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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 13493/06

DATE: 03/08/2007
UNREPORTABLE

In the matter between:

JOHANNES FREDERIK KLOPPER N.O APPLICANT

VS

THE MASTER OF THE HIGH COURT RESPONDENT

BOSIELO J

JUDGMENT

INTRODUCTION

1 This matter is about a trustee who is dissatisfied with his remuneration in the amount of R6 7521, 51 determined in terms of Tariff B of the Second Schedule B to the Insolvency Act, 24 of 1936 amended ("the Act"). These fees in the amount of R6 7521, 51 including value added tax (VAT) were for services rendered in administering an insolvent estate. As the applicant was of the view that the above-stated fees were

inadequate, he made representations to the respondent for an increased remuneration in the further amount of R7 620, 00 in terms of Section 63 of the Act. The respondent, purporting to exercise it's discretion in terms of section 63 (1) of the Act, refused to increase the applicant's remuneration, having found that there was no 'good cause' for such an increase. This is what gave birth to what turned out to be an ugly and scathing legal brawl between the applicant and the respondent. It is regrettable that in the course of this bruising skirmish, the professional reputation and integrity of both the respondent and applicant were seriously tarnished.

2. FACTUAL BACKGROUND

2.1 The facts of this case are not complex and, are, to great extent, common cause. The applicant is an insolvency practitioner employed as a director by a company called Independent Trustees (PTY) LTD. The respondent is the Master of the High Court, Pretoria who, amongst others, is responsible for insolvent estates.

2.2 The estate of one Bill Oosthuizen was sequestrated on 12 August 2003 by an order of this court. On 24 November

2003, the applicant was appointed the trustee of this insolvent estate by the Master. This estate was finally wound up on 5 July 2005 on which dated the amended Final Liquidation and Distribution and Contribution Account was filed.

2.3 Pursuant to the Second Schedule to the Insolvency Act, and in accordance with Tariff B thereof, the applicant calculated his remuneration to be R6 752, 51. The applicant avers that the amount of R6 752, 51 is too little and does not amount to reasonable remuneration for the services which he rendered in administering and winding up the insolvent estate. As a result, the applicant wrote a letter to the respondent on 5 July 2005, wherein he sought an increase of his remuneration in a further amount of R7 620, 63 in terms of section 63 (1) of the Act.

2.4 In support for his request for an increase of his remuneration, the applicant alleged, *inter alia,* that he had to use many members of his staff to do various activies in administering the insolvent estate, and further that he spent approximately 29 hours in the administration of this estate. The respondent

advised the applicant on or about 29 July 2005 that he declined to increase the applicant's remuneration. The primary reason advanced by the respondent was that this estate was not complex; that there was only one asset in the insolvent estate, to wit, an immovable property which was sold by auction; that the applicant had already received a fee from the sale of that asset; that there was only one secured creditor, being ABSA and further; that ABSA already paid a contri bution.

2.5 Relying on the respondent's refusal to increase his remuneration, the applicant launched the present proceedings to this court to have the decision of the respondent to refuse to increase his remuneration reviewed and set aside.

3. THE STATUTORY FRAMEWORK

3.1 It is common cause that this matter is governed by section 63 (1) and (2) of the Act which provide as follows+

"63- Remuneration of trustee or curator bonis

(1) *Every trustee or curator bonis shall be entitled to* a *reasonable remuneration for his services, to be*

taxed by the Master according to tariff B in the Second Schedule to this Act: Provided that the Master may, for good cause, reduce or increase his remuneration, or may disallow his remuneration either wholly or in part on account of any failure or delay in the discharge of his duties or on account of any improper performance of his duties:

(1) bis The Master may by notice in the Gazette amend the said tariff B.

(2) A person who employs or is a fellow employee or is ordinarily in the employment of the trustee shall not be entitled to any remuneration out of the insolvent estate, and a trustee or his partner shall not be entitled to any remuneration out of the estate for services rendered to the estate, except the remuneration to which under this Act he is entitled as trustee."

3.2 The parties were agreed that the applicant's remuneration had to be in accordance with Tariff B of the second Schedule to the Act. Furthermore, it was not in dispute that in terms of section 63(1) of the Act, the applicant as trustee of the

insolvent estate, was entitled to a reasonable remuneration for his services in winding up the estate. Of critical importance, the parties were also agreed that for the applicant to qualify, for an increase of his remuneration he had to prove **"good cause".** It became common cause that the real dispute revolved around the crisp question whether the respondent acted properly in finding that the applicant had not shown "good cause" for the increase of his remuneration and consequently refusing same.

4. **SUBMISSIONS**

4.1 Advocate Terreblanche S.C (assisted by Mr Smit) argued on behalf of the applicant that the respondent misdirected himself by, *inter alia,* refusing to acknowledge the principle of time-based claims and, as a result failing to consider the actual time which the applicant spent in administering this insolvent estate (estimated to be 29hrs); further that the respondent took irrelevant considerations into account, i.e. the fact that there was only one asset in the insolvent estate , viz, the immovable property; the fact that ASSA, the only secured creditor in the insolvent estate had paid a contribution as there was a shortfall and further that the

applicant had already received his fees from the sale of the immovable property which was the only asset in the insolvent estate.

4.2 On the other hand, Adv Neukircher SC, appearing for the respondent, submitted that the respondent acted properly in refusing to increase the applicant's remuneration as the applicant failed to prove "good cause" as required by section 6(3) of the Act. In particular, Adv Neukicher argued that the respondent was correct in finding that this insolvent estate was a simple estate, consisting of one asset only and that there were no complications involved in its administration including the preparation of the First and Final Liquidation and Distribution Account of 8 April 2005 together with the Amended First and Final Liquidation Distribution and Contribution Account dated 14 July 2005.

4.3 In further support of her submissions, Adv Neukircher pointed out to a number of unsatisfactory features in the applicant's account, i.e., the fact that the applicant claimed a fee for attending the first meeting of creditors and travelling on 27 October 2003 when in fact there was no such attendance

either by the trustee or any of this employees; further that the applicant claimed a fee for attending the second creditors meeting; when in fact there was no attendance by the trustee or any of his employees; that it was it was incorrect if not improper for the trustee to claim a fee in his account for 130 minutes for meetings which did not attend.

5. **CONCLUSION**

5.1 It is clear to me that the decisive concept herein is "good cause". It is worth mentioning that both counsel were agreed that the concept "good cause" is a nebulous if not elastic concept which defies precise definition. However it is clear to me that what is envisaged by section 6(3) are factors which are exceptional or cogent enough to persuade the Master that there is a need for an increase of a trustee's remuneration to meet the threshold of "reasonable remuneration "as required by section 6(3). To my mind, it is axiomatic that in order to determine whether there is "good cause" or not the Master has to consider all facts which have a bearing on the administration of the estate. I have no doubt that the actual time spent in the administration of such an insolvent estate, is one of the crucial facts to be considered

together with other factors like the size and complexity of the estate; the kind of assets in the estate (e.g. whether there are movables, immovables, shares, securities etc); the degree of any difficulties encountered by the trustee; the amount of work done etc. However as the respondent correctly pointed out in her affidavit, one cannot consider time **in vacuo.** Merely to admit time-based claims in general and indiscriminately would open the door for unscrupulous trustees to abuse section 6(3) of the Act to the detriment of the insolvent estate and/or the creditors. Contrary to the submission made forcefully by Mr Terreblance, I did not understand the respondent's stance to be that the actual time spent is irrelevant when considering whether the remuneration payable to a trustee is reasonable and further whether there is "good cause" for increasing such remuneration.

5.2 I agree with the respondent that, given the fact that both parties are agreed that this was a simple estate, comprising of one immovable property only which was sold on auction and further that there was only one secured creditor who paid a contribution, there is no justification for the amount of

time allegedly spent by the trustee on the administration of this insolvent estate. I agree with the respondent that it would be too risky to accept a general statement that it takes a minimum of approximately 30hrs to finalise even the most simplest of estate. Such an approach, without properly considering the facts of each insolvent estate and any peculiar problems which required special attention during the administration of the estate, is in my view, a good recipe for abuse of section 6(3) by unscrupulous trustees. In my view, it is imperative that each insolvent estate be considered on its own facts to determine the existence of “good cause" in order to ensure that a trustee is paid 'reasonable remuneration' for services rendered.

5.3 It was submitted by Adv Terreblanche for the applicant, that I should take cognisance of the fact that the current fee structure for trustees as provided for in the regulations is inadequate to enable trustees to pay their overheads. It was argued that as a result, trustees are unable to make their practices lucrative. The applicant asserts in his replying affidavit that in order for the trustees to be able to meet their overhead expenses, they need a minimum remuneration of at

least R25 00, 00 per estate. It is asserted that I should rule that this amount represents what a reasonable remuneration implies in terms of section 6(3) of the Act even in what one might describe as small or simple estates. To my mind, this argument is fallacious. A trustee is remunerated for actual services rendered and not on the basis of a minimum fee structure to enable him or her to pay overhead expenses or even run a lucrative practice.

5.4 It should be abundantly clear that I am not called upon to determine in general, what a reasonable remuneration is for trustees of insolvent estate. In any event, even if I wanted to, I do not think that I am authorised or competent to do that. As Mr Terreblanche correctly conceded such determination relates to policy decisions which fall outside the scope of my judicial functions. All I am required to do **in casu** is to determine on the cold facts of this case, whether the respondent misdirected herself in finding that the applicant failed to prove "good cause" to justify an increase of his remuneration bearing in mind the circumstances of this case. Alternatively, I have to determine whether in refusing to approve the increase of the applicant's remuneration, the

respondent took irrelevant facts into consideration or failed to consider relevant facts. For purposes of this case, I accept that I have wide powers as provided for in section 151 of the Act, which gives me a wide discretion than in ordinary reviews to review the respondent's decision.

5.4 Having given this matter careful consideration, it is clear to me that the respondent correctly and properly took into account all relevant facts into careful consideration before arriving at the decision that there is no **"good cause" to** increase the applicant's remuneration. I do not think, even by any stretch of the imagination, that it can be argued that the respondent, was wrong or misdirected herself in considering, amongst others, facts such as that this insolvent estate is fairly simple; that there was one immovable property only; that this property was sold on auction; that there was only one secured creditor; that the secured creditor had to pay a contribution and further that the applicant had already received a fee for the sale of the immovable property.

5.5 It is abundantly clear that given the above-stated facts, the respondent was of the view that the applicant was not

justified in expending 29 hours on such a simple estate. In this regard, I am in respectful agreement with the respondent that the size and nature of this insolvent estate does not justify the time allegedly spent on its administration. Contrary to what Mr Terreblanche submitted, I am satisfied that the respondent duly considered and accepted the principle of time-based claims as clearly set out in Nel and Another NNO v The Master (ABSA BANK LTD & INTERVENING) 2005 (1) SA 276 (SCA) where the following at p 284 i:

"..... *The tariff serves* as a *point* of *point* of *departure for the determine action* of *the appropriate fee. However, once taxation is complete, the Master has* a *flexible discretion to increase or decrease the amount* of *remuneration arrived at by the previous application* of *the tariff- the jurisdictional facts for the exercise* of *this discretion is the forming by the Master* of *the opinion that "good cause" exist for doing so*....."

5.6 I find it necessary to emphasise that section 63(1) and (2) like it's counterpart, to wit section 684(1) and (2) of the Companies Act 61 of 1973, must be read carefully and in its correct perspective. It is clear from the two sections that the

starting point for the Master is the tariffs which are statutorily prescribed. The Master is obliged to determine "reasonable remuneration" for the trustee or liquidator against the set tariff. Once the Master has finalised the taxation, then he/she can use his/her discretion either to increase or decrease fees, depending on the existence of "good cause".

5.7 In order to be able to exercise his/her discretion properly, it should be accepted that the Master must have a free hand to determine which relevant facts to consider in determing whether there is a "good cause" either to increase or decrease the remuneration. As it was clearly and authoritatively stated in Nel's case supra, the time spent by a trustee or liquidator in administering the insolvent estate, is but one of the facts from a myriad of other facts to be considered by the Master. It is clearly wrong and improper to suggest that time spent on the insolvent estate can be considered in isolation or even be regarded as the dominant or decisive factor. I venture to state that where excessive time is spent on the administration of an insolvent estate than is justified either by the size, nature or complexity of the estate or where imaginary as opposed to real or genuine

difficulties were encountered in the administration of the estate, the Master is free to refuse to accept that as "good cause", otherwise unscrupulous trustees would be able to record more time than they can justify. I believe the same holds true for the number of people assigned to work on an insolvent estate. In my view, it is senseless and illogical to have many people, some with high qualifications to administer a simple estate where there is no need for such. Self-evidently, the people working on a particular estate must be justified by the size and complexity of the estate. These are the kind of dynamics or considerations which make it imperative for the Master to be vigilant and to apply his/her mind properly to all facts which may be put before him as "good cause" to justify an increase of the trustee's remuneration. I am satisfied, on a careful perusal of the facts of this case that the respondent applied her mind properly to all the relevant facts which were put before her.

5.8 I am furthermore satisfied, contrary to what was asserted by Mr Labuschange that the Master, in determing whether the applicant had shown "good cause" for an increase of his remuneration, in casu, was actually aware and properly

considered the judgement in Nel's case (supra). This is clear from the respondent's letter dated 29 September 2005 marked "Annexure L" and which is attached to the papers. I find that the criticism against the respondent was ill conceived and unjustified. It follows, in my view, that the respondent acted correctly in the manner in which she dealt with the applicants request for an increase of his remuneration.

6. COSTS

6.1 Adv Neukircher argued for a punitive cost order against the applicant. Amongst others, Adv Neukircher argued that the applicant proved himself to be less frank and candid with the court by claiming payment in respect of services which he knew he did not render. She argued that the applicant, being a senior and experienced attorney-cu m-i nsolvency practitioner should have known better that he has a duty of **uberrima fidei** to the court. Furthermore, she submitted with vigour that the conduct of the applicant amounts to an abuse of the process of this court. She pointed out to the fact that the applicant raised new and irrelevant material in his replying affidavit which unnecessarily made this application

prolix and voluminous. I agree with Adv Neukircher, that for instance, issues relating to the alleged BEE component of the applicant; the opinions of other senior trustees regarding the reasonable minimum fees of trustee; the overhead structure of the applicant's practice were patently irrelevant for purposes of determing the issue in this matter. Regrettably, some of those facts impelled the respondent to seek leave to file a duplicating affidavit to deal with the new issues raised by the applicant in his replying affidavit. The end-result of this is that the court was forced to read irrelevant material.

6.2 In the course of his submissions, Mr Labuschagne contended that I should find that this matter is of great significance not only to the applicant but to the entire profession of trustees and liquidators. Based on this, he contended that I should consider this case as a test case for them. With respect, I disagree with Mr Labuschagne. Firstly, there is no indication on the papers that this is a class action. On the contrary, it is clear from the papers that this application was brought by the applicant in his own personal capacity and for his own personal benefit for an increase of

his remuneration. It is abundantly clear that what the applicant seeks is an increase of his remuneration for the benefit of his practice. Evidently, the applicant is not acting on behalf of any other person or entity except himself. I venture to state that even the citation Johannes Frederick Klopper NO is erroneous and seriously misleading as the applicant is not acting on behalf of the insolvent estate nor in the interests of the creditors of the insolvent estate. There is no doubt that the applicant acted in his personal capacity and for his own personal interests. As it was aptly remarked by Van Heerden AJA (as she then was) in Nel's case (supra) at p 298 F:

> *"Indeed, the appellant was -and still are-acting against the interests* of *the creditors, solely for their benefit. This being so, there is no reason why the costs* of *the review application or* of *the appeal should be borne by the company in liquidation."*

Suffice to state that I am in respectful agreement with the above quoted dictum.

To sum up, I am satisfied, on the admitted evidence that the respondent properly considered all the facts put before him by the applicant. I am furthermore satisfied, given the circumstances of

Heard on the: 30 May 2007
For the Applicant: F. H Terblanche SC correct in finding that the

Instructed by: Van Zyl Le Roux & Hurter ING
applicant failed to prove "good cause" to justify an increase of his
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remuneration and in refusing to approve such an increase of his **h/v Andries & Schoeman Strate.**
remuneration.

For the Respondent: B Neukircher SC

Strydom & Bredenkamp ING

In the result, and for **Groenkloof Forum Kantoor Park** e, the following

order is made: **George Storrar Rylaan 57**

JUDGEMENT DELIVERED:

"The application for review is dismissed with costs, including the costs consequent upon the employment of senior counsel, such costs to be paid by the applicant in his personal capacity and on the attorney and client scale"

L O BOSIELO

JUDGE OF THE HIGH COURT