REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020/12432

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	YES

21 May 2021 **Judge Dippenaar**

In the matter between:

SELWYN TRAKMAN N.O **1st APPLICANT**

TSIU VINCENT MATSEPE N.O **2nd APPLICANT**

RISHAAD MOOSA N.O **3rd APPLICANT**

AND

THE MASTER OF THE HIGH COURT
OF SOUTH AFRICA, JOHANNESBURG **1st RESPONDENT**

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH ARICA **2nd RESPONDENT**

ENGELHART CTP (SOUTH AFRICA) (PTY) LTD (REGISTRATION NUMBER 2013/145333/07) **3rd RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 21st of May 2021.

DIPPENAAR J:

[1] The applicants, the joint liquidators ("the liquidators") of Trademar Trading (Pty) Ltd (in liquidation) ("Trademar"), sought to review, under s151 of the Insolvency Act[1] ("the Act") [2], a decision and ruling of the first respondent ("the Master"), made on 8 October 2019, pertaining to the claim of the second respondent ("Land Bank"). This decision and ruling are contained in a letter from the Master, the relevant portion of which provides:

> *" 3.2. Kindly be advised that your application to the Master for the expungement of the Land Bank's proved claim number 1 in accordance with the provisions of Section 45 (3) of the Insolvency Act 24 of 1936 (as amended) read with the provisions of Section 339 of the Companies Act 61 of 1973 it is hereby accordingly refused by the Master. The Sale Agreement which is the main issue of bringing the expungement application has been made available to both the Master and your good self. The Master has perused the agreement and came to the conclusion that the claim as proved it is a valid claim and that it should stand. The Liquidators of the above mentioned company are hereby directed to proceed with payments of dividends to all proved creditors of the company in liquidation herein".*

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[1] 24 of 1936

[2] Read with s 399 of the Companies Act 61 of 1973 and item 9 of Schedule 5 of the Companies Act 71 of 2008

[2] The liquidators sought orders setting aside the decision of the Master to refuse the expungement of the Land Bank claim and the conclusion that the said claim was valid as well as setting aside the directive to the liquidators to proceed with the payment of dividends to all proved creditors of Trademar. Orders were further sought for the expungement of the Land Bank claim and costs.

[3] Land Bank in turn sought dismissal of the review application and sought orders directed at declaring its claim validly proved, inclusion of such claim in a second liquidation and distribution account and ancillary relief. Orders were further sought that the liquidators be precluded from being paid their costs from the Trademar estate and that the Land Bank's costs be paid from the Trademar estate.

[4] The Master did not deliver any report or affidavit in the application and did not actively participate therein. The third respondent, ("Engelhart"), a proved creditor of Trademar who first raised the issues constituting the nub of this application, delivered an explanatory affidavit but abided the court's decision.

[5] The background facts are not contentious. It is necessary to set them out in some detail, specifically in context of the interactions between the liquidators and Land Bank in relation to the Land Bank's claim.

[6] Trademar was placed under provisional and final winding up on 25 May 2016 and 25 July 2016 respectively[3]. On 8 August 2016 Land Bank was authorised by the Trademar creditors to seek and obtain leave to commence an enquiry in terms of sections 417 and 418 of the Companies Act, 1973 ("the Old Companies Act"). The enquiry, aimed mainly at the collection of Trademar's debtors, was held on various dates during the period September 2016 to January 2017. The liquidators were represented at the enquiry by Mr Van Greunen, Land Bank's attorney of record.

[3] S348 date being 22 April 2016

[7] Land Bank formulated a claim comprising some 409 pages and submitted it to proof at the first meeting of creditors on 2 September 2016 without objection. The Land Bank claim was based on a cession to it from Grocap Financial Services (Pty) Ltd ("Grocap") of its book debts, including the Trademar debt. A copy of the sale agreement between Grocap and Land Bank in terms of which in terms of which Grocap had allegedly sold and ceded all rights, title and interest to its book debts to Land Bank on 29 June 2012 ("the sale agreement"), did not form part of the claim documents. This forms the nub of the dispute between the parties.

[8] On 24 November 2016, Hayes attorneys, representing Engelhart, addressed a letter to the liquidators attacking the veracity of the Land Bank claim and the security relied on, raising the absence of the sale agreement. The liquidators sought an opinion regarding Engelhart's objection from their attorney, Mr Dos Passos of Fluxmans Inc, ("Fluxmans") who in turn sought advice from senior counsel. On 14 May 2018, Fluxmans sought a copy of the sale agreement from Mr Van Greunen. During the period May 2018 to November 2018 further correspondence ensured between the respective attorneys pertaining to the production of the sale agreement. Mr Van Greunen provided a non-disclosure agreement to be concluded by Fluxmans prior to the sale agreement being provided, which Fluxmans refused to sign due to its wide and onerous terms. Fluxmans offered certain undertakings instead, which were rejected. Land Bank persisted in its insistence on signature of the non-disclosure agreement. Fluxmans offered that a copy of the sale agreement be provided with the price sensitive information redacted. This offer was refused.

[9] On 25 June 2019 Fluxmans addressed a further letter to Mr Van Greunen, recoding *inter alia,* that an opinion had been obtained from senior counsel and the liquidators' duties under s 45(2) of the Act. It was contended that the sale agreement ought to have been filed with the Land Bank claim and that the effect of the proposed non-disclosure was to prevent the liquidators from fulfilling their duties. Land Bank was further informed that absent the production of the sale agreement, they would apply for the expungement of its claim. The sale agreement was not produced and on 4 September

2019 the liquidators launched an application under s45(3) of the Act to the Master for the expungement of Land Bank's claim.

[10] The basis of the expungement application was that Land Bank had proved its claim with reliance on two cessions: the first, a cession by Trademar of its book debts to Grocap as security for a financing facility; the second, the alleged cession by Grocap to Land Bank of certain book debts, being those "satisfying predetermined criteria". The liquidators' case was that in the absence of the production of the sale agreement as part of the documentation in support of the Land Bank claim, they were unable to ascertain that Trademar in fact owed Land Bank the amount claimed or any other amount, that they thus disputed the claim, and that it should be expunged. The application was accompanied by a copy of the recordal and the relevant correspondence between the parties.

[11] On 26 September 2019, Land Bank provided a copy of the sale agreement to the liquidators *"in order to avoid unnecessary litigation and further incurrence of unnecessary costs"*. It was provided on the basis that it would not be distributed or utilised save as provided by s 45 of the Act. Confirmation was requested that the expungement application would be withdrawn without delay.

[12] The following day, Mr Van Greunen addressed a letter to the Master responding to the expungement application to which a copy of the sale agreement was attached "under protest". Land Bank contended that there was no need for the sale agreement to be attached to its claim. Reliance was placed on the recordal which confirmed that Land Bank and Grocap were ad idem that effect had been given to the cession and it was illogical for a third party to doubt the existence of the agreement.

[13] On 10 October 2019, the liquidators via Fluxmans addressed a letter to the Master withdrawing the expungement application pending further consideration of the sale agreement, which required a proper opportunity to consider. The Master's letter dated 8 October 2019, dismissing the expungement application, was not immediately provided to

all the parties. A copy of the Master's letter, addressed only to Mr Van Greunen, was furnished by Mr Van Greunen to the liquidators on 18 October 2019. The Master only notified the liquidators of his decision via letter dated 24 October 2019. That letter was in substance in identical terms to his 8 October 2019 letter addressed to Mr Van Greunen. No explanation was tendered by the Master why the liquidators and Land Bank were not simultaneously advised of his decision.

[14] On 3 October 2019 Land Bank furnished the liquidators with a copy of Grocap's 2019 financial statements. Attention was drawn to note 8.2 thereto, which, it was contended, recognised the sale of the corporate book debts in support of the averments in the Land Bank claim.

[15] Prior to the launching of the review application on 8 June 2020, substantial correspondence ensued between the attorneys for liquidators and the Land Bank and the Master pertaining to the liquidators' contentions regarding errors and the misdirection made by the Master in his decision and ruling of 8 October 2019. Inter alia, the liquidators sought satisfactory proof that the Trademar debt was in fact identified in the "*A Sale Book Debts Storage Media*", alternatively, to be provided with a copy of the "*Approved Credit Policy*" as referred to in the sale agreement. These documents were not provided by Land Bank. According to the liquidators this correspondence was aimed at avoiding the review application, although it was not disputed that the Master was *functus officio* and could not revisit his decision and ruling.

[16] Turning to the merits of the application, the relevant portion of s151 of the Act provides:

> *". . any person aggrieved by any decision, ruling, order or taxation of the Master. . . may bring it under review by the Court . . .".*

[17] It is trite that a court has wide powers in terms of s 151. The court sits as a court of appeal and is entitled to adjudicate the disputed matter *de novo.*[4] It was common cause that before resorting to review proceedings under s151, a liquidator is obliged to follow the procedure set out in section 45 of the Act[5]. The section is peremptory[6] and provides:

> *"45 Trustee to examine claims:*
>
> *(1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.*
>
> *(2) The trustee shall 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.*
>
> *(3) If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five;"*

[18] Prior to considering whether the Master's decision and directive should be reviewed and set aside, it is apposite to consider the liquidators' conduct in the context of such duties. In summary, the liquidators' case was that the review application was brought in compliance with their duty under s45(2) to "examine all available books and documents" for the purpose of ascertaining whether Trademar in fact owes Land Bank the amount claimed. Their case is that they acted bona fide and in compliance with this duty in seeking relevant and necessary documentation from Land Bank in order to

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[4] Talacchi & Another v The Master and Others 1997 (1) SA 702 TPD 706 I – 707; Gilbey Distillers & Vintners (Pty) Ltd & Others v Morris N.O. & Another 1991 (1) SA 648 (A); Rabinowitz v De Beer N.O. & Another 1983 (4) SA 410 (T)

[5] Rendered applicable to companies in terms of s339 of the Companies Act 61 of 1973 read with item 9 of Schedule 5 of the Companies Act 71 of 2008

[6] Standard Bank of South Africa v The Master of the High Court & Others 2010 (4) SA 405 (SCA); Wishart v BHP Billiton 2017 (4) SA 152 SCA 159, par. 24 C - D

ascertain the validity of its claim and that the necessary documents were not provided. As the necessary documents were not provided, the Master misdirected himself in concluding that a consideration of the sale agreement was sufficient and that the claim as proved is valid and should stand.

[19] Land Bank's case on the other hand was that the liquidators did not have any factual basis to dispute its claim and had no controverting evidence that the Trademar debt was not an *'A sale book debt*'. It was argued that absent any controverting facts in their founding papers, the liquidators have relied on a mere suspicion and could not have a reasonable belief based on facts to dispute the Land Bank claim. Land Bank further contended that the liquidators have embarked on a fishing expedition and acted with an ulterior motive in seeking additional documentation and should have accepted the validity of its claim on the basis of the averments in the claim documents, specifically in relation to its locus standi as creditor. It argued that that all the necessary information to support the Land Bank claim was contained in the claim documents and the Master correctly concluded that the claim was valid as proved.

[20] It was undisputed that at the time the expungement application was launched, the sale agreement had not yet been provided. It was common cause that the material placed before the Master comprised of the Land Bank claim documents, the correspondence between the parties and the sale agreement, which the Master did consider in refusing the expungement application.

[21] In arguing that the liquidators had no reasonable belief based on facts to dispute the Land Bank claim, Land Bank relied on *Caldeira v The Master & Another ("Caldeira")* [7] in which Levinsohn J referred to the duties of a trustee or liquidator in terms of section 45(3) of the Act and stated:

[7] Caldeira v The Master & Another 1996 (1) SA 868 (N) at 874 D – E, referred to with approval by Griesel AJA in the minority judgment in Standard Bank of south Africa Ltd v the Master, fn 10 infra

"This section enjoins the trustee, if he disputes the claim, to report to the Master his reasons for doing so. It seems to me that if a trustee disputes the claim he must have a reasonable belief based on facts ascertained by him that the insolvent estate is not in fact indebted to the creditor concerned. Mere suspicion about the claim would not be sufficient. This belief would, I think, generally arise after the examination of the Company's records and the conclusion derived from the records that the indebtedness does not exist or has been extinguished. Of course, the facts giving rise to the belief may not necessarily be derived from the company's records, they could arise, for example, from the records of an interrogation conducted at the meeting of creditors";

[22] It is necessary to first consider Land Bank's claim to determine whether the liquidators had a reasonable belief based on facts or whether they had embarked on a fishing expedition. Land Bank contended that the contents of the documents supporting its claim was sufficient and that reliance should be placed on the version contained under oath by Mr Ernst as well as the memorandum and recordal. Emphasis was placed on Mr Ernst being a duly authorised representative of both the Land Bank and Grocap, both of which entities were satisfied and in agreement that the Trademar debt was indeed sold to the Land Bank.

[23] It is not necessary to deal comprehensively with all the documents comprising the Land Bank claim. The claim form contained the following salient features. The deponent to its affidavit supporting the claim, Mr Ernst, deposed thereto on behalf of Land Bank in his capacity as the chief legal advisor to Grocap and in his capacity as the true and lawful attorney and/or agent of Land Bank. The affidavit contained a statement that Trademar was indebted to Land Bank in the sum of R 14,298,363.50; that Trademar was the only liable party for the debt and that Land Bank held no other security apart from that referred to, in a form of a cession of debtors, a cession of SacOil shares, a suretyship and deed of negative pledge, which security was unlimited in terms of its value. A certificate of balance was provided as at the date of Trademar's winding up. The facility agreements and security agreements concluded between Trademar and Grocap were included as well as a service level agreement ("SLA") between Grocap, Land Bank and Afgri Operations Ltd ("Afgri").

[24] The cession of Trademar's debt to Land Bank by Grocap is central to its claim and the security relied on. On this issue, the claim documents included a document styled "Memorandum" and a document styled "Recordal", being "a joint confirmation of Land Bank's locus standi".

[25] The Memorandum is an unsigned document, the author of which is not identified. It describes Land Bank as "the creditor" and states that *"a sale agreement and a service level agreement were concluded between Grocap and Land Bank on 29 June 2012 whereby Grocap sold, ceded, and delegated the rights, title and interest in and to its existing corporate debtors book to the creditor*" (Land Bank). It refers to an attached cession agreement, which is not attached. It also contains the statement:

> *"4 I respectfully submit that due to the nature of the Agreements referred to supra that all debtors are automatically ceded to the Creditor and have all Agreements referred to hereunder entered into between Grocapital Financial Services and the Respondents been sold, ceded and delegated to the creditor in accordance with the agreements between Grocapital Financial Services and the Creditor."*

[26] In the Recordal, the omission of the sale agreement was justified by Land Bank in the following terms:

> *"2.1 The Sale Agreement and the SLA all contain confidential information pertaining to the respective parties. In view of the aforementioned the contents of the aforementioned agreements are incapable of being disclosed to third parties".*

[27] The Recordal did not in any way seek to identify such "confidential information" or motivate, with reference to primary facts, why such agreement was "incapable of being disclosed". Rather, the recordal contained an unsubstantiated legal conclusion.

[28] The Recordal recorded that Land Bank, Grocap and Afgri entered into the sale agreement regarding the sale, cession and delegation by Grocap of its rights, title and interest in and to its existing "*Corporate debtors book which formed part of its Specialised Finance division*" to Land Bank, and that in terms of the sale agreement Grocap is obliged

to sell and Land Bank is obliged to purchase the rights in all future book debts "*subject to such book debts satisfying predetermined criteria*". The Memorandum, which stated that "*all debtors are automatically ceded*" is thus at variance with the aforesaid statement in the Recordal. Neither the Recordal or the Memorandum expressly identifies the Trademar debt as having been sold to Land Bank.

[29] The Recordal[8] provides for a schedule, signed by either the financial director or manager of operations of Grocap, reflecting the details of a particular book debt, to be provided as confirmation of such book debt being sold to Land Bank. The Recordal was not accompanied by such a schedule, although Land Bank argued that the certificate of balance contained elsewhere in the claim documents, signed by a Mr Du Toit, the general manager, operations of Grocap, was sufficient. I do not agree. The certificate was not provided as an attachment to the recordal. It followed on the various statements of account addressed to Trademar, all of which were either on Afgri or Grocap letterheads and on which no reference was made to Land Bank. The certificate of balance in its terms did not purport to be a schedule in terms of the Recordal or seek to identify Trademar as a particular book debt envisaged therein. It merely in broad terms certified Trademar to be indebted to Land Bank in an amount of R14 298 363-50, which amount was due and payable.

[30] Considering (i) the contradictions between the Memorandum and the Recordal, (ii) the vague objections pertaining to confidentiality of the sale agreement despite the clear existence of such sale agreement and (iii) the absence of any primary documents evidencing the cession of the Trademar debt to Land Bank (despite the voluminous nature of the claim documents) I am persuaded that the liquidators acted reasonably in demanding clarity and not on mere suspicion. Moreover, the statements contained in the claim documents by Mr Ernst constitute legal conclusions, rather than providing evidence of primary facts from which such conclusions can reliably be drawn. The Land Bank's criticism of the liquidators' failure to accept his evidence as sufficient proof, does not bear

[8] Clause 2.2

scrutiny. The failure by the Land Bank to produce the sale agreement as part of its claim documents, and its vague reliance on confidentiality, in my view justifiably moved the liquidators to request the sale agreement after Engelhart raised its objection.

[31] The ongoing obstructive and hostile approach adopted by Land Bank on this issue is curious. The objective undisputed facts illustrate a steadfast refusal on the part of Land Bank to produce the very agreement on which its cession and thus locus standi as creditor relies, in the face of conflicting statements and gaps in its claim documents. Applying the principles in *Caldeira*[9], I am persuaded that the facts do sustain a reasonable belief that the debt may not be due by Trademar and that further investigation by the liquidators was required.

[32] It is apposite to refer to the majority judgment in *Standard Bank of South Africa v The Master of the High Court and Others*[10], wherein the Supreme Court of Appeal enunciated the duties of a liquidator thus:

> *"[93] It is clear that once a claim is proved a liquidator is under an obligation to examine all available books and documents. The mere admission of a claim does not ratify it or make it res judicata. The importance of corroborating documents is clear. The presiding officer is obliged to deliver every document in support of the claim to the trustee. In a scheme of things liquidators are required to examine all available books and documents for corroboration or comparison. In Estate Friedman v Katziff 1924 WLD 298 the court, in dealing with a similar section in the previous Insolvency Act 32 of 1916, said the following at 304:*
>
> *'In my view there can be no doubt that the word "shall" where used in sec 43 of the Act is peremptory and not directory, and it is therefore the duty of the Court to see that the provisions of the Statute are complied with'*
>
> *The liquidators' duty in this regard are therefore peremptory".*

[33] Measuring their conduct against these principles, it cannot in my view be concluded that the liquidators were doing anything other than what s45 (2) of the Act obliges them to do. I agree with the liquidators that they were under a statutory duty to

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[9] Fn 7 supra
[10] 2010 (4) SA 405 (SCA) para [93]

examine all available relevant books and records for corroboration or comparison and that the documentation sought by them falls within this category. The liquidators' insistence on obtaining a copy of the sale agreement and the further relevant documents referred to therein can in my view not be characterised as 'a fishing expedition". Land Bank's contention of the liquidators being moved by ulterior motive similarly lacks factual substance. Land Bank's answering papers are replete with repeated intemperate criticism aimed at the liquidators. It is not necessary to repeat these allegations in any detail. Suffice it to state that such criticism was unwarranted and the approach and tone adopted by Land Bank regrettable.

[34] I turn to consider whether the Master's decision of 8 October 2019 should be set aside. At this juncture it is apposite to refer to the exposition by Malan J (as he then was) of the approach to be taken by a court as stated in *Al-Karafi & Sons v Pema*[11]*:*

> *A court hearing a review application under s 151 sits both as a court of review and a court of appeal to reconsider the ruling or decision of the Master. That does not mean that the court may disregard the factual material before the Master or the Master's reasoning. It is only where the Master, in granting his approval, has erred or misdirected himself based on the material placed before him that the court can, on review and or appeal, go further and decide the matter de novo. It is by reference to what was placed before the Master that the correctness or otherwise of the Master's decision is to be judged. If, based on what was before the Master, there was no error or misdirection on the Master's part, then that is the end of the matter. It is not open to the parties to introduce the new material that they seek to place before this court, and argue on the basis of what was not before the Master that the Master erred or misdirected himself. The approach is to consider the factual material placed before the Master, together with the Master's decision and his report, and to consider whether in the light of that material, the Master erred or misdirected himself in any material respect. If any basis for interfering with the Master's decision does appear ex facie the documents before the Master as read with his decision and rulings, then the reviewing court may reconsider the matter based on the material before it.*

[35] It must thus first be determined whether the Master misdirected himself in his decision and directive of 8 October 2018. I have already referred to the contents of Land Bank's claim documents and the deficiencies therein and do not repeat them. The expungement application was predicated on the need to consider the sale agreement. In

[11] 2010 (2) SA 360 (W) par [11]; Nel and Another NNO v Meester (Absa Bank Ltd and Others intervening) 2005 (1) SA 276 (SCA) paras 22-23

their response to the expungement application, the Land Bank contended that it was not necessary to provide the sale agreement, but nonetheless provided a copy thereof under protest. The agreement was not provided in redacted form. The Master's decision was predicated on his perusal of the sale agreement, which he considered sufficient.

[36] In the sale agreement, the following is of relevance: First, the category into which the Trademar debt fell was potentially the *"*A sale book debts*"* category. Second, certain categories of book debts were expressly excluded from the book debts which Land Bank acquired from the sale. Any debt that was excluded from the definition of *"*A sale book debts*"*, and which did not comprise a "B sale book debt", would thus not have been acquired by Land Bank from Grocap. The definition of "A sale book debts storage media" served to identify the "A sale book debts" sold by Grocap to Land Bank. Third, the allegation in the claim and specifically the Memorandum that "*all debtors are automatically ceded*" is thus factually incorrect and conflicts with the contents of the sale agreement.

[37] In order to verify whether the Land Bank claim comprised of an "A sale book debt" which was acquired by Land Bank, it was necessary to either consider the "approved credit policy" referred to in the sale agreement or to consider the "storage media" as referred to in the sale agreement to consider and confirm that the Trademar debt is specified thereon. In terms of the sale agreement[12], Grocap would deliver to Land Bank the "storage media" identifying the "A sale book debts". The storage media is thus vital to identifying the "A sale book debts" and is in possession of Land Bank.

[38] Land Bank's reliance on definitions contained in the SLA and other documents submitted as part of the claim to clarify the "A sale book debts", "storage media" and the like, does not bear scrutiny. The voluminous claim documents did not contain an

[12] Clause 7.1 of the sale agreement provided: "*In respect of all 'A' Sale Book debts to be sold to Land Bank in terms of this agreement by no later than the Completion date, the Seller shall deliver to the Land Bank the Storage Media specifying, amongst other things, the 'A' Sale Book Debts to be sold to Land Bank in terms of this Agreement which shall comprise of all' 'A' Sale Book debts".*

exposition of those terms or highlight the importance of the definitions. Such definitions of themselves do not sufficiently clarify the position.

[39] The Master did not have or consider either the “approved credit policy” or the “storage media”. A mere perusal of the sale agreement would be insufficient to properly conclude that the Trademar debt was indeed a debt sold and ceded to Land Bank. It appears that the Master did not consider it necessary to consider the “approved credit policy” or the “storage media” but considered provision of the sale agreement as sufficient. The Master further did not consider the contradictions between the sale agreement, the Memorandum and the Recordal regarding whether all the Grocap debts were sold to the Land Bank. He also did not consider that the sale agreement did not give a definitive answer in its terms as to whether the Trademar debt was sold to Land Bank.

[40] I conclude that in reaching his conclusion, the Master thus misdirected himself by not considering or appreciating that he did not have all the necessary information to reach his conclusion. He also misdirected himself that scrutiny of the sale agreement was sufficient to determine that the Land Bank claim was valid and the Trademar debt had in fact been ceded to the Land Bank. It follows that the Master’s decision to dismiss the expungement application falls to be set aside.

[41] That is however not the end of the matter. Considering the conclusions reached, the application need not be considered on the basis of the material which was placed before the Master and any new evidence can be considered in determining the matter *de novo.* I deal first with whether Land Bank’s claim should be expunged and return to the Master’s directive later.

[42] The expungement application was predicated on the need to consider the sale agreement. I have already concluded that the sale agreement itself is insufficient. In their response to the expungement application, Land Bank contended that:

> *"The joint confirmation of the parties concerned with the cession, which has in fact been agreed to, is clearly evident from the meeting of the minds that an agreement has been reached to that effect, is sufficient for the satisfaction of the Presiding Officer in accordance with Section 44 of the Insolvency Act".*

[43] Land Bank has persisted in this argument. For reasons already provided, the mere *ipse dixit* of Land Bank and Grocap is insufficient to establish Land Bank's locus standi as creditor or the sale of the Trademar debt to Land Bank. A proper consideration of all the underpinning agreements is required to clarify what the agreements achieved, rather than simply accepting what the parties thought they achieved. The provision of the sale agreement is also insufficient to reach this conclusion, absent consideration of the "storage media", which evidences whether the Trademar debt is an *"A sale book debt"*[13] in terms of the sale agreement.

[44] Certain new evidence has come to light in the present proceedings: first, that on Land Bank's version, the "approved credit policy" referred to in the sale agreement will not take the matter further. Second, consideration must be given to the 2019 financial statements of Grocap provided to the liquidators on 3 October 2019. In Mr Van Greunen's correspondence, Land Bank relied on paragraph 8.2 of the notes to the financial statements. That note is cast in broad terms and refers to "Transferred financial assets not derecognized entirely". Although it refers to the sale it does not clarify the position in relation to the Trademar debt. In my view it does not take the matter any further.

[45] Third, in its replying affidavit to the counter application Land Bank produced a spreadsheet, which it contended was the relevant extract from the storage media ("the spreadsheet"). In the affidavit, attaching the spreadsheet, it was stated:

> *"To the extent that the computer records could be reduced to a printed form, I attach…the singular transaction incorporating the Trademar transaction against number 912884".*

[13] The parties were in agreement that the Trademar debt would fall into this category.

[46] This qualification is perplexing. It is not explained why the relevant computer records could not be printed or properly reduced to a printed form. It was also not explained why it was not provided to the liquidators with the sale agreement. The replying affidavit further does not contain any authentication of the spreadsheet or confirmation of the information provided thereon.

[47] In the sale agreement *"storage media"* was defined as: "*means a computer disk compiled by the Seller containing information which identifies the 'A' Sale Book Debts sold to Land Bank on the Initial Effective Date (including, as a minimum, the Key Information)".*

[48] *"Key information"* in turn, was defined as: *"means in relation to a sale Book Debt, the minimum information specified in Annexure B".* [14]Annexure B contained a comprehensive list of information which was to be provided.

[49] On the spreadsheet provided, an entry is contained against the number 912884 referring to Trademar as a C risk debt and reflecting certain values as at 29 June 2012. The annexure is identified as *"Sale Corporate Division debtors book schedule 1*", although the spreadsheet itself contains no heading. The spreadsheet provided by Land Bank does not contain the key information or information referred to in annexure B to the agreement.

[50] The spreadsheet, when measured against the relevant provisions of the sale agreement, does not contain the requisite information required and it cannot be concluded from the papers that it constitutes the storage media or sufficient proof that the Trademar debt was sold to Land Bank.

[14] Annexure B formed part of the claim documents although it was not attached to the copy of the agreement provided to the liquidators or the Master.

[51] The spreadsheet was earlier provided to the liquidators by way of letter dated 17 August 2020 from Mr Van Greunen, the salient portions of which provided:

> *"We attach hereto the spreadsheet which constitutes the electronic media which was provided by Grocap to the Land Bank which further constitutes a list of transactions which were being sold on that day to the Land Bank.*
>
> *You will note that there is nothing untoward on this spreadsheet and really doesn't take it any further forward for your client."*

[52] It was thus clear to Mr Van Greunen that the spreadsheet did not take the matter further. A further spreadsheet styled "fee schedule" was attached to the replying affidavit. It reflects the name Trademar, a sale date of 29 June 2012 and certain fees due to respectively Grocap and the Land Bank. This document, absent proper explanation, also does not take the matter any further.

[53] It was open to Land Bank to provide proper and sufficient proof of the storage media, properly authenticated, to support its claim and its counter application. In my view, what was provided by Land Bank falls short of the mark of providing the necessary information to reasonably conclude that the Trademar debt constitutes an A sale debt sold to Land Bank in terms of the sale agreement. Its reluctance to provide all available documents remains unexplained. Absent proper disclosure and access to the storage media or proper proof of the spreadsheet, Land Bank has in my view not provided sufficient proof of its claim. I conclude that Land Bank's claim falls to be expunged, absent the necessary information and proof.

[54] What remains is to consider the the directive issued by the Master in his 8 October 2019 letter. The Master directed that the liquidators *"are to proceed with the payment of dividends to all proved creditors"*.

[55] The undisputed facts established that only a first liquidation and distribution account had been lodged and approved on 6 June 2018 and the dividends provided for therein had been paid to creditors.

[56] The liquidators argued that it was necessary for them to frame and lodge a second liquidation account which was to lie open for inspection and be approved in terms of ss 403 to 409 of the Old Companies Act before any further dividends could be paid. As such, payment of dividends could not proceed and the Master's directive fell to be set aside as he failed to consider the relevant statutory provisions.

[57] Land Bank argued that it was implicit in the Master's directive that a further liquidation and distribution account would have to be drafted and that the manner in which the directive was phrased should be read as prescribing the acts which the liquidators had to perform in compliance with their obligations under the Act. They pointed out that provision had been made for such steps in the counter application.

[58] I do not agree with Land Bank's interpretation of the directive. In its terms, the Master's directive is at best ambiguous and did not require the drafting of a second liquidation and distribution account. Instead, it directed payment of dividends to be made. The Master in issuing the directive in its terms did not have regard to the statutory requirements of ss 403 to 409 of the Old Companies Act. In my view the Master misdirected himself and erred in issuing the directive in its terms. Land Bank's argument implicitly concedes as much.

[59] Based on these conclusions it follows that Land Bank's counter application for declaratory relief cannot succeed. There is further no basis to grant the costs orders sought in the counter application. It cannot on the facts be concluded that the liquidators acted contrary to their duties. To the contrary, they acted diligently and in the best interests of the body of creditors of the Trademar estate. There is sound no basis to mulct the Trademar estate with the costs incurred in this application.

[60] If Land Bank had cooperated fully in providing all documents necessary to substantiate its claim, the legal proceedings could have been avoided. The normal principle is that costs follow the result. There is no reason to deviate from this principle. Both parties were represented by senior counsel. I am satisfied that the employment of senior counsel was warranted, considering the complexities of the matter.

[61] I grant the following order:

[1] The decision of the Master contained in his letter dated 8 October 2019 is set aside, including his:

[1.1] refusal to expunge a claim proved by the second respondent, the Land Bank in the insolvent estate of Trademar in the amount of R14,293,363.50;

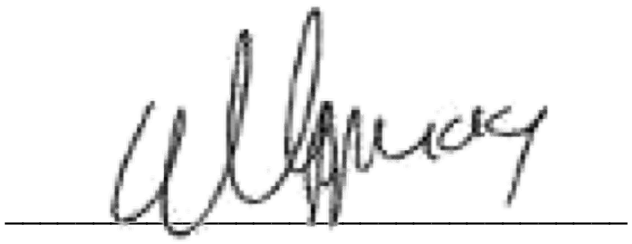
[1.2] conclusion that the Land Bank claim is valid and should stand;

[1.3] directive that the applicants, the liquidators, were to proceed with the payment of dividends to all proved creditors of Trademar.

[2] The Land Bank claim is expunged.

[3] The second respondent, the Land Bank, is directed to pay the costs of the application, including the costs of senior counsel.

[4] The second respondent's counter application is dismissed with costs, including the costs of senior counsel.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 12 April 2021
DATE OF JUDGMENT	: 21 May 2021
APPLICANT'S COUNSEL	: Adv. PT. Rood SC
APPLICANT'S ATTORNEYS	: Fluxmans Inc Mr L Los Passos
2nd RESPONDENT'S COUNSEL	: Adv. MA Badenhorst SC
2nd RESPONDENT'S ATTORNEYS	: Van Greunen & Associates Inc Mr Van Greunen