IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 7892/2015

In the matter between:

CHRISTOPHER PETER VAN ZYL N.O.	First Applicant
PETER CAROLUS N.O.	Second Applicant
ABDURUMAN MOOLLAJIE N.O.	Third Applicant

[in their capacities as the duly appointed liquidators of Chelsea West (Pty) Ltd (in liquidation)]

and

THE MASTER OF THE HIGH COURT OF SOUTH AFRICA, WESTERN CAPE DIVISION, CAPE TOWN	First Respondent
CHESTER FINANCE (PTY) LTD	Second Respondent

(Registration No: 1993/005402/07)

JUDGMENT DELIVERED ON 11TH MAY 2016

RILEY, AJ

[1] The applicants in their capacity as the duly appointed liquidators of Chelsea West (Pty) Ltd (in liquidation) seek an order in terms of Sections 151 of the Insolvency Act No 24 of 1936 ('the Insolvency Act'), read with Section 339 of the Companies Act

No 61 of 1973 and read with item 9 of Schedule 5 of the Companies Act No 71 of 2008 for a review of a decision by the Master of the High Court, Cape Town, in terms of which the Master refused to expunge a claim of Chester Finance (Pty) Ltd, the second respondent, in the winding-up of Chelsea West (Pty) Ltd (in liquidation).

[2] The first respondent filed a notice to abide by the decision of this court whilst the application is opposed by the second respondent.

The striking out application

[3] Before dealing with the background and facts of the matter, I deem it necessary to deal with the submissions made by Mr Peter on behalf of the second respondent that the application can be disposed of in short order by striking out the founding and replying affidavits of the applicants. Mr Peter submitted that for the most part the founding affidavit of the applicants consists of argument and inadmissible legal opinions. He submitted in particular that there is not one single new fact raised in response to the answering affidavit that is alleged in the replying affidavit and that argumentative matter is impermissible in affidavits. See ***President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others*** **2000 (1) SA 1 (CC)** at 19A. He submitted further that our courts have long since held the view that argumentative matter should not be permitted to clutter up affidavits and that in the present matter applicants had included voluminous matter of an argumentative and irrelevant nature in both the founding and replying affidavits. See ***Venmop 275 (Pty) Ltd and Another v Cleverland Projects (Pty) Ltd and Another*** **2016 (1) SA 78 GJ** at

86 para [12] to [13], ***Reynolds N.O. v Mecklenberg (Pty) Ltd*** **1996 (1) SA 75 (W)** at 78G – 80F.

[4] It is now generally accepted that it is neither admissible nor necessary for an applicant to include in his founding affidavit legal opinion on a matter of domestic law which a judge might have to decide on. See ***Prophet V National Director of Public Prosecutions*** **2007 (6) SA 169 (CC)** at 189 C.

[5] The law relating to the contents of affidavits generally, is set out in ***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa*** **1999 (2) SA 279 (T)** at 323F – 325C and can be summarised *inter alia* as follows:

(a) In motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties.

(b) By identifying the issues, the court is assisted and at the same time the parties know the case that must be met and in respect of which they must adduce evidence in affidavits.

(c) An applicant must raise the issues upon which it would seek to rely in the founding affidavit and in doing so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.

(d) The more complex the dispute between the parties the greater the precision that is required in the formulation of the issues.

(e) The facts set out in the founding, answering and replying affidavits must be set out simply and clearly and in chronological sequence and without argumentative matter.

(f) A party may advance legal argument in support of the relief or defence claimed even where such arguments are not specifically mentioned in the papers provided they arise from the facts alleged.

[6] Mr Goodman who appeared on behalf of the applicants submitted that there was no merit in Mr Peter's argument and that since the review related to issues which contained a mixture of fact and law, all that applicants had done was to refine the issues.

[7] On a consideration of the papers, I find that the founding affidavit of the applicants is in fact relatively short. Pages 1- 4 contain the notice of motion. Pages 6 – 14 identify the parties to the application; the relief sought and provides a brief history of the matter. The further information provides an essential narrative regarding the liquidation of Chelsea West and the claim of the second respondent. The reference to Section 45 of the Insolvency Act provides the basis upon which the applicants decided to proceed with the examination of claims. In pages 14 – 19 the applicants summarise the basis upon which they object to the first respondent's decision. Pages 19 – 21 is a summary of the second respondent's response to the objections, whilst pages 21 – 24 contain a summary of the applicants response and reference is made to the first respondent's ruling. Page 25 deals with the view of creditors, whereas pages 26 – 27 is a summary of the basis upon which first respondent's ruling is to be reviewed. On a

consideration of the applicants' replying affidavit all that applicant really seeks to do, is to rebut the legal argument which is contained in second respondent's answering affidavit.

[8] I agree with Mr Goodman that whilst the legal contentions do not constitute facts, they are of great importance in that they form the basis for why the first respondent's decision requires to be remedied. On the whole I am satisfied that applicants' papers "… *reveals that the factual foundation for those legal contentions is raised in the founding affidavit and the replying affidavit merely advances in a crisp fashion the legal contentions in question. The allegations in the replying affidavit on behalf of the applicants raising those legal contentions are in the form of legal conclusions rather than allegations of new factual matter* …" See ***Talacchi and Another v The Master and Others*** **1997 (1) SA 702 (T)** at 707E–F. I am accordingly not persuaded that the applicants' papers are unnecessarily prolix and/or that what is contained therein is of such a nature that it should be struck out or be disregarded in coming to a decision in this application.

Background

[9] The background facts are essentially common cause and are set out concisely in the founding affidavit of the applicants. Since there is no evidence that what is contained in the founding affidavit of Christopher Peter van Zyl ("Van Zyl") is demonstrably unworthy of credence or belief, I shall for the purposes of the determination of this application accept the factual account of Van Zyl as correct. I will

accordingly incorporate herein the chronology of the events as set out in his affidavit and I readily admit that the common cause and/or undisputed facts was practically taken verbatim from the affidavit of Van Zyl.

[10] On 17 December 2008 Chelsea West (Pty) Ltd ("Chelsea West") was placed in provisional liquidation by this court. The application was brought on the grounds that Chelsea West was unable to pay its debts within the meaning of Section 344(1) as read with Section 345(1) (C) of the Old Companies Act. On 6 January 2010 the applicants were appointed joint provisional liquidators of Chelsea West by the first respondent. On 3 February 2009 Chelsea West was placed in final liquidation and on 21 April 2009 the applicants were appointed as final liquidators.

[11] It is not in dispute that no claims were lodged for proof at either the first or second meetings of creditors and that three special meetings were thereafter convened for the admission to proof of claims.

[12] On 15 July 2014 the applicants were requested by the second respondent to convene a third special meeting of creditors for the purpose of submission to proof of claim to be lodged by the second respondent.

[13] As the applicants were of the view that the claim by the second respondent was incorrect, the applicants instructed their attorneys, Edward Nathan Sonnenberg ("ENS") to oppose the admission of proof of the second respondent's claim.

[14] At the third special meeting which was presided over by Assistant Master, Mr Mabandla Dondolo ("Dondolo") of the first respondent, both the applicants and the second respondent were allowed to advance oral argument whereafter written submissions were provided to Dondolo, by both parties. On 5 August 2014 Dondolo admitted second respondent's claim to proof in the amount of R2 916 006-14.

[15] The claim of the second respondent which is set out in an affidavit deposed to by Lewis Freidus, a director of second respondent, can be summarised as follows:

15.1 The claim allegedly arises as a result of monies owed and advanced by second respondent to Chelsea West prior to its liquidation in terms of a trade facility agreement ("TFA") concluded on or about 6 May 1997;

15.2 The claim was secured by virtue of three general notarial bonds and a cession executed by Chelsea West in favour of the second respondent;

15.3 The total amount lent and advanced by second respondent to Chelsea West was in the amount of R13 205 610-18;

15.4 On 1 December 2008, second respondent obtained an order from this court in terms whereof it perfected the security held by it in terms of the general notarial bonds;

15.5 On 3 December 2008 second respondent concluded an agreement with Dreywin Finance CC ("Dreywin") in terms whereof all the assets of Chelsea West which second respondent was authorised to take possession of in terms of the perfection order were sold to Dreywin for amount of R13 200 000-00;

15.6 On the 11th and 12th December 2008 Reichmans (Pty) Ltd ("Reichmans") made payment to second respondent of the amounts of R2 749 516-69 and R166 489-72 respectively ("the Reichmans payments"). It is necessary to point out in this regard that the Reichmans payments were purportedly made pursuant to the cession and were amounts that were held by Reichmans to which Chelsea West became entitled to on the termination of the facility which it had with Reichmans.

15.7 On 25 June 2013 the applicants obtained an order in this court under case number 25983/2010, ("the Binns-Ward judgments"), in terms whereof the Reichmans payments were determined not to form part of the sale agreement and were set aside as dispositions in terms of Section 29 of the Insolvency Act 24 of 1936.

15.8 On 25 April 2014 second respondent paid to the applicants the amount of R2 953 155-53 being the total amount paid in terms of the Reichmans payments.

15.9 It is common cause that the second respondents claim is based on the repayment of such payments.

[16] In accordance with their duties in terms of Section 45 of the Insolvency Act the applicants examined the books and documents relating to Chelsea West for the purpose of ascertaining whether Chelsea West in fact owes the second respondent the amount claimed. After studying the available books and documents relating to Chelsea West and after obtaining legal advice, the applicants formed the view that the claim by the second respondent that was admitted to proof, is not a genuine or valid claim and

instructed their attorneys ENS to make application to the first respondent to expunge the claim of the second respondent.

[17] The contents of the report by ENS which is dated 7 October 2014 is succinctly summarised in the applicants founding affidavit as follows:

> "*27.1 The documents lodged in support of the claim are at variance with what is recorded in the affidavit lodged in support of the claim and such affidavit does not reconcile with the facts which appear ex facie the documents lodged in support thereof;*
>
> *27.2 Annexure M to the claim is a document setting out a schedule of indebtedness which refers to, inter alia, three invoices allegedly issued by Chester Finance to Chelsea West ("the invoices");*
>
> *27.3 The invoices, which comprise part of annexure M, total the sum of R2 916 006,14, are all dated prior to the liquidation of Chelsea West and appear to have been issued pursuant to the TFA;*
>
> *27.4 A self-styled "client exposure report" dated 21 November 2008 is attached to the claim marked annexure K. In terms of this document, the amount due by Chelsea West to Chester Finance as at 21 November 2008, some three weeks before its liquidation, was R13 205 610.18. Included in the breakdown of how this total is computed are the amounts contained in the abovementioned invoices totalling R2 916 006,41. The amounts claimed in the invoices therefore form part of the*

total amount due by Chelsea West to Chester Finance as at 21 November 2008;

27.5 *On 3 December 2008, Chester Finance sold to Dreywin all of the assets of Chelsea West of which it was entitled to take possession of in terms of the GNBs and subsequent perfection order. As stated above, the purchase price was R13 200 000;*

27.6 *On 8 December 2008, Dreywin paid to Chester Finance the purchase price thereby reducing Chelsea West's indebtedness from R13 205 610.18 to R5 610.18, being the total amount owing of R13 205 610.18 less the purchase price of R13 200 000;*

27.7 *No further advances were made by Chester Finance to Chelsea West prior to its liquidation. Accordingly, Chester Finance's claim against Chelsea West has been substantially reduced. The only claim which is disclosed in the claim as read with the supporting documents attached thereto is in the amount of R5 610.18 together with simple interest thereon according to the rate recorded in the TFA;*

27.8 *Chester Finance alleges that until the Binns-Ward, J. judgment, it was "mistakenly under the impression" that the sale agreement included the sale of the monies that formed the basis of the Reichmans payments. Once it was determined that these monies did not form part of the assets attached when Chester Finance's bond was perfected, so the argument of Chester Finance continues, Chelsea West became liable to*

Chester Finance for such amounts as its indebtedness to Chester Finance has not been extinguished as initially believed;

27.9 *The liquidators do not agree with this construction. The only effect of the Binns-Ward, J. judgment insofar as the sale agreement is concerned, is that the retention monies held by Reichmans in terms of a factoring agreement did not form part of the assets sold by Chester Finance to Dreywin i.e. it dealt with the subject matter as defined in the sale agreement. This in no way impacts upon the purchase price (which remained unaltered by the Binns-Ward, J. judgment) which was as a matter of fact paid by Dreywin to Chester Finance settling, in the main, Chelsea West's indebtedness to Chester Finance;*

27.10 *The extent of the assets sold in terms of the sale agreement is irrelevant. The purchase price was fixed, being equal to the extent of the debt due to Chester Finance by Chelsea West (but for R5 610,18). Chester Finance received that purchase price;*

27.11 *In addition to the liquidators' view that Chester Finance does not assert a valid claim, or at the very least that such claim falls to be substantially reduced, the liquidators are further of the view that the security relied on by Chester Finance is bad in law;*

27.12 *Chester Finance alleges that the claim is secured by virtue of the cession of book debts dated 15 May 1997;*

27.13 However, the Reichmans factoring agreement in terms of which Chelsea West ceded to it, in securitatem debiti, its right, title and interest in the retention fund was concluded on 28 June 1996;

27.14 Accordingly, at the time the cession between Chelsea West and Chester Finance was concluded, Chelsea West had already ceded the subject matter thereof to Reichmans. The only interest it retained in its book debts was the reversionary interest which would arise upon the repayment of Reichmans. Accordingly, the cession concluded with Chester Finance could only have been in respect of Chelsea West's reversionary interest;

27.15 Despite the aforegoing, the cession relied upon by Chester Finance does not contemplate the cession of Chelsea West's reversionary interest;

27.16 Therefore, for present purposes the cession does not afford Chester Finance any security in the course of Chelsea West's winding-up; and

27.17 The case law in respect of section 45(3) of the Insolvency Act provides that a liquidator is only required to establish that there are reasonable grounds for suspicion that the claim of a creditor that the liquidator disputes is not genuine. If there are reasonable grounds for such suspicion, the Master ought to disallow the claim and allow the creditor to establish its claim by way of action."

[18] The ENS report concluded by stating that in the circumstances, the applicants are of the view that the claim that has been admitted to proof by second respondent

should be expunged and that if the first respondent is unwilling to expunge the claim, it should, at the very least, be reduced to R5 610.18 for the reasons that are set out in the report.

[19] In a letter dated 21 October 2014 Fluxmans Attorneys ("Fluxmans"), the attorneys of second respondent, objected to the applicants application for expungement of the second respondent's claim for the following reasons:

19.1 That at the time the sale agreement was concluded, second respondent and Dreywin were under the impression that the claim against Reichmans in regard to the retention monies was an asset secured by the general notarial bonds and thus attached pursuant to the perfection order;

19.2 On 8 December 2008, all debts owing to Reichmans were repaid and the balance remaining in the retention fund was the amount of R2 916 005.42;

19.3 That on 11 and 12 December 2008, and on the instructions of Dreywin, Reichmans made two payments totalling R2 916 005.41 to second respondent which received same in partial discharge of Dreywin's obligation to pay the R13,2 million purchase price payable in terms of the sale agreement;

19.4 On the handing down of the Binns-Ward, J. judgment, second respondent repaid to the liquidators the sum of R2 916 005.41, together with interest thereon;

19.5 Second respondent alleges that the effect of the Binns-Ward, J. judgment was that it had no obligation to deliver the claim against Reichmans to Dreywin. In turn, Dreywin had no obligation to pay second respondent therefor and, accordingly, that aspect of the sale agreement is void by reason of common mistake. As a result, the Reichmans payments were set aside and the purchase price of R13 200 000 received by second respondent was reduced by the concomitant amount leaving a balance of R2 916 005.41 owing by Chelsea West to second respondent;

19.6 As regards the cession, second respondent alleges that the wording thereof caters for the cession of all claims arising from any cause of indebtedness and furthermore specifically includes a cession of any reversionary interest. Second respondent asserts that in any event, by 8 December 2008, all debts owing by Chelsea West to Reichmans had been settled and, as such, the balance in the retention fund ceased to be the subject of the cession to Reichmans and Chelsea West's claim thereto became an ordinary claim and not merely a reversionary interest.

[20] On 1 December 2014, ENS responded on behalf of the applicants to the objections raised by Fluxmans to the expungement of the second respondent's proof to claim. It is not necessary to repeat the response of ENS to the objections raised by Fluxman's.

[21] On 19 March 2015, the first respondent wrote to ENS on the applicants' expungement application and advised that '… *due to the fact that our Mr Dondolo presided at the meeting where Chelsea Finance (Pty) Ltd's claim was proven, this office cannot review the decision arrived at on 5th August 2014. Mr Dondolo's decision is the decision of this office. This office cannot review its own decision. In the circumstances the correct form (sic) to undertake such a task will be the High Court*".

[22] From the contents of the letter it is clear that the first respondent had taken the position that it could not review a decision taken by its office and should the applicants wish to review its decision, they should approach the High Court. The first respondent's approach, however, also resulted in a situation where the decision made by Dondolo on 5 August 2014, when he admitted the second respondents claim to proof in the amount of R2 916 006-14, effectively remained in place since the first respondent had decided that he could not make a decision on the matter.

[23] On 25 March 2015 the first respondent formally informed the applicants of his decision.

[24] It is common cause that the applicants, after consultation with Credit Guarantee who appears to be the largest creditor of Chelsea West, decided to take the decision of the first respondent on review.

The Binns-Ward J Judgment

[25] Since this application relates to the interpretation of the Binns-Ward J judgment, it is necessary to have regard to it so that the submissions of the second respondent and the applicants can be viewed in their proper perspective. A concise summary of the main features of the Binns-Ward J judgment is contained in paragraphs 15-25 of applicant's heads of argument and for the sake of convenience I shall repeat same below.

> "[*15] Chelsea West carried on business as a garment manufacturer and had only one customer, being Woolworths. It factored its claim against Woolworths to Reichmans.*
>
> *[16] In terms of the factoring agreement, a "retention fund" was retained by Reichmans as security for the discharge of Chelsea West's obligations to it. Further in terms of the agreement, on its termination and immediately after all amounts due by Chelsea West to Reichmans had been duly paid, Chelsea West would be entitled to repayment of the retention fund.*
>
> *[17] Chesterfin was a creditor of Chelsea West, allegedly its "principal financier". It was owed as at 30 November 2008, R13 290 267-77. Resulting from communications by the managing director of Chelsea West, one Dreyer, to one Freidus of Chester Finance relating to the inability of Chelsea West to reduce its indebtedness to Chester Finance, the latter applied to court to perfect*

its security in terms of certain general notarial bonds which it had over the assets of Chelsea West.

[18] Chester Finance attached the movable assets of Chelsea West on 2 December 2008. On the following day, Chester Finance, represented by Freidus, concluded an agreement with Dreyer, this time representing Dreywin Finance CC ("Dreywin") in terms of which Chester Finance sold the assets of Chelsea West which it had attached to Dreywin for R 13.2 million. This amount closely approximated the total sum of Chelsea West's indebtedness to Chester Finance. It was entered into without any valuation of the attached property or without any records having been drawn up as required in terms of the court order authorising the perfection.

[19] The agreement of sale between Dreywin and Chester Finance requires consideration. It defined the "assets" which were the subject matter of the sale as "all the assets which the seller (Chester Finance) was authorised to take possession of in terms of the court order and in terms of which it took possession". The sale had effect from the "Effective Date", being 3 December 2008. The purchase price of the assets was R13 200 000-00. It was further provided that in terms of a separate agreement, Chester Finance would lend an advance to Dreywin as a loan amount equal to the purchase price.

[20] It is accordingly clear that the assets sold to Dreywin were those which Chester Finance had attached the previous day. It had not attached the retention funds. These funds "did not fall within the meaning of 'assets' defined

in clause 2.1.2 of the agreement of sale between Dreywin and Chesterfin because it was not a claim of which Chesterfin had taken possession of by 3 December", as the learned Judge held.

[21] Sometime later on 17 December 2008 at the instance of Dreyer, Chelsea West was placed in provisional liquidation. Prior thereto Chester Finance's attorneys contacted Reichmans attorneys to advise that Chelsea West's right to the balance in the retention fund had been included in the property attached by Chester Finance and sold to Dreywin. As the learned judge held, "this information was in fact incorrect. As at 2 and 3 December, Chelsea's right to any money in the retention fund vested in Reichmans consequent upon the cession thereof to it in securitatem debiti in terms of the previously mentioned provision in the factoring agreement". The learned judge also held that Chelsea West's claim against Reichmans did not fall within the meaning of "assets" as defined in the agreement of sale between Dreywin and Chester Finance because the latter had not taken possession of it by 3 December – the relevant date which fixed the assets which were sold, namely those of which Chester Finance had taken possession of pursuant to the perfection order."

[22] The learned judged noted that it was the intention of Chester Finance and Dreywin that the Reichmans retention monies due to Chelsea West should be paid by Reichmans to Chester Finance, and that the amount would be appropriated to reduce Dreywin's indebtedness to Chester Finance.

[23] The learned judge ultimately found that the agreement involving Chelsea West in terms of which it disposed of its right to payment of the Reichmans retention fund, constituted a voidable preference in terms of section 29 (1) of the Insolvency Act, the disposition (effected in two tranches) was set aside and Chester Finance was ordered to pay the Applicants as Plaintiffs the sum of R 2 916 006-41, together with costs.

[24] The court order entitling Chester Finance to attach Chelsea West's assets authorised it to perfect its security by taking possession of all of Chelsea West's movable property. As the judgment makes clear, the monies in the retention fund were not attached by Chester Finance and did not constitute part of the assets which were sold to Dreywin with effect from 3 December 2008.

[25] The consequences of the transaction, however, was that Chester Finance "transposed its creditor-debtor relationship with Chelsea (West) to a virtually identical relationship with Dreywin. The funds it received from Reichmans upon the early termination of Chelsea's factoring agreement were credited in full in reduction of Dreywin's indebtedness in respect of the purchase of Chelsea's business". The consequence of this, as is apparent from the finding, is that Dreywin became the debtor of Chester Finance, and Chelsea West was no longer indebted to it (but for R 5 610-18)."

[26] I do not propose to repeat the whole of the arguments and submissions made on behalf of the applicants and the second respondent before me as they are dealt with

fully hereinbefore in the reports made on behalf of the respective parties by their attorneys to the first respondent. Accordingly, I shall highlight only the main submissions made on behalf of the respective parties.

Second respondent's main submission

[27] Mr Peter submitted that on an analysis of the Binns-Ward J judgment, as between second respondent and Dreywin, the claim against Reichmans was part of the assets sold, therefore the value of such claim had been taken into account in the sale and it was intended that when the claim was paid, notwithstanding that it had been sold to Dreywin, it would be paid directly to second respondent which would and did give Dreywin a credit for the purchase price. He submitted that the sale transaction between second respondent and Dreywin included the Reichmans claim. In his view, second respondent had disposed of the Reichmans claim to Dreywin in satisfaction of the indebtedness owed by Chelsea West to second respondent. He submitted that both second respondent and Dreywin mistakenly believed that it was entitled to do so in terms of the court order. According to Mr Peter, second respondent was not so entitled and the disposition was thus impeachable.

[28] He submitted further that the effect of the court order setting aside the payment as a voidable disposition has the effect of undoing part of the transaction in the sense that not only did second respondent not get part of the payment in the sum of R2 916 006-41, but Dreywin did not receive one of the assets i.e. the claim against Reichmans in the sum of R2 916 006-41. He submitted that under the circumstances

second respondent has no claim against Dreywin for part of the R13.2 million in an amount in the sum of R 2 916 006-41. Accordingly, he submitted that Chelsea West's indebtedness to second respondent was not discharged by the transaction to the extent that it was set aside as a voidable disposition. In his view, the court was simply dealing with a disposition of an insolvent's assets in partial consideration of that insolvent's liability to the creditor and the fact that the court has subsequently set aside such disposition does not absolve the insolvent from liability.

The essence of the submissions made on behalf of the liquidators

[29] The essence of Mr Goodman's argument against the claim by the second respondent is that the payment by Dreywin to second respondent in the amount of R13 200 000-00 in terms of the agreement of sale, had the effect of extinguishing the indebtedness of Chelsea West to second respondent. He submitted that second respondent no longer had a claim against Chelsea West, but for the sum of R 5610-18.

[30] In his view, second respondent now had a new debtor, namely Dreywin, which owed it R13 200 000-00 on the basis that second respondent sought to reduce Dreywin's indebtedness by obtaining payment of the Reichmans retention fund and crediting Dreywin with the equivalent amount. He submitted further that the effect of the Binns-Ward J judgment was that second respondent was not entitled to the Reichmans monies which had to be repaid to the liquidators of Chelsea West. Accordingly, Dreywin continued to owe the second respondent the equivalent sum. He submitted further that second respondent was not entitled on some "fanciful basis", to resurrect part of the indebtedness formerly owed by Chelsea West and to prove a claim in the winding up.

According to Mr Goodman the claim by second respondent against Chelsea West had thus been extinguished.

The legal framework

[31] In the present matter the liquidators seek to have the claim of the second respondent expunged in terms of section 45. Section 45 (1) provides for the delivery by the officer presiding at a meeting of creditors to the trustee or a meeting of creditors to the trustees or liquidator of every claim proved against the estate. Sub-section (2) provides that the trustee shall examine the available books and documents relating to the insolvent estate for the purpose of determining whether the estate owes the claimant the amount claimed.

[32] Section 44(3) of the Insolvency Act provides that '*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: Provided that the rejection of a claim shall not debar the claimant from proving that claim at a subsequent meeting of creditors or from establishing his claim by an action at law…'*

[33] According to Meskin, *Insolvency Law* para 9.2.5 the function of the officer presiding at the meeting of creditors where a claim has been lodged to be proved is a *quasi*-judicial one. It therefore follows that the presiding officer has the duty to examine the proof of claim documents for the purpose of deciding whether or not they disclose *prima facie* the existence of an enforceable claim. If, *ex facie* the proof of claim

documents, the claim is in fact invalid, the presiding officer is duty bound to reject such claim. The fact that a claim is rejected, which is on the face of it invalid, does not in my view cause prejudice to the party which has lodged the claim of proof as the rejection thereof by the presiding officer does not debar the claimant from amending his claim to be proved at a subsequent meeting. Such a party may also establish his claim at law in terms of section 44(3) of the Insolvency Act.

[34] It seems to me that in allowing the proof of claim at a subsequent meeting or by way of action, the legislature intended to allow for the proof of a claim at a subsequent meeting or by way of action, to protect the watering down of the dividends of genuine creditors by way of incurring costs in relation to the expungement proceedings provided for in section 45(3) of the Insolvency Act in the event of the proof of an invalid claim.

[35] Section 45 (3) of the Insolvency Act provides that:

> "*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. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five.*"

[36] Regulation 18 of the Regulations for the Winding Up and Judicial Management of Companies provides that a liquidator who disputes a claim "*shall furnish to the Master in duplicate the reasons for disputing the claim and shall at the same time –*

> *(a) forward a copy of the said reasons to the creditor and request him to furnish his reasons to the Master within 14 days or such longer period as the Master may on application allow, why his claim should not be expunged or reduced; and*
>
> *(b) report to the master in writing the steps taken by him in this regard."*

[37] The case law in respect of section 45(3) of the Insolvency Act provides that all that a liquidator is required to establish in a section 45(3) report is that there are reasonable grounds for suspicion that the claim of the creditor that the liquidator disputes, is not genuine.

[38] The learned authors, Blackman *et al* (vol 3 at 14-378), in *Commentary on the Companies* Act and the SCA in **Standard *Bank of South Africa v The Master of the High Court and Others* 2010 (4) SA 405 (SCA)** at 427A-B, described the test as follows:

> "*The test as to what is or is not reasonable in any given circumstances is not whether the conclusion arrived at is reasonable, but is that of a reasonable man applying his mind to the conditions of affairs, which means considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide."*

[39] Accordingly, the Master ought to disallow the claim and require the creditor to establish its claim by way of action if there are reasonable grounds for suspicion. It is for the alleged creditor in due course, and by way of separate proceedings, to satisfy the Court on the propriety of the claim. No hardship is done to the alleged creditor. He is given every opportunity to establish his claim at law.

[40] Watermeyer J stated the principle as follows in ***Chappell v The Master & Others*** **1928 CPD 289** at 291:

> *"…my view is that when claims are submitted for proof to the Master and there are reasonable grounds for suspicion that the claims are not genuine claims, the Master ought to disallow them and leave the parties who are putting forward these claims to apply to Court to establish their claims by way of action. If this is not the principle followed, then once claims are admitted, the onus of disproving their existence, which may amount to proving a negative, is thrown upon a trustee, or some creditor who may object to these claims, and I do not think that that is fair."*

[41] Section 151 of the Insolvency Act provides that:

> *"… any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected…"*

[42] In this regard section 151 must be read with section 339 of the Companies Act no 61 of 1973 and item 9 of schedule 5 of the Companies Act, Act No 71 of 2008. It is generally accepted that section 339 renders the law of insolvency applicable to companies unable to pay their debts; while the 2008 Act renders the Chapter on winding up in the 1973 Act of continued application.

[43] In ***Nel & another NNO v The Master (ABSA Bank Limited and Others intervening)*** **2005 (1) SA 276 (SCA)** at 286 C-G the SCA held as follows with regard to section 151:

> "*South African courts have long accepted that the review envisaged by s 151 of the Insolvency Act is the 'third type of review' identified more than a hundred years ago in Johannesburg Consolidated Investment Co v Johannesburg Town Council … i.e. where Parliament confers a statutory power of review upon the Court. In the Johannesburg Consolidated Investment Co case, Innes CJ stated, with reference to this kind of review that a Court could*:
>
> > '…*enter upon and decide the matter de novo. It possesses not only the powers of a Court or review in the legal sense, but it has the functions of a Court of Appeal with additional privileges of being able, after setting aside the decision arrived at … to deal with the matter upon fresh evidence*…'
>
> *Thus, when engaged in this third kind of review, the Court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality*

has occurred. However, while it is sometimes stated that the Court's powers under this kind of review are 'unlimited' or 'unrestricted', this is not entirely correct. The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review."

[44] Accordingly, it is accepted that a court is entitled to have regard to, *inter alia,* the nature of the evidence placed before the Master, and if it is satisfied that the Master's decision is wrong, it may correct such decision and substitute the decision with its own decision.

The principles of interpretation

[45] Since I will be required to interpret the judgment of Binns-Ward J and also have regard to what the intention of the parties were when they entered into the agreement which precede and form the subject matter of the Binns-Ward judgment, I deem it necessary to deal briefly with the general principles relating to interpretation. The basic rules for interpreting a judgment or order of court are no different from those applicable to the construction of documents. See *Herbstein & Van Winsen Civil Procedure of the High Courts of South Africa*, 5th edition, 936. In ***Jaga v Donges, NO and Another; Bhana v Donges, NO and Another*** **1950 (4) SA 653 (A)** at 662 G-H, Schreiner JA in interpreting a statute was of the view that:

"*The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of statute, its apparent scope and purpose, and, within limits, its background. …"*

[46] In ***Van Rensburg v Taute*** **1975 (1) SA 279 (A)** at 303 B-D, Wessels JA expressed the view that:

"*'n Geskrewe stuk word natuurlik na gelang van sy aard en opset vertolk, bv. in die onderhawige geval gaan dit oor 'n ooreenkoms wat die daarstelling van 'n serwituut beoog. Ook moet die woord of woorde wat vertolk moet word nie in isolasie nie, maar in samehang van die stuk as geheel, gelees word. Die hof kan blykbaar ook ingelig word oor die agtergrondsomstandighede waaronder kontraksluiting plaasgevind het, maar slegs om die breë konteks, waarin die woorde wat vertolk staan te word, gebesig word, beter te kan begryp.'*

[47] In ***Engelbrecht and Another NNO v Senwes Ltd*** **2007 (3) SA 29** at 33, Malan AJA held that: "*The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence*." The learned judge, further at 33, distinguished three classes of admissible evidence namely,

"*Evidence of background facts is always admissible. These facts, matters probably present in the minds of the parties when they contracted, are part of the context and explain the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the Court 'in the armchair of the author(s)' of the document. Evidence of*

'surrounding circumstances' is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide 'sufficient certainty'."

[48] In ***Bothma–Batho Transport (Edms) BPK v S Bothma & Seun Transport (Edms) Bpk*** **2014 (2) SA 494 (SCA)** at 498E–499E**,** Wallis JA referring to the case of ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** **2012 (4) SA 593 (SCA)** at para 18, stated that:

" '…Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statue or statutory instrument is to cross the divide between interpretation and

legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

That statement reflected developments in regard to contractual interpretation in ***Masstores (Pty)Ltd v Murray & Roberts Construction (Pty) Ltd and Another****;* ***KPMG Chartered Accountants (SA) v Securefin Ltd and Another****; and* ***Ekurhuleni Metropolitan Municipality v Germinston Municipal Retirement Fund****. I return to it and to those cases only because we had cited to us the well-known and much-cited summary of the earlier approach to the interpretation of contracts by Joubert JA in Coopers & Lybrand and Others v Bryant, that:*

'The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interpretation to the contract as a whole, including the nature and purpose of the contract…

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted…

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the

parties showing the sense in which they acted on the document, save direct evidence of their own intentions.' "

[49] According to the learned judge of appeal, the above summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. In his view, whilst, the starting point remains the words of the document which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is '*essentially one unitary exercise'*. See ***Bothma-Batho Transport (EDMS) Bpk v S Bothma & Seun Transport (EDMS) Bpk*** *(supra)* at para [12].

[50] Considering the arguments raised on behalf of the parties, I deem it necessary to have a closer look at the claim lodged for proof by the second respondent.

[51] In the claim lodged with the Master, Lewis Freidus affirms and states *inter alia* that:

"… (3) That Chelsea West (Pty) Ltd (in liquidation) (hereinafter referred to as the said Estate) which Estate has been liquidated was at the date of liquidation (15

December 2008) and still is indebted to Chester Finance Proprietary Limited, the said Creditor in the sum of R 2.916.006-14 …

for the balance of monies loaned and advance [sic] by the Creditor to the Estate prior to its winding up and pursuant to a trade facility agreement concluded on or about 6 May 1997… as read with the General Notarial bond numbers 86238/2004, 1372/08 and 27621/96 ("the GNBs") and Cession date 15 May 1997 ("the Cession") as security…

Monies were lent and advanced by the said Creditor to Chelsea West (Pty) Ltd pursuant to the Trade Finance Agreement in the sum of R 13 205 610-18…

On or about 01 December 2008 the Creditor obtained an order in the High Court of South Africa, Western Cape Division, under case number 19747/08 for the perfection of the security held by it under the GNBs…

On or about 3 December 2008 the Creditor and Dreywin Finance CC ("Dreywin") concluded an agreement in terms of the Creditor [sic] sold to Dreywin all of the assets of Chelsea West (Pty) Ltd which the Creditor was authorised to take possession in terms of the December 2008 order [the perfection order] for an amount of R13 200 000.00…

Reichmans (Pty) Ltd made payment of the amounts of R2 749 516.69 and R166 489.72 to the Creditor on 11 December 2008 and 12 December 2008 respectively in accordance with the Sale Agreement ("the Reichmans payments")…

On or about 17 December 2008 the Estate was placed into provisional liquidation.

The Estate was deregistered on 19 October 2009 alternatively 24 February 2011…

On or about 25 June 2013 the liquidators of the Estate obtained an order in the High Court of South Africa, Western Cape Division, under case number 25983(10), in terms of which the Reichmans payments were determined not to form part of the assets sold in terms of the Sale Agreement and were set aside as dispositions in terms of section 29(1) of the Insolvency Act…

On or about 27 March 2014 an order was granted by the High Court of South Africa Western Cape Division, under case number 21141/2013 in terms of which, inter alia, the deregistration of the Estate was declared to have been void…

On or about 25 April 2014, the Creditor refunded the sum of R2 953 155.53 to the Estate…

In all of the above mentioned circumstances, the Estate is indebted to the Creditor in the sum of R2 916 006.41 as at 15 December 2008 being the date of liquidation of the Estate…"

(4) The said debt arose in the manner and at the time set forth in the documents schedule annexed hereto marked "A" to "N"…"

[52] It is important to note that second respondent relies upon a 'schedule of indebtedness at the date of liquidation in support of the claim. In Annexure "M" at 148 of the record, reference is made to the following invoices:

INV 7737L dated 20 November 2008 for R 1 515 832.27

INV 7736L dated 20 November 2008 for R 1 098,121.04

INV 7696L dated 10 October 2008 for R 988 387.56

[53] What is clear is that the invoices referred to hereinbefore are all dated prior to the liquidation of Chelsea West which occurred on 17 December 2008. Also attached to the claim is a client exposure report dated 21 November 2008 in terms of which the amount is due to second respondent by Chelsea West as at 21 November 2008 (i.e. about 3 weeks prior to liquidation)was the globular amount of R 13 215 610.18. The amounts contained in the invoices mentioned hereinbefore is included in the breakdown of the globular amount under the heading "Bills Outstanding Local". These amounts were due to second respondent by Chelsea West on 21 November 2008.

[54] On a consideration of the documents lodged in support of the claim I find that they are at variance with each other. In short, the allegations made in the proof of claim affidavit do not reconcile with the facts which appear *ex facie* the documents lodged in support thereof.

[55] I have already referred to the agreement entered into between second respondent and Dreywin on 3 December 2008 hereinbefore. Having considered the

arguments advanced on behalf of the parties and considering the facts of the matter, I make the following findings:

1. In terms of clause 5.1 the purchase price for the assets which were the subject matter of the agreement was the amount of R 13.2 million;
2. In terms of clause 5.4 the purchase price was to be paid in full by Dreywin to second respondent on the advance date, which is defined in the agreement as the date on which the general notarial bond in favour of second respondent was registered over the assets of Dreywin (Clause 5.3.2 of the agreement)
3. On 8 December 2008 Dreywin paid the purchase price as set out in the agreement to second respondent.
4. Based on the schedule attached to the claim submitted by second respondent the second respondent's claim against Chelsea West was reduced to an amount of R5610-18 (i.e. R13 205 610-18 less R13 200 00.00).

[56] Second respondent made no further advances to Chelsea West after 8 December 2008 and it is common cause that Chelsea West was liquidated on 17 December 2008.

[57] What is significant is that second respondent did not claim to be a creditor of Chelsea West until such time as Binns-Ward J made the order that the payment of the R2.9 million received from Reichmans was impeached. It is not unreasonable to

conclude that the claim arose due to the fact that second respondent was dissatisfied as it had to repay to Chelsea West the undue preference it had received prior to the liquidation of Chelsea West.

[58] I am satisfied that Binns-Ward J was alive to the fact that the indebtedness of second respondent had been settled by second respondent, but for the R5610-18 referred to hereinbefore. In his judgment, at para 27, the learned judge deals with this issue as follows where he states that "*It (Chesterfin) did so, (disposed of Chelsea West's assets to Dreywin) without having undertaken any valuation of the attached property and at a price that very closely approximated the extent of Chelsea West's indebtedness to it. Chesterfin's confessed intention in disposing of the attached property in the way which it did was to, in effect; dispose of Chelsea's business as a going concern. It did so on terms of credit that, to the extent that they are discernable, would appear essentially to have transposed its creditor – debtor relationships with Chelsea to a virtually identical relationship with Dreywin*".

[59] Put simply the learned judge found that Dreywin replaced Chelsea West as second respondent's debtor, but for the amount of R5610-18.

[60] Having regard to what I have stated hereinbefore, I am accordingly not persuaded that the documents lodged in support of the proof of claim affidavit provides a basis for the claim of R2 916 006-41. In the result, the only claim made out by second respondent on the supporting documents by it, is a claim for the amount of R5610-18 plus interest in accordance with the rate stipulated in the agreement.

The issue of prescription of second respondent's claim

[61] A further important matter which requires to be highlighted is the impact of the issue of prescription on the second respondent's claim. The second respondent's claim arose in or around November / December 2008. In the ordinary course, that claim would have prescribed at the end of 2011. It is accepted law that it is competent for a presiding officer to admit a claim as to a portion thereof only, i.e. that portion which has been proved to his satisfaction. See ***Garlicks Wholesale & Others v Magistrate of Sutherland & Others* 1926 CPD 267**. A presiding officer can, however, not admit as proof to claim, a claim which on the face of it appears to have prescribed, which appears to have happened in the present case. Second respondent, is in my view, confronted with a situation where it bears the onus to prove that prescription of its claim has been interrupted if it wishes to revive any claim which it believes it may have.

Can second respondent place any reliance on para 31 of the judgment of Binns-Ward J for its contention that the portion of the sale agreement relating to the Reichmans claim is "*void by reason of common mistake*"?

[62] It is trite law that in order to render a contract void, a common mistake must be material. It is also accepted law that a common error as to the extent or substance of the subject matter of a sale agreement (i.e. an error in *substantia* / *qualitate*) or an error in law, is not considered to be a material error that vitiates actual consensus between the parties to a contract, i.e. it does not render the contract void.

[63] Second respondent appears to rely on para 31 of the Binns-Ward J judgment for the contention that part of the sale agreement which related to the Reichmans claim, i.e. the obligation to deliver same under the sale and the obligation of Dreywin to pay for same was thus void by reason of common mistake.

[64] In para 31 of his judgment, Binns-Ward J finds in relation to the refusal of the liquidators claim in terms of section 31 of the Insolvency Act that:

> *"[31] The correct approach entails taking appropriate account of the indications in the evidence that Freidus and Dreyer (and indeed also Chesterfin's attorney) believed, albeit mistakenly, that Chelsea's claim against Reichmans in respect of the retention fund was subject to the notarial bond and the court order made on 1 December 2008*".

[65] In my view, para 31 does not declare the portion of the sale agreement relating to the Reichmans claim to be "*void by reason of mistake*". On an ordinary reading of the paragraph, all that the learned judge finds is that Freidus and Dreyer were mistaken as to the extent of the assets sold in terms of the sale agreement i.e. that the Reichmans payment did not form part of the definition of the assets sold in terms of the sale agreement, which would be "*all the assets which the seller was authorised to take possession of in terms of the court order, and in terms of which it took possession*". I am satisfied that the Reichmans payment could not form part and does not form part of this definition as it was not capable in law of being attached in terms of the notarial bonds, nor was it in fact so attached.

[66] I agree with Mr Goodman that the error between Freidus (on behalf of second respondent) and Dreyer (on behalf of Dreywin) at the time of the conclusion of the sale agreements related to the extent of the assets sold. Put differently, the error related to the quantity and the quality of the subject matter sold. In interpreting the Binns-Ward J judgment, second respondent effectively seeks to divide and void only a portion of the sale agreement whilst the rest of the agreement remains in place.

[67] On a consideration of the sale agreement, I cannot find that it contains a "*division clause*" in terms of which the parties expressly agree that each provision of a contract is divisible from the others with the effect that should one of the provisions be attacked on the basis of being void or unenforceable, that it will not taint the balance of the agreement. On the contrary, paragraph 9.2 of the agreement between the parties contain what is commonly referred to as a non-variation clause. I am accordingly satisfied that it was never the intention of the parties that each provision of the agreement is divisible from the others. Should the argument advanced on behalf of second respondent on the interpretation of para 31 of the Binns-Ward judgment be correct, then the effect thereof would be that the entire sale agreement and not just a portion thereof would have to be declared void. This would effectively mean that second respondent would be obliged to refund the entire purchase price to the liquidators of Chelsea West. This could never have been the intention of the parties.

[68] The submissions made on behalf of the second respondent in this regard, accordingly, falls to be dismissed.

Second respondent's attempt to import onto the Binns-Ward J judgment a rectification of the quantum of the purchase price agreed upon between Freidus and Dreyer at the time that the sale agreement was concluded.

[69] In his argument, Mr Peter attempted to persuade me that the price of R13.2 million which mistakenly included the value of the claim, had to be reduced accordingly and that the correct position was that second respondent did not in fact receive the sum of R13.2 million from the realisation of its security but rather the sum of R10 283 993-59.

[70] It is accepted law that rectification of agreement can only be achieved where the agreement which contains the understanding between contracting parties, unintentionally fails to reflect the common intention of the parties at the time when the agreement is entered into. It is further accepted that the effect of a rectification is not to rectify the underlying agreement between the parties to the agreement, but merely to rectify the document in question because such document does not reflect what the parties thereto, intended to be the content of their agreement at the time.

[71] On a consideration of the Binns-Ward J judgment, the learned judge makes no reference whatsoever to the alteration of and/or reduction of the purchase price in terms of the agreement. I agree with Mr Goodman that there is no factual basis for the submissions made by Mr Peter in this regard. I further agree that the fact that the Reichmans payment did not form part of the assets sold in terms of the agreement, did

not alter the purchase price of R13.2 million as the assets defined in the sale agreement are not separately identified or valued.

[72] What is clear is that at the time that the sale agreement was entered into, both Freidus and Dreyer believed that the Reichmans payment was capable of being attached and sold pursuant to the perfection of the general notarial bonds. It appears that after the institution of the *concursus* and in particular after the judgment of Binns-Ward J, that second respondent realised its dilemma and that this was not possible in law. A further problem that confronted the second respondent was that Dreyer, who had represented Dreywin at the time that the agreement was entered into, had died and could therefore not have appreciated his error prior to his death.

[73] Second respondent did not raise the issue of rectification at the time that Binns-Ward J decided the disposition claim and when it was proved. I am satisfied that if the learned judge had intended to rectify the provisions of the sale agreement in his judgment, he would have made an express finding in this regard. He did not do so.

[74] Accordingly, it must be so that the sale agreement concluded between the parties reflects the common intention of the parties thereto at the time and it cannot now be rectified.

[75] Should rectification be allowed to take place, the effect would be to disturb the rights of the remaining creditors of Chelsea West, resulting in what has been described by applicants as a watering down of the concurrent dividends and which is not

permissible. Considering what I have said hereinbefore, it follows that the first respondent is not empowered to rectify a contract which is the subject of a disputed claim during the course of the expungement procedure. The second respondent's attempt to import onto the Binns-Ward J judgment a rectification of the purchase price agreed upon between Friedus and Dreyer at the time that the sale agreement was concluded, accordingly has no merit and must therefore also be dismissed.

[76] In my view, it is unnecessary for the purposes of this judgment to deal with the issue of the purported security relied on by the second respondent. The issue of security is irrelevant for the determination I am required to make at this stage. The applicants will have to evaluate the merits of the alleged security if and when it is necessary to do so.

Conclusion

[77] In conclusion I find that the correct approach, as was set out in the submissions made by applicants to the presiding officer, is that the presiding officer should have decided to either:

> "*26.1 Admit the claim of Chesterfin against Chelsea in the reduced amount of R5610-18 as this is the extent of the claim disclosed on the papers before the presiding officer (provided that Chesterfin is in a position to persuade the presiding officer that the claim has not prescribed); or*

26.2 To reject the claim of Chesterfin in order to allow it to redraw such claim in the lesser amount to be proved at a subsequent meeting of creditors, alternatively to allow Chesterfin the opportunity to establish its claims against Chelsea West at law".

[78] I am satisfied that for the reasons hereinbefore set out, that the liquidators have established reasonable grounds of suspicion relating to the validity of the second respondent's claim and that for these reasons, the claim should be disallowed. I am however satisfied that second respondent has proved a claim in the amount of R5610-18.

[79] For the reasons as set out hereinbefore, I am satisfied that the ruling of Dondolo of the first respondent falls to be reviewed and set aside. Consequently the claim of the second respondent falls to be expunged and is hereby reduced to R5610-18.

[80] Accordingly, I make the following order:

1. That in terms of Section 151 of the Insolvency Act No 24 of 1936 read with item 9 of Schedule 5 of the Companies Act 71 of 2008, the decision of the Master of the High Court in terms of which the Master refused to expunge, alternatively reduce the claim of the second respondent against Chelsea West (Pty) Ltd (in liquidation) is hereby reviewed and set aside.
2. The claim of the second respondent is hereby expunged and reduced to the amount of R5610-18.

3. The second respondent is ordered to pay the applicant's costs of this application including the costs of two counsel.

_____

RILEY, AJ