IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case number: A185/2020
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 24 July 2023
SIGNATURE:

In the matter between:

TSIU VINCENT MATSEPE N.O	1st Appellant
ZEENATH KAJEE N.O	2nd Appellant
and	
KROONS GOURMET CHICKENS (PTY0 LTD	1st Respondent
ROBERT WILLIAM KROON	2nd Respondent
THE MASTER OF THE HIGH COURT	3rd Respondent
THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES	4th Respondent
In re:	
KROONS GOURMET CHICKENS (PTY0 LTD	1st Applicant
ROBERT WILLIAM KROON	2nd Applicant

and

THE MASTER OF THE HIGH COURT	1st Respondent
TSIU VINCENT MATSEPE N.O	2nd Respondent
ZEENATH KAJEE N.O	3rd Respondent
THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES	4th Respondent

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JUDGMENT

MNGQIBISA-THUSI, J.

[1] The appellants (the second and third respondents in the court *a quo*) seek the setting aside of part of the order and judgement handed down (per Bester AJ) on 01 June 2020, in particular, prayer 3 of the order which reads as follows:

> "3. It is declared that the first applicant is not liable for the costs of the inquiry in terms of section 417 of the Companies Act 61 of 1973, held in the winding up of Tradefirm 195 (Pty) Ltd (in liquidation)."[1]

[2] The first and second respondents will, where appropriate, be referred to as 'the respondents' hereinafter.

[3] It is apposite at this stage to set out a brief factual background leading to this appeal.

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[1] Section 417(6) of the Companies Act of 1977 ("the Act") provides that: "Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental there to, unless the Master or the court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned."

[4] During October 2004, an entity known as Tradefirm 195 (Pty) Ltd ('Tradefirm') was provisionally liquidated[2]. At the time of its liquidation, the second respondent, Robert William Kroon, was its sole director. The second respondent is the sole director of the first respondent, Kroons Gourmet Chickens (Pty) Ltd. The appellants were appointed the joint liquidators of Tradefirm.

[5] Although Tradefirm in liquidation was under the control of the appellants, the first respondent continued running the business of Tradefirm until the appellants obtained an order granted on 26 November 2007, directing the first respondent to give possession of the movable assets of Tradefirm back to the liquidators and to account and debate the account.

[6] In August 2008 the appellants, the respondents and others concluded a settlement agreement in terms of which the first respondent purchased the business of Tradefirm. The settlement agreement provided, *inter alia*, that:

6.1 first respondent would pay the sum of R5.5 million to the liquidators in full and final settlement of all claims against Tradefirm. This is the amount the fourth respondent, the South African Revenue Services ("SARS"), was prepared to settle on *in lieu* of a claim it had against Tradefirm;

6.2 first respondent would be liable for the administration costs in the winding-up of Tradefirm, which costs would be payable on receipt of the first and final L& D account;

6.3 first respondent would be liable for the costs of services rendered by Mr G Barrett (the applicants' representative) in the liquidation of Tradefirm; and

6.4 first respondent would pay the legal costs of the liquidators in respect of two previous litigation matters under case numbers 4945/2007 and 120/2008.

[2] On 12 January 2008 Tradefirm was finally liquidated.

[7] Subsequent to the conclusion of the settlement agreement, the respondents paid the sum of R5.5 million to the appellants. From this amount, the appellants paid SARS an amount of R3,1 million and the balance was used as an advance payment to fees due to them.

[8] On 8 January 2016, the appellants prepared the second amended first and final liquidation and distribution account ("the L & D account"). On 22 February 2016 the respondents lodged an objection with the third respondent with regard to certain aspects of the account. The crux of the respondents' objections pertinent to this appeal relate to the following issues:

8.1 the appellants' inclusion of a fee of 6% on the trading account;

8.2 the appellants' attempt to recover in the L & D account an additional amount of R2.4 million from the first respondent in order to pay SARS the shortfall of the agreed negotiated amount of R5.5 million;

8.3 the appellants' attempt to procure payment of a shortfall in the amount of R7, 442,865.29 from the first respondent; and

8.4 the payment of any fees to the appellants for services rendered as joint liquidators.

[9] On 5 July 2017, the Master dismissed most of the respondents' objections and directed the appellants to amend the L & D account in certain respects.

[10] On 19 September 2017, first and second respondents (first and second applicants in the court *a quo*) launched an application in terms of section 407(4)(a)[3] of the Act for the review an setting aside of a ruling made by the third respondent, the Master of the High Court ("the Master"), dismissing objections the first and second respondents had raised against the second amended first and final liquidation and

[3] Section 407(4)(a) of the Act reads as follows: "A liquidator or any person aggrieved by a decision made by 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."

distribution account ("the L & D account") the appellants had prepared in relation to the winding up of an entity known as Tradefirm 195 (Pty) Ltd ('Tradefirm'), without providing any vouchers to the account.

[11] In the notice of motion the respondents sought the following relief:

11.1 That the decisions arrived at by the Master, allegedly on 05 July 2017, dismissing respondents' objections against the L & D account filed by the liquidators in the winding up of Tradefirm be reviewed and set aside;

11.2 That should the appellants oppose the application, they be ordered to pay the costs *de bonis propriis*;

11.3 That the court should decide on the objections and grant appropriate declarators upholding all of the respondents' objections to the L & D account;

11.4 That the Master and the appellants be ordered to implement and give effect to the decisions made by the court on the respondents' objections;

11.5 Further and/or alternative relief.

[12] The appellants opposed the review application and brought a counter application in which they sought an order that the Master be directed to confirm the third amended final liquidation and distribution account and that the respondents be directed to make payment of an amount of R 683 986,18 upon confirmation of the account.

[13] It is common cause that in the objections lodged with the Master, the respondents did not include an objection relating to the legal costs of either a section 415 or 417 enquiry. Whether the enquiry was in terms of section 415 or 417 is immaterial as although the sections deal with different issues, it has been held in *Nedbank Limited v The Master of the High Court (Witwatersrand Local Division) and Others* (5619/08) [2008] ZAGPHC 216 (18 July 2008) that these two sections are complementary and are not mutually exclusive.

[14] In justifying its decision relating to the prayer in the order that is the subject of this appeal, the court *a quo* was of the view that at the time the objections were lodged with the Master, the respondents had not had sight of any vouchers to the L & D account and would therefore not have known that the item dealing with legal costs included legal costs for the enquiry. Further, the court *a quo* was of the view that since the issue of the legal costs of the enquiry was dealt with in the appellants' answering affidavit and respondents' replying affidavit in the review application and argued, it had the power to deal with the issue relating to the costs of the enquiry. In this regard the court stated the following:

> "[25] During argument, Mr Steyn for the liquidators, conceded that costs in relation to the enquiry in terms of section 417 does not ordinarily form part of the administration costs in a winding up. …
>
> [26] There was no request to the Master or this court to give such a direction."

[15] The court *a quo* also rejected the appellants' assertion that the respondents, in the application before Ramagaga AJ, had admitted to the costs forming part of the administration costs. The court was of the view that the extract relied on does not contain or imply such an admission. The court *a quo* further opined that the parties to the settlement agreement had expressly agreed on the obligations of the respondents which did not include an agreement to pay the legal costs of the enquiry.

[16] The appellants are appealing on the following grounds, namely, that the court the *quo* erred:

16.1 in granting the declaratory in prayer 3 of the order in circumstances where the applicants had not objected to the treatment of the section 417 inquiry costs in the liquidation and distribution account; and

16.2 in granting the declaratory in prayer 3 in circumstances where it was not asked for in the notice of motion.

[17] The issue to be determined is whether the court *a quo* was correct in making an order dealing with an objection which was never raised with the Master and whether the order granted is encompassed by prayer 5 of the respondents' notice of motion.

[18] On behalf of the appellants it was submitted that in terms of section 407 of the Act, the procedure to be followed in dealing with objections to a liquidation and distribution account is that any interested party must first lodge an objection with the Master for his or her consideration, and if aggrieved by the decision or ruling of the Master, only then should the person approach a court in terms of section 407(4)(a) of the Act for a review of the Master's decision or ruling. It is the appellants' contention that the court *a quo* erred in making the order in prayer 3 of the order in that it usurped the statutory powers vested in the Master for the consideration of objections lodged with regard to an L & D account. Further that the court *a quo* failed to show deference to the Master as a statutory body vested with the power to deal with objections to an account. In this regard the appellants rely on the decision in *Wishart NO v BHP Billiton Energy Coal and 5 Others* 2017 (4) SA 152 (SCA) at para [17] where the Supreme Court of Appeal, in dealing with the issue of the expungement of a claim, held that only the Master has the power to expunge a claim under section 407 of the Act and that only then would the court have the power to review the decision of the Master. It is the appellants' contention that the court *a quo* was limited to determine only the objections as lodged with the Master.

[19] In relation to the second ground of appeal it was submitted on behalf of the appellants that as the relief granted in prayer 3 was never sought in the notice of motion and the respondent failed to seek an amendment to the notice of motion, the court *a quo* had no power to grant such relief.

[20] In relation to the first ground of appeal, it is the respondents' contention that in a section 407(4)(a) of the Act application, the court is not limited to the objections raised with the Master as the section confers the court with a wide discretion to make an order which it deems fit. In this regard the respondents rely on the decision in *South African Bank of Athens Ltd v Sfier and Others* 1991 (3) SA 534 (T) at 536 E-I where the court held that:

> "Section 407(4)(a) gives the court hearing the application wide powers and in particular authorises the court to make such order as it thinks fit. Moreover, I agree with Mr Joseph that the procedure, although called a review in this application, is not a review *strictu sensu*, it is really an application sui generis.
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> …
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> In an application in terms of s407 or of the similarly worded s111 of the insolvency Act 24 of 1936, the applicant is not limited to the material placed before the Master. It is not a review, and not even an appeal in the wide sense, limited to the facts which had been before the Master. It is indeed, as suggested, by Mr Joseph, a fresh application where new facts and in appropriate cases also oral evidence will be allowed."

[21] In relation to the second ground of appeal, although conceding that the relief granted was not expressly sought for in the notice of motion to the review application, counsel for the respondents submitted that the relief granted was covered in the prayer for "further and/or alternative relief " in prayer 5 of the notice of motion. Counsel for the respondents submitted that the facts relating to the legal costs of the section 417 enquiry being part of the administration costs in the winding up of Tradefirm only became apparent in the annexures to the appellants' answering affidavit to the review application and was dealt with by the respondents in their replying affidavit. In light of the issue having been canvassed in the papers and dealt with during the hearing of the review application where counsel for the appellants conceded during questioning by the court that the disputed legal costs do not ordinarily form part of the administration costs, it is the respondents' submission that the court *a quo* acted within its wide discretion in granting the relief challenged. In this regard counsel referred to the decision in *Port Nolloth Municipality v Xhalisa* where the court, in dealing with the phrase "further and/or alternative relief' stated that:

> "… Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and

other) affidavit (or in the pleadings) and is established by satisfactory evidence on the papers (or is given). … Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefore has been fully canvassed, viz the party against whom such relief is to be granted is fully apprised and that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of 'further and/or alternative relief'.

[22] It is trite that the Master is entrusted with the power to deal with objections to an L & D account lodged by an interested party. It is only when a party is aggrieved by a ruling of the Master that a court may entertain an application in terms of section 407(4)(a) which grants the court the power to either uphold the Masters decision or overrule it or make such order as it thinks fit.

[23] This matter is distinguishable from the Wishart matter (above) the appellants rely on for their contentions. In that matter the party seeking the expungement of a claim had the relevant facts at its disposal to lodge an objection with the Master. In this matter, at the time the respondents lodged the objection to the L & D account, it was not apparent from the account that the item dealing with legal costs include costs of the enquiry. Further the fact that the legal costs of the enquiry were part of the administration costs only came to light when the appellants filed the answering affidavit to the section 407(4)(a) application and was dealt with by the respondents in the replying affidavit. It could therefore not have been expected of the respondents to have dealt with an objection to the inclusion of the legal costs in their objection lodged with the Master. It further cannot be disputed that the inclusion of the legal costs as part of the administration costs is an irregularity. The court *a quo*, in terms of its powers as set out in section 407(4)(a) under the phrase 'such order as it thinks fit' was correct in dealing with the apparent irregularity particularly when one takes into account that the issue of the legal costs of the enquiry was dealt with in the papers and was argued before the court *a quo*.

[24] Further, it is trite that a party is bound by the relief sought in its notice of motion. The relief for 'further and/or alternative relief' as sought by the respondents in prayer 5

of the notice of motion, is usually used to entitle a party to an order in terms other than those set out in the notice of motion if such relief is covered in the parties' pleadings and is established by satisfactory evidence.

[25] As indicated above, it cannot be disputed that the issue of the legal costs of the enquiry forming part of the administration costs was dealt with in the appellants' answering affidavit and the respondents' replying affidavit. Further, as noted in the court *a quo*'s judgment, counsel for the appellants did during argument concede that legal costs of an enquiry do not ordinarily form part of the administration costs of a company being wound up. I am of the view that the court *a quo* did not err in granting an order as it did as the appellants were aware of the issue and had dealt with it during the proceedings. I am therefore of the view that the second ground of appeal ought to fail.

[26] With regard to the issue of costs, it was submitted on behalf of the respondents that should the respondents be ordered to pay the costs in their capacity as liquidators, the first respondent will be burdened by such costs in terms of the settlement agreement.

[27] Having considered the matter, I am of the view that no order as to costs should be made.

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

1. The appeal is dismissed.

2. No order as to costs is made.

NP MNGQIBISA-THUSI
Judge of the High Court

I agree.

N Janse van Nieuwenhuizen

Judge of the High Court

I agree.

H Kooverjie
Judge of the High Court

DATE HEARD:
8 March 2023

DATE DELIVERED:
24 July 2023

APPEARANCES

For the Appellants:	Advocate E Theron SC
Assisted by:	Advocate A Cooke
Instructed by:	De Vries Inc Attorneys

For the 1st & 2nd Respondents:	Advocate MP Van Der Merwe SC
Instructed by:	Vezi & De Beer Inc