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

18/1/2017

Case Number: 55163/2016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

18.1.2017

DATE

SIGNATURE

In the matter between:

JOHAN FRANCOIS ENGELBRECHT N.O.	First Applicant
DEON MARIUS BOTHA N.O.	Second Applicant
ALLAN DAVID PELLOW N.O.	Third Applicant
BAREND PETERSEN N.O.	Fourth Applicant

and

THE MASTER OF THE HIGH COURT, PRETORIA	Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is an application in terms of section 407(4)(a) of the now repealed Companies Act, 61 of 1973 ("The Old Companies Act") for the setting aside of a directive issued by the respondent on 4 March 2016 in respect of the applicants' remuneration as liquidators in the winding-up of a company known as Pamodzi Orkney ("Pamodzi).

[2] In terms of the directive, the applicants' fees in the Encumbered Asset Account No. 1 are taxed at 3% in accordance with Item 2 of Tariff B of the Insolvency Act, 24 of 1936.

[3] In the event that the applicants succeed and the directive is set aside, the applicants seek an order directing the respondent to confirm the account on the basis that the applicants' fees should be taxed at 10% in terms of Item 1 of Tariff.

[4] Section 407(4)(a) of the Companies Act provides for the relief claimed by the applicants and reads as follows:

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

[5] The issues that arise herein, is therefore:

i. whether the Master applied the correct tariff in respect of the applicants' remuneration; and

ii. if not, should the Court grant the order sought by the applicants in respect of the 10% tariff to be applied.

[6] Prior to addressing the issues in dispute, a synopsis of the facts underlying the relief claimed is apposite.

FACTUAL MATRIX

[7] Pamodzi was provisionally wound-up on 20 March 2009 and the applicants were appointed as liquidators in the winding up of Pamodzi.

[8] Prior to its winding-up, Pamodzi operated a gold mine in Orkney and had a work force of approximately 6 000 employees.

[9] Shortly before the granting of the provisional winding-up order, Pamodzi was placed under care and maintenance which resulted in the mine (inclusive of all its assets used in connection with the mining operations) being capable of operating fully.

[10] According to the applicants, the individual assets that were used in the mining operations had very little value and as a result, the applicants opted to keep the mine under care and maintenance.

[11] In the opinion of the applicants, the continued operation of the mining activities would enable them to sell the business as a going concern, which would yield a sizeable return for creditors.

[12] During the period of March 2009 to August 2011, the applicants endeavoured to find a purchaser for the business of Pamodzi.

[13] Eventually and on 1 August 2011, the applicants succeeded in concluding a sale agreement ("the sale agreement") with China African Precious Metals (Pty) Ltd ("the purchase") for a purchase consideration of R 150 000 000, 00 (excluding VAT).

[14] For present purposes, a description of the assets that were sold is of relevance.

[15] The *"Sale assets"* is defined in clause 2.2.50 of the agreement as follows:

"2.2.50 Means all the assets owned by the Seller and used in or in connection with the Orkney gold mine, being

2.2.50.1 the buildings;

2.2.50.2 the gold work-progress;

2.2.50.3 the equipment and infrastructure;

2.2.50.4 the fixed assets;

2.2.50.5 the immovable property;

2.2.50.6 the intellectual property;

2.2.50.7 the new order mining rights;

2.2.50.8 the shafts;

2.2.50.9 the surface assets;

2.2.50.10 the surface right permits;

2.2.50.11 the stock;

2.2.50.12 all information and technical data relating to the Orkney gold mine area, including geology reports, drill cores and the like;

2.2.50.13 all ore stockpiles; and

2.2.50.14 all prepaid expenses and deposits made in connection with the Orkney gold mine."

[16] According to the applicants, the immovable properties referred to in clause 2.2.50.5 have little value if not utilised for mining activities. The properties are approximately 131 hectares in extent and virtually barren land. Save for the fact that the immovable properties have little value if not utilised for mining activities, Pamodzi also had a rehabilitation liability for the environmental damage caused by the mining activities conducted on the land.

[17] The rehabilitation liability in excess of R 100 000 000, 00 extinguished any value attached to the immovable properties and in order to facilitate the sale of the business as a going concern, the purchaser agreed to be liable for the rehabilitation of the immovable properties.

[18] In the result, the applicants content that the immovable properties were not an asset that carried any positive inherent value or even a market value in the context of the prevailing circumstances.

[19] In the First Liquidation and Distribution account lodged with the respondent during or about October 2015, the total gross realisation of the assets of Pamodzi amounted to R 222 356 112, 17 and consisted of two amounts; one in respect of the Free Residue Account and the other in respect of the Encumbered Asset Account No. 1. The aforesaid Asset Account refers to income received in respect of the immovable properties as being

"PROCEEDS OF MINE" and *"INTEREST RECEIVED ON PURCHASE PRICE".*

[20] Although the account only refers to the immovable properties, it is clear from the facts *supra* and the reference to *"proceeds of mine"* as well as *"purchase price"* that the proceeds reflected therein emanates from the assets sold in terms of the sale agreement. The respondent did not dispute the fact that the proceeds emanated from a conglomerate of movable and immovable property as well as other rights and interests.

[21] In the Asset Account, the applicants' remuneration is reflected as *"10% ON PROCEEDS-PROPERTY/ASSETS/INTEREST"* .

[22] The respondent did not agree with the applicant's claim and in a letter dated 14 December 2015, the respondent stated the following:

"Kindly be advised that after reviewing the facts at my disposal that the liquidators fee of 10% will be taxed to 3% in accordance with Tariff B of the Insolvency Act."

[23] The respondent persisted in its view and the directive, that forms the subject matter of this application, was subsequently issued.

LEGISLATIVE FRAMEWORK

[24] In terms of the provisions of section 384 of the Old Companies Act, the applicants are entitled to a reasonable remuneration to be taxed by the respondent in accordance with the prescribed tariff of remuneration.

[25] In terms of regulation 24 of the regulations for the winding-up and judicial management of companies, the applicants are entitled to the remuneration contained in annexure "CM104" thereto.

[26] Annexure "CM104", in turn, stipulates that the applicants are entitled to the tariff of remuneration for trustees of insolvent estates for the time being. The Insolvency Act, 24 of 1936 and more pertinently tariff B in the second schedule to the Act, prescribes the remuneration of trustees for insolvent estates.

[27] Tariff B provides as follows:

"1.	*On the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income.*	*10 per cent*
2.	*On the gross proceeds of immovable property, shares or similar security sold, life insurance*	*3 per cent*

policies and mortgage bonds recovered and the balance recovered in respect of immovable property sold prior to sequestration.

3. *On –*

(i)	*money found in the estate;*	*1 per cent*
(ii)	*the gross proceeds of cheques and postal orders payable to the insolvent, found in the estate; and*	

4. *On sales by the trustee in carrying on the business of the insolvent, or any part thereof, in terms of section 80.* — *6 per cent*

5. *On the amount distributed in terms of a composition, excluding any amount on which a remuneration is payable under any other item of this tariff.* — *2 per cent*

6. *On the value at which movable property in respect of which a creditor has a preferent right, has been taken over by such creditor."* — *5 per cent*

[28] Having regard to the legislative framework, it appears that the applicants consider the proceeds from the sale agreement to fall within the ambit of Item 1 of tariff B, whereas the respondent deem the proceeds to fall under the second item, i.e. gross proceeds from immovable property.

[29] It is, furthermore, clear that Tariff B does not refer to a situation such as the one under consideration.

SETTING ASIDE OF DIRECTIVE

[30] Mr Cilliers SC, appearing with Mr Els for the applicants, submitted that the sale assets do not only consists of immovable property and consequently the respondent was clearly wrong, in applying the 3 % tariff provided for in Item 2 of Tariff B.

[31] It is not clear from the papers on what basis the respondent deemed the sale of all the assets to fall within Item 2 of Tariff B. It clearly does not and Mr Louw SC, appearing with Ms Seopela for the respondent, quite correctly, conceded this point during argument.

[32] In the premises, the applicants are entitled to an order setting aside the directive issued by the respondent on 4 March 2016 and such an order will follow.

[33] The further question that, however, arises is whether the applicants are entitled to an order directing the respondent to tax their fees at 10%.

APPLICABLE TARIFF

[34] Mr Louw SC submitted that Item 1 of Tariff B is not applicable to the gross proceeds of the sale because immovable property is not one of the items mentioned therein.

[35] Mr Cilliers SC did not agree. He submitted that the proceeds of the sale agreement falls within the scope of *"other income"* referred to in Item 1 of Tariff B.

[36] In support for this contention, Mr Cillies SC relied on the interpretation given to "other income" in *Elliot Brother (East London) (Pty) Ltd v The Master and Another NO* 1988 (4) SA 183 E ("Elliot matter").

[37] The bone of contention in the Elliot matter was the percentage applicable in respect of income received from Companies of which the insovent was a director and shareholder. The facts are summarised at 186 H – I, as follows:

"Butler was apparently a shareholder in three private companies named..... He had amounts owing to him by way of a loan account in each of the three companies. All three companies were placed in voluntary liquidation, and in due course the liquidator of the three companies paid various amounts to second respondent representing dividends payable to Butler by way of director's fees, repayment of his loan accounts and interest thereon, and the value of his shareholding."

[38] Having had regard to the various items in Tariff B, Mullins J concluded as follows at 190 A –C:

"I am, moreover, of the view that the collections in question can be categorised under tariff B , but under item 1 thereof. Item 1 includes, inter alia, 'the gross amount collected under promissory notes or book debts, or as rent or other income'. Even if 'other income' must be interpreted 'ejusdem generis', the categories which precede those words cover such a wide spectrum from promissory notes (a liquid document), book debts (which connotes amounts owing in the course of the insolvent's business), rent (which is a category on its own) and interest (which could cover a vast range of amounts owing), that it is in my view necessary to interpret 'other income' very broadly.

The amounts in question in the present case are, in my view, of the very type of asset of the insolvent envisaged by the term 'other income'. They are akin to 'book debts' in the sense that they are amounts owing to the insolvent by a third party. Books debts have been defined as

'debts connected with and part of the insolvent's trade, which are either entered, or should normally be entered, in its books of account."

See Rennie's case at 609C. Being a loan, they are akin to promissory notes, in the sense of money advanced to the insolvent and recoverable by him. I can certainly envisage no less difficulty in collecting the amount due on a promissory than that due on a loan account with a private company."

[39] The facts in the *Elliot* matter differ substantially from the facts under consideration.

[40] If one has regard to the assets forming the subject matter of the sale agreement, the following assets appears *prima facie* to attach to the immovable properties:

i. the buildings;

ii. the gold work-in-progress;

iii. the fixed assets;

iv. the shafts;

v. the surface assets;

vi. the surface right permits;

vii. all information and technical data relating to the Orkney gold mine area, including geology reports, drill cores and the like.

[41] Even if some of the assets do not attach to the immovable properties, it is clear that the sale assets consist of both immovable and movable property. The immovable properties might have had little or no value if the mining operations could not continue, but conversely without the immovable properties there would be no business to sell.

[42] An immovable property capable of being mined, surely has significantly more value than barren land.

[43] The efforts of the applicants in retaining the mining rights and operations are no doubt laudable, but do not change the nature of the assets that were sold.

[44] Mr Louw SC referred to the matter of *Griffiths v Foley's Trustee* 1910 – 17 GWL 270, in which a hotel was sold by public auction during the winding-up of an insolvent estate as a going concern. The court held that it in order to arrive at the amount of the trustee's commission and charges it was necessary to make an assessment of how much of the purchase price of the hotel as a going concern was for the immovable property and how much for the movable contents of the hotel.

[45] In the heads of argument filed on behalf of the applicants, the approach in the *Griffiths* matter, *supra,* is criticised as follows:

> *"The proceeds of the indivisible transaction must ex post fcto be dissected in a stilted process to force the individual companents of the merx into one or the other of the categories provided for in Table B* (sic) *and then to apply the differentiated prescribed percentages to the individual components that forms part of one indivisible conglomerate of assets and rights and claims. This process would then demand the placing of ex post facto artificial values on components of the merx that was never agreed to prior to the sale and never valued prior to the sale. The components of the merx in the present includes statutory rights and claims that cannot be divorced from the whole of the going concern sold and the movables and immovable are so much intertwined with each other and the rights and claims that they can hardly be said to have any ascertainable independent value."*

[46] If the sale assets were not defined in the sale agreement, the applicants' criticism of the approached followed in the *Griffiths* matter might have been justified. The fact that it would be a difficult exercise to attach value to the immovable and movable assets, does not mean that the sale assets do not fall in distinct categories in Tariff B.

[47] In the premises, the applicants did not make out a case for the further relief claimed.

[48] Mr Louw SC suggested a detailed order, entailing *inter alia* the determination of time limits in respect of the valuation of the assets. I am not prepared to fetter with the Master's discretion in determining a reasonable remuneration in the prevailing circumstances. The Master has a discretion in determining a reasonable remuneration and is in this regard *inter alia* guided by the fees prescribed in Tariff B.

COSTS

[49] Mr Louw SC advanced various reasons to justify a cost order against the applicants. Suffice to say that I am of the view that the applicants were substantially successful in the relief they sought, I do not deem it necessary to deal with each and every reason advanced on behalf of the respondent in justifying a cost order against the applicants.

ORDER

In the premises, I make the following order:

1. The directive of the respondent, dated 4 March 2016, that the liquidator's fee in the Encumbered Asset Account No. 1 is taxed as 3% in accordance with tariff B of the Insolvency Act, 24 of 1936, is set aside.
2. The matter is referred back to the respondent to determine a reasonable remuneration, in terms of the applicable legislation, in respect of the work done by the applicants as liquidators in the winding-up of Pamodzi Orkney.
3. The respondent is ordered to pay the costs of the application, which costs include the costs consequent upon the employment of two counsels.

[redacted]

N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Plaintiff	: Advocate P G Celliers SC
	and
	: Advocate A P J Els
Instructed by	: Schabort & Walker Attorneys
Counsel for the Defendant	: Advocate A J Louw SC
	and
	: Advocate T G Seopela
Instructed by :	State Attorney