

DISPUTES

Proving claims in an insolvent estate – basic principles reaffirmed

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In the recent case of *Firststrand Bank Limited v the Master of the High Court and others*, handed down on 29 September 2023, Potterill J in the Pretoria High Court core principles relating to the proving of a claim in circumstances where a concursus creditorum had been established, as well as the importance of lodging of claims within a 24 hour period prior to the convening of the first meeting of creditors were confirmed on review.

In a nutshell, and in the period after a provisional sequestration order had been obtained in respect of the insolvent estate of Mr Willem Abraham Nel ("Mr Nel") in February 2022 by FNB, several parties came forward and made payment collectively of the FNB indebtedness. Despite payment, which FNB was not able at the time to accept at face view on the basis of concerns expressed as to the origin and basis of such payments and the risk which acceptance of such a payment would pose to FNB if the payors (or their representatives or custodians (trustees, liquidators or the like)) sought recovery of the sums so paid on the basis of there being no causa or if other creditors of Mr Nel's sequestrated estate were to challenge it on the basis that same constituted an undue preference, FNB obtained the final sequestration order in May 2022.

At the first meeting of creditors, FNB sought to prove its claim, but was precluded from doing so on the basis that (in the face of a challenge raised) the presiding officer, deemed that because payment of the debt had had been made, and that the funds had been retained in the bank account, no claim existed for proof despite FNB having explicitly noted its position insofar as the payment was concerned.

The position with respect to the assessment of a claim by the Master or presiding officer in an insolvent estate is not that the claimant must be critically examined, but that the presiding officer has to be satisfied that the claim is prima facie proved.^[1]

On review, Potterill J found that the presiding officer did not consider if there was a prima facie claim, but he took into consideration surrounding facts and made a finding that because FNB knew where the money came from and kept the money in the bank account, FNB had accepted payment.

The decision of the Master to reject FNB's claim was set aside.

Also an issue in the review proceedings was the question of the timing of the lodgement of certain other claims which were lodged and proved before the presiding officer at the same meeting of creditors.

It is to be borne in mind that the effect of an order of sequestration (or liquidation) is to establish a concursus creditorum, and that thereafter, nothing can be done by the creditors to alter the rights of the other creditors.^[2]

Section 44(1) of the Insolvency Act provides that a party seeking to make a claim in an insolvent estate must prove the claim in the manner provided, in relation to a cause of action which arose before the sequestration of that estate.

A claim for proof must be lodged within a period of 24 hours prior to a meeting of creditors in accordance with section 44(4), and the reason for this, is to afford other creditors an opportunity to inspect and consider claims lodged and submitted by others in order to enable them to object and interrogate those claims in terms of section 44(7).

It appeared from the record before the review court that the other claims as presented and which were queried by FNB at the meeting of creditors (where its claim had been rejected as outlined above) that the claims of creditors 3 to 10 (purportedly employees of the sequestrated estate) had no stamp or evidence before the presiding officer to suggest that the claims had been timeously lodged.

The legal representative for FNB had however checked before the meeting and been informed that there were no claims.

This fact notwithstanding, the presiding officer took at face value the oral submissions of the legal representative appearing for the creditors in question that they had indeed been lodged on 19 September 2022, and allowed and proved the claims in question.

Subsequent to the meeting, versions of these claims materialised reflecting date stamps of 20 September 2020 stamped by a clerk at the family court.

No explanation was afforded concerning the difference in version concerning the date of submission of the contentious claims, suffice it to note that these date stamps did not materialise for discussion at the actual meeting of creditors itself where the question of the date of submission was hotly contested.

The review court against the foregoing backdrop and relying on the dicta that the provision (section 44(4))

"...is clearly peremptory, it is expressly directed that "failing which the claim shall not be admitted to proof at the meeting". "The presiding officer has no discretion save where the delay is shown to be through no fault of the creditor"^[3]

held that no explanation for the lateness was provided in circumstances where the date of the lodgement of the claim was disputed and that the presiding officer had no discretion to accept the word or say so of an individual in the absence of no objective proof of the date of lodgement at the time of proving.

The review court therefore held that the claims were too late and should not have been lodged and in consequence that the first meeting of creditors, and thereby the appointment of the provisional trustee had to reversed and undertaken afresh.

Let this be a reminder to all that

- claims paid after the date of *concursum creditorum*, cannot be regarded as settled and are incapable of being interfered with, unless that sequestration (or liquidation) application or order has been discharged, as the affairs of the estate are from that date effectively under the hand of the court and the Master from that date; and
- strict adherence to the protocols and requirements for the submission of claims must be followed. It would in all circumstances be prudent and advisable to try and ensure the lodgement of any claims at least two days prior to the conduct of a meeting of creditors.

[1] The Master of the High Court Kimberly (20537/2014)[2015] ZA SCA166 (26 November 2015) at paragraph 23

[2] Vather v Dhavraj 1973(2) SA 232(N) 236A-E

[3] Darby Shirt Manufacturers (Pty) Limited v Nel N.O. and another N.O. 1964(2) SA 59(D) 602E



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