THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 643/07

JOHANNES FREDERICK KLOPPER N.O. Appellant

and

THE MASTER OF THE HIGH COURT Respondent

Neutral citation: *Klopper v The Master of the High Court* (643/07) [2008] ZASCA 155 (27 November 2008)

CORAM: Cameron, Mthiyane JJA and Mhlantla AJA

HEARD: 6 November 2008

DELIVERED: 27 November 2008

CORRECTED:

SUMMARY: Insolvency Act 24 of 1936 ─ Trustee's remuneration ─ s 63(1) ─ court upheld Master's refusal to allow an increase in remuneration in respect of the administration of the insolvent's estate.

ORDER

On appeal from: High Court, Pretoria (Bosielo J sitting as court of first instance).

The appeal is dismissed with costs, such costs to be borne by the appellant in his personal capacity.

JUDGMENT

MHLANTLA AJA (Cameron and Mthiyane JJA concurring):

[1] This is an appeal with the leave of the court below against an order of the Pretoria High Court (Bosielo J) dismissing an application for the review of the Master's (the respondent's) decision refusing the trustee's (the appellant's) request for an increased fee in terms of s 63(1) of the Insolvency Act 24 of 1936 (the Act).

[2] The issue in this appeal is whether the appellant is entitled to increased remuneration in respect of the administration of an insolvent estate and whether the respondent's refusal to allow the appellant increased remuneration should have been reviewed and set aside by the court below.[1]

[3] The appellant is an insolvency practitioner and a director of Independent Trustees (Pty) Ltd. According to the appellant the primary objective of the company is the administration of insolvent estates. The

[1] Accessible as *Klopper NO v Master of the High Court* (13493/06) [2007] ZAGPHC 139 (3 August 2007).

respondent is the Master of the High Court, who amongst others, is responsible for the insolvent estates.

[4] The remuneration of a trustee or *curator bonis* is governed by s 63 (1) of the Act which reads as follows:

'(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 of or delay in the discharge of his duties or on account of any improper performance of his duties.'

[5] The Master is in terms of s 63(1) obliged to determine 'reasonable remuneration' for the trustee or liquidator against the set tariff. Once the Master has determined what constitutes a reasonable remuneration depending on the circumstances of the matter, he or she may exercise his or her discretion either to increase or reduce the fee. The reasonable remuneration marks a point from which he or she departs. There must of course, be good cause warranting the departure.

[6] The facts of this case are common cause. On 24 November 2003 the appellant was appointed as a trustee of the insolvent estate of Billy Oosthuizen. The administration of this estate was fairly simple in that it consisted of only one major asset being an immovable property which was sold by way of public auction for R180 000. ABSA Bank was the only secured creditor. It proved a claim in the estate which was admitted in the amount of R217 976.39. The creditor was obliged to pay a contribution of more than R21 000.

[7] Pursuant to the performance of his duties as trustee, the appellant prepared an amended First and Final Liquidation, Distribution and Contribution account, in which he made provision for, inter alia, the trustee's fees in the amount of R6 752.51 calculated in accordance with Tariff B of Schedule 2 to the Act: 3 per cent of the gross sum realised (R5 000), 10 per cent on occupational rental (R389.68) and interest (R133.50) plus value added tax (VAT). In addition the appellant applied to the respondent for an increased fee of R8 687.75 in terms of s 63(1) of the Act on the basis that he and his staff had worked for approximately 29 hours on the administration of the estate. He contended that although the administration was not of a complex nature, the actual time spent in the administration of the estate should have been taken into account in determining a reasonable remuneration. He accordingly sought an increase to a total sum of R15 440.26.

[8] The respondent refused to increase the appellant's remuneration contending that the time spent on the estate was not the sole determining factor when deciding whether or not to allow an increased fee and that there were several other factors that had to be considered. One such factor is the complexity of the matter. There was nothing complicated about this estate and as pointed out by the respondent, it involved the sale of an immovable property for which the appellant had already received a fee. No further assets were realised and a contribution was payable by ABSA Bank.

[9] As a result of the respondent's refusal to increase the remuneration, the appellant instituted a review application under s 151 of the Act, which gives the court the power to review any ruling by the Master, invoking the provisions of the Promotion of Administrative Justice Act 3 of 2000.

He contended that the respondent had failed to take relevant factors into account and that the decision was not rationally connected to the information before her.

[10] The court below dismissed the application with costs on an attorney-client scale to be borne by the appellant in his personal capacity. The learned judge held that in determining whether 'good cause' existed justifying the increase of the appellant's remuneration or not, the respondent had to consider all the facts which had a bearing on the administration of the estate; that the time factor could not be considered in isolation nor could it be regarded as the dominant or decisive factor. To do so would open the door for unscrupulous trustees to abuse s 63(1) of the Act to the detriment of the insolvent estate and/or its creditors. The learned judge held that the respondent had applied her mind properly to all the relevant facts which had been put before her.

[11] In the appeal before us counsel for the appellant argued that the minimum fee set in the tariff was insufficient when regard is had to the work performed by insolvency practitioners. He set out a myriad of duties which according to him were not required to be performed by insolvency practitioners in 1936 when the Act was promulgated. These were inter alia:

(a) there were no financial leases in existence and the insolvency practitioner was not obliged to take possession of all the assets, which would include leased assets;

(b) there were no VAT, pay as you earn (PAYE) or Capital Gains Tax provisions;

(c) the insolvency practitioner was not a representative taxpayer;

(d) there were no contracts of hire for equipment such as office machines, cellular phones etc.

He furthermore contended that the overhead structure of the appellant's company consisted of salaries and various other expenses with the result that the overheads per month per estate were in the amount of R25 000. Given present business and economic realities, the appellant argued this was the minimum remuneration per estate to which a liquidator should be entitled.

[12] The tariff is a statutory instrument set by the Minister of Justice. It is admittedly an old tariff and was last reviewed in March 1995. The minimum fee is in the amount of R2 500. It is indeed not generous. As already mentioned, the Master can only exercise his or her discretion once good cause has been shown. He or she cannot use the discretionary power in order to address limitations in the tariff itself. The same applies to the function of the courts reviewing the Master's decisions: if the tariff is not realistic or just, given the economic and business conditions, especially since it was last adjusted in 1995, that must be, in the first instance, a matter for the executive to address.

[13] Accordingly, the strict question before us, is whether the Master erred in refusing to conclude that 'good cause' existed for increased remuneration on the facts of this case. Counsel for the appellant contended that the appellant's remuneration as taxed in accordance with Tariff B was not reasonable; that it was grossly inadequate as it did not reflect the time spent in administering the estate and that the time and effort spent were the overriding factors. In this regard he relied on the decision of *Nel and another NNO v The Master (ABSA Bank Ltd &*

others intervening),[2] and in particular the following remarks by Van Heerden AJA:[3]

'The fee prescribed by the tariff must be assessed for reasonableness by way of a critical assessment of such prescribed fee in the light of the time and effort expended by a liquidator, *taking into account (inter alia) the degree of complexity of his or her duties in the winding-up*.' [My emphasis].

[14] In *Nel* the appellants were joint liquidators of Intramed (Pty) Ltd. After performing their duties as such they claimed liquidators' remuneration in terms of s 384 of the Companies Act 61 of 1973.[4] The Master reduced the remuneration for their services. The appellants sought an order declaring that they were entitled to remuneration in the higher amount. With regard to the concept of 'good cause' Van Heerden AJA held as follows:[5]

'The concept of "good cause" is very wide and there is nothing in s 384 of the Act which indicates that it should be interpreted so as to exclude *any* factor which may be relevant in determining what constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors *are* relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him or her in the discharge of the duties involved. If, in the winding-up of a company, particular difficulties are experienced by the liquidator because of the nature of the assets or some other similar feature connected with the winding-up, this

---

[2] 2005 (1) SA 276 (SCA).
[3] At 293I-J.
[4] Section 384(1) and (2) provide:
'(1) In any winding-up a liquidator shall be entitled to a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration: Provided that, in the case of a members' voluntary winding-up, the liquidator's remuneration may be determined by the company in general meeting.
(2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.'
[5] At 285C-F.

would undoubtedly constitute "good cause" entitling the Master to *increase* the tariff remuneration.'

[15] The nub of the appellant's argument is that, even though this was an avowedly simple and straight-forward liquidation, to mount a liquidation operation at all, requires a complex business infrastructure which should automatically qualify for increased remuneration. The overriding factor, even in such 'simple' matters, counsel urged us to find, was the time and effort required, against the background of the necessary office infrastructure: The relative simplicity of the estate and the ease of liquidating the assets, he contended, were of lesser importance.

[16] The argument on behalf of the appellant cannot be sustained. In my view the learned judge clearly stated that time and effort together with the degree of complexity of one's duties have to be taken into account. It is accordingly clear that the time factor cannot be considered in isolation nor can it be an overriding factor. The other factors must be taken into account as well. It is evident in this matter that the respondent provided reasons for refusing to increase the fee: that the estate was fairly simple, there being one immovable property which was sold at an auction and there was one secured creditor who had to pay a contribution. The appellant had already received a fee for the sale of the immovable property. It is clear that the respondent did not act contrary to the principles enunciated in the *Nel* case. The respondent further stated in her response that to allow the issue of time-based remuneration seen on its own would negate the intention of s 63 of the Act.

[17] Counsel for the appellant also relied on the unreported judgment of *Johannes Klopper v The Master of the High Court*[6] where it was held that an estimate of time spent would be acceptable. The facts of that case are however distinguishable from the facts of this matter. In that case there were about 13 points which warranted an increased fee. I set them out briefly:

The administration of the estate spanned a period of more than five years; the winding up process was multifaceted, complex and difficult; there was a dispute with the South African Revenue Service (SARS) about custom duties relating to company stock; there were cross-border matters in respect of Australian suppliers; there were objections by creditors; legal proceedings were instituted against the liquidator; there were negotiations in regard to the sale of stock and the company trademark in South Africa and Australia as well as negotiations in respect of the release of lien over stock; the company's book debts had been factored to Nedbank Ltd; VAT claims by SARS required extensive investigation etc. None of these points are present in this matter.

[18] As already indicated the respondent in the exercise of her discretion did not reject the time factor out of hand. She considered all the relevant factors and concluded that good cause for the increase of the appellant's remuneration had not been shown. In my view, the respondent did not exercise her discretion improperly and there is thus no basis for the setting aside of her decision. It follows therefore that the appeal must fail.

[19] I turn to the question of costs. The appellant pursued the matter in his personal capacity and for his own benefit. The costs are to be borne

[6] Unreported judgment of Thring J, case no 2475/2008 (CPD) delivered on 13 June 2008.

by him in his personal capacity. As to the costs order issued by the court a quo, there is in my view, no basis to interfere with the exercise of its discretion.

[20] In the result the appeal is dismissed with costs, such costs to be borne by the appellant in his personal capacity.

_____

N Z MHLANTLA
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant: F H Terblanche SC

Instructed by
Strydom & Bredenkamp Inc Pretoria
E G Cooper Attorneys Bloemfontein

For Respondent: B Neukircher SC

Instructed by
State Attorney Pretoria
State Attorney Bloemfontein