Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19265/13

Before: The Hon. Mr Justice Binns-Ward

In the ex parte application of:

JURGENS JOHANNES STEENKAMP N.O. First Applicant

ANDREW LEHLOYO DORCKY MOHOHLO N.O. Second Applicant

CHAVONNES BADENHORST ST CLAIR COOPER N.O.
[in their capacities as the joint
Liquidators of Monoceros Trading 111 CC
(in provisional liquidation)] Third Applicant

For an order in terms of section 386(5) of the Companies Act No. 61 of 1973 (as amended), as read with Schedule 5(6) to the Companies Act No. 71 of 2008 and section 66 of the Close Corporation Act No. 69 of 1984 (as amended)

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REASONS DELIVERED: 10 January 2014

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BINNS-WARD J:

[1] In this matter the provisional liquidators of a close corporation applied for authorisation in terms of s 386(5) of the Companies Act 61 of 1973 read with s 66 of the Close Corporations Act 69 of 1984 to do various things, including to institute or defend legal proceedings and to obtain legal advice. They also sought authorisation (i) to engage the services of counsel and attorneys (ii) to agree upon the scale of fees to be payable to such legal representatives and (iii) to conclude written agreements with the legal representatives of

the nature contemplated in s 73(2) of the Insolvency Act 24 of 1936 in regard to the applicable tariff of fees. An order granting the substantive relief sought by the liquidators was made on 29 November 2013. The liquidators, however, also sought an order that the costs occasioned by the filing of a report by the Master be paid by the Master. After hearing argument, the court reserved judgment on the question of costs. This judgment thus deals with the question that was reserved for consideration.

[2] The Master filed a report in the application for the assistance of the court. The relevant parts are contained in para. 3, 6, 7 and 8, which read as follows:

> 3. The Master foresee (sic) conflict or potential conflict of interest from the attorneys who are representing the liquidators in this application, in that the same attorneys are the attorneys who brought the application for the liquidation of the company (sic) in question, the conflict of interest was clearly shown in case (sic) of Standard Bank of South Africa v The Master of the High Court (Eastern Cape Division) 2010 (4) SA 405 (SCA). Therefore it is my recommendation that the liquidators concern (sic) acquire the services of other independent attorneys.
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> 6. I humbly request the Honourable Court to include in the Court order that the Master may in terms of section 73(5) of the Insolvency Act 24 of 1936 disallow any costs under s 73(2) if the Master is of the opinion that any such costs are incorrect or improper or that the trustee (sic) acted in bad faith, negligently or unreasonably in incurring any such costs.
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> 7. I humbly request the Honourable Court to include in Court order (sic) the agreement concluded between the liquidators and the attorneys regarding tariffs shall be lodged with the Master and before payments is (sic) made to the attorney(s) or counsel the bill shall be lodged with the Master to allow the Master to exercise oversight in terms of section 73(5) of the Act.
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> 8. I humbly request the Honourable Court to include in the Court Order that the declaration in terms of section 73(4) should be lodge (sic) with the Master before any payment is made to the attorney or counsel.

[3] The matter of Standard Bank of South Africa v The Master of the High Court (Eastern Cape Division) referred to in para 3 of the Master's report is not in point. The judgment cited by the Master was concerned with a failure by certain liquidators to discharge their duties

with independence and impartiality. The failure occurred in the context of a manifest conflict of interest by one of the joint liquidators. The conflict arose in the peculiar circumstances by reason of the liquidator's appointment as co-liquidator of another company in the same group and the existence of a contentious claim by the one company against the other. The case also concerned the unjustifiable use by the liquidators of the funds of the company in the course of winding-up to fund their challenge to a decision of the Master to limit their fees. This happened when it was obvious - the challenge having been mounted in the liquidators' personal interest – that the fees in question should have been paid out of their own pockets.

[4] The Master's concern in the current case is a possible conflict of interest on the part of the attorneys used by the liquidators. The liquidators are availing of the professional services of the same firm of attorneys as that which represented the applicant for the winding up order. There is nothing inherently untoward about this. Whether a conflict of interest presents in any matter is dependent on the facts. A legal practitioner, whether such be an advocate or an attorney, is under an ethical obligation not to represent a party in circumstances in which, by reason of the practitioner's involvement in or exposure to other matters, a potential of conflict of interest arises.

[5] The Master has not explained the factual basis upon which a potential conflict of interest might arise in the current matter if the attorneys concerned represent the liquidators. It is not evident to me that there would be a conflict of interest between the winding-up applicant and the liquidators. On the contrary, the allegations in the supporting affidavit in the application in terms of s 386(5) show that the proceedings which the liquidators are minded to institute are inspired by concerns brought to their attention by the applicant for the winding-up. On their face they will be to the benefit of the company and its creditors. This points to a coincidence of interest; not a conflict. There is furthermore nothing on the information before the court to suggest that, were a situation of conflict that is not currently apparent to emerge subsequently, the attorneys concerned would not comply with their ethical obligation to withdraw. In the absence of sound reason to suspect otherwise, one must approach matters on the assumption that officers of the court will act ethically.

[6] In dealing with the issues raised in para. 6-8 of the Master's report it would be useful to have the provisions of s 73 of the Insolvency Act readily to hand. Section 73 provides:

> 73 Trustee may obtain legal assistance

(1) Subject to the provisions of this section and section 53 (4), the trustee 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) if it is not likely that there will be any surplus after the distribution of the estate, may at any time before the submission of his or her accounts obtain written authorization from the creditors for any legal work performed by any attorney or counsel,

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.

(2) Subject to the provisions of subsection (3), costs incurred under this section, except costs awarded against the estate in legal proceedings, shall not be subject to taxation by the taxing master of the court if the trustee has entered into any written agreement in terms of which the fees of any attorney or counsel will be determined in accordance with a specific tariff: Provided that no contingency fees agreement referred to in section 2(1) of the Contingency Fees Act, 1997 (Act 66 of 1997), shall be entered into without the express prior written authorization of the creditors.

(3) If-

(a) the trustee has not entered into an agreement under subsection (2); or

(b) there is any dispute as to the fees payable in terms of such an agreement,

the costs shall be taxed by the taxing master of the High Court having jurisdiction or, where the costs are not subject to taxation by the said taxing master, such costs shall be assessed by the law society or bar council concerned or, where the counsel concerned is not a member of any bar council, by the body or person designated under section 5 (1) of the Contingency Fees Act, 1997.

(4) No bill of costs based upon an agreement entered into under subsection (2) shall be accepted as cost of the sequestration of the estate, unless such bill is accompanied by a declaration under oath or affirmation by the trustee stating-

(a) that he or she had been duly authorized by either the creditors or the Master, as the case may be, to enter into such an agreement;

(b) that any legal work specified in such bill has been performed to the best of his or her knowledge and belief;

(c) that any disbursements specified in such bill have been made to the best of his or her knowledge and belief; and

(d) that, to the best of his or her knowledge and belief, the attorney or counsel concerned has not overreached him or her.

(5) Notwithstanding anything to the contrary contained in this Act, the Master may disallow any costs incurred under this section if the Master is of the opinion that any such costs are incorrect or improper or that the trustee acted in bad faith, negligently or unreasonably in incurring any such costs.

[7] As to the directions which the Master recommended should be incorporated in the order concerning the fees of legal practitioners engaged by the liquidators, it seems to me that these are the product of a misapprehension by the Master of the import of s 73 of the Insolvency Act and indeed of the role and function of a liquidator. As emphasised in the opening paragraph of the judgment in Standard Bank of South Africa v The Master of the High Court (Eastern Cape Division) supra, 'In the winding-up of companies liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vests in them. Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice.'[1] The provisions of s 73 determine what legal fees incurred by the liquidator in properly authorised legal proceedings may be recovered as costs in the winding-up. The liquidator will be personally liable for payment of any fees incurred that are not recoverable as costs in the winding-up.

[8] The provisions of s 73(2) of the Insolvency Act, which allow a liquidator to agree a scale of fees for an attorney or counsel engaged to act on behalf of the company in liquidation according to a specific tariff, are entirely consistent with the notion of the independent

[1] Navsa JA cited the authorities collected in Bertelsman *et al*, *Mars: The Law of Insolvency* 9 ed (2008) at 293-294 in support of these well established propositions.

authority vested in the office of a liquidator. Nothing in the statutory provisions envisages that the Master will vet such an agreement before it is concluded, or before any costs in authorised legal proceedings are incurred. When the fees in question are payable in terms of an agreement of the nature contemplated in s 73(2), they may be accepted as a cost in the winding-up only if the liquidator makes the solemn declaration on affidavit or by affirmation as to the matters referred to in s 73(4)(a)-(d).

[9] The legislation does not contemplate that the Master will exercise a monitoring or closely supervisory role in relation to incurrence of legal expenses by the liquidator. The Master is able, of course, to exercise oversight in terms of ss 381 and 393-3 of the Companies Act, but will do so with due respect to the liquidator's independence and statutory status.

[10] Legal fees fall to be accounted for in the accounts that a liquidator is required to draw up in terms of s 403 of the Companies Act. It is in the context of a consideration of such accounts that the Master will ordinarily, assuming the circumstances justify it, exercise the power in terms of s 73(5) to disallow any of the costs. In that regard, s 73(5) falls to be read with s 407(3) of the Companies Act. The Master will disallow costs if he is of the opinion that they are incorrect or improper, or that the trustee acted in bad faith, negligently or unreasonably in incurring any such costs. The effect of disallowing costs in terms of s 73(5) is not that the fees in question do not have to be paid, but that they are not dealt with as costs in the winding-up. The considerations that the Master will have regard to in exercising the power in terms of s 73(5) are essentially distinguishable from those to which a taxing master gives consideration. As Hiemstra J observed in Wulfsohn v Kearney NO and Others 1963 (1) SA 782 (T), at 789, while a taxing master is concerned with guarding against over charging, the Master's concern is whether the costs involved 'however proper between attorney and client, [are] chargeable against the estate'. (emphasis supplied) In other words, the Master's oversight role in terms of s 73(5) goes to whether the costs concerned have been incurred bona fide in relation to the process of the winding up of the estate.

[11] In the circumstances I did not consider it fitting or appropriate to incorporate the recommendations made in para. 6-8 of the Master's report in the order that was made.

[12] The Master's report was filed very shortly before the hearing with the result that counsel instructed to move the application was not prepared to argue the issues that arose from it. The matter was consequently stood down to the following day, when the liquidators' attorney appeared to deal with the report. It is the costs attendant on the additional appearance that the liquidators' attorney submitted should be awarded against the Master.

[13] The liquidators' attorney submitted that the Master's misdirections concerning the import of s 73 of the Insolvency Act were inexcusable in the context of the issues recently argued in another matter in which the attorney and the relevant official in the Master's office had been involved. The attorney argued that in the face of what had transpired in the other matter, it was apparent that the Master's input in the current case was improper and inspired by the ulterior motive of wishing to control the appointment of attorneys by liquidators. I am not sure that that is entirely correct. The other matter to which Mr Katz, the liquidators' attorney, referred was the matter of Van Zyl N.O. and Four Others v The Master of the High Court, Cape Town, case no. 17175/2013. It was argued before Le Grange J on 29 October 2013. That case involved an application for the review and setting aside of a decision or by the Master not to confirm a liquidation and distribution account and for an order by the court confirming the account. It would appear from the papers in that matter, which I have cursorily perused, that the difficulty lay in the Master's misapprehension of the import of s 73. It appears from the transcript of the hearing that the relevant official at the Master's office, Mr Mabusela, attended court and, at the invitation of the presiding judge, made certain oral submissions. These submissions included a remark that liquidators should not engage as attorneys practitioners who had acted for the applicant for the winding up. That appears to me to have been a gratuitous statement, which had nothing to do with the matter in hand. It does, however, indicate a personal viewpoint by Mr Mabusela, who is an assistant master at the Master's Office, Cape Town. Le Grange J did not comment on Mr Mabusela's view in this regard. That viewpoint has been reiterated in the report placed before me in the current matter. I have made it plain that as a general proposition it is legally unfounded.

[14] Le Grange J granted the substantive relief sought in the matter before him. The learned judge, however, declined to make a costs order against the Master, apparently on the basis of an acceptance that the Master's position had been inspired by a bona fide misapprehension of the import of the relevant provisions of s 73 of the Insolvency Act. The learned judge did say in deciding the issue of costs, however, 'that if a similar matter comes to this Court again with a similar problem there's no doubt in my mind that I, sitting as a presiding judge, will definitely grant costs and perhaps not only on the ordinary scale, but costs on a punitive scale because I think the Master now understands what it's all about…'. Those remarks were uttered on 29 October 2013, and the Master's report in the current matter was drawn up less than a month later.

[15] It was perhaps unfortunate that the substantive order in the Van Zyl case was made without reasons therefor having been given. It is clear that the learned judge's remarks quoted in the previous paragraph were made in the context of his understanding that Mr Mabusela would have appreciated from the nature of the discussion during argument that his apprehension of the effect of s 73 was unsound. The tenor of the report submitted in the current case suggests that Le Grange J's perception was overly optimistic. The absence of a reasoned judgment, however, leaves scope for the reasonable inference that Mr Mabusela may not have been fully aware of the bases upon which the learned judge considered his understanding of s 73 of the Insolvency Act to have been wrong.

[16] I would be reluctant to make a costs order against the Master unless persuaded that his office had acted in bad faith. The role of the Master in the provision of reports to the Court is to be of assistance and to make the views of the Master's office as an interested organ of state known to the Court. The Master will not ordinarily attract a costs liability simply because his or her legal submissions are not accepted, or because the Court does not agree with his or her views on the matter in hand. I am not convinced that the report in the current matter was made in bad faith. I would in any event not have been disposed to make a costs order against the Master without notice to the Master and the opportunity being afforded for submissions as to why an order should not be made. I do hope, however, that the reasons provided for not accepting the Master's recommendations in the current matter will conduce to a better understanding in the Master's office of the application of s 73 of the Insolvency Act and the status and functions of liquidators, as well as the ethical duties of attorneys. It is expected of the Master's office, of course, to apply legislation consistently with the pertinent jurisprudence.

[17] The Registrar is directed to forward a copy of this judgment to the Master for information.

A.G. BINNS-WARD
Judge of the High Court