IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

CASE No.: **337/2023**

In the matter between:

TUHF LIMITED Applicant

and

THE MASTER OF THE HIGH COURT BLOEMFONTEIN First Respondent

EMELIA COURT (PTY) LIMITED (IN LIQUIDATION) Second Respondent

MARYNA SYMES N.O. Third Respondent

NOMANDLA NDABENI N.O. Fourth Respondent

JOSHUA MUTHANYI N.O. Fifth Respondent

CORAM: VAN RHYN, J

HEARD ON: 25 MAY 2023

DELIVERED ON: 4 JULY 2023

INTRODUCTION.

[1] This is an application in terms of the provisions of section 407(4)(a) of the Companies Act[1] for the setting aside of the First Respondent's (the "Master")

[1] Act 61 of 1973.

decision/directive regarding an objection which was lodged by the applicant with the Master in respect of the Third to Fifth respondents' (the "Liquidators") remuneration as liquidators in the winding-up of a company known as Emelia Court (Pty) Limited (in liquidation), cited as the second respondent. In the notice of motion the applicant applies for the following relief:

1. Setting aside the refusal and/or failure of the Master to make a decision regarding the applicant's objection to the second respondent's First and Final Liquidation, Distribution and Contribution Account as prepared by the Third respondent;

2. An order rectifying and/or correcting the First and Final Liquidation, Distribution and Contribution Account, and thus disallowing the incorrect and increased tariffs of 10% for the sale of Portion 5 of Erf 1702 Bloemfontein (the "property") and to be rectified to the usual and correct tariff of 3% for sale of immovable properties;

3. That the costs of this application be paid by any party opposing same.

[2] The applicant is TUHF Limited, a public company registered as a bank in terms of the Bank's Act[2] with its principal place of business at Braamfontein, Gauteng. The applicant is a major secured and proven creditor of the second respondent. Applicant's claim amounts to R 5 675 335.93. The second respondent was finally wound-up on 20 October 2021. On the liquidation of the second respondent, the third, fourth and fifth respondents were appointed as joint liquidators on 1 December 2021. The application is opposed by the Liquidators. On 19 May 2023, shortly prior to the hearing of this matter, the Master filed a report.

THE FACTUAL BACKGROUND.

[3] The second respondent was the owner of a block of apartments known as Emelia Court situated at the property. Emelia Court, consisting of 21 units, is the only and/or the largest asset in the estate of the second respondent and the apartments were leased to tenants. However, most of the tenants did not pay any rental in terms of their lease agreements while other units were occupied

[2] Act No 94 of 1990 (as amended).

illegally. A managing agent, Ellenberger & Kahts was appointed by the applicant pursuant to a property management agreement concluded between the applicant and the agent.

[4] On 23 February 2022 the applicant, in writing, communicated their dissatisfaction to the selling of the property at a public auction to the Liquidators. The applicant recorded that the decision by the Liquidators to proceed to arrange a public auction sale of the property "... has left them with the impression that their interests, as secured creditor and creditor with the largest claim in value, are not receiving the required protection from the liquidators." However, the applicant agreed to the sale of the property at public auction on the express condition that they approve the terms and conditions of such an auction.

[5] Subsequent to the sale of the property, the Liquidators lodged the First and Final Liquidation and Distribution account (the "L & D Account") with the Master on 29 July 2022. In the L & D Account the Liquidators charged a fee equivalent to 10 % of the gross proceeds of the sale of the property on the basis that the sale thereof constituted a sale as a going concern. On 12 August 2022 the applicant's attorneys addressed a letter to the Master in which the applicant's objection to the remuneration or fee of 10% was recorded. The Master, having received the objection and the submissions by the applicant and the Liquidators, refused to sustain the applicant's objection on the basis that "... the issue of the whether or not the sale of the immovable property was as a going concern or not is factual and the Master is not in a position to make a decision on this, only the High Court on your application to that effect."

THE POINTS *IN LIMINE*.

[6] The Liquidators raised 3 points in *limine*. The first point *in limine* pertains to the fact that the Master indicated that, while not being in a position to make a decision whether the sale was as a going concern or not, the applicant was given until 6 January 2023 to bring an application to the High Court for a declaratory order. In effect the Master has not made a decision, which can be taken on review in terms of Section 407(4)(a) of the Companies Act[3] (the "Companies Act").

[3] Act 61 of 1973.

[7] Secondly, *in limine,* the applicant failed to adhere to the provisions of Rule 41A of the Uniform Rules of Court. The Liquidators served a Form 27 notice in terms of Rule 41A and indicated that they are amenable to mediation where after the applicant filed its replying affidavit without referring to the Rule 41A notice or furnishing any answer to the Liquidators' suggestion that they are amenable to mediation of the dispute.

[8] Thirdly, the Liquidators raised the point *in limine* that the applicant applies for condonation in its founding affidavit for the failure of lodging this application within the 14-day period referred to in section 407(4)(a) of the Companies Act. The decision that the applicant seeks to set aside is contained in a letter by the Master dated 8 December 2022. Due to the fact that the Master's letter was received by the applicant shortly prior the December recess, the applicant's application was filed two days late, namely not on 23 January 2023 but on 25 January 2023.

[9] I agree with the submission made by Mr Van der Merwe, counsel for the applicant, that this does not constitute an inordinate delay and the reasons for the delay were fully dealt with in the applicant's founding affidavit. The Liquidators did not take issue with the application for condonation with the result that condonation for the late filing of the applicant's application in terms of Section 407(4)(a) of the Companies Act was granted at the hearing of the matter. In this way the third point *in limine* was disposed with.

[10] Arguments regarding the issue whether the failure of the Master to make a decision in respect of the question whether the sale of the property was as a going concern or not, were heard in respect of the second point *in limine*. Both Mr Van der Merwe as well as Mr Zietsman SC, counsel on behalf of the Liquidators, were *ad idem* that the Master did indeed come to a decision. The Master had indicated that, as a result of the factual dispute between the applicant and the Liquidators, no decision was reached in respect of the question whether the sale of the property was as a going concern or not. In the Masters' report it was stated as follows: "I must put it to the court that the issue of the liquidators' remuneration is something which the Master has jurisdiction on but the angle which both the liquidators and the objector wanted to implore for the Master to decide whether the

sale was a going concern or not is the one that made it impossible for the Master to make a decision on."

[11] However, in the letter dated 8 December 2022, in which the Master advised the applicant to bring this application in terms of section 407 of the Companies Act, the Master stated that: "Should you fail to do so the Liquidators will be instructed to finalise the estate as is." The language used by the Master clearly conveys that the writer had already made up his mind and was giving a directive or ruling that a fee calculated at 10% will be allowed.

[12] Mr Zietsman SC, with reference to the decision in **Fourie's Poultry Farm v Kwanatal Food Distributors**[4] and the full bench case referred to by Page J in this matter, conceded that it is permissible for the applicant whose objection to the L & D Account involves a dispute of fact not capable of being resolved by the Master, to resort to the procedure prescribed in section 407(4)(a). the applicant is entitled to have the dispute resolved by the court as well as to have the Master's decision set aside, if the dispute is resolved in the applicant's favour. Consequently, the court is not persuaded that the second point *in limine* has merit.

[13] Regarding the point *in limine* relating to the failure to comply with the provisions of Rule 41A, the Liquidators submitted that not only did the applicant fail to comply with the provisions of Rule 41 A, the applicant totally ignored the notice served by the Liquidators on 27 March 2023 in terms whereof it was indicated that they are not in opposition to mediation. In this regard Mr Van der Merwe argued that the stance of the Liquidators who sought to charge a fee not permissible in law, had already caused mistrust between the parties with the result that the applicant's failure to resort to mediation cannot be faulted and cannot be equated to bad faith.

[14] Rule 41 A mandates that parties to a dispute shall together with the summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation. Sub-Rule (2)(c) provides that the notice shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely

[4] 1991 (4) SA 514 (NPD).

indicate the reasons for such party's belief that the dispute is or is not capable of being mediated. It follows that the applicant was compelled by Sub-Rule (2)(a) to serve a notice in terms of Rule 41A and such notice ought to have been filed prior to summons being issued or an application being launched. It is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated. The applicant did not state the reasons, relied upon during the hearing of arguments, as required in terms of Rule 41A.

[15] In the unreported judgment of **Koetsioe and Others v Minister of Defence and Military Veterans and Others**[5] it was held as follows:

> "Rule 41A... not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for his belief that a dispute is or is not capable of being mediated."

[16] I am not convinced that the applicant duly considered the possibility of mediation earnestly. In any event the applicant disregarded the prescripts of Rule 41A and did not apply for condonation for its non-compliance. Mr Zietsman SC referred to case law pertaining to the non-compliance of the provisions of Rule 41A and argued that the application should not be removed from the court roll, subject to the court's discretion in this regard, but moved for an appropriate costs order against the applicant.

[17] I am of the view that the dispute between the parties could have been resolved through mediation and an agreement regarding the percentage fee to be charged by the Liquidators could have been agreed upon, most likely with the input from the Master. I am therefore of the view that non-compliance should attract some kind of sanction. I, however, agree with the submission made by Mr Zietsman SC that the matter be adjudicated upon and not be removed from the roll due to the applicant's failure to comply with Rule 41A, but that the court show it displeasure with the non-compliance of the Rules of Court through an appropriate costs order.

[5] (12096/2021) [2021] ZAGPPHC 203 (6 April 2021) para 6.

THE ARGUMENTS ON BEHALF OF THE APPLICANT AND THE LIQUIDATORS IN RESPECT OF THE MERITS

[18] The Liquidators charged a fee equivalent to 10% of the gross proceeds of the sale of the property on the basis that the sale thereof constituted a sale as a going concern. On 12 August 2022 the applicant lodged its objection to the L & D Account and contended that the sale could not be regarded as a sale as a going concern due to the fact that, although the nature of the property is such that it could generate an income, the property had been occupied by tenants who failed to pay their monthly rental and by illegal occupants.

[19] Ellenberger and Kahts was appointed as the managing agent pursuant to the applicant exercising its right to enforce its cession of rental contained in the registered mortgage bond passed over the property and thereby requiring the assistance of Ellenberger & Kahts to collect rental income. Accordingly, the Property Management Agreement concluded between the applicant and Ellenberger & Kahts will not be transferred with the property to the purchaser.

[20] From the contents of the statement of account received from Ellenberger & Kahts for March 2022 it is evident that only a few units of the property were occupied but hardly any payments were received from the tenants. Some of the tenants were hostile and intimidated other occupants. The income generated from the property was wholly insufficient to cover any costs and liabilities in respect of the property.

[21] The applicant decided not to proceed with the eviction of illegal occupants of the property due to the estate not having any funds available to proceed with legal action. It was therefore decided to sell the property at a sheriff auction with all risks and liabilities in respect of the property to be passed to the purchaser including the liability to evict any illegal occupants. Furthermore, it would then be the liability of the purchaser to settle all the arrears in respect of "rates and taxes". The applicant did not instruct the Liquidators to sell the property at a public auction or as a going concern.

[22] Mr Van der Merwe argued that it had not been envisaged that the sale of the property would lead to the continuation of the business of the second respondent. The second respondent would be de-registered and only the

property in its dilapidated state, mostly occupied by non-paying tenants and illegal occupants, was sold at the auction. In clause 2 of the Schedule to the Auction Conditions of Sale provision was made for the sale of the property as a going concern. However, none of the relevant clauses in clause 2.2 and 2.3.2 were completed by the purchaser in acknowledgement of the sale as a going concern.

[23] The enterprise conducted upon the property as a business was not completed in the agreement and neither were any assets recorded. Clause 2.3.1 specifically records that "... the purchase price includes the price of the business which the Seller sells to the Purchaser together with the property as a going concern as contemplated by the Value Added Tax Act, Act 89 of 1991". No VAT numbers were included in the agreement of sale.

[24] On behalf of the Liquidators it was argued that a liquidator is usually entitled to 10% remuneration of the sale of a going concern and over the years such a fee was allowed by the Master. Taking cognisance of the definition of "movable property" in section 1 of the Insolvency Act, being: "movable property means every kind of property and every right or interest which is not immovable property", a going concern therefore falls under the definition of movable property.

[25] The second respondent was not registered for VAT and neither was the purchaser of the property. One way in which to prove that a property was sold as a going concern is if both the seller and the buyer are registered as vendors in terms of the VAT Act. Mr Zietsman SC argued that the property is a residential property with the result that the usual transfer duties are payable to the South African Revenue Services and VAT is not applicable. Even though the applicant appointed Ellenberger and Kahts as the managing agent to collect the rental income, the Liquidators, subsequent to the liquidation of the second respondent abided by the contract between the applicant and Ellenberger and Kahts and requested Ellenberger and Kahts to proceed with the collection of the rental and to take the necessary steps for the upkeep of the property.

[26] Although, the building consisted of 21 apartments, there were only approximately 6 lease agreements with tenants. The majority of the apartments

were not occupied, which caused illegal occupants to enter and occupy several of the unoccupied apartments. The liquidated estate did not have any cash flow whatsoever. The upkeep of the property was left in abeyance due to the dire financial situation and because of the various illegal occupants, the remaining valid occupiers refused to pay their rent except for one tenant. As a result of the financial constraints the municipal costs for water, electricity and property rates, which were in arrears in the amount of approximately R180 000.00, were increasing each month.

[27] Prior to the sale of the property the Liquidators received two written offers for the property as a going concern. Before the second meeting of creditors the Liquidators applied to the Master to realise the property as a going concern. The motivation was to shift the burden upon the purchaser to decide whether to keep the rental agreements in place and to proceed with the eviction of the illegal occupants. On behalf of the Liquidators it was contended that the Master took into consideration all the various factors and exercised his discretion in favour of allowing a 10% remuneration for the sale of the property.

THE STATUTORY FRAMEWORK

[28] In terms of the provisions of section 384 of the Companies Act the liquidator of a company is entitled to reasonable remuneration for his services. The liquidator's remuneration is to be taxed by the Master in accordance with the prescribed tariff of remuneration. The Master may reduce or increase such a remuneration if, in his opinion, there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.[6]

[29] The prescribed tariff of remuneration is provided for in Annexure CM104 to Regulation 24 of the Regulations for the Winding-Up and Judicial Management of Companies. Annexure CM104 stipulates that liquidators are entitled to the same tariff of remuneration as a trustee of an insolvent estate in terms of section

[6] Section 384(2) of the Companies Act.

63(1) of the Insolvency Act[7] i.e. Tariff B as contained in the Second Schedule to the Insolvency Act. Tariff B, inter *alia,* provides as follows:

29.1 On the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income .... 10 %;

29.2 On the gross proceeds of immovable property, shares or similar security sold, life insurance policies and mortgage bonds recovered and the balance recovered in respect of the immovable property sold prior to sequestration .... 3%.

[30] The Liquidators submitted the First and Final L & D Account with the Master claiming remuneration at 10 % of the proceeds of the sale of the property on the basis that they regarded it as part of the second respondent's business which was sold as a going concern "as it was a tenanted property". The proceeds of the sale amounted to R 5 650 000.00 and the Liquidators fees were calculated at 10% of the aforesaid amount, being R 565 000.00. The applicant was awarded a dividend in the amount of R 4 251 866.95. The applicant lodged its objection with the Master in respect of the amount claimed by the Liquidators on the basis that the proceeds fall under the second item, i.e. gross proceeds of immovable property.

[31] On request of the Master, the Liquidators furnished their comments to the applicant's objection. The applicant in reply, stated that the submissions made by the Liquidators to the Master are, for the most part, incorrectly recorded. The Master, having received the objection and the further submissions by the applicant and the Liquidators, refused to sustain the applicant's objection on the basis that the issue of whether or not the sale of the immovable property was as a going concern or not, is a factual issue.

[32] In support of the applicant's argument that the sale of the property was not as a going concern, Mr Van der Merwe relied on the decision in **Griffiths v Foley's Trustee.**[8] The court held that in order to arrive at the amount of the trustees

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[7] Act 24 of 1936.
[8] 1910 17 GWL 270.

commission and charges, it was necessary to make an assessment of how much of the purchase price of a hotel, which was sold by public auction during the winding- up of an insolvent estate, was for the immovable property and how much was for the movable contents of the hotel.

[33] In the matter at hand, the Liquidators contented that, taking cognisance of the fact that no cash was available in the estate and due to the applicant's stance not to finance evictions of the illegal occupants, the upkeep of the property was left in abeyance with the result that the Liquidators did their level best under the circumstances to transfer the existing lease agreements to the purchaser to continue with the business of the second respondent. The remuneration of the liquidator is in the Masters discretion and covers all the services of whatever nature rendered by the liquidator. The Master has a wide discretion in taxing a liquidator's remuneration and may for good cause reduce or increase the scales of remuneration by considering aspects such as the complexity of the estate in question, the amount of work done and the time spent in discharge the liquidator's duties.[9]

THE DISPUTE

[34] The matter came before me as a review of the decision of the Master in terms of the provisions of section 407(4)(a) of the Companies Act. In reply the applicant, under the prayer for further and/or alternative relief, moved for an order that the court base its order on the provisions of section 6 of the Promotion of Administrative Justice Act[10], alternatively, that the court grant declaratory relief in as far as this is possible under section 407 of the Companies Act.

[35] Notwithstanding the point *in limine* raised by the Liquidators that the applicant has not made out a case for the review of the decision by the Master under section 407(4)(a) of the Companies Act, Mr Zietsman SC, during argument, conceded that the court can entertain this matter as a review in terms of section 407 "as a *sui generis* type of the application".

[36] As such this court has review powers as well as appeal powers in hearing the matter. If the Master erred or misdirected himself in any material respect, the

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[99] Collie NO v The Master 1972 (2) SA 7 (T); 1972 (3) SA 623 (A).

[10] 3 of 2000.

court may determine the matter *de novo.*[11] The court must therefore consider the factual material placed before the Master together with his report.

[37] Section 407 provides that any person having an interest in the company being wound-up may, at any time before the confirmation of an account, lodge with the Master an objection to such an account stating the reasons for the objection[12]. If the Master is of the opinion that the objection lodged ought to be sustained, the Master shall direct the liquidator to amend the account or give such other directions as he may think fit. If the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged, direct the liquidator to amend the account. The Master may give such other directions as he may think fit.

[38] "Going concern" is an accounting term for a company that has the resources needed to continue operating indefinitely until it provides evidence to the contrary. Conversely, this means the entity will not be forced to halt operations and liquidate its assets. An entity is assumed to be a going concern in the absence of significant information to the contrary. An example of such contrary information is an entity's inability to meet its obligations as they come due without substantial asset sales, or in this case, substantial monthly rental income. In The New Shorter Oxford English Dictionary[13] a going concern is described as: "a business in operation and thriving".

[39] The Master is evidently of the view that the property was sold at the auction as a going concern and therefore viewed the fee charged by the Liquidators calculated at 10% of the purchase price for the property as appropriate. The Master's report merely stated his reasons for his findings as:

> "5. After all these it appeared that this is a factual dispute and as the Master I cannot make a decision on it. The liquidators were then put on terms to advice *(sic)* the Master whether the

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[11] Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111; Unreported Judgment: Nedbank Limited v Master of the High Court, Cape Town and Others (11689/2018) [2019] ZAWCHC 180 (12 December 2019) at para14.

[12] Section 407(1).

[13] Oxford University Press, Fourth Ed 1993, p 1113.

sale was a going concern or not and not put it on the Master to decide for them. The liquidators then responded in their e-mail dated 01/12/2022 that indeed the sale was a going concern.

6. On 8 December 2022 (Annexure M1) I made a decision in terms of section 407(4) of the Companies Act 61 of 1973 where I advised the objector that I am not in a position to make a decision on this seeing that the objection raised is factual in nature and that only the High Court on application by any of them may make a decision.

7. I must put it to the Court that the issue of the Liquidators remuneration is something which the Master has jurisdiction on but the angle with which both the Liquidators and the objector wanted to implore for the Master to decide whether the sale was a going (sic) or not is the one that made it impossible for the Master to make a decision on."

[40] These reasons provided by the Master are unhelpful and does not provide a basis for finding that the Liquidators would be entitled to a fee equivalent to 10% in respect of the property sold. I am therefore of the view that the absence of ascertainable reasons for the decision by the Master points to an arbitrary decision. No adequate reasons to justify the Master's conclusion were provided. As such the Master's decision to ultimately agree to a fee of 10% must be set aside as one where he erred or misdirected himself.

[41] Mr Van der Merwe argued that section 384(1) of the Companies Act does not provide a wide discretion to the Master in terms of which the Master is entitled to refuse to 'tax' in accordance with the tariff. It is incumbent upon the Master to perform a taxation which includes the categorisation of assets under the various tariff items in order to apply the percentile based tariff to each of the items thus identified. Only thereafter, does the Master acquire a wide discretion as contemplated in section 384(2) of the Companies Act.

[42] In his submission, Mr Van der Merwe relied upon the following dicta in **Nel and Another NNO v The Master (ABSA Bank Ltd Intervening) and Others Intervening:**[14]

> "...the Master, as a statutory functionary, is not free to choose whether or not to tax the liquidator's remuneration – the Master must tax in accordance with the tariff (s 384(1)), but having done so, may reduce or increase the amount arrived at by applying the tariff if, in his or her discretion, there is 'good cause' to do so. The dominant provision in s 384(1) remains that the remuneration to which a

[14] 2005 (1) SA 276 (SCA).

> liquidator is entitled, *is remuneration for work or services rendered*, not a set commission, and that it must be reasonable. The determination of 'reasonable remuneration' by the Master involves, in the first instance, 'taxation' in accordance with the tariff, which includes the categorisation of assets under the various tariff items in order to apply the (percentile- based) tariff to each of the items thus identified. The tariff serves as a point of departure for the determination of the appropriate fee. However, once taxation is complete, the Master has a flexible discretion to increase or decrease the amount of remuneration arrived at by the previous application of the tariff- the jurisdictional fact for the exercise of this discretion is the forming by the Master of the opinion that 'good cause' exists for doing so. On this approach, there is no difference in meaning between the phrase 'getakseer moet word' and the corresponding phrase' to be taxed"[15]

[43] On behalf of the applicant it was contended that the issue to be determined is whether the tariff of 10% applied by the Liquidators in the L & D Account in respect of their remuneration in relation to the sale of the property is correct or whether the Liquidators are only entitled to a fee of 3%. I do not agree with this submission. The argument entails that the Master is obliged to tax in accordance with the tariff (section 384(1)) and thus, based on the facts in this matter either allow a fee of 3% or a fee of 10%. In **Nel v The Master** the Supreme Court of Appeal held that although the Master *must* tax in accordance with the prescribed tariff, after having done so, the Master may reduce or increase the amount arrived at if, in his or her discretion, there is "good cause to do so."[16]

[44] The court held that the Master has a duty to satisfy himself or herself as to the reasonableness of the remuneration arrived at by the application of the tariff. The court further held that the discretion vested in the Master in terms of section 384(2) is a wide one. Regarding the Master's discretion the court in the **Nel** matter held as follows:

> "This means that where, in the Master's view, there is 'good cause' for departing from the tariff, the Master has the power to do so. The concept of 'good cause' is very wide and there is nothing in s384 of the Act which indicates that it should be interpreted so as to exclude *any* factor which may be relevant in determining what

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[15] Nel v The Master (supra) at [19]

[16] Nel v The Master (supra) at [19].

> constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors *are* relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him or her in the discharge of the duties involved. If, in the winding-up of a company, particular difficulties are experienced by the liquidator because of the nature of the assets or some other similar feature connected with the winding up, this would undoubtedly constitute 'good cause' entitling the Master to *increase* the tariff of remuneration. On the other hand, in a situation where, having regard to all the relevant factors, the Master forms view that the remuneration calculated according to the tariff is excessive in relation to the work done or the responsibility involved, this would likewise entitle the Master – and the Master will be obliged- to depart from the tariff figures by *decreasing* the tariff of remuneration to an amount which would be reasonable in the circumstances.[17] (foot notes omitted)

[45] The view of the Liquidators is that the monies recovered from the sale of the property as a going concern constitute "other income" collected in terms of Item 1 of Tariff B, *prima facie* entitling the liquidators to 10% of the gross amount so collected. Tariff B is obviously intended to be exhaustive, and the words "or other income" are wide enough to cover a case where a business is sold in the winding-up of a company as a going concern. The applicant considers the proceeds from the sale of the property to fall within the ambit of Item 2 Tariff B i.e." gross proceeds from immovable property".

[46] Taking cognizance of the facts relating to the property sold at the auction, it is evident that only 6 of the 21 apartments were occupied by tenants with lease agreements. However, only 1 of the tenants paid the monthly rentals in terms of the lease agreement. It is common cause that second respondent suffered financial constraints due to dwindling income with an exponential increase of expenditure as a result of the influx of illegal occupants. The amount due in respect of municipal accounts amounted to approximately R180 000.00. This means that the Mangaung Metropolitan Municipality was certainly entitled to disconnect the delivery of services, including water and electricity to the

[17] Nel v The Master (supra) at [20].

property. I am not convinced that the property sold at the auction falls within the description of "a business in operation and thriving".

[47] I agree with the submission made by Mr Van der Merwe that the property was not sold as a going concern. The reason is firstly that the property was evidently not advertised to be sold as a going concern. In any event, a prospective purchaser of the property as a going concern, would have been entitled to rescind the agreement of sale on the grounds of misrepresentation, if the liquidators or agent for that matter, falsely represented to the purchaser that the property was generating an income and consisted of goodwill and a number of lease agreements which generated an income to sustain the business as a going concern.

[48] It is evident from the contents of the conditions of sale which ultimately became the agreement of sale that no agreement was reached that the property was sold as a going concern. In **Engelbrecht NO and Others v The Master of the High Court, Pretoria**[18] the facts were that a company known as Pamodozi Orkney, which operated a gold mine in Orkney with a workforce of approximately 6000 employees was wound-up. The mine, inclusive of all its assets used in connection with the mining operations, was placed under care and maintenance which resulted in the mine being capable of operating fully.

[49] The liquidators were of the opinion that the continued operation of the mining activities would enable them to sell the business as a going concern. The liquidators concluded a sale agreement for a considerable purchase price which included the immovable property as well as a description of the "sale assets" that were sold and defined in the agreement. The "sale assets", *inter alia,* included the following: "... the equipment and infrastructure, the fixed assets, the intellectual property, the new order mining rights, the shafts, the surface assets, the surface right permits, the stock and all information and technical data relating to the Orkney gold mine area, including geology reports, drill cores and the like..."

[18] (55163/2016) [2017] ZAGPPHC 5 (18 January 2017).

[50] Janse van Niewenhuizen J in the **Engelbrecht NO** matter held that even if some of the assets do not attach to the immovable property, it is clear that the assets sold consisted of both immovable and movable property. In the matter at hand the sale agreement refers only to immovable property and nothing else. If the Liquidators' version is correct, the existing lease agreements and the goodwill of the second respondent would have formed part of the assets which ought to have been included in the sale agreement. This was not done.

[51] It follows that the monies in question cannot be described as "other income" in terms of Item 1 in Tariff B and the moneys so recovered from the sale of the immovable property must then be considered to be income in respect of which the Liquidators is entitled to 3% in terms of the tariff subject to the provisions of the proviso that the Master may on good cause reduce or increase the Liquidators remuneration. In the premises, the applicant made out a case for the setting aside of the directive/decision that the Liquidators' fee is to be calculated on the basis that the sale of the property was a going concern.

[52] I, however also agree with the submission made by Mr Zietsman SC that the court would normally not interfere with the discretion of the Master regarding the remuneration of a liquidator.[19] I am therefore of the view that the ultimate decision regarding the 'reasonable remuneration' for the services of the Liquidators in the winding-up of the second respondent rests with the Master. Similar to the decision made by Janse Van Niewenhuizen J in the **Engelbrecht N.O** matter, I am inclined to revert the matter back to the Master to determine the reasonable remuneration of the Liquidators in accordance with the applicable guidelines.

COSTS

[53] The general rule in awarding costs is that the court has a discretion to be exercised judicially upon a consideration of all the facts in the particular case. It must also strive to achieve fairness to both parties. The relevant circumstances and the conduct of the parties may also play a role.[20] In principle the successful party is entitled to his/her costs and the court should not depart

[19] Graaff Reinet Board of Executors Ltd v Fourie NO 1959 (4) SA 517 (O).
[20] Erasmus loc cit at D5-6 and authorities quoted.

from this established principle, except where there are good grounds to deviate, or unless exceptional circumstances exist.[21]

[54] The applicant was substantially successful in the relief sought. However, as a result of the applicant's disregard of the provisions of Rule 41A and to respond to the notice served by the Liquidators in this regard, I am of the view that the applicant is not entitled to the usual cost order. This is an appropriate case to order the parties to pay their own costs. In my view such order is fair to both parties.

ORDER:

[55] **In the result the following order is made:**

1. The refusal and/or failure of the First Respondent to make a decision regarding the Applicant's objection to the Second Respondent's First and Final Liquidation, distribution and contribution Account as prepared by the Third Respondent is set aside.

2. The matter is referred back to the First Respondent in order to determine the reasonable remuneration of the Third, Fourth and Fifth Respondents in terms of the applicable legislation and having regard to the finding by this court that the sale of the property of the Second Respondent, Portion 5 of Erf 1702 Bloemfontein, only consisted of the immovable property.

3. Each party shall pay his/her own costs in respect of this application.

[redacted]

VAN RHYN. J

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[21] Ibid D5-7

On behalf of the Applicant:	**ADV. R VAN DER MERWE**
Instructed by:	WEBBERS ATTORNEYS BLOEMFONTEIN
On behalf of the Respondent:	**ADV. P ZIETSMAN SC**
Instructed by:	VAN DER BERG VAN VUUREN ATTORNEYS BLOEMFONTEIN