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JUDGMENT

LOM Business Solutions t/a Set LK Transcribers/LR

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 01527/07

2007-11-30

**DELETE WHICHEVER IS NOT APPLICABLE**

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED

DATE \_\_\_\_\_ SIGNATURE \_\_\_\_\_

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In the matter between

INDUSTRIAL DEVELOPMENT CORPORATION  
OF SOUTH AFRICA

Applicant

and

MASTER OF THE HIGH COURT  
JOHANNESBURG & 7 OTHERS

Respondents

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J U D G M E N T

SNYDERS, J: The applicant previously applied for the liquidation of one of its debtors Noteworthy Properties 18 (Pty) Ltd. A provisional order of liquidation was granted on 31 October 2006. Two joint provisional liquidators were appointed, the third and fourth respondents. A final order of liquidation was granted on 6 December 2006. On 15 December 2006 the first meeting of creditors was advertised by the Master in the Government Gazette for 27 December 2006 at 10:00. The

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meeting took place as advertised. For a variety of reasons, irrelevant for present purposes, the applicant did not learn about that meeting, did not attend the meeting, did not prove any claim in the insolvent estate at that meeting and did not partake in the vote for a liquidator.

In this application the applicant attacks the validity of this first meeting of creditors as well as the decisions taken thereat and the consequences thereof.

The attack is based on the following common cause facts: On 28 November 2006, prior to the final liquidation, a representative of the Master, the first respondent, sent an e-mail instruction to the government printers to advertise, on 15 December 2006, the first meeting of creditors of Noteworthy Properties 18 (Pty) Ltd to be held on 27 December 2006 at 10:00.

These facts illustrate, so the applicant submits, that the steps taken by the Master fall foul of the provisions of section 40(1) of the Insolvency Act 24 of 1936. That section provides:

"On the receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee."

The Master, in the person of Ms Marijke Luther, has, in a report, expressed an opinion in support of the applicant's contention "that there are sufficient grounds to set aside the first meeting of creditors held

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before the Master, Johannesburg on 27 December 2007 ..."

This application is opposed by the third and fourth respondents. The difference in submissions between the applicant on the one hand and the third and fourth respondents on the other hand arises from the interpretation of section 40(1). On behalf of the applicant it is submitted that the Master is only entitled to take steps to convene the first meeting of creditors once he or she receives an order of court sequestrating an estate finally - in this case that would have been upon receipt of the order of final liquidation which was only granted on 6 December 2006.

10 Hence the request to the Government Printer was taken without any statutory authority and could not give rise to a validly convened meeting.

On behalf of the third and fourth respondents it is submitted that a meeting in terms of section 40(1) is only convened once the notice is published in the Government Gazette and as that occurred after the date of final liquidation there has been compliance with section 40(1), and that the notification to the Government Printer is an irrelevant fact.

The meeting in terms of section 40(1) is convened by notice and that notice has to be published after final liquidation of an estate, however, there are two reasons why the respondents are wrong.

20 Firstly, meaning has to be given to the words used by the Legislature to introduce the obligation of the Master to convene the meeting by notice, the introductory words "On the receipt of an order of the court sequestrating an estate finally".

The words are very particular. It does not state that after or upon final liquidation the Master shall convene a meeting by notice.

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The words determine a time at which the Master shall take steps and convene a meeting and that time is "on receipt of an order of the Court sequestrating an estate finally". The Master is authorised to act in terms of the Insolvency Act. The wording of section 40(1) restricts action by the Master to a time when the final order has been received. Only upon final liquidation does the procedure of convening the first meeting of creditors arise and only upon final liquidation is the Master entitled to decide on a date for such a meeting and a date for publication of the notice.

10           Secondly, the word convene in this section is used in the broad sense of the word as defined in the Greater Oxford English Dictionary "To cause to come together". Deciding on a date for the meeting and a date for the publication of the notice is part of the process to convene and in terms of section 40(1) has of necessity to happen after final liquidation. The section is worded in a way that promotes certainty and clarity. To test this interpretation one merely has to postulate a scenario on the facts of this case if the final winding up order was not granted on 6 December 2006. The final liquidation order was opposed. There could not have been any certainty that a final order would have been  
20 granted.

This postulation illustrates why the Legislature found it undesirable for the Master to set the steps in motion to decide on a date for the meeting, to decide on a date for the publication of the notice and to issue an instruction for the publication whilst not knowing that the final order was granted or issued. In fact the Legislature required not

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only knowledge by the Master of the final liquidation but the actual order and the receipt thereof by the Master.

The facts illustrate that the Master acted in contravention of section 40(1), hence the first meeting of creditors of 27 December 2006 was not validly convened or held and no valid decisions could consequently have been taken thereat.

The third and fourth respondents are provisional liquidators. Although there was a vote at the first meeting of creditors for them to be the liquidators they have not been appointed as such by the Master primarily due to this dispute. They oppose the application. They claim that they have derived authority to do so from an extension of their powers granted by the Master in terms of section 396(4)(a) read together with section 386(3) of the Companies Act 61 of 1973.

Section 386(4)(a) empowers the Master to authorise "any urgent legal proceedings for the recovery of outstanding accounts". The current litigation does not fall within the ambit of proceedings that the Master may authorise the liquidators to defend. Furthermore the authorisation sought by the third and fourth respondents from the Master was "due to the fact that legal action has been taken against the company in liquidation" which was not a fair statement of the application by the applicant. Although both liquidators were cited in their representative capacity, no relief is sought against them as such or against the liquidated company.

In addition all the commentators on section 386(3) and (4)(a) seem to be in agreement that the reference to liquidator in those

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subsections do not include a reference to a provisional liquidator. A provisional liquidator could only obtain authority in a case of this nature from the Court, hence the third and fourth respondents have no *locus standi* to oppose this application.

Paragraph 4 of the notice of motion asks for the costs of the application to be costs in the liquidation except if the application is opposed by any of the respondents in which event the costs were to be sought against the opposing parties. The order that I make is the following:

- 10 1. The first meeting of creditors of Noteworthy Properties 18 (Pty) Ltd (in liquidation) held on 27 December 2006 and all decisions taken thereat are set aside.
2. The first respondent is authorised and directed to convene a first meeting of creditors.
3. The third and fourth respondents are ordered jointly and severally to pay the costs of the application.