



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 6222/2024

In the matter between:

FIRST TIME TRADING CC

Applicant

And

**THE MAGISTRATE FOR THE DISTRICT OF THE
CITY OF CAPE TOWN SUB-DISTRICT
BELLVILLE, HELD AT BELLVILLE R MAAS**

First Respondent

**THE MASTER OF THE HIGH COURT
OF THE WESTERN CAPE**

Second Respondent

STEPHEN MALCOM GORE N.O.

Third Respondent

DONOVAN THEORDORE MAJIEDT N .O.

Fourth Respondent

NONKULULEKO LAWRENCIA THWALA N.O.

Fifth Respondent

NICHOLAS TIMKOE N.O.

Sixth Respondent

GREIG MICHAEL TIMKOE N.O.

Seventh Respondent

FANTOM OPERATIONS LTD

Eighth Respondent

SRB FINANCIAL SERVICES CC

Ninth Respondent

JGL FORENSIC SERVICES (PTY) LTD

Tenth Respondent

RE COÖPERATIE U.A.

Eleventh Respondent

**REASONS FOR ORDER
DELIVERED ELECTRONICALLY ON 10 JUNE 2024**

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] I hereby provide reasons for an order I granted on 9 May 2024, which was as follows:

“Having heard counsel for the applicant and the third to eighth respondents, an order is granted in the following terms:

1. It is directed that the application brought by First Time Trading CC under case number 6222/24, which was set down for hearing on 10 May 2024, is promoted on the roll and that the hearing proceeds on 7 May 2024.
2. The application brought by First Time Trading CC under case number 6222/24 is dismissed.
3. The applicant, First Time Trading CC, is directed to pay the costs of the application under case number 6222/24, based on a party-and-party scale C tariff.”

[2] The applicant sought an order setting aside the first meeting of creditors which was held on 2 February 2024 in the insolvent estate of Reeco Holdings Pty Ltd (under liquidation) before Magistrate R Maas in terms of section 44 of the Insolvency Act 24 of 1936 (“*the Insolvency Act*”); and alternatively, that the claims proved at that meeting be declared as not proved and that it be declared that no votes were cast at that meeting. A further prayer sought was the removal of the third respondent as a provisional liquidator in the estate of Reeco Holdings.

B. BACKGROUND FACTS

[3] On 20 July 2023 Reeco Holdings was placed under provisional liquidation in terms of section 346 of the Companies Act 61 of 1973 (“*the 1973 Companies Act*”), and on 8 August 2023 the third to seventh respondents were appointed as provisional liquidators of the insolvent estate. The provisional order of liquidation was made final on 22 August 2023.

[4] On 22 December 2023 the first meeting of creditors and of members, the subject of these proceedings, was advertised in the *Government Gazette*, and was to be held on 2 February 2024 at the Bellville Magistrate’s Court. It proceeded on that date before Magistrate R Maas. The proceedings were recorded and transcribed, and a copy of the transcript, which is attached to the parties’ papers, indicates that all parties present were legally represented.

[5] First, a meeting of the sole shareholder of Reeco Holdings, named RE Cooperatie (eleventh respondent), was convened, where the third respondent was nominated as liquidator. Thereafter, a meeting of creditors was convened, where a claim belonging to Fantom Operations Limited (eighth respondent), worth R185 million, was sought to be proved. During that process, Mr. Harms attempted to object against the claim of Fantom Operations.

[6] It appears from the transcript that the creditors’ claims that Mr Harms purported to represent, numbered from 4 to 14, had already been paid. Further, that another claim which he purported to represent (numbered 22), was an unliquidated damages’ claim which was, in any event, represented by another attorney whose instructions were to withdraw the claim, as reflected in the documents before the Magistrate. One of the

specific issues that arose during those interactions is the fact that the applicant's claim against Reeco Holdings, which was based on an invoice worth R43,125, had been paid in full prior to the meeting, and the payment was effected by Fantom Operations. Despite vociferous objections and interjections from Mr Harms the Magistrate considered the R185 million claim of Fantom Operations proved. At the end of the proceedings, the meeting of creditors was postponed to 10 May 2024 at 9h00.

[7] Thereafter, on or about 28 March 2024 the applicant instituted these proceedings, seeking to be heard at 9h00 on 10 May 2024. The application was opposed by the third to eighth respondents. In addition, the third to seventh respondents (*"the liquidators"*), supported by Fantom Operations, brought a counter-application for promotion of the matter to the urgent roll of 7 May 2024 so that it could be heard before the date of 10 May 2024.

[8] The counter-application for promotion of the matter on the roll, which was opposed by the applicant, was based on the fact that the adjourned meeting of creditors was scheduled for the exact same time and date that the applicant sought to be heard in this Court. The respondents explained that an interrogation in terms of section 44(7) of the Insolvency Act was planned for that day, where the deponent to the applicant's affidavits, Mr Jaco Avenant, was to be interrogated, and they argued that the application before this Court was a *stratagem* to evade and frustrate the progress of those proceedings. They also pointed out that much expenditure of time and resources would be wasted if the adjourned meeting was aborted because of the applicant's application, since court officials, including the Magistrate, had been preparing for it as well as a large array of creditors, the shareholder, and their representatives.

[9] The respondents stated that there was no basis to place the meeting in jeopardy by adjourning it or risking its adjournment whilst the applicant pursued its application at a leisurely pace. This would indefinitely delay the distribution of dividends to creditors. In addition to this, the respondents argued that the applicant's application was in any event brought on spurious grounds, discussed below, which include the fact that its claim had already been paid. As a result, the respondents argued that it was appropriate for the matter to be dispensed with on an urgent basis prior to the meeting of creditors of 10 May 2024.

[10] The applicant opposed the promotion of the matter to the urgent roll on the basis that no case was made out for urgency in compliance with Uniform Rules 6(12)(b), and the respondents had already been in receipt of the application by 20 March 2024, and they had only delivered their notice of intention to oppose on 10 April 2024. Nevertheless, the applicant's replying affidavit was delivered on 6 May 2024 in time for the hearing of 7 May 2024. As appears from the order I granted on 9 May 2024, the matter was promoted to the roll of 7 May 2024.

[11] Given that the applicant set the matter down for 10 May 2024 at 9h00, the very same time and date on which the creditors' meeting was scheduled, the conclusion was irresistible that it must have foreseen the possibility that those proceedings would have to be postponed in light of these court proceedings. That was borne out by correspondence exchanged between the parties in the lead up to these proceedings. In a letter dated 10 April 2024, the applicant's legal representatives requested the liquidators to explain why they "*held* the view that it should be necessary to proceed with the inquiry in terms of section 44(7) and 44(8) of the Insolvency Act while the meeting is subject to a review". Then, after the liquidators' legal representatives responded that the creditors' meeting was to continue despite the launching of these proceedings by the applicant, the applicant's representatives responded by stating that it was not in the interest of the company and

creditors that the inquiry in terms of the Insolvency Act should proceed on 10 May 2024, and that if the applicant was successful in setting aside the first meeting as sought in its notice of motion, all costs would be wasted. As a result, the letter requested the liquidators to advise whether they would indemnify the creditors against wasted costs if the meeting was set aside in these proceedings. This makes it clear that in the applicant's mind, its application before this Court would have an impact on the proceedings before the Magistrate and, the implication in the letter was that those proceedings should not continue until completion of these proceedings.

[12] It was as a result of the applicant's attitude displayed in the above correspondence that the respondents communicated an intention to promote the applicant's application on the roll so that it could be heard prior to 10 May 2024. In the respondents' letter dated 22 April 2024, the applicant was confronted regarding its "*intention... to utilize the fact that a High Court application is pending as a spurious basis to suggest that the [creditors'] meeting should be postponed thereby avoiding interrogation of your clients*". It was a mere four days later, on 26 April 2024, that the answering affidavit of the liquidators was delivered, including the counter-application, and on 30 April 2024 that the answering affidavit of the eighth respondent was delivered. I do not consider that to have been an undue delay in light of the correspondence highlighted above. The correspondence makes it clear that the applicant was made aware since 22 April 2024 that the respondents were to pursue legal proceedings to ensure that the meeting of 10 May 2024 would proceed.

[13] Needless to say, considerations of the proper administration of justice required that there should be clarity regarding the status of the adjourned meeting which was scheduled to be heard before the Magistrate. It was conceded at the hearing of the matter on behalf of the applicant that the outcome of these court proceedings would inevitably have an impact on the adjourned meeting of the creditors which was scheduled for 10 May 2024. It was furthermore convenient to hear the matter on 7 May 2024 since, as already indicated, all the parties had delivered papers, which in total, ran to

approximately 590 pages, and the matter was ripe for hearing. I also considered it to be in the interests of justice for the matter to proceed, one of those considerations being the common cause fact that the applicant's claim has in fact been paid. It is also noteworthy that, although the applicant stated that there was no urgency to hear the matter, it also provided no assurances that Mr Avenant, who was to be interrogated at the meeting of 10 May 2024, intended to attend the adjourned meeting.

[14] Before discussing the application, it is apposite to set out the relevant applicable law.

C. THE LAW

[15] The meeting that is the subject of these proceedings was convened by the Master in terms of section 364 of the 1973 Companies Act. In terms of Item 9 in Schedule 5 of the Companies Act 71 of 2008, the winding-up and liquidation provisions in Chapter 14 of the 1973 Companies Act continue to apply, and in terms of section 366(1) thereof, the claims against a company in winding-up by a court “*shall be proved at a meeting of creditors mutatis mutandis in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency*”.¹ Hence the application of the provisions of section 44 of the Insolvency Act 24 of 1936 (“*the Insolvency Act*”). But those provisions apply *mutatis mutandis*² - ‘*subject to the necessary alterations*’³ - and must accordingly, be applied in their proper context.

[16] Section 44(1) of the Insolvency Act provides as follows:

‘Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at

¹ In terms of section 339 of the 1973 Companies Act, the provisions of the Insolvency Act apply *mutatis mutandis* to the winding-up of a company.

² See section 366(1) 1973 Companies Act.

³ *South African Fabrics Ltd v Millman NO & another* 1972 (4) SA 592 (A); *Mayo NO v De Montlehu* (20504/2014) [2015] ZASCA 127; 2016 (1) SA 36 (SCA) (23 September 2015) para 14.

any time before the final distribution of that estate in terms of section *one hundred and thirteen*, but subject to the provisions of section *one hundred and four*, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.’

[17] The Supreme Court of Appeal (SCA) recently held in *Mantis Investments Holdings v De Jager NO*⁴ that section 44 of the Insolvency Act deals comprehensively with the procedure for the proof of liquidated claims against an insolvent estate. The procedure is intended to enable creditors to prove their claims in a relatively simple and expeditious fashion.⁵ In *Breda N O v Master of the High Court, Kimberley*, the SCA Court observed that a presiding officer does not adjudicate upon the claim as a court of law, is not required to examine a claim too critically and only has to be satisfied that the claim is *prima facie* proved.⁶

[18] After the process set out in section 44 of the insolvency Act, the provisions of section 45 apply, notably subsection (3), which provides as follows:

“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 75.”

[19] It has been held that, similar to section 44, section 45 only requires the Master to examine the documents supporting the proof of claims to determine whether they

⁴ *Mantis Investments Holdings v De Jager NO* (696/2022) [2023] ZASCA 134; 2024 (3) SA 431 (SCA) (18 October 2023) para 14.

⁵ *Caldeira v The Master and Another* 1996 (1) SA 868 (NPD) at 873H-874F.

⁶ *Breda N O v Master of the High Court, Kimberley* [2015] ZASCA 166.

disclose *prima facie* the existence of an enforceable claim.⁷ A liquidator⁸ or creditor⁹ who has unsuccessfully objected to the Master’s decision to admit a claim may apply to court to review it in terms of section 151 of the Insolvency Act which provides as follows:

“Subject to the provisions of section *fifty-seven* 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 and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee’s account otherwise than as is provided in section *one hundred and twelve*.” (my emphasis)

[20] In order to have *locus standi* to bring a review under section 151, an applicant must be a ‘person aggrieved’. It has been held¹⁰ that “*the words ‘person aggrieved’ are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.*”

[21] It has also been held¹¹ that a ‘person aggrieved’ signifies someone whose legal rights have been infringed – a person harbouring a legal grievance. Further, that the legal rights which are alleged to have been infringed must have existed at the time when the decision in question was made.¹² Further, that a ‘person aggrieved’ does not mean someone “*is disappointed of a benefit which he or she might have received if some other order had been made. A person aggrieved must be a person who has suffered a legal grievance... against whom a decision has been pronounced which has wrongfully deprived him or her*

⁷ *Mantis Investments Holdings v De Jager NO* paras 14-15.

⁸ See *Mantis Investments Holdings v De Jager NO* para 16.

⁹ *Noord-Kaaplandse Ko-op Lewendehawe Agentskap Bpk v Van Rooyen and Others* 1977 (1) SA 403 (NC) at 406-407.

¹⁰ See *Kaniah v WPC Logistics (Joburg) CC (in liquidation) & Others* (5794/2016) [2017] ZAKZDHC 45 (13 December 2017) at para [21], where the Court quoted with approval *Attorney-General of Gambia v N’Jie* (1961) 2 All ER 504 (PC) at 511.

¹¹ *Frances George Hill Family Trust v SA Reserve Bank and others* 1992(3) SA 91 (AD) at 102C.

¹² *Jeeva and another v Tuck N.O. and Others* 1998 (1) SA 785 (SE) at 795 D-E.

*of something, or wrongfully refused him or her something or wrongfully affected his or her title to something”.*¹³

[22] Since the application is final in nature, the legal principles set out in *Plascon-Evans*¹⁴ apply insofar as any disputes of fact may arise in the papers. That is, that a final order can be granted only if the facts averred in the applicant’s affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order.¹⁵ It may be different if the respondents’ version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.¹⁶ The Court has to accept those facts averred by applicant that were not disputed by respondents, and respondents’ version insofar as it was plausible, tenable and credible.¹⁷

D. DISCUSSION

[23] The applicant does not specifically seek to review a decision of the Magistrate, but instead seeks an order setting aside the creditors’ meeting itself, which is a far-reaching remedy, and no reason is given for why it has opted to seek that relief as opposed to the normal available remedy of a review. As the case law above indicates, section 151 of the Insolvency Act provides the remedy for any person aggrieved by a decision of the presiding officer at a meeting of creditors by means of a review. No specific reference is made in the notice of motion or in the founding affidavit to any decision of the Magistrate that is sought to be reviewed, and the applicant has otherwise made no mention of section 151 or indicated an intention to bring its application within the purview of those provisions. To the extent that the applicant intended the application to be determined in

¹³ *De Hart NO v Klopper & Botha NNO & others* 1969 (2) SA 91 (T)

¹⁴ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹⁵ Harmse *Civil Procedure in the Supreme Court*, B6.45.

¹⁶ *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA).

¹⁷ *Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA).

the light of section 151 which remains opaque, it is trite that it falls upon an applicant to specify the relief it seeks as well as the grounds upon which relies for the relief. That is not a task for the respondents or the Court. Nevertheless, the grounds of irregularity raised by the applicant are examined later below, within the purview of the relief sought by the applicant.

[24] I do take into account the fact that the admission of creditors' claims, which is the subject of the alternative relief, was indeed a decision made by the Magistrate. However, to the extent that this aspect of the application is to be read as a review, it is premature because the provisions of section 45 of the Insolvency Act set out above had not yet been exhausted when the applicant approached this Court. It provides as follows:

- “(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.”

[25] It is common cause that, matters had not reached the stage enunciated in the above provisions for the liquidator to examine the documents to ascertain whether the estate in fact owed any of the claims. Neither had the Master had opportunity to determine any dispute of a claim that might be raised by the liquidator after the aforesaid examination, as envisaged in subsection 45(3).

[26] In any event, contrary to what the applicant avers in its papers, the case law summarized earlier¹⁸ makes it clear that a presiding officer does not adjudicate upon the claim as a court of law and is not required to examine a claim too critically, and only has to be satisfied that it is *prima facie* proved. Thus, if the presiding officer in this case was satisfied that the claims were regular on their face, the requirement is met.

¹⁸ *Breda NO v Master of the High Court, Kimberley* [2015] ZA SCA 166. *Mantis Investments Holdings v De Jager NO* [2023] ZA SCA 134 (18 October 2023).

[27] Furthermore, in terms of the case law set out earlier, a person instituting a review in terms of section 151 must establish that (s)he is an aggrieved person. It is in this respect that the respondents have raised a point *in limine*, stating that the applicant is not a creditor of the company in liquidation because its claim is based on an invoice dated 8 May 2023 for services rendered to Reeco Holdings for an amount of R43,125, which was paid on 1 February 2024, before the first meeting of creditors was held. They state that, since the applicant's claim has been paid, there is no basis to suggest how or why its legal interests have been adversely affected by any decision taken by the presiding officer. The applicant admits that it was paid but tendered to return the payment stating that the payment was calculated to deprive it of *locus standi* at the insolvency proceedings, which included the right to question the conduct and independence of the liquidators.

[28] I do not consider it desirable to determine the dispute relating to whether the applicant is an 'aggrieved person' or a creditor, given that the insolvency proceedings are currently underway, especially as a preliminary issue preventing the applicant from instituting these proceedings at this stage. Although it may well be the case later that the applicant is not an aggrieved person and creditor, it is also true that the issue may very well be affected by the processes outlined in terms of section 45, amongst other avenues that may be available to the applicant. In my view, this is one of the reasons why the statutory mechanism provides, in the main, for recourse to court at a later stage, once all the statutory remedies have been exhausted. By then, a court would have all the information relevant and necessary to be able to make a determination of that nature, after taking into account all the information and evidence from the insolvency proceedings. Given the findings made in this judgment that this application is premature because the statutory scheme provides for alternative remedies before this Court is approached, it would be premature to finally decide that issue before those processes are exhausted. However, I do

take into account the fact that the applicant's claim was paid in full, an issue which is common cause amongst the parties.

[29] I now proceed to deal with the irregularities raised by the applicant in its application, which may be summarized as follows:

- a. Firstly, there were procedural irregularities in relation to the shareholder's meeting, including the fact that it was held before the first meeting of creditors, and that the documents submitted on behalf of the shareholder were not submitted 24 hours prior to the meeting.
- b. Secondly, there were numerous disputes relating to the shareholding.
- c. Thirdly, there were irregularities in the claims submitted for proof by Fantom and JGL Forensic Services. With regard to the Fantom claim, the applicant alleges that there was an irregularity with the resolution authorizing Andre Cronje to act on behalf of Fantom Operations and submit its creditor claim; and secondly, there was a calculation error with regards to the claim amount. With regards to JGL Forensic Services, the applicant alleges that some aspects of the invoice supporting the claim post-date the deemed date of Reeco's liquidation.
- d. As regards the removal of the provisional liquidator, the applicant states that there was an irregularity in the voting at the shareholder's meeting where the liquidator was nominated.

[30] The applicant claims that its legal representative was not afforded *audi alteram partem* because he was not afforded an opportunity to participate in the proceedings. The

transcript shows the opposite. Mr Harms addressed the Magistrate at various stages, some of which I have pointed to earlier. It is correct that his views did not carry the day. That, however, does not mean he was not given opportunity to address the proceedings. I have otherwise referred to the difficulties, which are evident from the transcript, regarding the exact identity of his clients at the proceedings. I find no basis for the claim made that he was not afforded an opportunity to participate.

[31] As regards the complaint that the order of the two meetings was wrong because the shareholder's meeting was irregularly held before the creditors' meeting, no legal basis was laid for the allegation that this amounted to an irregularity. The two meetings were held in terms of section 364 of the 1973 Companies Act. Although that provision sets out the provisions relating to a meeting of creditors (at section 364(1)(a)) before those relating to a meeting of the members (at section 364(1)(b)), there is no requirement in the statute for the meetings to appear in any particular order, and the applicant has not referred to any such statutory requirement. There was accordingly no merit to this argument. This point was in any event conceded at the hearing before me by the counsel representing the applicant.

[32] As to the complaints relating to the shareholder's meeting, the applicant alleged firstly that there was non-compliance with Regulation 12 of the Regulations for the Winding-Up and Judicial Management of Companies published under GNR2490 in *Government Gazette* 4128 dated 28 September 1973 ("*the Regulations*") because at the meeting the Magistrate requested one of the parties' legal representatives to compile a list of the creditors' claims, which thereafter became an official court document and was placed in the file. The applicant stated that this was contrary to the 24 hours' deadline for submission of documents prescribed in the Regulations. Coupled with this, is an allegation that, on the morning before the proceedings resumed, "*the only documentation in the file was the claims of the creditors and nothing else*". Thus, the allegation regarding the presence or not of the creditors' claims is, in itself unclear and contradictory. Nevertheless,

it was similarly claimed that the power of attorney from the counsel representing Reeco Holdings was also handed up during the proceedings and was not in the court file by the deadline prescribed in terms of Regulation 12.

[33] In answer to the applicant's allegations relating to the non-compliance with Regulation 12, the respondents filed a comprehensive affidavit deposed by Katherine Jane Morgan and a confirmatory affidavit of an attorney Mr Dunster, in which all the allegations are refuted. Ms Morgan was specifically tasked with lodging the creditors' claim documents of the eighth and tenth respondents, as well as shareholder documents of the eleventh respondent, which she attended to on 31 January 2024, two days prior to the meeting. On 31 January 2024 she also lodged the relevant powers of attorney in the court file. Then, on 1 February 2024 she again attended at the Bellville Magistrate's Court to submit a further creditor's claim, on behalf of the tenth respondent and to also check what further creditors' claims had been lodged since her lodgment on the previous day.

[34] On 2 February 2024 she was present throughout the proceedings, and she states that the Magistrate struggled to locate the shareholder documents, especially the shareholder's power of attorney in the court file and that as a result, the counsel representing the liquidators (Adv Woodland SC) handed up a copy of the shareholder's documents, including the power of attorney, for the Magistrate's convenience. Indeed, the transcript bears this out, including Mr Woodland's mention to the Magistrate that the documents were otherwise already in the court file.

[35] There is no basis to refute the averments of Ms Morgan. At the hearing, the applicant's counsel also conceded this point, and accepted that the issue relating to the alleged irregularity in this regard has no merit. My observation is that even in the papers, the applicant's case in this regard was not clearly established in any event because the

applicant did not state that he personally inspected the file or how he established that the said documents were missing as alleged from the court file.

[36] The applicant also alleged that there were numerous disputes relating to the shareholding, presumably of Reeco Holdings, which are not identified in the papers. No case was made out in this regard, and here too the applicant's counsel capitulated at the hearing.

[37] Next, the applicant claimed that the resolution which authorized Mr Cronje to act on behalf of Fantom was invalid because it was not signed by Mr Cronje who is a director of Fantom. The complaint is that the resolution is signed by two other directors. However, there is no discernible reason for why the resolution is invalid, since it was not disputed that the two directors who did sign the resolution had the authority to grant Mr Cronje the authorization to sign all necessary documents and to take all the steps required to enforce Fantom Operation's rights. Accordingly, this ground had no merit, and indeed the applicant was unable to substantiate it.

[38] Likewise, the allegation that the calculation of the rand value of Fantom Operation's claim as reflected in the documents was invalid appeared to be based on a reliance on the applicant's own rand value of them claim. I say 'appeared to be based' because there was otherwise no substantiation for why the applicant's calculation was said to be correct and Fantom Operations' was not. I was otherwise not referred to any legal authority for the proposition that a creditor is only permitted to advance its claim in South African rands. There was no legal impediment to Fantom Operations to calculate its claim in foreign currency. The respondents have referred to figures contained in an affidavit submitted by Fantom Operations in the insolvency proceedings, where the rand value was reflected as of the date of transfer, stating that the figures were correct. The applicant has not provided any evidence to the contrary, save to state a figure that it relies upon, without

substantiation. On application of the principles laid down in *Plascon-Evans* set out earlier, the respondents' version must prevail. Lastly on this point, it is worth pointing out that, even if the calculation was incorrect, this would not alter the position of Phantom Operations as a creditor, although admittedly the claim would have to be altered, which would trigger a process in terms of section 45, and not application to this Court at this stage.

[39] As regards the JGL Forensics Services claim, the applicant claims that some of the work claimed for in the invoices was performed after the issue of the papers in the liquidation application. However, whether these amounts should ultimately be included in the claim is a matter for determination in the insolvency proceedings and specifically investigations in terms of section 45(3) of the Insolvency Act. It is not for this Court at this juncture to make such a determination.

[40] I now proceed to deal with the applicant's grounds for the removal of the third respondent. First, the applicant claims that the voting for the third respondent was irregular and in contravention of section 59 of the Insolvency Act and/or sections 339 and 379 of the 1973 Companies Act. The first observation is that section 59 of the Insolvency Act does not apply to liquidators but only to trustees. As for section 339 of the Companies Act, there is no indication from the applicant of how it specifically applies independently of section 379.

[41] Section 379 of the Companies Act is the provision which specifically provides for removal of liquidators. It provides for the removal of a liquidator by the Master and by the court in certain specified circumstances. Notably, in terms of subsection (2) "*the court may, on application by the Master or any person, remove a liquidator from office if the Master fails to do so in any of the circumstances in subsection (1), or for any other good cause*". Thus, in terms of section 379 an applicant is first required to approach the Master

before approaching this Court for removal of the third respondent. It is common cause that the applicant has not done so in this case. Accordingly, the application is premature.

[42] Furthermore, section 379 provides for various grounds upon which a liquidator's removal may be sought. However, the applicant has not specified the ground(s) he seeks to invoke. It is trite that it falls upon the applicant to plead its case clearly and precisely, and the applicant has failed to comply with this requirement. At the hearing, the applicant's counsel conceded that no case is made out regarding any misconduct by the third respondent.

[43] But in any event, the third respondent was merely nominated by the shareholder in terms of section 369(2)(a) of the 1973 Companies Act, and the nomination has yet to be confirmed by the Master. It is only once that is done that section 371 provides the mechanism for challenging the appointed liquidator, which must be instituted by an 'aggrieved person'. Because the third respondent had only been nominated by the shareholder in this case, the Master had not accepted the nomination when the applicant approached this Court. In fact, the creditors had not yet nominated the liquidator. Only after the Master has accepted the nomination would the applicant have a remedy in terms of section 371.¹⁹ Once again, the applicant's counsel conceded that section 371 does not apply in the circumstances of this case for all the reasons already mentioned.

[44] Thus, insofar as the applicant sought the removal of the third respondent, the application was premature. In addition, section 371(2) provides that a court may only remove a liquidator after the Master fails to remove a liquidator on the request of an interested person. In this regard, provided that the applicant will be able to establish that it is an 'aggrieved person', it has available alternative remedy.

¹⁹ *Henochsberg on the Companies Act 71 of 2008, Delpont et al 371, and C Geduldt v The Master & others 2005 (4) SA 460 (C) at 464.*

[45] Then, the applicant sought to rely on section 55(m) of the Insolvency Act stating that in terms of a power of attorney, Advocate Woodland SC was authorized to act on behalf of the creditors Fantom Operations and JGL Forensics, but also advanced arguments on behalf of the “*the liquidator*”. It is not clear from the papers which liquidator this is said to refer to, since there are no fewer than five liquidators in this matter. However, assuming that this is a reference to the third respondent, the first observation is that section 55 of the Insolvency Act does not apply to liquidators but to trustees, and that section 372(j) of the 1973 Companies Act is the equivalent, applicable provision. But in order for that provision to apply, it would have to be established that Mr Woodland sought appointment as liquidator, which is not the case of the applicant. Alternatively, since it is the liquidator’s nomination that the applicant challenges, it would have to be established that the third respondent was an agent authorized to vote on behalf of creditor(s) at the meeting. No such case has been made out by the applicant. Also significant is that the transcript reveals that Fantom Operations was represented by a different counsel, Advocate Greig, whilst Mr Woodland represented the liquidators. This was made clear to the Magistrate as the proceedings commenced on 2 February 2024. There is accordingly no substance to this complaint.

[46] In conclusion, there is no doubt that the relief sought by the applicant is drastic and is final in nature. Accordingly, the applicant was required to make out a clear case for it. As appears from the discussion above, the case had very poor merit, and most of the case was, in any event, conceded at the hearing. Furthermore, this judgment has discussed various remedies available to the applicant in the event that it should encounter irregularities, or there should be objections to be raised during the winding-up proceedings.

E. COSTS

[47] There is no reason why costs should not follow the result. The applicant’s case was without merit and, by all accounts, was calculated to delay if not collapse a meeting

scheduled for 10 May 2024. No reason has ever been provided by the applicant why that specific date of 10 May 2024 and the specific time of 9h00 was chosen for the hearing of the matter, even after the respondents challenged the applicant directly regarding its motives. The inference is irresistible that the purpose was to collapse the adjourned creditors' meeting scheduled for that date and time. Furthermore, the respondents had no option but to approach the court, not only to resist the applicant's unmeritorious application, but to also ensure that the insolvency proceedings continue on the scheduled the date of 10 May 2024. The respondents should not be placed out of pocket in those circumstances.

F. ORDER

[48] In the circumstances, the following order is made:

1. It is directed that the application brought by First Time Trading CC under case number 6222/24, which was set down for hearing on 10 May 2024, is promoted on the roll and that the hearing proceeds on 7 May 2024.
2. The application brought by First Time Trading CC under case number 6222/24 is dismissed.
3. The applicant, First Time Trading CC, is directed to pay the costs of the application under case number 6222/24, based on a party-and-party scale C tariff.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	:	Adv M H van Twisk
Instructed by	:	Grundlingh & Associates Mr J M Grundlingh
For the third to seventh respondents	:	Adv G W Woodland SC
Instructed by	:	Gillan & Veldhuizen Inc. Mr P J Veldhuizen
For the eighth respondent	:	Adv M Greig
Instructed by	:	Dunsters Attorneys