IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO. 48137/12

In the matter between:

WISHART, GRANT LOGAN N.O.	**First Plaintiff**
GOEBEL, ARNO N.O. **(In his capacity as trustee of the LOGAN TRUST)**	**Second Plaintiff**
WISHART, MALCOLM GRANT N.O. **(In his capacity as trustee of the LOGAN TRUST)**	**Third Plaintiff**
PENGUIN MINING & PLANT (PTY) LIMITED	**Fourth Plaintiff**
COLT MINING (PTY) LIMITED	**Fifth Plaintiff**

and

BHP BILLITON ENERGY COAL SOUTH AFRICA LIMITED	**First Defendant**
EURO COAL (PTY) LIMITED (IN LIQUIDATION)	**Second Defendant**
KLEIN, NORMAN N.O.	**Third Defendant**
VAN DEN HEEVER, THEODORE WILHELM N.O.	**Fourth Defendant**
MASTER OF THE HIGH COURT, GAUTENG SOUTH, JOHANNESBURG	**Fifth Defendant**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION ("CIPC")	**Sixth Defendant**

Date heard: 3 March 2015
DATE: 30 JULY 2015
Reportable: No
Of interest to other Judges: Yes

JUDGMENT

ROSSOUW AJ:

[1] Euro Coal (Pty) Ltd (in liquidation) ("Euro Coal") was placed in winding-up by this Court on 13 May 2009. Euro Coal is the Second Defendant in the action. The Third and Fourth Defendants are the joint liquidators of Euro Coal. The First Defendant submitted a claim for proof in the winding-up of the company. The claim was admitted.

[2] According to the amended particulars of claim the First Plaintiff is a 10 % shareholder of Euro Coal and the Logan Trust, represented in this action by the Second and Third Plaintiffs, is a 90 % shareholder of Euro Coal.

[3] It is alleged in the Plaintiffs' amended particulars of claim that Euro Coal is indebted to the First Plaintiff, the Logan Trust, the Fourth Plaintiff and the Fifth Plaintiff in various amounts. It is for present purposes not relevant to consider the various claims more closely. All the Plaintiffs claim the following substantive relief in the action:-

> "*1 An order grating* (sic) *special leave to:*
>
> *1.1 The Logan Trust (IT1450/1987);*

1.2 The First Plaintiff;

1.3 The Fourth Plaintiff; and

1.4 The Fifth Plaintiff,

to prove claims in the winding-up of Euro Coal (Pty) Ltd (in liquidation) (Master's Ref G73/09), in such manner and upon such terms and conditions as the Master may determine.

2 An order that the claim of the First Defendant be and is hereby expunged and omitted from the First Liquidation and Distribution Account, dated 31 August 2012, in the winding-up of Euro Coal (Pty) Ltd (in liquidation) (Master's Ref G973/09)."

[4] The First Defendant took exception to Plaintiffs' first and second claims. The Second, Third and Fourth Defendants also took exception to both claims, in terms virtually identical to the exceptions taken by the First Defendant. It is therefore only necessary to quote the First Defendant's exceptions:-

"***THE FIRST EXCEPTION***

1 *The first claim by all five plaintiffs is for*

> *"An order grating (sic) special leave* [to the plaintiffs] *..... to prove claims in the winding-up of EuroCoal (Pty) Ltd (in liquidation) ... in such manner and upon such terms and conditions as the Master may determine."*

2 *In support of that prayer, in paragraphs 79 and 80 of the particulars of claim, the plaintiffs allege*

> *"79.* *The First Plaintiff, the Trust and the Fourth and Fifth Plaintiffs have lodged an objection to the First Liquidation and Distribution Account, lodged by the Third and Fourth Defendants in the winding-up of Euro Coal, with the Master.*
>
> *80.* *The Trust, the First, Fourth and Fifth Plaintiffs hereby, in terms of s 44(1) of the Insolvency Act, read with s 339 of the*

Companies Act, request that the Court grant them special leave to prove their respective claims in the winding-up of Euro Coal."

3 *The proof of claims in the winding-up of a company is governed by section 366 of the Companies Act, No. 61 of 1973 (as amended) ("the Companies Act"). Section 339 of the Companies Act restricts the incorporation of "the law relating to Insolvency" to "any matter not specifically provided for" by the Companies Act.*

4 *In the circumstances section 44 of the Insolvency Act, relied upon by the plaintiffs does not apply except to the extent dealt with below.*

5 *Section 366(1)(a) of the Companies Act provides for claims against a company being wound up to be proved* ***at a meeting of creditors*** mutatis mutandis *in accordance with the provisions relating to the proof of claims under the Insolvency Act.*

6 Claims are proved under the Insolvency Act at meetings of creditors before the Master or any other officer presiding at a meeting of creditors.

7 No authority is conferred upon a court to admit a claim to proof or to grant special leave to an unproved creditor to prove a claim.

8 In the circumstances the plaintiffs' first claim does not disclose a cause of action against the first defendant."

"***THE SECOND EXCEPTION***

9 The second claim by all five plaintiffs if for

> *"An order that the claim of the First Defendant be and is hereby expunged and omitted from the First Liquidation and Distribution Account, dated 31 August 2012 in the winding-up of Euro Coal …"*

10 In support of the second claim the plaintiffs plead in paragraph 81

> *"In the further premises the Trust and each of the First, Fourth, Fifth Plaintiffs are persons interested in the winding-up of Euro Coal, as contemplated in terms of s 407 of the Companies Act, 1973 and/or s 111(1) of the Insolvency Act, read with reg 6 of the Insolvency Regulations, and s 339 of the Companies Act, and/or s 34 of the Constitution, and therefore have* locus standi *to seek the relief as hereinafter set out."*

11 *In the context of the winding-up of a company the objection to a claim recorded in a liquidation and distribution account ("L&D Account") is dealt with in section 407, read with sections 403 and 406, of the Companies Act.*

12 *Section 403 requires a liquidator to lodge an L&D Account with the Master.*

13 *Section 406 requires the account to lie for inspection on the terms set out therein.*

14 Section 407 deals with objections to an account in the following terms that are material herein

14.1 Any person having an interest in the company may lodge an objection to the L&D Account;

14.2 The Master decides the fate of the objection; and

14.3 Thereafter, in terms of section 407(4)(a)

"The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit."

15 The only context in which a court has authority to

adjust an L&D Account is where a person aggrieved by a decision of the Master takes the Master on review to a court.

16 There is no allegation in the particulars of claim of a decision by the Master and the present action does not constitute a review of a decision of the Master by a person aggrieved by any such decision.

17 This Honourable Court has no jurisdiction to entertain a claim for the "expungement" of a proved claim in the absence of the allegations referred to in paragraphs 15 and 16 above.

18 In the circumstances the plaintiffs amended particulars of claim do not disclose a cause of action against the first defendant."

[5] In ***Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v. Advertising Standards Authority SA***, *2006 (1) SA 461 (SCA), at para [3]*, Harms JA (as he then was) stated:-

"*Exceptions should be dealt with sensibly. They provide a*

> *useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility.*"

In deciding an exception, the alleged facts are taken as correct. It is trite that an excipient must show that, on every interpretation, the particulars of claim disclose no cause of action (see ***Michael v. Caroline's Frozen Yoghurt Parlour (Pty) Ltd***, *1999 (1) SA 624 (W), at 632C-D*; ***Rabinowitz v. Van Graan and Others***, *2013 (5) SA 315 (GSJ), at paras [5] & [6]*).

[6] Mr Suttner SC (with him Mr Eyles SC and Ms Cirone) for the First Defendant, submitted that the Plaintiffs' first claim does not disclose a cause of action because the proof of claims in the winding-up of a company is governed by section 366 of the Companies Act, No. 61 of 1973 ("the Companies Act") and that section 339 of the Companies Act restricts the incorporation of "*the law relating to insolvency*" to "*any matter not specifically provided for*" by the Companies Act. Mr Suttner argued that, in the circumstances, section 44 of the Insolvency Act, No. 24 of 1936 ("the Insolvency Act"), does not apply, in particular that the proviso contained in section 44(1) of the Insolvency Act finds no application in the winding-up of a company. Mr Theron SC, who appeared for the Second, Third and Fourth

Defendants, also submitted that the proviso to section 44(1) of the Insolvency Act finds no application in the winding-up of a company because section 366(1)(a) of the Companies Act is qualified by section 339 thereof. According to Mr Theron, the effect of this is that claims against a company in liquidation are proved in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency, unless, and only to the extent that, there is a specific applicable provision in the Companies Act. It was submitted that the applicable provision of the Companies Act is evidently section 366(2).

[7] The relevant sections of the Companies Act read:-

> "***339. 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, insofar as they are applicable, be applied* mutatis mutandis *in respect of any matter not specifically provided for by this Act.*"
>
> and
>
> "***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;*

(b) a secured creditor shall be under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency, and the value of his vote shall be determined in the same manner as is prescribed under that law;

(c) a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency.

(2) The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved."

[8] Mr Hartzenberg SC (with him Mr Combrink), for the Plaintiffs, submitted that the proviso contained in section 44(1) of the Insolvency Act does apply to the winding-up of a company and that it would indeed be incongruous, if in the case of an insolvent estate, creditors were to enjoy the opportunity of proving late claims, but not in the case of the winding-up of a company.

[9] Section 44(1) of the Insolvency Act provides:-

"*Any person or the representative 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: Provided that no claim shall be proved against an*

estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct."

[10] In ***Stone & Stewart v. Master of the Supreme Court*** *(unreported, case number 8828/87, Transvaal Provincial Division)*, Flemming J (as he then was) held that the proviso set out in section 44(1) of the Insolvency Act does not apply to the proving of claims in the case of winding-up of companies and stated:-

"*The question to be determined then is: does the Companies Act itself regulate the outlimit for the proof of claims?*

To my mind it does. Whether it does so by exhaustively spelling out a period of time or whether it does so by authorising the master to take steps in this regard is immaterial. The Companies Act touches upon the topic. It serves as authorisation for the operation of an effective and binding date for the proof of claims. In insolvency there may be one, two, three or four meetings, by various names such as second

meeting or special meeting. But whatever meeting is held, the creditor is subject to the three month limit set out in Section 44(1). Under the Companies Act there may be a similar number of meetings and I will assume they can have similar names. But the limit for proving claims is different. Section 366 says that the master "may" lay down a limit. There is no pre-determinable limit as to the proof of claims. But the Companies Act governs the limit. It says that the limit will be as created by the Master and accordingly not a fixed always-effective 3 month period.

The applicant was accordingly fully entitled to prove his claim at the meeting concerned. He was not subject to any limit at all as things stand. For that reason then he was wrongly debarred from proving his claim. But the remedy was not to take the Master's decision on review nor to ask this court's leave in terms of Section 44(1) of the Insolvency Act. His remedy was to get the presiding officer to a correct view of the law."

[11] Kathree-Setiloane J in ***De Montlehu v. Mayo N.O. and Others*** *[2014] JDR 1096 (GJ)* held that the finding of Flemming J in ***Stone & Stewart*** that the proviso to section 44(1) of the Insolvency Act has no

application to the proving of claims in a winding-up to be clearly wrong. The learned Judge stated (*para [19] of the judgment*):-

> "*For these reasons I consider the finding of Flemming J in* Stone & Stewart, *that the proviso to s 44(1) of the Insolvency Act has no application to a proof of claim in a winding-up in the light of the provisions of s 366(2) of the Companies Act, to be clearly wrong. To arrive at the conclusion that Flemming J did, would require reading the words of the section that precede the conjunction "or" disjunctively from the words of the section that appear after it, and in the process to completely ignore the latter. This is a flawed approach to the interpretation of section 366(2) as it does not give effect to its purpose, which is to prevent the holding up of distribution under an account lodged with the Master, as a result of proof of claim after lodgement of such account by for instance a creditor who elects not to prove his or her claim until it is established that there is to be a distribution.*"

The learned Judge found support for her finding in the judgment reported as ***Trans-Drakensberg Bank Ltd and Another v. The Master, Pietermaritzburg, and Another***, *1966 (1) SA 821 (N), at 824*.

[12] Section 366(2) of the Companies Act is clear in its terms, irrespective of whether the two parts of the section are to be read disjunctively or conjunctively. The Master "*may ... fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved*". This means that the Master may fix a time or times within which creditors of a company in liquidation have to prove claims. The purpose of section 366(2) is not, to my mind, to regulate a participation in a distribution under a particular account. If section 366(2) was intended to regulate the participation in a distribution under a particular account, then there would be no need for the time limit prescribed by section 44(1) of the Insolvency Act.

[13] In the ***Trans-Drakensberg*** case the Court dealt with section 179(2) of the Companies Act, No. 46 of 1926. That section is substantially similar to section 366(2). In the ***Trans-Drakensberg*** case Van Heerden AJ found (*at 825H*):-

> "*Sec. 179(2) gives the Master a discretion to fix "a time or times" for the proving of claims and, it seems to me that, upon a proper reading of the section, it was the intention of the*

Legislature to give the Master a discretionary right not only to fix a date but also to extend that date."

Evidently, the intention of the legislature was that the proviso to section 44(1) of the Insolvency Act would not apply to companies, but that section 366(2) would apply. The result is, unless determined otherwise by the Master, that there is no fixed time period within which creditors of a company in liquidation have to prove claims against the company. I respectfully disagree with the finding of the learned judge in ***De Montlehu*** and I am inclined to follow Flemming J's judgment in ***Stone & Stewart***.

[14] The first claim is based upon section 44(1) of the Insolvency Act read with section 339 of the Companies Act. In my view, this is misconceived. Section 366(2) of the Companies Act regulates the time for the proving of claims in the case of companies in liquidation.

[15] I therefore find that the proviso to section 44(1) of the Insolvency Act finds no application in the case of the winding-up of a company and that this Court does not have the power in the circumstances to admit the Plaintiffs' claims to proof or to grant special leave for them to prove their respective claims. The first exception must

therefore succeed.

[16] I turn to deal now with the second exception.

[17] The Plaintiffs allege that they are persons interested in the winding-up of Euro Coal as contemplated in terms of section 407 of the Companies Act and/or section 111(1) of the Insolvency Act read with Regulation 6 of the Insolvency Regulations and section 339 of the Companies Act and/or section 34 of the Constitution and that they therefore have *locus standi* to seek the relief claimed in terms of the second claim.

[18] The objection to a claim in the winding-up of a company recorded in a liquidation and distribution account is dealt with in section 407 read with sections 403 and 406 of the Companies Act. Section 403 requires a liquidator to lodge a liquidation and distribution account with the Master. Thereafter, in terms of section 406, the account must lie for inspection and section 407 deals with objections to an account. Any person having an interest in the company may lodge an objection, the Master decides the fate of the objection and thereafter, in terms of section 407(4)(a):-

> "*The liquidator or any person aggrieved by any decision of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision and the Court may on any such application confirm the account in question or make such order as it thinks fit.*"

[19] Messrs Suttner and Theron argued that the Court only has authority to adjust a liquidation and distribution account where an aggrieved person takes the Master on review. There is no allegation in the particulars of claim of a decision by the Master and the present action does not constitute a review of a decision of the Master by an aggrieved person.

[20] For the Plaintiffs Mr Hartzenberg submitted that it is alleged in the particulars of claim that the First Defendant's claim was admitted which, by necessary implication, must mean that the Master had made a decision to admit such claim. It was further submitted that the exception to the Plaintiffs' second claim flies in the face of the decision in ***Millman and Another N.N.O. v. Pieterse and Others***, *1997 (1) SA 784*

(C), at 788H-789G.

[21] However, the Plaintiffs do not seek to review or set aside any decision by the Master. This is clear from the allegations contained in the particulars of claim. In fact, it is alleged that the Master has not determined the Plaintiffs' objection in terms of section 407 of the Companies Act. It is also not alleged that the Master has refused to sustain the Plaintiffs' objections and the jurisdictional trigger for the setting aside of a decision by the Master is therefore absent.

[22] A review envisaged in terms of section 151 of the Insolvency Act (and section 407 of the Companies Act) is the type of review identified in ***Johannesburg Consolidated Investment Co. v. Johannesburg Town Council***, *1903 TS 111, at 117.* The Plaintiffs' reliance on the judgment in ***Millman*** is misconceived as the facts of that case are distinguishable from the facts in the present matter.

[23] In this present case the Plaintiffs have a specific statutory remedy which triggers a review in terms of section 407 of the Companies Act. The Plaintiffs pleaded their case in support of the second claim in a manner which establishes that the jurisdictional trigger, i.e. the rejection of their objection to the First Defendant's

claim, has not been activated.

[24] In the circumstances, I am of the view that this Court has no jurisdiction to entertain a claim for the "*expungement*" of a proved claim in the absence of an allegation of a decision by the Master which has been taken on review by a person aggrieved by such decision. It follows that the Plaintiffs' amended particulars of claim do not disclose a cause of action to support the second claim.

[25] The Plaintiffs employed the services of two counsel, the First Defendant the services of three counsel and the Second, Third and Fourth Defendants the services of one counsel. The nature and complexity of the matter warranted the employment of two counsel and the costs of two counsel should be awarded, where two or more counsel were used. I must add that the First Defendant only sought the costs of two counsel.

[26] In the result, I make the following order:-

(a) The first and second exceptions of the First to Fourth Defendants are upheld;

(b) The Plaintiffs are given leave to amend their particulars of

claim within 10 (ten) days from date of this order;

(c) The Plaintiffs are ordered, jointly and severally, the one paying the others to be absolved, to pay the First to Fourth Defendant's costs, in the case of the First Defendant to include the costs consequent upon the employment of two counsel.

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P F ROSSOUW
Acting Judge of the High Court
10 July 2015.

APPEARANCES:
For the Plaintiff:
C J Hartzenberg SC, L E Combrink, instructed by Venns Attorneys

For the First Defendant:
J M Suttner SC, A Eyles SC, P Cirone, instructed by Hogan Lovells Attorneys

For the Second to Fourth Defendants:
E L Theron SC, instructed by Hahn & Hahn Attorneys

Date of Hearing :
30 July 2015