REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: **37425/2014**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

29/9/17
SIGNATURE DATE

In the matter between:

CWT- AQUARIUS SHIPPING INTERNATIONAL (PTY) LTD	**1ST APPLICANT**
DARRELL GRANT GOODWIN N.O	**2ND APPLICANT**
ROBERT JOHN POVERELLO N.O	**3RD APPLICANT**

And

MASTER OF THE HIGH COURT, GAUTENG LOCAL DIVISION, JOHANNESBURG	**1ST RESPONDENT**
GEORGE DA SILVA RAMALHO N.O	**2ND RESPONDENT**
MAYFAIR PROPERTY INVESTMENTS LIMITED	**3RD RESPONDENT**
MRS DAVIES N.O	**4TH RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	**5TH RESPONDENT**

JUDGMENT

Windell J:

INTRODUCTION

[1] This is an application for an order reviewing and setting aside the decision of the fourth respondent (the presiding officer) to admit a claim at the first meeting of creditors in the insolvent estate of Aquarius Shipping International (Pty) Limited, (Aquarius).

[2] The review is brought in terms of Section 151 of the Insolvency Act 24 of 1936, and Sections 3 and 6 of The Promotion of Administrative Justice Act 3 of 2000. The applicants also seek an order declaring Section 40 (1) of the Insolvency Act and Section 364 (2) of the Companies Act 61 of 1973 invalid. The first, second and third respondent (the respondents) oppose the application.

[3] The disputed claim was admitted in terms of Section 44 of the Insolvency Act at the first meeting of creditors in the presence of the second respondent (the liquidator).The claim was that of the third respondent, Mayfair Property Investments Limited (Mayfair).

[4] The applicants firstly contend that the claim could never have been regarded as a liquidated claim and the presiding officer should have rejected it. Secondly, in light of the inadequately worded claim for which no supporting documents were provided, the presiding officer should have subjected the person who wishes to prove the claim to interrogation in terms of Section 44 (7) of the Insolvency Act. The respondents submit that the court should not engage in the merits of the review as the applicants are not "aggrieved persons" as provided for in Section 151 of the Insolvency Act, and the application should, for that reason alone, be dismissed.

[5] The constitutional challenge turns on rewriting Section 40 (1) of the Insolvency Act and Section 364 (2) of the Companies Act to make it mandatory for the Master, in addition to publication in the Gazette, to also give notice in writing to the insolvent and to every director and member of the company of the meeting. During the hearing of the application the question arose whether the challenge should be entertained at all in light of the established and uniformly observed policy directing courts not to exercise their discretion in favour of deciding issues that are merely abstract, academic or hypothetical.

BACKGROUND

[6] Mayfair and Aquarius entered into an agreement on 8 December 2010, in terms of which Aquarius undertook to deliver certain equipment to Mayfair with a value of US$420,000. Aquarius failed to deliver the equipment because it was destroyed in a fire on 24 December 2010.

[7] On 1 June 2011, Aquarius divested itself of all of its assets (worth R19.5 million) by disposing of its logistical business and assets to the first applicant, and its shares in the first applicant to the second and third applicant's trusts.

[8] On 6 October 2011, Mayfair instituted action (the action) against Aquarius for payment of US$ 420,000 arising from the latter's alleged breach of the agreement.

5 November 2013, instituted a new application to convert the voluntary winding up into compulsory winding up to enable the liquidator to conduct an insolvency enquiry to determine whether the disposition by Aquarius of its assets to the applicants was impeachable and whether its directors could be held personally liable for its debts.

[13] On 27 November 2013, this court granted an order converting the voluntary winding up into a compulsory winding up.

[14] On 11 June 2014, the presiding officer at a duly convened first meeting of creditors of Aquarius (in liquidation) admitted Mayfair's claim in the amount of US$ 420,000 to proof.

[15] On 5 August 2014, the liquidator instituted an action against the three applicants on the basis that, prior to its liquidation, Aquarius had disposed of its property without receiving value. He sought an order in terms of section 26 (1) (b) of the Insolvency Act for the setting aside of the dispositions and the return of the assets to Aquarius for the benefit of its creditors. He also sought an order in terms of section 424 of the Companies Act, 1973, declaring the second and third applicants personally liable for the debts of Aquarius. The liquidator instituted the action at the instance of Mayfair in terms of section 32 (1)(b) of the Insolvency Act, having been indemnified for costs by Mayfair.

[16] The applicants filed a plea on 13 October 2014 (i.e. the day before they filed this application) in which they allege that Mayfair's claim was "*incorrectly proved*", and, more particularly, that it was abandoned because Mayfair did not give notice of

continuation to the liquidator, as required by section 359(2)(a) of the Companies Act, 1973.

THE COMPLAINT

[17] Sections 44 and 45 of the Insolvency Act deal with the procedure to be followed in relation to the proving of claims in an insolvent estate. Section 44(1) only permits liquidated claims to be proved, but proof of an unliquidated claim may be tendered at the meeting, and if it is, such claim is deemed to have been proven at such a meeting where either the trustee has compromised or admitted it, or it has been settled by a judgment of Court[1].

[18] Section 44(3) provides that a claim against an insolvent estate shall be proved *"... to the satisfaction of the officer presiding at the meeting"*. Section 44(4) requires, *inter alia*, that a claim shall be proved by way of an affidavit, together with documents supporting the claim. The affidavit must be made by any person *"fully cognizant of the claim"*, and, the affidavit *"shall set forth ... the facts upon which his knowledge of the claim is based and the nature and particulars of the claim"*.

[19] The liquidator and Mr Brooks, an attorney representing Mayfair, were present at the first meeting of creditors. According to *"The Minutes of the Proceedings"* (Form J 223), one claim was proven namely that of Mayfair in the amount of US $420 000. In the column *"Particulars of debt"* the presiding officer noted *"Loss of an asset"*. The applicants contend that a claim formulated in this manner could never be regarded

[1] Section 73 (3) of the insolvency Act

as adequate, and furthermore, it could never be regarded as a liquidated claim within the meaning of Section 44(1). The presiding officer for these reasons alone should have rejected Mayfair's claim. It is contended that the limited phraseology does not convey the elements of a cause of action, nor does it set out the particulars of the claim and the facts upon which the deponent's knowledge is based. Under these circumstances the presiding officer should have subjected the person who wishes to prove the claim to interrogation by the officer or the trustee or agent in terms of Section 44 (7). The applicants also contend that Section 45(2) obliged the liquidator to examine the claim for the purpose of ascertaining whether the estate in fact owed the claimant the amount claimed.

[20] The inscription *"loss of asset"* in Form J223 is not determinative of the cause of action, and is not what is of importance in determining whether the presiding officer exercised her discretion correctly in admitting the claim. There was an affidavit and supporting documents filed in support of Mayfair's claim. The affidavit stated the following:

> "*That* *Aquarius Shipping International (Pty)Ltd*
>
> *which company has been placed in liquidation and still is justly and truly indebted to the said creditor in the sum of:*
>
> *United States Dollars four hundred and twenty thousand*
>
> *for* *Refer Annexure "A".*

[21] There was, in addition to the affidavit above, an affidavit by Mr Brooks, which Mayfair had filed in support of its previous application to convert the winding up of Aquarius from a voluntary winding up into a compulsory winding up, attached to the claim. A schedule, reflecting the Rand/US dollar exchange rate as the date of

Aquarius winding up was also attached.

[22] The respondents submitted that Mayfair placed sufficient information before the presiding officer to be *prima facie* satisfied that Mayfair's claim was in order and the review is just another attempt by the applicants to avoid Mayfair's claim against Aquarius. The respondents contend that the applicants seek to avoid the liquidator's claim against themselves by launching this application in the hope that the court will review and set aside the presiding officer's decision to admit Mayfair's claim to proof. It is submitted that the applicants believe that if they can achieve this, the liquidator will be unable to pursue his action against them, because, so they say, his claim is conditional upon Mayfair being a proved creditor of Aquarius.

LEGAL PRINCIPLES

[23] The review is brought in terms of Section 151 of the Insolvency Act. The review envisaged by Section 151 is the *'third type of review'* identified in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* [2]; i.e. the type of review where Parliament confers a statutory power of review upon the court.

[24] Section 151 provides for "*any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court....*" The respondents contend that the applicants are not aggrieved persons as provided for in Section 151 and that their application should be dismissed on that basis alone.

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[2] *1903 TS 111*

[25] The first issue that therefore needs to be determined is whether the applicants are "persons aggrieved" by the presiding officer's decision to admit Mayfair's claim.

[26] The high water mark of the applicants' case is found in their founding affidavit wherein it is alleged that *"the pre-condition to the claim of the second respondent is the claim that the third respondent proved in the liquidation of the liquidated company by virtue of the fourth respondent decision."* In other words they contend that if the presiding officer had rejected Mayfair's claim, the liquidator would not have been able to institute action against the applicants because the liquidator's claim is conditional upon Mayfair being a proved creditor.

Is the liquidator's claim conditional on Mayfair being a proved creditor?

[27] It is common cause that the liquidator instituted an action against the applicants and nine other parties on 5 August 2014. In par 3.1 and par 3.2 of the Particulars of Claim of the action it is alleged that:

> *"3.1 On 11 June 2014 Mayfair proved a claim, in accordance with the provisions of The Insolvency Act No. 24 of 1936 in the estate of Aquarius Shipping in the amount of R 4 262 496.00;*
>
> *3.2 The proceedings are instituted in the name of the plaintiff at the instance of Mayfair in terms of section 32 (1)(b)of the Act, the plaintiff being indemnified by Mayfair against all costs arising from the action"*

[28] Upon commencement of the winding up, the directors ceased to have any control over the insolvent company. They become *functus officio* and their powers

are assumed by the liquidator.[3] In terms of Section 386 (4) and Section 424(1) of the Companies Act 1973, the liquidator is authorized to institute legal proceedings. Section 386(4) proceedings are generally brought in the name of the liquidated company. The power of the liquidator to institute legal proceedings in terms of Section 386(4) can be exercised only if authority is granted by creditors at a meetings of creditors, or if such authority is not granted on a direction by the Master under Section 387, or if such direction is not given, by leave of the court under Section 386(5) read with Section 387(3). Section 424(1) does not require such authority and empowers the liquidator to institute proceedings exercising his statutory power.

[29] The liquidator instituted the action against the three applicants on the basis that, prior to its liquidation, Aquarius had disposed of its property, worth R19.5 million, without receiving value. He sought the following orders:

29.1 an order in terms of section 26 (1) (b) of the Insolvency Act for the setting aside of the dispositions and the return of the assets to Aquarius for the benefit of its creditors; and

29.2 an order in terms of section 424 of the Companies Act, 1973, declaring the second and third applicants personally liable for the debts of Aquarius.

[30] An order sought under Section 26(1) of the Insolvency Act and Section 424 of the Companies Act are examples of instances where the liquidator is exercising his statutory power and where no authority is needed from the creditors. In order to

[3] *Attorney-General v Blumenthal* 1961 (4) SA 313 (T) at 315

succeed with a claim in terms of Section 26 (setting aside a disposition without value and Section 424 (declaring the directors liable for debts of the company), the liquidator need not proof the existence of a proved claim. The power of the liquidator to institute claims in terms of Section 26 and Section 424 are therefore not dependent on the existence of a proved claim.

[31] The fact that Mayfair has the right to fund and direct the litigation because of the provisions of Section 32(1)(b), does not detract from the fact that it is liquidator that is instituting the action. It is to him that payment will have to be made if the litigation is successful, and who will be liable for costs if it fails, irrespective of whether he can enforce the indemnity against Mayfair or not.[4] Notably, the reference to "any creditor" in Section 32(1)(b) is simply that: any creditor, not *"creditors who have proved their claims"*.

[32] I agree with counsel for the respondents that whether or not Mayfair is a proved creditor is not one of the *facta probanda* or essential averments necessary to found the liquidator's cause of action against the applicants. The liquidator's claim is not conditional upon Mayfair being a proved creditor, and it will make no difference to the applicants that Mayfair's claim was admitted to proof.

Are the applicants aggrieved persons?

[33] The concept "aggrieved person" has been the subject matter in numerous cases. The words signify someone whose legal rights have been infringed - a person

[4] Reynolds NNO v Standard Bank of SA Ltd 2011 (3) SA 660 (W)

harbouring a legal grievance[5], and is not merely a person who is merely 'annoyed or hurt' by the determination[6]. In *De Hart NO v Klopper and Botha NNO and Others*[7] Trollip J, gave the following context to the words:

> "He [first respondents' counsel] relied upon the definition of that expression by James LJ in Ex parte Sidebotham 14 ChD 458 at 465:
>
> > "It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something."
>
> That definition was approved and adopted by Krause J in Friedman's Trustee v Katzeff 1924 WLD 298 at 304 - 5, in construing the expression "person aggrieved" in the corresponding section, s 151, of the previous Insolvency Act, 32 of 1916."

[34] As stated above Mayfair's claim is not a pre-condition for the institution of the action against the applicants. The fact that Mayfair proved its claim at the first meeting of creditors will constitute *prima facie* proof of the claim and nothing prohibit the applicants from, during the action, providing contrary evidence to show that there is no valid claim. This principle was confirmed in the matter of *Retail Management Services Edms Bpk v Schwartz*[8] where the court stated the following:

> "Die vraag is derhalwe of 'n direkteur van 'n maatskappy wat in likwidasie geplaas is enigsins die reg ontsê kan word om die bestaan van 'n skuld wat behoorlik teen die

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[5] *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A).

[6] *Neuhaus v The Master of the High Court and Another* 1932 SWA 30 at 32

[7] 1969 (2) SA 91 (T) at 99H-100B

[8] 1992 (2) SA 22 (W)

maatskappy bewys en toegelaat is aan te veg en te weerlê. Mnr *Smit* se reaksie hierop was dat dit aanvaar moet word dat daar 'n bewese skuld teen die maatskappy is terwyl daar geen stappe gedoen is om sodanige toegelate vordering tersyde te stel nie.

Indien mnr *Smit* ten opsigte van hierdie betoog gelyk gegee moet word, sou dit kon lei tot 'n absurde situasie. Dit sou, byvoorbeeld, beteken dat 'n direkteur van 'n maatskappy wat ingevolge art 424(1) aangespreek word en wat vooraf geen kennis dra van die eis wat teen die maatskappy in likwidasie bewys is nie, geensins tydens sy verhoor die eis of die bedrag daarvan in gedrang sou kon plaas alvorens hy nie stappe gedoen het om die vordering tersyde te laat stel nie. Dit sou 'n verreikende gevolg wees met baie ernstige uitwerking op ons regsproses indien 'n litigant op hierdie wyse hom van sy verweer ontneem sou kon word.

Dit kom my voor dat daar 'n mate van verwarring hier ingesluip het. Die vraag is uiteindelik nie of die eiser vir doeleindes van die Insolvensiewet as 'n krediteur van die maatskappy beskryf kan word nie; dit is klaarblyklik so. Die vraag is of die eiser, vir doeleindes van hierdie geding, daarin geslaag het om te toon dat dit 'n krediteur van die maatskappy is. Hierdie vraag hou so nou verband met die tweede vraag wat hierbo gestel is dat hulle gerieflikheidshalwe saam behandel kan word.

In *Dorklerk Investments (Pty) Ltd v Bhyat* 1980 (1) SA 443 (W) te 447E-448A het Philips Wn R gehandel met die effek van 'n vordering teen 'n insolvent wat bewys en toegelaat is:

> 'It is to be noted that s 424(1) confers a wide discretion on the Court. At the time of liquidation, the applicant's claim for damages for wrongful holding over was entirely unliquidated and nebulous. Indeed, there was nothing to indicate that it had any such claim at all. In my view, before the Court should make a declaration against a director under s 424(1), it should require to be satisfied on the balance of probabilities that the creditor's claim exists and that it is quantified by acceptable evidence. In this case there is no evidence at all, save that the applicant states that it proved a claim against the company in liquidation and that the claim was admitted by the magistrate who

> presided at the meeting of creditors. The liquidator apparently had no objection to its admission. If this were to be regarded as the norm in the case of completely unliquidated claims like damages, then every director of every company that is forced into liquidation would be in danger of a declaration being made against him under s 424(1) on the flimsiest of evidence. . . . The respondent was, of course, not a party to the admission of the applicant's claim in the liquidation and I consider that he cannot be bound by that fact. Nor should the Court be bound by it when it is asked to exercise a discretion against the respondent.'
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> .....Na my mening kan 'n eiser staatmaak op 'n vordering wat bewys en toegelaat is om *prima facie*-bewys van skuld daar te stel. Wanneer dit gedoen word ontstaan daar 'n weerleggingslas wat op die normale wyse deur die verweerder gekwyt kan word.

[35] In light of the aforesaid there can be no question of the applicant's legal rights been infringed by the admittance of Mayfair's claim at the first meeting of creditors. If Mayfair's claim is at all material during the trial, the applicants can still dispute the validity of the claim and produce evidence to counter it.

[36] In addition, the applicants also failed to prove that they were aggrieved persons **at the time** of the admittance of the claim. In *Jeeva and Another v Tuck NO and Others*[9] the erstwhile directors of the company in liquidation applied for a review of the presiding officer's decision to admit a creditor's claim to proof, which had the effect of entitling that creditor to interrogate them at an insolvency enquiry in terms of sections 417 and 418 of the Companies Act. The applicants argued that this constituted an infringement of their rights, including a host of constitutional rights.

[9] 1998 (1) SA 785 (SE)

The court, rejected the argument and dismissed the application on the basis that they were not "*persons aggrieved*" by the presiding officer's decision and therefore did not have *locus standi* to apply for a review. The court made the following remarks:

> "The applicants did not show that they had any other legal rights or interests save for the assumed right not to be interrogated which could be or in fact were affected at the special meeting of creditors where the claim of [the creditor] was admitted. Nor, at the time, did the admission to proof of this claim affect any such rights or interests including the assumed right. This much was in fact conceded by Mr De Bruyn in argument when he submitted that the admission of [the creditor's] claim did not itself affect the relevant right. He submitted that it was only when [the creditor] decided to interrogate the applicants at the enquiry that their rights became affected. This argument, in my view, is also unsound. The crucial stage as far as this inquiry is concerned is the time when the special meeting of creditors where [the creditor's] claim was admitted to proof, took place. In the Francis George Hill Family Trust case supra at 103B Hoexter JA said the following:
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> > `...The crucial stage at which the Hill FT had to achieve that status was the very time at which the notice of attachment was served upon Phoenix on 10 May 1989. If the Hill FT did not then rank as a ``person aggrieved", later events could not alter the legal position.'"

[37] The facts in the present matter are analogous to that in *Jeeva supra*. If it is for a moment accepted that the applicants had an assumed right not to be sued by the liquidator, because Mayfair should not have become a proved creditor, the fact is that at the time Mayfair's claim was admitted to proof, the liquidator had not yet

instituted action against the applicants. As stated in *Jeeva* supra *"if the applicants were not aggrieved persons because they did not have a legal right which could be infringed at the time the claim was admitted to proof, then they cannot acquire that status because of the later events relied upon".*

[38] I am not convinced that the applicants are aggrieved persons. They failed to show that any of their legal rights have been infringed. They do not have *locus standi* to apply for review under Section 151 of the Insolvency Act.

CONSTITUTIONAL ATTACK ON SECTION 40 (1) OF THE INSOLVENCY ACT NO 24 OF 1936 AND SECTION 364 (2) OF THE COMPANIES ACT NO 61 OF 1973

[39] The applicants' constitutional challenge relates to Section 40(1) of the Insolvency Act and section 364(2) of the Companies Act,1973 *(the impugned provisions).*

[40] Section 40(1) of the Insolvency Act reads as follows:

> *"On 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".*

[41] Section 364(2) of the Companies Act,1973 reads as follows:

> *"Meetings of creditors under this section shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency, and meetings of members or contributories in the manner*

prescribed in the legislation: Provided that, in the case of a meeting of creditors, the Master, may direct the company concerned or the provisional liquidator to send a notice of such meeting by post to every creditor of the company".

[42] The applicants complain that the impugned sections, which they say must be read with section 414 of the Companies Act 1973, offends against Sections 33 and 34 of the Constitution. They argue that the manner in which the Master is required to give notice of the first meeting of creditors in terms of Section 40(1) of the Insolvency Act and Section 364(2) of the Companies Act is insufficient and offends against the *audi alterem partem* principle.

[43] The applicants submit that the process by which affected parties are notified in terms of the impugned provisions of the first meeting of creditors is outdated, and does not amount to "fair administrative procedure'. Placing an advert in the Gazette is an inadequate manner of notice of the first meeting of creditors "*as it takes little imagination to appreciate that the man in the street does not have ready access to the Gazette".* The applicants further contend that it is entirely anomalous for the directors to be required to attend a meeting under threat of criminal prosecution, without there being any statutory provision in existence which requires notice to be given to a director to attend such meeting. It is not only the interests or risk of criminal prosecution that are germane to the consideration of impugned sections, but had the directors been given notice of the meeting of creditors, they could have attended and provided useful input to the presiding officer regarding the nature of the claim that Mayfair was endeavouring to prove.

[44] The applicants seek via their constitutional challenge to have the impugned provisions rewritten to make it mandatory for the Master, in addition to publication in the Gazette of notice convening a meeting of creditors and members, to also give notice in writing to the insolvent and to every director and member of the company of the meeting.

[45] In *Goldberg v Provincial Minister of Environmental Affairs and Development Planning And Others*[10], Rogers J remarked that the question whether the court should entertain a constitutional challenge turns on considerations of judicial policy expressed in the concepts of ripeness, mootness and constitutional avoidance. In considering the challenge he stated as follows:

> "Ripeness and constitutional avoidance are sometimes inter-related. If it is possible to decide a matter without determining the constitutional validity of legislation or other action, the principle of avoidance may lead to the conclusion that the constitutional question is not ripe to be determined."

[46] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*[11], the Constitutional Court held as follows:

> 'While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'

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[10] Case number 15927/12 [2013] ZAWCHC 185 (17 December 2013)

[11] 2000 (2) SA 1 (CC)

[47] In *Goldberg supra* Rogers J declined to entertain the constitutional challenge for the following reasons:

> "[12] An important reason why a high court should not entertain a constitutional challenge to national or provincial legislation unless it presents a live issue which needs to be reached is that the court's declaration would have no effect unless and until confirmed by the Constitutional Court. That court should not be burdened with confirmation proceedings in relation to matters where the interests of justice do not demand a decision. In the present case there are various factors which lead me to conclude that this court should not entertain the challenge.
>
> [13] As I have already observed, the applicant justified his challenge because of its significance to his conviction in the criminal proceedings. However, and as will appear from the judgment in the appeal to be delivered simultaneously with this one, we have concluded that the criminal appeal should succeed on other grounds. Accordingly, and even assuming all other matters in favour of the applicant, he does not require a declaration of invalidity in order to secure his acquittal."

[48] It is trite that courts should not decide matters that are abstract or academic and which do not have any practical effect either on the parties before the court or the public at large. In *Premier, Provinsie Mpumalanga en 'n ander v Grobblerdalse Stadsraad*[12] Olivier, discussing the rationale behind Section 21A of the Supreme Courts Act, remarked as follows:

> "Die artikel is, myns insiens, daarop gerig om die drukkende werklas op Howe van appèl, insluitende en miskien veral hierdie Hof, te verlig. Dit breek weg van die destydse vae begrippe soos 'abstrak', 'akademies' of 'hipoteties', as maatstawwe vir

[12] 1998 (2) SA 1136 (SCA)

die uitoefening van 'n Hof van appèl se bevoegdheid om 'n appèl nie aan te hoor nie. Dit stel nou 'n direkte en positiewe toets: sal die uitspraak of bevel 'n praktiese uitwerking of gevolg hê? Gesien die doel en die duidelike betekenis van hierdie formulering, is die vraag of die uitspraak in die geding voor die Hof 'n praktiese uitwerking of gevolg het en nie of dit vir 'n hipotetiese toekomstige geding van belang mag wees nie. "

[49] A declaratory order is a discretionary remedy. As Didcott J stated in *JT Publishing (Pty) Ltd & Others v Minister of Safety and Security & Others*[13] , if a claim is lodged by an interested party, it does not in itself "*oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer*". I am not convinced that in determining the constitutionality of the impugned provisions will produce any concrete or tangible result for the parties in the present matter and the interest of justice in this instance does not demand a decision. The issues raised by the applicants are purely hypothetical. In the event that the directors are charged with criminal offence, they can raise the issue at the appropriate time in the appropriate forum.

[50] As the review application was capable of being decided without entertaining the constitutional challenge, I come to the conclusion that the constitutional challenge is not ripe for hearing and under the circumstances I decline to entertain it.

[51] In the result the following order is made:

1. The review application is dismissed with costs.

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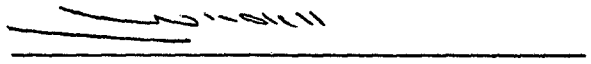
[13] 1997 (3) SA 514 CC

2. The declaratory application is dismissed. No order as to costs.



L WINDELL

JUDGE OF THE HIGH COURT

Attorney for Applicant:	Gerings Attorneys
Counsel for Applicant:	Advocate KJ van Huyssteen
Attorney for second and third Respondents:	Brian Bleazar Attorneys
Counsel for second and third Respondents:	Advocate GD Wickins
Attorney for 5th Respondent:	State Attorneys
Counsel for 5th Respondent:	Advocate M J Ramaepadi Advocate Kerusha Pillay
Date matter heard:	17 August 2017
Judgment date:	29 September 2017