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

REPORTABLE
CASE NO: 12477/2020

In the matter between:

VINCEMUS INVESTMENTS (PTY) LTD **(Registration number: 196[…])**	Applicant
And	
MARTHINUS JACOBUS BEKKER N.O.	First Respondent
OTTLIE ANTON NOORDMAN N.O.	Second Respondent
AVIWE NTANDAZO NDYAMARA N.O. **(In their capacities as joint liquidators of** **TRAVEA (PTY) LTD (in liquidation)**	Third Respondent
VITAL FLEET (PTY) LTD	Interested Party

in re:

VINCEMUS INVESTMENTS (PTY) LTD **(Registration number: 196[…])**	Applicant
And	
TRAVEA (PTY) LTD	Respondent

Bench: P.A.L. Gamble, J

Heard: 6 March 2023

Delivered: 25 July 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Tuesday 25 July 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This is the extended return day of a rule nisi issued by Binns-Ward J on 28 October 2022 relating to that most common of disputes: the recovery of costs incurred in litigation. The matter has a rather turgid history.

2. On 7 September 2020, the present applicant ("Vincemus") launched an application in this Division under case no 12477/20 for the winding-up of Travea (Pty) Ltd ("Travea"), which allegedly owed it a substantial amount of money. That application was opposed with Travea, inter alia, contesting the extent of its liability to Vincemus. The application wound its way through the Motion Court and was eventually referred to the semi-urgent roll where it was heard on 22 February 2021. Having heard full argument, Nyati AJ reserved judgment and later handed down a provisional winding-up order on 21 May 2021, returnable on 21 July 2021.

3. In the meanwhile, another creditor, Vital Fleet (Pty) Ltd ("Vital"), launched a separate application for the winding-up of Travea on 8 February 2021 under case no 2474/21. That application was served on Vincemus' attorneys on 10 February 2021 and the matter was enrolled for hearing in the Fast Lane of the Motion Court on 23 February 2021. Vital approached the court in the full knowledge that Vincemus'

application was already pending. However, it did not seek leave to intervene as a creditor in that application and says that it preferred to launch a separate application to put the ailing company out of its misery there and then. It did so, it says, because it believed that its claim against Travea, unlike that of Vincemus, was uncontestable.

4. Vital's application was heard by Samela J on 23 February 2021, the very day after Nyati AJ had reserved judgment in Vincemus' application. The matter was not opposed by Travea despite proper service on it and Samela J was persuaded to grant a provisional winding-up order there and then. The return day of that order was fixed as 12 April 2021 when the provisional order was confirmed in the absence of any opposition. Pursuant to Samela J's provisional winding-up order, the First to Third Respondents were duly appointed as the provisional liquidators of Travea on 25 March 2021, which appointments were subsequently confirmed on 1 March 2022.

5. The consequence of the confirmation of the provisional order made by Samela J was that the adjourned proceedings pending before Nyati AJ became redundant: it is trite that once the provisional order made by Samela J had been made final, it was not competent for Nyati AJ to make a similar order while the order of Samela J remained operative. Travea had already been declared to be finally wound up and that was the end of its corporate life. I should stress that it appears that Nyati AJ was not informed by any of the parties of the existence of the provisional order of Samela J. The judgment of Binns-Ward J indicates that he was informed by counsel from the Bar that Samela J had been informed of the upcoming application before Nyati AJ but Binns-Ward J notes that there was no evidence before him to that effect.

6. In the result, on the return day of the order of Nyati AJ, Vincemus did not seek confirmation of the provisional order. Rather, it sought to amend para 4 of its notice of motion to read as follows –

> "That the costs of this Application be costs in the estate of [Travea], <u>alternatively</u> that the costs of this Application shall be paid as administrative costs in the estate of [Travea] consequent upon the provisional order of liquidation under case number 2474/21, issued by (sic) [Vital] against [Travea] which was heard on 23 February 2021

and granted on 2 March 2021, and which order was made final on 20 April 2021 consequent upon the hearing thereof on 13 April 2021."

7. In a nutshell then, Vincemus asks that its wasted costs expended in the abortive winding-up application before Nyati AJ be paid by the liquidators as part of the administrative costs in the winding up of Travea. This application (which I shall call "the costs application") is opposed by the liquidators, on the instructions of the other creditors of Travea.

THE COSTS' APPLICATION

8. The costs application elicited a substantial bundle of papers and was eventually heard on 12 October 2022 by Binns-Ward J who found favour with the relief sought. On 28 October 2022, His Lordship delivered a considered judgment and issued a rule nisi calling on all interested parties to show cause on 6 March 2023 as to why an order should not be made directing that Vincemus' costs in its abortive application (including the costs of two counsel where employed) should be costs in the liquidation of Travea.

9. By the time the matter came before this Court on 6 March 2023, Vital had joined the fray as an interested party pursuant to the judicial invitation issued by Binns-Ward J on 28 October 2022. To that end it filed an affidavit on 9 February 2023 in which it sought to persuade this Court that the rule nisi issued by His Lordship should be discharged. This elicited a response from Vincemus on 20 February 2023 in the form of a replying affidavit.

10. Counsel for Vincemus did not file fresh heads of argument for the hearing on the return day but relied on the extant heads filed when the matter was before the court in October 2022. The heads on behalf of Vital were filed very late – on Friday 3 March 2023, the last court day before the hearing. When the matter was called before this Court it appeared that the rule had not been served on The Master and so her attitude on this rather unusual point was not known. This was important in light of the argument advanced by Vital that by granting the relief sought in the costs application,

the Court would be depriving The Master of her statutory discretion to disallow such costs when assessing the liquidation and distribution account eventually submitted to her by the liquidators. In addition, the Court did not have the benefit of heads of argument from counsel for Vincemus in response to those filed on behalf of Vital.

11. The Court accordingly extended the return day to 18 May 2023, directing that the rule be served on The Master thus affording her an opportunity to file an explanatory report, if so advised. The parties were also given the opportunity to file affidavits in response to any issues raised by The Master. Finally, Vincemus was directed to file heads of argument in reply to Vital's argument.

12. In the result, The Master did not file any report with the Court, while, in the interim, Vital filed an application for condonation of the late filing of its heads of argument. As fate would have it, the Court was indisposed on 18 May 2023 and the parties thus agreed that the matter would be dealt with further by the Court in chambers on the basis of the papers filed of record. In addition, they agreed to the filing of further written submissions, which were duly lodged. The matter is thus to be dealt with on the papers as they stand.

13. The pertinent facts are set out in the judgment of Binns-Ward J and need not be repeated herein. In addition to those facts set out above, I would mention the following. After their appointment, the liquidators were initially not averse to considering the payment of Vincemus' costs as part of the administration of Travea and advised Vincemus that the creditors had "*provisionally agreed*" thereto. However, the liquidators advised Vincemus that a final decision could only be taken once the creditors had been afforded the opportunity to consider a bill of costs.

14. At the second meeting of creditors, which was convened on 1 July 2022, the liquidators put forward a proposal that Vincemus' costs be paid as part of the administration. This proposal was supported only by Vincemus, with the remaining 17 creditors whose claims had been proved voting against it. The objection appears to have been based, not on any principle in law, but purely on account of the extent of the bill of costs.

15. In the result, the liquidators wrote to Vincemus on 8 July 2022 informing it that payment of its costs was contrary to the express wishes of the remaining creditors and that they would be obliged to oppose the costs application. Thereafter, a settlement proposal was made by the liquidators to settle the costs application in an endeavour to avoid the running up of further expense in the administration. However, this did not find favour with Vincemus which proceeded to argue the matter before Binns-Ward J.

16. The parties before Binns-Ward J were only Vincemus and the liquidators. The latter duly advanced argument to the Court as to why the costs should not form part of the administration in the liquidation. The principle complaint then was that the costs application was premature because the liquidators had yet to decide whether to include such costs in the final liquidation and distribution account before submitting it to The Master.

17. The liquidators further argued that there was no basis in law for the costs application, which it was said sought relief contrary to the provisions of s 97 (and in particular s97(3)) of the Insolvency Act, 24 of 1936 ("the Act") which governs the payment of the taxed costs of sequestration. As will be seen hereunder, s97(2) prescribes the ranking of such costs and is qualified by s97(3) which gives content to the term where it is used in that subsection.

> "**97 Cost of sequestration**
>
> (1) Thereafter any balance of the free residue shall be applied in defraying the costs of sequestration of the estate in question with the exception of the costs mentioned in subsection (1) of section *eighty-nine*.[1]
>
> (2) The costs of sequestration shall rank according to the following order of priority –
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> (a) the sheriff's charges incurred since the sequestration;

[1] Section 89 concerns such costs which have been incurred in relation to the realization of any security which have not been covered by the secured asset.

(b) fees payable to the Master in connection with the sequestration;

(c) the following costs which shall rank *pari passu* and abate in equal proportions if necessary, that is to say: the text costs of sequestration (as defined in subsection (3), the fee mentioned in section 16 (5), the remuneration of the *curator bonis* and of the trustee and all other costs of administration and liquidation including such costs incurred by the trustee in giving security for his proper administration of the estate as the Master considers reasonable, in so far as they are not payable by a particular creditor in terms of section 89(1), any expenses incurred by the Master or by a presiding officer in terms of section 53(2) and the salary or wages of any person who was engaged by the *curator bonis* or the trustee in connection with the administration of the insolvent estate.

(3) In paragraph (c) of subsection (2) the expression 'taxed costs of sequestration' means the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included."

VITAL'S RESPONSE TO THE *RULE NISI*

18. On the return day, as I have said, Vital entered the lists and advanced reasons as to why the costs application should not be granted. Any suggestion that Vital approached the Court in the costs application as a disinterested party is illusory. Its affidavit in opposition was deposed to by its director Mr. Uren, who also deposed to the founding affidavit in Vital's urgent liquidation application heard by Samela J and, further, it has been represented throughout by the same attorneys and counsel who appeared on behalf of the liquidators before Binns-Ward J. Vital clearly has an interest to ensure that sufficient funds are available to the liquidators to settle its claim in full.

19. Vital's case as pleaded is essentially a regurgitation of that advanced earlier by the liquidators and its intervening affidavit in these proceedings raises precious little by way of new facts for further consideration by this Court. Rather it is replete with argument urging this Court to discharge the rule and proceeds from the premise that –

> "[7] Binns-Ward J did not make any *prima facie* findings in respect of the question whether [Vincemus'] costs should be included in the administration costs of Travea or not. This aspect has been deferred *in toto* to be decided on the return day of the rule *nisi.*"

20. That argument is specious and demonstrates that the deponent has either not properly read, or not understood, the clear wording of the judgment. Indeed, His Lordship made findings which are neither prima facie nor provisional as the discussion below will demonstrate. On the contrary, Binns-Ward J made definitive findings of fact and law in the course of exercising a wide discretion regarding the recovery of costs. The purpose of the court issuing a rule nisi was founded on the practice suggested in Aitchison[2] - that all creditors should be granted an opportunity to be heard before such an order is made final. With Vital having been granted such an opportunity, this Court must now determine whether there is any basis to reconsider the findings and the extent of the costs order made by Binns-Ward J.

21. In its heads of argument Vital identified four questions of law purportedly arising from that judgment which it contends fall to be considered now by this Court.

(a) Firstly, was Vital entitled to institute and prosecute its urgent application for the liquidation of Travea while knowing of Vincemus' application?

(b) Secondly, is the court able to grant the relief claimed by Vincemus at this juncture i.e. before the liquidators have drafted a liquidation and distribution account?

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[2] Ex parte Aitchison 1924 TPD 570 at 572

(c) Then, does a court have the power and/or a discretion to award two sets of costs to form part of the administration costs of an insolvent company?

(d) Lastly, what circumstances would permit the inclusion of a creditor's costs, if one creditor was not the creditor who procured the order, as administration costs pursuant to the provisions of s97(3) of the Act?

22. I have considered the thorough and well-reasoned judgment of Binns-Ward J and can find no reason to come to a different conclusion, notwithstanding Vital's submissions made on the return day. To avoid prolixity, I intend answering those submissions collectively.

23. In his judgment, Binns-Ward J relied primarily on the decision in Merchants' Trust [3] for the finding that Vincemus was entitled, as of right, to seek to recover its costs. His Lordship found support for this view in the judgment of the Full Bench in Hankins [4] and Simms Service Station [5] and observed, following Aitchison, that such an order could be made provided the other creditors had been given notice to object. While those cases found that the demand for the payment of costs such as those incurred Vincemus should first be made on the liquidator, they did not proscribe the entitlement in law to make such a claim.

24. In this matter, as Binns-Ward J observed, it was pointless requiring Vincemus to follow that route because the liquidators had already indicated that they would not recognize the claim. Thus, His Lordship followed the directions in the cases to afford the other creditors the opportunity to be heard before directing that Vincemus' costs should be costs in the liquidation.

25. In the exercise of his judicial discretion to sanction the inclusion of Vincemus' costs in the costs of the liquidation, Binns-Ward J, correctly in my view, had regard to

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[3] Ex parte The Merchants'' Trust Ltd 1930 TPD 142 at 146

[4] Ex parte Hankins and another: in re Cellocrete Manufacturing Co (Pty) Ltd 1950 (2) SA 611 (N) at 614

[5] Simms Service Station v Maharaj 1960 (3) SA 465 (N)

the fact that it was *bona fide* in approaching the court initially. Further, His Lordship considered that Vital launched its application of extreme urgency well-knowing that Vincemus had already approached the court in the ordinary course for a provisional order which was to be heard the day after it set down its application in the Fast Lane. The learned Judge rightly excoriated Vital for not seeking to intervene as a co-creditor in the Vincemus application which was the obvious step to take in the circumstances, given that the latter application was well-advanced and ripe for hearing. If Vital considered that its claim was akin to the proverbial silver bullet, it should have joined the extant application and added a round to the chamber in the revolver pointed at Travea rather than attempting to sneak in via the side door, if I may be permitted to mix my metaphors.

26. The complaint by Vital that the admission of Vincemus' claim as a preferent claim will render its claim worthless and possibly lead to a contribution by creditors is no basis for objection. It really amounts to a plea *ad misericordiam* by a creditor which expediently adopted an unwarranted approach. Had Vital followed the correct route as suggested by Binns-Ward J, the litigation costs in this liquidation would have been significantly reduced. It is thus the cause of any short-fall that it may suffer in its claim against Travea.

27. Lastly, there is the decision of Berman J in this Division in Courier Townhouse[6] which counsel for Vital argued in their "Short Submissions" of 25 May 2023 was clear authority for the proposition that only one set of costs was recoverable in a case of a multiplicity of applications for sequestration. The judgment is hailed as a "landmark ruling" which is "binding authority" on this Court.

28. With respect, there is nothing novel in the judgment of Berman J which, I should point out, was reserved and later delivered after an unopposed hearing in the Motion Court, with the court not having had the benefit of argument from the competing or other interested creditors. Be that as it may, and while His Lordship expressed some reservations in that regard, the judgment is not binding authority for

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[6] Courier Townhouse (Pty) Ltd v Myers 1986 (4) SA 1038 (C)

the proposition that only one set of costs may be recoverable under s97(3) of the Act, as the following passage at 1041G makes clear.

> "It seems to me then that, even if it is competent for this Court to order that the costs of both competing creditors applying for the sequestration of their debtor's estate should be included in the cost of sequestration (as to which proposition I have considerable doubt), the practice of this Court is to leave a decision as to who should bear the costs incurred by the unsuccessful creditor to the trustee."

29. The judgment thus refers to a practice in this Division which evidently existed some 37 years ago and which, I must confess, I am not aware is still the practice. But whatever the practice, the order which His Lordship granted left the decision as to whether such costs might be recovered to the discretion of the trustee of the insolvent estate. That is certainly in accordance with the approach advocated in cases such as Aitchison and The Merchants' Trust and manifestly does not, in law, preclude an entitlement to recover such costs. The case does therefore not bind this Court to refuse Vincemus' application.

30. As far as the "practice" of leaving the matter to the discretion of the liquidators is concerned, I agree with Binns-Ward J that this would serve little purpose in the instant case because the liquidators have repeatedly made their position clear – they will not include Vincemus' claim in the liquidation and distribution account. In para 25 of the judgment His Lordship adverted to the "special circumstances" inherent in this matter as affording him the basis to exercise his discretion to direct that Vincemus' costs be included in the liquidation. Those circumstances, in my view correctly, distinguish this matter from the "normal" situation discussed in cases such as Hankins and Simms Service Station.

COSTS

31. Vital opposed Vincemus' application on the return day and has not succeeded in disturbing the conclusions arrived at by Binns-Ward J. In doing so it has introduced

nothing new to the debate and there is thus no reason why the insolvent company should be saddled with these costs, which should rather follow the result.

32. The liquidators initially opposed Vincemus' application but then backed off at a late stage and indicated that they would abide. But in doing so they went so far as to file a so-called "Liquidator's Report" which was no more than an opposing affidavit dressed up as such. That report necessitated a further reply by Vincemus which occasioned it further costs. As already noted, Vital and the liquidators share a commonality of interests – what counsel for Vincemus appropriately dubbed a "complicity of intention" - and there is thus no reason to permit Vital to seek to recover its costs from the insolvent company.

33. Further, it was Vital's conduct that occasioned the postponement of the matter on 6 March 2023 when it filed its opposing papers at such a late stage that an adjournment of the matter was inevitable. It should thus bear the wasted costs incurred by Vincemus and the liquidators when the matter was postponed.

34. Given that Vincemus was statutorily required to approach the court to secure a direction that the liquidators should include its wasted costs in the abortive winding-up application, I am of the view that it is only the costs occasioned by Vital's opposition that should be borne by it.

35. *Ex abundante cautela* I shall direct that any remaining costs are to be costs in the administration.

ORDER OF COURT

Accordingly, it is ordered that**:**

A. The rule nisi issued in this matter on 28 October 2022 is confirmed.

B. The applicant's costs occasioned by the opposition hereto by the interested party, Vital Fleet (Pty) Ltd, are to be paid by that interested party.

C. The applicant's costs occasioned by its reply to the "Liquidators' Report" of 9 February 2023 are to be paid by the said liquidators, being the First to Third Respondents herein.

D. Any remaining costs are to be costs in the administration of Travea (Pty) Ltd (in liquidation).

GAMBLE, J

APPEARANCES

For the applicant

Adv. A.R. Sholto-Douglas SC and
Adv. G. Brown

Instructed by De Jager & Lordan Attorneys
Makhanda
c/o Van der Spuy and Partners
Cape Town.

For the first to third respondents and the interested party

Adv. M.P. van der Merwe SC and
Adv. J. van Rooyen

Instructed by Donn Bruwer Attorneys
Hartebeestpoort
c/o Chris Fick & Associates Inc.

Cape Town