

SOUTH AFRICA / JUDGMENT

MMI Group Limited v Haywood N.O and Others (1533/2018) [2019] ZAGPPHC 564 (28 November 2019) [2019] ZAGPPHC 564

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

1533/2018

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REPUBLIC OF SOUTH AFRICA

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THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

YES

/ NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE NO: 1533/2018

28/11/2019

In the matter between:-

MMI GROUP LIMITED

Applicant

and

MARI HAYWOOD N.O

ADRIAAN WILLEM VAN ROOYEN N.O

INA HOGEWIND N.O

TINTINGERS INCORPORATED

THE MASTER OF THE HIGH COURT

GAUTENG DIVISION

First Respondent

Second Respondent

Third Respondent

Fourth Respondent
Fifth Respondent

JUDGMENT

RANCHOD, J

Introduction

[1] This is an application for the review and setting aside of the decision of the fifth respondent and ancillary relief set out in the Notice of Motion which I have paraphrased as follows:

1.1 That the decision of the fifth respondent dated the 29th November 2017 to disallow the applicant's objection to the amended second and final liquidation distribution and contribution account in the insolvent estate of Mr RC Martens, (Master's reference No T4315/12) be set aside and substituted with an order upholding the objection.

1.2 That the first, second and third respondents be ordered to submit an amended second and final liquidation and distribution account in the insolvent estate of Mr RC Martens, master's reference no T4315/12, subject to the following:

1.2.1 That the fourth respondent's bills of costs addressed to St Adens International (the trustees) dated 25 May 2015 No LB5465, 28 May 2015 No LB563 and 28 July 2014 No SP004806 be submitted to the Law Society of the Northern Provinces for assessment in terms of section 73(3)(b) of the Insolvency Act;

1.2.2 That the assessment of the fourth respondent's bills of costs be done with notice to the first, second and third respondents and the applicant;

1.2.3 That the first, second and third respondents comply with the provisions of section 73(4) of the Insolvency Act;

1.2.4 That the fifth respondent investigate the costs incurred by the first, second and third respondents for the services

rendered by the fourth respondent to ensure that every cost item is correctly and properly charged and that the first, second and third respondents have not acted in bad faith, negligently or unreasonably in incurring such costs; and

1.2.5 That the first, second and third respondents investigate the claim for legal costs in the amount of R35,000.00 by attorneys DLB Moabelo Incorporated (DLBM) in respect of the costs incurred in the application for the voluntary surrender of the estate of Mr RC Martens, included as costs in the administration of the estate in the first liquidation and distribution account, the alleged double recovery thereof by DLBM and to recover any amount unduly paid to DLBM.

1.3 That the first, second and third respondents personally and the fourth respondent pay the costs of this application jointly and severally, the one paying the other to be absolved.

[2] The papers in the application are voluminous, comprising of some 600 pages. However, although this may suggest a complicated and involved factual and legal dispute, it is in fact a narrow one. It involves two issues.

Firstly, the decision of the Master to allow certain costs of the fourth respondent in the amended second liquidation and distribution

account and secondly, an amount of fees included in the first account by the trustees in relation to legal costs of DLBM attorneys who acted on behalf of the insolvent in his voluntary surrender application.

[3] The first to fourth respondents oppose the application while the Master has not entered an appearance.

Factual matrix

[4] The applicant is a creditor in the insolvent estate of Mr. RC Martens (Martens or the insolvent). The first, second and third respondents are the joint trustees appointed by the Master in the insolvent estate. The fourth respondent is a firm of attorneys who were engaged by the joint trustees to, inter alia, resist an application for the removal of the first to third respondents as trustees of the insolvent estate which was launched by the applicant. The joint trustees included the costs incurred by them as costs in the administration of the estate in the second and final liquidation and distribution account dated 9 June 2015.

[5] The applicant objected to the inclusion of the costs of the fourth respondent. The joint trustees, represented by the fourth respondent, responded to the objection.

[6] Based upon what was stated by the joint trustees in their answer to the objection, the applicant filed a “Response” in which it expanded upon the grounds of its objection. The applicant also raised an additional objection relating to the inclusion of the fees charged by DLBM in the application for the acceptance of the voluntary surrender of Marten’s estate as part of the costs of administration in the first liquidation and distribution account when they had already recovered most of those costs from the sale of an immovable property of a close corporation in which the insolvent was the sole member.

[7] In a letter dated 10 November 2015, the joint trustees, represented by the fourth respondent, objected to the raising of additional grounds of objection to the account as set out in the “Response” but did not deal with the merits of the “Response”.

[8] The Master thereafter published her ruling regarding the objection on 10 October

2016. The Master determined that all legal costs incurred by the joint trustees in relation to the application by the applicant for the removal of the first to third respondents as trustees of the insolvent estate should be excluded and not form part of the costs of administration of the estate.

[9] The joint trustees accordingly filed an amended second and final liquidation and distribution account dated 30 November 2016. A reduced amount claimed by the fourth respondent was included in the account.

[10] The applicant objected once again, this time to the amended second and final liquidation and

distribution account. The gist of the second objection to the account was that no proper bill of costs was presented by the fourth

respondent to enable the applicant to determine how the now reduced amount claimed by the fourth respondent was calculated. In addition, the applicant stated in its objection that the fourth respondent's bill of costs should be assessed by the Law Society in terms of s73 of the Act.

[11] The fourth respondent opposed the objection of the applicant, contending that the Master had already ruled on the objection by not directing the fourth respondent to submit its account for assessment to the Law Society.

[12] In a letter dated 29 November 2017 the Master disallowed the objection to the amended second and final liquidation and distribution account on the basis that she had already ruled upon the objection in the earlier decision dated 10 October 2016 (and that she was therefore *functus officio*).

[13] The questions that arise are firstly, whether the Master was correct in disallowing the objection to the fourth respondent's reduced account when it had not been assessed by the Law Society (now the Legal Practice Council). Secondly, whether the amount claimed by DLBM was correctly allowed in the first liquidation and distribution account.

Relevant legal principles

[14] Section 73 of the Insolvency Act 24 of 1936 (the Act) provides:

- (1) Subject to the provisions of this section and s53(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 the behalf of the estate: Provided that the trustee –
 - (a) if he or he 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.

- (2) Subject to the provisions of subsection (3) costs incurred under this section, except costs awarded against the estate in legal proceedings, shall not be subject to taxation by the taxing master of the court if the trustee has entered into any written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff: Provided that no contingency fees agreement referred to in s2(1) of the Contingency Fees Act 66 of 1997, shall be entered into without the express prior written authorisation of the creditors.

- (3) If –

- (a) the trustee has not entered into an agreement under subsection

2; or

- (b) there is any dispute as to the fess payable in terms of such an agreement,

the costs shall be taxed by the taxing master of the High Court having jurisdiction or, where the costs are not subject to taxation

by the said taxing master, such costs shall be assessed by the law society or bar council concerned’

- (4) No bill of costs based upon an agreement entered into under subsection (2) shall be accepted as cost of the sequestration of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the trustee stating-

- (a) that he or she had been duly authorised by either the creditors

or the Master, as the case may be, to enter into such an agreement;

- (b) that any legal work specified in such bill has been performed to the best of his or her knowledge and belief;

- (c) that the disbursements specified in such bill have been made to

the best of his or her knowledge and belief; and

(d) that, to the best of his or her knowledge and belief, the attorney

or counsel concerned has not overreached him or her.’

Discussion

[15] The common cause facts relevant to this application are that:

15.1 The applicant is the only concurrent creditor who proved a claim in the insolvent estate of Mr RC Martens.

15.2 The joint trustees in terms of the amended second and final liquidation and distribution account, levied a contribution of R48,909.55 against the applicant.

15.3 Included in the amended second and final liquidation and distribution account is an amount of R24,196.47 as disbursements to be paid to the fourth respondent for legal services incurred by the joint trustees.

15.4 Included in the first liquidation and distribution account is an amount of R35,000.00 paid to DLBM for the

costs of the application for the acceptance of the voluntary surrender of the insolvent’s estate.

15.5 Although the fourth respondent states that he concluded a written agreement with the joint trustees in terms of which fees charged by him would be determined in accordance with a specific tariff, he did not attach a copy of such agreement to his answering affidavit. No evidence has been given by the fourth respondent as to what the terms of the agreement were and in particular what the specific tariff was.

[16] It is apparent that the fourth respondent’s bill of costs which has been included in the amended second and final liquidation and distribution account has not been submitted to the Law Society for assessment in terms of s73(3)(a) or (b) of the Act.

[17] It is also apparent that the bills of costs have not been accompanied by an affidavit by the joint trustees in terms of section 73(4) of the Act.

[18] I am of the view that the provisions of s73 of the Act are peremptory.

[19] The trustees can only include a bill of costs in respect of costs incurred by them for services rendered by the fourth respondent if there is compliance with the express provisions of section 73. The Master has no discretion to waive compliance with the provisions of the Act. I could find no acceptable evidence in the papers that the joint trustees and the fourth respondent concluded a written agreement as contemplated in s73(2) of the Insolvency Act. Indeed, the applicant says despite a request by it, the fourth respondent has refused to provide a copy of the agreement.

- [20] Even if it is accepted that there is a written fee agreement, the applicant in any event disputes the fees. In these circumstances the provisions of s73(3) would apply.
- [21] The fourth respondent contended that he had concluded an agreement as contemplated in s73(2) of the Act. If that is indeed the case then the trustees were obliged to comply with the provisions of s73(4). From the papers before me it therefore seems common cause that there has been no compliance with either s73(3) or s73(4) of the Act.
- [22] The first to third respondents also do not contend that there was substantial compliance with the Act. It seems as if they, on the version of the fourth respondent argue that because the Master did not insist in the first ruling that the respondents comply with the provisions of section 73, they are somehow excused from compliance with the peremptory provisions of the Insolvency Act. There is no merit in such an argument.
- [23] The provisions of s73 are clearly designed to protect the creditors of the insolvent estate. It is them who ultimately have to pay legal costs incurred by the trustees either by way of a reduced dividend or by a contribution to costs. Neither the trustees nor the Master have any discretion whether there should be compliance or not[1].
- [24] In those circumstances the bills of costs submitted by the fourth respondent should either be excluded from the amended second liquidation and distribution account or they should be submitted for assessment before they are included.
- [25] The trustees also contend that a resolution passed at the creditors meeting authorised them to engage the services of a legal practitioner. That may be so in accordance with s73(1). However, it is clear from the wording of the subsequent relevant subsections that that does not absolve them from complying with those subsections.
- [26] I turn then to the inclusion in the first liquidation and distribution account the R35,000.00 paid to attorneys DLBM for the costs of the voluntary surrender of the insolvent's estate.
- [27] The insolvent was the only member of a close corporation called Polsméd CC, which owned an immovable property. The applicant says, and it appears to be not in dispute, that DLBM recovered R30,000.00 of its costs of R35,000.00 for the voluntary surrender of the insolvent's estate from the sale of the immovable property. It nonetheless submitted a claim for the full amount of R35,000.00 in the insolvent estate and it was paid in full by the trustees. Prima facie it appears as if there was a double recovery of costs of at least R30,000.00 by DLBM.
- [28] The applicant says this issue has not been investigated by the joint trustees nor has a satisfactory explanation been given for their failure to do so and the Master has said nothing about it.

[29] The trustees contend that the applicant should have objected when the fees were included in the first account which has already been confirmed by the Master and the claim paid and cannot do so now at the stage of the amended second account. The applicant counters that it (and the trustees themselves) only became aware of the issue at the inquiry held in terms of s65 of the Act which was only after the first account had already been confirmed. It follows that it could not have objected earlier. The contentions of the trustees and the fourth respondent therefore cannot be sustained. It seems to me that on the prima facie evidence presented to the joint trustees, they were obliged to investigate the circumstances of the alleged double recovery of fees by DLBM.

[30] I turn now to the issue of costs. But before I do so an issue to be dealt with is the applicant's application for condonation for filing a supplementary affidavit by its attorney regarding costs after it had filed its replying

affidavit. In the supplementary affidavit the attorney explains in detail how he prevailed upon the first to fourth respondents to do what the applicant contended they were obliged to do and thus avoid further litigation. He says the endeavours were unsuccessful. This information is helpful in determining the issue of costs and therefore condonation should be granted.

[31] The applicant seeks a costs order against the joint trustees in their personal capacity because, it says, they have steadfastly refused to comply with their obligations in terms of s73 and have also not investigated the alleged double recovery of fees by DLBM.

[32] The trustees say the applicant should not have sought relief against them – at least so says the first respondent's counsel in the heads of argument. First respondent says:

'The trustees did not act dishonest (sic), obstructed the interest of justice, acted irresponsibly or grossly negligent (sic)... The only reason why the trustees are obliged to oppose this application is due to the cost order being sought de bonis propriis for a decision that the fifth respondent took.'[2]

[33] The relevant part of s111(2) of the Act provides:

'(a) any person aggrieved . . . by the refusal of the Master to sustain an objection so lodged, may apply by motion to the court within fourteen days . . . as from the date of intimation to the objector of the Master's refusal to sustain his objection, after notice to the trustee, for an order to set aside the Master's decision and the court may thereupon confirm the account or make such order as it thinks fit; . . .'

[34] First respondent says the applicant did not apply for review within fourteen days. That is incorrect. The Master had informed the applicant by email[3] that due to the December holiday period she will hold over confirmation of the amended second and final liquidation and distribution account until 12 January 2018 to allow the applicant an opportunity to launch this application, which it did by issuing the notice of motion on that date.

- [35] The first respondent laments the fact that no costs are sought against the Master when it was the latter who took the decision that led to this application. She says the applicant seeks to penalise the trustees for the decision of the Master. What applicant should have done is to seek a review of the Master's decision and request costs against the first to fourth respondents only if they were to oppose the application in which event none of them would have opposed the application and abided the decision of the Court. They have been forced to oppose the application only because of the personal costs orders sought against them.
- [36] The trustees and the fourth respondent did not do what they ought to have done, as set out earlier. However, it was the Master who sanctioned their decisions by approving the amended second account. The applicant implicitly acknowledges it by seeking a review of the decision of the Master. It is the Master who is to ensure that the trustees carry out their duties as such in the correct manner. In these circumstances the applicant should not have sought costs against the trustees in their personal capacities but rather seek costs against them (and the fourth respondent) only if they opposed the application. In any event, while the stance adopted by the trustees was incorrect they did not behave improperly, grossly negligently, or vexatiously.[4] I do not think a costs order against the trustees in their personal capacity is in the circumstances warranted. Having said that, in my view there was no good reason for each of them to appoint their own separate attorneys. The second and third trustees in the end aligned themselves with the submissions of the first trustee. But as I said earlier, they were prevailed upon by the applicant to avoid litigation by paying heed to the issues raised by the applicant.
- [37] The fourth respondent steadfastly refused to prepare a new bill of costs dealing only with legal costs other than those disallowed by the Master regarding the applicant's application to have the trustees removed. The Master determined that those costs were not recoverable from the insolvent estate but were to be borne by the trustees personally. Only the costs relating to two other matters were allowed as claims against the insolvent estate. The fourth respondent did not prepare a new bill of costs relating to those two matters but merely reduced the amount originally claimed for the three matters. He also did not pertinently disclose whether a written agreement was concluded with the trustees as provided for in s73 of the Act nor did he comply with the requirement in s73 for the assessment of its bill of costs by the law society.
- [38] In all these circumstances, in my view an appropriate costs order would be that each party should bear their own costs
- [39] I make the following order:
1. The application for condonation by applicant for filing a supplementary affidavit is granted.

2. That the decision of the fifth respondent dated the 29th of November 2017 to disallow the applicant's objection to the amended second and final liquidation and distribution account in the insolvent estate of Mr RC Martins, master's reference No 4315/12, be set aside and substituted with an order upholding the objection.
3. The fifth respondent is to direct the first, second and third respondents to submit an amended second and final

liquidation and distribution account in the insolvent estate of Mr RC Martins, master's reference No T4315/12, subject to the following:

3.1 That the fourth respondent's bill of costs addressed to St Adens International dated 25 May 2015 No LB565, 28 May 2015 No LB563 and 28 July 2014 No SP004806 be submitted to the Law Society of the Northern Provinces for assessment in terms of s73(3)(b) of the Insolvency Act;

3.3 That the first, second and third respondents comply with the provisions of s73(4) of the Insolvency Act.

5. The fifth respondent is to direct the first, second and third respondents to investigate the claim for legal costs in the amount of R35,000.00 by attorneys DLBM Incorporated in respect of the costs incurred in the application for the voluntary surrender of the estate of Mr RC Martins, included as costs in the administration of the estate in the first liquidation and distribution account, the alleged double recovery thereof by DLBM Incorporated and to recover any amount unduly paid to DLBM Incorporated.
6. Each party is to bear their own costs.

RANCHOD, J

JUDGE OF THE HIGH COURT

Appearances:

Appearance for the Applicant:

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Instructed by Gerings Attorneys

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Appearance for the Second

Adv PJ Greyling

Respondent:

Instructed by Schabort & Walker Attorneys

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Appearance for the Third

Mr JA Du Plessis

Respondent:

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Appearance for the Fourth

Adv DM Leathern SC

Respondent:

Instructed by Susan Strydom Attorneys

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Hazelwood, Pretoria

[1] Merry Hill (Pty) Ltd v Engelbrecht 2008 (2) SA 5 (SCA); Van Niekerk and Another v Favel and Another 2006 (4) SA 58 (W); Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (In Liquidation) 1981 (1) SA 171 (A).

[2] First respondent's heads of argument p12 at para 2.25.

[3] Email dated 20 December 2017 attached as annexure "FA14" to the founding affidavit.

[4] See Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 SCA at para 37 and Murray and Others NNO v African Global Holdings (Pty) Ltd and Others (306/2019) [2019] ZASCA 152 (22 November 2019).

[4] See Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 SCA at para 37 and

Murray and Others NNO v African Global Holdings (Pty) Ltd and Others (306/2019) [2019] ZASCA 152 (22 November 2019).

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