

REPUBLIC OF SOUTH AFRICA



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

Case Number: 122962/2023

(1)	REPORTABLE: <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>NO</u>
(3)	REVISED: <u>NO</u>
29 /01/2024	[REDACTED]
DATE	SIGNATURE

In the matter between:

**MET IMPORT CC t/a METRO ORIENTAL
IMPORT & EXPORT (2000/017337/23)**

APPLICANT

And

**MASTER OF THE HIGH COURT,
JOHANNESBURG**

FIRST RESPONDENT

TUTOR TRUST

SECOND RESPONDENT

KOBUS VAN DER WESTHUIZEN N.O.

THIRD RESPONDENT

MONIQUE NOELLE DAMON N.O.

FOURTH RESPONDENT

RUBEN MAPHAHA

FIFTH RESPONDENT

**HANS MERENSKY LANDOWNERS'
ASSOCIATION NPC**

SIXTH RESPONDENT

VERMAAK BEESLAAR ATTORNEYS

SEVENTH RESPONDENT

SOUTHERN SKY DEVELOPMENT (PTY)

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the order is deemed to be the 29th of January 2024.

MYBURGH, AJ

- [1] The applicant in this matter seeks an interim interdict preventing the first respondent from appointing the third and fourth respondents as liquidators of the eighth respondent pending the determination of the claims for relief contained in part B of the notice of motion. In the alternative, and in the event that the first respondent has already made the appointments, the applicant asks that the powers of the third and fourth respondents, as liquidators be suspended pending the determination of the applicant's claims for final relief as set out in part B. The application is cast on the basis that the said third and fourth respondents, who were previously appointed as provisional liquidators of the eighth respondent will remain in that capacity and continue to exercise the powers vested in them as provisional liquidators *pendente lite*.
- [2] The applicant claims to be, and *prima facie* is, a creditor of the eighth respondent, which is a company in liquidation. The deponent to the founding affidavit, a certain Mrs Rinderknecht is the sole director and controlling mind of the applicant. The first respondent is the Master of the High Court, Johannesburg. The second respondent is a trust company. Its business includes the rendering of services in connection with liquidations. The third and fourth respondents, who are both employees of the second respondent, were appointed as the joint provisional liquidators of the eighth respondent and may, by this time, have been appointed as the joint liquidators of that company. The fifth respondent is an Assistant Master in the office of the first

respondent. The remaining respondents are creditors who proved claims at the first meeting of the creditors of the eighth respondent.

[3] The application, which came before me in the urgent court in the week commencing 5 December 2023,¹ was opposed by the sixth and seventh respondents. The third and fourth respondents delivered a report which was in the form of an affidavit deposed to by the fourth respondent. The first and fifth respondents also delivered a report which was in the form of an affidavit deposed to by the fifth respondent. I will return to the contents of these reports at the appropriate juncture.

[4] The facts may conveniently be summarised as follows:

- a. The eighth respondent was placed under liquidation by order of this Court on 31 August 2023.
- b. The first respondent thereafter appointed the third and fourth respondents as joint provisional liquidators of the eighth respondent. This occurred on 26 September 2023.
- c. On 27 October 2023 the first respondent gave notice of a first meeting of creditors to be held at the Randburg Magistrates' Court on 8 November 2023. The notice was duly published.²
- d. The meeting was presided over by the fifth respondent.
- e. Mrs Rinderknecht was not present at the meeting however, she and the applicant were represented by an attorney, Mr Morris.
- f. The applicant, represented as aforesaid, attempted to prove two claims at the meeting. Mr Morris did not persist with one as the power of attorney which had been filed with the first respondent had not been witnessed. The other claim was rejected because of discrepancies in the claim documentation. Other claims which had been advanced by an entity or

¹ That is, the calendar week which commenced on Monday 4 December 2023.

² The notice also convened a meeting of shareholders, however the complaints raised by the first applicant relate solely to the meeting of creditors. I will accordingly say nothing regarding the meeting of shareholders.

entities in which the applicant has an interest or interests were also rejected.

- g. The sixth and seventh respondents proved claims. So did a certain Mr Mendelsohn who, for reasons known only to the applicant, was not joined in the application.
- h. The parties whose claims had been accepted at the meeting then unanimously voted to appoint the third and fourth respondents as joint liquidators of the eighth respondent.
- i. On the same day, the applicant addressed a letter to the first respondent in which she complained about the rejection of the applicant's claims and the acceptance of the sixth respondent's claims and asked for the appointment of an independent liquidator.³
- j. On 10 November 2023 the first respondent, represented by the fifth respondent, replied by way of email in which it was, *inter alia*, recorded that the first respondent was not disposed to appoint an additional liquidator. That email concluded with a paragraph in which the applicant's attention was brought to the remedy (of review) provided for in section 151 of the Insolvency Act.⁴
- k. On 13 November 2023 the applicant addressed a further letter to the first respondent.⁵ In that letter the applicant raised a fresh complaint, viz. that the meeting had been conducted on a basis which was irregular. The basis of this complaint was that the meeting had been presided over by the fifth respondent rather than a magistrate. This, so the complaint went, was contrary to the provisions of sub-section 39 (2) of the Insolvency Act. For a reason which is not apparent from the papers, that letter, which was in the form of an email, was addressed to a particular employee in the office of the first respondent, a certain Advocate Netshitahame, rather than to the first respondent's official email address (as had been the case

³ Annexure FA3 to the founding affidavit.

⁴ Act 24 of 1936.

⁵ Annexure FA5 to the founding affidavit.

I. On the same day, the said employee of the first respondent responded by way of an email in which essentially, they paraphrased the provisions of sub-section 39 (2) and stated that the fifth respondent was neither a magistrate nor a designated official but in fact "the Master".

m. The present application was launched on 24 November 2023. In terms of the notice of motion any respondent wishing to oppose was required to deliver its answering papers by 29 November 2023. The dates of the returns of service vary from 27 November to 29 November, but it seems that service was, at least in respect of some of the respondents, effected informally (by email) prior to those dates. Even if one assumes that (informal) service was effected on 24 November 2023, respondents wishing to oppose were given only three business days in which to prepare and file their opposing papers.

[5] Two issues were raised by the opposing parties *in limine*. The first was that the applicant had failed to make out a proper case in respect of urgency. The second concerned the applicant's failure to join Mr Mendelsohn. I will deal with those issues in turn before proceeding to deal with the merits.

[6] The requirements in respect of alleged urgency are so well known as not to require restatement. Suffice to say that an applicant seeking an urgent hearing is required to show (in a separate part of its founding papers) that it will not be able to obtain satisfactory redress at a hearing in due course. It is also required to justify the degree of urgency or, put otherwise, the extent of the deviation from the ordinary time periods contended for. This includes the time afforded to the respondents – which should not be unduly short. The applicant is also required to satisfy the court that it has acted with appropriate speed in bringing the application – i.e. the urgency must not have been "self-created".^{6 7}

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- [7] I have to say that I considered the applicant's case in respect of urgency to be thin. In the first instance, the founding papers were completely silent regarding the period 13 to 24 November – i.e. a period of 11 calendar days. While it is obviously so that the applicant would have required some time to put the application together and while it is also so that legal advisors are not always available at the click of a finger, these are facts which the applicant ought properly to have addressed in its founding papers. Secondly, the time afforded to the respondents was substantially less than the time which the applicant had afforded itself to prepare and deliver the application. Thirdly, very little was said in relation to the consequences which were likely to follow if the third and fourth respondents were not promptly interdicted from carrying out their functions as joint liquidators of the eighth respondent. The high-water mark of the applicant's case on this issue, as I understood it, was that the third and fourth respondents were likely to dispose of some or all of the eighth respondent's assets. When that might occur was not addressed – a significant omission in my view as such things do not, in the ordinary course, occur overnight. Indeed, I am inclined to the view that the degree of urgency was overstated and that a special allocation early in the first term of 2024 would have sufficed. That said, I permitted the matter to be argued on an urgent basis and having done so, believe that it would be appropriate for me to deliver a judgment on the merits.
- [8] As indicated above, the second *in limine* issue related to the non-joinder of a creditor, Mr Mendelsohn. This issue was not addressed at any length in argument. I do not agree with the assertion that such non-joinder had the effect of rendering the application fatally defective. On my understanding, it simply meant that no order which would stand to prejudice the party who ought to have been joined could be given until that party had been given notice, and an adequate opportunity to deliver papers, if so advised. Given my assessment of the merits and the order which I propose to make, to require that would only serve to delay and to burden another judge with having to read the papers (which are voluminous) and to hear argument. This would, in

⁷ A further consideration which arises in this division is that matters in which the papers exceed 400 pages in length cannot simply be enrolled on the urgent roll – this can only be done by way of a special allocation authorised by the deputy judge president.

my view, entail a waste of public resources and be inconsistent with the proper administration of justice.

- [9] Turning to the merits, the first requirement which an applicant seeking an interim interdict must satisfy is the establishment of a right, which may be open to some doubt – i.e. what is often referred to as a “*prima facie* right”. If the applicant satisfies this requirement, then the further considerations come into play – viz. ongoing harm or a well-grounded apprehension of harm; the absence of a satisfactory alternative remedy and that the balance of convenience favours the applicant. Conversely, if the applicant does not get over the first hurdle, then that is the end of the matter.⁸ In the context of an application for an interim interdict pending the outcome of review proceedings, an applicant has, in order to establish a right (albeit perhaps open to some doubt), to show that it has some prospect of success in the review proceedings.⁹
- [10] Although the attacks made by the applicant in the founding papers were quite wide-ranging, the issues which were argued before me in respect of the right contended for were narrow. What the applicant's case came down to was that the first meeting of creditors was tainted by irregularity because it was presided over by a member of the first respondent's staff rather than by a magistrate or someone designated by him/her for that purpose. Several counter arguments were advanced on behalf of the respondents in this regard. I will not deal with all of them as that would be unnecessary given the facts.
- [11] The facts, as they appeared from the report of the first respondent were that there had been a long-standing arrangement between the office of the first respondent and that of the Chief Magistrate, Randburg in terms of which meetings of the kind under consideration held at the Randburg Magistrates'

⁸ *Webster v Mitchell* 1948 (1) SA 1186 (W); *Simon N.O. v Air Operations of Europe AB & others* [1998] ZASCA 79; 1999 (1) SA 217 (SCA); *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA).

⁹ See *National Treasury and others vs Opposition to Urban Tolling Alliance and others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC); *National Commissioner of Police and Another v The Gun Owners of South Africa and Another* [2020] ZASCA 88; [2020] 4 All SA 1 (SCA).

court would be presided over by a member of the first respondent's staff.¹⁰ That arrangement had been given effect to over the years, and it was on that basis that the fifth respondent came to preside at the meeting in question.

- [12] The argument which was advanced on behalf of the applicant was that the arrangement was not competent as it fell foul of subsection 39 (2) of the Insolvency Act – this, so the argument went, because the fifth respondent was not a public official who had been designated by a magistrate to preside over the meeting. Counsel for the applicant also asserted that it would not be competent for a magistrate to appoint or designate the first respondent or a member of the first respondent's staff to preside over a meeting of the kind under consideration.
- [13] While it is true that a strict, literal reading of the subsection is supportive of the proposition that a Master may not preside over a meeting held outside the magisterial district in which his/her office is situated,¹¹ such a reading gives rise to a measure of absurdity. After all, the administration of all insolvent estates is subject to the authority of the Master of the division of the court which granted the order – be it one for the winding up of a corporation or the sequestration of a natural person, partnership or trust. It also appears to be accepted law that a magistrate who presides over a meeting of creditors does so as an agent of the Master, to whom he/she must report.¹² These things being so, it seems to me to be somewhat absurd to suggest that the legislature intended that a Master should be precluded from presiding over a meeting in a “foreign” district if he/she considers that to be appropriate. It is however not necessary for me to reach a final view on this issue given the facts, and I will accordingly not do so.
- [14] As I have already explained, the fifth respondent came to preside over the meeting in issue pursuant to an arrangement which had been concluded between the office of the first respondent and that of the Chief Magistrate, Randburg. Thus, even if it is to be accepted that a designation by a magistrate

¹⁰ According to the evidence this arrangement was concluded during 2018. Nothing turns on the exact date.

¹¹ *In casu*, Johannesburg Central.

¹² See *Wilkens v Potgieter N.O. en 'n ander* [1996] 2 All SA 546 (T).

rather than the first respondent was a requirement in order for the fifth respondent to have been entitled to preside over the meeting (a proposition which I consider to be questionable), it seems clear to me that that requirement was satisfied. The fifth respondent, who is an Assistant Master in the employ of the first respondent, clearly qualifies as an "officer in the public service". It is also clear that his appointment was made in terms of and pursuant to the arrangement which I have already referred to. Subsection 39 (2) does not stipulate a particular mode of designation and I do not believe that the law requires anything more than what in fact occurred. The suggestion that the subsection precludes the designation of any official in the employ of the office of the Master is, to my mind, utterly untenable. The subsection does not contain words to that effect, and it is not necessary to read such words into it in order to avoid an absurdity. I was also not pointed to any authority supportive of that argument.

[15] I am accordingly of the view that the applicant has failed to establish even a glimmer of the right contended for, and that the application must accordingly fail. However, even if I am wrong in this regard, the application must, in my view, fail for other reasons. I will deal with these briefly in the paragraphs which follow.

[16] The second requirement for an interim interdict is that of harm. For this purpose, the applicant must demonstrate either a continuing infringement of the right in issue or a well-grounded apprehension of infringement. In *casu* the applicant's papers were hopelessly deficient. While the deponent to the founding affidavit stated that a "*travesty of justice*" would occur and that "*it could have grave and dire consequences to the effectual and proper winding up of... the eighth respondent*" none of those allegations were underpinned by averments of primary facts supportive of those assertions or concerns. The high-water mark of the applicant's case on this issue was that the third and fourth respondents might not deal appropriately with claims advanced by creditors and that they might sell some or all of the eighth respondent's assets. No proper basis was laid for the first concern (I deliberately put it no higher than that). To this I would add that the third and fourth respondents, as

liquidators, would be bound to carry out their duties in accordance with the law and with due regard to the interests of creditors – all under the eye of the first respondent. In the absence of any evidence of prior wrongdoing, I cannot properly conclude that there is any likelihood that the third and fourth respondents will not discharge their obligations in a proper manner.¹³ As to the second, while I accept that it does appear to be likely that the third and fourth respondents will, if left to their own devices, sell some or possibly all of the eighth respondent's assets, that is a consequence which arises from the fact that the eighth respondent is insolvent. It has nothing to do with the identities of the third and fourth respondents *per se*. To this I would add that the applicant's papers are silent as to any other possible solution – by way of example, a compromise or the injection of further capital. In the circumstances I am not satisfied that a proper case has been made out in respect of the harm element.

[17] I am also not satisfied that the applicant does not have any other suitable remedies. If the third and fourth respondents should do or attempt to do anything which is contrary to law or otherwise inconsistent with their obligations to the creditors of the insolvent company then the applicant, like other creditors, will have all the usual remedies at their disposal. I will not elaborate save to say that such remedies would include interdictory relief and, in appropriate circumstances, the removal of the third and fourth respondents from office.

[18] Finally, I am not satisfied that the balance of convenience favours the grant of the relief sought. While it may be so that the third and fourth respondents are likely to act in a manner which will be prejudicial to the interests of the applicant and those of its controlling mind, Mrs Rinderknecht, the enquiry does not end there. On the contrary, one has to consider the interests of the eighth respondent's creditors generally. In my view those interests are best served by an orderly winding up a process - which may well entail the sale of some or all of the eighth respondent's assets.

¹³ Although the deponent to the applicant's founding affidavit alleged that claims were accepted and rejected in circumstances where they ought not to have been, those acts were committed by the fifth respondent, not the third and fourth respondents – who are under a duty to investigate all claims, regardless of whether they were accepted or rejected at the first meeting.

[19] I accordingly make the following order.

ORDER

- [1] The application is dismissed with costs, such costs to include the costs of two counsel where so employed.


G S MYBURGH
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

For Applicant: M M Van Zyl SC assisted by W R Du Preez

Instructed by: Goodes and Co

For 2nd, 3rd and 4th Respondents: ..Stroebe

Instructed by:

For 6th Respondent: P Louw SC assisted by D Vetten

Instructed by: Esc and Kaka

For 7th Respondent: J Hershenson assisted by R De Leeuw

Instructed by: Vermaak Beeslaar

Date of Hearing: 5 December 2023

Date of Judgment: 29 January 2024

