IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 1558/2012
Date Heard: 28 March 2013
Date Delivered: 7 May 2013

In the matter between:

LAMBERTUS VON WIELLIGH BESTER NO First Applicant

CHRISTOPHER PETER VAN ZYL NO Second Applicant

ESME MAGRIETA DORFLING NO Third Applicant

P Q NAIDOO NO Fourth Applicant

(in their capacities as joint liquidators of

Innova Holdings (Pty) Limited (in Liquidation) –

Master's Ref: S60/2009

("Innova")

and

THE MASTER OF THE HIGH COURT, Respondent

EASTERN CAPE HIGH COURT, PORT

ELIZABETH

Nature of matter: Company law - Liquidation -
Application – applicants seek to review and set aside the reduction of their remuneration, as set out in their first liquidation and distribution account, by the respondent in terms of the provisions of section 384(1) and (2) of the Companies Act 61 of 1973

Order: In all the circumstances the argument that it would have been wrong, as a matter of law, to have regard to proceeds of the sale of the encumbered assets in the present matter when assessing the remuneration of the applicants on the presentation of the account cannot be upheld. It follows that the decision of the respondent was materially influenced by an error of law (PAJA section 6(2)(d)), was

taken for a reason not authorised by the Companies Act, the Insolvency Act or the regulations (PAJA section 6(2)(a)(1) and 6(2)(e)(i)) and took into account irrelevant considerations (PAJA section 6(2)(e)(iii)) and both the decision and the direction which flowed from it fall to be set aside.

Order is as follows:

1. The decision of the Master to tax down the applicants' fees to nil in respect of encumbered assets 1, 14, 15, 16, 17 and 18 in the liquidation of Innova, is set aside;
2. The direction by the Master to the applicants to amend the first liquidation and distribution account of Innova dated 30 November 2010, to reflect the applicants' fees as nil is set aside.
3. The respondent is ordered to pay the costs of the application.

JUDGMENT

EKSTEEN J:

[1] The applicants are the duly appointed joint liquidators of Innova Holdings (Pty) Ltd (in liquidation) (herein referred to as "Innova"). In this application they seek to review and set aside the reduction of their remuneration, as set out in their first liquidation and distribution account, by the respondent in terms of the provisions of section 384(1) and (2) of the Companies Act 61 of 1973 ("the Companies Act").

[2] It is common cause between the parties that the Companies Act finds application to the winding up of Innova. The remuneration of liquidators is regulated by section 384 of the Companies Act. Section 384 provides as follows:

> "(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 …
>
> (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."

[3] The "prescribed tariff to which reference is made in subsection (1) is contained in annexure "CM104" to regulation 24 of the regulations for the winding-up and judicial management of companies. The remuneration of a liquidator appointed to attend to the winding-up of a company is the same as that which applies in the case of a trustee of an insolvent estate in terms of section 63(1) of the Insolvency Act, 24 of 1936 ("the Insolvency Act"). The applicable tariff is tariff B as contained in the second schedule to the Insolvency Act ("the tariff"). The tariff prescribes that a liquidator's remuneration is determined on the basis of specified percentages of various different items. These include 10% on the gross proceeds of movable property sold or on the gross amount collected under promissory notes for book debts, and 3% on the gross proceeds of immovable property and other assets sold.

[4] The applicants set about their task to liquidate Innova and sold both movable and immovable property as discussed hereafter. They presented their first liquidation and distribution account (herein referred to as "the account") in which they reflected their remuneration in accordance with tariff B. The respondent taxed certain items down "to nil" and instructed the applicants to amend the account.

[5] The applicants seek an order setting aside the respondent's decision to tax down their fees "to nil in respect of encumbered assets account numbers 1, 14, 15, 16, 17 and 18" and a further order to review and set aside the respondent's direction

to them to amend their account so as to reflect the liquidator's fees in respect of these items as nil.

The background

[6] The sorry tale of the winding-up of Innova has an unduly lengthy history. The applicants were appointed as liquidators of Innova on 2 July 2009. They took control of and administered the property and affairs of Innova and proceeded to liquidate it. On 1 December 2010 the applicants lodged the account with the respondent as contemplated in section 403 of the Companies Act.

[7] Included in the account was the encumbered asset account number 1 in respect of immovable properties bonded in favour of Absa Bank Limited (Absa) which had been sold at an auction which had been authorised and approved by Absa. At the time of the submission of the account Absa had not yet proved any claim in the insolvent estate and accordingly the applicants did not allocate these proceeds for distribution and did not allow any dividend in favour of Absa in the account.

[8] The account also included encumbered asset account numbers 14 and 15 in respect of a Toyota Dyna motor vehicle and a Tata 7135 Tipper respectively. Both these vehicles had been subject to instalment sale agreements in favour of Absa. Both were sold on 9 September 2010 by public auction with the approval of Absa and the proceeds collected by the applicants. Again Absa had not proved a claim against the insolvent estate at the time of the submission of the account and again

these proceeds were dealt with in the same manner as the proceeds collected from the sale of the immovable properties to which I have referred above.

[9] Finally the account included encumbered asset account numbers 16, 17 and 18 which were in respect of two Kia work horses and a Volvo BL71 respectively. These assets too had been sold by public auction with the approval of Absa and the proceeds collected by the applicants. These proceeds were dealt with in the same manner as the previous assets set out above and for the same reason.

[10] The delivery of the account to the respondent was followed by a deathly silence. Accordingly, on 20 December 2010 the first applicant, acting on behalf of the applicants, addressed a letter to the respondent in which he stated that the applicants await a receipt of the respondents query sheet. In this regard the applicants allege, and it is not in dispute, that it is customary for liquidators, after submission of an account and prior to advertising the account for inspection, to request the Master to consider whether the account was in any way incorrect as contemplated in section 407(3). If the Master had reservations then, in the general course of events, he would direct a query sheet to the liquidators and give directives in respect of any errors.

[11] Notwithstanding the letter of 20 December 2010, no response was received from the respondent. A second letter was addressed on 17 January 2011 which referred to the earlier letter and again requested the delivery of any query sheet as a matter of urgency. This too did not have the desired effect and a third letter was

addressed in similar terms on 1 March 2011. Again the applicants were not favoured with the courtesy of a reply.

[12] On 15 June 2011 the first applicant yet again addressed the respondent pointing out that more than seven months had now elapsed without the acknowledgment of receipt of any of the previous communications or receipt of the customary query sheet. First respondent recorded that he intended now to assume that the respondent had found the account to be in order and that he would accordingly proceed to advertise the account for inspection. Again no response was received to his correspondence.

[13] In view of the aforegoing the first respondent arranged for the account to be duly advertised for inspection on 1 July 2011 as contemplated in section 406 of the Companies Act, and at the same time, he addressed a letter to the respondent advising that he had arranged for the advertisement in the Government Gazette to be published on 1 July 2011 for the account to lie for inspection for a period of fourteen days before the respondent. This letter too remained unacknowledged and the respondent was not moved by its content.

[14] The account lay for inspection for a period contemplated in section 406(1) of the Companies Act which period expired on 15 July 2011. No creditor, including Absa, raised any objection to the account. In these circumstances the first applicant again addressed the respondent on 17 August 2011 and 24 October 2011 in which he requested the respondent's confirmation notice in respect of the account as a matter of urgency. Still he did not receive as much as an acknowledgment of

receipt. In the circumstances, on 27 October 2011, whilst attending a meeting in Pretoria, the first applicant enlisted the assistance of the Chief Master to look into the matter. This prompted a response from the respondent on 16 November 2011, almost an entire year after the account was lodged. In this letter she, one Lampbrecht, set out various requirements. She recorded, *inter alia*, as follows:

> "1.4 Liquidator's fee in respect of encumbered assets 1, 14, 15, 16, 17 and 18 has been taxed down to nil as there is no benefit to creditors, amend."

[15] It is not in dispute that this recordal constituted both a decision in respect of the applicants' fees relating to the itemised accounts, and an instruction to amend the account.

[16] This prompted the application for review. In the answering affidavit the respondent denies that the decision is prone to being set aside. The deponent, Lampbrecht, explains the basis as follows:

> "I say so because the Liquidation Account in question is a First account, the Applicants are still to make a Final Liquidation Distribution Account. Once that Account is submitted, a new assessment shall be made as to whether or not the Liquidators are entitled to the fee they claim for work done. In this instance, it must be stressed that the entitlement of a Liquidator to a fee is not automatic on the performance of any task such task must be result in the achievement the primary objective for which the task is undertaken …. Only once the Respondent is satisfied that there has been a due discharge of the responsibility and duty of the Liquidator as aforesaid that that the Respondent will allow a fee." (*Sic*)

[17] Later Lampbrecht explains that:

> "… [A]s long as the claim of creditor has not yet been proved and not yet been met, the exercise of the disposal of assets and acquisition of a cash flow against it is an incomplete exercise if its purpose is not to grant to creditors what is due to them."

[18] After the replying papers had been filed the respondent applied for leave to file a further affidavit because Lampbrecht contended, on reflection that "the basis upon which certain fees of the [a]pplicants were not accepted, may not have emerged clearly from what is set out in the previous affidavit". In the supplementary affidavit Lampbrecht explains that, where no claims are proved in respect of an encumbered asset then, depending on the nature of the asset, the proceeds from the disposal thereof must either be paid into the Guardian's Fund or distributed as free residue. Lampbrecht states that "[i]t is only when the actual distribution occurs that a liquidator can be said to have completed his or her functions and obligations with regard to the disposal of the relevant asset and the distribution of the funds obtained pursuant thereto, and it is only then that the liquidator is entitled to raise a fee in respect of such asset".

[19] In the alternative to this argument, in the opposing affidavit, Lampbrecht acknowledges that her decision on 16 November 2011 is indeed an administrative decision as contemplated in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") and that in making her decision she was purportedly acting pursuant to the powers vested in the Master by section 384(2) of the Companies Act to which I have referred above. She did not deny that her decision was procedurally unfair. She did, however, deny that her decision could be set aside under PAJA for other reasons.

The merits

[20] It is common cause that Lampbrecht purported to act in terms of the provisions of section 384(2). Where a party is aggrieved by a decision taken by the respondent in terms of the provisions of section 384(2) he is entitled to bring such decision under review by a court. (See ***Nel and Another NNO v The Master (Absa Bank Limited and Others Intervening)*** 2005 (1) SA 276 (SCA) at 286C and 290F; section 339 of the Companies Act; section 151 and 151*bis* of the Insolvency Act.) It has long been accepted that the review envisaged by section 151 of the Insolvency Act, as is the case here, is the "third type of review" identified in ***Johannesburg Consolidated Investment Company v Johannesburg Town Council*** 1903 TS 111. In this kind of review Parliament confers a statutory power of review upon the court. In such a case it was held in the **Johannesburg Consolidated Investment Company** case *supra* at 117 that the court could:

> "… enter upon and decide the matter *de novo*. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at …, to deal with the whole matter upon fresh evidence …."

[21] This notwithstanding, in ***Nel's*** case *supra*, the Supreme Court of Appeal held that it was desirable that the grounds of review should be formulated so as to clearly bring such grounds within the purview of those enumerated in section 6(2) of PAJA. In this regard Van Heerden AJA stated at p. 290-291 para [29]:

> "By giving 'legislative form and detail to the fundamental principles of administrative law entrenched in s 33 of the Constitution', the PAJA introduced a new era in South African administrative law, placing the control of administrative

> power - including the judicial review of administrative action - largely on a statutory footing. As is evident from the above-quoted passage from the judgment of Innes CJ in the *Johannesburg Consolidated Investment Co* case, the third (wider) kind of review appears to have more to do with the powers of the Court of review and the evidence which such Court may take into consideration rather than with the grounds of review. It can therefore be argued that the 'material disparity' ground of review referred to by the Constitutional Court in the *Gauteng Lions Rugby Union* case now also falls within the grounds of review listed in s 6(2) of the AJA."

[22] In the circumstances the applicants correctly formulated their grounds of review in accordance with the provisions of section 6(2) of PAJA. The power which the court has in adjudicating the matter and evidence which may be taken into consideration, is however wider than the provisions of PAJA.

[23] Mr ***Buchanan****,* on behalf of the respondent, argues that the applicants would become entitled to "reasonable remuneration for services actually rendered" when the services have been rendered. Until such time as a claim has been proved in respect of the encumbered asset, so the argument goes, the distribution from the proceeds of such asset cannot be finally determined and the services of the liquidator are incomplete. On this basis it is contended that applicants are only entitled to the tariff fee in respect of the disposal of the specific assets once such assets have been sold and the distribution of such proceeds can be established. Depending, in this case, upon whether claims are eventually proved by Absa or not, the proceeds of such sale may eventually either be allocated to the secured creditor or to the general residue, or indeed to the Guardian's Fund in certain circumstances. For this reason it is contended that the applicants cannot, as a matter of law, raise a claim for remuneration until a final distribution and liquidation account has been drawn and his duties have been completed.

[24] It was argued accordingly that the respondent was entitled to "reduce" the applicants' remuneration set out in the account as was done. If it would be wrong in law, so it is argued, for the applicants to raise the remuneration set out in the account at this stage, then, procedural fairness under PAJA becomes irrelevant as the application cannot succeed. It was conceded, however, that if I hold against the respondent on this aspect the application should be allowed. In the circumstances I do not think that it is necessary to consider the grounds of review under PAJA, which emerge from the papers, save to the extent set out below.

[25] Mr ***Buchanan*** has been unable to refer me to any authority in support of his proposition. He argues that it must follow from the fact that the remuneration to which a liquidator is entitled is "reasonable remuneration for his services".

[26] I revert to section 384 of the Companies Act. Subsection (1) provides that a liquidator shall be entitled to reasonable remuneration for his services which are to be taxed by the Master in accordance with the prescribed tariff of remuneration. I have referred to the tariff above. Subsection (2) then confers upon the Master the power to reduce or to increase the sum of the remuneration which is yielded by the taxation exercise, if in his opinion there is good cause to do so. In addition the Master has the power to disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties. In the present case there is no suggestion of the latter.

[27] In respect of the former, the Supreme Court of Appeal, in ***Nel's*** case, *supra*, referred with approval to the analysis of the court *a quo* of the provisions of section 384(2). Van Heerden AJA at 284A-C said:

> "The Court *a quo* analysed the provisions of s 384 and held, in effect, that the dominant provision of this section is the entitlement of the liquidator to 'a reasonable remuneration' for 'his services' in terms of ss (1). Any reduction or increase in the liquidator's remuneration by the Master in terms of ss (2) must still result in a reasonable remuneration for the liquidator's services. This being so, the words 'such remuneration' in ss (2) must be read as referring to the 'prescribed tariff of remuneration' mentioned in ss (1), *viz* the amount of remuneration arrived at by applying the tariff."

[28] Later, on the same page G-H she states:

> "… the Master, as a statutory functionary, is not free to choose whether or not to tax a liquidator's remuneration – the Master *must* tax in accordance with the tariff (s384(1), but having done so, *may* reduce or increase the amount arrived at by applying the tariff if, in his or her discretion, there is 'good cause' to do so. The dominant provision in s 384(1) remains that the remuneration to which a liquidator is entitled is *remuneration for work or services rendered,* not a set commission, *and* that it must be *reasonable*. The determination of 'reasonable remuneration' by the Master involves, in the first instance 'taxation' in accordance with the tariff, which includes the categorisation of assets under the various tariff items in order to apply the (percentile based) tariff to each of the items thus identified. The tariff serves as a point of departure for the determination of the appropriate fee."

[29] Mr ***Muller***, who appears on behalf of the applicants, emphasises that tariff B, forming part of Schedule 2 to the Insolvency Act, read with Form CM104 to the Companies Act, provides that trustees in insolvency are entitled to 10% on gross <u>proceeds</u> of movable properties <u>sold</u> or on "the gross amount <u>collected</u>" under promissory notes for book debts and 3% "on the gross <u>proceeds</u> of immovable property" and other assets "sold" (counsel's emphasis). He contends therefore that the entitlement arises when the proceeds of the sale have been received or the moneys have been collected.

[30] A consideration of the account submitted shows that the remuneration claimed by the applicants in each instance relates to assets already sold and proceeds already collected. Repeated requests to the respondent to advise of any query which he may have in respect of the account went unanswered. The account duly lay for inspection and no creditor had any objection to the account.

[31] On a careful consideration of the argument presented I do not think that the conclusion which Mr ***Buchanan*** contends for necessarily follows from the fact that a liquidator is entitled to reasonable remuneration for his services. The tariff is determined with reference to proceeds of property sold and amounts collected. Once the amounts have been collected and the proceeds of sales received I think that the applicants are entitled to include these in their account. Once that is done the respondent is obliged to tax the bill in accordance with the tariff. I can find nothing in the Companies Act, the Insolvency Act or in the regulations which supports the submission that proceeds of particular assets should be excluded from the taxation until a claim is proved in respect of the proceeds. In this case Absa had no objection to the account. If after approval of the account Absa were to prove a claim, the proceeds may be allocated to it as a secured creditor in any subsequent account. If not, it would be allocated and distributed as required by law. This is a mere formality.

[32] After the taxation of the account the Master may either increase or reduce the amount yielded by the taxation if he believes that there is “good cause”. This would usually involve an assessment of the amount of work required to affect the sale or to

collect the money. In ***Ex Parte Wells NO: in re Auto Protection Insurance Co. Limited*** 1968 (2) SA 631 at 634, Galgut J stated:

> "There may well be an occasion when the tariff of fees prescribed in the Schedule to the Insolvency Act may be over-generous and may allow remuneration in excess of the value of the actual work done. It may well be that there is a large property centrally situated in one of the bigger cities of the Republic which has to be sold and the act of selling it may not involve a great deal of work. To allow a remuneration of 2½ per cent on the proceeds of such sale may in some circumstances constitute an overpayment of remuneration. Similar considerations may well apply if the movable assets are of a very high value or if the amount of cash found is large."

[33] The discretion conferred upon the Master in section 384 is, however, not restricted to this consideration. He is entitled to reduce or increase the remuneration if there is "good cause" to do so and he is entitled to have regard to all services which the liquidator has rendered and which he will in future render in order to finalise the winding-up of the estate. It does not follow, in my view, that the remuneration of the liquidator cannot be taxed before a final liquidation and distribution account reflecting the distribution of the particular asset is drawn. On the contrary, the Supreme Court of Appeal has consciously approved the taxation and fixing of remuneration long before the services of the liquidator have in fact been completed and prior to a final liquidation and distribution account. ***Nel's*** case is an example thereof. In ***Nel's*** case a dispute arose and the liquidators requested the Master to finally determine their remuneration upon taxation of the first liquidation and distribution account. The Master, in that case, determined as follows:

> "In the circumstances I hereby fix a total remuneration for the work done and still to be done by the liquidator's at an amount of R3 250 000,00; provided that their

> remaining duties are carried out to my satisfaction. The amount should still be in excess of 1% of the eventual total projected asset situation in the estate and in my view adequately remunerates them for the amount of work and complexity of work that they have done and must still do in this estate."

[34] Thus, having taxed the account in accordance with tariff B the respondent assessed and fixed the liquidators' reasonable remuneration before the final liquidation and distribution account was lodged and many months before the work required in the liquidation was complete.

[35] The Supreme Court of Appeal in ***Nel*** *supra*, commenting with apparent approval of this approach, noted at p. 296G-297A:

> "In determining the extent of the remuneration finally awarded, the Master allowed for 15 months spent on the administration of the Intramed estate - this being double the 7½ month period which had expired from the date of liquidation to the date of filing of the first liquidation and distribution account - an average of 2½ hours per day, 22 days per month at an hourly remuneration of R1 800 per hour for each appellant."

[36] In all the circumstances the argument that it would have been wrong, as a matter of law, to have regard to proceeds of the sale of the encumbered assets in the present matter when assessing the remuneration of the applicants on the presentation of the account cannot be upheld. It follows that the decision of the respondent was materially influenced by an error of law (PAJA section 6(2)(d)), was taken for a reason not authorised by the Companies Act, the Insolvency Act or the regulations (PAJA section 6(2)(a)(1) and 6(2)(e)(i)) and took into account irrelevant considerations (PAJA section 6(2)(e)(iii)) and both the decision and the direction which flowed from it fall to be set aside.

[37] In the result the following order is made:

1. The decision of the Master to tax down the applicants' fees to nil in respect of encumbered assets 1, 14, 15, 16, 17 and 18 in the liquidation of Innova, is set aside.

2. The direction by the Master to the applicants to amend the first liquidation and distribution account of Innova dated 30 November 2010, to reflect the applicants' fees as nil is set aside.

3. The respondent is ordered to pay the costs of the application.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicants: *Adv J Muller SC* instructed by De Klerk & Van Gend Inc, Cape Town c/o McWilliams & Elliot, Port Elizabeth

For Respondents: *Adv R G Buchanan SC & Adv N Msizi* instructed by State Attorney, Port Elizabeth