THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 162/2016

In the matter between:

WISHART, GRANT LOGAN NO	**FIRST APPELLANT**
GOEBEL, ARNO NO **(In his capacity as co-trustee of the Logan Trust)**	**SECOND APPELLANT**
WISHART, MALCOLM GRANT NO **(In his capacity as co-trustee of the Logan Trust)**	**THIRD APPELLANT**
PENGUIN MINING & PLANT (PTY) LIMITED	**FOURTH APPELLANT**
COLT MINING (PTY) LIMITED	**FIFTH APPELLANT**

and

BHP BILLITON ENERGY COAL SOUTH AFRICA (PTY) LIMITED	**FIRST RESPONDENT**
EURO COAL (PTY) LIMITED (IN LIQUIDATION)	**SECOND RESPONDENT**
KLEIN, NORMAN NO	**THIRD RESPONDENT**
VAN DEN HEEVER, THEODORE WILHELM NO	**FOURTH RESPONDENT**
MASTER OF THE HIGH COURT, GAUTENG SOUTH, JOHANNESBURG	**FIFTH RESPONDENT**
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION (CIPC)	**SIXTH RESPONDENT**

Neutral Citation: *Wishart v Billiton* (162/2016) [2016] ZASCA 164 (16 November 2016)

Coram: Lewis, Cachalia, Mathopo and Mocumie JJA and Makgoka AJA

Heard: 2 November 2016

Delivered: 16 November 2016

Summary: Section 44(1) of the Insolvency Act 24 of 1936 applies to the proof of claims in the winding-up of companies and fixes a time-period for such proof, and for making a claim after the expiry of the time period with the leave of the Master or a court.

Only the Master has the power to expunge a claim under s 407 of the Companies Act 61 of 1973; a court has the power to review the Master's decision made under the section.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Rossouw AJ sitting as court of first instance).

1 The appeal against the order upholding the first exception is upheld with costs. The order is replaced with the following:

'The first exception to the particulars of claim is dismissed with costs.'

2 The appeal against the order upholding the second exception is dismissed with costs including the costs of two counsel.

JUDGMENT

Lewis JA (Cachalia, Mathopo and Mocumie JJA and Makgoka AJA concurring)

[1] At issue in this appeal is the interpretation of provisions of the Companies Act 61 of 1973 (the 1973 Companies Act), read with those of the Insolvency Act 24 of 1936, in relation to late proof of claims, and the expungement of claims, in the winding up of a company. Although the 1973 Companies Act was largely repealed when the Companies Act 71 of 2008 came into force (in 2011), those provisions regulating the winding-up of companies remain in force.

[2] Penguin Mining & Plant (Pty) Ltd and Colt Mining (Pty) Ltd, the fourth and fifth appellants and plaintiffs in the court a quo, seek to appeal against a decision of the Gauteng Local Division of the High Court of South Africa (Rossouw AJ) upholding two exceptions to their particulars of claim. I shall refer to them as the appellants. Leave to appeal was given to this court by the court a quo. The first to third plaintiffs

in the court a quo, trustees of a trust, abide the decision of the court on appeal. The first respondent, BHP Billiton Energy Coal South Africa Ltd (Billiton), is a company that submitted a claim to proof in the estate of the second respondent, Euro Coal (Pty) Ltd (in liquidation) (Euro Coal). The other respondents are the liquidators of Euro Coal, the Master of the Gauteng Local Division, and the Companies and Intellectual Property Commission. The latter respondents also play no role in the appeal.

[3] The court a quo, having upheld the exceptions, gave leave to the appellants to amend their particulars of claim within 10 days of the date of the order, as is customarily done. The attorney for the appellants wrote to the respondents' attorneys soon after the order was made asking for an extension of time within which to amend their pleadings, which was granted. This act, the respondents argue on appeal, amounted to a peremption of the appeal. I shall deal with the argument after considering the exceptions.

The first exception

[4] The appellants, in their particulars of claim, sought leave to prove a late claim in the winding-up of Euro Coal 'in such manner and upon such terms and conditions as the Master may determine'. They alleged that they had objected to the first Liquidation and Distribution Account (the L & D account) lodged by the liquidators with the Master, and asked, in terms of s 44(1) of the Insolvency Act, for special leave to prove their respective claims.

[5] The exception raised to this claim was that s 44(1) was not applicable in the winding-up of a company, and that s 366 of the 1973 Companies Act governed proof of claims in a winding-up. Section 339 of the 1973 Companies Act provides:

'339 Law of insolvency to be applied mutatis mutandis.

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 specially provided for by this Act.'

[6] The question thus arises as to whether the application of s 44(1) of the Insolvency Act, and particularly the proviso to it which deals with fixing a period for

the proof of claims, and the late proof with the leave of the Master or the court, is excluded by the terms of s 366 of the 1973 Companies Act. Section 366(1) regulates the proof of claims in a winding up, and s 366(2) gives the Master a discretion to fix a time within which creditors are to prove their claims.

[7] Section 44 of the Insolvency Act regulates proof of liquidated claims against an estate. Section 44(1) reads:

'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 . . . 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 the 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.'

[8] Section 366 of the 1973 Companies Act reads:

'(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.'

[9] The most recent decision of this court dealing with the meaning of s 339, and the words 'mutatis mutandis' in particular, and which also determines that s 44(1) of

the Insolvency Act applies in the winding up of a company, is *Mayo NO & others v De Montlehu* 2016 (1) SA 36 (SCA) ([2015] ZASCA 127). This court held that s 44(1) of the Insolvency Act governs the time period within which claims can be lodged and a late claim be proved in a winding-up, whereas s 366 governs the procedure for participation in a distribution in a winding-up of a company. They are complementary rather than mutually exclusive. Section 44(1) is thus applicable to claims against a company being wound up.

[10] That conclusion is contrary to the finding of Rossouw AJ in this matter. He relied on an earlier decision in the division, which this court has now said to be wrong (*Stone & Stewart v Master of the Supreme Court*, unreported TPD Case No 8828/87 of 18 August 1987). Rossouw AJ did not agree with the decision of the court a quo in *De Montlehu* (*De Montlehu v Mayo NO* 2015 (3) SA 253 (GJ)), where Kathree-Setiloane J had considered *Stone & Stewart* to be incorrectly decided.

[11] On appeal, Billiton argued that, although this court in *De Montlehu* had settled the matter, and although it accepted that s 44(1) did apply to claims in a winding-up, the ratio of the decision was confined to the time period and did not affect the balance of the proviso to s 44(1), which allows a late claim to be proved with the consent of the Master or the court. In order to assess the argument it is necessary to have regard to the formulation of the judgment of this court, and what was said by Kathree-Setiloane J in the court a quo in that matter, which was considered to be correct by this court.

[12] Willis JA said in *De Montlehu* (para 18) that a plain reading of s 366(2)

'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 later 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.'

He added (para 19):

'Were the three-month period not to apply [in liquidations], 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 of either 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 bench mark 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.'

[13] Despite this, argued Billiton, the decision of this court in *De Montlehu* was confined to the application of only three aspects of s 44(1): the time period, the fixing of costs and payment of costs by a creditor that submitted a claim after the three-month period had expired. The balance of the proviso, dealing with the proof of a late claim with the leave of the court or the Master, did not apply to claims in the winding up of a company. The reason for that, it was argued, is that s 366(2) itself provides for a time limit: the Master *may* fix a time within which creditors are to prove their claims or otherwise be excluded from the benefit of the distribution under any account lodged with the Master.

[14] However, Willis JA said (para 23), 's 366(2) relates to participation in a distribution under a particular account, and not to the late proof of claims in general'. He referred in this regard to *Trans-Drakensberg Bank Ltd & another v The Master, Pietermaritzburg & another* 1966 (1) SA 821 (N) at 824H-825E where Van Heerden AJ said, of the predecessor section (179(2)) in the Companies Act 46 of 1926), that it did not prevent a creditor from proving a claim after the date fixed by the Master nor did it exclude from the benefit of the distribution debts proved after the date.

[15] In the court a quo in *De Montlehu*, Kathree-Setiloane J, finding that there was no inconsistency between s 44(1) of the Insolvency Act and s 366(2) of the 1973 Companies Act, said (para 20):

'[T]he two sections are functionally different, and have different objectives. Section 366(2) of the Companies Act is a special provision intended to enable participation in a distribution under a particular account. It has no application to the late proof of claims in general, which is governed by the proviso to s 44(1) of the Insolvency Act . . . . Simply put, its objective is to nullify an attempt by a creditor to delay proving his or her claim until a lodged account shows that a distribution is to occur. The proviso to s 44(1) of the Insolvency Act, on the other hand, is to prevent proof of a claim after the expiration of a period of three months as from the

conclusion of the second meeting of creditors, except with leave of the court or the master. The overall purpose of the proviso to s 44(1) of the Insolvency Act is to ensure that the administration of the estate is concluded expeditiously.' (Footnotes omitted.)

[16] That reasoning was clearly endorsed by this court in *De Montlehu*. Accordingly, the exception to the claim for the leave of the court to prove a claim on the terms and conditions set by the Master should not have been upheld. The appeal against the order upholding the first exception must thus succeed.

The second exception

[17] The second claim made by the appellants was for the expungement from the L & D account of Billiton's claim in the winding-up of Euro Coal. The exception taken by the respondents was that an objection to an L & D account is governed by s 407 of the 1973 Companies Act. Section 403 requires that the account be lodged with the Master, and s 406 that it lies open for inspection. Section 407 regulates who may object to the account and the procedure for doing so. It reads:

'(1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.

(2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.

(3) If in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit.

(4) *(a)* The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit

. . .'

[18] The respondents asserted, in response to the particulars of claim, that as there was no allegation in the particulars that a decision had been taken by the Master, by which the appellants were aggrieved, the claim was excipiable. The gist of the exception is that objections to an L & D account must first be made to the Master: only when he or she has made such a decision can a review of it be undertaken by a court. In the absence of an allegation that the Master had made a decision, the particulars disclosed no cause of action.

[19] Rossouw AJ upheld the exception, finding that the appellants' remedy was statutory – a review in terms of s 407 – and that a court has no jurisdiction to expunge a claim. The appellants argue that the decision of the court a quo flies in the face of the authority in *Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C). In that matter, the liquidators of a company instituted action to claim expungement of the claims of certain creditors that had been admitted to proof at the first meeting of creditors. The defendants excepted to the claims on the basis that a court has no jurisdiction to expunge claims, but is confined to reviewing a decision of the Master under s 151 of the Insolvency Act.

[20] The court in *Millman* dismissed the exception, holding that it had the jurisdiction to review a decision at common law, and that s 151 of the Insolvency Act did not oust that jurisdiction. Section 151 provides that any person aggrieved by a decision of the Master may review it on application to a court. Friedman JP and Farlam J in *Millman* stated (at 788G-I):

'There is a strong presumption against the ouster or curtailment of the Court's jurisdiction. . . . The mere fact that the Legislature has created an extra-judicial remedy is not conclusive of the question whether the Court's power has been restricted. It is in every case necessary to consider all the circumstances and then to determine whether a necessary implication arises that the Court's jurisdiction is either wholly excluded or at least deferred until the domestic or extra-judicial remedies have been exhausted.'

[21] That court considered that since the Insolvency Act did not expressly 'oust' the court's jurisdiction, and since there appeared to be no intention in the Act to deprive the court of the power to expunge a claim, especially where there were complicated factual disputes, it had the power to expunge the creditors' claims in an

action brought by the liquidators. It is not clear to me, however, what power the court had that it considered was ousted. Insolvency administration is wholly a creature of statute: *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* 2012 (3) SA 325 (SCA) ([2011] ZASCA 238) para 5. The various statutes regulating insolvency of individuals and companies have always conferred the power to expunge a claim on the Master. It is only once the Master has made the decision whether or not to expunge a claim that it becomes subject to review by a court.

[22] The court a quo held that *Millman* is distinguishable on the facts: the plaintiffs were liquidators, not creditors, as in this case, and the claims sought to be expunged were not included in the L & D account, but had been admitted to proof at the first meeting of creditors.

[23] On appeal, the appellants argue that the decision of Rossouw AJ did not take into account the judgment of this court in *Fey NO and Whiteford NO v Serfontein & another* 1993 (2) SA 605 (A), which held that the power of the court at common law to remove a trustee of an insolvent estate on the ground of misconduct was not displaced by the enactment of the Insolvency Act. Hoexter JA said (at 613F-G):

'It is trite law, moreover, that statutes in derogation of the common law are to be strictly construed. The common law will be displaced only where the terms of the statute are irreconcilably opposed to the common law.'

[24] The respondents, on the other hand, argue that *Millman* is not only different, but also wrongly decided. In *Bank of Lisbon and South Africa Ltd v The Master & others* 1987 (1) SA 276 (A) at 287G it was held that the admission of a claim by the Master at a meeting of creditors did not amount to ratification of the claim or render it res judicata. (See also *Estate Friedman v Katzeff* 1924 WLD 298 at 303.) And in *Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA) ([2010] ZASCA 4), this court held that, before resorting to review proceedings under s 151 of the Insolvency Act, a liquidator is obliged to follow the procedures set out in s 45 of the Act. The section is peremptory (para 93). That is contrary to the decision in *Millman*.

[25] Section 45 of the Insolvency Act requires that every claim proved against an insolvent estate at a meeting of creditors, and all documents supporting such claim, must be delivered to the trustee, who must examine all available books and documents to ascertain whether the estate owes the claimant the amount claimed. If a trustee disputes a claim after proof at a meeting he or she must report on this to the Master, explaining why the claim is disputed. The Master may confirm the claim, or, after affording the claimant an opportunity to substantiate the claim, reduce or disallow it. It is this decision that triggers the review procedure under s 151 of the Insolvency Act.

[26] The court's jurisdiction is not, in my view, ousted: the trustee has first to comply with s 45 before a decision can be reviewed, but that hardly amounts to an ouster of jurisdiction, if ever the court had the power to expunge a claim. In finding that procedure by action instead of implementing the provisions of ss 45 and 151 of the Insolvency Act is permissible, the court in *Millman* did not apparently take fully into account the principle that a review under s 151 is one where the court has the powers of appeal and review, and can hear further evidence, deciding the matter de novo. See the classic statement of Innes J in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 117. The court in *Millman* was alive to this, but nonetheless considered that s 45 was not peremptory. In so far as the decision is not consonant with the principle enunciated in *Standard Bank* above, it is incorrect.

[27] I consider that the appellants should have invoked the procedures set out in s 407 of the 1973 Companies. The power to expunge a claim or to reduce it is conferred on the Master alone. (See B Galgut et al (eds) *Henochsberg on the Companies Act 61 of 1973*, Volume 1, pp 861-862 (service issue 20) and the authorities cited there.) Only when the Master has made a decision in this regard may an interested person approach a court to review it. The second exception was thus correctly upheld by the court a quo.

Peremption of the appeal

[28] The respondents argued that by asking for an extension of time in which to file amended particulars of claim, the appellants' attorney had indicated an intention not

to appeal, which had the effect of perempting the appeal. There is no need to consider whether the appellants manifested a clear intention to acquiesce in the order of the court a quo. The order in respect of which the letter was written was not appealable. The request by the attorney had nothing to do with the orders on the two exceptions, which were appealable. The respondents fairly conceded at the hearing that the appeal had not been perempted.

Costs

[29] The appellants have succeeded in so far as the first exception is concerned, but failed in so far as the second exception is concerned. They are entitled to the costs of the appeal in relation to the first order. The respondents are entitled to the costs of the appeal in respect of the second order, and there is no reason to deprive them of the costs of two counsel, for which they have asked.

[30] Accordingly:

1 The appeal against the order upholding the first exception is upheld with costs. The order is replaced with the following:

‘The first exception to the particulars of claim is dismissed with costs.’

2 The appeal against the order upholding the second exception is dismissed with costs including those of two counsel.

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C H Lewis

Judge of Appeal

APPEARANCES

For the Second, Third, Fourth and Fifth Appellants:	L E Combrink
Instructed by:	Venns Attorneys, Pietermaritzburg Pieter Skein Attorneys, Bloemfontein
For the First Respondent:	J Suttner SC (with him P Cirone) Hogan Lovells (South Africa) Incorporated as Routledge Modise Inc, Johannesburg Webbers, Bloemfontein
For the Second, Third and Fourth Respondents:	E Theron (with him A Thomson)
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