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[3] **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

[4] **JUDGMENT**

[5] Case No: 176/2013

[6] Reportable

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[8] In the matter between:

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[10] MICHAEL ALEXANDER COWAN APPELLANT

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[12] and

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[14] CRAIG MACLEAN HATHORN N.O. FIRST RESPONDENT

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[16] CHRISTOPHER PETER VAN ZYL N.O. SECOND RESPONDENT

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[18] DUDLEY BERNARD DAVIDS N.O. THIRD RESPONDENT

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[21] Neutral citation: *Cowan v Hathorn* (176/2013) [2013] ZASCA 159 (25 November 2013)

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[23] Coram: Navsa ADP, Brand, Malan and Pillay JJA and Swain AJA

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[25] Heard: 13 November 2013

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[27] Delivered: 25 November 2013

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[29] **Summary*:* Section 32(1)(b) Insolvency Act 24 of 1936 – indemnity not furnished prior to institution of proceedings – subsequently furnished**

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– in circumstances of case object of section found to be satisfied – proceedings not a nullity.

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[36] **ORDER**

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[39] **On appeal from:** Western Cape High Court, Cape Town (Savage AJ sitting as court of first instance):

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[41] 1 The application to supplement the appeal record is dismissed with costs.

[42] 2 The appeal is dismissed with costs.

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[45] **JUDGMENT**

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[47] **SWAIN AJA** (**NAVSA ADP, BRAND, MALAN AND PILLAY JJA** concurring):

[48] The appellant, Mr Michael Alexander Cowan (Cowan), unsuccessfully applied to the Western Cape High Court (Savage AJ) for an order in terms of rule 30 of the Uniform Rules of Court to set aside an action instituted against Cowan in terms of s 32(1)(b) of the Insolvency Act 24 of 1936 (the Act), in the names of the first respondent Mr Craig Hathorn N.O, the second respondent Mr Christopher van Zyl N.O. and the third respondent Mr Dudley Davids N.O, (the liquidators) in their capacities as the joint liquidators of Africa Plastics Holdings (Pty) Ltd (in liquidation).

[49] The main relief sought against Cowan were orders in terms of ss 26, 29, 30 and 31 of the Act read with ss 339 and 340 of the Companies Act 61 of 1973 and Schedule 9 of the Companies Act 71 of 2008, setting aside certain notarial general covering bonds registered by Cowan in his favour, over the movable property of the company in liquidation. Essentially, it was alleged that the passing of these bonds constituted prohibited dispositions by the company in liquidation of its property within the meaning of the applicable sections in the Act.

[50] The relevant facts which formed the basis for Cowan's application in terms of rule 30 are as follows:

[51] a The liquidators had failed to take any proceedings to set aside the notarial bonds in question. Olampa (Pty) Ltd (Olampa) a creditor of the company in liquidation, therefore wished to institute proceedings against Cowan in terms of s 32(1)(b) of the Act to achieve this objective.

[52] b In a letter dated 20 February 2012 Ms Carina Van Niekerk (Van Niekerk,) the attorney acting for Olampa, advised the liquidators of the action

that Olampa intended instituting in their names in terms of s 32(1)(b) of the Act. Van Niekerk advised the liquidators that Olampa 'indemnifies the joint-liquidators against all costs incurred as a result of the abovementioned litigation'. A power of attorney was also enclosed for signature by the liquidators in terms whereof Van Niekerk was authorised and instructed to proceed with the action.

[53] c Van Niekerk accordingly instituted the action in the names of the joint liquidators on 21 February 2012. She did so in the belief that the claim would prescribe on 6 March 2012. Thus, the summons was served on Cowan on 27 February 2012.

[54] d By letters dated 27 and 28 February 2012 the attorneys representing the liquidators indicated that they did not accept the indemnity provided by Olampa, that consequently Olampa was not entitled to act in the names of the liquidators and the summons should be withdrawn immediately. The liquidators' concern arose in regard to the nature and extent of the indemnity to be furnished, rather than whether the action to be instituted was well founded. This aspect will be dealt with later in this judgment.

[55] e Negotiations then ensued between Van Niekerk and the liquidators' attorneys as to the nature of the indemnity to be furnished, as well as the wording of a power of attorney in favour of Van Niekerk to institute the proceedings. The terms of the indemnity acceptable to the liquidators were finalised on 16 April 2012 and Van Niekerk was furnished with a power of attorney signed by the liquidators on 23 April 2012.

[56] The application in terms of rule 30 was dismissed and that decision is before us on appeal with the leave of the court below. An application to amend granted by the court below is no longer relevant.

[57] The basis upon which Cowan sought to set the summons aside in terms of rule 30 was that the failure by Olampa to furnish the liquidators with an indemnity against all costs to be incurred in the action in terms of s 32(1)(b) of

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the Act, before the action was instituted, had the result that the summons was invalid, or a nullity. The issue of the summons was accordingly an irregular step in terms of rule 30.

[58] The court below held that the purpose of s 32(1)(b) of the Act was satisfied by the provision of an indemnity after the institution of the proceedings, because the liquidators and general body of creditors had not been prejudiced. The purpose of the section to protect them against any adverse order of costs in the litigation had been achieved. It is this conclusion that is challenged on appeal. The court below also had regard to s 157(1) of the Act which provides as follows:

[59] 'Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.'

[60] It concluded as follows:

[61] 'To the extent that the late provision of indemnity constitutes a "formal defect or irregularity", there is no evidence of substantial injustice which has resulted as a consequence of the institution of the proceedings in this matter and therefore it follows that such proceedings are not invalid on this basis.'

[62] The question in this appeal is whether the court below was correct in dismissing Cowan's application to declare the issue of the summons an irregular step in terms of rule 30.

[63] A resolution of this issue requires a consideration of s 32(1)*(a)* and *(b)* of the Act which provides as follows:

[64] '32. Proceedings to set aside improper disposition

[65] (1)(a) Proceedings to recover the value of property or a right in terms of s 25(4), to set aside any disposition of property under s 26, 29, 30 or 31, or for the recovery of compensation or a penalty under s 31, may be taken by the trustee.

[66] (b) If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof.'

[67] A creditor may take proceedings in terms of s 32(1)(b) of the Act only if the trustee has failed to do so. In addition, the creditor may take these proceedings 'upon' the creditor indemnifying the trustee against all the costs of the proceedings. The plain meaning of the section is that the furnishing of the indemnity must occur at the time of the institution of the proceedings by the creditor.

[68] However, 'even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved'. See *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at 209 G-I.

[69] The object of s 32(1)(b) of the Act is clear. An indemnity has to be furnished to ensure that the liquidators 'will not be liable for any adverse costs order which the creditors may incur while litigating' in the name of the liquidators 'at a time when the proceedings have effectively become those of the creditors' and the liquidators 'no longer have any control over the way in which they are conducted or on the expenditure involved'. See *Lane & another NNO v Dabelstein & others* 1999 (3) SA 150 (C) at 163J-164B. The section is aimed at preventing the assets of the company in liquidation being dissipated in litigation. See *Patel v Paruk's Trustee* 1944 AD 469 at 475; and *Waisbrod v Potgieter & others* 1953 (4) SA 502 (W) at 507G-H.

[70] To determine whether in the present case the object has been attained the facts require closer scrutiny.

[71] a Before the issue of summons Van Niekerk advised the liquidators that Olampa indemnified them against all costs incurred as a result of the litigation.

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The liquidators were not entirely satisfied that Olampa had the means to comply with the indemnity and they accordingly required a statement of the assets and liabilities of Olampa which reflected assets of material significance, so as to enable the indemnity to be met within a reasonable period of it being called upon. At the least they required an indemnity to be provided by a suitable party in addition to that from Olampa.

[72] b What followed was interaction between the liquidators and Van Niekerk in order for the liquidators to be appeased. That was the cause for the delay in the indemnity not being 'formally' lodged.

[73] c There is no doubt that the indemnity was offered prior to the institution of the proceedings. Van Niekerk was seeking to comfort the liquidators and to assure them that the indemnity offered could be met.

[74] d The indemnity finally lodged does indeed cover 'all costs incurred as a result of the litigation instituted on 21 February 2012'. In other words past and future costs incurred in the litigation.

[75] As can be seen the liquidators were at all times adequately protected against any costs order which might have been granted against them in the proceedings. In reality the liquidators were never at risk. The court below was accordingly correct in its conclusion that the object of s 32(1)(b) of the Act had been met.

[76] A further submission made by Cowan in support of his application to have the summons set aside was that he would suffer substantial injustice within the meaning of s 157 of the Act if the summons was not set aside. The injustice was said to arise in the context that the summons had interrupted the running of prescription in respect of the claim, which would have prescribed shortly thereafter. If the liquidators were obliged to issue a fresh summons, Cowan would then be entitled to raise a special plea of prescription.

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[77] In my view, when regard is had to what is set out in the preceding paragraphs, there was no need for the court below to have gone further to examine the provisions of s 157(1) of the Act. Put simply, s 32(1)(b) of the Act had in substance been complied with.

[78] In response to the prescription point being persisted with on appeal the liquidators launched an application in this court to supplement the record of appeal, with certain documents that formed part of an application brought by Olampa (which application was subsequently withdrawn) in terms of ss 417 and 418 of the Companies Act 61 of 1973 as amended, as read with Schedule 5 of the Companies Act 71 of 2008. This was to hold a commission of enquiry into the trade, dealings, affairs and property of the company in liquidation. It was submitted that certain selected documents forming part of the abortive application, were relevant to the issue of prescription. The file in regard to the enquiry was placed before the court below, was referred to in argument and, it was submitted, must have been considered by the court below in concluding that a defence of prescription had not been shown to exist. Counsel for the liquidators, however, conceded that there had been no agreement between the parties as to the evidential status of these documents, nor what weight should be accorded to them. There was no agreement as to the accuracy or admissibility of the contents of these documents. They accordingly had no probative value. The application was misconceived and should not have been brought.

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

[80] 1 The application to supplement the appeal record is dismissed with costs.

[81] 2 The appeal is dismissed with costs.

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K G B SWAIN

[85] **ACTING JUDGE OF APPEAL**

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[90] APPEARANCES:

[91] FOR APPELLANT: J G DICKERSON SC

[92] SMITH TABATA BUCHANAN BOYES, CLAREMONT

[93] MATSEPES INC, BLOEMFONTEIN

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[96] FOR RESPONDENT: A KANTOR

[97] CARINA VAN NIEKERK ATTORNEYS, CAPE TOWN

[98] LOVIUS BLOCK ATTORNEYS, BLOEMFONTEIN