

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Master of the High Court and Another (43581/16)

[2019] ZAGPJHC 393 (31 October 2019)

[2019] ZAGPJHC 393

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.A. Meyer

CASE / FILE NUMBER

43581/16

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

Case

No: 43581/16

In

the matter between:

NEDBANK
LIMITED Applicant
and
MASTER
OF THE HIGH
COURT First
Respondent
ATKA
TRADING 223 (PTY) LTD
t/a
HOLBOTH BUSINESS
SOLUTIONS Second
Respondent
Case
Summary: Companies Act 71 of
2008 – business rescue proceedings – whether, when
business rescue proceedings converted to liquidation, business rescue
practitioner's claim for unpaid remuneration and expenses
enjoys a preference over all creditors, secured or unsecured.
Diener
No v Minister of Justice and Correctional Services and others 2018

(2) SA 399 (SCA) ([2018] All SA 317 (SCA)) and Diener
No v Minister of Justice and Correctional Services and others 2019
(2) BCLR 214 (CC) (2019 (4) SA 374 (CC) followed and applied.

JUDGMENT

MEYER, J

- [1] This case concerns the claim for remuneration and expenses of a business rescue practitioner when business rescue has failed and been converted into a liquidation, and particularly the order of preference of the BRP's claim on the liquidation of the company concerned, which question the Supreme Court of Appeal resolved in Diener No v Minister of Justice and Correctional Services and others 2018 (2) SA 399 (SCA) ([2018] All SA 317 (SCA)) prior to the hearing of this matter. The judgment of the Supreme Court of Appeal was endorsed by the Constitutional Court in Diener No v Minister of Justice and Correctional Services and others 2019
- (2) BCLR 214 (CC) (2019 (4) SA 374 (CC), also prior to the hearing of this matter.
- [2] The first respondent, the Master of the High Court, Johannesburg (the Master), nevertheless persisted in his opposition to the relief claimed by the applicant, Nedbank Limited (Nedbank), a secured creditor with a claim in the amount of R19 993 324.60 against the company in liquidation, Fima Films SA (Pty) Ltd (Fima), for the review and setting aside of the decision and direction of the Master-
- '... issued on 23 November 2016 in relation to the first and final liquidation and distribution account in respect of Fima Films SA Proprietary Limited (in liquidation) (Master's reference no. G20419'14 ('the company in liquidation'), signed by and on behalf of the joint liquidators of the company in liquidation on 11 May 2016 ('the revised L&D account')).
- [3] The facts are essentially common cause. In 2010, Nedbank lent and advanced funds to Fima, which loan was secured by a mortgage bond registered in favour of Nedbank over certain immovable property owned by Fima (the encumbered property). On 9 October 2013, Fima was placed under supervision and business rescue proceedings commenced. The second respondent, Atka Trading 223 (Pty) Ltd t/a Holboth Business Solutions, an entity controlled by Mr Basil Anthony Holboth, was appointed as the business rescue practitioner (the BRP).
- [4] In July 2014, the business rescue proceedings were superseded by a final liquidation order. Ms Tracy Hill N.O. and Mr Bhadrish Daya N.O. were appointed joint liquidators of Fima (the joint liquidators). At the first meeting of creditors on 3 March 2015, Nedbank proved its claim in the amount of R19 993 324.60 arising from its loan to Fima, which claim is secured by the mortgage bond registered in favour of Nedbank over the encumbered property, and the BRP proved his claim in the amount of R706 873.59 for his remuneration and expenses during the business rescue proceedings.

- [5] The joint liquidators prepared a first and final liquidation and distribution account, which they lodged with the Master on 1 March 2016 (the initial L&D account). The initial L&D account reflects the BRP's claim as a 'Super Preferent' claim to be paid from the proceeds of the sale of the encumbered property, before Nedbank's secured claim. The joint liquidators sent a circular to the proved creditors advising that the account would lie open for inspection until 25 March 2016.
- [6] In early April 2016, Nedbank's attorneys wrote to the joint liquidators, advising them that they had been instructed to object to the initial L&D account, and enquiring whether it had been submitted to the Master for confirmation. The joint liquidators replied, saying that the account was in the process of being submitted for confirmation, but in the light of the attorneys' letter, they would not pursue confirmation of the account then, and they suggested that before Nedbank lodged a formal objection with the Master, it should indicate its objection to the joint liquidators with a view to resolving the matter. Nedbank's attorneys therefore wrote to the joint liquidators, also in April 2016, indicating that Nedbank objected to the treatment of the BRP's claim in the initial L&D account and submitted (with reference to certain statutory provisions and the high court's judgment in the Diener matter) that the BRP's claim was not to be deducted from the proceeds of the encumbered property, but instead was a claim against the free residue, to be paid after deduction of the costs set out in s 97 of the Insolvency Act 24 of 1936. They indicated that if Nedbank's objection was not resolved via the process proposed by the joint liquidators, they would lodge an objection with the Master in terms of s 407 of the Companies Act, 61 of 1973 (the 1973 Companies Act).
- [7] The latter section provides as follows:
- '407. Objections to account.
- (1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.
 - (2) If the Master is of the opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.
 - (3) If in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit.
 - (4) (a) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit.

- (b) If any such direction given by the Master under this section affects the interests of a person who has not lodged an objection with the Master, such account as amended shall again lie open for inspection in the manner and with the notice as prescribed in section 406, unless the person affected consents in writing to the immediate confirmation of the account.’
- [8] In May 2016, the joint liquidators lodged a revised first and final liquidation and distribution account with the Master (the revised L&D account), which account reflects the BRP’s claim as a (preferent) claim against the free residue, rather than against the proceeds of the encumbered property. On 2 May 2016, the BRP wrote to the Master, setting out his objections to the revisions, including his contention that, after the conversion of business rescue proceedings into liquidation proceedings, s 135(4) and s 143(5) of the Companies Act 71 of 2008 (the 2008 Companies Act) create a preference in respect of the business rescue practitioner’s claim for remuneration and expenses before the claims of all other secured and unsecured creditors.
- [9] Section 135 of the 2008 Companies Act deals with post-commencement finance that includes the remuneration and expenses of the business rescue practitioner, and subsection
- (4) provides that ‘[i]f business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation’. Section 143 deals with the remuneration of the business rescue practitioner and subsection (5) provides that ‘[t]o the extent that the practitioner’s remuneration and expenses are not fully paid, the practitioner’s claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors’.
- [10] On 18 May 2016, the joint liquidators wrote to the Master, recording that they had been advised by Nedbank’s attorneys that Nedbank intended objecting to the initial L&D account, and that they had requested the attorneys to provide the basis of Nedbank’s objection with a view to possibly resolving the dispute without the potentially protracted process of a formal objection. They also addressed the BRP’s objections, and their view, and that of Nedbank, that the provisions of s 135(4) and 143(5) of the 2008 Companies Act only elevate a business rescue practitioner’s claim for remuneration and expenses to a preferential claim against the free residue after the conversion of business rescue proceedings into liquidation proceedings.
- [11] On 14 November 2016, the Master wrote to the BRP, advising Mr Holboth thus:
- ‘Please be advised that your objection to the amended first liquidation and distribution account is sustained. This office will direct the liquidators to amend the account and comply with Section 143(5) of the New Companies Act’.
- And on 23 November 2016, the Master also wrote to the joint liquidators, stating:

'I acknowledge receipt of your email and advise that Section 143 of the 2008 Companies Act regulates the payment of business rescue practitioner. Section 143 (5) reads as follows: "To the extent that a practitioner's remuneration and expenses are not fully paid, the practitioner's

claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors." Therefore we are of the view that the BRP is entitled to full recovery from the estate in liquidation, in priority before the claims of all other secured and unsecured creditors in terms of Section 143 as read with Section 135 and regulation 128(1)(c) of the Companies Act 71 of

2008. The Trevor John Murgatroyd v Theodor Wilhelm van den Heever N.O. and Others is in line with the interpretation of the aforementioned applicable sections.

There is a later judgement Diener N.O. v Minister of Justice, in this judgement it was found that where the business rescue is superseded by liquidation order, Section 135(4) of the Companies Act 71 of 2008 must read with Section 97 of the Insolvency Act 24 of 1936 and the remuneration of the BRP and the expenses incurred during business rescue that has not been paid cannot be paid from proceeds of the secured asset. The BRP fees are neither administration costs in terms of section 97 nor Section 89 costs which can be reflected in an encumbered asset account. The decision of Diener's case has been appealed in which leave to appeal has been granted, until the appeal court rules otherwise the principle in Murgatroyd is applicable. Therefore you have to amend the First Liquidation and Distribution Account in compliance with Section 143 of the Companies Act 71 of 2008.'

[12] The citation of the Murgatroyd judgment on which the Master relied, is Murgatroyd v Van den Heever NO and others [2014] 4 All SA 89 (GJ) (2015 (2) SA 514 (GJ)). That case concerned the entitlement of a business rescue practitioner to be reimbursed for expenses incurred and disbursements made during business rescue proceedings, and not the order of preference of a business rescue practitioner's claim for remuneration and expenses when business rescue has failed and been converted into a liquidation. It is not authority for the Master's view that when business rescue has failed and been converted into a liquidation, a business rescue practitioner's claim for remuneration and expenses enjoys a 'super-preference' in terms of subsections 135(4) and 143(5) of the 2008 Companies Act in priority to the claims of all other pre-business rescue secured and unsecured creditors.

[13] On 7 December 2016, Nedbank, aggrieved by the decision of the Master sustaining the BRP's objection, instituted the present

application in terms of s 407(4)(a) of the 1973 Companies Act for an order setting aside the Master's decision. Only the Master is opposing the application, and his answering affidavit was filed on 20 February 2017. The replying affidavit was thereafter filed on 7 March 2017. Because the appeal in Diener was due to be heard in the Supreme Court of Appeal on 13 November 2017, the parties agreed to await the decision of the Supreme Court

of Appeal, which was handed down on 1 December 2017. An application for leave to appeal to the Constitutional Court against

the decision of the Supreme Court of Appeal followed, which was heard on 6 September 2018. The Constitutional Court endorsed the decision of the Supreme Court of Appeal and refused the application for leave to appeal on 29 November 2018. This application in terms of s 407 of the 1973 Companies Act was accordingly only enrolled for hearing in this court on 3 May 2019.

[14] In rejecting an identical contention upon which the Master in this instance sustained the objection of the BRP, the Supreme Court of Appeal in *Diener* (per Plasket AJA), *inter alia*, held as follows:

‘[42] . . . Section 135 concerns itself with post-commencement finance and it is in this context, i.e. while business rescue proceedings are in place, that it creates a set of preferences for the payment by the company of certain of its unpaid debts. It does so as part of the regulation of the affairs of the financially distressed company. It is only s 135(4) that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement

finance on liquidation, subject only to the costs of liquidation. This section, to the limited extent that it has to do with

liquidation, says nothing of the ‘super-preference’ contended for over secured assets. To the contrary, it creates in favour of those claims listed in the section, a preference over unsecured claims. . . .

[43] Section 143 is also not concerned with liquidation. Instead, it regulates the BRP’s right to remuneration during business rescue proceedings: it concerns the tariff in terms of which BRP’s are remunerated; the additional contingency-based remuneration that the BRP may negotiate, and safeguards in that respect; and the BRP’s claim for unpaid remuneration, which ranks ‘in priority before the claims of all other secured and unsecured creditors’. The reference to secured and unsecured creditors in the section must, in my view, be understood to be a reference back to s 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company’s pre-business rescue creditors. Simply put, the preference operates within this limited context. Henochsberg’s commentary, referred to in paragraph 37 above, seen in proper perspective, is consonant with the conclusion.

. . .

[49] For these reasons, I conclude that s 135(4) and s 143(5), whether taken individually or in tandem, do not create the ‘super-preference’ contended for on behalf of *Diener*. Section 135(4) provides to the BRP, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-commencement

finance, whether those claims were secured or not, and of any other unsecured creditors.

- [15] Where business rescue proceedings are superseded by a liquidation, as in this instance, the business rescue practitioner's claim for unpaid remuneration and expenses is against the free residue of the estate and ranks ahead of the claims of post-commencement financiers (including employees in respect of post-commencement wages) and ahead of other unsecured creditors. The business rescue practitioner's claim, however, is not to be met from the proceeds of an asset subject to security, which pre-dates the business rescue proceedings. (If the proceeds of the secured asset exceed the claim of the creditor holding security over the asset, the surplus will fall into the free residue.) This legal position is now conceded by the Master in these proceedings.
- [16] But the Master nevertheless persists in his opposition to the relief claimed in this application based on an in limine point that did not form part of his reasoning in sustaining the BRP's objection nor raised before the filing of his answering affidavit. The argument is this: Based on Nedbank's objection, the joint liquidators amended the initial L&D account, and submitted a revised one that reduced the super preferent status of the BRP's claim for remuneration and expenses, which objection and revision were not in compliance with the provisions of subsections (1) and (2) of s 407 of the 1973 Companies Act, and therefore invalid. Those provisions, it is argued, require the objection to be lodged with the Master (and not the liquidator) and if the Master is of the opinion it should be sustained, for the Master to direct the liquidator to amend the account (and not the liquidator to amend it of his or her own accord). It is argued that only the initial L&D account is accordingly valid, and not the revised one. This application, therefore, so the argument continues, is premature and the matter ought to be referred back to the Master for 'adjudication'. This argument, in my view, has no merit.
- [17] The requirements of s 407 of the 1973 Companies Act have been met. The BRP lodged an objection to the revised L&D account (as contemplated in s 407(1)); the Master sustained the BRP's objection and directed the joint liquidators to amend the account (as provided in s 407(2)); and Nedbank, being aggrieved by the Master's decision brought the present application to this court (as contemplated in s 407(3)). The Master knew – because the joint liquidators' submissions to the Master clearly set this out – that the revised L&D account was a revised account and that the revisions to the initial L&D account had come about because of the representations made on behalf of Nedbank directly to the joint liquidators. The Master did not suggest that the revised L&D account was for any reason invalid or that the initial L&D account was the only valid one. Instead, he dealt with the objection to the revised L&D account as contemplated in s 407, and sustained the objection.
- [18] I am of the view, therefore, that the Master's opposition to the relief claimed in this application became unreasonable once the Constitutional Court had delivered judgment in *Diener* on 29 November 2018, and he should then have withdrawn the opposition. The costs order I propose to make reflects this view.

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

- (a) The decision and direction of the first respondent issued on 23 November 2016, in relation to the revised first and final liquidation and distribution account in respect of Fima Films SA Proprietary Limited (in liquidation) (Master's reference no. G20419'14) ('the company in liquidation'), signed by and on behalf of the joint liquidators of the company in liquidation on 11 May 2016, is hereby reviewed and set aside.
- (b) The first respondent is to pay the costs which the applicant incurred in respect of the application as from 30 November 2018.

P.A. MEYER

JUDGE OF THE HIGH COURT

Date of hearing: 03 May 2019

Date of judgment: 31 October 2019

Counsel for the applicant: Adv MP van der Merwe SC

Instructed by: Edward Nathan Sonnenbergs Inc., Cape Town

C/o Edward Nathan Sonnenbergs Inc., Sandton

Counsel for the 1st respondent: Adv KD Mhango

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