

**IN THE NORTH GAUTENG HIGH COURT OF PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: 47962/2012

DATE: 4/2/2014

In the matter between:

FEDBOND NOMINEES (PTY) LTD

Applicant

and

ELSIE WAGNER N.O.

First Respondent

ANTON VICTOR HAMMAN N.O.

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

JUDGMENT

DE KLERK AJ

[1] This is an application for:

- a) Reviewing and setting aside the confirmation by the Master of the First and Final Liquidation and Distribution account of Global Tourism and Sports Development (Pty) Limited (in liquidation).

- b) Granting the Applicant the right to reopen the said account.
- c) Directing the First and Second Respondents to pay the costs of the proceedings *de bonis propriis*.

[2] The First and Second Respondents raised a point *in limine* to wit the Applicants failure to comply with the provisions of Section 7 of the Promotion of Administrative Justice Act 3 of 2000.

[3] In the Applicant's replying affidavit it was submitted that it would be in the interest of Justice that the delay in launching the application be condoned. Same was however not persisted with and it was subsequently argued on behalf of the Applicant that the confirmation of the account by the Master does not fall within the ambit of the Act and that the time limit prescribed by Section 7 therefore does not apply.

[4] Section 7 of the Act is in my view applicable.

[5] The Applicant in my view did not comply with section 7 of the Act.

[6] Consequently prayer 1 for the reviewing and setting aside of the confirmation by the Master of the First and Final Liquidation and Distribution account is dismissed.

Reopening - Legal Principles:

[7] Sections 112 and 151 of the Insolvency Act 24 of 1936, contemplate the reopening of a confirmed account.

[8] In order to succeed in an application for reopening it is necessary for the Applicant to establish the existence of one of the grounds upon which *restitutio in integrum* would be granted, such as fraud or justus error.

[9] Even though the court may find that good grounds exist for reopening the account, the Applicant must further establish *prima*

facie that the account is incorrect and would have to be amended.

The Applicant's contentions:

[10] The Applicant with regard to *restitutioin integrum* relies on justus error and contended that his ignorance in omitting to inspect the account while lying open for inspection was not caused by his negligence but was justifiable in that he had not received notice to that effect.

[11] With regard to the second hurdle to wit, that the Applicant should satisfy the Court that some good purpose would be served in reopening the account the Applicant submitted that it was agreed between the Applicant and the First and Second Respondents to abandon the immovable property owned by Global Tourism and Sports Development (Pty) limited (in liquidation) in favour of the Applicant and to pay the First and Second Respondents an agreed fee in the amount of R50 000.00.

The Respondents' contentions:

[12] The Respondents' contentions first of all with regard to *restitutio in integrum* were that proper notice had been given and that the account had been laid open for inspection in accordance with provisions of the Companies Act.

[13] The First and Second Respondents further disputed the alleged fee agreement.

[14] **The common cause facts are:**

1. The account was confirmed by the Master.
2. The Applicant is the only creditor in the insolvent estate.
3. Included in the account is provision for "likwidadeursvergoeding" in the amount of R350 000.

4. The First and Second Respondents sent a notice dated 27 November 2009 by registered mail addressed to all known creditors advising them that the account would lay open for inspection during the period 11 December 2009 to 25 December 2009.

5. The notice was returned as unclaimed to the Respondents.

[15] Application of the law to the facts:

1. In my view it is clear on the papers that the Applicant did not receive notice and that the Applicant was not negligent with regard to the inspection of the liquidation and distribution account and failure to object thereto.
2. In my view the Applicant's failure to object has been induced by justus error.

3. With regard to the second hurdle referred to herein before the dispute concerns the remuneration claimed by the First and Second Respondents for their fees as reflected in the Liquidation and Distribution account.
4. The memorandum of agreement entered into between the First and Second Respondents and the Applicant (attached to the Applicants founding affidavit) in terms whereof the immovable property was abandoned in favour of the Applicant is not in dispute.
5. The notice of abandonment (attached to the Applicant's founding affidavit) which contains the alleged fee agreement is however in dispute. The First and Second Respondents have stated that Mr Swanepoel, who entered into the agreement with the Applicant, did not have the necessary authority to act on their behalf.
6. It is however common cause that Mr Swanepoel was also at the time a Director of Tutor Trust.

7. As stated hereinbefore the dispute between the parties concerns the remuneration claimed by the First and Second Respondents for their fees.
8. Section 63 (1) of the Insolvency Act 24 of 1936 entitles a trustee to a reasonable remuneration for his services "to be taxed by the Master according to tariff B in the second schedule to the Act provided that the Master may, for good cause, reduce or increase his remuneration or may disallow his remuneration either wholly or in part on account of any failure of or delay in the discharged of his duties or on account of any improper performance of his duties".
9. The Master was unaware of all the facts and allegations central to the dispute between the parties when the account was confirmed by him.

10. In my view, the Applicant has made out a *prima facie* case that some good purpose will be served in reopening the account.

In the premises, the court orders that:

1. The Applicant is given the right to reopen the First and Final Liquidation and Distribution account of Global Tourism and Sports Development Proprietary Limited in liquidation;
2. No order as to costs.

Signed at _____ on this _____ day of _____ 2014.

Judge De Klerk AJ
The Honourable Judge of the
High Court of Pretoria