IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case number: 2007/463

In the matter between:

STEELNET (ZIMBABWE) LIMITED	Applicant

and

THE MASTER OF THE HIGH COURT JOHANNESBURG	First Respondent
NONDUMISO GAGELA NO	Second Respondent
THEODOR VAN DEN HEEVER NO	Third Respondent
ELSIE WAGENAAR NO	Fourth Respondent
HARRY KAPLAN NO	Fifth Respondent
AFRICA HERITAGE MANAGEMENT SERVICES (PROPRIETARY) LIMITED	Sixth Respondent
ECC PROPERTIES (PROPRIETARY) LIMITED	Seventh Respondent

Judgment

Jajbhay J

INTRODUCTION

In this matter the Applicant seeks an order in terms of Section 151 of the Insolvency Act, 24 of 1936, ("The Insolvency Act") read with Section 339 of the Companies Act, 73 of 1966 ("The Companies Act") as well as the Promotion of

Administrative Justice Act 3 of 2000. The applicant seeks an order setting aside a decision by the Second Respondent at an adjourned first meeting of creditors held at Johannesburg on 24 October 2006 in the estate of Petter Trading (Pty) Ltd, ("Petter")The decision of the Second Respondent admitted as proved certain claims filed by the Sixth and Seventh Respondents.

The Applicant further seeks an order that this Court adjudicates on the two claims filed by the Sixth and Seventh Respondents and rejects these claims. Alternatively the applicant seeks an order that the two claims be subjected to an interrogation in terms of Section 44 (7) of the Insolvency Act, that all meetings to be held in future in the insolvent estate of Petter, be chaired by a Magistrate, independent of the offices of the First Respondent, and the appointment of the Fourth and Fifth Respondents, as final liquidators, be set aside and that the first meeting of creditors in the estate of Petter be reconvened. The Applicant further seeks that the costs be paid by the First, Sixth and Seventh Respondents, jointly and severally.

The relevant part of Section 151 of the Insolvency Act reads as follows:

> *"**151.Review.** – 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.*"

The meeting which is the subject matter of this application was an adjourned first meeting of creditors of Petter, which was finally liquidated at the instance of the Applicant in terms of an order of this Court on 20 September 2005.

The First and Second Respondents do not oppose prayers 1, 2 and 4 of the notice of motion but they do oppose prayer 3 and the granting of costs against them. The First Respondent gave notice that in future Mr. Lester Basson the acting Master of

this division will personally deal with matters relating to the Petter estate.

This application is based on the Second Respondent's failure, as the representative of the First Respondent and the presiding officer at the meeting, to apply her mind to the claims filed by the Sixth and Seventh Respondents and her failure to apply the rules of natural justice.

LEGAL PRINCIPLES AND THE PROCEDURE

In terms of Section 43(3) of the Insolvency Act, a claim made against an insolvent estate shall be proved at a meeting of creditors of that estate to the satisfaction of the officer presiding at that meeting, who shall admit or reject the claim. Every such claim shall be proved by affidavit to be made by the creditor or by any person fully cognisant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim. The said affidavit and documents submitted in support of the claim shall be delivered at the office of the officer who is to preside at the meeting of creditors not later than 24 hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim, failing which the claim shall not be admitted as proof at that meeting, unless the presiding officer is of the opinion that through no fault of the creditor he has been unable to deliver such evidence of his claim within the prescribed period. Section 44(4)

Section 44(7) stipulates that the officer presiding at any meeting of creditors may of his own motion or at the request of the trustee or his agent or at the request of any creditor who has proved his claim, or his agent, call upon any person present at the meeting who wishes to prove or who has at any time proved a claim against the estate to take an oath, to be administered by the said officer, and to submit to interrogation by the said officer or by the trustee or his agent or by a creditor or the agent of a creditor whose claim has been proved, in regard to the said claim.

In terms of Section 40(3) (a) the Master shall, after the first meeting of creditors

and the appointment of a trustee, appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate. The trustee shall convene the second meeting of creditors by notice in the Gazette and in one or more newspapers. Section 40(3) (b)

After the second meeting of creditors the trustee shall convene by notice in the Gazette a special meeting of creditors for the proof of claims against the estate in question whenever he is thereto required by any interested person. Section 42(1). The trustee may at any time, and shall whenever he is required by a creditor who has proved his claim against the estate, provided that the Master consents thereto, convene by notice in the Gazette a special meeting of creditors for the purpose of interrogating an insolvent. Section 42(2).

After a meeting of creditors the officer who presided shall deliver to the trustee every claim proved against the insolvent estate. The trustee shall then examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed. 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 same. Section 45.

With certain exceptions not relevant for purposes of this application, every creditor of an insolvent estate shall be entitled to vote at any meeting of creditors as soon as his claim against the estate has been proved. The vote of any creditors shall be reckoned according to the value of his claim except when it is provided in the Act that votes shall be reckoned in number. Section 52(1) – (2). A creditor may vote at a meeting of creditors upon all matters relating to the administration of the estate, but may not vote in regard to matters relating to the distribution of the estate, except for the purpose of directing the trustee to contest, compromise or admit any

claim against the estate. Section 53(1). Subject to certain exceptions, every matter upon which a creditor may vote shall be determined by the majority of votes reckoned in accordance with Sub-Section 2 of Section 52.

In terms of Section 386(3) of the Companies Act the liquidator of a company, in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under Section 387 shall have the powers mentioned in Section 386(4). These powers are *inter alia:* to bring or defend legal proceedings of a civil nature; to agree to any reasonable offer of composition and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment thereof; to compromise or admit any claim or demand against the company; to make any arrangement with creditors, including creditors in respect of unliquidated claims; to submit to the determination of arbitrators any dispute concerning the company to carry on or discontinue any part of the business of the company; to sell any movable and immovable property of the company.

A claim must be proved at a meeting of creditors to the satisfaction of the officer presiding at the meeting. The officer presiding should examine the proof of claim documents for the purpose of deciding whether they disclose *prima facie* the existence of an enforceable claim. The information in such documents may be supplemented by the Claimant's evidence under interrogation on oath.

Meskin, Insolvency Law, p 9-11, para 9.2.5
Catherine Smith, The Law of Insolvency, 3rd ed, p 217-222

De La Rey, Mars, The Law Insolvency in South Africa, 8th ed, p 332 *et sec*

In **Aspeling & Another v Hoffmans Trustee 1917 TPD 305,** Gregorowsk**i** J said the following with regard to the duties of the presiding officer:

"**With regard to the proof of debt it is clear, under Section 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. It is very desirable that Magistrates should be precise in the carrying out of this function. … I think the intention of the law is that matters of this kind should be perfectly clear. … In a case like the present he ought in each instance to thoroughly scrutinise the claim and see whether *prima facie* the debt is one which ought to be admitted. The wording of the law is that the claim must be '*proved to the satisfaction of the presiding officer, who shall admit or reject the claim*'. I think that that means that when a debt, for instance is proof before him, and it appears *ex facie* the documents that the debt is prescribed, he should reject it, because a prescribed debt cannot be proved against an insolvent estate. He should also see that there is precision and exactness in the claims made, and some regard should be paid to the date of the accrual of the claims. … When the meeting took place the proofs of debt were handed in, a list was made of them, and the Magistrate says he cursorily looked at the documents. I do not think that that is performing the duty which is prescribed by Section 42(2). <u>It is his duty to not merely to look at them cursorily, but to examine them carefully and to see whether they are entitled to be admitted or not</u>."**(emphasis added)

In **Aircondi Refrigeration v Ruskin N.O. & Others 1981 (1) SA 799 (W)** Nicholas J, said the following about the proof of a claim at a meeting of creditors (at **p 803** *et seq*)*:*

> **"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**
>
> **…**
>
> **In regard to (b) the presiding officer performs a *quasi* judicial function … 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)"**

With regard to substituting the decision of the presiding officer with the Court's own decision the following was said (at **p 805** D – H):

> **"It is true that ordinarily, in a case such as the present, the Court will refer the matter back for consideration by the person in whom the discretion was vested. And during argument I indicated that my view was that that should be done in the present matter. Upon reconsideration, however, I am of the opinion that the matter should not be referred back to the receiver but that this Court should itself make an order. In *Agricultural Supply Association (Pty) Ltd v Minister of Agriculture 1970 (4) SA 65 (T)* Colman J said at 72:**
>
> > **"In Johannesburg City Council v The Administrator of the Transvaal 1969 (2) SA 72 (T) Hiemstra J summarised, conveniently, the considerations which have been**

recognised in the relevant authorities. In the ordinary course, he said, a matter of this kind will be referred back, because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. But it may do so –

(a) If the end result is a foregone conclusion and a reference back will merely waste time; this criterion will be of particular importance if delay will be prejudicial to the applicant.

(b) If the tribunal or functionary has exhibited bias to such a degree that a reference back would be unfair to the applicant.

(c) If the tribunal or functionary has exhibited incompetence to such a degree that it would be unfair to the applicant to refer the matter back. ”

In **Marendaz v Smuts 1966 (4) SA 66 (T)** Rabie J said the following about Sections 44(4) and 44(7) of the Insolvency Act:

At p 72 D:

“The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided in sec. 44(3) of the Act, or as to when he resort to the calling of evidence as provided for in sec. 44(7). …I agree with the submissions of Mr *Page* and Mr *Davidson* that applicant failed to comply with the provisions of sec.

44(4) when submitting her claim. It seems to me that where, as in the present case, money is claimed on more than one ground of indebtedness, such grounds should be separated and particularised that both the presiding officer and creditors are given sufficient information to enable them to consider each claim properly. To hold otherwise in a case like the present could cause prejudice and render nugatory the right of inspection given to creditors under sec. 44(5) of the Act."

At p 72 H *et seq*:

"As I have said before, applicant states her claim to be in respect of household expenses and loans, without any indication as to what part of the claim is for household expenses and what part for loans. In his supporting affidavit the insolvent makes no reference to loans. This discrepancy between his version and that of the applicant makes the position completely uncertain and, in my view, also casts doubt on the genuineness of the applicant's claim.

…

In the light of this statement by applicant the submission made on her behalf that sufficient particulars were given for respondent to have allowed her claim on her the basis of household necessaries as provided for in sec. 3 of the Matrimonial Affairs Act is more than a little unreal. To accept this submission would in the circumstances be

tantamount to admitting a claim of which an unspecified part is based on a ground which applicant admits to be non-existent.

...

It seems to me, furthermore, that in view of the aforementioned finding of Vieyra, J, in regard to the very basis of applicant's claim, viz., the letter of 23rd May, 1953, respondent was entitled to reject applicant's claim on the ground of suspicion as to its genuineness. In my view the present is pre-eminently a case for the application *mutatis mutandis* of what was said by Watermeyer, J., in *Chappell v The Master and Others,* 1928 C.P.D. 289, when he set aside a Master's decision to allow the claims of an insolvent's two sons which were based on donations. The learned Judge said (at p. 291):

> **"Before dealing with the facts of the case I would like to say that 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 those 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. That principle would apply especially in cases where the interests of the insolvent coincide with the interests of the person putting forward these claims, and especially where claims are proved by the insolvent on behalf of children**

or relatives."

With respect to the application of Section 151 in the context of the review of the proof of claims, see:

Derby Shirt Manufacturers (Pty.) Ltd. v Nel, N.O. and Another, N.O. 1964 (2) SA 599 (D)

Noordkaaplandse Ko-op Lewendehawe Agentskap Bpk v van Rooyen and Others 1977 (1) SA 403 (NC)

Rabinowitz v De Beer NO 1983 (4) SA 410 (T)

BACKGROUND FACTS

I consider it essential to set out the following background facts, although somewhat tedious, necessary in order to properly understand the present dispute.

THE PARTIES

The Applicant is a public company incorporated in terms of the Companies Act, Chapter 24/03, of the laws of the Republic of Zimbabwe, with its principal place of business at 6 Tilbury Road, Willowvale, Harare, Zimbabwe. The Third, Fourth and Fifth Respondents are liquidators. On 13 January 2006, the Third to Fifth Respondents were appointed as provisional liquidators of Petter. On 24 October 2006, the Fourth and Fifth Respondents were appointed as final liquidators of Petter. The Sixth and Seventh Respondents are South African companies.

RELEVANT ZIMBABWEAN COMPANIES

SMM Holdings (Private) Limited ("SMM") is a company incorporated in Zimbabwe, which carries on business *inter alia* in the mining of asbestos fibre, which it exports

to customers throughout the world. The Applicant is a subsidiary of SMM. The Applicant is listed on the Zimbabwean stock exchange. The Applicant carries on business in Zimbabwe in the manufacturing of various steel products.

THE AR PROJECT SERVICES (PROPRIETARY) LIMITED GROUP OF COMPANIES

AR Projects Services (Proprietary) Limited (“ARPS”) is a company incorporated in South Africa. ARPS previously acted as the management holding company to a group of subsidiary companies, including Southern Asbestos Sales (Proprietary) Limited (now in liquidation) ("SAS"), Petter and a host of other companies. ARPS was finally liquidated at the instance of Lombard Insurance (Proprietary) Limited (“Lombard Insurance”) on 6 May 2006. SAS is a subsidiary of ARPS and a South African company, with its registered office at AHI House, 325 Rivonia Boulevard, Rivonia, Johannesburg. SAS was finally liquidated at the instance of SMM in this Court on 14 June 2005.

SMM has proven a claim against the estate of SAS in the amount of R81, 440.15 on the basis of a taxed bill of costs and a taxing master's allocoteur. SMM has also instituted action against SAS in this division under case number 2006/19777 for another claim in the amount of United States Dollar ("US$") 18,464,595.27, Canadian Dollar ("C$") 628,071.84 and South African Rand ("R") 4,515,367.48.

On 17 July 2007 SMM obtained judgment against SAS in the amount of US $ 13 308 150, 27, C$ 628 071, 84 and ZAR 4 515 367, 48 together with interest and costs.

The Sixth and Seventh Respondents also lodged and proved claims in the estate of SAS. The claims were for rental, management fees and legal costs. However, the decision of the First Respondent's officials to admit these claims has been set aside in a review application brought in this Honourable Court under case number 2006/ 20467 ("the SAS review application").

Petter is also a subsidiary of ARPS and is a company incorporated in South Africa.

Petter conducted business prior to liquidation as a procurement company. Petter was finally liquidated at the instance of the Applicant on 20 September 2005. The Applicant is alleges that it is a creditor of Petter in the amount of R3, 228,040.21.

The Sixth and Seventh Respondents lodged claims in the estate of Petter. It is the decision to admit these claims that is the main subject of this application.

LIQUIDATION PROCEEDINGS RELATING TO PETTER

The Applicant brought a winding-up application against Petter in this division under case number 05/8037 on 14 April 2005. The Applicant's claim against Petter was for funds in the amount of R3, 228,040.21 paid for the procurement of steel. As appears from the founding papers in the liquidation application Petter's indebtedness to the Applicant was admitted by Petter. An affidavit deposed to by Mr Mariemuthu on behalf of Petter was filed, and the matter set down for hearing on the opposed roll for 20 September 2005**.** Petter indicated shortly before the hearing that it would not be opposing the application for its winding-up and the final winding-up order was therefore granted on an unopposed basis on 20 September 2005.

EVENTS AT FIRST MEETING OF CREDITORS HELD ON WEDNESDAY, 12 JULY 2006

On a careful study of the papers, the following chain of events emerges. The Third Respondent was a provisional liquidator of Petter and was tasked with the day-to-day management and administration of the liquidation proceedings. On 28 April 2006 the Applicant's attorneys of record addressed to Mr. Johan Adendorff of D&t Trust (assistant to the Third Respondent), in terms of which the Applicant registered its name and address as a creditor in the estate of Petter, in terms of section 43 of the Insolvency Act. On 23 June 2006, the first meeting of creditors in

the estate of Petter was advertised in the Government Gazette. The Applicant was at that stage not aware of the proposed first meeting of creditors or the publication of the notice in the Government Gazette.

On 7 July 2006 D&t Trust sent an email to the Applicant's attorneys wherein it is stated that the first meeting of creditors will be held in the Petter estate on Wednesday, 12 July 2006 and that the claim documents must be lodged by 10h00 on Tuesday, 11 July 2006. The Applicant did not lodge a claim by the deadline of 10h00 on the day prior to the first meeting of creditors, Tuesday, 11 July 2006. On 11 July 2006, the Sixth and Seventh Respondents represented by Mr Mariemuthu, submitted claims against Petter in the amounts of respectively R4, 982,975.00 and R957, 600.00.

The first meeting of creditors of Petter proceeded at approximately 10h00 on 12 July 2006 at the offices of the First Respondent. Representing the Applicant, were Mr FH Odendaal SC, Adv HC Bothma and Ms Young. Also present were the Third Respondent, and Mr Johan Adendorff, as well as Mr Mawere and Mr Mariemuthu. Ms Lindup, a joint liquidator in SAS, also attended the meeting.

Ms Pamela Dube, an assistant master at the offices of the First Respondent, presided over the meeting. Ms Dube, Mr Benett Aphane and the Second Respondent are all assistant masters at the offices of the First Respondent. These individuals have presided over various creditors' meetings in the estates of SAS and Petter. These officials are, and have been, to a greater or lesser extent, all involved in the various creditors meetings and that they all have knowledge of the relevant facts and the inter-relationship of the various matters. This appears from a "*report*" filed by the First Respondent in the SAS review application.

At the meeting, Mr Odendaal SC applied for a postponement of the meeting in order for the Applicant to lodge its claim. The reasons for the Applicant's failure to lodge a claim timeously were explained to the presiding officer. The Applicant contended that, through no fault of its own, it was unable to deliver evidence of its claim within the prescribed period. In terms of section 44(4) of the Insolvency Act, the First Respondent accordingly has discretion to allow a late claim where,

through no fault of its own, a creditor could not lodge a claim timeously. In regard to the Applicant's claim, Ms Dube ruled that in terms of "*fairness and reasonableness*", and "*taking into account [her] discretion*", the Applicant would be given a fair opportunity to lodge its claim. She stated that the claim ought to be lodged twenty-four hours prior to the commencement of the adjourned first meeting of creditors, and that the issue as to whether or not the Applicant should be allowed to lodge its claim at such time ought to be argued at the meeting to be held on 24 October 2006.

The Third Respondent attended at the First Respondent's offices the day prior to the first meeting of creditors taking place, and examined the claims lodged by the Sixth and Seventh Respondents. When the question of admission of these claims arose at the meeting held on 12 July 2006, the Third Respondent requested an adjournment of the meeting, so that he could discuss the matter with the various parties. The adjournment was granted by Ms Dube. At the reconvened meeting, the Third Respondent stated that he had experienced severe difficulties in obtaining documentation supporting the Sixth and Seventh Respondents' claims and that he had been furnished with no such documentation. As a result, the Third Respondent required an interrogation of the Sixth and Seventh Respondents in terms of the provisions of Section 44(7) of the Insolvency Act. The Third Respondent (assisted by Mr J Adendorff) is the person who investigated the affairs of Petter and is the person who is in the best position to express a view as to the status of the Sixth and Seventh Respondents' claims. Ms Dube acceded to the request and directed that the representatives of the Sixth and Seventh Respondents be interrogated with regard to their claims. Mr Mariemuthu indicated that he would readily submit to a section 44(7) interrogation. The meeting was postponed to 24 October 2006, for the interrogation and consideration of whether or not the Applicant's claims should be received. The minutes read:

"*The meeting is postponed to 24/10/2006 at 10h00 for the purpose of*

interrogation in terms of section 44(7) of the Insolvency Act. The Applicant creditor can lodge its claim on the 24/10/006 the presiding officer will decide whether to look at the claim or reject it."

EVENTS AT ADJOURNED FIRST MEETING OF CREDITORS HELD ON TUESDAY, 24 OCTOBER 2006

The adjourned first meeting of creditors proceeded on Tuesday, 24 October 2006. The Second Respondent now presided over the adjourned first meeting of creditors on 24 October 2006. The meeting was scheduled to commence at 10h00. Whilst waiting for the meeting to commence, the following persons were present in the main meeting room at the First Respondent's offices, termed by the First Respondent's employees as "*the court*": Mr Odendaal senior counsel acting on behalf of the Applicant, and Mr Bothma, junior counsel acting on behalf of the Applicant; Mr Colyn, Ms Young and Ms Anne Daniel of the attorneys acting on behalf of the Applicant; The Third Respondent, assisted by Mr Adendorff; The Fifth Respondent; Mr Mawere and Mr Mariemuthu. At approximately 10h05, the Second Respondent entered the room and the meeting commenced. The Second Respondent confirmed that all parties had received her telefax dated 28 September 2006. The Third Respondent confirmed receipt thereof and stated that he had responded to her telefax, especially as it is imperative that a section 44(7) interrogation be held. He stated that the Fourth Respondent had confirmed to him that she supported a section 44(7) interrogation, but that he was not aware of the Fifth Respondent's views in this regard. The Second Respondent then requested a brief adjournment so that the Fifth Respondent could peruse the telefax dated 28 September 2006 and later, so that the parties could check whether they were in possession of all supporting documentation. The Second Respondent noted that she needed to attend to another meeting of creditors in another matter, and so the parties would have to make haste. After the adjournment, the Second Respondent made it clear that she had made a final ruling in her letter dated 28 September 2006, that no interrogation of the Sixth and Seventh Respondents was necessary and that the Applicant's claim would not be considered. She stated that she would

not entertain any debate in this regard. She continued that any party aggrieved by her decisions could take the matter to court.

The Second Respondent proceeded to consider the Sixth and Seventh Respondents' claims. She stated that she did not have to consider the claims too critically. After a few minutes, the Second Respondent declared her satisfaction with the claims and duly accepted them as proved. The Sixth and Seventh Respondents, upon acceptance of their claims, became proved creditors in the estate of Petter. After the Second Respondent had admitted the Sixth and Seventh Respondents' claims, she asked the parties whether or not they wished to place anything on record. The Third Respondent indicated that he did not believe that the claims ought to have been admitted, as there was not sufficient evidence to support the claims. He stated that he did not wish to delay the administration of the estate, but that an interrogation was necessary in order to place proper information before the presiding officer. He gave the example of the authority of Mr Mawere to sign the documentation in respect of a claim lodged by the Sixth Respondent. He was thereupon silenced by the Second Respondent. The Applicant did not make any comment.

The Second Respondent then indicated that the proved creditors, the Sixth and Seventh Respondents, were to vote on the appointment of final liquidators. The Fifth Respondent indicated to the Second Respondent that only the First Respondent can appoint liquidators. The Sixth and Seventh Respondents then voted that the Fifth Respondent be appointed as final liquidator in the estate of Petter. The meeting was then adjourned.

GROUNDS OF REVIEW

The Applicant relies on the provisions of Section 151 of the Insolvency Act. To my mind the Applicant is an "*aggrieved person*" within the meaning of section 151 of the Insolvency Act. There is no doubt that the Applicant remains for all intents and purposes *aggrieved* by the decision of the Second Respondent, as contemplated

in this Section. The Applicant in the present matter opposes the acceptance of a claim of another creditor. It is entitled to do so, if it is able to show that the claim was wrongly admitted. The Applicant need not wait until the liquidator has examined the claim and has, in terms of section 45(3) of the Insolvency Act, decided to dispute the claim or until the Master has decided to confirm the claim, before it is entitled to bring the presiding officer's original decision to accept the claim as proved, under review.

Catherine Smith *The Law of Insolvency* Third Edition at 314

Derby Shirt Manufacturers (Pty.) Ltd. v Nel, N.O. and Another, N.O., 1964 (2) SA 599 (D) at 601

Noordkaaplandse Ko-op Lewendehawe Agentskap Bpk v van Rooyen and Others 1977 (1) SA 403 (NC)

Section 33(1) of the Constitution (the Constitution of the Republic of South Africa Act, 108 of 1996) affords everyone the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) demands the enactment of national legislation to give effect, *inter alia,* to that right. Such legislation exists in the shape of the Promotion of Administrative Justice Act 3 of 2000. Section 6(2) confers the power to review administrative action judicially if

'. . .

(f) the action itself -

(i) . . .

(ii) is not rationally connected to -

(aa) the purpose for which it was taken; G

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

. . .

(h) the exercise of the power or the performance of the function authorised by

the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal.

It is not in dispute that the functions of The Second Respondent constituted administrative action. In the performance of these functions, the evidence indicates that she misconstrued her duties and exceeded her powers. The performance of her duties can be properly described as unreasonable and irrational. She made a final ruling without hearing the protagonist who professed to have a substantial interest in the subject matter of the gathering. Her inordinate haste to finalise this matter in the way she set out was unfortunate. The Second Respondent could not have applied her mind to the matter on hand, whether properly or at all. She further misconstrued her duties with regard to the test to be applied before admitting a claim as proved.

It is a requirement of the rule of law that the exercise of public power by functionaries such as the First and Second Respondents should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power such functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action. The Second Respondent also failed to properly apply the *audi alterem partem* rule, when she refused or failed to allow the legal representatives of the Applicant to address her prior to finalising her decision.

RELIEF SOUGHT

It is not a foregone conclusion that the Sixth and Seventh Respondents' claims ought to be rejected and a referral of the matter back to the First Respondent to reconsider this question, will amount to an unnecessary waste of time. This matter must be referred back to the First Respondent for reconsideration of the question of whether or not an interrogation should be ordered, or whether or not the Sixth and Seventh Respondents claims should be admitted. This is not a matter where I believe it proper or expedient to adjudicate on the two claims filed by the Sixth and Seventh Respondents. The First Respondent will be in the best position to attend to this important task in a case such as the present. I consider it in the best interests of justice to refer the matter back for consideration by the person in whom the discretion was vested. The voluminous papers filed, punctuated with the antagonism and factual disputes dictate that this may be the most expedient route to follow. I do not believe that the Applicant has indicated that there are exceptional circumstances present that warrant such a decision. The First Respondent can determine whether the two claims be subjected to an interrogation in terms of Section 44(7) of the Insolvency Act.

The opposition to the granting of prayer 3 by the First and Second Respondents is sound. There is no statutory basis for the order to be granted. Neither the Insolvency Act, nor the Companies Act, provide for meetings in an insolvent estate to be held "*independent of the offices of"* the relevant Master. The power and duty regarding the meetings of creditors is granted to the Master in terms of Section 364(1) of the Companies Act. Section 364(2) further provides that meetings of creditors under section 364 of the Companies Act shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency. In addition, Section 39(2) of the Insolvency Act provides that "*all meetings of creditors held in the district wherein there is a Master's office shall be presided over by the Master or an officer in the public service, designated, either generally or specially, by the Master for that purpose*." Here, it is not in dispute that there is a Master's office in the district relating to the insolvent estate of Petter. Therefore, meetings of creditors must, in terms of Section 39(2) be presided over by the Master or by any officer in the public service designated either generally or

specially by the Master for that purpose. The section does not make reference to or permit for such meetings to be held independent of the office of the master.

Locus Standi of the Applicant

The contentions submitted on behalf of the Sixth and Seventh Respondents included the argument that the Applicant lacks *locus standi* to pursue this claim because it is the alter ego of the Government of Zimbabwe. It was further contended that if this Court were to grant the Applicant an audience, then it would be giving credence to unjust and unfair expropriation legislation implemented by the Zimbabwean Government. The essentials of the concerns articulated included the purported method utilized by the Government of Zimbabwe in acquiring the control of the Applicant from its directors. Reliance was further placed on the Presidential decree which vested in the Minister of Justice powers which were ordinarily vested in a court of law. According to these two Respondents, the Minister is purportedly empowered to make prejudicial decisions against a third party without affording the third party an opportunity to have its dispute adjudicated by an independent forum. The relevant Legislation as well as the Regulations (commonly referred to as Reconstruction Orders) was attached to these Respondents answering affidavit. The remnants of our very own dark and depressive past are mirrored in this Legislation. The powers afforded to the Minister are frightening, and arbitrary. The protest on behalf of these two Respondents may not be in vain. However, I make no conclusive finding in this regard.

The present dispute is a review application. The applicant has a right in terms of our Constitution to raise the complaint, as it does, against the proprietary nature of the Second Respondent's findings. This right is enshrined in Section 33 of our Constitution. Most importantly, based on the papers, I am unable to make a conclusive finding that the Applicant is the alter ego of the Government of Zimbabwe. Therefore, this argument cannot be sustained.

Costs

In the present matter there are no outright winners or losers. The Applicant has been partially successful, in that the matter is referred back to the first Respondent. However, it has not achieved success in having the substantial benefit of all of its relief. In any event I believe that this is a matter where each party must carry the burden of their own costs. I also express my serious concern in the manner in which the present antagonists continue to engage in the continuous litigation against each other.

Order

The decision by the Second Respondent at the adjourned first meeting of creditors held at Johannesburg on 24 October 2006 in the estate of Petter Trading (Pty) Ltd, ("Petter"), to admit as proved claims filed by the Sixth and Seventh Respondents is set aside. The matter is referred back to the First Respondent for reconsideration of the question of whether or not the Sixth and Seventh Respondents claims should be admitted. Each party is ordered to pay its own costs.

Jajbhay J

Judge of the High Court

Date of hearing: 18th June 2008.

Date of Judgement: 24th June 2008.

On behalf of the Applicant: Adv FH Odendaal SC, Adv HC Bothma

Instructed by Brink Cohen Le Roux Inc.

On behalf of First and Second Respondents: Adv A Bham SC, Adv S Baloyi

Instructed by State Attorney

On behalf of the Sixth and Seventh Respondents: Adv NA Cassim SC,

Adv F Boda

Instructed by Dockrats Incorporated