THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20537/2014

In the matter between:

LANEL BREDA NO **APPELLANT**

and

THE MASTER OF THE HIGH COURT, KIMBERLEY **FIRST RESPONDENT**

NOMZI KHUMALO NO **SECOND RESPONDENT**

PETRUS ARNOLDUS ELS **THIRD REPONDENT**

Neutral citation: *Breda NO v The Master of the High Court, Kimberley* (20537/2014) [2015] ZASCA 166 (26 November 2015)

Coram: Maya DP, Theron, Wallis, Swain and Mathopo JJA

Heard: 9 November 2015

Delivered: 26 November 2015

Summary: Proof of creditor's claims in terms of s 44 of the Insolvency Act 24 of 1936 – ex facie documents claim possibly prescribed – provisional admission of claim – final determination falling within trustees functions and powers – commissioning by attorney of affidavit in support of claim – falls within exemption contained in item 1*(b)* of Schedule to Regulations Governing the Administering of an Oath or Affirmation, promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 – attorney having an interest in the matter – not precluded from commissioning affidavit.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Kgomo JP and Williams J, sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Swain JA (Maya DP, Theron, Wallis and Mathopo JJA concurring):

[1] The appellant, Lanel Breda NO in her capacity as the executrix in the insolvent estate of her late husband Sarel Johannes Breda (the deceased), unsuccessfully sought an order in terms of s 151 of the Insolvency Act 24 of 1936 (the Act), before the Northern Cape Division of the High Court, Kimberley, reviewing and setting aside a decision made by the second respondent, Ms Nomzi Khumalo NO, in her capacity as the Assistant Master (Kimberley) on 27 February 2013. That decision was taken at the first meeting of creditors in the insolvent estate of the deceased. It admitted the claim of the third respondent, Petrus Arnoldus Els, in the amount of R3 569 678.97.

[2] The first respondent is the Master of the High Court, Kimberley under whose auspices and control the second respondent performed her functions. The first and second respondents took no part in the proceedings before the court a quo, save for the furnishing of a Master's report by the second respondent.

[3] The challenge by the appellant as applicant, before the court a quo, against the decision of the second respondent, was advanced on two grounds:

(a) The documents lodged with the affidavit in support of the claim of the third respondent, were premised upon various loans to the deceased, during his lifetime in the period 6 December 2006 to 25 August 2008. It was submitted that ex facie these documents, the claim of the third respondent had prescribed.

(b) The affidavit submitted by the third respondent in support of his claim did not comply with the provisions of reg 4(2) of the Regulations Governing the Administering of an Oath or Affirmation, GN R1258, *GG* 3619, 21 July 1972 (the regulations) promulgated in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. It was alleged that the commissioner of oaths who commissioned the affidavit had failed to set out his prescribed details and this rendered the affidavit invalid. The second respondent was accordingly not entitled to admit the claim.

[4] The court a quo (Kgomo JP and Williams J) rejected these submissions. It held that the details of the commissioner of oaths were fully set out in the original affidavit produced by the second respondent at the hearing, although the stamp setting out these details on the copy provided to the appellant, was practically illegible. As regards the claim of prescription the court a quo held that payment of an amount of R1 300 000 on 30 June 2009, interrupted the running of prescription, with the result that the debts had not prescribed. The application was accordingly dismissed with costs.

[5] An application for leave to appeal to this court was subsequently granted by the court a quo on two grounds:

(a) On being provided with the original affidavit at the hearing before the court a quo, and having had an opportunity to examine the affidavit after the hearing, the appellant alleged that the commissioner of oaths who had commissioned the affidavit, had an interest in the matter and was precluded from administering the oath in terms of reg 7(1) of the regulations. If this was the case the affidavit was invalid as s 44(4) of the Act, which requires the production of an affidavit by the claimant in proof of the claim, had not been complied with and the claim had wrongly been admitted to proof. The court a

quo noted that this aspect had not been brought to its attention during the hearing.

(b) The nature of the documents supporting the claim by the third respondent were unusual and regard being had to the claim of prescription, there was a reasonable possibility that another court might find that the second respondent should *mero motu* have invoked her powers under s 44(7), and/or s 44 (8) of the Act, and directed that the third respondent submit to interrogation on these issues.

[6] Before dealing with the challenges raised by the appellant to the admission of the third respondent's claim, it is necessary to set out the historical background to place the disputes in context. This is necessary because the relief claimed by the appellant, namely the review and setting aside of the decision of the second respondent to admit the claim of the third respondent, in reality has as its objective, a far greater goal, namely the removal of the duly appointed trustees from the administration of the insolvent estate. The evidence reveals a great deal of distrust between the appellant and the third respondent, which in the case of the appellant also includes the roles played by the trustees and the second respondent, in the administration of the insolvent estate. As will be seen, this distrust has resulted in challenges being raised by the appellant to the conduct of the second respondent as well as the trustees, unsupported by any evidence.

[7] The deceased died on 3 March 2009. The appellant was appointed by the first respondent as the executrix on 26 April 2011 after she objected to the way in which the estate was being administered by the original executor. The third respondent as applicant, was however successful, despite opposition by the appellant, in obtaining the provisional sequestration of the deceased estate on 14 May 2012, and thereafter its final sequestration on 21 September 2012. The Northern Cape Division of the High Court, Kimberley (Lacock J) granted the final order on the basis that it was in the interest of creditors to do so. Lacock J found that prima facie it appeared there had been a possible diminution, or alienation of assets in the estate by the appellant. In addition, he regarded as suspicious the secrecy of the appellant, in her unwillingness to disclose the assets and liabilities of the estate.

He concluded that the appellant had an interest in the estate and it was questionable whether she could objectively administer it.

[8] As regards the claims of the third respondent upon which the sequestration was based (being the claims in issue in the present proceedings) Lacock J remarked that at the very least they appeared peculiar and not in accordance with normal business practice. The claims were said to be loans made to the deceased by the third respondent of millions of rands, which were solely evidenced by handwritten 'IOU's'. He found that it was understandable why the appellant did not wish to accept the claims and questioned the bona fides of the third respondent. Accordingly, the issue of whether these claims had prescribed, or whether the running of prescription had been interrupted, as well as the validity of the claims themselves, were all issues to be objectively investigated by a duly appointed trustee.

[9] Messrs Venter & Tau were thereafter appointed as trustees of the deceased's insolvent estate, by the second respondent, on 26 March 2013. This occurred as a result of the nomination by the third respondent of Mr Venter, at the first meeting of creditors, after the admission by the second respondent of the disputed claim of the third respondent.

[10] However, when the appellant launched the present review proceedings, neither the trustees nor the third respondent were joined as respondents, despite their clear interest in the relief sought. The appellant steadfastly maintained this stance in the face of the Master's report in which it was correctly stated that the trustees, as well as the third respondent, should have been cited as interested parties. The third respondent was accordingly obliged to intervene in the proceedings.

[11] The intentional non-joinder of the trustees by the appellant is surprising in light of the statement made before this court by counsel for the appellant, that the object of the application was the removal of the trustees from the administration of the estate. This was to be achieved by the review and setting aside of the decision of the second respondent to admit the claim of the third respondent. In the absence of

an admitted claim, the third respondent was not entitled to nominate the duly appointed trustees.

[12] Despite the fact that the conduct of the trustees was not in issue before the court a quo and they had not been joined, submissions were made in the appellant's heads of argument to justify the trustees' removal. These were that the trustees were appointed as a result of their nomination by the third respondent and 'no evidence is available to conclude that any investigation took place as to the claim by the third respondent, or that such a trustee invoked the provisions of s 45 of the [Act]'. Section 45 places a duty upon a trustee to examine all proved claims and decide whether the estate owes the claimant the amount claimed. In argument, counsel for the appellant repeated this submission, but when asked whether he was suggesting impropriety in the conduct of the trustees, and was reminded of the seriousness of such an accusation, he did not persist with this submission.

[13] The paucity of evidence as to the trustees' conduct in the discharge of their obligations is accordingly understandable as their conduct was never directly challenged. This is highlighted by the statement in the Master's report dated 7 October 2013, that an interrogation was scheduled to be held before the second respondent on 16-18 October 2013. The report stated that the presiding officer, trustee and any creditor who has proved a claim against the estate could interrogate the third respondent with regard to his claim. Counsel for the appellant was unable to say whether the third respondent had been interrogated. However, as at the date of appellant's replying affidavit, 25 February 2014, it was alleged that 'to date the third respondent's claim has not been subjected to an insolvency inquiry'. Counsel for the appellant correctly conceded that it was the appellant's obligation to place evidence before the court a quo, concerning the scheduled interrogation. It may have been adjourned in the light of these proceedings but there is no indication, if that is the case, that it will not take place at some time.

[14] However, the appellant's ulterior objective to remove the trustees, and the allegations made by appellant's counsel in appellant's heads of argument and before this court, in pursuit of this objective, cannot obscure the true nature of the present inquiry. It is simply this: did the second respondent err in admitting the claim of the

third respondent without interrogating him as to whether the claims had prescribed? In addition, did the second respondent err in admitting the claim of the third respondent, if the attorney who commissioned the third respondent's affidavit in proof of the claim, represented the third respondent for this purpose and was accordingly disqualified from performing this function? It is to these issues that I now turn.

[15] In *Marendaz v Smuts* 1966 (4) SA 66 (T) at 72C-E the exercise of a discretion by a presiding officer to interrogate a claimant was described as follows:

'The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided for in sec. 44 (3) of the Act, or as to when he should resort to the calling of evidence as provided for in sec. 44 (7).'

[16] In *Cachalia v De Klerk NO and Benjamin NO* 1952 (4) SA 672 (T) at 675E-F the following was stated concerning the functions of a presiding officer in deciding whether to admit a claim:

'The admission of a claim by the presiding officer is in a sense only provisional, because under sec. 45 (3) the trustee may dispute the claim notwithstanding its admission by the presiding officer. Furthermore, the presiding officer does not adjudicate upon the claim as if he were a court of Law; he is not required to examine the claim too critically (*Hassim Moti & Co v Insolvent Estate Joosub & Co* 1927 TPD 778 at p 781), or to require more than *prima facie* proof (*Aspeling v Hoffman's Trustee* 1917 TPD 305 at p 307).'

[17] The second respondent in her report pointed out that the third respondent's claim had to be proved to her satisfaction, in terms of s 44(3) of the Act. She stressed the provisional nature of her determination, as the trustees were obliged to ascertain whether the estate owed the amount claimed by the creditor and dispute the claim if necessary. She added that the scheduled interrogation would assist the trustees to decide on the validity of the claim. There is no evidence to suggest that the second respondent failed to properly fulfil her function.

[18] As pointed out however, the main challenge to the second respondent's decision to admit the claim, was that whether the claim had prescribed, should have been investigated by the second respondent by subjecting the third respondent to interrogation in terms of s 44(7). The manner in which a presiding officer should assess a claim which ex facie the documents submitted in proof of the claim may have prescribed, accordingly requires examination.

[19] In *Aspeling & another v Hoffman's Trustee* 1917 TPD 305 at 307 the following was stated:

'The wording of the law is that the claim must be "proved to the satisfaction of the presiding officer, who shall admit or reject the same." I think that that means that when a debt, for instance, is proved before him, and it appears *ex facie* the documents that the debt is prescribed, he should reject it, because a prescribed debt cannot be proved against an insolvent estate.'

At 309 Gregorowski J however more accurately described the debts as being prima facie prescribed.

[20] The decision in *Aspeling* was followed in *Ilsley v De Klerk NO & another* 1934 TPD 55 at 56-57 in which Solomon J stated:

'Now it appears to be the law that at the first meeting of creditors the presiding officer must see that *prima facie* proof of the various claims is produced and if that *prima facie* proof is not produced in respect of a particular claim he must reject it. This principle appears from the cases cited by Mr Heather, namely, *Aspeling and another v Hoffman's Trustee* 1917 TPD 305 and *Peach v Stewart NO and another* 1929 WLD 228. But unless the claim is on the face of it bad – for example, it may ex facie be prescribed – the presiding officer, in my opinion, should not reject it without hearing the creditor's evidence under sec. 42 (5). . . .'

[21] *Mars The Law of Insolvency in South Africa*[1] citing *Ilsley* states that 'if on the face of it the claim is bad, eg if the documents show that the debt is prescribed, [the presiding officer] should reject the claim without calling the creditor to give evidence.'

[1] E Bertelsmann and others *Mars The Law of Insolvency in South Africa* 9 ed (2008) at 409.

P M Meskin et al[2] citing *Aspeling* adopts a similar view subject to the proviso that, if the creditor intends to rely on the fact that prescription was interrupted, he should set forth the facts in this regard in the affidavit for proof. Catherine Smith,[3] although stating that the view that the claim should be rejected is generally accepted, is of the view that it is doubtful if this is correct. The learned author states:

'The presiding officer's refusal to admit a claim which appears to have become prescribed may well be met with the explanation that prescription has been interrupted. It is suggested that prima facie the debt is due and that the claim should be provisionally admitted.'

[22] The need to allow a claimant an opportunity to raise the issue of the delay or interruption of the running of prescription underlies the provisions of s 17 of the Prescription Act 68 of 1969. This section provides that a court shall not of its own motion take notice of prescription. A party to litigation who invokes prescription must do so 'by way of a plea or special plea and not by way of exception. The reason is that the plaintiff may have a valid answer (such as delay or interruption) to the plea of prescription, which may be raised in replication.'[4]

[23] The rejection of a claim by a presiding officer in terms of s 44(3) on the basis that prima facie it is prescribed, denies a creditor the right to furnish an answer to this conclusion. The presiding officer does not adjudicate upon the claim as a court of law, is not required to examine the claim too critically and only has to be satisfied that the claim is prima facie proved. The view of Catherine Smith that the claim is prima facie due and should provisionally be admitted affords this opportunity to the creditor. The appropriate stage to determine whether the claim is prescribed is when the trustee examines the claims proved against the estate. The trustee is obliged to examine all books and documents in order to determine whether the estate owes the amount claimed. This would encompass any documents relevant to the issue of

---

[2] P M Meskin et al *Insolvency Law and its Operation in Winding Up*, Service Issue 44 (June 2015) para 9.2.5.

[3] Catherine Smith *The Law of Insolvency* 3 ed (1988) at 222 n 61.

[4] LTC Harms *Amler's Precedents of Pleadings* 8 ed (2015) at 312-313.

whether the running of prescription was delayed or interrupted. The trustee can of course ask for a creditor to be interrogated if the claim is questionable. In addition, in terms of s 45(3) of the Act if the trustee disputes the claim, he is obliged to inform the Master in writing and include his reasons for doing so. The Master may only disallow the claim after having afforded the claimant an opportunity to substantiate his claim. It is therefore clear that the determination of whether a creditor's claim has prescribed, more appropriately falls within the powers and functions of the trustee. The furnishing of an affidavit by the creditor to the presiding officer as the basis for a claim that the running of prescription has been delayed or interrupted, as suggested by Meskin, falls beyond the circumscribed functions of the presiding officer and should more appropriately be furnished to the trustee.

[24] Although the claims of the third respondent ex facie the documents submitted to proof may have prescribed, as the last loan to the deceased was made on 25 August 2008, the third respondent relies ex facie on a letter dated 20 December 2007 as proof of an obligation to make payment, which was then allegedly made on 30 June 2009 in part payment of the loans. This was accepted by the court a quo which found that the running of prescription was interrupted and the claims had not prescribed. There is no evidence to suggest that the second respondent failed properly to examine whether the claim had prescribed, nor that she erred in this regard in finding that the claim had prima facie been proved to her satisfaction.

[25] I turn to consider the challenge that the affidavit filed by the third respondent in proof of his claim, was commissioned by an attorney who held an interest in the matter, in contravention of the prohibition contained in reg 7(1) of the regulations. In accordance with the decision in *Noordkaaplandse Ko-op Lewendehawe Agentskap Bpk v Van Rooyen & others* 1977 (1) SA 403 (NC) at 407, it was argued that the second respondent was not entitled to admit the claim.

[26] Although it was submitted in third respondent's heads of argument that this challenge was not raised before the court a quo and the appellant should be precluded from raising it for the first time on appeal, no argument was advanced by counsel for the third respondent in support of this contention. This concession was

correct because the failure of the appellant to raise this argument before the court a quo, was solely caused by the failure of the second respondent to provide a legible copy of the relevant affidavit to the appellant before the hearing. Counsel for the third respondent did however submit that the appellant had placed no evidence before the court a quo, to prove that the attorney who had commissioned the affidavit represented the third respondent in submitting the claim and therefore held a disqualifying interest in the matter. It appeared to be common cause that the attorney, Mr Engelbrecht, had acted for the third respondent during the sequestration proceedings and continued to act for him during the review proceedings. Be that as it may, in the light of the conclusion I have reached on the validity of the legal challenge to the commissioning of the affidavit, it becomes unnecessary to consider any evidential basis for this challenge.

[27] The statutory foundation for the relevant regulations is found in ss 7 and 10(1) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 which read as follows:

‘7. **Powers of commissioners of oaths**

Any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person: Provided that he shall not administer an oath or affirmation or take a solemn or attested declaration in respect of any matter in relation to which he is in terms of any regulation made under section ten prohibited from administering an oath or affirmation or taking a solemn or attested declaration, or if he has reason to believe that the person in question is unwilling to make an oath or affirmation or such a declaration.

. . .

10. **Regulations**

(1) The Minister may make regulations –

. . .

(c) prescribing the circumstances under which commissioners of oaths shall be prohibited from administering an oath or affirmation or taking a solemn or attested declaration; . . . .’

[28] The regulations made in terms of s 10, the Regulations Governing the Administering of an Oath or Affirmation, GN R1258, *GG* 3619, 21 July 1972, provided that:

'7 (1) A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.

(2) Subregulation (1) shall not apply to an affidavit or a declaration mentioned in the Schedule.'

[29] The relevant portion of the schedule read as follows:

'SCHEDULE

AFFIDAVITS AND DECLARATIONS EXEMPTED FROM THE PROVISIONS OF REGULATION 7(1)

1. Any affidavit or declaration taken by an attorney and required-

. . .

(b) for record in any office of the Government of the Republic, a provincial administration or . . . .'

[30] Before its amendment, the relevant portion of the schedule provided that an affidavit taken by an attorney and required 'for record in any office of the Government of the Republic. . .' was exempt from the prohibition contained in reg 7(1). The decision in *Noordkaaplandse Ko-op*, which concerned the validity of an affidavit submitted in terms of s 44(4) of the Act, followed the reasoning in *Nochomowitz v Bellville Liquor Licensing Board & another* 1956 (2) SA 228 (C) at 234F-H and *Royal Hotel, Dundee & others v Liquor Licensing Board Area No 26*; *Durnacol Recreation Club v Liquor Licensing Board Area No 26* 1966 (2) SA 661 (N) at 670A-C. These cases concerned the validity of affidavits submitted in support of applications for liquor licences in terms of the (now repealed) Liquor Act 30 of 1928.

[31] In *Noordkaaplandse Ko-op* the argument that the affidavit required in terms of s 44(4) of the Act was simply required for record in an office of the Government was rejected. It was held that because the commissioner held an interest in the matter, within the meaning of reg 7(1), the affidavit was invalid and the provisions of s 44(4) of the Act were not complied with. The rejection of this argument was based

upon the reasoning in *Nochomowitz*, that although the affidavit in support of the application for a liquor licence would inevitably be filed in an office in the Government, that was not its purpose. Its true purpose was to inform the Liquor Licensing Board of certain particulars which were regarded as information to be placed before the Board, when it came to its decision upon the application for a licence. The documents to be exempted in terms of the schedule, were those required for record purposes of a more or less formal nature, dealing with formal matters.

[32] In *Royal Hotel* at 670B-D the same reasoning was followed. It was pointed out that the Liquor Licensing Board was not an 'office of the Government', but a quasi-judicial body and the affidavits were required for the purpose of informing it of certain information, to enable it to come to a decision on the application before it. This was part of the process of placing evidence before the Board and was by no means a formality. In addition, the affidavits were to inform possible objectors and the police of that information, so that they could make representations to the Board.

[33] Consequently, an affidavit commissioned by an attorney with an interest in the matter, before the amendment of the schedule, in proof of a claim in terms of s 44(4) of the Act was invalid.

[34] By GN R1428, *GG* 7119, 11 July 1980, the schedule was however substituted by a new schedule, which reads as follows:

'SCHEDULE

DECLARATIONS EXEMPTED FROM THE PROVISIONS OF REGULATION 7 (1)

1. A declaration taken by an attorney which-

. . .

(b) should be furnished to a Minister or an administrator or an officer in the service of the State. . . .'

The substituted schedule accordingly exempts an affidavit taken by an attorney with an interest in the matter from the restriction contained in reg 7(1) where 'the affidavit should be furnished to. . .an officer in the service of the State'.

[35] The interpretation of the amendment to the schedule by the courts, in connection with the submission of affidavits in support of applications for liquor licences in terms of s 37 of the (also now repealed) Liquor Act 87 of 1977, has resulted in a reversal of the decisions in *Nochomowitz and Royal Hotel* that an affidavit commissioned by an attorney with an interest in the matter is prohibited. It is therefore necessary to consider these subsequent decisions, before determining the validity of the third respondent's affidavit.

[36] In *East Cape Consumers Co-operative Ltd v National Liquor Board & another* 1986 (4) SA 612 (E) at 614E-I it was held that:

'What is relevant to the present problem is para 1*(b)* and in particular the words "a declaration taken by an attorney which should be furnished to a Minister or an administrator or an officer in the service of the State". The word "should" would seem to be inappropriate. What is presumably meant is a declaration which is required to be furnished to a Minister or an Administrator or an officer in the service of the State. Compare the Afrikaans wording "verstrek moet word".

Mr *Whitehead*, on behalf of the applicant, has argued that the affidavit in question is a declaration which is required to be furnished to the Minister or to an officer in the service of the State and that the affidavit is accordingly exempt from the provisions of reg 7(1).

An application in terms of the Liquor Act such as the present one is made to the Minister of Justice by lodging the same with the magistrate who in turn transmits the application to the Liquor Licensing Board for its consideration and recommendation. (See s 37 of Act 87 of 1977). It would accordingly seem to be correct to say that such applications, and therefore the affidavits accompanying them, are documents required to be furnished to a Minister or to an officer in the service of the State. See the remarks made in the case of *Nochomowitz v Bellville Liquor Licensing Board and Another* (*supra* at 234E).'

[37] This decision was followed in *Drop-Inn Group of Liquor Supermarkets (Pty) Ltd v Chairman, Liquor Board & another* 1986 (4) SA 1042 (C) at 1046H-I where the following was stated:

'It was further submitted by Mr *Selikowitz* that the affidavits and declarations envisaged by the schedule are documents of a more or less formal kind which solely concern the Minister or Administrator or officer of the State to whom they are furnished and not affidavits in Liquor Board applications which concern the Liquor Board, the police and opposing parties,

although they are formally addressed to the Minister. I do not agree. In terms of s 37 of the Liquor Act 87 of 1977 an application for a licence is made to the Minister and he decides whether it should be granted or not.'

[38] I agree with the reasoning and conclusion in these cases. Consequently, the purpose in furnishing the requisite affidavit, is no longer a relevant consideration in deciding whether the affidavit falls within the exemption contained in the amended schedule. All that is required is an obligation to furnish an affidavit to 'a Minister or an administrator or an officer in the service of the State'. The reason why the affidavit is required by any of these officials is irrelevant to a determination of whether the exemption applies to the commissioning of a particular affidavit.

[39] The inquiry therefore is whether the affidavit which a claimant is obliged to deliver to the presiding officer in terms of s 44(4) of the Act in proof of a claim, is furnished to 'an officer in the service of the State'. Section 39(2) of the Act provides that:

'All meetings of creditors held in the district wherein there is a Master's office shall be presided over by the Master or an officer in the public service, designated either generally or specially, by the Master for that purpose. Meetings of creditors held in any other district shall be held in accordance with the direction of the Master and shall be presided over by the magistrate of the district, or by an officer in the public service, designated either generally or specially, by the Magistrate for that purpose.'

[40] It is therefore clear that the presiding officer is 'an officer in the service of the State'. Where a magistrate acts as the presiding officer the following conclusion in *President of the Republic of South Africa & others v Reinecke* [2014] ZASCA 3; 2014 (3) SA 205 (SCA) para 15 is relevant:

'All these are indicia that, notwithstanding their whole or partial detachment from the public service, magistrates have not ceased to be employees of the State.'

Consequently where a magistrate performs the function of a presiding officer at a meeting of creditors, he or she acts as an 'officer in the service of the State' within the meaning of that term contained in the schedule to the regulations. If this were not so, it would mean that the validity of an affidavit submitted in proof of a claim in terms of s 44 of the Act, would be dependent upon whether the meeting of creditors was

held in a district where there is a Master's office, or not. Such an interpretation of the schedule would lead to an insensible or unbusinesslike result and would undermine the apparent purpose of the amended schedule to the regulations.[5]

[41] In the result, an affidavit commissioned by an attorney with an interest in the matter furnished in proof of a claim to a presiding officer in terms of s 44(4) of the Act is furnished to 'an officer in the service of the State' and accordingly does not fall within the prohibition contained in reg 7(1). Consequently in the present case it matters not that Mr Engelbrecht may have represented the third respondent and may have held an interest in the proof of the third respondent's claim, at the time he commissioned the third respondent's affidavit.

[42] I make the following order:

The appeal is dismissed with costs.

K G B Swain
Judge of Appeal

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

Appearances:

For the Appellant:	P Zietsman SC
	Instructed by:
	Weavind & Weavind Inc c/o
	Mervyn Joel Smith, Kimberley
	Matsepes, Bloemfontein
For the Third Respondent:	J W Olivier SC
	Instructed by:
	Engelsman Magabane Inc, Kimberley
	Kramer Weihmann & Joubert, Bloemfontein