

SOUTH AFRICA / JUDGMENT

Warricker NO and Others v Master of the High Court, Johannesburg (28265/15)

[2017] ZAGPJHC 74 (14 March 2017)

[2017] ZAGPJHC 74

COURT

South Gauteng High Court, Johannesburg

BEFORE

C J Van der Westhuizen

CASE / FILE NUMBER

28265/15

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

CASE NO.: 28265/15

Reportable:

No
Of
interest to other judges: No
Revised.
In
the matter between
GAIL
LIYN WARRICKER N.O.
FIRST
APPLICANT
JOHANNES
HENDRICUS DU PLESSIS N.O. SECOND
APPLICANT
JUANITO
MARTINS DAMONS N.O.
THIRD
APPLICANT
and
THE
MASTER OF THE HIGH COURT
JOHANNESBURG RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

[1] The applicants are the joint-trustees of the insolvent deceased estate of Jeffrey Mark Wiggil (the estate) that was finally

sequestered on 19 November 2013.

[2] This application seeks a review and setting aside of the Master's decision not to confirm the First Liquidation and Distribution

Account (the account) that the applicants had prepared and lodged with the Master on 13 August 2014. The applicants further seek an order confirming the account, alternatively a referral back to the Master for such confirmation.

[3] It is common cause between the parties that the account:

- (a) Does not constitute the final accounting of the estate. However, it is final in respect of the assets dealt with therein;
 - (b) Lay for inspection by creditors for fourteen days at the Master's office in terms of s 108(2) of the Insolvency Act, No. 24 of 1936 (the Act);
 - (c) Was initially objected to in terms of s 111(1) of the Act, but the objection was subsequently withdrawn;
 - (d) Was not subsequent to the objection being withdrawn, confirmed by the Master in terms of s 111(2) of the Act.
- [4] The bone of contention between the parties relate to a special fee in the applicants' favour that is included in the aforesaid

account, which the Master refuses to consider at this point. The Master ruled that the special fee would be considered at a later

stage when the final account is submitted.

[5] In terms of s 63(1) of the Act, trustees are entitled to a reasonable remuneration for their services in accordance with the prescribed tariff, but the Master may increase, or decrease, the remuneration "for good cause". In this regard, the Master has a discretion that is to be exercised upon a consideration of all the relevant facts and circumstances having regard to the complexity of the estate, the amount of work done and the time spent in the discharge of the trustees' duties.[1]

- [6] The remuneration of a trustee is only payable once the account that provides therefor is confirmed in terms of s 112 of the Act.[2] However, this matter concerns the determination of the remuneration that the applicants would be entitled to. It was held in *Nel et al NNO v The Master*,[3] that

“... the Master, as a statutory functionary, is not free to choose whether or not to tax a liquidator’s remuneration – the Master must tax in accordance with the tariff (s 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.”

Although *Nel*, supra, dealt with the provisions of s 384 of the Companies Act, it is equally applicable to s 63 of the Act which contains similar provisions.

- [7] Further in that regard, it was held in *Lambertus Von Wielligh Bester NO et al v The Master of the High Court, Eastern Cape*,[4] that the Supreme Court of Appeal, and with particular reference to *Nel*, supra, has consciously approved taxation and fixing of remuneration long before the services of the liquidator have in fact been completed and prior to a final liquidation and distribution account.
- [8] It follows that the Master is obliged to consider the remuneration that the applicants are entitled to, at least in respect of the prescribed tariff as a point of departure.[5]
- [9] This application is premised upon the provisions of s 112 of the Act. It clearly appears from the provisions of that section of the Act that it is to be read in conjunction with the provisions of s 111(2) of the Act.
- [10] It follows that the review contemplated in s 111(2) of the Act is of the third type of review referred to in *Johannesburg Consolidated Investment Company v Johannesburg Town Council*,[6] i.e. that it is both a review and an appeal. The Supreme Court of Appeal in *Nel*, supra, endorsed this principle.[7] However, the Supreme Court of Appeal further held that it was desirable that the grounds of review should be formulated so as to

clearly bring such grounds within the purview of those enumerated in s 6(2) of the Promotion of Administration of Justice Act, 3 of 2000 (PAJA).[8] The applicants have in addition formulated the grounds of the review on the provisions of s 6(2) of PAJA.

- [11] In the present instance, the applicants aver that the special fee levied relates to additional work done in collecting additional

assets for the benefit of creditors. The applicants are of the view that the collection of the aforementioned additional assets in the amount of approximately R24 000 000.00 constitutes “good cause”. The submission is that much effort was required to collect those assets.

- [12] It is further submitted on behalf of the applicants that there is no genuine dispute that the trustees have performed substantial work and went to substantial additional lengths to secure additional benefit for the creditors. The applicants aver that the estate is otherwise exceptionally complex and difficult to administer. It is alleged that the first applicant herself

expended approximately 7 months exclusively to the process of securing the additional benefit. It is not explained what part the other two trustees played in that regard. The first applicant states that due to the effort required in securing the additional benefit, she was unable to take other appointments for at least the seven-month period referred to above.

- [13] The applicants further contend that the work in respect of the collection of the additional benefit has already been done. The consideration of an increase of the fee is to be determined at this stage and is not to be deferred to the stage that the trustees have completed the administration of the estate. It is further common cause that (some) creditors support the applicants'

request for a special fee.

- [14] The respondent's view in respect of the determination of the special fee is set out in the answering affidavit summarised as follows:

- (a) The Legislature has provided a tariff on which remuneration for trustees have to be taxed;
- (b) The Master, in the present matter Assistant Master Ms N Luiters who is tasked with the estate's administration, is satisfied to tax at tariff, but the applicants have not sought a fee at tariff but an extraordinary fee in excess of the tariff;
- (c) There is no reason for a special fee to be granted at this stage of the administration of the estate;
- (d) The respondent would be in a better position to consider an approval or otherwise of a special fee when all the issues arising in the sequestration of the estate have been finalized;
- (e) There is an accepted standard procedure in the Master's Office and there is no reason set forth in the applicants' founding papers to deviate from this practice.

- [15] What the accepted standard procedure referred to comprises, is not stated. Furthermore, that contention flies in the face of a letter dated 2 September 2014 by Ms Luiters addressed to the applicants. The respondent has attached, as annex "NL1", that letter to the answering affidavit. In that letter, Ms Luiters clearly indicates that the request for a special fee is under consideration. Various queries are posed to which a reply is sought. Most of the queries are directed at the circumstances why a special fee would be warranted. It clearly does not refer to any accepted standard procedure, nor does it state or imply that a consideration of a request for a special fee is to be deferred to when the applicants have completed their duties in respect of the estate. On the face of it, it is clear that the request for a special fee was under consideration at that stage.

- [16] In a subsequent letter there is a volte force. In that letter, Ms Luiters indicated that consideration of a special fee is deferred. That letter contains an oblique reference to guidelines and practices at the Master's Office. Those are not disclosed, nor detailed. The respondent contends further in the answering affidavit that the issue of a special fee could only be considered once the estate has been finally dealt with, i.e. in a final liquidation and distribution account. The letter has been attached as annex FA15 to the founding affidavit.
- [17] Subsequent to the letter in FA 15, further correspondence was exchanged and a meeting was held between the first applicant and the respondent. The applicants thereafter commenced the present proceedings.
- [18] On behalf of the Master it is conceded that the decision of the respondent to defer the consideration of a special fee constitutes an administrative action. However, it is further submitted that the decision to defer the determination of an increased fee does not fall within the ambit of s 6(2) of PAJA.
- [19] Counsel appearing on behalf of the respondent submitted that the provisions of s 111(2) of the Act find no application in the present instance. I have already found that s 112 is to be read in conjunction with the provisions of s 111(2) of the Act.
- [20] In my view, the Master's decision to defer the consideration of a special fee is a decision contemplated in s 111(2) of the Act. It being conceded that that decision is an administrative act, it follows that it falls within the scope of s 6(2) of PAJA.
- [21] In that regard, the Master is obliged to tax the applicants' fees in respect of the prescribed tariff as a point of departure and then to consider whether the fee is to be increased or decreased depending upon the circumstances relating to the work done for which remuneration is sought. In the present instance, it is common cause that the work required in securing the additional benefit had been done and the applicants' fees in that respect are to be determined. Ms Luiters concedes the point in her answering affidavit. Her decision not to determine the fee at the appropriate stage is a decision that squarely falls within the ambit of s 6(2) of PAJA.
- [22] It is submitted on behalf of the respondent that Ms Luiters was of the view that the account containing the special fee could not be considered in law as a lot of work on the estate still had to be done. It is submitted further that such view does not constitute an error of law.
- [23] I have already found that the appropriate stage to consider the request for a special fee is at the stage that fees of the applicants in respect of the work done that is reflected in the particular account is to be determined. What is to be determined is the remuneration of the applicants at that stage. That is clear from the wording of s 111(2) of the Act. The judgment of Bester, *supra*, supports such finding.[9]
- [24] The respondent clearly erred in law. The respondent has no discretion in deferring a consideration of a special fee in relation to a determination of the applicants' remuneration to a later and final account. Consideration of a special fee is to be given when the event of a

special fee arises. The respondent has the discretion whether to increase or decrease a fee “on good cause”. The respondent exercised no discretion in that regard. She had taken a positive decision to defer. In my view it is that decision in conjunction with the refusal to confirm the aforesaid account that falls within the ambit of s 111(2) of the Act and s 6(2) of PAJA.

- [25] It follows that the decision of the respondent to defer consideration of a special fee, and hence the refusal to confirm the account, stands to be set aside.
- [26] There remains the further issue of what relief the applicants are entitled to.
- [27] The applicants primarily seek an order that the aforesaid account be confirmed, alternatively that the aforesaid account be referred back to the Master for confirmation subject to an order that the referral for confirmation is not to the Assistant Master whose decisions are reviewed and set aside.
- [28] It is trite that the taxing of trustees’ fees falls within the function and discretion of the Master with reference to the tariff and the provisions of s 63 of the Act. The court should be slow in usurping that function.[10]
- [29] In the present event, the applicants’ fees have not yet been taxed. It would accordingly be presumptuous of the court to undertake that task. The account cannot be confirmed until the applicants’ fees have been determined. Accordingly, the court cannot confirm the account, as by doing so, the fees of the applicants would by implication be determined, which in the present instance is not within the court’s jurisdiction.
- [30] In the alternative, the applicants seek a referral of the issues to a different Assistant Master. There is merit in that request. Acceding to such request in no way implies or imputes any untoward conduct of Ms Luiters. It is merely a practical approach.
- [31] It follows that the applicants’ are entitled to the review and setting aside of the respondent’s decision not to consider the request for a special fee and the deferral thereof and accordingly the decision not to confirm the said account.

I grant the following order:

- (a) The respondent’s decision not to confirm the First Liquidation and Distribution Account in the insolvent estate of JM Wiggil (Master’s Ref.: G1077/13) lodged on 13 August 2014 is reviewed and set aside;
- (b) The aforesaid account is referred back to the respondent for confirmation, such referral is to a different Assistant Master other than to Ms Luiters;
- (c) Costs of this application to be costs in the insolvent estate of JM Wiggil (Master’s Ref.: G1077/13).

C J VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants: Ms GD Wickins

Instructed by:

KWA Attorneys

On behalf of Respondent: V S Notshe

Madlanga

Instructed by:

The State Attorney

Date of hearing: 28 February 2017

Date of judgment: 14 March 2017

[1] Nel NNO v The Master (ABSA Bank Ltd Intervening) 2005(1) SA 276 (SCA)

[2] Ex parte Thomas [2002] 4 All SA 227 (T) at 229

[3] 2005(1) SA 276 (SCA) at par [19]

[4] [2013] ZAECPEHC 25 (4 MAY 2013) at par. [33]

[5] *ibid*

[6] 1903 TS 111

[7] at par. [23]

[8] See Bester, *supra*, at par 21

[9] See also Nel, *supra*, at par. [19] – [20]

[10] See Nel, *supra*, at par. [14]

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2017/74.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/warricker-no-and-others-v-master-unknown-topic-agpjhc-2017--6a3ea51d3b1caa9129813999>

Prepared on 10 October 2026 · Esheria