

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO.: 2632/2017

In the matter between:

**THE STANDARD BANK OF SOUTH
AFRICA LIMITED**

Applicant

and

**THE MASTER OF THE HIGH COURT,
EASTERN CAPE, PORT ELIZABETH**

First Respondent

LIONEL SHROSBREE

Second Respondent

GARY MARK SHROSBREE N.O.

Third Respondent

*In his capacity as the joint liquidator of
Mario Levi Manufacturing, South Africa
(Pty) Ltd (In Liquidation)*

MICHELLE PAY N.O.

Fourth Respondent

*In her capacity as the joint liquidator of
Mario Levi Manufacturing, South Africa
(Pty) Ltd (In Liquidation)*

MOHAMMED IMRAN PETERSEN N.O.

Fifth Respondent

*In his capacity as the joint liquidator of
Mario Levi Manufacturing, South Africa
(Pty) Ltd (In Liquidation)*

SIVALUTCHMEE MOODLIAR N.O.

Sixth Respondent

*In her capacity as the joint liquidator of
Mario Levi Manufacturing, South Africa
(Pty) Ltd (In Liquidation)*

**PW HARVEY AND COMPANY (PTY)
LIMITED**

Seventh Respondent

JUDGMENT

HUISAMEN AJ

INTRODUCTION:

[1] This is a review application in which the applicant (Standard Bank) seeks the following relief:

- "1. *Condoning the Applicant's failure to institute the application within the time period specified in section 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).***
- 2. *Reviewing and setting aside the decision of the First Respondent (the Master) taken on 21 November 2016 regarding the payment to the Second Respondent (Lionel Shrosbree) of a commission on the investment of certain funds of Mario Levi Manufacturing South Africa (Pty) Ltd (in liquidation) (Mario Levi) during the course of the administration of Mario Levi;***

3. ***Declaring that the Second Respondent had no lawful entitlement to receive payment of commissions in respect of the investment of the funds of Mario Levi, invested by the Third Respondent (Gary Shrosbree), in his capacity as joint liquidator of Mario Levi, with a financing house known as PW Harvey and Co.;***
4. ***Directing Gary Shrosbree to provide to the Master and the Applicant a full account of all amounts paid to Lionel Shrosbree from the funds of Mario Levi within 30 days of the date of this Order and upon the furnishing of such account, a debatement thereof, if necessary;***
5. ***Directing Lionel Shrosbree, alternatively Gary Shrosbree in his personal capacity, to repay the commissions received by Lionel Shrosbree to Mario Levi within 5 days of the delivery of the debatement and accounting referred to in paragraph 3 above;***
6. ***Directing that the costs of this application be paid as a cost in the winding-up of Mario Levi, alternatively that the costs be paid by any respondent opposing this application;..."***

[2] The Master is abiding the court's decision.

- [3] Standard Bank's founding affidavit, as well as its replying affidavit, was deposed to by Elizabeth Johanna Engelbrecht.
- [4] Lionel Shrosbree, Gary Shrosbree and PW Harvey are opposing the application.
- [5] No direct relief is sought against PW Harvey. However, having regard to the obvious impact and consequences of the relief sought, PW Harvey joined the proceedings as seventh respondent and is also opposing the application.
- [6] Gary Shrosbree and Gavin Charlton Harvey deposed to extensive opposing papers. Lionel Shrosbree filed a confirmatory affidavit in which he confirmed the allegations contained in Gary Shrosbree's affidavit.
- [7] Gary Shrosbree conducts his business through Shrosbree Trustees CC. He is the sole member of the CC.

CONDONATION:

[8] The decision of the Master, which is the subject matter of these proceedings, was conveyed to Standard Bank through its attorneys on 21 November 2016. The application was launched on 3 August 2017, some 75 days out of the prescribed period of 180 days set out in PAJA.

[9] Standard Bank has fully set out their explanation for the delay in relation to the bringing of the application. The explanation covers the entire period of the delay. There was no objection from any of the respondents to the application for condonation and I therefore granted the required condonation to Standard Bank.

THE BACKGROUND FACTS:

[10] Mario Levi was provisionally wound-up by this court on 4 March 2014 and finally on 8 April 2014. The initial liquidators were appointed on 14 March 2014.

[11] The Master convened the first meeting of Mario Levi's creditors and members, as contemplated in section 364 of the 1973 Companies

Act, on 21 May 2014, at which meeting Gary Shrosbree was finally appointed as one of the liquidators of Mario Levi, together with Ms Pay and Mr Petersen.

[12] Ms Moodliar was also appointed as one of the joint liquidators on 13 August 2014. Prior to Ms Moodliar's appointment the initial liquidators, on 8 August 2014, lodged the first liquidation and distribution account (the first account) with the Master.

[13] Standard Bank subsequently lodged an objection to the first account with the Master, raising various grounds of objection, including the defective advertising of the first account. Thereafter Standard Bank amplified its objection and the amplified objection was lodged with the Master on 18 September 2014.

[14] Prior to Ms Moodliar's appointment the administration of Mario Levi's liquidation process was led by Gary Shrosbree.

[15] Ms Moodliar subsequently brought an investment of certain funds of Mario Levi with PW Harvey to the attention of Standard Bank.

- [16] Standard Bank became concerned as to, *inter alia*, the propriety of this arrangement as well as other aspects relating to the administration of Mario Levi. Consequently, on 6 May 2015, Standard Bank formally applied to the Master to convene an enquiry to investigate, *inter alia*, whether commission was being earned on the investment of Mario Levi's funds with a private investment company.
- [17] Gary Shrosbree, in his official capacity, invested the said funds of Mario Levi in a corporate saver account with Nedbank, through the agency of PW Harvey on or about 30 June 2014.
- [18] PW Harvey invests, as part of their business, funds placed with it on behalf of its clients with certain financial institutions, including Nedbank, and charge a fee, alternatively receives a commission, for this service from Nedbank. The said fees are charged as a percentage of the interest earned on the monies invested.
- [19] PW Harvey has, at all material times hereto, had an arrangement with Lionel Shrosbree in terms of which Lionel Shrosbree would receive a referral commission for any investments referred by him to PW Harvey. This arrangement was in terms of a historical oral

agreement which included an entitlement to commission on all funds invested by Gary Shrosbree with PW Harvey.

[20] Lionel Shrosbree is not involved with Shrosbree Trustees and has no connection with Shrosbree Trustees other than that Gary Shrosbree is his son.

[21] The net interest rate earned on the corporate saver account at the time that the funds of Mario Levi were invested as aforesaid with Nedbank (after deduction of PW Harvey's agency fee), was 3.65% per annum.

[22] Standard Bank contends that this net rate is significantly lower than the interest rate offered by similar investments by other financial institutions.

[23] Standard Bank's complaint is that the investment of the funds of Mario Levi with PW Harvey on the basis set out above, resulted in:

23.1 the unlawful payment of fees and/or charges out of the funds of Mario Levi; and.

23.2 the payment of the funds of Mario Levi to a third party (Lionel Shrosbree), who had no lawful entitlement thereto.

[24] After receiving representations from PW Harvey and Gary Shrosbree, the Master ruled, on 13 August 2015, that a *prima facie* case was made out by Standard Bank, necessitating an investigation into the conduct of the initial liquidators in terms of section 381 of the 1973 Companies Act.

[25] The Master requested the details of a suitable person to investigate the books and vouchers of the initial liquidators, as well as details of the relevant individuals at PW Harvey who were in control of the funds invested in the corporate saver account. He also requested a complete set of the bank statements of Mario Levi as well as the bank statements in respect of the funds invested with PW Harvey from the date of the appointment of the provisional liquidators until the date of the first liquidation account.

[26] On 28 September 2018 the Master appointed Alan Greyling of Accountants@Law to conduct a forensic investigation into the investment of the funds of Mario Levi through the agency of PW Harvey, as part of the enquiry process.

- [27] At the enquiry, held on 20 October 2015, which was initially only aimed at the production of documents, various individuals were subpoenaed to attend, including the initial liquidators; Gavin Harvey and Ms Lindy Kotze, an employee of PW Harvey.
- [28] PW Harvey's attorneys, Kaplan Blumberg, submitted various documents to the enquiry, including documents which related to the request to open a corporate saver account for Mario Levi; investment statements for the corporate saver account and a summary of fees paid in respect of that account.
- [29] From the documents submitted by Kaplan Blumberg it became apparent that over a period of one year, Lionel Shrosbree earned an amount of R7 804,48 from the interest which accrued on the funds of Mario Levi in the corporate saver account. Although this sum seems fairly insignificant, I accept that this matter is not primarily about the repayment of this sum, but that it involves an important principle in relation to the lawfulness of the administration of the estate under the leadership of Gary Shrosbree.

- [30] PW Harvey, duly represented at all material times by Gavin Harvey, also furnished a statement under oath to the enquiry in which he confirmed that PW Harvey had an arrangement with Shrosbree Trustees CC in relation to funds which the latter invested with PW Harvey in its Nedbank corporate saver facility.
- [31] Gavin Harvey further advised that no commissions were paid to either Shrosbree Trustees CC or to Gary Shrosbree, but that PW Harvey paid a share of the agent's fee, earned by it, to Lionel Shrosbree, on a monthly basis in terms of the aforesaid longstanding relationship between PW Harvey and Lionel Shrosbree.
- [32] Standard Bank contends that, based on a comparison between the net rate earned by Mario Levi on the said investment and comparable rates obtained from other financial institutions, for the period in question, the initial liquidators would have been able to achieve a higher interest rate (ranging from 4.5% to 6%), had they invested the funds with another financial institution.
- [33] Consequently, so Standard Bank contends, in accordance with the initial findings of Accountants@Law, Mario Levi forfeited 1.2% (plus

VAT) of the interest accruing to it as a result of its capital being invested with PW Harvey.

[34] On 8 April 2016, Accountants@Law circulated a supplementary report, which took into account a letter and annexures submitted by Gary Shrosbree's attorneys; the bank statements of Lionel Shrosbree; the comparative rates submitted by Gary Shrosbree; as well as correspondence from the remaining initial liquidators regarding the commission arrangement.

[35] According to Standard Bank the following new evidence emerged from the supplementary report of Accountants@Law:

35.1 Gary Shrosbree acknowledged that he was aware that a portion of the interest from the corporate saver account was paid as an agent's fee to PW Harvey, although he denied any knowledge of the referral commission payments made to his father by PW Harvey;

35.2 Gavin Harvey was under the impression that Gary Shrosbree had been aware of the details of the commission agreement between PW Harvey and Lionel Shrosbree, based on the fact

that all monthly statements regarding the agent's fees were delivered to Lionel Shrosbree via the offices of Shrosbree Trustees CC and they followed up on the payment of the commission;

35.3 Ms Pay and Mr Petersen (the fourth and fifth respondents) were not aware of the agent's fee that was being deducted from the interest earned on the funds of Mario Levi or of the fact that half of the agent's fee was paid to Lionel Shrosbree on a monthly basis, and they never had sight of any forms or participated in any decision to open the corporate saver account through PW Harvey.

[36] Accountants@Law furthermore found that there was no evidence that Lionel Shrosbree was the effective cause of Mario Levi's funds being invested with PW Harvey.

[37] They also concluded that Mario Levi's funds were invested in the corporate saver account at less than competitive rates as a consequence of the agency fee earned by PW Harvey on the investment.

[38] On 27 October 2016, the Master furnished his ruling regarding the enquiry and the objections of Standard Bank.

[39] Although the Master made a ruling in respect of the various grounds of objection he omitted to make a ruling regarding the commission arrangement between PW Harvey and Lionel Shrosbree.

[40] Accordingly, on 15 November 2016, Standard Bank's attorneys requested that the Master make a ruling regarding the commission arrangement.

[41] On 21 November 2016, the Master advised that the ruling had not been made, as the issue of the commission issue had not been raised in the initial objection.

[42] The Master, however, made the following decision regarding the commission arrangement:

"The ruling will be guided by the following question. Is Mr Lionel Shrosbree liable for the re-payment of the commission paid to him by P.W. Harvey to the estate banking account? The Master answers the aforementioned question in the negative. The reason for answering the commission question in the negative is found in the evidence of Gavin

Harvey on the inquiry dated 6 June 2016 when he stated that he paid 50 percent of the administration fee to Mr Lionel Shrosbree based on a long standing relationship between Mr Lionel Shrosbree and P.W. Harvey for introducing clients to P.W. Harvey. On his evidence Gavin Harvey admitted that Shrosbree trustees were introduced to P.W. Harvey by Mr Lionel Shrosbree. Mr Gavin Harvey further admitted that work which emanated from Shrosbree trustees triggered the payment of 50 percent administration fee to Mr Lionel Shrosbree. From the evidence of Mr Gavin Harvey the source of the funds was not a factor and their only consideration to pay Mr Lionel Shrosbree 50 percent of the administration fee is that funds must be from Shrosbree trustees.

The Master has considered the fact that the P.W. Harvey was not concerned of the source of the funds be it estate funds or not, their only consideration resulting to the 50 percent payment to Mr Lionel Shrosbree was funds must be from Shrosbree trustees and in the present matter directive to invest estate funds was from Shrosbree trustees. The 50 percent administration fee to Mr Lionel Shrosbree had to follow the link of funds from Shrosbree trustee to P.W. Harvey.

In light of the above consideration of the Master, Mr Lionel Shrosbree is not liable for the payment of 50 percent administration fee to the liquidators of the estate."

[43] This ruling is the subject matter of these proceedings.

[44] This matter is predicated upon the suspicion on the part of Standard Bank that Gary Shrosbree has earned a secret referral commission or kickback from PW Harvey as a result of the investment made by Gary Shrosbree with Nedbank through the agency of PW Harvey. This is apparent from the request for a section 381 enquiry addressed to the Master which reads, *inter alia*, as follows:

"25. *There is a further issue of serious concern which has been brought to our attention by Ms Moodliar. This relates to the secret referral commission or 'kick-back' paid to one of the liquidators, Mr Gary Shrosbree, by the firm PW Harvey...*

29. *This arrangement is done in secret and is not disclosed to creditors, nor to the remaining liquidators. Mr Shrosbree derives a commission without reflecting this in the Estate banking account or the liquidation and distribution account.*

30. *This is an illegal practice in terms of the Insolvency Act and taking a secret commission without disclosing it to affected parties, could in fact amount to a fraud on creditors if effectively funds which are ultimately for their benefit are used to generate secret commissions to liquidators.*"

[45] Lionel Shrosbree was not called upon by the Master to give any evidence at all as part of the section 381 enquiry.

[46] The essence of the dispute between the parties is whether or not the payment to Lionel Shrosbree of a portion of the interest earned on the funds of Mario Levi which had been invested with PW Harvey was lawful.

THE LEGAL POSITION:

[47] Section 381 of the Companies Act of 1973 provides as follows:

"(1) *The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirement imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.*

(2) *The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is*

engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

- (3)** *The Master may at any time appoint a person to investigate the books and vouchers or a liquidator.*

- (4)** *The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator de bonis propriis.*

- (5)** *Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of that company."*

[48] As emphasized in the opening paragraph of the judgment in Standard Bank of South Africa v The Master of the High Court (Eastern Cape Division)¹: *"In the winding-up of companies liquidators occupy a position of trust, not only towards the creditors but also the companies in liquidation whose assets vest 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 See 2010 (4) SA 405 (SCA)

[49] The object of the provisions of the 1973 Companies Act relating to winding-up, which provisions continue to apply in terms of item 9 of schedule 5 to the new Companies Act of 2008, is to ensure a fair distribution of the company's assets among its creditors in the order of their preference.²

[50] The effect of a winding-up order is to establish a *concursum creditorum* and once the law takes control of the estate, the rights of the general body of creditors have to be taken into consideration on a fair and equal basis.

[51] Included in the duties of a liquidator is the fiduciary duty not to make a secret profit or receive a kickback resulting from investments made by the liquidator.

[52] English Law is instructive in this regard and provides that:

"A liquidator is required to act in good faith, prohibited from making a secret profit out of dealings with the company's property and money, not

² See *Walker v Syfret* NO 1911 AD 141 at 166

at liberty to act out of self-interest in the performance of his duties and not entitled to unapproved reward.³

[53] The liquidator must act with reasonable care in discharging his duties, whether the winding-up is compulsory or voluntarily.⁴

[54] Section 394 of the 1973 Companies Act prescribes the manner in which the banking and investment of funds of a company in liquidation are to be dealt with and provides, *inter alia*, as follows:

"394. (1) *The liquidator of a company-*

(a) *shall open a current account from which amounts are withdrawable by cheque in the name of the company in liquidation with a banking institution registered under the Banks Act, 1965 (Act No. 23 of 1965), within the Republic, shall from time to time deposit therein to the credit of the company all moneys received by him on its behalf;*

(b) *may open a savings account in the name of such company with such a banking institution, a mutual building society registered under the Mutual Building*

³ See *Top Brands Limited and Another v Sharma and Another* [2015] 2 All ER 581 at [40]

Societies Act, 1965 (Act No. 24 of 1965), or a building society registered under the Building Societies Act, 1986 (Act No. 82 of 1986), within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company;

(c) may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company, on interest-bearing deposit with such banking institution, mutual building society or building society within the Republic;

(d) shall not withdraw any money from any account referred to in paragraph (b) or (c) otherwise than by way of a transfer to the said current account." (own emphasis)

[55] In other words, a liquidator is obliged to open a current account in the name of the company in liquidation. In addition, he may also open a savings account in the name of the company. The savings account is meant to be in addition to, and not instead of, the current

⁴ See Concord Leasing Corporation (Rhodesia) Limited v Pringle-wood NO 1975 (4) SA 231 (R) at 234 to

account. All funds received by the liquidator on behalf of the company must be deposited into the current account and funds deposited in the savings account can be only those which have been transferred from the current account and which are not immediately required for the payment of any claims against the company.

- [56] In addition to a savings account the liquidator may also place funds in a current account on an interest-bearing deposit with a banking institution, if such funds were not immediately required for the payment of any claims against the company.

THE MAIN SUBMISSIONS AND DISCUSSION:

- [57] Adv Adhikari, appearing on behalf of Standard Bank, contends that a corporate saver account is not a current account as contemplated by section 394 of the 1973 Companies Act. She continues to argue as follows:

57.1 In terms of section 394(1)(a) Gary Shrosbree was obliged to open a current account with a bank, from which account amounts could be withdrawn by cheque in the name of Mario

Levi, and into which account Gary Shrosbree was obliged to deposit, to the credit of Mario Levi, all monies received by him on its behalf;

- 57.2 It is clear that what is intended by section 394(1)(a) is that all monies received by the liquidator on behalf of the company must be deposited into the current account.⁵ A savings account and/or interest-bearing deposit are to be additional to, and not instead of, the current account.
- 57.3 Further, section 394(1)(b) and (c) makes it clear that monies deposited into the savings account or interest-bearing deposit may only be those which have been transferred from the current account;
- 57.4 Section 394(1)(d) is a peremptory provision that requires that monies in the savings account, or on interest-bearing deposit, may only be withdrawn by way of a transfer to the current account;

⁵ *Henechsberg on the Companies Act 61 of 1973, Vol. 1, 5th Ed. p. 845*

- 57.5 The clear purpose of section 394 is, according to Ms Adhikari, to ensure that there is effective control over the payment of funds of an insolvent company by ensuring that there is a single transactional account for the receipt of all funds due to the insolvent company and through which all payments to third parties out of the funds of the insolvent company are made;
- 57.6 The liquidation and distribution account (which sets out the manner in which all the assets of the company have been liquidated and how the proceeds thereof will be used in settling the administration costs and in paying dividends to the proved creditors), is prepared on the basis of the transaction record of the current account;
- 57.7 Section 394 is an essential tool in ensuring that the Master is able to exercise effective control over all aspects of a winding-up by, *inter alia*, examining the liquidation and distribution account against (a) vouchers submitted by the liquidator and (b) the transaction record of the current account;

57.8 Ms Adhikari furthermore argues that Gary Shrosbree expressly requested PW Harvey to open a savings account for Mario Levi and not a current account. According to her Gary Shrosbree at all relevant times considered the corporate saver account to be a savings account and not a current account;

57.9 She argues that this is confirmed by the fact that, during the period December 2014 to April 2015, Gary Shrosbree requested PW Harvey on several occasions to electronically transfer certain specified amounts from the corporate saver **"to the Estate banking account"**, as reflected on the transfer requests annexed to the application papers. She argues that the corporate saver bank statements demonstrate that transactions made in respect of the corporate saver account were:

- (a) cheque payments into the account recorded as being from accounts identified as Mario Levi;
- (b) electronic deposits identified as coming from the Mario Levi Standard Bank account;

- (c) amounts paid from the corporate saver account to the Mario Levi Standard Bank account; and
- (d) amounts debited against the corporate saver account in respect of agent's fees and VAT on agent's fees;

57.10 She concludes that, on the evidence, it is clear that the corporate saver account is not a current account as contemplated by section 394(1)(a);

57.11 According to Ms Adhikari section 394(1)(a) furthermore does not permit a liquidator to open more than one current account, given that the current account is meant to operate as the sole record of payments made in satisfaction of legitimate claims against the estate. According to her it is clear from the evidence that there was in fact a Mario Levi current account (being an account held with Standard Bank). That being so, and to the extent that Gary Shrosbree might have opened a second current account, on his version, in the form of the corporate saver account, he contravened section

394, as a consequence of which the payment of any funds out of that account was *per se* unlawful;

57.12 She contends, in particular, that the debiting of agent's fees and VAT directly from the corporate saver account contravened section 394(1)(d) and was unlawful;

57.13 She also argues that a portion of the interest income earned on the investment of Mario Levi's funds which was, as a matter of law, income in the hands of Mario Levi (and which income would otherwise have been available to it to pay its creditors and for which it incurred a tax liability), was unlawfully paid over to Lionel Shrosbree and PW Harvey;

57.14 According to Ms Adhikari Mario Levi was, in the circumstances, deprived of a portion of its income to its detriment and the detriment of its creditors. The detriment also extended to the net interest earned by Mario Levi on the investment, which was less than could have been earned had the funds been invested directly with a financial institution.

[58] Adv Dyke SC, appearing on behalf of Gary Shrosbree, contends as follows:

58.1 A corporate saver account is in effect a current account with the added benefit that interest is earned on funds deposited in the account;

58.2 A current account is an account at a registered bank into which cash or cheques may be deposited and from which money may be withdrawn as required by the account holder;

58.3 Collins⁶ defines a current account as:

"an individual's or company's account kept at a commercial bank or building society into which the customer can deposit cash or cheques and from which he or she can draw cheques or make withdrawals on a day-to-day basis."

58.4 Penguin⁷ defines a current account as:

⁶ See Dictionary of Business 2nd ed 163

⁷ See A Dictionary of Economics

"The most common type of bank account, on which deposits do not earn interest, but can be withdrawn by cheque at any time."

- 58.5 Caney J, in Standard Bank of South Africa Ltd v Minister of Bantu Education⁸, explains the difference between a deposit account and an ordinary or current account. He quotes (with approval) Halsbury's definition as adopted in Colonial Banking Trust Co Ltd v Hill's Trustee 1927 AD 488 at 494 i.e.:

"The business of banking strictly speaking is the receipt of money from or on account of a customer to be repaid on demand or when drawn on by cheque";

- 58.6 At 340 Caney J cites Halsbury⁹ and describes the business of banking as:

"the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer."

⁸ See 1966 (1) SA 299 (N) at 234 and 239

⁹ See 3rd Ed, p150, paragraph 277

58.7 Caney J then concludes:

"it is clear also that a customer who has an ordinary or current account at the bank is entitled to withdraw the whole or any portion of the amount standing to his credit in that account, upon demand..."

58.8 In modern banking, the practice of issuing cheques has, according to Mr Dyke, to a large extent been replaced with the electronic transfer of money, but the principle of what comprises a current account has not. In modern parlance a current account serves the same purpose it always did – it facilitates transactional banking, notwithstanding the disappearance of cheques, in many instances, to facilitate payments from and deposits into such an account;

58.9 As discussed by Caney J¹⁰, there are considerable differences between a current account; a deposit account and a savings account. All are distinguishable. The most striking feature of a current account is its liquidity and the account holder's ability to transact on it;

- 58.10 A savings account is used by individuals to invest their money. Savings accounts earn interest calculated on a minimum balance kept in the account on a predetermined basis;
- 58.11 Funds are normally not invested in current accounts for fixed periods and, as a general rule, no interest is earned on the balance maintained in current accounts. Deposits and withdrawals are normally unlimited on current accounts;
- 58.12 According to Mr Dyke there can be no doubt that the corporate saver account at Nedbank is a current account. It meets all the criteria for current accounts and it offers the benefit of an attractive interest rate. It does not meet the criteria of a deposit account or a savings account;
- 58.13 As far as the portion of PW Harvey's agency fee which was paid to Lionel Shrosbree is concerned, Mr Dyke argues that the commission sharing arrangement between Lionel Shrosbree and PW Harvey is historical and should be regarded as *res inter alios acta*. According to Mr Dyke the

¹⁰ See Standard Bank supra at 234-235

fee charged by PW Harvey has been duly disclosed on the statements. What PW Harvey did with its income was of no concern to Gary Shrosbree or, for that matter, the creditors of Mario Levi;

58.14 Mr Dyke also emphasizes that neither Gary Shrosbree nor Shrosbree Trustees CC has received any portion of the commission or agency fees from PW Harvey. The commission sharing arrangement has always been between PW Harvey and Lionel Shrosbree. This is also effectively what the Master found in the section 381 enquiry. According to Mr Dyke this finding cannot be faulted;

58.15 Mr Dyke furthermore argued that whilst section 381(2) of the 1973 Act empowers the Master to examine the liquidator or any other person on oath concerning the winding-up, this does not entitle the Master to make a binding finding or decision against any other person, other than the liquidator, against whom he may act in terms of sections 373 and 379 of the 1973 Act. This, according to Mr Dyke, presented a jurisdictional obstacle to the relief claimed by Standard Bank;

- 58.16 Should the Master make a finding against any other person, Mr Dyke argued that the Master's remedy is to commence civil or criminal action against such a person. No direct action by the Master against any other person, in the absence of independent recovery proceedings, is permissible in terms of the 1973 Act;
- 58.17 Mr Dyke pointed out that the Master's powers in terms of Section 381 are proscribed. They are limited to an enquiry into the faithful performance by a liquidator of his duties and due observation of all the requirements imposed upon him by law;
- 58.19 Mr Dyke therefore argued, by reference to the said provisions of section 381, that the Master lacked the jurisdiction to make the decision the applicant contends he should have made in relation to the repayment of Lionel Shrosbree's earnings received from PW Harvey and that, similarly, this court cannot review the Master's failure to make this order when the Master never had this jurisdiction in the first place.

[59] Adv Richards, appearing for PW Harvey, essentially makes common cause with Mr Dyke and it is not necessary to repeat his submissions for purposes hereof.

EVALUATION OF THE MAIN SUBMISSIONS:

[60] The contention of Ms Adhikari in relation to the obligation of a liquidator to open a current account in terms of section 394(1)(a) of the 1973 Act is plainly correct. I do not think this is in dispute between the parties.

[61] However, Mr Dyke's proposition that the corporate saver account was, for all intents and purposes, a current account in terms of section 394(a), is, in my view, incorrect. It ignores the fact that Mr Shrosbree did in fact operate a current account in the name of the liquidated estate, as plainly demonstrated by the transfer instructions annexed to the founding papers as annexure "FA18C".

[62] The existence of such a current account is furthermore evident from:

62.1 the liquidation accounts of Mario Levi where, under the heading "*bank charges*", provision is made for disbursements in respect of a "*current account*"; and

62.2 the cheque deposits and electronic transfers from the Mario Levi current account to the corporate saver, as reflected on the corporate saver investment register, annexed to the founding papers, marked "FA18B".

[63] It is not apparent from the application papers when the Mario Levi current account was opened. What is clear, however, is that a Mario Levi current account was operated by Gary Shrosbree during the liquidation process.

[64] It is also important to note that none of Mario Levi's creditors or disbursements in the liquidation were paid from the corporate saver account. The corporate saver account was therefore a savings account for surplus funds, and not a current account.

[65] In the circumstances I find that Gary Shrosbree indeed operated a current account for Mario Levi in terms of section 394(1)(a) of the Companies Act of 1973.

[66] I also find that Gary Shrosbree opened the corporate saver account with Nedbank, through the agency of PW Harvey, in terms of section 394(1)(b), alternatively section 394(1)(c) of the 1973 Act.

[67] I find it difficult to understand why the Respondents' case was not presented on the above basis, instead of attempting to massage the corporate saver facility into something which it never was.

[68] The next issue to determine is whether or not the manner in which Gary Shrosbree carried out his obligations as a liquidator, in relation to the corporate saver account, was tainted with illegality. As stated above:

68.1 Gary Shrosbree operated a current account in the name of Mario Levi;

68.2 He also opened a corporate saver account in the name of Mario Levi;

68.3 He transferred funds into the corporate saver account from the current account;

68.4 He did not, on the evidence placed before me, withdraw any money from the corporate saver account otherwise than by way of a transfer of the funds to the current account.

[69] The agency fees payable to PW Harvey were deducted directly from the corporate saver account. These fees were not reflected as disbursements on the final liquidation accounts of Mario Levi. It should be remembered, however, that Mario Levi was only ever contractually entitled to receive the net interest which was generated on the corporate saver account. Mario Levi did receive this interest.

[70] The agency fee payments to PW Harvey were effected in terms of an arrangement between Nedbank and PW Harvey. PW Harvey was Nedbank's agent. (I will revert to this issue in greater detail later herein.) Nedbank could, for instance, have paid the agency fees directly to PW Harvey without any reference thereto on the corporate saver investment register.

[71] There would, in my view, have been no need for the agency fees to be accounted for in the liquidation accounts of Mario Levi. The fact that these payments were reflected on the investment register of the

corporate saver account is however indicative of a full disclosure on the part of PW Harvey in relation to the corporate saver investment.

[72] I therefore disagree with Ms Adhikari's contention that the debiting of agent's fees and VAT directly from the corporate saver account contravened section 394(1)(d) and was unlawful.

[73] In my view Gary Shrosbree complied with his obligations in terms of the provisions of section 394.

[74] Even if I am wrong in my said finding in relation to Gary Shrosbree's compliance with section 394, this is not necessarily fatal to the legality of Gary Shrosbree's conduct. The question remains whether or not the purpose and object of section 394 have been achieved by the way in which the funds of Mario Levi were administered by Gary Shrosbree? It is, in this regard, a trite principle of our law that, where the purpose and object of a statutory provision have been achieved, or where there has been substantial compliance with such a provision, a failure to strictly comply with the statutory provision

will not necessarily mean that the actions under scrutiny would be rendered invalid.¹¹

[75] The purpose and object of section 394 of the 1973 Act are, in my view, to ensure the secure investment of all monies of the company in liquidation received by the liquidator in a current account and (in the discretion of the liquidator), in a savings account, for purposes of the payment of disbursements and the fair distribution of the balance thereof, under the auspices and supervision of the Master, for the benefit of the entire body of creditors. There is no doubt that this purpose and object were achieved by the way in which Gary Shrosbree dealt with the funds of Mario Levi.

[76] I therefore find that, if there was not strict compliance with the provisions of section 394 in the circumstances of this matter, there was certainly substantial compliance therewith.

[77] Mr Dyke's further submissions in relation to the provisions of section 381 of the 1973 act are, in my view, compelling. However, having regard to my aforesaid conclusions regarding section 394 of the

¹¹ See Liebenberg NO v Bergrivier Municipality 2013 (5) SA 246 (CC) at [25] and [26]; and Weenen Traditional Local Council v Van Dyk 2002 (4) SA 653 (SCA) at [13]

1973 Act, I do not deem it necessary to make specific findings in this regard.

[78] The next and related issue is whether or not PW Harvey was legally entitled to earn an agency fee from Nedbank.

[79] Section 1(1) of the Banks Act No 94 of 1990 describes agency as follows:

"'agency', in relation to a bank, means a right granted to a person by that bank to receive on its behalf from its clients any deposits, money due to it or applications for loans and advances, or to make payments to such clients on its behalf".

[80] Ms Adhikari argues that, if regard were had to the context within which "agency" is utilized in the Banks Act, it does not include a situation such as the present.

[81] I disagree with this submission. Agency means a ***"right granted to a person by that bank to receive on its behalf from its clients any deposits..."*** This is exactly what happened in this matter.

[82] See furthermore section 40 of the Banks Act which provides as follows:

"If a bank or a controlling company or any director, officer, employee or agent of a bank or controlling company in good faith and on the strength of information reasonably obtained act or fails to act and thereby unknowingly contravenes the provisions of section 38, such act or failure to act shall not constitute an offence." (own emphasis)

[83] This section plainly, in addition to the definition of agency, recognizes circumstances in which a bank may act through a duly appointed agent. It follows that such an agent would be entitled to an agency fee. This is a matter between PW Harvey and Nedbank.

[84] PW Harvey was, in my view, an agent of Nedbank in terms of the said definition of agency. Gary Shrosbree invested some of the funds of Mario Levi with Nedbank, through the agency of PW Harvey. This was perfectly legal.

[85] As far as the interest which was earned by Mario Levi on the investment is concerned, the net interest rate which the investment generated was 3.65% per annum.

[86] There is no provision in the 1973 Act, nor have I been referred to any authority, requiring that the funds invested must be in an account which offers the highest possible interest rate, which proposition appears to be one of the key elements of Standard Bank's complaint herein.

[87] On the contrary, section 394 of the 1973 Act is conservative and compels the liquidator to invest the liquidated company's funds in a current account. If Gary Shrosbree had invested all the funds of Mario Levi in a current account, there would be no basis for a complaint against him, even if no interest was earned on such an investment. In this case, however, the net result of Gary Shrosbree's decision was to benefit the creditors to the extent of the interest earned on the investment.

[88] Furthermore, I agree with Mr Dyke that the commission sharing arrangement between Lionel Shrosbree and PW Harvey is historical and irrelevant for purposes of the present matter. What PW Harvey did with its agency fees was its own business. Giving a portion thereof to Lionel Shrosbree was not unlawful and did not taint Gary Shrosbree's conduct with any degree of illegality.

[89] In this regard neither Gary Shrosbree himself, nor Shrosbree Trustees CC, has made a secret commission from the corporate saver investment, notwithstanding Standard Bank's persistent suspicions to the contrary.

[90] It is significant to note, as correctly pointed out by Mr Richards, that Standard Bank is not asking the court to interfere in the agreement between PW Harvey and Lionel Shrosbree. The real issue, according to Standard Bank "***is the manner in which Gary Shrosbree invested the funds of Mario Levi***". This is a clear concession that there is in principle nothing wrong with the investment of funds through investment houses that charge administration fees for their services rendered. This concession effectively disposes of any contention that there is a legal obligation on the part of Lionel Shrosbree to repay the commission which he had received from PW Harvey.

CONCLUSION:

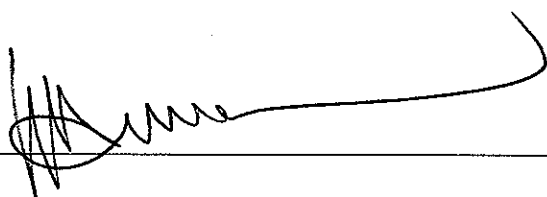
[91] In all the circumstances set out above, I am constrained to find that Standard Bank has failed to prove any reviewable error on the part of the Master. In light of this finding, it follows that the remaining relief claimed by Standard Bank is also without merit.

[92] It is with some concern that I note the zeal with which this litigation has been driven, fueled by Standard Bank's unfounded suspicion that Gary Shrosbree's intention was to supplement his income in an unlawful manner. This culminated in application papers exceeding 600 pages (including the notices index and the joinder application of the seventh respondent), at huge costs, in circumstances where the monetary value of the amount in issue is less than R8 000,00. I think this is most unfortunate.

[93] As far as the costs of the application are concerned, Ms Adhikari fairly conceded that the joinder of the seventh respondent was reasonable, and that the seventh respondent's costs should form part of any cost order herein.

[94] In the circumstances I make the following order:

- (a) The application is dismissed;
- (b) The applicant is ordered to pay the respondents' costs of the application.



J D HUISAMEN

ACTING JUDGE OF THE HIGH COURT

Matter heard on : 14 September 2018

Judgment delivered on : 2 October 2018

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