



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 30123/2015

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... DATE SIGNATURE

In the matter between:

LUDWIG WILHELM DIENER NO

Applicant

and

THE MINISTER OF JUSTICE

First Respondent

THE MASTER OF THE HIGH COURT

Second Respondent

CLOETE MURRAY NO

Third Respondent

WINIFRED FRANCES HARMS NO

Fourth Respondent

CHRISTIAAN FREDERICK DE WET NO

Fifth Respondent

J U D G M E N T

DEWRANCE AJ

- [1] The applicant seeks an order reviewing and setting aside the decision of the Master of the High Court of this Division ("the Master") in terms

whereof the Master determined certain questions (“the impugned decisions”) effectively against the applicant. The Master did this in terms of section 382 of the Companies Act 61 of 1973 (“the Old Companies Act”), after a dispute arose between the third, fourth and fifth defendants.

[2] The impugned decisions relate to treatment of the applicant’s remuneration, as business rescue practitioner (“BRP”) and certain expenses incurred during the business rescue proceedings.

[3] The applicant seeks the following relief:

[3.1] that the decision by the second respondent (“the Master”) to accept the first and final liquidation, distribution and contribution account be reviewed and set aside;

[3.2] that this court provides direction regarding the manner in which the first and final liquidation, distribution and contribution account should provide for:

3.2.1. the costs of a business rescue practitioner engaged in lawful business rescue proceedings;

3.2.2. the costs of service providers who provided services to a lawfully appointed business rescue practitioner in finalising business rescue proceedings;

3.2.3. the costs of service providers who provided services to the close corporation after the commencement of the business rescue proceedings;

[3.3] in the alternative to paragraph 3.2 above, the first and final liquidation, distribution and contribution account for JD Bester Labour Brokers CC (in liquidation) be amended to make provision for the remuneration and expenses of the applicant in the business rescue proceedings of JD Bester Labour Brokers CC, which include the expenses of Cawood Attorneys for services rendered to the applicant and JD Bester Labour Brokers CC in the business rescue proceedings, to be payable in order of preference after the costs of liquidation and before the claims of any secured or unsecured creditors.

BACKGROUND

[4] The applicant is the erstwhile BRP of JD Bester Labour Brokers CC (in liquidation) (*"the close corporation"*).

[5] The close corporation commenced business rescue proceedings when a resolution to that effect was adopted by the members of the close corporation and filed with the Companies and Intellectual Property Commission (*"the CIPC"*) on 13 June 2012. The CIPC appointed the applicant as the close corporation's BRP on 20 June 2012. The business rescue proceedings ended on 27 August 2012.

when this court terminated it and placed the close corporation under liquidation.

[6] Prior to the applicant's appointment but after the business rescue proceedings commenced, the existing management of the close corporation instructed Cawood Attorneys ("the attorneys") to urgently approach this court to obtain an order staying the sale in execution of an immovable property belonging to the close corporation ("*the urgent application*"). The sale in execution was held at the instance of FirstRand Bank Limited in whose favour a mortgage bond was registered. The sale in execution was scheduled to be held on 15 June 2014. This court granted the order on 14 June 2012 but did not make any pronouncements as to the issue of costs.

[7] Approximately two months after the business rescue proceedings commenced, the BRP, during August 2012, determined that the close corporation could not be rescued and approached the new attorneys to launch an application in terms of section 141(2)(a) of the Companies Act, 2008 ("the New Companies Act") to terminate the business rescue proceedings and to place the close corporation under liquidation ("liquidation application"). On 27 August 2012, this court ordered that the business rescue proceedings be terminated and that costs of the application be costs in the liquidation of the close corporation.

[8] Pursuant to the liquidation order being granted, the Master appointed the third, fourth and fifth respondents as the joint liquidators of the close corporation.

[9] The applicant provided his account for his fees and the bill of costs of the attorneys to the joint liquidators for payment. Both his fees and those of the attorneys remain outstanding.

[10] The liquidators demanded that the attorney's bill of costs for the liquidation application be taxed against them, in their capacities as provisional liquidators. The account was taxed on a party and party scale.

[11] A dispute arose amongst the liquidators as to the treatment of BRPs and liquidators' fees. The third respondent approached the Master in order to resolve the dispute in terms of section 382 of the Old Companies Act. Three issues were referred to the Master.

[12] Section 382 of the Old Companies Act provides that:

"Plurality of Liquidators, Liability and Disagreement -

- (1) *When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.*
- (2) *Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the question in*

issue or give directions as to the procedure to be followed for the determination thereof. (emphasis added)

THE IMPUGNED DECISION

[13] The third respondent ("Murray") prepared a first and final liquidation and distribution account ("L&D") reflecting "a true and correct account of [the liquidator's] administration" of the close corporation. The account contains, *inter alia*, an encumbered asset account, free residue account and a contribution account.

[14] The encumbered asset account reflects that, after the sale of the immovable property (which was the subject of security held by First National Bank), certain costs were deducted from the purchase price. These were the Master's fee, bond of security premium, the liquidator's fees, income tax on post liquidation income, the auctioneer's commission and VAT. The balance of the purchase price was awarded to First National Bank.

[15] The free residue account reflects that there was no free residue at all and that there was a contribution payable. The free residue account reflects that the attorney's claim for the liquidation application should be paid from this account. It does not reflect the claim for the urgent application.

[16] The contribution account reflects, *inter alia*, two claims of the attorneys and that a contribution is payable by them. The

remuneration of the applicant is not reflected at all. I will return to this aspect later as the whole dispute turns on the framing of the L&D.

[17] The Master addressed three issues, namely:

[17.1] should the taxed bill of costs of the attorneys be included in the liquidation, distribution and contribution account ("L&D") as an administration charge in the encumbered asset account or is it a charge against the free residue? ("the first issue");

[17.2] should the contribution be levied against concurrent creditors and, if so, is it only against them or are secured creditors also liable for contribution? ("the second issue"); an

[17.3] the costs of the applicant attending to the business rescue of the corporation before liquidation is not reflected as a charge in the L&D. No claim was proved for these costs. Was it necessary? ("the third issue").

[18] As will be seen hereunder, the Master determined the aforementioned issues in favour of the third respondent.

[19] For the purposes of this judgment, it is not necessary to deal with the second issue as the relief the applicant claims is not directed at whether contributions are payable are not but rather what the effect is of the applicant's fees and those of the attorneys during liquidation.

FIRST ISSUE

[20] The third respondent argued that the costs of the two attorneys is a charge upon the free residue account. For this proposition, the third respondent relied on section 97(2)(c) of the Insolvency Act, 1936, which provides as follows:

"97. Costs of sequestration

(1) *Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in subsection (1) of section 80-9.*

(2) *The costs of sequestration shall rank according to the following order of priority -*

- (a) ...
- (b) ...
- (c) *the following costs which shall rank pari passu and abate in equal proportions if necessary, that is to say: the taxed costs of sequestration (as defined in subsection (3)), the fee mentioned in section 16(5), the remuneration of the curator bonis and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, insofar as they are not payable by a particular creditor in terms of section 89(1), any expenses incurred by the Master or by a presiding officer in terms of section 53(2) and the salary or wages of any person who was engaged by the curator bonis or the trustee in connection with the administration of the insolvent estate.*

(3) ...” (emphasis added)

[21] Accordingly, the third respondent argued that, by virtue of the provisions of section 97(2)(c) of the Insolvency Act, the attorneys’ fees can never be a charge in the encumbered asset account.

[22] The third respondent further argued that section 97 “*clearly stipulates that the costs of liquidation will be paid by the free residue available after payment of funeral and death bed expenses, as contemplated by section 96 of the Insolvency Act*”.

[23] The remaining joint liquidators argued that, because this court ordered that the costs of the winding up of the close corporation be costs in the administration of the estate, the necessary implication is that it refers to the “*whole winding up*”. Since there are not sufficient funds in the free residue to pay the taxed bill of costs, section 97 of the Insolvency Act is not applicable.

THIRD ISSUE

[24] The draft L&D provided to the Master by the third respondent did not reflect any charges being payable to the business rescue practitioner. The third respondent contended that the business rescue practitioner did not submit or prove a claim for his charges in the estate. He further contends that the costs of the business rescue practitioner do not fall within the definition of section 97 (the costs of administration)

and must therefore be a claim in the estate. He further argues that the costs of the business rescue practitioner were not catered for in the liquidation application.

[25] The third respondent, in essence, argued that *“to expect of the business rescue practitioner to be entitled to payment of his account, without proving a claim, would in effect mean that the creditor gets paid in respect of an ‘unproven claim’ which is against the entire structure of the Insolvency Act”*.

[26] The remaining joint liquidators argued that, in terms of section 135(4) of the new Companies Act, the business rescue practitioner is entitled to demand payment of his costs *“as a first charge after the costs of liquidation were paid”*.

MASTER’S RULING

[27] On 12 December 2013, the Master ruled on the dispute. As indicated earlier, the ruling was in favour of the third respondent.

[28] In respect of the first issue, the Master was of the view that section 97 of the Insolvency Act was applicable and that in terms of this section the costs of liquidation will be paid from the free residue available after payment of funeral and death bed expenses. The *“source of funds for payment of taxed costs is nothing other than the free residue*

and that section 89(1) makes it apparent what charges may be deducted against securities”.

[29] In respect of the third issue, the Master noted that no claim was proven against the estate for these costs. The Master reasoned that sections 143(4) and 135(4) of the new Companies Act dealt specifically with the issue of costs of the business rescue practitioner. The Master further argued that all these subsections provide for preference in favour of the business rescue practitioner before the claims of all other secured or unsecured creditors and that not one of these sections provides that the costs of the business rescue practitioner shall be deemed as costs of administration in the insolvent estate. The Master further argued that section 97 of the Insolvency Act provides which costs may be deducted as costs of the administration and that, therefore, the costs of the business rescue practitioner should have been proven.

EVENTS AFTER THE MASTER'S RULING

[30] In a letter dated 15 July 2014, the attorneys addressed a letter to the Master on behalf of the BRP and themselves wherein they objected to the L&D account. I do not intend discussing the contents of the objection.

[31] The Master dismissed the BRP and attorneys' objection. The Master noted that he “*ruled on this matter on 12 December 2013 and all*

interested parties were duly notified. The Master further indicated that his ruling, made more than 12 months' earlier, stands because it had not been set aside by way of review.

- [32] The Master further indicated that he had no other option but to proceed to confirm the L&D since the liquidators had successfully complied with the pre-confirmation requirements.

REVIEW APPLICATION

- [33] The applicant launched this application on 23 June 2015 reviewing and setting aside the decision of the Master to "accept" the L&D.

- [34] The applicant contends that the expenses associated with the bringing of the urgent application are premised on an attorney and client relationship between the attorneys and the close corporation. He further contends that "*these services and expenses represent expenses in business rescue as defined in Section 143 of the new Companies Act or at the very least, ... represent unsecured post-commencement finance as defined in section 135 of the new Companies Act.*"

- [35] A further reason for contending that these costs (i.e. the costs for the urgent application) must be regarded "*as expenses in the business rescue proceedings of the close corporation*" is that the attorney's account only became due and payable after his appointment as the

BRP and after the close corporation had been placed under supervision as defined in Chapter 6 of the New Companies Act.

[36] With regard to the liquidation application the applicant takes issue with the liquidators' demand to have the bill of costs taxed as he contends that the attorney's fees represent an account based on an attorney-client relationship that existed between him, in his capacity as BRP, and the attorney. Therefore, the account cannot be subjected to taxation against the joint liquidators on party and party scale. It can only be the subject, so he argues, of taxation against him in his capacity as the duly appointed BRP on an attorney and client scale.

[37] The applicant further contends that the date of liquidation of the close corporation is 13 June 2012, the date on which the business rescue proceedings commenced, and therefore the services rendered by the attorneys to the close corporation and him are services rendered post commencement of the liquidation proceedings of the close corporation.

[38] The applicant argues that the account for services rendered during the business rescue proceedings should be recorded as part of the expenses incurred by him and must be considered and paid in accordance with the provisions of section 135, 143, read with section 150 of the New Companies Act, prior to any claims by other creditors, secured or otherwise. He further argues that these accounts

“represent ‘claims’ of a super preferent nature and should be dealt with as such in any liquidation and distribution account”.

HAS THE APPLICANT JOINED ALL THE INTERESTED PARTIES

[39] As indicated earlier, the close corporation owns one encumbered asset over which FirstRand Bank holds a mortgage bond.

[40] The relief the applicant seeks is his claim for his remuneration and the expenses incurred in the employment of the attorneys be paid before any dividend is awarded to First National Bank.

[41] Therefore, in my view, First National Bank has a direct and substantial interest in the outcome of this application and ought to be joined as a respondent in these proceedings.

[42] In the normal course, I would have ordered that the matter be postponed *sine die* in order for the applicant to join First National Bank. However, because of the view I take, the issue of joinder is of no consequence.

LEGISLATIVE CONTEXT

[43] The close corporation was incorporated in terms of the Close Corporations Act, Act 69 of 1994. Both the old Companies Act (Act 61 of 1973) and the new Companies Act (Act 71 of 2008) are

applicable to close corporations (see section 66(1) of the Close Corporations Act; Schedule 5 of the new Companies Act). Section 66(1) provides that:

“66. *Application of Companies Act, 1973 -*

- (1) *The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.”*

[44] Section 66(1A) makes the provisions relating to business rescue proceedings in the new Companies Act applicable to close corporations. It provides that:

“66. (1A) *The provisions of Chapter 6 of the Companies Act, read with the changes required by the context, apply to a corporation, but any reference in that Chapter to -*

- (a) *a company must be regarded as a reference to a corporation; or*
- (b) *a shareholder of a company, or the holder of securities issued by a company, must be read as a reference to a member of a corporation.*

[45] Section 66(2) of the Close Corporations Act renders the provisions of the Insolvency Act, Act 24 of 1936 (“the Insolvency Act”) applicable to close corporations and provides as follows:¹

“66 (2) *For the purposes of subsection (1) -*

¹ See s339 of the old Companies Act

(a) any reference in a relevant provision of the Companies Act, and in any provision of the Insolvency Act, 1936 (Act No. 24 of 1936), made applicable by any such provision -

(i) to a company, shall be construed as a reference to a corporation;

(ii) ...;

(iii) ...

(iv) ...

(v) ...

(vi) ...

(vii) ...

(viii) ...

(ix) to the Companies Act or the regulations made thereunder, or to any provision thereof, shall be construed as including a reference to this Act or the regulations made thereunder, or to any corresponding provision thereof, as the case may be;

(x) to an insolvent estate, shall be construed as a reference to a corporation;

(xi) to a provisional liquidator of a company, or to a liquidator of a company or a trustee of an insolvent estate, shall be construed as a reference to a provisional liquidator and to a liquidator of a corporation, respectively;

(xii) ...

(xiii) ...

(xiv) ...

(xv) ...

(b) ...

(c) ...⁹

[46] Section 143 of the New Companies Act regulates the remuneration of BRP's and expenses incurred during business rescue proceedings. It provides as follows:

"143. Remuneration of practitioner -

(1) *The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).*

(2) ...

(3) ...

(4) ...

(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(6) *The minister may make regulations prescribing a tariff of fees and expenses for the purposes of subsection (1)."* (emphasis added)

[47] The term "remuneration" of the BRP refers to the amount he or she is entitled to be paid in accordance with the prescribed tariff in terms of Regulation 128(1). In terms of Regulation 128(3), the term

"expenses" means the actual costs of any disbursement or expenses incurred by the business rescue practitioner to the extent reasonably necessary to carry out his functions, and to facilitate the conduct of the company's business rescue proceedings.

[48] Section 135(4) of the New Companies Act provides that, if business rescue proceedings are superseded by a liquidation, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation.

[49] The preferences conferred in terms of section 135 are the following:

[49.1] first the practitioner's remuneration, expenses and other costs (in accordance with section 143) and other claims arising out of the costs of business rescue proceedings will be paid;

[49.2] secondly, all claims for post-commencement financing obligations that are related to employment will be paid;

[49.3] thirdly, all post-commencement finance (unrelated to employment) will be paid; and

[49.4] fourthly, all unsecured claims against the company will be paid.²

² Cassim *et al*, *Contemporary Law*, Juta p 797 - 798 holds the view that the preference conferred by section 135 would remain in force in the event that the business rescue proceedings are superseded by a liquidation order except to the extent of claims arising

HAS THE MASTER ERRED

[50] I agree with the reasoning of the Master and cannot find any fault therewith. However, I wish to add the following.

[51] In practice, the L&D is divided into two sections - the encumbered asset section and the free residue section. The former deals with the assets which are held as security, i.e. subject to special mortgage, legal hypothec, pledge or right of retention. It sets out the proceeds of each asset (or group of assets) and the claims and other charges to which that asset (or group) is subject. It is common practice to place under a separate heading, or draw up a separate account, for each encumbered asset (or group of assets) and the items chargeable against it. For the purposes of this judgment, it is not necessary to deal with the free residue section because the relief which the applicant seeks has no effect on it, but only the encumbrance section.

[52] In terms of section 89(1) of the Insolvency Act, 1934 ("the Insolvency Act"), the proceeds of each encumbered asset must be applied to the payment of certain costs before payment of the claims secured by the asset. These costs are:

[52.1] the costs of maintaining, conserving, and realising the assets
in question, for example, the costs of a night-watchman,

out of costs of liquidation. The effect is that preference, so it is argued, is still given even in the event of liquidation to unpaid, post rescue salaries and employment-related payments, as well as other post-commencement finance

auctioneer's commission, a sectional title levy, and water, sewerage and other charges paid to a local authority to obtain a clearance certificate for registration of transfer;

[52.2] the trustee's remuneration in respect of the asset;

[52.3] a proportionate share of the costs incurred by the trustee in giving security;

[52.4] a proportionate share of the Master's fees;

[52.5] if the asset is immovable property, any tax which is, or will become, due on it:

- for a period not exceeding two years immediately preceding the date of liquidation; and
- for the period from the date of sequestration to the date of transfer of the property;

together with any interest or penalty which may be due on the tax.

[53] Where the proceeds of a secured asset are insufficient to pay the initial cost mentioned *supra*, the deficiency must be paid by the

creditors whose claims are secured by the asset, each being liable for a *pro rata* amount.³

[54] After payment of the costs, the balance of the proceeds of the encumbered asset, including any interest earned on the price obtained for the asset,⁴ must be applied to the payment of all claims secured by the asset, in the proper order of preference.⁵ Interest due on a claim for a period not exceeding two years immediately preceding the date of sequestration is secured as if it were a part of the capital sum.⁶ Interest from date of sequestration to date of payment is also secured.⁷

[55] The grounds of review advanced by the appellant in this court are whether the remuneration of the BRP and the expenses incurred during business rescue proceedings should be regarded as a super preferent claim and be paid before any secured creditor, i.e. FNB.

[56] These issues were mainly dealt with by the Master, who determined that:

[56.1] the costs of liquidation are dealt with in section 97 of the Insolvency Act. This section clearly provides that the costs of liquidation must be paid from the free residue available after

³ See section 89(1) of the Insolvency Act

⁴ See *Singer NO v The Master and Another* 1996 (2) SA 133 (A)

⁵ See section 91(1) of the Insolvency Act

⁶ See section 89(3) of the Insolvency Act

⁷ See section 95(1) of the Insolvency Act

payment of the funeral and death-bed expenses in terms of section 96;

[56.2] because the appellant did not prove a claim in the close corporation, he was not entitled to any remuneration.

[57] Section 135(4) provides that if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of section 135 will remain in force, except to the extent of any claims arising out of the costs of liquidation.

[58] Henochsberg on the new Companies Act, 2008 is of the view that this this preference is retained if business rescue proceedings are superseded by a winding up order, but ranks behind the costs of liquidation.⁸

[59] The costs of liquidation are regulated by section 97 of the Insolvency Act. It provides as follows:

"97. Costs of sequestration

(1) *Thereafter any balance of the free residue shall be applied in defraying the costs of the sequestration of the estate in question with the exception of the costs mentioned in subsection (1) of section eighty-nine.*

(2) *The costs of the sequestration shall rank according to the following order of priority -*

- (a) *the sheriff's charges incurred since the sequestration;*
- (b) *fees payable to the Master in connection with the sequestration;*
- (c) *the following costs which shall rank pari passu and abate in equal proportions if necessary, that is to say: the taxed costs of sequestration (as defined in subsection (3)), the fee mentioned in section 16(5), the remuneration of the curator bonis and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of section 89(1), any expenses incurred by the Master or by a presiding officer in terms of section 153(2) and the salary or wages of any person who was engaged by the curator bonis or the trustee in connection with the administration of the insolvent estate.*

- (3) *In paragraph (c) of subsection (2) the expression '**taxed costs of sequestration**' means the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included."*

[60] In my view, section 135(4) of the Companies Act must be read with section 97 of the Insolvency Act. That being the case, the remuneration of the BRP and the expenses incurred during business rescue proceedings, to the extent that it has not been paid during business proceedings and during liquidation, can only be paid after the costs set out in section 97 have been paid.

[61] This finding is dispositive of the entire application.

[62] Accordingly, the application is dismissed. There shall be no order as to costs.



DEWRANCE, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA