THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 491/2005

In the matter between :

MARTHINUS JOHANNES ALLERS & 144 OTHERS	**APPELLANTS**

and

PHILLIP FOURIE NO	**FIRST RESPONDENT**
HENRY JAMES VAN RENSBURG NO	**SECOND RESPONDENT**
REINETTE KARSTENS NO	**THIRD RESPONDENT**
MASTER OF THE HIGH COURT	**FOURTH RESPONDENT**

CORAM :	**ZULMAN, CAMERON, BRAND JJA, COMBRINCK *et* MALAN AJJA**
HEARD :	**29 AUGUST 2006**
DELIVERED :	**21 SEPTEMBER 2006**

Summary: Previous court order consolidating administration of separate insolvent estates – effect on proved creditors in one of constituent estates – interest of applicant as requirement for declaratory order – costs order *de bonis propriis* against trustees – whether justified by non-compliance with s 73 of Insolvency Act 24 of 1936 and/or by improper conduct on the part of trustees.

Neutral citation: This judgment may be referred to as *Allers v Fourie* [2006] SCA 106 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The first three respondents are the trustees in the insolvent estate of Mrs Brenda Jansen. The fourth respondent is the Master of the High Court, Pretoria. Since the Master does not oppose the appeal, I refer to the trustees as the 'respondents'. The appellants' case is that they should be regarded as proved creditors in Brenda Jansen's insolvent estate. This is denied by the respondents. Their position is that the appellants' claims are still subject to proof under s 44 of the Insolvency Act 24 of 1936 ('the Act'). In the light of these opposing contentions, the respondents sought and obtained a declaratory order in the Pretoria High Court (Fourie AJ), upholding their position that the appellants still had to prove their claims. The appeal against that order is with the leave of this court. The full terms of the declaratory order and the exact nature of the underlying dispute will best be understood in the light of the background facts.

[2] Brenda Jansen was the master mind behind a fraudulent scheme which eventually drew investments from the public in excess of R50m. As a vehicle for her scheme, she utilised a company, Chinza Holdings (Pty) Ltd. The representation to potential investors was that Chinza acted as agent for a company registered in the Bahamas, specialising in investments all over the world, through which overseas investments could be made. Chinza also promised guarantees by supposedly reputable independent third parties as security that the obligations by the Bahamian company towards investors would be met. In truth, so it eventually turned out, the affairs of the Bahamian company were conducted by Brenda Jansen from her office in Centurion and in the end both this company and Chinza proved to be no more than her alter egos that she used in furtherance of her fraudulent scheme. The guarantees by so-called independent third parties proved to be worthless forgeries.

[3] The appellants numbered amongst the luckless members of the public who were persuaded to invest in Brenda Jansen's scheme. Though some of the funds invested initially went overseas, a large portion were channelled back to Jansen in South Africa. What she did not squander on her extravagant lifestyle,

she used to acquire assets to the value of about R20m. These assets were mostly held in corporate entities and trusts under her control.

[4] On 19 May 2003 Brenda Jansen's estate was finally sequestrated and on the same day Chinza was finally wound up. In the course of time the other entities in which Jansen held her assets met with the same fate. While the respondents were appointed as trustees of Jansen's estate, two other individuals were appointed as provisional liquidators of Chinza. In the same way as many other investors in Brenda Jansen's scheme, the appellants submitted their claims for proof under s 44 of the Act, both against Chinza and against Brenda Jansen's personal estate. Their claims against Chinza were not opposed. At the first meeting of creditors of the company, which was held on 19 August 2003, these claims were therefore formally admitted by the presiding officer, in terms of s 44(3). (I shall, for the sake of convenience, henceforth describe the officers chairing the various meetings of creditors of Chinza and Brenda Jansen's insolvent estates referred to as 'the Master', although she did not personally preside at all these meetings.)

[5] As will presently appear, proof of the appellants' claims against Brenda Jansen's estate turned out to be substantially more complicated than the proof of their claims against Chinza. The second meeting of creditors in the former started on 27 August 2003. When the appellants tried to prove their claims at that meeting, the respondents asked for a postponement pending the outcome of an application that had in the meantime been brought by the liquidators of Chinza in the Pretoria High Court. The crux of the relief sought in that application was for the corporate veil to be lifted – or pierced – in respect of all the different entities which were used by Brenda Jansen in the execution of her fraudulent scheme, with the view that all the estates of these entities under sequestration or liquidation could be administered as one. Rather unsurprisingly, the liquidators proposed themselves as the most suitable candidates for appointment as administrators of the new superordinate entity. In their capacities as trustees of Brenda Jansen, the present respondents were also joined by the liquidators as respondents in that application. The respondents opposed the application by the liquidators. They also brought a counter-application in which they essentially

sought the same relief, save for proposing that they were better qualified than the liquidators to take control of the new umbrella entity. In the end the respondents won the battle for the lucrative position of control. Apparently they did so by entering into a fee sharing agreement with the liquidators. The result was that, on 28 August 2003, Daniels J was able to make an order by agreement between the opposing parties.

[6] As will soon transpire, the present appeal turns largely on the proper interpretation of the order by Daniels J ('the previous court order'). A rather extensive quotation of its terms therefore seems to be unavoidable. It reads as follows:

'1. That the first and second applicants [who were the provisional liquidators of Chinza] and the first, second and third respondents [who were the present respondents] be granted leave to institute the proceedings.

2. That a declarator be issued declaring that the following entities, namely:

2.1 Chinza Holdings (Pty) Ltd (in liquidation);

[and the six other entities referred to in paras 2.2-2.7, in which Jansen held the assets gained from her fraudulent scheme]

acquired all their assets with a title invalid to the creditors of Brenda Jansen and are not to be regarded as separate entities or in any manner distinctive from Brenda Jansen;

3. That the first, second and third respondents, the trustees of Brenda Jansen, be authorized to liquidate and/or sequestrate the entities referred to in paragraph 2 as one economical entity;

4. That it be declared that the said trustees of Brenda Jansen are entitled to take into their possession or under their control all property, books and documents to which the entities listed in paragraph 2.1 to 2.7 would otherwise be entitled to, had it not been for the declarator issued in paragraph 2 above;

5. That it be declared that the trustees of Brenda Jansen are entitled to administer and dispose of all the property, books and documents of the entities listed in paragraph 2.1 to 2.7 above as if it were the property, books and documents of Brenda Jansen;

6. That Mrs Brenda Jansen is declared to be liable, in her personal capacity, to the creditors of the entities listed in paragraph 2 above;

7. That the declarators in paragraphs 2, 4 and 5 above are subject to the right of any creditor of either Mrs Brenda Jansen or any of the entities listed in paragraph 2 above'.

. . .

12. It is recorded that the first and second appellants and the first, second and third respondents made application to this honourable court in several matters with leave of the court, to take reasonable steps to protect the assets of the economical entity referred

> to in paragraph 3. It is ordered that all authorized and/or approved costs and expenses reasonably incurred by the liquidators of Chinza Holdings and the trustees of Brenda Jansen to date hereof and/or any of the entities referred to in paragraph 2 above, to be costs in the liquidation of the economical entity referred to in paragraph 3 above, including any authorized and lawful special arrangements concluded between the said trustees and the liquidators and their attorneys.'

[7] As far as the Chinza estate is concerned, the Master subsequently decided that, by virtue of the previous court order, the liquidation process of the company had been subsumed into the sequestration of Brenda Jansen's estate and that, consequently, the winding-up of the company had effectively been concluded. This decision is reflected in the ruling that the Master gave at the continuation of the first meeting of creditors of Chinza on 9 September 2003. The pertinent part of that ruling reads as follows:

'Subsequent to the first meeting of creditors [which occurred on 19 August 2003] the High Court . . . issued a declarator on 28 August 2003 . . .

Having regard to the effect of the court order aforementioned it is my opinion that:

> it is unnecessary to continue with the first meeting of creditors . . .
>
> all the property of Chinza Holdings (Pty) Ltd (in liquidation) now vests in the trustees of Brenda Jansen.
>
> all that remains for the provisional liquidators of Chinza Holdings (Pty) Ltd (in liquidation) is to submit an account to this office and to the trustees of Brenda Jansen reflecting all the property that they administered, how they applied the funds under their control after making provision for their fees, after which they will be entitled to apply for their release and the release of the security filed herein.
>
> The first meeting of creditors is hereby closed.'

[8] I revert to what happened in Brenda Jansen's estate. After the previous court order was granted, the second meeting of creditors, which had been postponed in anticipation of that order, was resumed. At the meeting, the Master made a ruling, at the behest of the respondents, that all creditors who wanted to prove their claims against the estate would have to submit to interrogation under the provisions of s 44(7) of the Act with regard to those claims. Creditors, including the appellants, who had previously proved claims against Chinza then took up the position that the Master's ruling did not apply to them. In support of this contention they argued that pursuant to the previous court order they automatically became proved creditors in the estate of Brenda Jansen by virtue

of the fact that they were proved creditors in the estate of Chinza. The respondents did not agree. Their argument was that, although, as a matter of substantive law, the previous court order effectively declared all creditors of Chinza to be creditors of Brenda Jansen, those creditors still had to prove their claims against the latter estate in accordance with the provisions of the Act. It followed, so the respondents' argument went, that the appellants were also subject to the Master's ruling. Consequently that they also had to submit to interrogation under s 44(7).

[9] The Master found himself unable to resolve this dispute. He therefore recommended that the respondents should seek a solution by way of a declaratory order from the High Court. The Master also proposed that, while the respondents were approaching the court, they might as well, at the same time, seek a declaratory order on another issue he found himself unable to resolve. This issue arose from another request – it is not exactly clear by whom – that, in view of the previous court order, the Master should issue certificates contemplated in terms of s 419 of the Companies Act 62 of 1973 – read with s 66 of the Close Corporations Act 69 of 1984 – in respect of Chinza and all the other corporate bodies referred to in paras 2.2 to 2.7 of the previous court order.

[10] Section 419 of the former Companies Act deals with the dissolution of companies and other bodies corporate that have been wound up while s 66 of the Close Corporations Act makes these provisions applicable to close corporations. The nature of the certificate appears from the provisions of s 419:

'(1) In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar [of companies] a certificate to that effect and send a copy thereof to the liquidator.

(2) The Registrar shall record the dissolution of the company and shall publish notice thereof in the *Gazette*.

(3) The date of dissolution of the company shall be the date of recording referred to in subsection (2).

(4) In the case of any other body corporate the certificate of the Master under subsection (1) shall constitute its dissolution.'

[11] These were the circumstances in which the respondents then brought their application for the declaratory order that eventually gave rise to the present appeal. Despite vigorous opposition by the appellants, raising various defences, the court *a quo* eventually granted the order sought. Translated from the original Afrikaans, it reads as follows:

'1. It is declared that:

1.1 claims previously proved against Chinza Holdings (Pty) Ltd (in liquidation) will be struck out and will have no legal effect in the administration of the insolvent estate of Brenda Jansen;

1.2 creditors who have proved their claims against Chinza Holdings (Pty) Ltd (in liquidation) as well as all creditors who intend to do so, if any, are ordered to prove their claims against the insolvent estate of Brenda Jansen in accordance with the provisions of s 44 of the Insolvency Act;

1.3 the Master is authorised to implement the provisions of s 419 of the Companies Act . . . , read with s 66 of the Close Corporations Act . . . , with reference to the following corporate bodies:

1.3.1 Chinza Holdings (Pty) Ltd; [and the other companies and close corporations set out in para 2 of the previous court order].

2. That the costs of this application, excluding the cost of oppositions, be costs in Brenda Jansen's insolvent estate.'

[12] Against this background I turn to the issues between the parties. Their outcome does not depend so much on the application of general legal principles, but on a proper construction of the previous court order. In construing a court order, the approach is no different from interpreting any other document. The interpreter is initially confined to the order read as a whole. If on such reading the intention of the court –which granted the order – is clear, that is the end of the matter. It is only when uncertainty remains that regard may be had to extrinsic circumstances, which would include the issues giving rise to the order as well as the facts upon which it relied (see eg *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304D-H; *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) at 362I-363D).

[13] With reference to the previous court order, the question that underlies the key issue between the parties is thus – does the order, on a proper interpretation, reflect an intention by the court that creditors who had previously

proved their claims against Chinza, were to be absolved from proving their claims against Brenda Jansen's insolvent estate in accordance with s 44 of the Act? The respondents' contention is that it does not. Their argument in support of this, which found favour with the court *a quo,* started out from the premise that the previous court order did not interfere with the separate existence of the entities involved. Though the order provided that the assets of these entities were to be transferred to Brenda Jansen's estate and that the creditors of these entities also became creditors of Brenda Jansen, they argued, the entities retained their separate legal existence. Chinza, for example, was not somehow absorbed into Brenda Jansen's estate. It remained in existence as a company, albeit with no assets of its own, until a certificate in terms of s 419 of the Companies Act had been issued by the Master.

[14] From this it follows, the respondents argued, that proof against Chinza could not possibly be regarded as automatically constituting proof against Brenda Jansen's estate. A legal mechanism whereby proof against one insolvent estate can without more be regarded as proof against another, they said, simply does not exist. The mere fact that, as a matter of substantive law, Brenda Jansen had been declared personally liable to the creditors of Chinza (and the other entities), they argued, did not justify the inference that proof against Brenda Jansen's estate was intended to be dispensed with because these claims had been proved in the estates of other entities. What is more, respondents argued, the interpretation of the previous court order contended for by the appellants would mean that they, as trustees of Brenda Jansen, were bound to accept the consequences of any lackadaisical failure by the liquidators to investigate claims submitted against the company. This result, they said, could not have been intended by the court. In consequence, the respondents contended, the preservation of creditors' rights in para 7 of the previous order must be understood to refer to substantive rights and not to procedural rights such as those resulting from formal proof of claims in terms of s 44 of the Act.

[15] In considering these arguments, it is apparent, in my view, that on the respondents'reasoning, para 1.1 of the order appealed against can hardly be justified on any legal basis. Once it is accepted that Chinza remained a separate

legal entity, how could proved claims against that entity simply be struck out? What in the previous order, would justify that procedure? The fact that, as a result of the previous order these claims became valueless because the company was deprived of all its assets, might have been regarded as a pragmatic reason for granting the order, but it could not constitute any legal basis for doing so. However, para 1.1 of the order appears to be of little practical consequence. The appeal is primarily aimed at the relief granted in para 1.2.

[16] Turning to para 1.2, I am, unlike the court *a quo,* not persuaded by the respondents' argument in support of that relief. It departs from the wrong premise and therefore inevitably arrives at the wrong conclusion. The question is not so much whether the previous court order interfered with the separate existence of legal entities. That it obviously did not, as is illustrated by the fact that s 419 certificates were sought in respect of these entities. The further proposition that there is no legal mechanism whereby proof against one insolvent estate can be regarded as proof against another, amounts to *petitio principii* in the present context. The very issue is whether the previous order should be construed to constitute such mechanism. Thus understood, the real question relates to the effect of the order on the administration of the separate insolvent estates. The answer to this question is in the first place that they were to be administered as one. For purposes of administration a new entity was created and administrators for this new entity were appointed. This new entity was to take over all the assets of the separate entities. At the same time, creditors of the separate entities automatically became creditors of the new entity. It is true that the new entity was given the name of one of its constituent elements, ie insolvent estate Brenda Jansen. That, however, is purely fortuitous. Equally fortuitous is the fact that the trustees of one of the constituent entities were appointed to administer the newly created entity. The new entity might as well have been called XYZ.

[17] On the respondents' argument, creditors who proved their claims against one of the constituent elements, estate Brenda Jansen, would remain proved creditors against the new entity while those who proved their claims against other constituent entities would have to start all over again. I can see no reason for such discrimination and if it was really intended, I would have expected an

express provision in the order to that effect. What is more, I do not agree with the respondents' argument that the resulting discrimination against the creditors of other entities would only be a matter of procedure. It may well involve substantive prejudice. Take the example of creditors who had unliquidated or disputed claims against Chinza which had been settled with the liquidators and then proved against the company. Such creditors will undoubtedly be prejudiced if they are required to start all over against the new entity. Causing prejudice of this kind would be in direct conflict with the intention that, in my view, appears clearly from the order, namely, that it should not cause prejudice to any creditor of any of the constituent entities.

[18] Thus far I have referred only to the wording of the previous order itself. But, if any uncertainty remains as to what effect the order was intended to have on proved claims, it is, in my view, eliminated by reference to the issues giving rise to the order and the facts upon which it relied. What gave rise to the order were the problems encountered in the winding-up process by everybody concerned, including both administrators and creditors, as a result of the different entities that were put up by Brenda Jansen as part of the smoke and mirrors of her fraudulent scheme. The overall purpose of the order was to avoid these problems and to streamline the winding-up process. It was obviously not to make the process more costly and more complicated. Its purpose was to alleviate the plight of Jansen's victims, not to put new obstacles in their way, for example, by requiring (some of them) to start all over again. The mechanism created by the order to achieve its overall purpose was essentially to consolidate the separate winding-up processes already in progress — together with those that were about to follow — under one umbrella.

[19] The intention to be inferred from all this is, in my view, that the winding-up processes already in progress were to continue under the new umbrella as if no change had occurred. Otherwise stated, that a snapshot be taken as at the moment of consolidation and the picture transposed onto the new entity. This is borne out, not only by para 7 of the order with its express preservation of existing rights, but also by para 12 which provides that costs incurred in the winding-up of the separate estates will become costs of sequestration in the new entity

'referred to in paragraph 3'. The conclusion that inevitably follows, I think, is that creditors who had proved their claims against any one of the separate entities were intended to be regarded as proved creditors of the new entity. It is true that on this construction, the administrators of the new entity were bound by the order to bear the consequences of failures by liquidators or trustees in the estates of the separate entities to properly scrutinise claims submitted in those estates. That negative impact can, however, largely be eliminated, I think, by application of the procedure in s 45 of the Act. In consequence, I hold the view that paras 1.1 and 1.2 of the court *a quo*'s order fall to be set aside.

[20] This brings me to para 1.3 of that order, which authorised the Master to issue certificates contemplated in s 419 of the Companies Act with reference to Chinza and the other corporate entities involved. The reasoning behind this order, as it appears from the judgment was that, as a result of the previous court order the winding-up process in the corporate entities concerned had in effect been finalised and that there was therefore no reason why s 419 certificates should not be issued at this stage. On appeal, the respondents supported this reasoning. It is borne out, they contended, by the Master's ruling at the continued first meeting of creditors in Chinza on 9 September 2003 (referred to in para [7] above). According to this ruling, the respondents said, the Master decided that, by virtue of the previous court order, the winding-up of Chinza had effectively been finalised and that the liquidators could apply for the release of their security once they had provided him with an account 'reflecting the property they administered [and] how they applied the funds under their control'.

[21] The cornerstone of the appellants' objection to the order in terms of para 1.3 was that a s 419 certificate in respect of Chinza would deprive them of whatever remedies they may otherwise have had against the liquidators of the company. In developing this objection, they recounted that, pursuant to the Master's ruling of 9 September 2003, the liquidators had filed their administration account. What appeared from this account, the appellants said, was that, while the liquidators started their administration of Chinza with assets to the value of about R1,5m, they ended up with a nett loss of R1,59m. Resulting from the account, objections against the liquidators' administration were raised by

creditors of Chinza which caused the Master to appoint an inspector in terms of s 381 of the Companies Act. The inspector's report, which the appellants annexed to their papers, prima facie concluded, firstly, that the liquidators did not act in the best interest of creditors and, secondly, that estate funds had been misapplied on a substantial scale.

[22] For these and other possible transgressions, the appellants said, they intended to hold the liquidators liable and their expressed concern was that a s 419 certificate in Chinza will prevent them from doing so. In answer, the respondents denied that a s 419 certificate would deprive the appellants of any remedy they may have against the liquidators. Since the liquidation process in Chinza had now been transferred to the estate of Brenda Jansen, the respondents contended, the appellants could now exercise whatever remedies they may have in the course of the administration of that estate. In any event, they argued, the result of the Master's ruling of 9 September 2003 – which had not been taken on review – was that, as a fact, nothing more could happen in the winding-up of Chinza.

[23] Though I appreciate the force in the respondents' arguments, I do not share their confidence that a s 419 certificate in respect of Chinza could have no negative impact on the rights of creditors against the liquidators. For reasons I regard as self-evident, I would in all the circumstances be extremely reluctant to endorse any order which might provide the liquidators with an additional shield against the legitimate claim of creditors. However, be that as it may, I find it inappropriate to enter any deeper into this debate. There is another reason why, in my view, the declarator concerning s 419 should not have been granted. This reason has its origin in the jurisdictional fact for the granting of a declaratory order stipulated in s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 – whence the High Court derives its power to grant these orders – namely, that such an order can only be granted at the instance of an 'interested person'.

[24] Whether the 'interest' required by s 19(1)(a)(iii) should be described as 'a direct and substantial legal interest' (see *Milani v SA Medical and Dental Council* 1990 (1) SA 899 (T) 902F-903G) or as a 'real and sufficient interest' (see eg

Tsosane v Minister of Prisons 1982 (2) SA 55 (C) 63D) makes no difference in this case. The incontrovertible fact is that the respondents had no interest whatsoever in the order that they sought. When asked during argument what possible difference it could make to respondents if the s 419 certificate were only to be issued at the end of the sequestration process in Brenda Jansen's estate, the respondents' counsel conceded that this would not alter his clients' position at all. His response was, in reality, that the declarator had been sought at the behest of the Master. In my view this response does not make the grade. An intent to assist the Master in making a ruling may be laudable, but it does not satisfy the requirement of 'an interest' on the part of the applicant in the declaratory order. For this reason, para 1.3 of the court *a quo*'s order should also not have been granted and likewise falls to be set aside.

[25] There remains to be considered the appellants' contention that the costs order, both in the court *a quo* and on appeal, should not be against the insolvent estate of Brenda Jansen, but against the respondents *de bonis propriis*. Though I found the argument in support of this contention rather confused, it seemingly rested on two legs. First, on the proposition that s 73(1) of the Act had not been complied with and, secondly, on the basis of alleged misconduct on the part of the respondents. I propose to deal with these two bases in turn.

[26] In so far as it is relevant for present purposes, s 73(1) of the Act provides:

'. . . [T]he trustees of an insolvent estate may with the prior written authorization of the creditors engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate: Provided that the trustee -

(a) if he or she is unable to obtain the prior written authorization of the creditors due to the urgency of the matter or the number of creditors involved, may with the prior written authorization of the Master engage the services of any attorney or counsel to perform the legal work specified in the authorization on behalf of the estate; or

(b) . . .

and all costs incurred by the trustee, including any costs awarded against the estate in legal proceedings instituted on behalf of or against the estate, in so far as such costs result from any steps taken by the trustee under this subsection, shall be included in the cost of the sequestration of the estate.'

[27] It appears that the respondents did in fact obtain the prior written authorisation of the Master to bring the present application. Against that authorisation, the appellants, however, launched a two pronged attack. In the first place, they said, it was obtained by the respondents in breach of their earlier undertaking that they would not approach the court without the creditors' consent. In the second place they contended that neither of the two preconditions for obtaining the Master's consent – in lieu of creditors' consent – that are stipulated for in s 73(1)(a), ie urgency or the number of creditors involved, had been established. The respondents' answer to this attack, gave rise to a rather involved dispute of fact.

[28] I find it unnecessary to decide these issues of fact. In my view, the appellants' argument based on s 73 is misconceived. Non-compliance with s 73(1) does not in itself justify a *de bonis propriis* cost award. It deals with the question whether costs – previously – awarded by the court against the estate should – eventually – be considered as part of the sequestration costs. This interpretation is, I think, borne out by the wording of the section itself. It also conforms, in my view, with the decision of this court in *Patel v Paruk's Trustee* 1944 AD 469 at 474-475. According to this decision, absence of authority under s 73 is a matter which concerns the relationship between the trustee and the insolvent estate. It is not something that can be raised by litigants against the estate. In the court proceedings at issue, the appellants were acting in their capacities as litigants against the estate and their position is no different from that of other litigants. Their protestations, *qua* creditors, against the inclusion of costs awarded against the estate as part of the sequestration costs, can be raised at the appropriate time by way of a objection to the trustees' account under s 111 of the Act.

[29] As to the appellants' argument based on respondents' alleged misconduct, it is a well established principle that a trustee should not be ordered to pay the costs of unsuccessful litigation on behalf of the estate, *de bonis propriis,* unless he or she had been guilty of improper conduct; for example, that he or she acted in bad faith, or negligently or unreasonably. Mere unacceptable or ill considered conduct is not enough to justify such an order (see eg

Grobbelaar v Grobbelaar 1959 (4) SA 719 (A) at 725; *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA) at 717D-E). In support of their argument that the respondents' conduct can indeed be described as 'improper', the appellants referred to the history of the administration of the insolvent estate; how the respondents on numerous occasions allegedly squandered the money of the estate, for instance on needless court applications and on postponements of creditors' meetings.

[30] It seems, however, that this is very much a case of the pot calling the kettle black. From the minutes of the creditors' meetings annexed to the papers, it is clear that there are various factions of creditors and that those representing the different factions are all jockeying for positions of control. They are clearly acting, at least prima facie, in their own interest and not in the interest of those they represent. It appears that at these meetings, time had been wasted on endless squabbles and ding-dong battles of futile point-taking by all concerned. For the most insignificant reasons postponements were sought. As a result, the second meeting of creditors in Brenda Jansen's estate had been postponed on no fewer than twelve occasions; with the end not nearly in sight. What is even more disturbing is the sense of unease that the courts too are being used by those responsible in this self-serving, wasteful process. Some costs order to mark the court's displeasure would clearly be appropriate. The problem is, however, that not only the respondents are to blame. What is more, it so happens that, in the application under consideration the respondents did not, in my view, act improperly. In this instance, they seem to have been motivated by an overall intent to save costs. The fact that this court does not agree with the declarator that they sought self-evidently does not, in itself, render their conduct improper, particularly where it found favour with the court *a quo.* It would therefore, in my view, be inappropriate to grant the *de bonis propriis* costs order sought.

[31] For these reasons, it is ordered that:

(a) The appeal is upheld with costs against the insolvent estate of Brenda Jansen, such costs to include the costs of two counsel.

(b) The order of the court *a quo* is set aside and for it is substituted the following:

'The application is dismissed with costs against the insolvent estate of Brenda Jansen.'

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F D J BRAND
JUDGE OF APPEAL

CONCUR:
ZULMAN JA
CAMERON JA
COMBRINCK AJA
MALAN AJA