REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 046772/2023

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

1/6/2023
DATE

SIGNATURE

In the matter between:

JUSTIN NICHLAS DIVARIS	1st Applicant
DAYTONA (PTY) LTD T/A ROLLS ROYCE MOTOR CARS JOHANNESBURG	2nd Applicant

and

THE MASTER OF THE HIGH COURT JOHANNESBURG	1st Respondent
SAFFY, LUKE BARNARD *N.O*	2nd Respondent
DU PLESSIS, JOHANNES HENDRICUS *N.O*	3rd Respondent
KGATLE, LOUISA SELINA *N.O*	4th Respondent

NEUTRAL CITATION: *Justin Nichlas Divaris v The Master of the High Court Johannesburg* (Case No: 046772/2023) [2023] ZAGPJHC 611 (01 June 2023)

ORDER

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1. The summons issued in terms of Section 152(2) of the Insolvency Act of 1936 dated and issued by the First Respondent on 18 April 2023 in the insolvent estate of Sheperd Huxley Bushiri with Master Reference Number G1230/2020 ("the insolvent estate") and directed at the Applicants, is set aside.

2. The costs of the application are costs in the administration of the insolvent estate.

JUDGMENT

Thompson AJ:

[1] Effectively, the absence of the sum of R584,00 and the inability of applying a practical and logical solution to a simple error, has given rise to extensive High Court litigation in the urgent court.

[2] The controversy in this matter to be determined is whether the Summons in terms of Section 152 of the Insolvency Act[1] ("the Act") is valid in the absence of a proper tender for witness fees as allowed for in terms of the Tariff of Allowances Payable to Witnesses in Civil Cases[2] ("the prescribed fees"). A similar issue is raised in respect of the failure to tender the reasonable travelling and subsistence costs of the first respondent who is resident in Cape Town. For the reasons to follow, I will only deal with the witness fees issue.

[3] It is common cause that the witness fees tendered in the summons are "*an allowance equal to the actual amount of income which the Trustees may found be forfeited by the witness as a result of the witness's attendance at this examination to a maximum of R1500,00 per day.*" It is further common cause that the prescribed fees allow for a maximum of R2 084,00.

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[1] 24 of 2936

[2] Published under GN R394a in GG 30953 of 11 April 2008 as amended by GN R965 in GG 41096 of 6 September 2017.

[4] In terms of settled authority,[3] it was incumbent on the trustees of the insolvent estate to tender the correct sum as per the prescribed fees. A tender of the incorrect or erroneous and lower sum as per the prescribed fees renders the summons defective and, on this ground alone, may be set aside.[4] These authorities are binding upon me and, unless I can find that they are clearly wrongly decided or are distinguishable on the facts, I am bound to follow them.

[5] *Mr Riley*, appearing on behalf of the second to fourth respondents, did not seek to persuade me that the aforesaid authorities are clearly wrong, rather he contended that this matter is distinguishable on the facts. The distinguishing feature he relied upon is the fact that in correspondences prior to the institution of the application, no issue was raised in respect of the failure to tender the correct witness fees. In this regard it was very loosely and without real vigour argued that the applicants waived their rights to rely on the failure to tender the correct witness fees.

[6] Various problems arise from this argument. I do not intend to deal with all the problems and will only refer to two aspects. Firstly, waiver must be pertinently raised and pleaded.[5] Waiver has not been raised in the answering affidavit. Secondly, even if waiver was raised, it would have been incumbent on the respondents to demonstrate that the applicants, with full knowledge of the existence of the right alleged to be waived, clearly waived same. At least on one occasion the applicants' attorneys stated during correspondences that no election or waiver of any nature whatsoever should be construed and that all rights are reserved.

[7] It was, as a back-up measure, advanced by the second respondents during argument that the matter remains distinguishable on the facts to the ***Swart-***

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[3] ***Swart v Cronje NNO*** 1991 (4) SA 296 (T) as approved in ***Mattheys & Another v Coetzee & Another*** [1997] 3 All SA 675 (W)
[4] ***Swart***, *supra* at 298
"*Die applikante was nie verplig om die ondervraging by te woon terwyl die korrekte gelde nie aan hulle getender was nie en daar inderdaad foutiewe en laer gelde as geregtig is aan hulle getender was. Op hierdie grond alleen kan die lasbriewe myns insiens tersyde gestel word.*"
[5] ***Coppermoon Trading 13 (Pty) Ltd v Governemtn of the Province of the Eastern Cape & Another*** (2949/05) [2019] ZAECBHC 16; 2020 (3) SA 391 (ECB) (18 June 2019) at para [15]

matter on the basis that the applicants' tendered to give evidence at the enquiry, provided that it is done by remote means (also described as virtual proceedings). The difficulty in this regard for the second to fourth respondents is that the tender to give evidence by way of remote proceedings was subject thereto that if no agreement relating thereto can be reached, the applicants will seek to have the summons set aside.

[8] No agreement could be reached pertaining to the giving of evidence by way of remote proceedings. It bears mentioning that the Master, after the application was launched, issued a ruling that the first applicant may give evidence by way of remote proceedings, however the applicants must pay the costs of an attorney to supervise the proceedings. Pertinent to this ruling, the Master indicated that if same is not acceptable to the applicants, the second to fourth respondents are authorised to oppose the application. Although the applicants did not expressly respond to the Master's direction or the second to fourth respondents' attorney's correspondence consequent upon the Master's direction the applicants' conduct made it quite clear that the Master's direction was not acceptable as they did not withdraw the application.

[9] The tender relied upon by the second to fourth respondents as causing this matter to be factually distinguishable is, in my view, nothing more than a practicable suggestion by the applicants to resolve the *impasse*. A more correct view of the attempt to distinguish this matter from the ***Swart***-judgment is nothing more than an attempt to rely on waiver in a disguised form. Accordingly, in my view this matter is not distinguishable from the ***Swart***-judgment and I am bound thereby.

[10] This brings me to the issue of costs. The applicants seek an order *de bonis propriis* against the second to fourth respondents. The basis for the claim for costs *de bonis propriis* is based thereon that the second to fourth respondents "*elected to oppose the application without any valid basis in law, and disparagingly so, . . .*". In my view, the second to fourth respondents were fully entitled to oppose the application on the basis that the facts of this matter is distinguishable from the facts in the ***Swart***-judgment. The fact that they were

wrong in that regard does not make their opposition frivolous, unreasonable or negligent. The fact there was a more cost-effective manner for the second to fourth respondents to have dealt with the matter, by merely causing the summons to be withdrawn, issuing a new one compliant with the law and serving same, does not make their opposition, *per se*, frivolous. One would expect them, in future, to act with greater care since the estate of the insolvent has no funds available. To litigate in such circumstances does, however, border on negligent conduct either by the trustees or negligent advice by the attorneys acting for the trustees. I am mindful that I am unaware as to who this potential negligence can be attributed to.

[11] As to the disparaging submission, it is my respectful view that the applicant as well as the second to fourth respondents have acted towards in a manner that is uncalled for in litigation. As mere examples, the applicant sought to cast a speculative assertion against the second to fourth respondents' attorneys pertaining to their independence as the attorneys previously acted for the applicant's ex-wife during divorce proceedings. This allegation took the applicant's case no further and, no doubt, raised the ire of the second to fourth respondents' attorney. This was evident from the fact that at a later stage the second to fourth respondents' attorney accused counsel appearing on behalf of the applicant of misleading the court.[6]

[12] Simply put, all of the parties engaged in the litigation before me, at some stage transgressed into the realms of uncalled for conduct. I see no reason why one party should suffer a censure whilst the other, equally guilty of such conduct, should emerge unscathed by their conduct. However, to attempt to determine the varying degrees of guilt to be attributed to both parties would result in nothing more than a waste of judicial resources. As such, I am of the view in exercising my discretion that although all parties' conduct, at times, were uncalled for, nothing amounts to conduct that warrants an order *de bonis propriis*.

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[6] For clarity purposes, applicant's counsel did not mislead the court.

[13] Accordingly, I make the following order:

3. The summons issued in terms of Section 152(2) of the Insolvency Act of 1936 dated and issued by the First Respondent on 18 April 2023 in the insolvent estate of Sheperd Huxley Bushiri with Master Reference Number G1230/2020 ("the insolvent estate") and directed at the Applicants, is set aside.

4. The costs of the application are costs in the administration of the insolvent estate.

C E THOMPSON AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING:	31 May 2023
DATE OF JUDGMENT:	01 June 2023

APPEARANCES

For the Applicants:	Adv. HP Nieuwenhuizen
Instructed by:	Allan Allschwang & Associates
For the 2nd to 4th Respondents:	Adv. N. Riley
Instructed by:	Snaid & Morris Incoroporated