IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

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

24/02/2025

DATE SIGNATURE

CASE NO: 098558/2023

In the matter between:

Johannes Hendricus Du Plessis NO First Applicant

Nomsa Ursula Sefanyetso NO Second Applicant

And

Candice Cabral Defendant / Respondent

Neutral Citation:

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.

JUDGMENT

SENYATSI J

Introduction

[1] This is an opposed application for money judgment for fees incurred in an application for provisional sequestration of the defendant's former husband which sequestration order was set aside.

Background

[2] The applicants, Johannes Hendricus Du Plessis and Nomsa Ursula Sefanyatso, were joint trustees of the insolvent estate of Dorian Robert Cabral ("Mr Cabral"). The respondent and her erstwhile husband were divorced and in terms of the decree of divorce, the husband had to pay maintenance for the minor children. He defaulted and the sequestration proceedings were initiated which resulted in the final sequestration order been granted during June 2021.

[3] After the sequestration order, the respondent, through her attorney, requested the joint trustees of the insolvent estate to approach the Master of the High Court to grant the consent to conduct an inquiry into the insolvent estate of Mr. Cabral in terms of section 152[1] of the Insolvency Act. This was on 17 March 2021. The Master of the High Court granted the consent on 24 March 2021 to conduct a section 152 inquiry in terms of the Act.

[4] To enable the applicants to conduct an inquiry, the respondent was required to indemnify the applicants and all the creditors of the insolvent estate against any/or all costs relating to the administration of the insolvent estate and/or the inquiry conducted. The respondent agreed and signed the

[1] Insolvency Act, No: 24 of 1936

indemnity agreement during March 2021. The respondent submitted the claim which was the only one proved at the creditors meeting. The claim was in respect of arrear maintenance of the minor children, legal costs and extra-mural expenses.

[5] The applicants, through their attorneys, conducted an inquiry into the insolvent estate. At the hearing, Mr Cabral was called, so was his new wife together with their business partners. The inquiry ran on various dates for a total of nine days and Mr Morris of Snaid and Morris Inc represented the trustees of the insolvent estate. The trustees determined that there was a shortfall of R402 542-6. The funds in the free residue account totalled R15 315.50 and following the successful appeal order, the funds were returned to Mr. Cabral as the trustees were not entitled to retain them.

[6] Following the setting of aside of the sequestration on appeal, the bill for cost related to the inquiry was presented to the trustees and was accepted by them as fair and reasonable and was found to be in accordance with the mandate given to Mr Morris. The Master of the High Court refused to tax the bill on the basis that on the successful appeal sequestration order, the intermission account cannot be taxed. Without the taxation, the trustees are not entitled to recover the fees and costs incurred in the insolvent estate.

[7] Consequently, the demand was made against the respondent in terms of the Indemnity Agreement. The respondent refused to pay and relied on section 73(1) of the Act as the reason for non-payment. She denies that she concluded the Indemnity Agreement, and that the agreement did not comply with section 73(1) of the Act. She states that when she signed the

agreement, she was of the view that the applicants would conduct the inquiry themselves without the need to use the attorneys and that in any event, she never consented to the attorneys to be used in the conduct of the section 152 inquiry. She, furthermore, denies that the first application has the authority to act for the second application.

Issues for determining.

[8] The issue for determination is firstly, whether the applicants required the consent of all the creditors to conduction an inquiry into the insolvent estate and secondly whether the indemnity agreement entitles the applicants to recover the amount claimed from the respondent.

Legal principles and reasons

[9] Once a person is sequestrated, his estate is placed in the hands of the Master who then appoints the trustee to manage the estate. Section 18(3) states that "A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the Court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the Court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct." It is evident from this section that the provisional trustee has all the powers except that when he/she institutes legal action on behalf of the estate, the leave of court is required to authorise him/her to do so.

[10] Section 73(1) provides as follows:

"(1) Subject to the provisions of this section and section 53(4), the trustee of an insolvent estate may with the prior written authorisation of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate: Provided that the trustee—

(a) if he or she is unable to obtain the prior written authorisation of the creditors due to the urgency of the matter or the number of creditors involved, may with the prior written authorisation of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorisation on behalf of the estate; or

(b) if it is not likely that there will be any surplus after the distribution of the estate, may at any time before the submission of his or her accounts obtain written authorisation from the creditors for any legal work performed by any attorney or counsel, and all costs incurred by the trustee, including any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, in so far as such costs result from any steps taken by the trustee under this subsection, shall be included in the cost of the sequestration of the estate."

[11] In *Patel v Paruk's Trustee*[2] Tindall JA said the following on the correct interpretation of section 73(1):

"The original proviso, prohibiting the trustee from instituting or defending any legal proceedings without the prescribed consent, was enacted, as between the trustee and the creditors, in order to protect the estate from being dissipated in litigation. The Legislature could not have intended that steps taken by a trustee to institute or defend proceedings must necessarily be a nullity because the prescribed consent had not been obtained. An interpretation to the contrary would bring about a result that, where there is not enough time to enable the trustee to obtain such consent, he may be powerless to issue a summons timeously in order to prevent a claim due to the estate from becoming prescribed or to file a plea in order to prevent a default judgment from being obtained against the him."

[2] 1944 AD 469 at 475

[12] In the instant case, the respondent was the only proven creditor, and the inquiry came at her instance. It is therefore inapt to suggest that the consent of the general body of creditors should have been sought and given before the inquiry could commence because the consent alleged to have been missing would not have been given because there was only one proof of claim by the respondent.

[13] The respondent contends that she was of the view that the applicants would conduct the inquiry themselves and impliedly not make use of the services of an attorney for that purpose. The answer to that contestation was dealt with in *Muller v The Master and Others*[3], Preiss J said the following on the interpretation and application of section 73(1) of the Act in disputed legal costs:

> "Section 73 empowers a trustee to obtain legal advice and to employ an attorney or an attorney and counsel for legal proceedings in which an estate is involved. The costs so incurred are included in the costs of sequestration. Section 73(2)*(a)* provides that all costs which are not subject to taxation by a Taxing Officer of the Court, shall be taxed by the Master according to the latter's tariff."

Although Preiss J dealt with the controversy about the taxation of the costs, the principle is clearly articulated that the services of the attorney can be used and the reason the costs need to be taxed is to ensure that the insolvent estate is protected from the disposition of its property through legal costs.

[3] [1992] 4 All SA 470 (T) at p 474

[14] I turn to the wording of the Indemnity Agreement which is drafted as follows:

> "**INDEMNIFICATION FOR COSTS IN THE INSOLVENT ESTATE OF DORIAN CABRAL MASTER REFERENCE NUMBER: G768/20**
>
> I the undersigned Candice Cabral Identity _____(*omitted to protect privacy*) of _Hertford Road Bryanston Sandton. Do hereby indemnify the trustees of the abovementioned estate together with all creditors being secured ,concurrent or contingent creditors of any and all costs relating to the administration of the estate and or any inquiry run by the trustees either upon my instruction or on their own fruition or otherwise .Subject to that should any funds be recuperated , and subject to the Master's approval, I am claim such costs from the estate as costs of the administration.
>
> Thus, done and signed at BLACKHEATH on this 15th MARCH day of 2021. In the presence of the undermentioned witnesses."

[15] The unambiguous wording of the indemnity shows that the indemnity is for "any and all costs … relating to… any inquiry." There is no basis for a wider interpretation of the meaning of the words used by the parties to exclude the costs of attorneys or counsel.

[16] There is no controversy that the respondent signed the Indemnity and that the terms thereof are what they purport to be. From the face of it, it is evident that the agreement envisaged inter alia, the costs related to the inquiry into the estate. In my view, that the sequestration order was set aside in an appeal is of no moment. The Indemnity Agreement was not dependent on any condition and the parties agreed about its terms.

[17] Mr Bolus submitted that because the applicants had not sought the consent from the creditors to engage in the services of the attorneys in the conduct

of the inquiry in terms of section152 of the Act, they are in violation thereof and that the claim for costs incurred should not be favourably considered.This argument is without merit because firstly, the consent of the Master was sought and granted before the inquiry could be embarked upon. From the papers, there is no controversy with the consent given by the Master of the High Court. In any event, the consent by the Master of this Court is not disputed. It is also not that Mr. Morris conducted the inquiry on behalf of the applicants for the days that the proceedings took place wherein the respondent together with her legal representatives were present. The papers show that the respondent's own legal representatives advised her that it would cost effective for them not to continue to be present in the inquiry. To suggest that there is no proof of the mandate given by the applicants to Mr Morris of Snaid and Morris Attorneys to assist the trustees to conduct the inquiry. Accordingly, the defence must fail.

[18] I now deal the counterclaim by the respondent. The respondent contends that her father who made the payment was under the misapprehension that the respondent was liable for the costs. The respondent's claim is based on what should be an enrichment claim. She does not make a case for enrichment. In any event, it is permissible for a third party to pay a debt of behalf of the debtor. In our law, this is not unique, and it is acceptable for the creditor to accept such payment. Having already ruled that the indemnity agreement is in order, I have no basis to rule otherwise with the payment received by the applicants from the respondent's father. Consequently, the counterclaim must fail.

Order

[19] Having heard counsel for the applicants and the respondent, it is ordered that:

19.1. the Respondent shall pay the First and Second Applicants the sum of R384,207.29.

19.2. the Respondent pay interest on the aforesaid amount of R384,207.29 to the First and Second Applicants a *tempore morae* at the maximum permissible statutory rate from 5 September 2023 to date of final payment.

19.3. the counter-claim is dismissed.

19.4. the Respondent shall pay the costs of this application on scale "B".

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 03 September 2024

DATE JUDGMENT HANDED DOWN: 24 February 2025

APPEARANCES

Counsel for the Applicant:	Adv L.M. Olivier SC
Instructed by:	Snaid & Morris Inc
Counsel Respondent:	J.N. Bolus
Instructed by:	Bolus Attorneys