THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20504/2014

In the matter between:

HENRY MAYO NO	**FIRST APPELLANT**
SUMAYA ABDOOL GAFAAR KAHAMMISSA NO	**SECOND APPELLANT**
MATOME STANLEY MPHAHLELE NO	**THIRD APPELLANT**
CHEVREAU CONSTRUCTION (PTY) LTD	**FOURTH APPELLANT**
STARSPAN INVESTMENTS (PTY) LTD	**FIFTH APPELLANT**

And

ALAIN RIVALZ CHEVREAU DE MONTLEHU	**RESPONDENT**

Neutral citation: *Mayo NO v De Montlehu* (20504/14) [2015] ZASCA 127 (23 September 2015)

Coram: Bosielo, Leach, Majiedt, Willis and Zondi JJA

Heard: 31 August 2015

Delivered: 23 September 2015

Summary: Section 366(2) of the old Companies Act 61 of 1973 does not affect the applicability of the time period stipulated in s 44(1) of the Insolvency Act 24 of 1936 – the respondent, as a 'person aggrieved' in terms of s 151 of the old Companies Act successfully objected where the time period was not complied with.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Kathree-Setiloane J sitting as the court of first instance), judgment reported *sub nom De Montlehu v Mayo* 2015 (3) SA 253 (GJ).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Willis JA (Bosielo, Leach, Majiedt and Zondi JJA concurring):

[1] The respondent (Mr Chevreau De Montlehu) was the applicant in the court a quo. He was the sole shareholder and director of the fourth appellant, Chevreau Construction (Pty) Ltd (the company in liquidation) at the time of its winding-up. Mr Chevreau De Montlehu brought an application to review the decision of the Master of the High Court, Johannesburg, made at a special meeting of creditors of the company in liquidation on 5 October 2012 in terms of which the Master admitted a claim by the fifth appellant, Starspan Investments (Pty) Ltd (Starspan) against the insolvent estate of the company in liquidation in an amount of R1 577 432.70. The court a quo (Kathree-Setiloane J) set aside that decision and ordered the first, second, third and fifth appellants to pay the costs of the application (the first, second and third appellants being the joint liquidators of the company in liquidation). The court a quo granted leave to appeal to this court.

[2] Prior to its winding-up, the company in liquidation had taken over the completion of a partly built townhouse development, which had been a joint venture between Starspan and a close corporation known as Milton Dales Projects CC.

Commissions were payable to an estate agent both on the purchase price of stands sold and on the value of the building contracts, which were an integral part of the development and were sold together with the stands.

[3] On 10 March 2006, a contract was concluded between Starspan and the company in liquidation in terms of which the company in liquidation undertook to complete the development. A dispute arose between Starspan and the company in liquidation as to who was liable for the estate agent's commission, Starspan contending that it was the company in liquidation, and the company in liquidation contending that it was Starspan. An arbitration to determine the liability for payment of the commission was commenced before the winding–up of the company in liquidation. Starspan claimed just over R1,5 million from the company in liquidation in this regard. The arbitration was not proceeded with.

[4] The company in liquidation was wound up by way of a special resolution adopted on 22 July 2011 and registered on 6 September 2011. The day-to-day administration of the company in liquidation was thereafter undertaken by the first appellant. After the appointment of the liquidators, and at a time when no creditors had proved claims against the company in liquidation, the joint liquidators launched an application to set aside the sales and transfers of two immovable properties by the company in liquidation to Zemprop CC (Zemprop) and Premium Hotel and Property Investments (Pty) Ltd (HPI) respectively. In response, Mr Chevreau De Montlehu, Zemprop and HPI brought a counter-application seeking a stay of the winding-up of the company in liquidation in terms of s 354 of the Companies Act 61 of 1973 (the old Companies Act) on the basis that Starspan had not proved its claim, with the consequence that the company in liquidation, in fact, no longer appeared to be insolvent, with no other creditors having submitted claims.

[5] When the fact that no creditors had submitted any claims was pointed out to the first appellant by Mr Chevreau De Montlehu, the first appellant, at the request of Starspan, convened a special meeting of creditors of the company in liquidation for the purpose of proving claims. This meeting was convened on 5 October 2012, at which two claims by Starspan were lodged. The first was for R173 479.40, being an amount of taxed costs awarded in the arbitration and R1 557 432.70, being the

amount in dispute in the arbitration. The Master admitted both claims to proof at that meeting, despite Mr Chevreau De Montlehu's attorney, Mr David Kahn, having attempted to object to the admission of the claim for R1 577 432.70 on the basis that it had been disputed and that the arbitration to determine the claim was pending. Counsel for Starspan in turn objected that Mr Chevreau De Montlehu did not have locus standi as a creditor with a claim that had been proved (or as one of the other persons mentioned in s 44(7) of the Insolvency Act 24 of 1936). Ultimately, Starspan's claims were admitted. It was the admission of these claims that led to the application in the court a quo to review the Master's decision.

[6] Although both the Master and the appellants contended in the papers that as Mr Chevreau De Montlehu was not a creditor of the company in liquidation he had no locus standi to object to the claim of Starspan Investments, it was fairly and correctly conceded by counsel for the appellants, that Mr Chevreau De Montlehu indeed qualifies as an aggrieved person in terms of s 151 of the Insolvency Act. This section reads as follows:

'**151. Review**

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*.'

The concession by counsel for the appellants accords with the decision of this court in *Francis George Hill Family Trust v South African Reserve Bank*.[1]

[7] In support of the review, Mr Chevreau De Montlehu contended that the special meeting of creditors of the company in liquidation held on 5 October 2012 had been convened in order to defeat the aforesaid counter-application to stay its winding-up

[1] *Francis George Hill Family Trust v South African Reserve Bank & others* [1992] ZASCA 50; 1992 (3) SA 91 (A) especially at 98F-101E.

and to ‘avoid having a disputed claim tested and proven in a fair and impartial manner’. He further submitted that, as that meeting had taken place more than three months after the second meeting of creditors that was held on 11 May 2012, s 44(1) of the Insolvency Act had not been complied with. That section provides:

‘(1) 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 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.’

Relying on this section, it was submitted by Mr Chevreau De Montlehu that the proof of these claims was flawed as it had taken place without the leave of the Master or the court. Furthermore, there had been no payment by Starspan of costs in relation thereto as should have been directed by the Master or the court.

[8] The critical question in this case is whether the three-month time-frame, as provided for in s 44(1) of the Insolvency Act, applies to companies in liquidation. The appellants’ assertion both in the court a quo and in this court was that it did not. This contention was based on the interpretation of s 366(2) of the old Companies Act that it gave the Master, on the application of the liquidator, a broad discretion to extend the time period for the proof of claims. Accordingly, so the argument went, there was no need to obtain leave or pay costs in regard to the late lodging of claims against a company in liquidation as provided for in terms of s 44(1) of the Insolvency Act in regard to sequestrated estates of natural persons.

[9] The Master filed a report in response to Mr Chevreau De Montlehu’s application, but did not oppose it. He said that at the meeting on 5 October 2012 he had no difficulty ex facie the claim form, as in his view, it accorded with the statutory requirements, was a liquidated claim and was, accordingly, approved. He has maintained this stance and set out, in detail, his reasons for his decision to admit the

claim of Starspan. Not only the Master, but also the appellants, have alleged that the claim of Starspan was lodged timeously and in anticipation of the special meeting on 5 October 2012 and in accordance with the provisions of s 366(2) of the old Companies Act.

[10] In this court, counsel for the parties agreed that the case falls to be decided by reference to a single issue: whether the three-month time-frame – and therefore the fixing of costs and thereafter the payment thereof in respect of claims proved outside of this time-frame – as provided for in s 44(1) of the Insolvency Act applied to companies in liquidation or not.

[11] Sections 366(1) and (2) of the old Companies Act provide:

'(1) In the winding-up of a company by the Court and by a creditors' voluntary winding-up -

(a) the claims against the company 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;

(b) a secured creditor shall be under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency, and the value of his vote shall be determined in the same manner as is prescribed under that law;

(c) a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency.

(2) The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.'

[12] In similar vein, s 339 of the old Companies Act provides that:

'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specifically provided for by this Act.'

Counsel for both sides agreed, however, that for purposes of this case, the critical issue was the interpretation to be placed on s 366, as s 339 obviously applies to

provisions of the Insolvency Act that are not otherwise covered by s 366(2) of the old Companies Act.

[13] The question, therefore, is what precisely is affected by the qualification 'mutatis mutandis' in s 366(1) of the old Companies Act. The appellants submitted that, insofar as the applicability of section 44(1) of the Insolvency Act was concerned, 'mutatis mutandis' in s 366(1) of the old Companies Act meant that the adoption and incorporation of the law of insolvency in regard to natural persons applied only to the *manner* of proving claims and not the time periods within which this was to be done. Accordingly, it was contended that the fixing of costs by the Master and the payment thereof by the creditor did not apply in the case of companies in liquidation. Much, therefore, depends on the precise interpretation of the words 'mutatis mutandis'.

[14] In *South African Fabrics Ltd v Millman No*[2] Ogilvie Thompson CJ, illuminating the imperative nuance inherent in the Latin expression, said that the words mean 'subject to the *necessary* alterations' (my emphasis).[3] He referred to *Touriel v Minister of Internal Affairs, Southern Rhodesia*[4] in which the following was said:

'The question therefore, arises whether, in deciding as to the effect of the expression *mutatis mutandis*, the test to be applied for the purpose of ascertaining in any particular case what are "*mutanda*" is "necessity" or "fitness". I think the answer to this question must be that necessity is the test, and that considerations of fitness are not sufficient to justify a change, as a change which the expression *mutatis mutandis* requires to be made, unless they are so cogent as to establish necessity. If fitness in a less strict sense, i.e., fitness not sufficient in degree to show necessity, were the test to be applied for the purpose of ascertaining what changes are required in order to give due effect to "*mutatis mutandis*", a wide field would be opened up for speculation in many cases where this expression is used, and there would be room for great differences of opinion as to whether particular changes were, or were not fitting; with the result that in the case of any provision taken from the context of one Act and applied for the purpose of another "*mutatis mutandis*", there would be serious risk of uncertainty as to how it was to be construed in the context of the Act into which it had been, so to speak, transplanted.'[5]

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[2] *South African Fabrics Ltd v Millman NO & another* 1972 (4) SA 592 (A).
[3] Ibid at 600C-D. See also *Big Ben Soap Industries Ltd v Commissioner for Inland Revenue* 1949 (1) SA 740 (A) at 751.
[4] *Touriel v Minister of Internal Affairs, Southern Rhodesia* 1946 AD 535.
[5] Ibid at 545.

In *Touriel* the court also referred to *Cape Provincial Administration v Xabanisa*[6] in which it was made clear that the words 'mutatis mutandis' mean that the necessary changes must be required: it does not merely permit them.[7]

[15] Against this background of authority, the strictness of meaning which is to be given to the meaning of 'mutatis mutandis', has the consequence that the fixed time period provided for in s 44(1) of the Insolvency Act, and therefore the fixing of costs by the Master and the payment thereof by the creditor should apply both in the case of sequestration and the liquidation of a company.

[16] Both in this court and the court a quo, the appellants placed considerable reliance on the unreported judgment of Flemming J in *Stone & Stewart v Master of the Supreme Court*[8] in which it was held that the three month time limit in s 44(1) of the Insolvency Act did not apply by reason of the provisions of s 366(2) of the old Companies Act. The Master also relied on this case in support of his approach to the matter. The court a quo disagreed with the correctness of Flemming J's judgment, finding support for her views in *Trans-Drakensberg Bank Ltd v the Master, Pietermaritzburg*[9] and *Barlows Tractor Co Ltd v Townsend.*[10] These two cases did not deal specifically with the applicability or otherwise of s 44(1) of the Insolvency Act by reason of the provisions of s 366(2) of the old Companies Act and its predecessor. I shall, however, revert to the relevance of these cases later.

[17] The appellants also relied on a case decided after the judgment in the court a quo, *Logan NO & others v BHP Billiton & others*,[11] in which Rossouw AJ expressly disagreed with the court a quo's judgment and supported the correctness of Flemming J's judgment in *Stone & Stewart.*

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[6] *Cape Provincial Administration v Xabanisa* 1941 AD 203 at 211. Cited in *Touriel* at 545.
[7] Ibid at 211.
[8] *Stone & Stewart v Master of the Supreme Court* (TPD) (Unreported Case No 8828/27 of 18 August 1987).
[9] *Trans-Drakensberg Bank Ltd & another v The Master, Pietermaritzburg* 1966 (1) SA 821 (N), especially at 824H-826D.
[10] *Barlows Tractor Co Ltd v Townsend* 1996 (2) SA 869 (A).
[11] *Logan NO & others v BHP Billiton Energy Coal & others* [2015] ZAGPJHC 160. I note that the plaintiff in that matter ought to have been cited as 'Wishart NO' and not 'Logan NO'.

[18] The court a quo found that the reasoning in *Stone & Stewart* was wrong and that s 366(2) of the old Companies Act did not, in the case of companies in liquidation, push aside the time-period in s 44(1) of the Insolvency Act. I agree. A plain reading of s 366(2) of the old Companies Act does not affect the applicability of the three-month time period in s 44(1) of the old Companies Act and the issues that arise therefrom. Neither in logic nor in the grammar of the respective provisions, is there a reason why the three-month time period, together with the fixing of costs and the payment thereof by a late creditor, should not apply alongside the discretionary power granted in terms of s 366(2). In both instances, the lodging of claims needs momentum driven by the factor of time.

[19] Were the three-month period not to apply, then in the absence of a time period being fixed by the Master in terms of s 366(2), there would be no formal time period within which creditors would be required to lodge and prove their claims. The risk of tardiness, if not inertia, would be ever present. Clearly, this would not be in the interest either of the creditors or the general public. The three-month period stipulated in s 44(1) of the Insolvency Act relating to the proof of claims thus remains the benchmark in both sequestrations and liquidations. Section 366(2) does not, therefore, affect the applicability of s 44(1) of the Insolvency Act to companies in liquidation. In the view of Meskin in *Insolvency Law,* s 366(2) affects the applicability of s104(1) of the Insolvency Act.[12] The same view is held by Professor RC Williams in the title, *'Companies'*, based on the text of the late Professor M S Blackman, in *LAWSA*.[13]

[20] Section 104 of the Insolvency Act reads as follows:

'(1) Subject to the provisions of section 95 (2) and section 98A (3), a creditor of an insolvent estate who has not proved a claim against that estate before the date upon which the trustee of that estate submitted to the Master a plan of distribution in that estate, shall not be entitled to share in the distribution of assets brought up for distribution in that plan: Provided that the Master may, at any time before the confirmation of the said plan permit any such creditor who has proved his claim after the said date to share in the distribution of the said assets, if

[12] P A M Magid et al (eds) *Meskin's Insolvency Law and its operation in winding-up* (June 2014 - Service Issue 42) para 9.5.
[13] 4(3) *LAWSA* 2 ed para 60.

the Master is satisfied that the creditor has a reasonable excuse for the delay in proving his claim.

(2) A creditor of an insolvent estate who proved a claim against that estate after the date upon which the trustee submitted to the Master a plan of distribution in that estate and who was not permitted to share in the distribution of assets under that plan, in terms of subsection (1), shall be entitled to be awarded under any further plan of distribution submitted to the Master after the proof of his claim, the amount which would have been awarded to him under the previous plan of distribution, if he had proved his claim prior to the submission of that plan to the Master: Provided that the Master is satisfied that the creditor had a reasonable excuse for the delay in proving his claim; and provided further that any creditor who was aware that proceedings had been instituted under section *twenty-six*, *twenty-nine*, *thirty* or *thirty-one* and who delayed proving his claim until the court had given judgment in those proceedings, shall not be entitled to share in the distribution of any money or the proceeds of any property recovered as a result of such proceedings.

(3) If any creditor has under subsection (1) of section 32 taken proceedings to recover the value of property or a right under section 25 (4), to set aside any disposition of or dealing with property under section 26, 29, 30 or 31 or for the recovery of damages or a penalty under section 31, no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.'

[21] In *Woodley v Guardian Assurance Company of SA Ltd*,[14] in relation to the provision, similar to s 366(2) of the old Companies Act contained in s 182 of its predecessor (the Companies Act 46 of 1926), Colman J said:

'The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent individual. There are some different requirements which flow from the fundamental difference between a company and an individual: those are specifically provided for in the Companies Act'.[15]

[22] Accordingly, it may be useful to refer to Meskin in *Insolvency Law* where the learned author said the following:

'The liquidator may apply to the Master to fix a time or times within which creditors are to prove their claims in order to participate in a distribution under a particular account lodged

[14] *Woodley v Guardian Assurance Co of SA Ltd* 1976 (1) SA 758 (W).
[15] Ibid at 763E - F.

with the Master before such proof. The purpose here is not to prevent proof of a claim after the time fixed by the Master; it is to prevent the holding up of distribution under such an account as a result of proof of claims after lodgment thereof: the intention is to nullify an attempt by a creditor to delay proving his claim until a lodged account shows that a distribution is to occur. Thus, if the Master fixes a time, claims may be proved before and after such time (subject to compliance with the requirements for late proof), but once an account is lodged with him, claims proved after such time are excluded from the distribution under such account if they were proved after such lodgment.

A time fixed by the Master may be extended by him; and accordingly he may consider on its merits an objection to an account which is in effect an application for such extension for the purpose, *not of proving a claim*, but of enabling a claim which is proved late to participate in the distribution. In the light of the provisions of section 366(2) of the Companies Act, the proviso to section 104(1) of the Insolvency Act has no application in the winding-up.'[16]

(Own emphasis, footnotes omitted.)

A similar explanation is provided in Henochsberg *on the Companies Act*.[17]

[23] In other words, as Mr Hoffman, counsel for the respondent submitted, s 366(2) relates to participation in a distribution under a particular account and not to the late proof of claims in general.[18] Therein lay the rationale for s 366(2) of the old Companies Act. Indeed the very difference in the process of participating in and benefitting from a distribution explains why s 366(2) of the old Companies Act was enacted.

[24] Further support for this conclusion as to the purpose of s 366(2) is to be found in *Trans-Drakensberg Bank Ltd*, which explained the purpose of s 179(2) of the Companies Act 46 of 1926, the predecessor to s 366(2).[19] Van Heerden AJ said:

'Sec. 179(2) does not prevent s creditor from proving a claim after the date fixed by the Master nor does it exclude from the benefit of distribution certain debts proved after the date fixed by the Master. Debts proved after the date fixed by the Master can still share under a distribution under an account lodged with the Master after such debts were proved. In other

[16]Magid above para 9.5 (Issue 8, p9-18 to 9-19).
[17]B Galgut et al (eds) *Henochsberg on the Companies Act 61 of 1973* (June 2011 – Service Issue 33) at 787. I note that the publication was previously edited by the late Justice P M Meskin.
[18]See also *Meskin's Insolvency Law* op cit.
[19]At 824H - 825E.

words, it is not so much the date fixed by the Master that is of importance as regards sharing in a certain distribution but rather the date when an account is lodged with the Master'.[20]

[25] Similar considerations and explanations were given in *Barlow's Tractor*.[21] In that case Harms JA, delivering a separate concurring judgment said:

'The provision [s 366(2)] does not prevent a creditor from proving his claim after the date fixed by the Master. Nor does it disentitle a creditor of the benefit under the next account lodged. He is only excluded from the benefit of a distribution under an account lodged before proof.'[22]

[26] Section 366(2) therefore affects a creditor's right to benefit under a distribution and does not affect the time for the proof of creditor's claims: the issues relating to the fixing of costs and thereafter the payment thereof by creditors seeking to prove late claims remain unaffected thereby. The court a quo accordingly correctly relied on these cases in drawing its conclusions. As mentioned earlier, the three-month period stipulated in s 44(1) of the Insolvency Act relating to the proof of claims is the benchmark in both sequestrations and liquidations. Therefore, apart from the proof thereof, the Master must fix costs for a late claim and there must then be payment in respect thereof in order for such a late claim against a company in liquidation to be valid. The appeal cannot succeed.

[27] The parties on both sides agreed that, regardless of the outcome in the case, the costs of two counsel should be allowed. This case has dealt with important and intricate questions of law that justify the costs of two counsel.

[28] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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[20] At 824H.
[21] At 885B-C.
[22] Id.

N P Willis

Judge of Appeal

APPEARANCES:

For the Appellant:	A Subel SC (with him L Hollander)
	Instructed by:
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	Matsepes Incorporated, Bloemfontein
For the Respondent:	GI Hoffman SC (with him S Kuny)
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