IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 18748/2021

In the matter between:

The Master of the High Court, Cape Town	Applicant
And	
Steven Malcolm Gore N.O.	First Respondent
Jurgens Johannes Steenkamp N.O.	Second Respondent
Eugene Januarie N.O.	Third Respondent

[in their capacity as joint liquidators of Brick Art Construction (Pty) Ltd (in liquidation)]

JUDGMENT ELECTRONICALLY DELIVERED
25 MAY 2023

Baartman, J

[1] On 31 January 2022, the respondents, the liquidators for Brick Art

Construction (Pty) Ltd **(the company)** obtained an order by default[1]. The Master of the Cape High Court **(the applicant),** in terms of the common law, seeks a rescission of that order.

[2] The requirements for relief in terms of the common law are as follows[2]:

> '...In that matter, this Court expressed the common law requirements thus:
>
> "...the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.'"

The reasons for the delay

[3] The explanation for the failure to have opposed the review application must be reasonable and satisfactory and must cover the whole period of inaction. The company was provisionally liquidated on 20 February 2020 and finally

---

[1] 31 January 2022: '1. The [Master's] determination in terms of section 384(2) of the Companies Act 61 of 1973 (the 1973 Companies Act) dated 4 May 2021 not to increase the applicants' remuneration, is reviewed and set aside;

2. It is declared that the reasonable renumeration to which the applicants are entitled in

terms of 384(1) of the 1973 Companies Act is the sum of R939 598.75 (plus Vat);

3. The applicants are directed and authorised to record their remuneration in the first liquidation and distribution account as the sum of R939 598.75 (plus Vat); and

4. The first respondent is ordered to pay the costs of this application.'

[2] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption* & *Fraud in the Public Sector including Organs of State* & *Others* 2021(11) BCLR 1263 (CC) para 71.

wound up on 6 March 2020. It was common cause that the respondents were appointed as the company's joint provisional liquidators on 20 February 2020. At the first meeting of creditors, on 20 February 2020, the provisional liquidators were confirmed as the final liquidators and claims totalling R14 004 185.69 were proved. On 24 March 2021, the joint liquidators lodged their first liquidation and distribution account from which it appeared that they had realised R2 214 751.34 in recoveries. At that stage, the liquidators were entitled to remuneration of R496 573.65[3]. The first respondent made an application, submitted together with the first liquidation and distribution account, 'that the Master, acting in terms of section 384(2) of the Companies Act, 61 of 1973... , increase his remuneration by R564 894. 57 (excluding VAT) over and above the prescribed statutory tariff that he was entitled to'.

[4] On 6 April 2021, the applicant raised the following three queries:

> '7. The Master appointed three liquidators, why was the Forensic work not shared with fellow joint liquidators to avoid doing all the work himself. One of the Uoint] liquidators is Mr Steenkamp who once worked for KPMG one of the largest accounting, auditing, and forensic firms in the world.
>
> 8. Does Mr Gore have any forensic qualifications? If yes, please provide certificate.
>
> 9. Mr Gore's special fee is based on his directorship of Sanek. Does the Insolvency Law differentiate between liquidators and trustees who are directors and those who are employees or associates?'

[5] The first respondent replied as follows:

---

[3] *Insolvency Act* 24 of 1936 Tariff B.

'...even if we were not under level five lockdown, it would have been impractical and inefficient to try and divide the forensic work amongst 3 different liquidators.'

[6] Although, the first respondent did not hold a forensic qualification, he submitted that he was the holder of a university degree and had 43 years in practice, so he qualified for the additional fee. The fee was based on the Auditor-General's recommended hourly rate for someone of the first respondent's seniority. The applicant was not persuaded and on 4 May 2021 refused the application. Among others, the applicant reasoned as follows:

'30.5 the guidelines and fees for audits performed by private firms on behalf of the Auditor-General were not relevant to [the first respondent] as he was appointed as a liquidator, not an auditor....

31.5 [the first respondent] has no forensic qualification ...[and] did not have to claim forensic services fee as would have been done by a specialist forensic professional. The work of a liquidator is forensic or investigative in nature. It is work expected to be done by liquidators and comes with the job.'

[7] The applicant further advised the first respondent that, if aggrieved, he could review the refusal in terms of section 151 of the Insolvency Act, 24 of 1936. On 3 November 2021, the respondents launched and served the review application. The applicant functions under the auspices of the 'Department and when litigation is instituted against the Master, this must be referred to the Chief Master and Legal Services who operates from Pretoria'. The applicant could not, in terms of internal protocol, approach the state attorney; instead, as the applicant was obliged to, she duly 'processed and thereafter scanned [the

application] to the Master [in Pretoria[4]] for consideration' on 10 November 2021.

[8] The respondents had prayed for a costs order against the applicant, therefore her first concern to the Chief Master was expressed as follows:

> 'It appears that costs are being prayed for against the Master. In this regard, the State Attorney should be approached to negotiate abandonment of costs. The applicant does not show that the Master was *mala fides,* though he plays on unreasonable, irrational and unlawful.
>
> Should the Applicant not be amenable to abandon costs, the matter should be opposed.'

[9] On 11 November 2021, Ms van Aarde enquired as follows:

> 'In the event that applicants refuse to abandon costs, kindly confirm whether costs only should be opposed, or the application in its entirety.'

[10] It was also apparent from the 11 November 2021 correspondence that the Chief Master considered that the state attorney should be approached to discuss the issue of costs with the respondents/ applicants in the review application. At that stage, the idea was to obtain an undertaking that the review applicants would not seek costs against the Master. To that end, Ms Nonzuzu Ngcobo **(Ms Ngcobo)** from Legal Services was assigned to liaise with and instruct the state attorney. On 12 November 2021, she duly, approached the state attorney at Cape Town as follows:

---

[4] The email correspondence was sent to the following persons in the Office of the Chief Master in Pretoria:

'42.1 Ms Sindy van Aarde, the PA to the Chief Master in Pretoria;

42.2 Ms Hester Venter, Assistant Master in the Office of the Chief Master;

42.3 Mr Martin Mafojane in the Office of the Chief Master Pretoria.'

> 'Kindly be aware that this matter has been allocated to me...kindly liaise with the [first respondent] to abandon the costs. We are currently still awaiting the master's response as to whether the whole application should be opposed if they refuse to abandon costs or just the costs.'

[11] At the time, the IT systems in the Department was still compromised due to a cyber-attack in September and October 2021 that had affected national systems. The applicant scheduled a meeting for 15 November 2021 to consider whether the merits of the review should be opposed. Because of the cyber-attack aftereffects, the meeting could not proceed; therefore, on 7 December 2021, instead of the meeting, the applicant drafted an internal memorandum and forwarded it to the Chief and Deputy Master in Pretoria. In that memorandum, the applicant motivated that the review should be opposed on the merits as well. The Chief Master agreed with the sentiments expressed. They resolved to inform the attorney, once appointed, accordingly.

[12] However, on 10 December 2021, a staff member who had been in contact with all other staff members tested positive for Covid-19. Therefore, the entire Liquidation and Insolvency section had to quarantine for 10 days which ran into the scheduled December vacation. Most staff were away in that period. On return to the office, there was no response from the state attorney. An enquiry was made to which the state attorney on 3 February 2022 responded as follows:

> 'I refer to our telephone conversation earlier today and advise that this matter was never received by our office. It was sent when our office was just recovering from ransom ware and the e-mails are not fully operational.
>
> We will open a file.'

[13] On 4 February 2022, Mr Golding, the newly appointed attorney, learnt that judgement had been granted by default against the applicant. He obtained permission to appoint counsel via the deviation process due to the urgency of the matter. However, the successful counsel was not available to attend the matter. Therefore, Mr Golding had to seek further authorisation to appoint new counsel. On 24 February 2022, the new counsel was appointed in terms of the deviation process.

What went wrong?

[14] In an affidavit filed in reply, Ms Ngcobo confirmed the following:

> '...11. My supervisor allocated the Gore matter to me on 11 November 2021 and instructed me to liaise with and instruct the State Attorney in Cape Town...I failed to do so timeously for the reasons...
>
> 12. On 12 November 2021, I sent the following letter to the State Attorney:
>
> Kindly be aware .... matter has been allocated to me...Kindly liaise with the applicant to abandon costs... [we await instructions whether] the whole application should be opposed...
>
> 13. I sent ... email to S[…]@justice.gov.za and B[…]@justice.gov.za...
>
> 14. In my short tenure with the Department, I had mainly worked with the State Attorney's office in Johannesburg and Pretoria, and was familiar with their procedures. While I had inherited four matters that were... dealt with by the State Attorney in Cape Town, Gore was my first new instruction to Cape Town. As such when I sent the email. ..I assumed that this was the official

email address to send the new instruction to.

15. As a precaution, I also copied in Ms Cata as I had previously worked as [with her on the inherited matters]

16 .....Ms Oswald Faasen [in response to mail sent to the other email advised] refrain from sending to [this email].....only send new invoices [to this address….he provided a telephone number instead]

19 I called the number provided to me by Mr Faasen on more than one occasion, but nobody picked up….However, as I had copied in Ms Cata…she did not object….I felt reassured that the instruction was duly delivered...

20. At the time, I was in the third trimester of my pregnancy with my first child, and started experiencing health complications, including severely elevated blood pressure. This posed a danger to both me and the baby……I was instructed to work from home from around 1 December 2021 until after I had given birth.

21. My gynaecologist and obstetrician also required me to stay away from all stressful situations....

22. During this period, As I did not have access to my files readily at hand... it slipped my mind to follow up...

23. In or about 3 February 2022, the Master's Office in Pretoria followed up with Legal Services…I was shocked to realise that I had erred by failing to follow up….'

Is the defence *bona fide?.*

[15] It is apparent that the applicant intended to defend the review application. Immediately upon receipt, the applicant wanted the respondents to abandon the costs order sought against her. In this regard, the applicant reasoned that she had not acted ma/a *fide* nor did the respondents allege that she did. Therefore, before considering the review on its merits, she indicated that the application should be opposed in respect of the costs order sought. However, the attorney should first engage the respondent on the issue. This is a sensible approach as the applicant litigates on the public purse. In the event, the respondents were amenable to abandon the relief in respect of costs and the applicant was prepared to abide the merits, there would have been no reason to engage in costly high court litigation.

[16] As it turns out, the respondents persisted with the relief in respect of costs and obtained that relief. There are good reasons why the applicant should not take costs order against it lightly; it sets bad precedent and the public is burdened with unnecessary costs.

[17] In respect of the merits, the applicant, in the internal memorandum, motivated for the opposition to the review as follows:

> 'I am of the view we oppose the entire application to prevent a possible abuse of special fee applications. In the present case there is huge estate deficiency of over R16 million as is evident in the Distribution Account.
>
> They are three liquidators appointed in the matter and only one liquidator effectively apply for special fee for his own benefit.
>
> Our opposition will go a long way to protect creditors, especially

vulnerable creditors, in the future. Even if the Master loses the review, a judgment of the court may enhance jurisprudence in this area.

This was a fairly new matter with 3 experience liquidators were appointed but one liquidator felt like doing the work alone when he has other 2 capacitated liquidators who could have assisted him....

If this matter goes unchallenged for the vulnerable creditors will suffer in future and they will abuse of special fees.'

Discussion

[18] It is apparent from the above chronology that the applicant intended to oppose the review application at an early stage. First, in respect of the costs sought against the applicant, I cannot fault the reasons for opposing the application on the issue of costs alone. The applicant litigates in the public interest and should be wary of incurring unnecessary and gratuitous expenses at the expense of the public purse. It also follows that in litigation, the applicant should conduct itself in a responsible manner, mindful of the vulnerable client it represents. Nevertheless, depending on the circumstances, an order of costs against the applicant may be appropriate.

[19] In this matter, I am persuaded that the applicant has acted with the necessary urgency. However, the process collapsed because different departments were being dealt with and there is enough blame to go around. The respondents have levelled just criticism against the failure to have acted timeously. However, the respondents' reliance on the *Coosner*[5] matter is misplaced as this matter is distinguishable on the facts. Similarly, the

[5] *Coosner v Nuttal* 2021 JDR 1645 (WCC).

respondents' reliance on the *Colyn*[6] matter does not assist; this matter does not deal with 'inexcusable inefficiency' on the part of the attorney. I am persuaded, in the circumstances of this matter, that the explanation for the delay covers the whole period and despite the just criticism is reasonable. The isolation period, followed by the December vacation and Ms Ngcobo's medical condition were all contributing factors that led to the failure to have acted timeously.

[20] The reasons, as articulated in the internal memorandum are *bona fide* and carry some prospect of success. In addition, the applicant intends to challenge the respondents' *locus standi,* as they are acting in their own interest and obviously not in the interest of the creditors. In the circumstances of this matter where the proven claims far outweigh the recoveries, the liquidators are undeniably acting in their own interest. The issue deserves judicial attention.

Conclusion

[21] I am persuaded that the applicant has satisfied the requirements for a rescission of the order. Although, the applicant succeeds, I am persuaded that the applicant should be denied its costs. As indicated above, the applicant must act diligently; more so as the Master acts on behalf of the public. The respondents were entitled to approach the court for default judgment.

[22] It is so that there is a limit to which a client can escape liability for its attorneys' neglect. Although, I was not persuaded that this was such a matter, the respondents cannot be faulted for attempting to make that case. The Master is no ordinary litigant; its failure must have some consequences.

[23] I, for the reasons stated above, make the following order:

---

[6] *Colyn v Tiger Food Industries Ltd tla Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA).

(a) The order granted on 31 January 2022 is rescinded in its entirety.

(b) The applicant is directed to file a notice of opposition within 5 (five) days of this order.

(c) The applicant is directed to file its Rule 53 record within ten (10) days of this order.

(d) The applicant is to file its answering affidavit within thirty (30) days after the period referred to in Rule 53(4) of the Uniform Rules of Court has elapsed.

(e) Each party to bear its own costs.

Baartman, J