

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO. : 2011/21387

In the matter of :

T.L.E. (PTY) LIMITED

and

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

Applicant

DATE SIGNATURE

MASTER OF THE HIGH COURT,  
THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

First Respondent

APHANE, BENNETT

Second Respondent

TRANSDECO GTMH (PTY) LIMITED  
(in final liquidation)

Third Respondent

MATHEBULA, TIRHANI SITOS DE SITOS

Fourth Respondent

KAPLAN, HARRY N.O.

Fifth Respondent

SAFFY, LUKE BERNARD N.O.

Sixth Respondent

FREEMAN, RIEKIE N.O.

Seventh Respondent

T B T TRUST CC

Eighth Respondent

PRIME BUSINESS RECOVERY TRUST  
(PTY) LIMITED

Ninth Respondent

JUDGMENT

Rautenbach A J

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

2011/12/02

DATE SIGNATURE

1. This application arose from the liquidation of the Third Respondent on the 3<sup>rd</sup> October 2008.
2. On the 6<sup>th</sup> May 2009 subsequent to the first meetings of creditors of the Third Respondent, the First Respondent appointed the Fourth Respondent and the late Mr Freeman as joint co-final liquidators of the Third Respondent.
3. The Applicant is a creditor of the Third Respondent and proved a claim at the first meeting of creditors in the sum of R7 603 113.44. The Applicant was also the largest major trade creditor of the Third Respondent.
4. On the 14<sup>th</sup> August 2009 the Fourth Respondent and Freeman filed their first liquidation and distribution account seeking fees in the sum of R2 272 038.98. The liquidation and distribution account was confirmed on 5 October 2009 (see annexure “F” to the founding papers). It is common cause that the liquidators received their fees under the first liquidation and distribution account. I pause to point out that it is not at all clear on the papers before me what was exactly done and how this fee was justified. This fee is however not a dispute between the parties and I will therefore, for purposes of this application, accept that the fee constituted reasonable remuneration to the liquidators appointed.

5. Mr Freeman passed away on 25 September 2010. His wife, the Seventh Respondent, as the Executor of Freeman's estate represented the Eighth Respondent, and together with the Fourth Respondent, provided the Master on the 10<sup>th</sup> September 2010 with a motivation drafted by the Fourth Respondent for a special fee or an advanced fee. The Seventh Respondent wrote a letter on the letterhead of the Eighth Respondent and attached to it the motivation by the Fourth Respondent in respect of the "interim special fee". (Annexure "H")
6. The interim liquidation and distribution account sent to the Master as part of this documentation by the Seventh Respondent disclosed only the recovery of interest in the sum of R946 856.47 between the filing of the first liquidation and distribution and the interim account in respect of which it sought liquidators fees in the sum of R94 685.65 being 10% of the amount. The account also sought an interim special fee of R2 million.
7. The motivation is largely a repeat of the earlier report by Freeman and Mathebula dated the 27<sup>th</sup> May 2009 (annexure "D"). The motivation is ended off with the following two paragraphs:

*"Further that it is our respectful submission, that we be permitted the requested fee of R2 million, for the Master to allow this application to succeed and, as provided and in terms of regulation CM101(5) of*

*the Companies Act 61 of 1973, for the approval and withdrawal of the provisionally or interim statutory fees in the amount of R2 million as envisaged supra, and as reflected in the interim liquidation account, prior to the same being confirmed, and more specifically, and as aforementioned, the estate will not be finalised at the very least, for approximately a further 2 years.*

*Further that, we wish to indicate the precedent case application, in the matter of M P Finance known as KRION, wherein regulation CM101(5) of the Companies Act 61 of 1973 was granted by the Master of North Gauteng High Court and attached hereunder in such an order as an annexure.”*

8. The Second Respondent responded in a letter stamped 10<sup>th</sup> December 2010 (Annexure “E”) and granted the application making the following decision:

*“Permission is hereby granted in terms of regulation CM101(5) of the Companies Act 61 of 1973 (as amended) for the liquidators to draw their fees in the amount of R94 685.65 plus VAT and increased remuneration in the amount of R2 million in this matter as reflected in the interim liquidation and distribution account.”*

9. The Applicants complaint is based on this “increased remuneration” or

*“advanced remuneration” or “interim remuneration”.*

10. The Applicant argues that the decision to pay this amount to the liquidators was unlawful, that the Master did not have the power in terms of the Act to grant this payment and alternatively, that this action taken by the Master was *ultra vires* the old Companies Act and even if it was not *ultra vires*, the Master should only have taken such a decision in exceptional circumstances where a proper basis have been laid for granting such remuneration.
11. The First, Second and Fourth Respondents adopt the stance that the payment was lawful and valid and done in terms of the regulations and more particularly CM101(5).
12. Further aspects that I have to deal with are applications for condonation in respect of the late filing of the Answering Affidavits by the First, Second and Fourth Respondents. This Court has a discretion to grant condonation if good cause is shown. The application must be *bona fide* and not with the intention to delay proceedings and there must be an explanation furnished for the late filing. The Court must also consider whether there is real prejudice for the opponents of the condonation seeker.<sup>1</sup>

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<sup>1</sup> Nedcor Investments Bank Ltd v. Nissan NO 2002 (4) 588 (T);

13. Having read the respective Affidavits and having considered the reasons for the late filing of the Answering Affidavits, condonation is granted to the First, Second and Fourth Respondents.
14. As alluded to above, the main issue in this application is whether the Master was correct or put differently acted lawfully and *intra vires* when the Master took the decision to grant the “*advanced remuneration*” and consequently paid the remuneration to the Fourth and the Eighth Respondents. As far as remuneration of liquidators is concerned, the general principle is that there is a discretion vested in the Master by section 384(2) of the Act. This discretion is a wide one. In taxing the liquidator’s remuneration for services rendered, the Master has a duty to satisfy himself as to the reasonableness of the remuneration arrived at by application of the applicable tariff.
15. Where the Master is of the view that there is “*good cause*” for departing from the tariff, the Master has the power to do so. Factors which will have to be taken into account will vary from case to case including such aspects as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration of the estate, the amount of work done by the liquidator and the time spent in

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Silber v. Ozen Wholesalers (Pty) Ltd 1954 (2) 354 (AD);  
Tshivhase Royal Council and Another v. Tshivhase and Another; Tshivhase and Another v.  
Tshivhase and Another 1992 (4) SA 852 (AD).

the discharge of the duties involved.<sup>2</sup>

16. A liquidator has an obligation under section 403 of the Companies Act to file a liquidation and distribution account. The liquidator's fee are also dealt with and stipulated in this liquidation and distribution account. The Act makes provision for the filing of further liquidation and distribution accounts within certain specified time periods.
17. Section 406 of the old Companies Act makes provision for periods of inspections of the account. The section stipulates that the accounts shall lie open for inspection for a period of not less than 14 days as the Master may determine. This section further stipulates under which circumstances the account should lie open for inspection at the office of a Magistrate when applicable. The liquidator further has the obligation to give due notice in the Gazette of the places at which such account will lie open for inspection and such notice must also state the period during which the account will lie open and the liquidator must transmit by post or deliver a similar notice to every creditor who has proved a claim against the company.
18. Section 407 of the old Companies Act deals with objections against any account. These objections may be raised with the Master. The Master

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<sup>2</sup> Nel and Another v. the Master (Absa Bank Limited and Others intervening) 2005 (1) SA 276 (SCA).

will deal with these objections and will either uphold them or will dismiss the objection or may give certain directions as he may think fit. The liquidator or any person aggrieved by the direction of the Master or by a refusal of the Master to sustain an objection may after notice apply to a competent Court for an order setting aside the Master's decision and the Court may in any such application confirm the account or make such order as the Court thinks fit.

19. Section 408 of the old Companies Act makes provision for the confirmation of the liquidation and distribution account. It is specifically stated that where an account has lain open for inspection as prescribed in section 406 and no objection has been lodged or where an objection has been dealt with, the Master must confirm the account and his confirmation shall have the effect of a final judgment save in certain particular circumstances.
20. It is thus clear from these sections (section 403 to 408) that the Act specifically makes provision for a situation and a process in terms of which a great deal of transparency is given to the process. Creditors are clearly given the opportunity of not only having proper access to the liquidation and distribution accounts but also are given the statutory right of making objections and approaching the Court for appropriate relief.



21. It appears that these sections confirm the Common Law in terms of which a Trustee cannot claim or draw his remuneration until the account in the estate showing the amount thereof has been confirmed. It just would not make sense that amounts and sometimes large amounts of money could be paid out to liquidators or persons in similar positions only to, after the event, that is after the monies have been paid to such liquidators, allow objections by creditors which may well lead to creditors not being able to recover significant sums of money from these liquidators.<sup>3</sup>

22. The First, Second and Fourth Respondents rely on regulation 24 of the Regulations for the Winding Up and Judicial Management of Companies promulgated under GN R2490 of 28<sup>th</sup> December 1973. Specific reliance is placed on annexure “**CM101**” item 5. Item 5 reads:

*“5. The account of payments may provisionally be credited with the amount claimed in respect of liquidator’s remuneration, but no such remuneration or part thereof shall, except by permission of the Master of the Supreme Court or the Court, be drawn until the account which it appears has been confirmed.”*

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<sup>3</sup> Mars , Law of Insolvency in South Africa, 9<sup>th</sup> Ed 310, Meskin, Insolvency Law loose leave, Ed para 4.21.

23. In **Strydom NO v. The Master and Another 2010 (6) SA 630 (GNP)**

Tuchten J dealt briefly with this very same issue. Tuchten J expressed a view, although obiter, that the provisions of “**CM101**” item 5 may be *ultra vires* and in the application before him, he dismissed the Applicant’s claim that the Applicant in that matter was entitled to review the Master’s decision not to make a payment in respect of remuneration in terms of item 5.

24. In the matter before me, the Applicant raises specifically the validity of item 5 alternatively the correctness of the decision of the Master to invoke the provisions of item 5 and argues that apart from the *ultra vires* argument, the First Respondent’s decision is reviewable as there were no grounds to take such decision.

25. Section 15 of the old Companies Act deals with regulations and policy. The following sub-sections are relevant as far as regulation 24 is concerned. Section 15(1) reads:

*“The Minister may make regulations.*

*(g) In consultation with the Minister of Finance, prescribing the matters in respect of which fees shall be payable and the tariff of such fee;*

*(h) Providing for the table of fees, subject to taxation by the Master,*

*which shall be payable to a liquidator as remuneration;*

(i) *Prescribing a tariff of remuneration payable to any person performing on behalf of a liquidator any act relating to the winding of a company, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed;*

(j) *In consultation with the Minister of Finance, prescribing the remuneration and allowances of members of the standing advisory committee and its standing sub-committees and the conditions upon which such members are appointed."*

26. The regulations are subordinate delegated legislation. Should there be any inconsistency in interpretation, the Act (that is the old Companies Act) would rather be instructive of an interpretation as the subordinate legislation should rather follow the Act instead of the other way around.<sup>4</sup>

27. Further a regulation which does not give effect to the Act would be *ultra vires*.<sup>5</sup>

28. The Minister's powers in terms of the Act are of a pure regulatory

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<sup>4</sup> Sekretaris van Binnelandse Sake v. Jawoodien 1969 (3) SA 413 (A) at 423 E.

<sup>5</sup> Mbatha v. Multilateral Motor Vehicle Accidents Fund 1997 (3) SA 73 (SCA).

nature.<sup>6</sup>

29. It seems to me that there is a real inconsistency in the provisions of Section 403 to 408 of the old Companies Act and regulation 24 annexure “**CM101**” item 5. The protection that the Act has given creditors and other interested persons is somehow negated by item 5. Item 5 gives the Master the right to give permission that the account of payments may provisionally be credited with the amount claimed in respect of the liquidator’s remuneration. The moment the Master gives permission in terms of this item, all the provisions in relation to the account laying open for purposes of inspection and the right to object before final confirmation are circumvented. It seems similar to what was stated by Milne J in **State v. Grindrod Transport (Pty) Limited and Others 1980 (3) SA 978 (N)**:

*“Once it is accepted, however, that the protection afforded severally under sub-paras (w) and (x) is cumulatively available to any particular individual company who wishes to carry on road transportation, then it is one of the objects of the Act that that individual or company shall have the protection afforded by both those paragraphs, and in any regulation which seeks to deprive the individual or company of one of those protections could not be*

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<sup>6</sup> **Padongelukke Fonds (voorheen Multilaterale Motorvoertuig Ongeluksfonds) v. Prinsloo 1999 (3) SA 569 (SCA).**

*described as one for the better carrying out the provisions and the objects of the Act. Even if the words 'and of the conditions' have formed part of sub-paras (w) and (x) at the time when regulation 2(5) was promulgated, and even if those regulations can properly be described as prescribing 'conditions', it seems to me quite clear that it would be ultra vires to prescribe a condition which deprives a person of a protection which that individual enjoys under another provision of the same Act. The only way in which the individual could be deprived of that protection would, it seems to me, be by amending the Act itself. To put it in a nutshell, it appears to me that the Minister, in promulgating the regulations, has, in effect, sought to amend the Act by regulations (which, in my view, he is not entitled to do)."*

30. To detract from the provisions of sections 403 to 408 of the old Companies Act this should only be done by way of a proper amendment to make provision for circumstances under which the Master may authorise additional or advanced remuneration, the Act had to be amended instead of "amending" it by regulation 24 and more specifically annexure "**CM101**", item 5. In my view the effect of the regulation, in the manner it is formulated constitutes amendment to the provisions of sections 403 to 408 of the old Companies Act. I am of the

view that “**CM101**” item 5 of the regulations is *ultra vires* in that it is inconsistent with the Act and in effect constitutes an amendment to the Act. In my view, item 5 would only have been *intra vires* had it made provision for a process in terms of which creditors had the opportunity to have access to the account and the right to object to it. On this ground alone the decision by the Master granting additional or advanced compensation is to be reviewed and set aside.

31. Even if I am wrong in making the finding that “**CM101**” item 5 is *ultra vires* the old Companies Act, I am of the view that the decision of the Master still has to be set aside assuming then that item 5 is not *ultra vires*.
32. I agree fully with the closing comments in the Judgment of Tuchten J in **Strydom v. The Master of The High Court** (*supra*) where he stated that even if the Master has such a power (as stipulated in “**CM101**” item 5) it should be exercised very sparingly and with exceptional caution. Assuming then that I am wrong and that the Master has the powers as per item 5, the motivation that was made to the Master to act in terms of item 5 was largely a repeat of the report by Freeman and Mathebula. Very little was actually added to this but to draw the Master’s attention to the fact that an amount of R946 856.47 accrued in respect of interest in terms of which the liquidators would have been

entitled to an amount of R94 685.65 plus.

33. The motivation mostly make bald statements in regard to the complexity and numerous litigious issues that still has to be sorted out without actually setting out in a chronological and logical manner explaining what was done that was so complex, how much time was spent on it and what was achieved in the interim.
34. The First and Second Respondents in their answering papers rely on annexure “**CM101**” item 5 coming to the decision to pay R2 million as an advanced or additional fee to the liquidators and rely on the fact that it became clear that there would be at least dividends to all classes of creditors. What the First and Second Respondents do not address is that an amount of R2 million is a significant amount that is paid out without allowing creditors to object. Furthermore the Master did not embark on any process in terms of which the creditors were advised of the Fourth Respondent’s motivation and the Master’s consideration of the issue. Had the First and Second Respondents at least informed effected people and more importantly creditors of the fact that it was given consideration to the “advanced fee”, the creditors would have at least been in a position where they could have made a proper input objecting against any increased or advanced fee. In the circumstances it is clear to me also from the answering papers filed on behalf of the

First and Second Respondents that the Second Respondent on behalf of the First Respondent did not apply his mind properly or at all to the issue of increased or advanced remuneration.

35. Nowhere in the papers does the First and Second Respondent offer a satisfactory explanation for coming to the conclusion that the amount of R2 million constituted fair and reasonable remuneration to the liquidators. Even if I was wrong in finding that item 5 is *ultra vires* the old Companies Act, the decision by the First and Second Respondents still falls to be reviewed and set aside on the basis that the Second Respondent on behalf of the First Respondent did not apply his mind properly or at all to the issue under consideration.
36. The First and Second Respondent also raised the issue of *locus standi* and argues that the Applicant does not have *locus standi*. It is common cause that the Applicant was the largest trade creditor of the Third Respondent. The Applicant has a direct interest as far as the payment of any accounts that will affect the free residue of funds available for distribution. The Applicant has *locus standi* to approach this Court to protect its rights as a major creditor.
37. The Second Respondent acted in the course and scope of his employment at the time the decision in terms of item 5 was made. There was an attempt by specifically Cameron, the attorney for the



Applicant to show that the Second Respondent interfered in the matter by taking possession of a file he was not supposed to do. However on this issue there is clearly a dispute of fact and I cannot on the papers make a finding as to whether the Second Respondent was entitled to interfere or take decisions in his capacity he was employed. In these circumstances I am not inclined to make a cost order against the Second Respondent.

38. The Seventh Respondent chose to abide by this Court's Judgment but appeared and argued the costs issue as the Applicant sought costs on an attorney/client basis against the Seventh Respondent. Whatever the role of the Seventh Respondent might have been, she was not a liquidator and had to rely on the skills and advice of the Fourth Respondent. I am of the view that there is no justification for an order on the attorney/client basis, or any other basis, against the Seventh Respondent. No order of costs will therefore be made either in favour or against the Seventh Respondent.
39. The Fourth Respondent opposed the application and aligned him with the decision taken by the Master. According to the motivation letter by the Fourth Respondent there was apparently some precedent for bringing such an application to the Master. No party elaborated on this and no argument was advanced in this respect. The real issue in the

matter was the Master's conduct and despite the fact that other parties could be criticised for a poor motivation and not providing the Master with enough information to take an informed decision, this application would never have been necessary had the Master applied his mind properly to the increased or advanced remuneration. I am therefore not inclined to make a cost order against or in favour of the Fourth Respondent.

40. As far as the wasted costs in connection with the postponement of the 28<sup>th</sup> June 2011 are concerned, this postponement was clearly caused by the First, Second, Fourth and Ninth Respondents not having been ready to proceed with the matter and in the circumstances had to approach this Court seeking an indulgence. Accordingly the First, Second, Fourth and Ninth Respondents are to pay the costs of the Applicant and the Seventh and Eighth Respondents.

41. In these circumstances I make the following orders:

- 1) The decision of the First Respondent in terms whereof on the 10<sup>th</sup> December 2010 it's functionary, the Second Respondent, permitted the Fourth Respondent and deceased estate of A W Freeman to become entitled and obtain payment of a fee in the sum of R2 million plus VAT is reviewed and set aside.

- 2) The Fourth and Ninth Respondents are ordered to pay to the Third Respondent the sum of R1 million plus VAT within 7 days of the grant of this order.
- 3) The Seventh and Eighth Respondents are ordered to pay the Third Respondent the sum of R1 million plus VAT within 7 days of the grant of this order.
- 4) In the event of the Fourth and Ninth Respondent and/or the Seventh and Eighth Respondent failing to comply with orders 2 and 3 above, then in such event the Applicant shall be entitled, on notice to these Respondents and to the First and Second Respondents, to apply on the same papers for judgment against the Fourth and Ninth Respondents and/or the Seventh and Eighth Respondents jointly and severally, the one paying the others to be absolved.
- 5) The First Respondent is ordered to pay the Applicant's costs.
- 6) The First, Second, Fourth and Ninth Respondents are ordered to pay the wasted costs of the Applicant, the Seventh and Eighth Respondents in respect of the wasted costs occasioned by the postponement of this application on the 28<sup>th</sup> June 2011.

A handwritten signature in black ink, appearing to read 'J G Rautenbach', written above a horizontal line.

**J G Rautenbach**

Acting Judge of the High Court

22 November 2011