

SOUTH AFRICA / JUDGMENT

Klopper NO v Master of the High Court (2475/2008) [2008] ZAWCHC 219 (13 June 2008)

[2008] ZAWCHC 219

COURT

Western Cape High Court, Cape Town

BEFORE

Thring, Bozalek

CASE / FILE NUMBER

2475/2008

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JUDGMENT

IN THE SUPREME COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2475/2008

DATE: 13 JUNE 2008

In the matter between:

JOHANNES FREDERICK KLOPPER N.O. AppElicantand

THE MASTER OF THE HIGH COURT Respondent

THRING, J:

The applicant in this matter, who is an insolvency practioner of some 25 years' standing, is the duly appointed liquidator of the Green Medicine Company (Pty) Ltd (to which I shall refer as "the company"). The company was placed under a provisional winding-up order on the 22nd May, 2002. The order was made final on the 2nd July, 2002. The applicant seeks to have reviewed and set aside the decision of the Master, which was taken on the 18th June, 2007, not to allow him as liquidator's remuneration an amount exceeding that prescribed in the applicable tariff. The applicant

seeks an order fixing his remuneration at an amount of R171 000 in his second liquidation and distribution account. The applicant contends that this will result in reasonable remuneration for his services as is contemplated by section 384 of the Companies Act, No. 61 of 1973, At our insistence, notice of the application was duly given by the applicant to two major creditors of the company who had objected to the fees reflected by the applicant in his second liquidation and distribution account, namely the South African Revenue Service and Nedbank Ltd.

Two liquidation and distribution accounts have been framed in this matter. The first of these has been confirmed, and the other not. The first liquidation and distribution account was lodged with the Master and was confirmed on the 3rd September,

2003. The applicant's remuneration of R308 222,02 before Value Added Tax ("VAT") reflected therein was calculated in accordance with the applicable tariff. An amended second liquidation and distribution account was subsequently lodged with the Master on the 22nd August 2006. Remuneration totalling R150 000 before VAT is claimed by the applicant in this account. Although the tariff remuneration is R23 257,13, an additional amount of R126 742,87 is claimed, yielding an aggregate remuneration in the account of R150 000 before VAT.

The applicant contends that it is the reasonableness of his overall remuneration for his services in attending to the company's

winding-up which must be considered. He contends further that, in the light of various relevant factors, an aggregate liquidator's

remuneration in this matter of R458 222,02 for the applicant's services since his provisional appointment on the 27th November, 2002, is reasonable. The applicant has used as a benchmark the time spent on the administration of the affairs of the company, taking into account what he says are the reasonable charge-out rates of the staff employed by him.

The applicant submitted his motivation to the Master on the 27th September, 2006 regarding his remuneration. On the 18th June, 2007, the Master, who is apparently a lady, responded in writing. She said the following:

"The tariff as per the second Schedule, Tariff B of the Insolvency Act, 24/1936 read with CN104 of Companies Act, 61/1973 serves as a point of departure in the determination of appropriate liquidator's fees. In order for the Master to exercise his/her discretion whether to increase or decrease the amount of remuneration arrived at by application of the tariff, there should be "good cause". Factors to be considered but not limited to include complexity of the matter, degree of difficulty encountered, amount of work done, time spent in discharge of duties. For purposes of your application I will confine myself to the basis of your application. Time spent on the performance of normal duties of a liquidator includes but is not limited to communication (telephonic, electronic or by post) with creditors or the Master, consultation with co-liquidators, respective purchasers, former directors of the company, drafting of liquidation and distribution account or other duties in relation to account, monitoring of bank accounts etc. These items are

covered by the tariff and do not constitute extraordinary which merits an additional discretionary fee.

Van Heerden, AJA found in *Nel v The Master* 2005(1} SA 276 (SCA) that time spent in the rendering of service is, at the very least, one of the tasks that may be taken into consideration in deciding whether "good cause" reduction or increase of tariff remuneration. It is clearly not the only factor to be considered and may not be the most important factor. Remuneration therefore must be according to the result attained. Items as indicated in the timesheets which you provided relates to the performance of normal duties of a liquidator and no relation is made to an extraordinary work performed by you.

Therefore your application for special fee is hereby disapproved and you are hereby call upon to amend the account accordingly within 14 days from date hereof".

The applicant's case may be summarised as follows:

- (a) His duties as liquidator spanned more than four years, were complex, difficult and time-consuming. The Master is prepared to allow a total tariff account of R331 479,15. Remuneration based purely on time spent would amount to R599 963,33. The applicant asserts, however, that overall remuneration for his services of R458 222,02 would be reasonable.
- (b) Had the Master properly considered the matter and taken into account all the relevant factors, she would have been driven to the conclusion that the applicant's tariff remuneration of R331 479,15 was not reasonable and that there was thus good cause to increase the remuneration in accordance with section 384(2) of the Companies Act.
- (c) The Court has the power to review the decision of the Master where it is clearly wrong, and the Court is at large itself to determine what is reasonable remuneration for the applicant. Alternatively, the Master's decision is reviewable in terms of section 6(2) of the Promotion of Administrative Justice Act, No. 3 of 2000.

In terms of section 384(1) of the Companies Act, a liquidator is entitled to reasonable remuneration for his services, to be taxed by the Master in accordance with the prescribed tariff of remuneration. The tariff is contained in Annexure CN104 to the winding-up regulations, Regulation 24. This in turn makes applicable Tariff B contained in the Second Schedule to the Insolvency Act, No. 24 of 1936. The Master may reduce or increase the tariff remuneration if, in his opinion, there is good cause for doing so in accordance with section 384(2) of the Companies Act. The section reads, in its relevant parts:

°(1) in any winding-up a liquidator shall be entitled to 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..."

The tariff is, however, merely a guide to taxation of the liquidator's remuneration. It is not to be regarded as embodying a full statement of the services which he may have to perform, or as constituting a minimum or a maximum scale of remuneration, (See *Glaum N.O. v The Master*. 1980(2) SA 600 (C) at 618C-F) The overriding consideration is that a liquidator should receive reasonable remuneration for the services which he renders. The approach to be adopted by the Master in determining whether the remuneration of the provisional liquidator is reasonable is described as follows in *Nel & Another NNO v The Master (Absa Bank Ltd & Others Intervening)*, 2005(1) SA 276 (SCA) at 284G:

"...the Master, as a statutory functionary, is not free to choose whether or not to tax the liquidator's remuneration - the Master must tax in accordance with the tariff (section 384(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 section 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 Court went on in that case at 284H-J to set out a two-stage approach to be adopted by the Master, namely, (a) the taxation of the bill in question in accordance with the tariff and, thereafter, (b) the exercise of a flexible discretion to either increase or decrease the amount of remuneration arrived at by the application of the tariff if "good cause" exists for so doing. Moreover, the Court held in *Net's* case that the discretion vested in the Master by section 284(2) of the Companies Act is a wide one {at 285A}. The Court also said at 285C-D:

"The concept of "good cause" is very wide and there is nothing in section 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". It was held in *Nel's* case that the relevant factors in determining "good cause" may include the following:

- (a) the complexity of the estate in question;
- (b) the degree of difficulty encountered by the liquidator in the administration thereof;
- (c) the amount of work done by the liquidator;
- (d) the time spent by the liquidator in the discharge of his duties.

What emerges from the *Nel* case is that the Courts have moved away from a commission-based system of remuneration for liquidators. The overriding consideration now is that reasonable remuneration must be fixed. In determining what is reasonable, factors such as the complexity of the administration, the degree of difficulty, the amount of work done and the amount of time spent are to be considered by the Master. If the application of the tariff does not result in reasonable remuneration this amounts to "good cause" to increase or decrease the amount as is provided for in section 384(2) of the Companies Act. The notion of so-called "swings and roundabouts", i.e. that liquidator's under-remuneration in smaller estates may be compensated for by greater fees in larger estates was rejected in the *Nel* case at 294F-295A.

The corollary of the rejection of the "swings and roundabouts" principle is that, where the application of the tariff

under-remunerates a liquidator, the converse of the NeE case, the Master is obliged to tax a higher remuneration than the tariff allows in order to arrive at remuneration which is reasonable.

In short, a liquidator's fee is no longer contingent what assets may or may not be in the estate. The modern corporate environment

requires insolvency practitioners to have the facilities and professional staff to deal with substantial liquidations. This entails significant overhead structures, as the applicant has been at pains in his papers to point out.

The applicant has set out in his founding affidavit the services which he has rendered in his administration of the winding-up of the company. His administration spanned a period of more than five years. The winding-up was multi-faceted, complex and difficult. Thus, the applicant was required to deal with the South African Revenue Service in complicated customs' issues concerning the company's stock. The South African Revenue Service asserted that it was entitled to seize the company's goods in terms of section 88(1) of the Customs & Excise Act, No. 91 of 1964. Then, cross-border issues had to be resolved with regard to the Australian suppliers of the company's specialised stock and the reservation of ownership which it claimed. The Australian suppliers' position as a secured creditor was disputed. Objections by various creditors had to be dealt with. The objections were sustained by the Master on the 20th June, 2005 and the applicant was directed to treat the Australian suppliers' claim as concurrent. This led to the institution of legal proceedings against the applicant by the Australian suppliers in his capacity as the liquidator of the company. These proceedings were instituted during June

2005. After further negotiations the action was later withdrawn.

The applicant also engaged in lengthy negotiations for the sale of the company's stock and the Green Medicine trademark, both in relation to South African and Australian purchasers. The sale of the stock was eventually concluded on the 8th July, 2002. The applicant had to negotiate the release of a lien which was claimed over the stock by a third party. This release was procured only after founding papers in an application to court had been prepared. The company's book debts had been factored to Nedbank Ltd, and difficulties were experienced in relation to its claims under the agreement. Negotiations were conducted with the bank regarding its advanced dividend.

The Value Added Tax claims by the South African Revenue Service required extensive investigation. The South African Revenue Service asserted a claim in this regard of some R3.9 million. The applicant also convened an enquiry in terms of section 415 of the Companies Act between February and June, 2004 and considerable time was spent analysing documents and records in this connection. Possible offences on the part of the former directors of the company were also investigated and their potential liability under section 424 of the Companies Act had to

be considered.

An assessment of the time spent by the applicant on his administration between the 28th May, 2002 and the 18th September, 2006, a period of over four years, at reasonable charge-out rates is alleged to indicate a total remuneration on this basis of R599 963,33, excluding VAT. Although a liquidator is under no obligation to keep time records regarding the fulfilment of his duties in administering an estate, an estimate of the time spent will be acceptable: see *Net's case*, supra, at 295B-G. The applicant has estimated the time he and his professional staff spent on the administration from the time of his appointment on the 28th May, 2002 until the 3rd September,

2002. The remuneration for the total time spent based on allegedly reasonable charge-out rates, together with disbursements, is averred by the applicant to amount to R447 750. The applicant did not at that stage keep detailed timesheets as he was not aware that his administration would be unduly protracted or that the remuneration which he now claims would be put in issue.

In his motivation to the Master on the 27th September, 2006 regarding his remuneration, the applicant annexed a detailed record of the time spent by him and his staff between the 5th

September 2003 and the 18th September 2006. At allegedly reasonable charge-out rates this is averred to amount to R152 213,33. The time-based total amount of R599 963,33 is substantially greater than the overall remuneration of R458 222,02 now claimed by the applicant for his services. This is the sum of R308 222,02 reflected in the first liquidation and distribution

account, and R150 000 claimed in the amended second liquidation and distribution account. These figures are both net of VAT. The

time-based total of R599 966,33 is approximately 30.9% greater than the total remuneration now claimed by the applicant.

The Court has the power to review the taxation by the Master of a liquidator's remuneration. This power is conferred by section 151 of the Insolvency Act, which reads:

"...any person aggrieved by any decision, ruling, order or taxation of the Master may bring it under review by the court and to that end may apply to the court by motion after notice to the Master". The statutory power of review in the present case is wider than the ordinary judicial review of administrative action, being the third type of review identified by Innes, CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council*. 1903 TS 111 at 117 where the learned Judge stated that, on review, a 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 by the lower tribunal, to deal with the whole matter upon fresh evidence as a court of first instance".

(See, also, *Nel & Another NNO v The Master (Absa Bank Ltd & Others intervening)*, supra, at 286C-288D. Thus the Court may receive new evidence and enter into and decide the whole matter afresh. The Court has the powers both of appeal and review.

We are of the view that the Master erred in her ruling of the 18th June, 2007, to the effect that the applicant's remuneration was to be limited to the tariff. In this regard, although she accepted that factors such as the complexity of the matter, the degree of difficulty, the amount of work done and the time spent by the

liquidator were to be taken into account, she erroneously dismissed the applicant's detailed motivation by stating that the items were covered by the tariff, and that these related to what she called the "normal duties of a liquidator". The tariff does not refer to the duties to be undertaken by a liquidator; it merely sets out the percentages allowed as remuneration for the liquidator on the disposal of various classes of property. It does no more. The only relevant consideration was whether the application of the tariff resulted in remuneration for the applicant which was reasonable when measured against the various factors mentioned. If it did not, this amounted to good cause to increase the remuneration in accordance with section 384(2) of the Companies Act.

A liquidator's administration is governed by the exigencies of each particular case. A diligent liquidator will discharge the duties

imposed on him by law. The reason advanced by the Master that a liquidator's remuneration must be determined by "the result

attained" is, in our view, a misdirection. To the extent that this assertion can be given any content at all it is, at best,

irrelevant.

Although the Court will usually be slow to interfere where the dispute concerns the quantum of a liquidator's fees, it will do so where the Master was clearly wrong. (See *Nel's case*, supra, at 287B-288G and *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another*. 2002(2) SA 64 (CC) at 73C-F.

We find, first, that the Master was wrong in her approach to the matter and that lip-service only was paid to the relevant factors which she ought to have taken into account. Secondly, we find that there is a material disparity between the remuneration which ought to have been allowed and that which the Master has allowed, based on the application of the tariff. As I have said, the applicant claims substantially less than the amount calculated on a time basis alone. That does not, of course, necessarily mean that the amount of remuneration claimed by the applicant is reasonable. It may or may not be. However, we find that, in all the relevant circumstances to be reasonable the applicant's total remuneration must substantially exceed the sum of R331 479,15 before VAT to which the Master seeks to limit it in terms of the applicable tariff.

In the Nel case, supra, the Court made no finding as to whether the applicants should have formulated their grounds of review so as to bring them within the ambit of the grounds specified in section 6(2) of the Promotion of Administrative Justice Act. The applicant in the present matter has, nevertheless, relied in its founding papers on this section of that Act in the alternative.

We find that the reasons stated by the Master for her decision amount to a misdirection and indicate that she was materially influenced by an error of law, that she took into account irrelevant considerations and that she did not consider relevant considerations. She also seems to have acted arbitrarily, her decision was proportionately unreasonable and the exercise of her discretion was not according to law. Having said that, we do not find that the Master was in any way mala fide or influenced by any improper or ulterior motive. She has at all times acted in good faith in this matter: nor has the contrary been alleged by the applicant.

It follows, in our judgment, that the relevant decision of the Master must be set aside on review. However, it does not necessarily follow that we, sitting as a Court of review, should fix the applicant's remuneration in the amended second liquidation and distribution

account at the amount claimed by the applicant (R150 000 before VAT, or R171 000 after the addition of VAT). This Court is not expert in the practical minutiae of the winding-up of companies, or familiar with the multitude of administrative and other tasks which such work involves. The Master

and the applicant have far more expert knowledge of these matters than we have.

The precise determination of remuneration for the applicant which would be reasonable in all the relevant circumstances is, in this case, best left to the Master, in our view. We therefore do not propose to embark in this matter on a minute examination of each item in respect of which the applicant claims to be entitled to be remunerated. It may be that in other cases situations may arise where it will be both possible and desirable for a Court on review to perform the function of the Master and to fix the precise amount which would represent reasonable remuneration for a liquidator. In such cases, the Court would have to be in as good a position, as the Master was to make such a determination. Here, however, the Court is not in such a position especially in the light of the criticism of certain items in respect of which remuneration is claimed by the applicant which have given rise to certain concerns to which I shall presently advert.

There are certain items in the applicant's daily timesheets which, on the face of them, give us pause, even if only on a prima facie view. These include the three items which are specifically referred to in a letter to the Master dated the 8th December, 2006, from one of the company's creditors, Nedbank Ltd, namely the following; on the 18th March, 2004 there is an item in terms of which R3 240 is claimed by the applicant for perusing a 36-page transcript of the proceedings of a section 415 enquiry, which would appear to represent a fee of R90 per page. Secondly, on the 14th June, 2004, remuneration of R46 500 is claimed for perusing a 155 page transcript of the proceedings of a section 415 enquiry at what seems to be R300 per page. Thirdly, on the 30th June, 2005, remuneration of R14 220 is claimed for perusing a summons running to 79 pages at what would appear to be a rate of R180 per page. It may be that these and other items reflected in

the timesheets are reasonable. On the other hand, it may be that they will be found to be excessive on consideration by the Master. All that we are able to say at this stage is that, on an overall view of the matter we are satisfied that reasonable remuneration for the applicant will be considerably in excess of the aggregate sum which the Master has hitherto been prepared to allow, based on the application of the tariff. The function of the Master in taxing the applicants remuneration in a matter such as this does not appear to us to be materially different from that of a Taxing Master taxing a bill of legal costs (see Nel's case, *supra*, at 288F-G).

For these reasons the following order is made:

1. The decision of the respondent taken on the 18th June, 2007 not to tax the applicant's remuneration otherwise than according to Tariff B of the Second Schedule to the Insolvency Act, No. 24 of 1936, read with form CN104 of the Companies Act, No. 61 of 1973, is set aside.
2. The matter is referred back to the respondent for her reconsideration, bearing in mind what has been said in this judgment, it being found that in terms of section 384(2) of the Companies Act, good cause exists for remuneration to be awarded to the applicant in excess of the amount arrived at solely by applying the provisions of the said tariff.
3. No order is made as to the costs of this application.

THRING, J

BOZALEK, J: I agree.

BOZALEK, J

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