IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 12024 / 2022

In the matter between:

JOHANNES HENDRICUS DU PLESSIS	**First Applicant**
AYESHA MAHOMED AYOB	**Second Applicant**
and	
THE MASTER OF THE HIGH COURT,	**First Respondent**
(CAPE TOWN)	
HEIN VOGEL	**Second Respondent**
ALAN RICHARD NEWTON N.O.	**Third Respondent**
CRATOS CAPITAL (PTY) LTD	**Fourth Respondent**
JSE LIMITED	**Fifth Respondent**

Coram: Wille, J

Heard: 25 July 2023

Order: 28 July 2023

Reasons: 4 August 2023

REASONS

WILLE, J:

***Introduction*:**

[1] The applicants sought a review of a decision made by the first respondent. This review was chartered regarding the court rules and specific sections of two pieces of intervening legislation.[1] Involved in this application was a dispute about the validity of a portion of an insolvency enquiry into the affairs of a company that was liquidated.[2]

[2] The first respondent decided that the entire enquiry was invalid and of no force and effect.[3] This decision was made by the first respondent several months ago.[4] The applicants wanted this decision to be set aside and substituted by a decision to the effect that the enquiry be regarded as valid and properly convened for a specified period only.[5] I agreed.

[3] The first and second respondents took no part in these proceedings and did not oppose the relief sought by the applicants. This even though the second respondent complained to the first respondent, which resulted in the decision being taken by the first respondent. The third respondent was the 'commissioner' appointed by the first respondent to conduct the enquiry into the affairs of the liquidated company. Similarly, the third respondent does not oppose the relief sought in the application. The fourth respondent was the only creditor who submitted a claim for proof against the liquidated company, and it too, did not oppose the relief sought in this application.

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1 The Promotion of Administration of Justice Act, 3 of 2000 and the Insolvency Act, 24 of 1936
2 *Cygne Bleu* (Pty) Limited (the liquidated company).
3 That had commenced with effect from 21 April 2021 to 21 October 2021
4 The decision was made on 21 January 2022 (the "decision").
5 From 30 April 2021 up to and including 21 October 2021 (the "second part" of the enquiry).

[4] The fifth respondent was a party whose employees participated in the enquiry into the affairs of the liquidated company. The fifth respondent was not an original party to the application but was subsequently granted leave to join the proceedings. The averments by the fifth respondent were to the effect that the enquiry into the affairs of the liquidated company fell to declared abusive proceedings and that specific evidence tendered fell to be set aside.[6]

[5] After some consideration, I granted an order in the following terms, namely: (a) that the decision of the first respondent that all the enquiries held into the affairs of the liquidated company were invalid and of no force and effect, be reviewed and set aside: (b) that the decision was substituted with a decision that the second part of the enquiry into the affairs of the liquidated company was declared valid and, (c) that the costs of and incidental to this application (including the fees of senior counsel, where so employed) were ordered to be costs in the "liquidation" of the liquidated company (on the scale as between party and party) as taxed or agreed.

Overview:

[6] The principal business activities of the fourth respondent are connected to the trading of *equities* listed by the fifth respondent, who was a trading member of the fifth respondent. To trade, the fourth respondent, among other things, concluded a clearing agreement with a registered deposit-taking institution. In terms of this agreement, it was agreed that the fourth respondent would be able to trade with instruments known as *'futures'.* The deposit-taking institution would clear these future trades as a clearing member for the fourth respondent so that the fourth respondent could trade on the fifth respondent's platform. In summary, the fourth respondent would purchase various derivative items, including all *'futures*' on behalf of its various clients. One of these clients was the liquidated company represented by the second respondent. Thus, as defined by the fifth respondent's trading rules, the liquidated company was a client of the fourth respondent.

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[6] The evidence tendered at the enquiry on 13, 14 and 15 July 2022.

[7] More than two years ago, the liquidated company was finally placed under a winding-up order because it was indebted to the fourth respondent.[7] After that, the fourth respondent convened an enquiry in which the third respondent was appointed as the 'commissioner' of the enquiry. Several hearings occurred after that from time to time and were held at differing locations.[8]

[8] During this time, the second respondent preferred a complaint against the applicants and questioned the legality of the enquiry proceedings. The first respondent dismissed this complaint which did not feature in this review application. During this enquiry, a witness confirmed that the liquidated company was the *alter ego* of the second respondent and was the party responsible for its trading and business activities. This was subsequently also corroborated by two other witnesses to the enquiry.

[9] Moreover, the evidence at the enquiry evinced that the second respondent preferred this structure to curtail and limit the risk attached to trading in '*futures'* with the result that the liquidated company could not fund the subsequent margin calls causing enormous losses to the fourth respondent. The applicants contended for the position that fraud was committed with the assistance of the second respondent by using discrete legal entities to avoid payment of the losses sustained by the liquidated company. I made no findings in this connection.

Chronology:

[10] The first applicant received the first order from the first respondent in terms of which the applicants were authorized to conduct an enquiry into the affairs of the liquidated company.[9] This first order had affixed to it an official stamp of the first respondent. It was however not signed by the first respondent. No proper explanation was tendered for this, and this remains unexplained on the papers.

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[7] This was in March 2021. The final winding-up order was granted on 5 February 2021.
[8] During the period 21 April 2021 to 21 October 2021.
[9] In terms of sections 417 and 418 of the Companies Act, 71 of 2008 (the "first" order).

[11] During this time, we were all subject to restrictions imposed by the then-raging pandemic. Accordingly, the applicants did not consider the lack of signature significant. Thus, the enquiry proceeded, and the second respondent gave evidence. At no time was any objection raised by any witnesses concerning the legality of the proceedings. After that, the first applicant received a further *mirror* order from the first respondent, which was stamped and signed by the first respondent.[10]

[12] Following this, the second respondent addressed a letter to the first respondent, wherein he made unfortunate allegations about the enquiry, the applicants, and the applicants' legal representatives (including, regrettably, the commissioner).[11] After that, the second respondent addressed a further letter to the first respondent, wherein he sought to remove the applicants as liquidators. Further, a demand was made to the first respondent to declare the entire enquiry illegal, null and void.

[13] This prompted a response from the applicants shortly after that. The following was accentuated: (a) at no stage was any objection raised by any party who gave evidence on the various dates of the enquiry as to the validity of the proceedings; (b) that the applicants believed that the enquiry had been adequately constituted; (c) that in the event of such belief being incorrect, they requested condonation for the hearing dates before the receipt of the second order and, (d) that the transcript of the enquiry to date was voluminous excluding the documents received from the various witnesses and thus they were prejudiced as to the costs thereof.

[14] The first respondent then communicated with the applicants and required them to provide the first respondent with a signed authority concerning the first order. According to the first respondent the only authority for the enquiry that the first respondent was aware of concerned the second order. All these 'complaints' were technical in nature.

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[10] The "second" order dated 30 April 2021.
[11] On 14 October 2021.

[15] The first respondent then ordered that pending any ruling by the first respondent, the enquiry to be held going forward was postponed *sine die*. After that, the applicants received a 'ruling' from the first respondent accentuating the following: (a) that the thrust of the complaint made by the second respondent was made against the 'commissioner' and not the applicants; (b) that the first order was false and, (c) that the correct order was the second order; (d) that the enquiry based on the first order was not authorized and therefore invalid; (e) that this finding of invalidity did not mean that the second respondent could not be called to account at a valid enquiry in the future; (f) that the second respondent had failed to make out any case for the removal of the applicants and, (g) any person aggrieved by the decision may bring it under review.

[16] Correspondence followed from the applicants' attorney of record. They sought clarity from the first respondent as hearings were held before the second order was issued. After that, all the subpoenas and further hearings were held regarding the second order. The first respondent then 'ruled' that the entire enquiry was invalid, but this notwithstanding, further hearings could occur regarding the second order. Herein lies the rub.

Consideration:

[17] The applicants submitted that the decision by the first respondent to declare all the days on which the enquiry was conducted after the granting of the second order was without any merit and was unreasonable. I agreed. The applicants accentuated that vast amounts of evidence had already been amassed prior to the decision and that the enquiry had proceeded without any complaint from any of the parties. The decision by the first respondent meant that this evidence fell to be re-obtained thereby further inconveniencing witnesses to provide the same evidence as they had previously attested to. In addition, the costs of re-hearing such evidence would be substantial notwithstanding the obvious inconvenience to the witnesses.

[18] It was contended that the first respondent should have found that all the days of the hearing after the grant of the second order were valid and that the evidence taken thereat was valid and did not need to be repeated. The applicants requested that the decision should be set aside and substituted with an order that the hearing dates of the enquiry after the second order were valid and lawful and that all evidence obtained from any witnesses after the grant of the second order was valid and lawful. Again, I agreed.

[19] Passing now to a consideration of the position adopted by the fifth respondent. It is common cause that the witnesses connected to the fifth respondent testified at the enquiry after the grant of the second order. Thus, it was argued that there was a valid order in place at the time that the employees of the fifth respondent gave evidence at the enquiry. Once again, I agreed.

[20] The fifth respondent also sought to interdict the enquiry from proceeding. These proceedings were settled because the fifth respondent acceded to provide the applicants with the relevant information they sought. Unmoved, the fifth respondent now alleges that it was unaware of the alleged invalidity of the enquiry. This bears some scrutiny. I say this because the second order was granted about two months before the witnesses connected to the fifth respondent testified. In addition, the fifth respondent's employees had already supplied the information to the applicants (in terms of the settlement agreement) before the first respondent had made the decision. sought to be reviewed and set aside.

[21] The fifth respondent embarks along a path of being a friend of the court in an endeavor to place information before the court relating to a series of emails between the applicants and the first respondent which have since come to the attention of the fifth respondent. The relief sought by the applicants is not opposed by the fifth respondent. The fifth respondent alleges that the applicants did indeed consider the absence of a signature on the first order to be of significance and importance.

[22] The status position of the fifth respondent was challenging to understand. I say this because an *amicus curiae's* standing differs entirely from a party becoming a respondent due to its intervention. Moreover, the information furnished by the fifth respondent was in the possession of the first respondent, and despite having such documentation, the latter elected not to oppose this application. Put another way, had the first respondent considered the documentation relied upon by the fifth respondent to have been of importance, one would have expected the first respondent to have made such documentation available to the court. I say this because the first respondent was obliged to have submitted the review record in terms of the court rules. Notably, the fifth respondent contended that they were not provided with a copy of the review record supplied by the first respondent. This, despite the index to the review record having been timeously filed on the fifth respondent's attorneys of record. The documentation relied upon by the fifth respondent was of no material significance, nor did it assist the court.

[23] Undoubtedly, the first respondent failed to consider all the relevant facts, including the costs of holding the enquiries. Most importantly, the first respondent provided no reasons for the 'invalid' enquiry. Yet, simultaneously, the first respondent said that the applicants were at liberty to proceed with further enquiries under the auspices of the second order. It must be so that the decision by the first respondent implies a decision that is structured rationally, which must be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken.[12] Put another way, the decision by the first respondent falls to be reviewed on the grounds of a 'disproportionality' between the adverse and beneficial consequences of the action, and the existence of less restrictive means to achieve the purpose for which the action was taken.[13] In addition, the first respondent did not have the power to make a ruling concerning the order relating to the invalidity of the enquiry.[14]

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[12] *S v Manamela* 2000(3) SA1 CC.
[13] *Carephone (Pty) Ltd Marcus N.O.* 1998 (11) BLLR 1093 (LAC).
[14] In terms of sections 417 and 418 of the 1973 Companies Act.

[24] Thus, in effect, the first respondent only made a declarator. This was then the subject of review strictly following the relevant provisions of the Insolvency Act.[15] Put another way, the first respondent had no statutory or common law power to rule on the validity of enquiry proceedings, *albeit* the first respondent initially authorised these proceedings. Thus, it must be so that the first respondent could not have legally made the invalidity ruling. The first respondent does not have an oversight role in how the enquiry is to be conducted.

[25] Finally, it was challenging to understand how the fifth respondent fell into the category of an aggrieved person in these circumstances. A person is *aggrieved* for the purposes of this species of review if any statutory rights are affected or if he or she is deprived of some advantage to which he or she is legally entitled.[16]

Costs:

[26] Despite the allegations levelled against the first respondent coupled with the decision made by the first respondent in these circumstances, the first respondent nevertheless elected not to deny such allegations or to oppose the relief sought by the applicants.

[27] I mention this because the applicants requested a costs order to be levied against the fifth respondent. I did not see it this way. Whilst I have some strong suspicions about the conduct of the fifth respondent, no costs order falls to be levelled against the fifth respondent, absent further evidence. I say this because the application was undoubtedly triggered in this matter due to the conduct of the first respondent. It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[17]

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[15] In terms of section 151 of the Insolvency Act, 24 of 1936.
[16] *De Hart v Klopper and Botha* 1969 (2) SA 91 (T) 100.
[17] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055 F- G.

[28] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as to costs as would be fair in the discretion of the court.

[29] No hard and fast rules have been set for compliance and conformity by the court unless there are exceptional circumstances.[18] In all the circumstances, a costs order against the fifth respondent was not warranted, and the costs were better placed to be costs in the liquidation proceedings.

[30] These were the reasons for my order and the costs attached to it.

E D WILLE
(Cape Town)

[18] *Fripp v Gibbon & Co* 1913 AD 354 at 364.