IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Reportable

Case no: 12054/2016

In the matter between:

CONSOLIDATED AONE TRADE & INVEST 6 PROPRIETARY LIMITED (IN LIQUIDATION)	**APPLICANT**
and	
THE MASTER OF THE HIGH COURT, KWAZULU-NATAL LOCAL DIVISION DURBAN	**FIRST RESPONDENT**
FATIMA CASSIM N.O	**SECOND RESPONDENT**
MANDLA PROFESSOR MADLALA N.O	**THIRD RESPONDENT**
NEIL DAVID BUTTON N.O	**FOURTH RESPONDENT**

(The second, third and fourth respondents are cited in their capacities as joint liquidators of Imperial Crown Trading 176 (Pty) Ltd (in liquidation)

GEARWISE PROPERTIES CC **FIRST INTERVENING PARTY**

HARESH OUDERAJH **SECOND INTERVENING PARTY**

Coram: M E Nkosi J

Heard: 23 November 2023

Delivered: 26 January 2024

ORDER

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1. That the first respondent's decision dated 12 May 2016 to expunge the claim proved by the applicant as Claim No. 4 against Imperial Crown Trading 176 (Pty) Ltd (in liquidation) be and is hereby reviewed and set aside;

2. That the first respondent's decision dated 12 May 2016 to expunge the claim proved by the applicant as Claim No. 5 against Imperial Crown Trading 176 (Pty) Ltd (in liquidation) be and is hereby reviewed and set aside;

3. That the first respondent be directed to reduce the applicant's Claim No. 5 to the sum of R7 261 755-85 as provided for in s 45(3) of the Insolvency Act No. 24 of 1936;

4. That it be and is hereby declared that the applicant's Claim No. 4 and Claim No. 5 reduced to the sum of R7 261 755-85, be dealt with by the second, third

and fourth respondents as claims proved against Imperial Crown Trading 176 (Pty) Ltd (in liquidation);

5. That the first and second intervening parties are hereby directed to jointly and severally pay the costs occasioned by their opposition to the main application, as well as the costs occasioned by their opposition to the condonation and extension of time application.

JUDGMENT

M E Nkosi J

Introduction

[1] The applicant is a company in liquidation, having been finally wound up by order of this court on 20 March 2014. It is represented in these proceedings by its duly appointed joint liquidators, namely, Theodore Wilhem van den Heever ('van den Heever'), Mduduzi Christopher Nkomo ('Nkomo') and Eugene Nel ('Nel'). The relief sought by it herein is threefold. It seeks an order, firstly, reviewing and setting aside the decision taken by the first respondent on 12 May 2016 to expunge its Claims No. 4 and No. 5 which were proved against Imperial Crown Trading 176 (Pty) Ltd (in liquidation) ('ICT'); secondly, directing the first respondent to reduce its Claim No. 5 to the sum of R7 261 755.85 as provided for in s 45(3) of the Insolvency Act, No. 24 of 1936 ('the Insolvency Act'); and lastly, declaring that its Claims No. 4 and No. 5, reduced as aforesaid, be dealt with by the second, third and fourth respondents as claims proved against ICT.

[2] Apart from the order referred to in the preceding paragraph, the applicant had also brought an interlocutory application for condonation of its failure to bring the application ('the main application') within the period of 180 days prescribed by s 7(1) of the Promotion of Administrative Justice Act, No. 3 of 2000 ('PAJA'), and for the extension of the aforesaid period to 24 November 2016.

[3] At the commencement of the hearing, this court granted an application made by the first and second intervening parties to intervene in the main application on the basis of their contention that they have a 'substantial and vested interest' in the matter. It was argued by the second intervening party, who appeared in person, that the applicant should be ordered to pay the costs of such application. However, the court refused to grant a costs order in respect of the said application on the basis that the applicant did not persist with its initial opposition thereof. Besides, it was apparent from the application papers that the intervening parties had not incurred any costs by reason of the applicant's initial opposition of their application to intervene in these proceedings.

The issues

[4] The issues for determination are primarily the following:

(a) Firstly, whether the applicant provided a full and reasonable explanation for its failure to bring the main application within the 180 days' time period stipulated in s 7(1)(*b*) of PAJA;

(b) Secondly, whether the first respondent's decision to expunge the applicant's Claims No. 4 and No. 5 ('the decision') ought to be reviewed and set aside on any one or more of the following grounds: (i) the presumption contained in

s 5(3) of PAJA that the decision was taken without good reason in view of the first respondent's failure to provide reasons for such decision after he was requested to do so; (ii) that the decision was taken arbitrarily or capriciously as contemplated in s 6(2)(*e*)(vi) of PAJA; (iii) that the decision was not rationally connected to the information which the first respondent had before him at the time as contemplated in s 6(2)(*f*)(ii)(cc) of PAJA; (iv) that the first respondent, in taking the decision, exercised his power or performed his function so unreasonably that no reasonable person could have exercised such power or performed such function in such a manner as contemplated in s 6(2)(*h*) of PAJA, and/or; (v) that the first respondent, in taking the decision, took irrelevant considerations into account and failed to consider relevant considerations in respect thereof as contemplated in s 6(2)(*e*)(iii) of PAJA; and,

(c) Thirdly, whether the first and second intervening parties should be directed to pay the costs occasioned by their opposition of the main application and their opposition of the applicant's application for condonation and extension of time.

Factual background

[5] The factual background to the matter, briefly stated, is that ICT was finally wound up by order of this court on 17 January 2014. The second, third and fourth respondents, together with Graham Bryan Perry ('Perry'), were appointed by the first respondent ('the Master') as its joint liquidators. Perry was subsequently removed by the Master as one of the joint liquidators of ICT. The first meeting of the creditors of ICT was held before the Master on 9 April 2014, whereat the

applicant proved its Claim No. 4 for the sum of R13 537 693.70 and Claim No. 5 for the sum of R7 261 755.85.

[6] Initially, the applicant had claimed an amount of R13 456 776.65 in respect of Claim No. 5. However, they subsequently conceded that the said amount was incorrect due to a duplication of the amount of R6 195 020.80 in the calculation of the claim. It is for this reason that one of the reliefs sought by the applicant in these proceedings is an order directing the Master to reduce the amount claimed in respect of Claim No. 5 from the sum of R13 456 776.65 to the sum of R7 261 755.85 based on its contention that the Master is entitled to do so in terms of s 45(3) of the Insolvency Act.

Basis of the applicant's claims

Claim No.4

[7] Van den Heever, who deposed to an affidavit in support of the applicant's claim against ICT, averred that the applicant is the owner of land on which the Ballito Bay Mall ('the Mall') is situated. As security for monies due by the applicant to Rand Merchant Bank ('RMB') a mortgage bond was registered over the land in question in favour of RMB. The applicant concluded two lease agreements with Shoprite Checkers (Pty) Ltd ('Shoprite') in terms of which the applicant let premises at the Mall to Shoprite.

[8] Subsequent to the conclusion of the lease agreements with Shoprite, RMB informed Shoprite in writing that in terms of the mortgage bond registered in its favour over the land, the applicant had ceded its right, title and interest in and to rentals generated by the mortgaged property to RMB. However, instead of making rental payments to RMB, Shoprite made payment thereof to ICT during the period

February 2010 to January 2013 in the total sum of R13 537 693.70, which resulted in ICT being unjustly enriched in the said sum at the expense of the applicant.

Claim No. 5

[9] In his supporting affidavit, Van Den Heever, stated that on 1 December 2009 ICT, Eugene Delaney Jackson ('Jackson'), Hemanth Singh ('Singh'), Roy Soodhoo ('Soodhoo') and Haresh Ouderajh ('the second intervening party') concluded a written agreement in terms of which it was recorded, *inter alia,* that ICT had constructed the Mall on the immovable properties ('the properties') owned by the applicant; that ICT would purchase two sectional title units at the Mall; and, that ICT would be liable for and would pay the costs of all rates, taxes, insurances, levies and other outgoings of whatsoever nature, inclusive of the costs of all water, electricity and other utilities relating to the properties from 1 December 2008 until the date of registration of transfer of the sectional title units into the name of ICT.

[10] The applicant complied with its obligations in terms of the said agreement but ICT failed to pay the rates, taxes, insurance and other utilities, such as water and electricity, in relation to the properties. Furthermore, ICT failed to demand and take registration of the sectional title units which it had agreed to pay, and also failed to pay the purchase price of R45 million in respect of such sectional title units.

[11] On 29 October 2013 the applicant cancelled, in writing, the aforesaid agreement with ICT and, by virtue of its ownership of the properties, became liable to pay the KwaDukuza Municipality ('the Municipality') a sum of R7 261 755.85 for, *inter alia,* the arrear rates, levies and service charges in respect of the two sectional title units concerned.

[12] In the alternative, the applicant claimed a sum of R3 950 230.37 in respect of its Claim No. 5, the basis of which was summarised by Van den Heever as follows: During the period April 2013 to October 2013 the applicant paid a sum of R4 693 113.97 to the Municipality in respect of the properties on which the Mall is situated. In terms of the aforesaid agreement, the obligation to pay the said sum to the Municipality was, in fact, of ICT. During the period April 2013 to October 2013 the applicant received refunds in the total sum of R742 883.60 from the Municipality, which leaves a balance of R3 950 230.37 owing by ICT to the applicant.

Application to expunge the applicant's claims

[13] On 2 June 2015 the applicant received a written notice from the second respondent advising that after investigating its claims, the liquidators of ICT had applied to the Master for the expungement of both claims. The basis of the application was that: in respect of Claim No. 4, the payment of rental was made by Shoprite to ICT on the instructions of Jackson, who was a shareholder and director of ICT; and, in respect of Claim No. 5, that the sum of R13 456 776.65 claimed by the applicant was incorrect due to the duplication of the sum of R6 195 020.80 in its calculation. The correct sum ought to have been R7 261 755.85. Furthermore, the Municipality had obtained a court order dated 30 May 2013 entitling it to receive the rentals payable by Checkers, which ought to have been sufficient to fully settle the applicant's indebtedness to the Municipality.

[14] The applicant contends that it provided the Master with written reasons as to why its claims ought not to have been expunged, but the Master proceeded to expunge same with no regard to such reasons. It further contends that the grounds advanced by the first and second intervening parties in their answering affidavit in

support of the expungement have no legal merit, particularly, by virtue of the legal position in respect of a cession *in securitatem debiti* subsequent to the winding-up of the cedent.

Intervening parties' grounds of opposition

[15] Regarding the applicant's application for condonation of the late delivery of the review application, the intervening parties raised a point *in limine* that the PAJA does not make any provision for condonation. Instead, so they argue, it makes provision for an application for an extension of the 180 days' period, provided that such application is made within the 180 days' period.

[16] Against the legislative background set out above, the intervening parties' contention is that the applicant delivered its application for condonation on 11 August 2022, which is almost six years after it lodged the review application. They argued that the applicant's application for condonation ought to be dismissed on the basis that it was not lodged expeditiously after the intervening parties had pointed out in their answering affidavit that the said application was out of time. Mr *Ouderajh* referred me to a number of judgments in support of his argument to that effect, the gist of which will be dealt with later on in this judgment.

[17] Regarding Claim No. 4, the intervening parties raised two points *in limine.* The first point is that the applicant has no jurisdiction to sue for rentals as it ceded its claim in respect thereof to RMB, and the second point is that a portion of the claim (for rentals collected in respect of the period December 2009 to March 2011) was extinguished by prescription. On the merits, the main issue raised by the intervening parties was that the payment of rentals by Shoprite to ICT was made on the instructions of Jackson, who was a shareholder and Chairman of ICT. It was

further argued by Mr *Ouderajh* that the applicant sold a vacant plot of land to ICT and did not expend any money towards its development. Therefore, so he argued, the applicant was not entitled to any claim for unjustified enrichment as it did not suffer any impoverishment.

[18] Proceeding to Claim No. 5, it was argued by Mr *Ouderajh* that by the applicant's own admission, the claim presented to the Master was grossly inflated. Furthermore, so he argued, Claim No. 5 was correctly expunged by the Master on the basis that the applicant failed to act 'immediately' in discharging its obligation to create a sectional title scheme in respect of its properties. For this reason, his contention was that ICT was not obliged to purchase sections 1 and 2 of the said scheme prior to the cancellation of the relevant agreement by the applicant in October 2013.

Determination of the issues

[19] Taking into account the legal arguments advanced by the parties as set out in the preceding paragraphs of this judgment, I now proceed to consider the issues raised by the parties for determination by this court.

Whether the applicant provided a full and reasonable explanation for its failure to bring the review application within the 180 days' period stipulated in s 7(1)(b) of PAJA?

[20] In terms of s 7(1)(*b*) of PAJA, review proceedings must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was: (a) informed of the administrative action; (b) became aware of the action and the reasons for it; or, might reasonably have been expected to have become aware of the action and the reasons. The evidence adduced by the applicant,

which was not disputed by the intervening parties, was that it only became aware of the Master's decision to expunge its Claims No. 4 and No. 5 on 25 May 2016 upon its receipt of the Master's letter dated 12 May 2016 advising it to that effect.

[21] Furthermore, it is common cause that the Master's letter (dated 12 May 2016) advising the applicant about the expungement of its two claims did not contain any reasons for the Master's decision to expunge such claims. This prompted the applicant, through its attorneys, to write to the Master on 7 June 2016 requesting written reasons for his decision to expunge the two claims. It is common cause that the Master had not provided any reasons for his decision as at the date of the hearing of this matter. This is notwithstanding the express stipulation in s 5(2) of PAJA that he was required to provide such reasons in writing within 90 days after receiving the applicant's request to that effect.

[22] Therefore, in the light of the applicant's evidence that it became aware of the Master's decision to expunge its claims on 25 May 2016, it accordingly follows that the earliest date on which the 180 days' period could have expired was 22 November 2016. The applicant, on the other hand, filed its main application to review the Master's decision on 23 November 2016, one day after its expiry. In the circumstances, I am satisfied with the explanation provided by the applicant for its failure to bring the review application within the 180 days' period stipulated in s 7(1)(*b*) of PAJA.

[23] Besides, I do not believe that it would be in the interest of justice to dismiss the applicant's review application on the basis of it having been filed late by only one day. In my view, the practical approach that must be adopted by this court is to condone the delay in the filing of the applicant's review application in accordance

with the *de minimis non curat lex* principle on the basis that it is in the interest of justice to do so. In the circumstances, I accordingly grant the applicant's application for an extension of the 180 days' period to 24 November 2016.

Whether the Master's decision to expunge the applicant's Claims No. 4 and No. 5 ought to be reviewed and set aside for any one or more of the reason/s advanced by the applicant?

[24] In my view, the preliminary answer appears in s 5(3) of PAJA, which provides that:

'If an administrator [being the Master in the present case] fails to furnish adequate reasons for an administrative action it must,...in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.'

[25] The Master elected not to oppose the relief sought by the applicant in these proceedings and decided to abide the decision of this court in the matter. This, in my view, reaffirms the presumption stipulated in s 5(3) of PAJA that the Master's decision to expunge the applicant's Claims No. 4 and No. 5 was taken without good reason. An attempt was made by the intervening parties to defend the Master's decision to expunge the applicant's two claims on the basis of the issues raised in their founding affidavit, the gist of which I alluded to earlier on in this judgment.

[26] Starting with Claim No. 4, the first issue raised by the intervening parties was that the applicant has no jurisdiction to sue ICT for rentals as it ceded its claim in respect thereof to RMB as security for its indebtedness to RMB. This was disputed by the applicant, which contended in its replying affidavit that by virtue of the cession being a cession *in securitatem debiti*, the right, title and interest in respect of the rentals which form the subject of the applicant's Claim No. 4 vested in the

applicant and its liquidators upon the winding-up of the applicant, which occurs by operation of the law.

[27] For authority in support of the applicant's contention I was referred by Mr *Lotz*, who appeared for the applicant, to the case of *Millman N.O v Twiggs and Another,*[1] where the court held that:

'When a right is ceded with the avowed object of securing a debt the cession is regarded as a pledge of the right in question: *dominium* of the right remains with the cedent and vests upon his insolvency in his trustee, who is under the common law entitled to administer it "in the interest of all the creditors, and with due regard to the special position of the pledgee".'

I agree with Mr *Lotz*, the legal position regarding a cession *in securitatem debiti* was correctly espoused by the court in *Millman*, which effectively disposes of the first issue raised by the intervening parties in respect of Claim No. 4.

[28] The second issue raised by the intervening parties in respect of Claim No. 4 was that a portion of the claim was extinguished by prescription. Their contention was that ICT collected rentals from Shoprite from December 2009, while the applicant lodged its claim in respect thereof only in April 2014. In the circumstances, so they contended, only rentals collected from April 2011 would not have prescribed. However, even if the intervening parties are correct in their contention that a portion of the claim had prescribed, this would not by any means justify the Master's decision to expunge the whole Claim No. 4. At most, one would have expected the Master to reduce the applicant's Claim No. 4 proportionately by taking off the prescribed portion thereof. In the circumstances, it accordingly follows that the

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[1] *Millman N.O v Twiggs and Another* 1995 (3) SA 674 (A) at 676H.

second issue raised by the intervening parties in respect of Claim No. 4 is also without merit.

[29] This brings me to the intervening parties' contention that the rental was paid by Shoprite to ICT on the instructions of Jackson, who was a shareholder and Chairperson of ICT at the time. However, unless a proper resolution to that effect was adopted by the applicant or ICT, the fact that Jackson was a shareholder and Chairperson of ICT did not give him the right to instruct Shoprite to make payment of rentals to ICT. Therefore, even if the payment of rentals to ICT was made on Jackson's instructions, this cannot constitute a good reason for the Master to expunge the applicant's Claim No. 4 as contended by the intervening parties.

[30] Regarding Claim No. 5, the intervening parties' contention is that: firstly, by the applicant's own admission, the claim presented to the Master was grossly inflated, and: secondly, that in terms of the purchase and sale agreement concluded between the applicant and ICT, the applicant was obliged to immediately establish a sectional title scheme over the properties but failed to do so until November 2011. They allege that the applicant breached its 'material' obligation in terms of the purchase and sale agreement, the effect of which was to release ICT from its obligation to perform in terms of the same agreement before it was repudiated by the applicant's liquidators in terms of a letter dated 8 October 2013.

[31] Regarding the amount of the claim, it was conceded by the applicant that the amount of R13 456 776.65 that was initially stipulated in its claim affidavit was erroneous, and ought to have been R7 261 755.85. The applicant requested an order directing the Master to reduce the claim accordingly, which the Master is entitled to do in terms of s 45(3) of the Insolvency Act. I do not believe that either ITC or any

other party will suffer prejudice if the Master is directed by this court to reduce the applicant's Claim No. 5 to the sum of R7 261 755.85 in terms of s 45(3) of the Insolvency Act. The issue raised by the intervening parties regarding the amount of Claim No. 5 is, in my view, without any merit.

[32] As for the alleged breach of the purchase and sale agreement, it would seem that there is a dispute between the applicant and the intervening parties as to whether the applicant had discharged its obligation to establish a sectional title register in terms of the agreement. According to the applicant, the alleged breach of the purchase and sale agreement is one of the issues which was addressed comprehensively in its response to the application made by the liquidators of ICT to expunge its Claim No. 5, the contents of which are alleged to have been ignored by the Master. This was not disputed by the Master, which effectively gives credence to the applicant's allegation that the Master expunged its claims without having any regard to its responses to the expungement application.

[33] Arising from the Master's failure to provide reasons for his decision to expunge the applicant's claims, the inference drawn by this court from his decision not to oppose the relief sought by the applicant herein is that such decision was taken arbitrarily, capriciously or is not rationally connected to the information placed before him at the time when the decision was taken as contemplated in ss 6(2)(*e*)(vi) and 6(2)(*f*)(ii)(cc) of PAJA.

Whether the intervening parties should be directed to pay the costs occasioned by their opposition of the applicant's main application and their opposition of the applicant's application for condonation and extension of time?

[34] Ordinarily, the costs in civil litigation would follow the result, unless the court directs otherwise for reasons which, in the view of the presiding officer, are in the interest of justice. In the present case, the relief sought by the applicant was essentially against the Master for failing to act in accordance with the applicable provisions of PAJA. That much was obviously conceded by the Master by virtue of his decision to abide the decision of this court in the matter.

[35] Be that as it may, the intervening parties elected to nonetheless proceed with their opposition of the relief sought by the applicant without any knowledge of the Master's reasons for expunging the applicant's claims. They did so at their own peril. In the circumstances, I see no reason to deviate from the normal practice of directing that the costs must follow the result.

[36] I accordingly make an order in the following terms:

Order

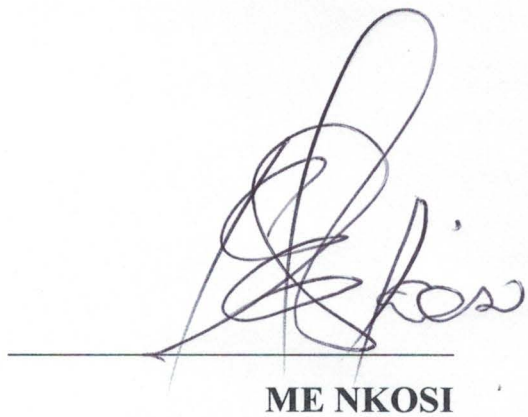
6. That the first respondent's decision dated 12 May 2016 to expunge the claim proved by the applicant as Claim No. 4 against Imperial Crown Trading 176 (Pty) Ltd (in liquidation) be and is hereby reviewed and set aside;

7. That the first respondent's decision dated 12 May 2016 to expunge the claim proved by the applicant as Claim No. 5 against Imperial Crown Trading 176 (Pty) Ltd (in liquidation) be and is hereby reviewed and set aside;

8. That the first respondent be directed to reduce the applicant's Claim No. 5 to the sum of R7 261 755-85 as provided for in s 45(3) of the Insolvency Act No. 24 of 1936;

9. That it be and is hereby declared that the applicant's Claim No. 4 and Claim No. 5 reduced to the sum of R7 261 755-85, be dealt with by the second, third and fourth respondents as claims proved against Imperial Crown Trading 176 (Pty) Ltd (in liquidation);

10. That the first and second intervening parties are hereby directed to jointly and severally pay the costs occasioned by their opposition to the main application, as well as the costs occasioned by their opposition to the condonation and extension of time application.



ME NKOSI

JUDGE

Appearances

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Date of Hearing:	21 November 2023
Date of Judgment:	26 January 2024