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

In the matter between CASE: 15353/18

DANIEL PIO **Applicant**

And

GÖTZ ESSEL N.O. **First Respondent**

MADELE FERREIRA

MOOIHOEK BOERDERY (PTY) LTD **Second Respondent**

ABDURUMAN MOOLLAJIE N.O. **Third Respondent**

MOHAMED CASSIEM RAWOOT N.O. **Fourth Respondent**

MASTER OF THE HIGH COURT, CAPE TOWN **Fifth Respondent**

JUDGMENT DELIVERED ON 3 MAY 2019

SIEVERS AJ

[1] The applicant is the sole member of George Refrigeration and Airconditioning CC (in liquidation) ("the Close Corporation"). The first respondent is a presiding Magistrate ("the Chairman"), who is cited in his capacity as the chairman of a special meeting of creditors of the Close Corporation held at the George Magistrate's Court on 6 April 2018. The second respondent ("Mooihoek Boerdery") is a company which proved a claim at the said meeting. Third and Fourth Respondents are cited as being the joint

liquidators of the Close Corporation. On 7 June 2018, the Master removed the fourth respondent as a liquidator, leaving the third respondent as the sole liquidator. The Master is the fifth respondent.

[2] The applicant seeks an order that the Chairman's decision of 6 April 2018, to admit as proved, the claim of Mooihoek Boerdery in the insolvent estate of the Close Corporation be reviewed and set aside. Applicant further asks that the costs of the application be costs in the liquidation, save that costs be awarded against any party opposing the relief sought.

[3] The application is opposed by Mooihoek Boerdery. The Chairman of the meeting, as well as the remaining liquidator. The Master filed notices to the effect that they abide by the court's decision.

[4] The factual basis upon which the review of the Chairman's decision is sought, is that the claim of Mooihoek Boerdery is unliquidated thereby rendering it outside of the provisions of section 44 of the Insolvency Act, 24 of 1936. ("the Insolvency Act").

[5] In his founding affidavit, the applicant advanced three grounds for the review of the Chairman's decision admitting the claim.

[6] It was contended that the decision amounted to administrative action as defined in the Promotion of Administrative Justice Act, 3 of 2002 ("PAJA"), and that it is liable to be reviewed in terms of section 6(2)(b) – a mandatory or material procedure was not complied with, section 6(2)(d) – the action was materially influenced by an error of law, and section 6(2)(e)(iii) – relevant

considerations were not considered. Firstly, it was submitted that as the Chairman had rejected Mooihoek Boerdery's claim at meetings prior to the special meeting of creditors, he was *functus officio* and not empowered to change the decision arbitrarily. It was further contended that the provisions of section 44 of the Insolvency Act expressly prohibit the proof of unliquidated claims at meetings of creditors in the absence of a compromise being reached in terms of section 78(3) of the Insolvency Act.

[7] The second ground was that Mooihoek Boerdery had instituted an action against the Close Corporation prior to its winding up in respect of the same claim. This action was stayed in terms of section 359 of the Companies Act of 1973. Mooihoek Boerdery thereafter, allegedly failed to give notice of its intention to proceed with the litigation as required by section 359(2) of the Companies Act, with the consequence that the litigation was deemed to have been abandoned in terms of section 359(2)(b).

[8] Thirdly, it was alleged that the claim had become prescribed and could thus not be admitted as proven.

[9] Applicant has abandoned the second and third grounds as well as the argument that the Chairman was *functus officio.*

[10] After the customary three sets of affidavits had been filed, the applicant applied in terms of rule 6(5)(e) for leave to file a supplementary founding affidavit. In this affidavit, the applicant does not seek to supplement the factual basis on which the review is sought, but rather, seeks to add the provisions of section 151 of the Insolvency Act as an additional legal basis for the relief

sought. Applicant concedes in the application to supplement his papers, that it must be clear from the facts set out in the founding affidavit that the statutory provision is applicable.

[11] This raises two issues. Firstly, is it clear from the founding papers that s151 of the Insolvency Act is applicable to the Close Corporation in liquidation? In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)** in para [27] O'Regan J stated as follows:

> "Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative."

[12] Section 66(1) of the Close Corporations Act 69 of 1984, provides that the laws mentioned, or contemplated in item 9 of schedule 5 of the Companies Act, 2008 apply to the liquidation of a corporation in respect of any matter not provided for in the Close Corporations Act.

[13] Chapter XIV of the Companies Act 1973, is of relevance with regard to the proof of claims and the review of decisions made in respect thereof.

[14] Regard must be had to section 339 of the Companies Act 1973, which provides that:

> "the law of Insolvency to be applied *mutatis mutandis* – In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by this Act."

[15] The Full Court of the Transvaal Provincial Division in **Taylor and Steyn NNO v Koekemoer** 1982(1) SA 374 (T) held that the time at which it must be determined whether the company is in fact unable to pay its debts is the time when it sought to invoke the section, not the time of the commencement of the winding up.

[16] The applicant's affidavits do not establish that the Close Corporation is unable to pay its debts as required by section 339. Section 151 of the Insolvency Act is thus not rendered applicable in terms of this section.

[17] Section 366 of the Companies Act 1973 provides for the proof of claims at a meeting of creditors. The section provides that:

> "366 Claims and proof of claims. – (1) In the winding-up of a company by the Court and by a creditors' voluntary winding-up-
>
> (a) the claims against the company shall be proved at a meeting of creditors *mutatis mutandis* in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency;"

[18] This section does not expressly make section 151 of the Insolvency Act applicable. It was contended on behalf of the applicant that section 151 of the Insolvency Act is made applicable by section 366 of the Companies Act 1973 as section 151 refers expressly to "a decision, ruling or, order of an officer presiding at a meeting of creditors".

[19] In **Swaanswyk Investments (Pty) Ltd v The Master and Another NO** 1978 (2) SA 267 (C) Van Zijl JP held at 270 A-G that:

> "It was contended that s 366 (1)(a) merely makes provision for the procedure that shall be followed when claims are proved at a meeting of creditors. The section does more. It lays down the manner in which claims may be proved against the company, *viz* in accordance with the provisions relating to the proof of claims against an insolvent estate under the laws of insolvency. That this section intends to deal with the substantive law and not merely with the procedure to be followed when proving a claim before a meeting of creditors can be seen from the substitution of the phrase "the law relating to insolvency" for the phrase "the law relating to insolvent estates". The latter is directed to the procedure to be followed. The former is directed, in addition, to the substantive law.
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> In the proof of claims against a company in liquidation, the Master and his representatives act in a *quasi*-judicial capacity in adjudicating upon the validity of the claim. The Companies Act 46 of 1926 contained provisions enabling a creditor who was dissatisfied with the rejection of his claim by the master or his deputies either, to appeal to the Courts or to take this decision on review to the Courts. These provisions have been omitted from the present Act because of the changes that have been made to the Insolvency Act 24 of 1936 and to the provisions of s 366 (1) (a) *supra.* When the 1926 Companies Act was passed, it did not make the provisions of the Insolvency Act 32 of 1916 applicable to the proof of claims against a company, and the 1916 Act gives no right of appeal against the decision of the Master or his deputies. It conferred only a right of review. This latter right of review is retained in the 1936 Insolvency Act which also confers a right of appeal on the dissatisfied debtor. See *Bendeman v Bendeman's Trustee* 1939 CPD 377. The right of review in terms of s 193 of the Companies Act of 1926 and the right of appeal in terms of s 179 are not repeated in the present

> Act. These two provisions giving recourse to the Courts became redundant when s 366 (1) (a) of the present Act was recast so as to make the substantive law in relation to the proof of claims against an insolvent estate applicable to the winding-up of a company by the Courts, *viz* they may where necessary be proved in Court."

[20] In **The Master v Stewart** 1981 (2) SA 472 (E) at 474 B Smalberger J (with Addleson J concurring) held that:

> "In terms of ss 339 and 336 of Act 61 of 1973, the provisions of the Insolvency Act in relation to claims by creditors are made applicable to companies".

[21] Insofar as the above authorities are construed to constitute authority for the proposition that section 366 of the Companies Act 1973 makes section 151 of the Insolvency Act applicable, regard must be had to the content of the latter section.

[22] Section 151 of the Insolvency Act reads as follows:

> "151 Review
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> Subject to the provisions of section *fifty-seven* 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: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one *hundred and twelve*."

[23] The applicant, in order to have *locus standi* to bring a review under this section, must therefore, establish that he is a "person aggrieved" by the decision in question. The phrase "aggrieved person" is also found in section 371, section 387(4) and section 407(4)(a) of the Companies Act 1973.

[24] In **Kaniah v WPC Logistics (Joburg) CC (in liquidation) & Others** (5794/2016) [2017] ZAKZDHC 45 (13 December 2017) at para [21] the Court quoted with approval **Attorney-General of Gambia v N'Jie** (1961) 2 All ER 504 (PC) at 511:

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

[25] The applicant in reply alleges that as he is the sole member of the Close Corporation his *locus standi* is self-evident.

[26] In **Muller N.O. v Trust Bank of Africa Ltd And Another** 1981(2) SA 117(N) a full bench of the Natal Provincial Division referred with approval to the following:

> "In *Mears v Pretoria Estate and Market Co Ltd* 1906 TS 661 (a decision referred to in *Reuvid's* case) INNES CJ held that the reversionary interest which an insolvent has in his insolvent estate (ie the right to have paid over to him any balance of assets over liabilities which might remain after his estate has been liquidated) is not legally executable and cannot be attached and sold in execution. INNES CJ held that the

insolvent merely has an expectation (*spes*) that there may be a residue left over after his estate has been liquidated and such a *spes*, said INNES CJ, cannot be sold in execution. The reasoning by which INNES CJ arrived at his conclusion is instructive and appropriate to the present enquiry. The learned CHIEF JUSTICE said at 665:

> "The provisions of that section merely constitute a *spes*, or expectation in favour of the insolvent. There may be a residue. If and when there is one, he becomes entitled to it. If there is no residue he is entitled to nothing. Nor does the fact that the statute makes a provision of this kind in anticipation constitute that a vested right which would not be so otherwise.
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> Let me put a case. Suppose that a public servant has a statutory right to a pension if and when he attains the age of 60. How could it be said that he had any vested right in the pension fund before he attained that age? He would be interested in its beneficial administration; but the fact that the statute provided that, if certain contingencies arose, he should have a pension, would not give him any present right whatever."

[27] The papers do not reflect whether there will be surplus funds to pay the Close Corporation's member after the payment of creditors' claims.

[28] For reliance upon section 151 to be permitted the applicant's founding papers had to allege facts that made the section relevant and operative. It was not alleged in the affidavit that applicant was an "aggrieved person".

[29] In **Frances George Hill Family Trust v SA Reserve Bank and others** 1992(3) SA 91 (AD) the Reserve Bank attached money deposited by a company in certain bank accounts. The court held that a trust, which owned

shares in the company, did not qualify by virtue of such shareholding to be a "person aggrieved" by the attachment. Hoexter JA held (at 102C) as follows:

> "Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa points, I think, to the general conclusion that the words 'person aggrieved' signify someone whose legal rights have been infringed – a person harbouring a legal grievance."

[30] The applicant does not satisfy this test on the facts set out in his founding affidavit. The mere fact that he is the sole member of the Close Corporation does not qualify him as such. There is no basis established that he has a legal interest which is prejudiced by the decision.

[31] Applicant further stated that he has been joined as a defendant in Mooihoek Boerdery's action for damages against the Close Corporation. Applicant does not in his founding affidavit set out on which basis Mooihoek Boerdery has joined him as defendant in the action. It is thus not apparent, how he as defendant in the action is prejudiced by the decision of the Chairman to admit Mooihoek Boerdery's claim against the Close Corporation (in liquidation).

[32] In order to qualify as an "aggrieved person", it must be further established that the legal right which is alleged to have been infringed existed at the time when the decision in question was made. A person cannot acquire this status as a result of subsequent events (**Jeeva and another v Tuck N.O. and others** 1998 (1) SA 785 (SE) at 795 D-E). The applicant states that he was joined as defendant subsequent to the winding up and does not state

whether this occurred prior to the special meeting of creditors. Applicant has accordingly, not established a legal right in existence at the time of the decision which he now seeks to review and set aside.

[33] I am accordingly of the view that the applicant has failed in his founding affidavit to set out facts from which it is clear that section 151 of the Insolvency Act is relevant and operative as the facts do not establish that he is an aggrieved person as required by the section.

[34] The nature of a review in terms of section 151 of the Insolvency Act (read with section 339 of the Companies Act 1973) was considered in **Nel and another NNO v The Master (Absa Bank Ltd & others intervening)** 2005 (1) SA 276 (SCA) paragraphs [22] and [23]. When engaged with this kind of review the court has powers of both appeal and review, with the additional power of receiving new evidence and deciding the matter afresh.

[35] The applicant's founding papers expressly rely on PAJA. A review under PAJA is a completely different type of review to that under section 151. The Respondent was not called upon to meet or, oppose a section 151 review in respect of which completely different considerations are applicable. A section 151 review permits further evidence. All three sets of affidavits deal with and are focused on a PAJA review. The belated reliance on section 151 was expressly stated to be an afterthought by the applicant. To allow its inclusion at this stage of proceedings would be unfair to Mooihoek Boerdery as it would then have to meet completely different criteria.

[36] In the **Master of the High Court, Western Cape Division, Cape Town v C.P. Van Zyl, Case No A276/2018 (6 March 2019)** a full bench of this division dealt with an appeal and cross-appeal in respect of a review of the Master's decision in terms of section 379(1) of the Companies Act 61 of 1973 to remove Van Zyl from the office of liquidator of more than 100 companies. The application for review was brought on a dual basis under s151 of the Insolvency Act and under PAJA.

[37] Binns-Ward J held as follows:

> "[4] The obvious question then was why the dual basis for the application under both the Insolvency Act and PAJA if s 151 has wider breadth than s 6 of PAJA? Van Zyl's counsel (Mr *Muller* SC, assisted by Ms *Reynolds*) explained that resort had been had to s 6 of PAJA in respect of those matters, such as the winding up of Asch Professional Services (Pty) Ltd, in which the liquidation of the company concerned had followed on grounds other than the company's inability to pay its debts, and to which s 151 of the Insolvency Act therefore did not apply. The difficulty is that in the respect of the vast majority of the affected liquidations the record gives no particularity as to what the grounds for the winding-up orders were, or even of the names of the companies or close corporations concerned. Experience suggests however, that most of the liquidations are likely to have followed on the corporations' inability to pay their debts. That, no doubt, explains why counsel gave so much prominence in their submissions to the reach of s 151 in the current proceedings.
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> [20] On any approach, however, and irrespective whether it acted in terms of s 151 of the Insolvency Act or s 6 of PAJA, the court would be justified in interfering with the Master's decision on

review if she had proceeded on a demonstrably incorrect appreciation of the import of the statutory provision under which she purported to act; in this case by proceeding without due regard to the constraints imposed on the exercise of her power in terms of s 379(1).

[22] For all the aforementioned reasons, I agree with the submission by Van Zyl's counsel that the court a quo could review and set aside the Master's decision on any of the conventional review grounds now codified in PAJA as well as on the wider review basis applicable in the circumstances in terms of s 151 of the Insolvency Act, which in this case entitled it to set aside the decision simply because it considered it to be 'wrong', as distinct from 'clearly wrong'."

[38] Mooihoek Boerdery contends that the Chairman's decision in the present matter does not constitute administrative action and that it accordingly cannot be reviewed under PAJA. Section 1 (ee) of PAJA provides that "administrative" action does not include "the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution …". The Chairman is a Magistrate and is thus a judicial officer of a court referred to in s166 (d) of the Constitution. It was submitted that the Chairman was exercising a "judicial function" in admitting Mooihoek Boerdery's claim and thus his decision fell within the exclusion set out in s 1(ee) of PAJA. The exception is discussed in Hoexter Administrative Law in South Africa 2nd ed page 240-241.

[39] In **Aspeling and another v Hoffman's Trustee** 1917 TPD 305 Gregorowski J described the function of the presiding officer when considering claims as follows:

> "With regard to the proof of debt it is clear, under sec. 42, that the magistrate has really to perform a judicial duty when he sits at a meeting of creditors and claims are produced before him. He must see that *prima facie* proper proof is produced, and if proper proof is not produced he ought to reject the claim."

[40] This authority was referred to in **Cachalia v De Klerk, NO and Benjamin N.O.** 1952 (4) SA 672 (T) where it was stated:

> "The admission of a claim by the presiding officer is in a sense only provisional, because under sec. 45(3) the trustee may dispute the claim notwithstanding its admission by the presiding officer. Furthermore, the presiding officer does not adjudicate upon the claim as if he were a Court of Law; he is not required to examine the claim too critically (*Hassim Moti & Co. v. Insolvent Estate M.Joosub & Co.,* 1927 T.P.D. 778 at p. 781), or to require more than *prima facie* proof (Aspeling v. Hoffman's Trustee, 1917 T.P.D. 305 at p. 307). It is by no means inconceivable that he might be satisfied, on the evidence advanced by the creditor, that the latter had a *prima facie* case, or even more than such a case, notwithstanding the declared opposition of the trustee to the claim."

[41] In **Swaanswyk Investors** (supra) it was held that the Master and his representatives act in a *quasi-judicial* capacity in adjudicating upon the validity of the claim.

[42] Similarly in **Aircondi Refrigeration (Pty) Ltd v Ruskin NO. and Others** 1981 (1) SA 799 (WLD), at 803 H, Nicholas J held:

> "From these provisions it appears that there are two elements in the proof of a claim:

(a) The submission of an affidavit in the prescribed form; and

(b) The satisfaction of the officer presiding at the meeting that it is valid.

No objection was taken in the present case to the form of the affidavit. In regard to (b) the presiding officer performs a *quasi-judicial* function (cf Aspeling and Another v Hoffman'sTrustee 1917 TPD 305 at 306-7). As such he must exercise an independent judgment. Unless a claim is on the face of it bad, he should not reject it without hearing the creditor's *evidence under ss (7). (See Ilsely v De Klerk NO and Another* 1934 TPD 55*.)* It seems that a creditor is entitled to have his claim considered without any evidence heard except his own under s 44 (7). (See *Peach v Stewart NO and Another* 1929 WLD 228 at 233.)."

[43] In **Steelnet (Zimbabwe) Ltd v Master of the High Court, Jhb & others** [2008] JOL 21948 (W) Jajbhay J was seized with an application in terms of section 151 of the Insolvency Act (read with section 339 of the Companies Act, 1973) as well as PAJA for the setting aside of a decision by the Master's representative admitting certain claims at an adjourned first meeting of creditors. The court relied upon both **Hoffman's Trustee** and **Aircondi Refrigeration** with regard to the nature of the function performed by the presiding officer. The creditor's meeting in Steelnet was held at the Master's offices and presided over by an assistant Master. It was thus not conducted by a judicial officer and the provisions of s 1 (ee) of PAJA were not applicable.

[44] Mooihoek Boerdery's counsel referred to **National Credit Regulator v Nedbank Ltd and others** 2009(6) SA 295 (GNP) at 306F where it is stated.

> "Each of the findings mentioned involves a consideration of the relevant evidence, the making of factual findings, a consideration of the relevant statutory and other legal provisions, rules and principles, and, finally an application of the law to the facts. The findings will in most cases be aimed at resolving one or more disputes between two or more parties. To resolve disputes and generally to make findings, based on the application of law to the facts, are essential elements of a judicial function."

[45] In **NCR v Nedbank** the court held that a Magistrate discharging his or her duties under section 87 of the National Credit Act 34 of 2005 fulfils a judicial role. It is to be noted that this section requires a Magistrates' Court to make the orders provided for in the section.

[46] The functions of a presiding officer with regard to the proof of claims was considered in **Breda NO . v The Master of the High Court, Kimberley** (20537/2014) [2015] ZASCA 166 (26 November 2015) at paragraph [23] the SCA concluded that:

> "the presiding officer does not adjudicate on the claim as a court of law, is not required to examine the claim too critically and only has to be satisfied that the claim is *prima facie* proved."

[47] The presiding officer's decision to admit a claim is thus based upon him being *prima facie* satisfied that the claim is good.

[48] It thus appears that the presiding officer performs a quasi-judicial function and not a judicial function, and the exclusion clause in s1 (ee) of PAJA is thus not applicable. The decision accordingly would fall to be reviewed under PAJA.

[49] It is however, not necessary to finally determine this issue as the review would still fall to be considered on the basis of legality.

[50] In **State Information Technology Agency Soc Ltd v Gijima Holdings** (Pty) 2018 (2) SA 23 (CC) Madlanga J and Pretorius AJ stated as follows:

> "[39] *Pharmaceutical Manufacturers* tells us that the principle of legality is 'an incident of the rule of law', a founding value of our Constitution. In *Affordable Medicines Trust* the principle of legality was referred to as a constitutional control of the exercise of public power. Ngcobo J put it thus:
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> > 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'
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> [40] What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what s 2 of the Constitution stipulates."

[51] In **Airports Company South Africa v Tswelokgotso Trading Enterprises CC 2019 (1) SA 204 (GJ)** Unterhalter J held:

"[5] Judicial review under the principle of legality has come to assume an ever greater significance in our public law. Originally conceived as a residual and limited form of scrutiny, of application to the exercise of powers that do not constitute administrative action, the principle of legality has been recognised in two ways that have greatly enhanced its centrality.

[6] First, the principle of legality is of application to the exercise of all public power. The exercise of a power that is not administrative action falls under the discipline of the principle of legality. Less clear is whether, recourse to the principle of legality applies only residually, where an applicant seeks to review administrative action. This position is based on the constitutional primacy that PAJA enjoys and considerations of subsidiarity. The other stance is that, the review of administrative action may rely upon the principle of legality, whether or not the PAJA offers a basis for determining the matter. The Constitutional Court has given different guidance on these issues. But if the principle of legality is of application to the exercise of all public power, without regard to subsidiarity considerations, its reach is cast wide.

[7] Second, the range and intensity of review permitted by the principle of legality has enjoyed some expansion by way of judicial interpretation. Central to the principle of legality, are the requirements that for a public power to be exercised lawfully it may not be exercised *ultra vires*; the holder of the power must act in good faith, and must not

> have misconstrued the power conferred; nor may the power be exercised arbitrarily or irrationally. It is the requirement of rationality, as an incident of legality, that has given rise to some significant expansion of judicial review under the principle of legality. Rationality has been found to encompass considerations of procedural fairness, the duty to give reasons and to take into account relevant material in reaching a final decision. This broad conception of rationality has meant that the principle of legality covers much territory that is also to be found in the grounds of review specified in PAJA. Whether this concurrence is warranted under the separation of powers is a matter of on-going consideration."

[52] In the present matter, the applicant in his founding affidavit contended that as Mooihoek Boerdery's claim was for damages, it was an unliquidated amount, and thus could not be admitted as proved in the absence of the claim being compromised by the Liquidators in terms of section 78 (3) of the Insolvency Act.

[53] The issue to be determined is accordingly whether, the Chairman was empowered by section 44 of the Insolvency Act to admit Mooihoek Boerdery's claim to proof. If not, his decision is to be set aside on the basis of legality in that he misconstrued the power conferred by the said section.

[54] Section 44 provides that:

> "(1) Any person or the representatives of any person who has a liquidated claim against an insolvent estate, the cause of which arose

before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section one hundred and thirteen, but subject to the provisions of section one hundred and four, prove that claim in the manner hereinafter provided …

(3) A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim: 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, but subject to the provisions of section seventy five: and provided further that if a creditor has twenty four or more hours before the time advertised for the commencement of a meeting of creditors submitted to the officer who is to preside at that meeting the affidavit and other documents mentioned in sub-section (4), he shall be deemed to have tendered proof of his claim at that meeting."

[55] Section 78 (3) provides that:

"If authorised thereto by the creditors or if no creditor has proved a claim against the estate, by the Master, the trustee may compromise or admit any claim against the estate, whether liquidated or unliquidated if proof thereof has been duly tendered at a meeting of creditors. When a claim has been so compromised or admitted, or when it has been settled by a judgement of a court, it shall be deemed to have been

> proved and admitted against the estate in the manner set forth in section 44, unless the creditor informs the trustee in writing within 7 days of the compromise or admission or judgment that he abandons his claim: provided that the preceding provisions of this sub-section shall not debar the trustee from appealing against such judgment, if authorized thereto by the creditors."

[56] The claim tendered for proof before the Chairman by Mooihoek Boerdery was for the fair reasonable and market related repair costs in respect of Mooihoek Boerdery's cold store and packing shed as determined by a registered professional engineer and a registered quantity surveyor appointed by Mooihoek Boerdery. This is clearly an unliquidated claim for damages based upon expert opinion. The quantum of the claim has not been determined by agreement or by an order of court.

[57] In Cachalia (supra) at 678 A-C, Dowling J held as follows:

> "While sub-sec. (1) of sec. 44 deals exclusively with liquidated claims, the remaining sub-sections bear no such limitation. It is true that sec. 44 (1) refers to proof of liquidated claims "in the manner hereinafter provided", which carries the suggestion that the machinery for proof of claims is provided exclusively for liquidated claims. But the provisions of sec. 78 (3) must I think lead to a broader construction, for sec. 78 (3) indubitably contemplates that proof of claims whether liquidated or unliquidated should be tendered at a meeting of creditors."

[58] This was confined in Proksch v Die Meester en Andere. 1969 (4) SA 567 (AD) at 589 A-D where Rumpff, A.R. stated:

> "Uit laasgenoemde sub-artikel blyk dit m.i. duidelikd at dit die bedoeling was dat 'n skuldeiser wat 'n ongelikwideerde vordering het, bewys van hierdie vordering kon aanbied. Indien die skuldeisers nie die curator tot vergelyk of erkenning magtig nie, meot die skuldeiser, indien hy wil voortgaan, sy ongelikwideerde vordering deur 'n hof laat besleg. Dieselfde bedoeling word m.i. weerspieël in art. 78 (3) VAN DIE Wet van 1936 en dié sub-artikel sal van toepassing wees op 'n ongelikwideerde vordering wat voorwaardelik is of onvoorwaardelik. Die verwysing na 'n vonnis van 'n hof in art. 78 (3) het nie betrekking op 'n vordering wat afgewys word luidens art. 44 (3) nie. In art. 44 (3) word uitdruklik bepaal dat die afwysing van 'n vordering die skuldeiser nie belet nie om sy vordering in 'n regsgeding te bewys. Die vonnis van 'n Hof waarna in art. 78 (3) verwys word, het betrekking op 'n ongelikwideerde vordering wat nie deur die curator erken of geskik word nie. Word die ongelikwideerde vordering besleg, word dit geag onder art. 44 bewys en toegelaat te wees, maar indien dit 'n voorwaardelike vordering is, sal die waarde van die vordering nog kragtens art. 48 bepaal moet word."

[59] Margo J in **Taylor and Steyn NNO v Koekemoer** 1982(1) SA374 (T) stated the position to be as follows:

> "Section 366 (1) provides for claims to be proved *mutatis mutandis* as under the law relating to insolvency. Under the Insolvency Act, an unliquidated claim, such as one for damages, may be tendered for proof, but cannot be proved until the amount thereof has been fixed by a judgment, or the trustee, acting under a resolution of creditors, has compromised it and agreed to the amount thereof. See Mars on *The Law of Insolvency in SA* 7th ed para 17.4 at 327. Once it has become liquidated by a judgment or a compromise, the claim, if it was tendered for proof, is deemed by s 78 (3) of the Insolvency Act to have been proved and admitted against the estate. See, for example *Cachalia v De Klerk NO and Benjamin* NO 1952 (4) SA 672 (T); *Wynne and Godlonton NNO v Mitchell and Another NNO* 1973 (1) SA 283 (E)."

[60] Similarly Van Der Walt J, held in **Rabinowitz v De Beer NO** and Another (at 412 H- 413 B) that:

> "It would follow therefore that at the first meeting of creditors proof of unliquidated claims may be tendered and noted but the claim only becomes a proven and admitted liquidated claim against the estate if it has been compromised or admitted by the trustee, or when it has been settled by a judgment of a court. Again reference is made to the *Cachalia* case at 678 A-B. I advisedly use the word "noted" and not "admitted" because if proof of an unliquidated claim is tendered no value can be placed upon it, the amount not being fixed and determined until the procedure in s 78 (3) has been put into effect. Should a creditor tender proof of an unliquidated claim at the first

> meeting of creditors the claim might be noted and recorded by the presiding officer, but, lacking proof and admission of the claim in a fixed and determined amount, the creditor will have no voting rights until his claim has been duly admitted in an amount determined in terms of s 78 (3)."

[61] In **Klein NO v Kolosus Holdings Ltd and Another 2003 (6) SA 198** (T) Bertelsmann J, set out and considered the authorities (including **Ilic v Parginos** 1985 (1) SA 795 (AD) and noted as follows:

> "[87] The decision of *Rabinowitz v De Beer and Another* 1983 (4) SA 410 (T) does not take the argument any further, other than to underline that an unliquidated claim must be rendered for proof at a meeting of creditors, where it is to be noted if not immediately compromised, admitted or determined by a judgment."

[62] The line of decisions above establish that, while proof of a liquidated claim is to be tendered at a meeting of creditors it will then be delivered by the presiding officer to the trustee to be compromised, or admitted which will thereby render it liquidated. Where it is not compromised or admitted the creditor must establish its claim by way of legal proceedings.

[63] The Chairman in the present matter was thus not empowered by section 44 of the Insolvency Act to admit Mooihoek Boerdery's unliquidated claim. His decision accordingly is to be reviewed and set aside on the basis of legality.

[64] It is therefore ordered that:

(a) The First Respondent's decision of 6 April 2018 to admit, as proved, the claim of the Second Respondent in the Insolvent estate of George Refrigeration CC (in liquidation) is reviewed and set aside;

(b) The Second Respondent shall pay the Applicant's costs.

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SIEVERS, AJ
Acting Judge of the High Court

I agree. It is so ordered.

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DOLAMO, J
Judge of the High Court