted all these remedies following the withdrawal of his first objection application and that, in any event, it was doomed to fail since the crucial issue therein had been finally disposed of by Veldhuizen J.

[73] Whilst it is correct that the power of creditors to give directions to the trustees is not unlimited, as discussed above, the law presumes that the creditors are the best judges of their own interests and there is nothing to suggest that the resolutions of the creditors in the present matter were not taken bona fide. On an analysis of the litigation that was withdrawn, insofar as it related to Hough's claim against the estate, it stood no prospect of success since the issue had been finally determined by Veldhuizen J in the Western Cape High Court.

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[3] 1991 (4) SA 825 (C).

[74] In seeking to set aside the trustees' withdrawal of the civil proceeding, counsel for Hough contended that they had ignored the fact that Hough had a vital reversionary interest in his insolvent estate and accordingly had the right to litigate in matters *'connected with the administration of his estate'*. He further contended that the trustees failed to appreciate that the insolvent's interest in Searll's estate was a contingent one which he could only acquire through litigation. Counsel submitted further that the trustees failed to appreciate that their refusal to continue the litigation entitled Hough to do so. In these submissions Mr van der Berg relied inter alia on *Stern and Ruskin, NO v Appleson* 1951 (3) SA 800 (W) 805 D–G and *De Polo and Another v Dreyer and Others* 1991 (2) SA 164 (W) at 179 D–F. In *De Polo,* however, it was held that the position would appear to be that in all matters which could result in a benefit to the insolvent estate, the proper person to take action would be the trustee and accordingly that an insolvent could not sue as of right.

[75] Finally, counsel for Hough contended further that the liquidation and distribution account was in suspension, the Master having made no ruling on its merits, nor on Hough's objection. However, as I have pointed out, the Master in fact did not sustain the objection with the result that Hough's only remaining course of action was to review that decision in the High Court which he duly did. That process having come to an end with no positive result for Hough, the liquidation and distribution account is no longer *'in suspension'*.

[76] In the result it is clear that Veldhuizen J's judgment is dispositive of the question of the validity of the Metamin cession, that independent counsel supported this view and advised the withdrawal of the relevant litigation by Hough's trustees, that the creditors cannot be faulted for passing such resolutions i.e. directing the trustees to withdraw the litigation and that, in any event, Hough has limited scope to challenge the resolutions or

the withdrawal of the litigation. In the circumstances, I consider that the executors have established that they are entitled to an order authorising them to pay the creditors and distribute the estate in accordance with the first liquidation and distribution account.

[77] It follows that, even if properly before Court, Hough's counterclaim cannot succeed in these respects nor in the alternative form in which it is cast, namely, that the Master's action are set aside and declared that the creditors resolution and the withdrawal of the civil proceedings by the trustees are null and void and of no force or effect.

[78] That disposes of the first issue as categorised by counsel and I turn now to the second issue, namely the relief sought against Hough in terms of the Vexatious Proceedings Act.

AN INTERDICT IN TERMS OF THE VEXATIOUS PROCEEDINGS ACT

[79] In prayer 6 of the notice of motion the executors seek an order in terms of sec 2(1)(b) of the VPA that no legal proceedings may be instituted by Hough against any person in the High Court, the Constitutional Court or an inferior Court without the leave of that Court or any judge of the High Court. As mentioned, Gamble J has already found Hough to be a vexatious litigant and to that end made an order requiring him to seek the written authorisation of the Judge President of this Division before launching any proceedings therein. The question therefore arises as to whether any further order is necessary.

[80] It appears from Gamble J's judgment that Hough was given an opportunity in that interlocutory application to deal with the suggestion that he was in effect a vexatious litigant and would in future have to seek permission from a neutral judicial authority before launching any further proceedings. The order was made, however, in the course

of interlocutory proceedings, and the issue was in fact introduced *meru motu* by Gamble J. By contrast in the present matter Hough has been given full notice of the relief sought and has had an opportunity to respond thereto by way of his answering affidavit. In addition this Court must apply the specific test laid down in sec 2(1)(b). In these circumstances I consider that it is appropriate to entertain the application for this relief notwithstanding the fact that any order given will overlap with that made by Gamble J.

[81] Sec 2(1)(b) provides as follows:

> *'(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.'*

[82] In essence then the requirement to be proved by a party seeking such an order is that the allegedly vexatious litigant has *'persistently and without any reasonable ground instituted legal proceedings'* against the applicant. The executors relied on the long running plethora of proceedings instituted by Hough and what can be termed *'his interests'* i.e. the companies under his control, in pursuance of a claim based on the Metamin cession against the late Aaron Searll or his estate. That litigation is set out in a summarised form covering four and a half pages in the founding affidavit filed on behalf of the executors and I have already described at least some of it.

[83] It commenced in April 2013 when Seardel launched an application against Hough, Metamin and La Lucia for an order declaring that the cession was valid and binding on the parties and continues up until November 2015. Further major suits brought by Hough included an urgent application to remove Osrin as an executor of estate Searll; three applications by Hough in the KwaZulu-Natal Durban High Court consequent upon the liquidation of his two companies, Metamin and La Lucia, at the instance of Seardel; an application for business rescue launched by Hough in respect of Metamin and La Lucia; action proceedings by Hough against inter alia Seardel and ENS; and Hough's application to review the decision taken by the Master at the first meeting of creditors in his insolvent estate. There was, importantly, also Hough's application to review the Master's decision not to sustain his objection against the liquidation and distribution account in estate Searll. Many of these actions involved interlocutory applications launched by Hough (and in at least one case against him).

[84] In most if not all of the actions and interlocutory applications which have been concluded, Hough was unsuccessful and cost orders were made against him. In the tabulated list I am unable to find one instance where Hough was successful in either an application, action or any interlocutory application. When unsuccessful, Hough would generally apply for leave to appeal which in all instances was refused. Thereafter he would launch a petition for leave to appeal, and, again, I can see no instance where this step was ever successful. A further perusal of the consideration of the brief table of litigation reveals seven instances where cost orders were made against him.

[85] In summary, in the main trial action heard before Veldhuizen J relating to the Metamin cession Hough was unsuccessful and his attempts to appeal the judgment have failed. His two companies, Metamin and La Lucia were placed into final liquidation and his business rescue application was not proceeded with. Despite his opposition a

final sequestration order was granted against him and his attempts to appeal this judgment have failed. Amongst other failed applications Hough lost two interlocutory applications relating to discovery in the matter finally determined by Veldhuizen J. He also lost interlocutory applications in terms of which he was required to furnish security for costs in the first objection application and where he contested ENS' authority to act. To this lengthy list of litigation can be added Hough's counter-application in the present matter for a wide range of relief. As discussed the counter-application was brought without any attempt to comply with the provisions of Gamble J's filtering order let alone refer thereto. There can be no doubt therefore that the executors have succeeded in proving that Hough has '*persistently instituted legal proceedings'* against the executors of estate Searll, Seardel and interests related to these entities.

[86] In granting the order which he did Gamble J clearly concluded that Hough was a vexatious and reckless litigant. Dealing with the Rule 47(1) application Davis J remarked of the first objection application that it had an *'astoundingly long history'* and in ordering the furnishing of security for costs, did so on the express basis that Hough's litigation was reckless or vexatious. In so doing Davis J stated:

> *'True litigants are entitled to exhaust their remedies but there comes a point when the Court must say: 'this is enough, your conduct is now bordering on vexatiousness or recklessness. It is designed only to postpone the inevitable as there is no legal merit in the argument'.*

[87] It must be noted too, what I believe is common cause, namely, that Hough has not paid one cent in respect of any costs order made against him in the litigation.

[88] There are other disturbing features of the litigation, one of which is Hough's propensity to persist in raising arguments already fully ventilated and disposed of by the Courts. The main example of this behaviour is Hough's persistent attacks on the Metamin cession which question has long since been finally resolved. Another such

example is Hough's repeated attempts to challenge ENS' entitlement to represent its clients and to practice as a firm of attorneys based on the contention, upheld by no Court to date, that it lacks a corporate fidelity fund certificate. Although that point appears, on the face of it, to have been disposed of by the SCA's refusal to grant him leave to appeal Rosenberg AJ's decision, Hough persisted with this argument in the sequestration proceedings before Dlodlo J. The latter also rejected the argument which Hough again raised before the SCA in his petition for leave to appeal which was rejected by both that Court and its President. Notwithstanding this Hough raised this argument before Davis J.

[89] There are also instances of Hough failing to disclose to courts, in seeking leave to appeal, that such arguments as he was advancing had been unsuccessfully ventilated before other Courts. In his petition for leave to appeal against the order of Dlodlo J, Hough failed to disclose that his fidelity fund certificate argument had effectively been rejected by the SCA and its President. In that petition he held out that before Veldhuizen J the question of the Metamin cession being obtained by fraud was never ventilated. As had been alluded to earlier, this was not the case.

[90] In his defence Hough denies any vexatious intent in litigating. This is difficult to square with his threats in proceedings before the Master on 16 March 2016 when he failed to obtain a further postponement of the second meeting of creditors and stated:

> *'And to get on with my life and let me just tell you what is number one on my agenda – Edward Nathan Sonnenbergs; that is my focus. I will nail this firm until there is nothing left of them for what they have done to me and my company, I promise you this is it.*
>
> *Mr Presiding officer – what do you mean?*
>
> *Mr Hough: this is an all-out, this is like warfare, you must understand this'*

[91] But even accepting at face value Hough's protestations that he does not litigate with vexatious intent, this takes the matter no further. The Courts recognise that proceedings may be vexatious in effect even though not in intent. See *In Re Alluvial Creek Limited* 1929 CPD 532 at 535. In *Corderoy v Union Government (Minister of Finance)*[4], Innes CJ, in the context of the Court's common law power to interdict vexatious litigants, expressed himself in terms particularly apposite to the present matter as follows:

> *'They were all cases against the Government, all founded on the same cause of action - the wrongful dismissal - and all substantially in respect of the same subject matter. The relief prayed for was not always couched in the same language; considerable ingenuity was exercised in varying the form of prayer; but in substance it was the same. Moreover the appellant quite frankly and openly announces his intention of proceeding on these lines until, as he says, the facts of the case are dealt with by some competent court. Now that being so, however genuine the feeling of injustice under which he smarts, however real his sense of grievance, the further prosecution of this long-continued litigation has become vexatious in a legal sense, and therefore an order prohibiting its continuance was justified, and I do not think we should interfere with it.'*

[92] It is not disputed that estate Searll has already incurred legal costs exceeding R3mil and Seardel nearly R9mil in respect of litigation against Hough. Hough's counsel placed some reliance on the fact that he had not instituted any legal proceedings since November 2015. This excludes of course the counter-application in the present matter. He also referred to the fact that although Hough had previously represented himself, he has now obtained the services of an attorney and senior counsel. This affords little comfort. It is clear from Hough's answering affidavit that he intends to proceed with litigation against the executors, Seardel and related interests as he sees fit. As he put it in his answering affidavit: '*I shall also be pursuing my legitimate objectives, in accordance of my constitutional right 'to have any disputes that can be resolved by the*

[4] 1918 A.D. 512 at 519.

application of law decided in a fair public hearing before a Court', selectively and judiciously'. Hough decried one of the stated reasons for the executors seeking the present order, namely, that it carries with it a potential criminal sanction but I see nothing untoward or reprehensible in this. Hough has already demonstrated his disdain for an order of this Court requiring him to seek permission before launching any proceedings out of this Court.

[93] Hough also sought to rely on the fact that all civil proceedings launched at his instance having been withdrawn by the trustees and that there was no evidence that he contemplated or threatened any future proceedings against the executors or related parties or interests. But this is disingenuous on the part of Hough when regard is had to inter alia the threat he made in the proceedings before the Master, his stated commitment to pursuing his *'legitimate objectives'* before the Court and the history and sheer volume of the litigation instituted by him arising out of or related to the Metamin cession.

[94] What must also be taken into account is the ingenuity of Hough's legal mind. Even though five civil suits at his instance have now been withdrawn, having regard to Hough's rights in terms of sec 23 of the Insolvency Act to sue in his own name and for his own benefit in respect of certain causes of action it is quite possible, if not probable, that he will nonetheless renew his campaign to assert his claim arising out of the Metamin cession. It must also be borne in mind that Hough has a reversionary interest even in those of his estate's assets as vest in the trustee because of a possibility that a surplus of realised assets over liabilities may accrue to him. The fact that Hough's estate has been sequestrated therefore does not necessarily disentitle him from instituting further legal proceedings. Should Hough obtain judicial permission to do so this would be entirely proper but at the least he must first make out a case for instituting

such proceedings to the Court in question or a judge of the High Court before being allowed to do so without let or hindrance.

[95] Section 2(1)(b) of the VPA has undergone and survived judicial scrutiny. In *Beinash and Another v Ernst & Young and Others*[5] the Constitutional Court held that the Act achieves its purpose of putting a stop to persistent and ungrounded institution of legal proceedings by allowing a Court to screen (as opposed to absolutely barring) a person who has *'persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court'*. It held further that this screening mechanism was necessary to protect the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation as well as the public interest that the functioning of the Courts and the administration of justice should proceed unimpeded by the clog of groundless proceedings. The Court, per Mokgoro J, noted that the right of access to courts by any person so affected is regulated and not prohibited. It stated:

> *'The more remote the proposed litigation is from the causes of action giving rise to the order or the persons or institution in whose favour it was granted, the easier it will be to prove bona fides and the less chance there is of the public interest being harmed. The closer the proposed litigation is to the abovementioned causes of action or persons, the more difficult it will be to prove bona fides, and rightly so, because the greater will be the possibility that the public interest may be harmed.'*[6]

[96] The Court also considered, favourably, the contention that the power to prohibit all proceedings against all persons in all courts necessarily encompasses a power to make a more limited order prohibiting some proceedings against some parties in some courts. I mention this point because I put it to Mr Manca, who appeared on behalf of the executors, that the interest which his clients sought to protect could be achieved by a

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[5] 1999 (2) SA 116 (CC) para 15.
[6] *Beinash* n 5 para 19.

more narrowly tailored order than the all-encompassing one which sec 2(1(b) articulates. The Constitutional Court said in this regard:

> *'There is much to be said for this contention. In the view that I take of the matter, however, it is unnecessary to decide this issue, which can properly be left open for consideration by the High Court should the occasion to do so ever arise. I am prepared to assume in favour of the applicants that the Act has the meaning for which they contend that the only order that can be made under the Act is one prohibiting all actions against all persons in all courts without leave of the court.'*[7]

[97] Since this issue was not specifically dealt with by counsel in their pleadings, I invited both parties' representatives to furnish me with a draft order and to exchange these orders within a stipulated time after the hearing. Hough's counsel made no submissions but the order received from the executors' attorneys seeks an order in terms of sec 2(1)(b) limited to the executors, any corporate body or trust in which estate Searll has an interest, the heirs of estate Searll, various creditors of estate Searll, Seardel and subsidiaries or associates thereof of estate Searll and its subsidiary or associated company, Edward Nathan Sonnenberg Incorporated and any of its directors, two senior counsel at the bar who previously acted for Seardel and were cited by Hough in proceedings, the trustees of Hough's insolvent estate, the liquidators of Metamin, La Lucia and the Master of the High Court. Regard being had to the outlines of the litigation instituted by Hough since 2011 and the parties which he has cited, I have no difficulties with the form of this order.

[98] In the result the applicants have satisfied me that the requirements for an order in terms of sec 2(1)(b) of the Vexatious Proceedings Act against Hough have been met.

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[7] *Beinash* n 5 para 9.

SHOULD HOUGH BE BARRED FROM LODGING FURTHER OBJECTIONS TO THE LIQUIDATION AND DISTRIBUTION ACCOUNTS IN ESTATE SEARLL?

[99] This relief was sought in prayers 2, 3 and 4 of the applicants' notice of motion wherein a declaration was sought that Hough was not a person contemplated in sec 35(7) of Act 66 of 1965, that he had no locus standi to lodge an objection in respect of any liquidation and distribution account and that his objection was not a valid objection as well as an order interdicting him from lodging any further objections.

[100] Hough's claim against the estate, as set out in his letter of demand to the executors dated 11 April 2011, was a not a liquidated claim and thus had to be proved against the estate. The claim was rejected by the executors on 11 May 2011 and therefore, at the latest, prescription commenced running from that date. It is common cause that neither Hough, Metamin nor La Lucia ever commenced action against the estate in respect of this claim despite being able to formulate it with precision by 11 April 2011 by which stage they were in possession of the pleadings in the action in which Seardel sued the late Aaron Searll for the theft of the corporate opportunity.

[101] The procedure envisaged in sec 32 of the Act dealing with disputed claims was not followed and the proceedings whereby Hough sought to review the Master's decision not to sustain his objection have now been withdrawn at the instance of his trustees. In the circumstances it would appear that Hough's claim against the executors arising out of the Metamin cession has prescribed.

[102] Section 35(7) of the Act provides that *'any person interested in the estate'* may lodge an objection to the liquidation and distribution account but that interest must of course be a legal interest. The only claim which Hough has asserted against the estate is that arising out of the Metamin cession but it has been finally determined in this Court and cannot sustain any objection, past or future, against an account in the estate.

[103] Apart from any other consideration, in my view Hough would be barred from raising the question of the validity of the Metamin cession in proceedings relating to estate Searll by the defence of res iudicata in the form of issue estoppel. Put differently, even though the requirements for the defence of res iudicata may not be met these requirements would be relaxed in the event that Hough were to rely on the Metamin cession in any action against the executors notwithstanding that they were not party to the proceedings before Veldhuizen J. See in the regard *Prinsloo NO and Others v Goldex 15 (Pty) Ltd*[8] where the Court stated as follows:

> *'[…] our courts have come to realise that rigid adherence to the requirements [of the same cause of action and the same relie]) may result in defeating the whole purpose of res iudicata. That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue […] Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.'*

In *Royal Sechaba Holdings (Pty) Ltd v Coote and Another*[9] it was said that:

> *'There is no reason in principle why a court cannot relax the same-person requirement for the very reasons that the two other requirements have, over time, been relaxed.'*

[104] In the course of argument it was put to counsel for the executors that an interdict might be unnecessary inasmuch as the Master could determine any further objection to the current liquidation and distribution account or any future variant thereon. In response counsel contended that this would merely set up the same cycle of litigation as the present case has seen, namely, the Master stating that he was unable to resolve complex issues of fact and directing or indicating that the dispute would have to be resolved by a court. In such an instance, it was pointed out, the winding up of the estate

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[8] 2014 (5) SA 297 (SCA) para 23.
[9] 2014 (5) SA 562 (SCA) para 19.

would be delayed by yet further litigation which, if founded upon the Metamin cession, would be doomed to failure by reason of the fact that this issue has been conclusively resolved.

[105] The submission on behalf of Hough that it would be unjust to interdict him from asserting what might turn out to be a valid claim against estate Searll is not well made. Counsel for Hough was unable to persuade me that any objection based on the Metamin cession was not doomed to failure by reason of that issue, including any aspect informed by an allegation of fraud on the part of the cessionary or its representatives, having being finally disposed of by the Courts. Significantly, Hough does not assert that he has no intention of lodging further objections or that the executors are wrong to fear further objections. An interdict will not be unfair to Hough since the only basis upon which he can lodge any objection is a claim based on the Metamin cession which has been found to have no merit. On the other hand without an interdict the executors are faced with the likelihood of further unmeritorious objections with the consequent expense and delay in the finalisation of the estate, already long delayed. In the circumstances the requirements for a final interdict, namely, a clear right, an injury reasonably apprehended and the absence of similar protection by any other ordinary remedy have been proven.

[106] For these reasons I am persuaded that the applicants are entitled to an interdict against further objections on the part of Hough.

[107] In the result, I am satisfied that the executors have made out a case for the relief which they seek in their application and, further, that the respondents' counter-application is without merit.

COSTS

[108] The applicants sought costs on the attorney and client scale. Taking into account the history of the litigation which has led to the present matter and the reasons why the executors were eventually driven to bring this application, I consider that such an order would be appropriate.

[109] In the circumstances the following order is made:

1. It is declared that first respondent is not a person interested in Estate Late Aaron Searll (“estate Searll”) as contemplated in terms of section 35(7) of the Administration of Estates Act No. 66 of 1965 and that the first respondent does not have locus standi to lodge an objection with the fourth respondent in respect of any liquidation and distribution account (whether a first, amended or supplementary account) in respect of estate Searll.

2. It is declared that first respondent’s objection to the first and final liquidation and distribution account in respect of estate Searll dated 14 March 2014 and addressed to fourth respondent is not a valid objection as contemplated in section 35(7) of the Administration of Estates Act No. 66 of 1965.

3. First respondent is interdicted from lodging any further objections to any liquidation and distribution account (whether a first, amended or supplementary account) in respect of estate Searll.

4. The applicants are authorised to pay the creditors and distribute the estate among the heirs in accordance with the first and final liquidation and distribution account in terms of section 35(12) of the Administration of Estates Act No. 66 of 1965.

5. It is directed that, in terms of section 2(1)(b) of the Vexatious Proceedings Act No. 3 of 1956, no legal proceedings shall be instituted by first respondent in any provincial or local division of the High Court of South Africa or an inferior court without the leave of that Court or any judge of the High Court against any of the following persons ("the listed persons"):

5.1. Lauren Searll, Eliot Osrin, Jeffrey Flax, David Friedland and Quinton Honey, in their personal capacities and in their capacities as joint executors of estate Searll;

5.2. Any company, close corporation and trust in which estate Searll has an interest, including but not limited to Reeds House CC;

5.3. The heirs of estate Searll, including but not limited to Lauren Searll, Juliette Sonia Searll, Sophia Searll and the Julsop Inheritance Trust (IT5951/2007);

5.4. The trustees of the Soliette Family Trust (IT16/2013);

5.5. The creditors of estate Searll, including but not limited to Balu Nivison, Cathy Abraham, Graham Searll, Jennifer Schneider, A Searll Descendants Trust, Searll Tannery Trust, the Tannery Park Development Joint Venture, Grawood Investments (Pty) Ltd (registration number 1971/003412/07), Balu Inheritance Trust, Cathy Inheritance Trust, Graham Inheritance Trust and Epprop Investment Trust;

5.6. Seardel Investment Corporation Ltd, Seardel Group Trading (Pty) Ltd and any subsidiary, fellow-subsidiary or associate company of Seardel Investment Corporation Ltd and/or Seardel Group Trading (Pty) Ltd;

5.7. Edward Nathan Sonnenbergs Inc. and any of its directors, including but not limited to John Zieff and Kaanit Abarder, and any of its employees;

5.8. Peter Hodes SC;

5.9. Paul Farlam SC;

5.10. Eugene Nel and Gordon Nokhanda, in their capacities as the trustees of the first respondent's insolvent estate;

5.11. The liquidators of Metamin Property Group Ltd (in liquidation), company registration number 1951/003010/06;

5.12. The liquidators of La Lucia Property Investments Ltd (in liquidation), company registration number 1968/004380/06; and

5.13. The Master of the High Court.

6. The first respondent's counter-application is dismissed.

7. The first respondent is directed to pay the costs of this application and the counter-application, including the costs of two counsel, on the attorney and client scale.

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BOZALEK J

APPEARANCES

For the Applicant:	Mr BJ Manca (SC) Ms K Reynolds Instructed by: Edward Nathan Sonnenberg Inc
For the 1st Respondent:	Mr J van der Berg Instructed by: Powell Kelly Veldman Attorneys