



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 512/2021

In the matter between:

CONSTANTIA INSURANCE COMPANY LIMITED

APPELLANT

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG FIRST RESPONDENT

VAN DEN HEEVER, WILHELM THEODORE N O SECOND RESPONDENT

KOKA, JERRY SEKETE N O THIRD RESPONDENT

THE MINISTER OF TRADE AND INDUSTRY FOURTH RESPONDENT

Neutral citation: *Constantia Insurance Company Limited v The Master of the High Court, Johannesburg and Others* (512/2021) [2022] ZASCA 179
(13 December 2022)

Coram: VAN DER MERWE and PLASKET JJA and BASSON AJA

Heard: 4 November 2022

Delivered: 13 December 2022

Summary: Insolvency – test for expungement of claim by Master under s 45(3) of Insolvency Act 24 of 1936 – sufficient ground required.

Company law – definition of ‘financial assistance’ in s 45(1) of Companies Act 71 of 2008 (Companies Act) exhaustive – indirect financial assistance provided by indemnifying guarantor of related company – requirements that board of company must adopt resolution to provide financial assistance after having satisfied itself of matters mentioned in s 45(3)(b) – substantive requirements for validity – not formal or procedural requirements in terms of s 20(7) of Companies Act – no case made to declare s 45(6) unconstitutional – financial assistance under indemnity void.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mngqibisa-Thusi J, sitting as court of first instance):

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

JUDGMENT

Van der Merwe JA (Plasket JA and Basson AJA concurring):

[1] The appellant, Constantia Insurance Company Limited (Constantia), proved three claims (the claims) at the second meeting of creditors of Protech Khuthele Property Investments (Pty) Ltd (in liquidation) (Protech Investments). At the instance of the second and third respondents, the joint liquidators of Protech Investments (the liquidators), however, the first respondent, the Master of the High Court, Johannesburg (the Master), expunged the claims. Constantia consequently approached the Gauteng Division of the High Court, Johannesburg (the high court) for an order reviewing and setting aside the Master's decision. The high court (Mngqibisa-Thusi J) dismissed the application with costs, but granted leave to Constantia to appeal to this court. Only the liquidators opposed the application in the high court and the appeal.

Background

[2] Protech Investments was a property-owning company. It formed part of a group of eight companies (the group). Protech Khuthele Holdings Limited (Protech Holdings) was the sole shareholder of Protech Investments. The remaining six companies in the group, all of which were operating companies, were also subsidiaries of Protech Holdings. One of them was Protech Khuthele (Pty) Ltd (Protech Khuthele). At all relevant times, Mr Antony Page was the chief executive officer of the group.

[3] On 16 September 2014, the high court placed Protech Investments in winding-up, on the ground that it was unable to pay its debts. All the other companies in the group are also being wound up. At the hearing of the appeal we were informed that Constantia, too, had been placed in liquidation. Both counsel, however, confirmed that its liquidator had been properly authorised to prosecute the appeal.

[4] Constantia's business included the provision of performance guarantees. The group approached Constantia to provide performance guarantees in respect of the contractual obligations of the operating companies in the group towards third parties. Constantia agreed to do so, in return for a premium per guarantee and an indemnity in its favour by each of the companies in the group.

[5] Pursuant hereto, on 25 January 2013, Mr Page signed a document entitled 'Deed of Indemnity and Counter Indemnity' (the indemnity). It was also signed on behalf of Constantia and evidenced its agreement with Protech Holdings and the latter's 'Associated Companies'. This expression encompassed the subsidiaries of Protech Holdings. In terms of the indemnity: 'Indemnitors' meant Protech Holdings and its subsidiaries; 'Insurance Company' referred to Constantia; and 'Bond' included any guarantee executed by Constantia ' . . . for securing the due performance and discharge of the obligations of any one or more of the Indemnitors', irrespective of whether the guarantee was executed before or after the date of the indemnity.

[6] Clause 2 of the indemnity provided:

'In consideration of the INSURANCE COMPANY executing or procuring the execution of any Bond, the INDEMNITORS hereby indemnify and keep indemnified, the INSURANCE COMPANY and holds it harmless from and against all demands, claims, payments, liabilities, costs, expenses, damage and/or losses (including loss of premium or interest) of whatsoever nature sustained or incurred by the INSURANCE COMPANY under or by reason or in consequence of having executed or hereafter executing any such Bond, or in relation to any application by it for the discharge or vacation of the same.'

In terms of clause 3:

'The INDEMNITORS undertake and agree to pay to the INSURANCE COMPANY on first written demand, any sum/s of money which the INSURANCE COMPANY may be called upon to pay under any Bond whether or not the INSURANCE COMPANY at such date shall have

made such payment and whether or not any of the INDEMNITORS admit or deny the validity of such claim against the INSURANCE COMPANY under such Bond. . .’

The effect of all of this was that each company in the group undertook an independent obligation to indemnify Constantia in respect of any demand on it or payment by it under any guarantee issued to third parties in respect of the obligations of any company in the group.

[7] The claims amounted to some R182 million and related to the various guarantees that Constantia had issued to third parties to secure the obligations of Protech Khuthele. Constantia claimed the demands that had been made on it in terms of these guarantees from Protech Investments under the indemnity. Constantia duly proved these claims on oath to the satisfaction of the officer presiding at the relevant meeting.

[8] The liquidators nevertheless disputed the claims. Consequently, they submitted a report to the Master in terms of s 45(3) of the Insolvency Act 24 of 1936 (the Insolvency Act), stating that fact and the reasons therefor. In essence, they contended that the indemnity constituted financial assistance by Protech Investments to Protech Khuthele, within the meaning of s 45 of the Companies Act 71 of 2008 (the Companies Act). The liquidators reported that they had been unable to find a resolution of the board of Protech Investments authorising Mr Page to bind it to the indemnity or indicating compliance with the requirements of s 45 of the Companies Act. The report concluded with the submission that the indemnity by Protech Investments in respect of the obligations of Protech Khuthele was void under s 45(6) of the Companies Act and that the claims ought to be expunged.

[9] At the invitation of the Master, Constantia submitted a written response, with supporting documentation, aimed at substantiating the claims. I shall in due course deal with the relevant matters that Constantia raised. The Master’s determination concluded as follows:

‘The Master find it not necessary to deliberate on the several other issues raised, as the Master has formed the opinion that compliance with section 45 of the New Companies Act must be objectively established. The question is not whether there could have been compliance but rather whether there was in fact compliance.

At the time of this decision, the Master had not been provided with satisfactory documentary proof of compliance and cannot assume that there had been compliance and therefore the Master has reasonable grounds for suspicion that claims no 2, 3 and 4 are invalid as provided for under section 45(6) of the New Companies Act.'

[10] In the application to review the Master's decision, the issues between the parties crystallised to the following, namely whether:

- (a) The indemnity constituted financial assistance by Protech Investments to Protech Khuthele as contemplated in s 45 of the Companies Act;
- (b) Protech Investments in any event complied with the requirements of s 45 for the provision of financial assistance;
- (c) Section 20(7) of the Companies Act assisted Constantia's case in the event of such non-compliance; and
- (d) Section 45(6) of the Companies Act was unconstitutional.

In dismissing Constantia's application, the high court found for the liquidators on all these issues.

Expungement decision and review

[11] By virtue of Item 9 of Schedule 5 to the Companies Act, Chapter 14 of the repealed Companies Act 71 of 1963 continues to apply to insolvent companies, until a date to be determined. Section 339 forms part of Chapter 14. It makes the provisions of the law of insolvency *mutatis mutandis* applicable to the winding-up of a company unable to pay its debts.

[12] Section 44 of the Insolvency Act deals with proof of liquidated claims against an insolvent estate. In essence, it provides that such a claim shall be proved on affidavit to the satisfaction of the officer presiding at the meeting. In terms of s 45(1), the officer who presided at a meeting is obliged to deliver the claims proved against the estate at that meeting to the trustee or liquidator.

[13] Sections 45(2) and 45(3) of the Insolvency Act read:

'(2) The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.

(3) If the trustee disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he had done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section seventy-five.'

[14] As I have demonstrated, the Master expunged the claims on the ground that there were reasonable grounds for suspecting that they were invalid. Before us, the liquidator contended that the Master was called upon to determine whether the liquidators had a reasonable belief based upon facts ascertained by them, not speculation, that Protech Investments was not in fact indebted to Constantia. For this proposition the liquidators relied upon the decision in *Caldeira v The Master and Another* 1996 (1) SA 868 (N) (*Caldeira*). For the reasons that follow, neither the test applied by the Master nor that proposed by the liquidators are sustainable.

[15] Section 45(2) of the Insolvency Act obliges a trustee or liquidator to examine all available books and records relating to the insolvent estate 'for the purpose of ascertaining whether the estate in fact owes' a proved claim. If the claim is disputed, the trustee or liquidator has to act in terms of s 45(3). It was in respect of these duties that Levinsohn J said in *Caldeira* at 874D-E:

'It seems to me that if a trustee disputes the claim he must have a reasonable belief based on facts ascertained by him that the insolvent estate is not in fact indebted to the creditor concerned. Mere suspicion about the claim would not be sufficient.'

[16] This dictum was not about the test to be applied by the Master under s 45(3). This is evidenced, *inter alia*, by what the court said at 875J-876A in concluding that the claim ought not to have been expunged:

'It follows then that the Master, objectively viewing what was placed before him by the liquidator, ought not to have been satisfied with the mere statement that the applicant had not substantiated the claims by providing documentation. This did not constitute sufficient grounds to expunge the claim.'

[17] The starting point in relation to the test to be applied under s 45(3) of the Insolvency Act, is that the Master is afforded the power to confirm, reduce or disallow a claim that was proved under oath to the satisfaction of the officer presiding at the relevant meeting. The reduction or disallowance of a claim under s 45(3) does not preclude the subsequent enforcement of the claim by 'action at law'. If the power to expunge or reduce a claim is exercised for insufficient reason, however, a creditor may suffer unnecessary delay and expense. That would be detrimental to the administration of justice.

[18] When the reduction or expungement of a claim is contemplated, the Master would generally have before him or her not only the report of the trustee/liquidator, but also the material submitted to substantiate the claim. The Master is enjoined to apply his or her mind objectively to all the relevant material thus placed before him or her. Whilst the Master is not required to determine whether the insolvent estate is in fact not indebted (or indebted) to the claimant, he or she should not reduce or expunge a claim unless there is a sufficient ground for doing so. To the extent that the decision in *Chappell v The Master and Others* 1928 CPD 289 differs from this approach, it should not be followed.

[19] It follows that the Master misdirected herself by applying the wrong test. But it did not follow that the review of the Master's decision had to succeed. The review was brought in terms of s 151 of the Insolvency Act. In *Nel and Another NNO v The Master (ABSA Bank Ltd and Others intervening)* [2004] ZASCA 26; 2005 (1) SA 276 (SCA) para 22-23, this court confirmed that in a review of this kind, a court enters into and decides the whole matter afresh. For this purpose it has powers of both appeal and review and may receive new evidence. In a review under s 151 of the Insolvency Act, a party may therefore raise an issue that was not placed before the Master. Whether an issue was properly raised in the review application must, of course, be determined on the ordinary principles applicable to motion proceedings.

[20] Albeit for a different reason than the one mentioned above, the high court concluded that the Master's decision could not stand. It therefore correctly proceeded to determine afresh, on the issues raised before it, whether the claims should be

expunged. The question on appeal is whether the high court correctly determined these issues against Constantia.

Financial assistance

[21] The first issue is whether the indemnity constituted financial assistance by Protech Investments to Protech Khuthele. In this regard it is necessary to reproduce s 45 of the Companies Act. It provides:

'Loans or other financial assistance to directors

(1) In this section, "**financial assistance**"–

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(b) does not include–

(i) lending money in the ordinary course of business by a company whose primary business is the lending of money;

(ii) an accountable advance to meet–

(aa) legal expenses in relation to a matter concerning the company; or

(bb) anticipated expenses to be incurred by the person on behalf of the company; or

(iii) an amount to defray the person's expenses for removal at the company's request.

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless–

(a) the particular provision of financial assistance is–

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that–

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees—

(a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution; or

(b) within 30 business days after the end of the financial year, in any other case.

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(7) If a resolution or an agreement is void in terms of subsection (6) a director of the company is liable to the extent set out in section 77(3)(e)(v) if the director –

(a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).'

[22] When used in a definition, the word 'includes' generally denotes a term of extension. That would be the case where the primary meaning of the term that is defined is well-known and the word 'includes' introduces a meaning or meanings that go beyond that primary meaning. In such a case, the definition would encompass the primary well-known meaning as well as that which the definition declares that it should include. See *Land and Agricultural Bank of South Africa v The Minister of Rural Development and Land Reform and Others* [2022] ZASCA 133 para 26 and authorities cited there.

[23] This does not appear to be applicable to s 45(1). All the matters included by s 45(1)(a) (and excluded by s 45(1)(b)), fall within the primary meaning of financial assistance. In *R v Debele* 1956 (4) SA 570 (A) at 575H-576A, Fagan JA referred to a situation where all the matters listed as included in the definition fell within the primary meaning of the defined term. He said that that indicated an intention to determine the ambit of the term with certainty and that the listed matters were exhaustive of the term. See also *Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others* 1987 (2) SA 331 (A) at 350J-351A.

[24] As I have said, this applies to s 45(1)(a). In my view, the intention to provide a precise definition is even clearer where, as in this case, the excluded matters would also fall within the primary meaning of the term. I therefore conclude that the matters mentioned in s 45(1)(a) are exhaustive of the meaning of 'financial assistance' and disagree with the high court's contrary finding. In terms of s 45(2), however, s 45 applies to direct and indirect financial assistance.

[25] In terms of s 2(1) and 2(2) of the Companies Act read with the definitions in s 1, a juristic person is related to another juristic person if, *inter alia*, they are subsidiaries of the same company. As I have said, both Protech Investments and Protech Khuthele were subsidiaries of Protech Holdings. Constantia therefore rightly accepted that Protech Khuthele was a company related to Protech Investments.

[26] What essentially transpired here was that Constantia guaranteed the contractual obligations of Protech Khuthele towards third parties, in return, *inter alia*, for the undertaking by Protech Investments to indemnify Constantia in respect of any claims under these guarantees. In terms of its contracts with the third parties, Protech Khuthele was obliged to furnish performance guarantees. It obtained those guarantees, *inter alia*, because Protech Investments indemnified the guarantor. As such, Protech Investments put its property at risk to ensure that Constantia provided the guarantees that Protech Khuthele required. To my mind, Protech Investments thus indirectly secured the obligations of Protech Khuthele within the meaning of s 45(1)(a).

Compliance with s 45

[27] Section 66(1) of the Companies Act reads:

'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

In the context of s 66(1) and of the use of the word 'resolution' in s 45(5), 45(6) and 45(7), the expression 'the board may authorise' means that the board of a company must adopt a resolution to provide financial assistance to a company or person mentioned in s 45(2).

[28] The board may not take such a resolution unless it satisfied itself of the two matters set out in s 45(3)(b). The first is that immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test (see s 4 of the Companies Act). The high court erred in finding that actual performance of the solvency and liquidity test was required. The second is that the terms under which the financial assistance is proposed to be given are fair and reasonable to the company. The board could only be satisfied of these matters if it applied its mind to them.

[29] There was no evidence on record that the board of Protech Investments had adopted a resolution to enter into the indemnity. The only resolution that was put forward in this regard, was one by Protech Holdings. In terms thereof Mr Page had been authorised to execute the indemnity on behalf of Protech Holdings and its 'Associated Companies'. This may have amounted to compliance with the requirement of a special resolution of shareholders in terms of s 45(3)(a)(ii), but self-evidently was not a resolution of the board of Protech Investments.

[30] The indemnity stated that it was executed on behalf of the 'Indemnitors' by Mr Page, who had been authorised thereto '. . . by virtue of a Resolution of Directors dated 14 December 2012'. The liquidators could not find such a resolution in the records of Protech Investments. It was common cause on the papers that on 14 December 2012 and on 25 January 2013 (when the indemnity was executed), Mr Christopher Porter and Mr Julian Dovey had been directors of Protech Investments. Whether Mr Page had then also been a director of the company was in dispute. This dispute was not material, because Constantia placed the affidavits of both Mr Porter and Mr Dovey before the high court. It suffices to say that in their affidavits they

studiously refrained from saying that the board had resolved to bind Protech Investments to the indemnity.

[31] In the circumstances it is not surprising that there was no evidence whatsoever that the board of Protech Investments had considered the matters mentioned in s 45(3)(b) in respect of entering into the indemnity. Constantia argued that this requirement had been met because the solvency and liquidity of the members of the group had regularly been considered at group level by the audit and risk committee of the group. This clearly did not meet the requirement, in accordance with the purpose of s 45, that the board of Protech Investments had to satisfy itself in terms of s 45(3)(b) that it was appropriate to place its assets at risk in terms of the indemnity. In the result, Protech Investments provided financial assistance to Protech Khuthele in terms of the indemnity that in material respects did not comply with the requirements of s 45. In terms of s 45(6), the indemnity is void to this extent.

Section 20(7)

[32] The next question is whether the provisions of s 20(7) of the Companies Act could come to Constantia's assistance. It provides:

'A person dealing with the a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.'

[33] There has been some academic debate about the import and scope of s 20(7). See P Delpont *Henochsberg on the Companies Act 71 of 2008* (5 ed) at 106(3) to 106(5). Save for the matters referred to below, it is not necessary to enter into that debate. The provision that the person dealing with a company in good faith is 'entitled to presume' that the company has complied with all applicable formal and procedural requirements, could not be read as a true presumption. In my view, it means that when s 20(7) finds application, a company may not rely on its own non-compliance with formal and procedural requirements.

[34] Formal and procedural requirements must be distinguished from substantive requirements for the validity of a resolution or agreement. See N Locke 'The Legislative Framework Determining Capacity and Representation of a Company in South African Law and its Implication for the Structuring of Special Purpose Companies' (2016) 133 *SALJ* 160 at 171. The requirements that the board of a company must resolve to provide financial assistance under s 45 and that it must be satisfied of the matters mentioned in s 45(3)(b), are substantive requirements. It follows that s 20(7) does not avail Constantia.

Constitutionality of s 45(6)

[35] It remains to consider Constantia's contention that s 45(6) of the Companies Act permits arbitrary deprivation of property and therefore infringes s 25(1) of the Constitution. The first step in the enquiry is to determine the ambit of s 45(6). At first blush, the expression 'this section' in s 45(6)(a) appears problematic. However, the context indicates that it must be read as referring to those provisions of s 45 that set requirements for providing financial assistance. Providing financial assistance could only be inconsistent with those provisions. It follows, for instance, that non-compliance with the *ex post facto* notices contemplated by s 45(5) would not result in the voidness of a resolution or an agreement to provide financial assistance.

[36] I am prepared to accept, without deciding, that s 45(6) may amount to the deprivation of property. A deprivation of property is arbitrary if the law in question does not provide sufficient reason for the deprivation. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) para 100, where Ackermann J also carefully set out how sufficient reason is to be established. That, in the main, requires an evaluation of the relationships between the deprivation and the purpose of the law in question, as well as between the purpose of the deprivation and the person affected, on the one hand, and the nature of the property, on the other. Constantia thus had to show along these lines that there was insufficient reason for s 45(6).

[37] In the founding affidavit the issue of arbitrary deprivation of property was raised in a single sentence, in the context of the proper interpretation of s 45(5) in respect of

notice to shareholders. And in its Rule 16A notice, filed after the replying affidavit, Constantia in this regard only stated that s 45 of the Companies Act had been enacted to protect shareholders from improper conduct of a company's directors and not to punish a bona fide party contracting at arm's length. In my view, it would not be unfair to say that Constantia did not come close to making a case that s 45(6) should be declared unconstitutional.

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

C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances

For appellant:

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