REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 65015/2018

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED.

.... SIGNATURE

14/2/2020
DATE

In the matter between:

ESAIAS JOHANNES VAN RENSBURG N.O. In his capacity as joint liquidator of Boschpoort Ondernemings (Pty) Ltd (in liquidation) Masters Reference T2553/2012	**1ST APPLICANT**
FAROUK SHARIFF N.O. In his capacity as joint liquidator of Boschpoort Ondernemings (Pty) Ltd (in liquidation) Masters Reference T2553/2012	**2ND APPLICANT**

and

THE MASTER OF THE HIGH COURT, PRETORIA	**1ST RESPONDENT**
JOHANNES STEPHANUS WESSELS	**2ND RESPONDENT**

In re:

BOSCHPOORT ONDERNEMINGS (PTY) LTD (IN LIQUIDATION)	**THE COMPANY**

J U D G M E N T

WANLESS AJ

Introduction

[1] This application is one of a myriad of applications involving one ESIAS JOHANNES JANSE VAN RENSBURG *("the First Applicant")*; FAROUK SHARIEF *("the Second Applicant")* and JOHANNES STEPHANUS WESSELS *("Wessels")*. The "web of litigation" which has ensued and continues to ensue, only adds to the complexity of the facts pertaining to the present application. In turn, this application has been unduly complicated by, *inter alia*, the conduct of the parties. This will become apparent as this judgment unfolds. Despite the aforegoing, this court has made every effort to set out the history of the matter together with the relevant facts pertaining thereto, as simply as possible.

[2] The First Applicant and the Second Applicant are the joint liquidators of BOSCHPOORT ONDERNEMINGS (PTY) LIMITED (IN LQUIDATION) *("the Company")*. During September 2018 the Applicants instituted this application *("the main application")* under case number 65015/2018. THE MASTER OF THE HIGH COURT, PRETORIA *("the Master")* was cited as the First Respondent and *"Wessels"* as the Second Respondent. The relief sought in the main application is that the Master be ordered to make a ruling in respect of the objection of Wessels to the first corrected Liquidation and Distribution Account in relation to the winding-up of the Company. In respect of costs the Applicants sought an order that the costs be costs in the administration of the winding-up of the Company except where the application was opposed, in which case the party opposing be ordered to pay the costs.[1]

[3] The mandatory interdict sought by the Applicants against the Master is in terms of subsection 407(2) of the "old" Companies Act, Act 61 of 1973 *("the Companies Act")*. Section 407 of the Companies Act deals with objections to accounts in winding-up proceedings and subsection (2) provides that *"If the Master is of the opinion that any such objection ought to be sustained, he shall*

[1] *Notice of Motion at pages 1 to 3 of the application papers*

direct the Liquidator to amend the account or give such other directions as he may think fit". The main application was served upon the Master on the 10th of September 2018. Whilst the Master elected not to oppose the relief sought in the main application, Wessels (cited on the basis that he had a material interest in the outcome of the main application but against whom no relief was sought) elected to do so and filed a notice of intention to oppose the main application on the 14th of September 2018.Thereafter, Wessels filed his answering affidavit in the main application on the 7th of December 2018. The Applicants filed their replying affidavit in the main application on the 14th of May 2019.

[4] At that stage the sole issue to be decided by this court in the main application was one of fact, namely whether or not the Master had made a decision in respect of the objection lodged with him by Wessels and, if he had sustained the objection, whether or not he had directed the liquidators to amend the account or act in terms of any other directions he may have seen fit. The merits of the objection and the decision of the Master in respect thereof, were never relevant to the decision to be made by this court in the main application.[2] In the premises, one would have expected any "dispute" arising therefrom to be easily resolved. At the end of the day the Master had either dealt with the objection or he had not. This is a matter of fact. More particularly, it could reasonably have been expected that it would be a relatively simple matter to ascertain (through, *inter alia*, relevant documentation and/or civil correspondence) if the Master had complied with his statutory obligations in terms of subsection 407(2) of the Act. Further, if there was any confusion in this respect, same could also have been resolved in the same manner. Regrettably, this did not happen. As a consequence thereof the parties managed, between them, to generate some 544 pages of affidavits and annexures thereto, in what can only have been an extremely costly exercise.

[5] Notwithstanding the fact that the main application had been instituted in early September 2018, it was only set down for hearing before this court on the 11th

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[2] *Paragraph 8 of the Founding Affidavit at page 9 of the application papers*

of November 2019. On the 30th of October 2019 (7 court days prior to the hearing of the application) Wessels instituted an interlocutory application *("the interlocutory application")* in terms of which he sought (at the hearing of the main application) condonation for the late filing of a supplementary affidavit.[3] In terms of this supplementary affidavit,[4] Wessels wished to place new facts before this court and sought an order that the costs of the main application be paid by the attorneys (JACO ROOS ATTORNEYS INCORPORATED) representing the First and Second Applicants *de bonis propriis*, such to be joint and several with any order for costs granted against the Applicants. This, in turn, gave rise to the filing of no less than three (3) further affidavits and annexures thereto. On the 4th of November 2019 the Applicants filed what they referred to as "a supplementary replying affidavit".[5] Then, on the 5th of November 2019 the attorneys representing the Applicants *("JRI")* instituted a counter-application to the interlocutory application *("counter-application")* supported by a Founding Affidavit.[6] In terms thereof, JRI sought that the interlocutory application be dismissed with costs on an attorney and client scale, payable by the attorneys representing Wessels, namely HAASBROEK AND BOEZAART INCORPORATED *("HBI") de bonis propriis* and Wessels, jointly and severally. Finally, on the 7th of November 2019, HBI filed an affidavit in opposition to the relief sought by JRI.[7] As a result thereof the application papers had grown to some 750 pages.

[6] In the premises, on the 11th of November 2019, this court was asked to make findings as to whether or not the Applicants were entitled to the relief sought as against the Master in the main application and the issue of costs in terms of the interlocutory application and counter-application. At the hearing the Master was represented and handed to the court a report *("the Master's Report")* dated the 8th of November 2019. This was despite the fact that the Master had not opposed the main application; had not placed any affidavits before this court in respect of the main application and was not a party to either the interlocutory

[3] *Notice of Motion at pages 545 to 548 of the application papers.*
[4] *Pages 549 to 627 of the application papers*
[5] *Pages 628 to 702 of the application papers*
[6] *Pages 703 to 724 of the application papers*
[7] *Pages 725 to 750 of the application papers*

application or the counter-application. The Master's Report was accepted by this court into evidence and with no objection from any of the parties (who, including JRI and HBI, were all represented at the hearing on the 11th of November 2019).

The main application

[7] On behalf of the Applicants, it was submitted that the objection by Wessels[8] contains a myriad of objections, some of which have not been decided upon by the Master. In this regard the Applicants rely on the fourth query sheet which they submit shows that the Master has only dealt with one of those objections.[9] In support of this submission the Applicants point out that the aforesaid query sheet states "The objections are still applicable".[10] Following thereon the Applicants submit that they have satisfied all the requirements of a final mandatory interdict in that they have a clear right to the relief sought; will suffer irreparable harm if the relief sought is not granted and there is no adequate alternative remedy other than the relief sought.

[8] In opposition thereto, it was submitted, on behalf of Wessels, that not only had the objection been decided upon by the Master but that the Applicants had acted in respect thereof by filing an amended Liquidation and Distribution Account in the winding-up of the Company. Arising therefrom, it was submitted that the main application has been overrun by events and that an order directing the Master to make a ruling in respect of an objection which has already been sustained is now moot.

[9] As already noted earlier in this judgment the only party against whom relief was sought, namely the Master, declined to oppose the main application. Astonishingly, at page 2 of the Master's Report, it is stated:

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[8] *Paragraph 8 of the Founding Affidavit at page 9 of the application papers; annexure "FA-11" at pages 190 to 244 of the application papers; paragraph 6 of the Answering Affidavit at page 379 of the application papers*
[9] Annexure "FA-22" at page *368A-C of the application papers*
[10] *Page 369C of the application papers*

"Despite the Master's citation as a Respondent, no relief is sought against the Master, the Master made a decision not to oppose but only to file a Master's report to assist the court and the parties by placing on record the correct state of affairs."

This is blatantly incorrect. Paragraph 1 of the Notice of Motion in respect of the main application states:

"Ordering the *first respondent* to comply with its statutory obligations in terms of section 407(2) and/or 407(3) of the Companies Act, 61 of 1973 in respect of the objection lodged by the second respondent against the liquidation and distribution account referred to in paragraph 8 of the founding affidavit".

The Master is cited in the headings of the main application as the First Respondent and also in the founding affidavit.[11]

[10] Having elected (for reasons only known to the Master) not to oppose the main application, as also noted above, the Master did not place any affidavits before this court which may well have clarified the issue as to whether or not the Master had dealt with the objection which is the subject matter of this protracted litigation. To say this is a grave pity, would be an understatement. What the Master has done is to hand to the court, on the day of the hearing, the Master's Report. Whilst this court is grateful therefor, the existence of this report (dated the 8th of November 2019) raises the obvious question as to why, having declined to oppose the main application and having failed to place any affidavits before this court (which the Master could have done without opposing the relief sought but merely to assist this court and abide the decision thereof) the Master did not, at the very least, file his report at the outset when the main application was instituted in early September 2018 and served upon the Master on the 10th

[11] *Sub-paragraph 3.1 of the Founding Affidavit at page 6 of the application papers.*

of September 2018. Had the Master done so, this could well have avoided the main application following the tortuous (and expensive) path that it did. Of course, the same result (a speedy and definitive resolution of the matter) could well have been obtained if Wessels (cited as the Second Respondent in that he had a material interest in the outcome of the main application) had elected not to oppose the main application but abide the decision of this court in respect thereof. In that case and in light of there being no opposition from either respondent the main application would have proceeded on an unopposed basis. This, in turn, would have resulted in the court reaching a decision as to whether or not the Applicants were entitled to the relief sought, with or without the possible assistance of the Master. In the event of this court holding that the Master should be ordered to comply with his statutory obligations, this would also, in all likelihood, have resulted in a speedy and relatively inexpensive, resolution of the main application. Unfortunately, as is clear from the history of this matter, a sensible or pragmatic solution to resolve the matter was not adopted and the main application has developed into a full blown opposed application with the consequent legal costs.

[11] Returning to the Master's Report the contents thereof deal with the background (to the main application as well as other issues pertaining to the winding-up of the company) and the nature of a number of other applications (past; present and future) involving the same parties. In his conclusion the Master states that he *"has made a ruling in respect of the special fee and also given directions to explain or to amend the account in terms of Section 407(2) of the Companies Act re query sheet dated 29 May 2018".* In this regard the conclusion in the Master's Report effectively substantiates the submissions made on behalf of Wessels in the main application.

[12] Whilst the contents of the Master's Report are instructive and provide valuable insight into not only the background of the main application but also the nature of the litigation which has ensued (and is ongoing) between the Applicants and Wessels, it fails to resolve and/or answer the crucial question in this matter, namely whether the abovementioned ruling in respect of the special fee by the

Master deals with all of the objections made by Wessels. The Master sets out a history of a number of objections submitted to him but fails to illustrate which specific objections have and have not been dealt with by him. It is this failure which, in the opinion of this court, has given rise to much confusion, by all parties in the main application. Most particularly, the Master has failed to deal with, at all, the major concern of the Applicants in respect of the fourth query sheet (dealt with earlier in this judgment) where the Master has stated *"The objections are still applicable"*.

[13] In the premises, there seems little to suggest that the Master has complied fully with the statutory obligations imposed upon him in terms of subsection 407(2) of the Companies Act. As correctly submitted on behalf of the Applicants the high water mark of the opposition put forward by Wessels to the relief sought in the main application is that the objection has, by virtue of the Applicants lodging a corrected account and by implication, been upheld. This cannot, in light of, *inter alia*, the statement by the Master that the objections still apply, be accepted as correct. The fundamental difficulty for Wessels, when considering the merits of his opposition to the relief sought in the main implication, is that same is based on what Wessels believes the Master did and did not do. As set out earlier in this judgment the Master has done nothing to assist Wessels in his interpretation thereof and the contents of the Master's Report (despite the Master's bold conclusion as set out above), filed at the very last hour, does nothing to support his contention that the Master has indeed made a decision in terms of the objection. In light of the aforegoing and in light of the fact that the Applicants have satisfied all of the requirements of a final interdict (which was not disputed by Wessels at the hearing) this court should grant to the Applicants the relief sought.

[14] As to the submission made on behalf of Wessels that the granting of such relief has been rendered moot by the events which have occurred since the institution of the main application, this cannot, for the reasons set out above, be true. On a balance of probabilities the Master has not made a decision in respect of the objection and is required to act in terms of subsection 407(2) of the Act. In

respect of the fact that there are a number of other applications pending (as set out in the Master's report), including an application for the removal of the Applicants as liquidators, which may well, from a practical standpoint, render the relief granted in terms of the main application moot, this does not mean that this court should not grant same. This court cannot "second guess" the final outcome of the pending litigation between the parties and whether same would indeed have a material effect on the order of this court.

Costs

[15] It is trite that, unless special circumstances exist, costs of litigation should, in the normal course, follow the result and the successful party should recover his or her costs from the unsuccessful party. It is also trite that the court has a fairly wide discretion when it comes to the question of costs. As set out in this judgment, it is the opinion of this court (setting aside the particularly mean-spirited manner in which litigation has ensued between the Applicants and Wessels) that the principal reason why the main application was not resolved, thereby avoiding the incurring by both parties of unnecessary costs, was the total inaction of the Master throughout the main application. In this regard, there is nothing on the application papers before this court to show that the Master played an active role, or any role whatsoever, in an attempt to resolve the impasse between the parties in respect of a dispute of fact which, *prima facie,* was easily resolved. This is indeed regrettable, since had such intervention occurred, same would not only have saved Wessels considerable costs but would also have been to the benefit of the Company's general body of creditors. Arising therefrom, this court considers that the inactions of the Master in the main application are such as to entitle this court, in the exercise of its discretion, to depart from the general rule that an award of costs should follow the result. Both the Applicants and Wessels have, to one degree or another, been the victims of the failure of the Master to play a more effectual role in this litigation. To that extent, it would be just and equitable if each party was ordered to pay their own costs in respect of the main application.

[16] If evidence of the deep malice permeating the litigation which has taken place and continues to take place between the parties, is required (which it is not), then one need look no further than the interlocutory application and counter-application in the present matter. In the interlocutory application Wessels seeks an order for costs in respect of the main application to be paid by the attorneys representing the Applicants *de bonis propriis* whilst in the counter-application the attorneys representing the Applicants seek an order that the costs of the interlocutory application be paid by the attorneys representing Wessels *de bonis propriis*. Furthermore, all the aforesaid costs were sought on a punitive scale.

[17] Orders in respect of costs *de bonis propriis* have in effect been given statutory affirmation in matters related to insolvent estates. Section 74 of the Insolvency Act 24 of 1936 (as amended) states:

"**Improper advising or conduct of legal proceedings**

If it appears to the court that any attorney or counsel has, with intent to benefit himself, improperly advised the institution, defence or conducting of legal proceedings by or against an insolvent estate <u>*or has incurred any unnecessary expense therein*</u>, the court may order the whole or part of the expense thereby incurred to be borne by that attorney or counsel personally."[12]

In the matter of *Pheko and Others v Ekurhuleni City 2015 (5) SA 600 (CC)* the court held, *inter alia*, at paragraph [51] the following:

"Costs *de bonis propriis* are costs which a representative is ordered to pay out of his or her own pocket as a penalty for some <u>*improper conduct*</u>, for example, if he or she acted <u>*negligently or unreasonably*</u>. Whether a person

[12] *Emphasis added.*

acted negligently or unreasonably must be decided in the *light of the particular circumstances of each and every case.'*[13]

Also, in the matter of *South African Liquor Traders' Association and Others v Chairperson Gauteng Liquor Board and Others 2009 (1) SA 565 (CC)*, at paragraph [54], it was held:

> "An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."[14]

[18] In respect of the costs order sought *de bonis propriis* by Wessels against the attorneys representing the Applicants in the main application, this court has already held that the Applicants should be granted the relief sought and that each party in the main application be ordered to pay their own costs. In light thereof and when applying the same reasoning (as set out earlier in this judgment), there are clearly no grounds upon which this court should order the attorneys representing the Applicants to pay the costs of the main application *de bonis propriis*.

[19] With regard to the order sought by the attorneys representing the Applicants that the attorneys representing Wessels pay the costs of the interlocutory application *de bonis propriis*, it is true that the aforesaid interlocutory application has proved to be unsuccessful insofar as it sought to have the attorneys representing the Applicants pay the costs of the main application *de bonis propriis*. This, however, is not the test in respect of an order that an attorney pay costs *de bonis propriis*. As set out in *Pheko and Others v Ekurhuleni City (supra)* that attorney should, on the facts of that particular case, have acted

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[13] *Emphasis added*

[14] *Emphasis added*

negligently or unreasonably. Furthermore, as held in *South African Liquor Traders' Association and Others v Chairperson Gauteng Liquor Board and Others (supra)* any negligence on the part of an attorney must be of a serious degree. On the facts of the case as they presented themselves in the main application and despite the fact that Wessels was unsuccessful in his opposition thereto, there is nothing to suggest that the attorneys representing Wessels acted negligently or unreasonably to a serious degree when advising their client to seek costs *de bonis propriis* from the Applicant's attorneys. This was based on the premise that, *inter alia*, the Applicant's attorneys were negligent or unreasonable in pursuing the main application when they should have known that any order granted would be moot. As stated earlier, this line of reasoning on behalf of the attorneys representing Wessels came about as a result of what Wessels and his attorneys believed the Master had done, namely, sustain his objection. This belief, also as stated earlier, was largely (if not solely) attributable to the inaction displayed by the Master in the main application and his attitude thereto. In the premises, the counter-application cannot succeed.

[20] That, however, is not the end of this matter. Both the interlocutory application and counter-application were unsuccessful. Moreover, both may be described as being unnecessary expenses within, *inter alia*, the meaning of section 74 of the Insolvency Act 24 of 1936 (as amended).In terms thereof and in the exercise of this court's discretion in respect of costs in general, it would be just and equitable if this court made an order that the costs of the interlocutory application and counter-application be borne by the respective attorneys and not by their clients, namely Wessels or the Applicants. In this manner the court is also able to express, to some degree, its displeasure at being burdened (at an extremely late stage of the proceedings which had been carrying on for more than a year) with a most unsavoury and ill-advised squabble as to costs, coupled with an attack, by both sets of attorneys, upon the integrity of their respective colleagues. In the oft hurley burley of litigation, attorneys should always bear in mind the standard of care, skill, knowledge and learning

expected from an attorney when carrying out his duties on behalf of his or her client, together with the duties towards his or her opponent and the court.[15]

[21] In the premises the court makes the following order:

1. The Master of the High Court (Pretoria) is to comply fully with the provisions of subsection 407(3) of the Companies Act 61 of 1973 (as amended) in respect of the objection lodged by the Second Respondent (JOHANNES STEPHANUS WESSELS) and as more fully described in paragraph 8 of the founding affidavit at page 9 of the application papers;

2. The Master of the High Court of South Africa (Pretoria) is to comply with paragraph 1 hereof within THIRTY (30) days of the granting of this order;

3. In respect of the application under case number 65015/2018 instituted by way of Notice of Motion dated the 4th of September 2018 at pages 1 to 3 of the application papers the First Applicant; the Second Applicant and the Second Respondent are to pay their own costs;

4. The application instituted by way of the Notice of Motion dated the 30th of October 2019 at pages 545 to 548 of the application papers and the counter-application instituted by way of the Notice of Motion dated the 5th of November 2019 at pages 703 to 705 of the application papers, are dismissed with no order as to costs.

5. In respect of the application and counter-application as set out in paragraph 4 hereof the attorneys HAASBROEK & BOEZAART ATTORNEYS and JACO ROOS ATTORNEYS INCORPORATED are not to receive any

[15] *Van der Walt v Murray and Another. an unreported judgment of the Free State Division (Bloemfontein); case number 2554/2019: 10 September 2019; at, inter alia, paragraph [13].*

payment from their respective clients and shall be liable to pay any costs and/or expenses incurred in respect thereof, such to include but not to be limited to, *inter alia*, disbursements to any third parties.

BC WANLESS

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	11 November 2019
For the Applicants:	Adv Swart SC
Instructed by:	Jaco Roos Attorneys Inc
For the 1st Respondent:	Adv H C Janse van Rensburg
Instructed by:	The State Attorney Pretoria
For the 2nd Respondent:	Adv F G Janse van Rensburg
Instructed by:	Haasbroek & Boezaart Attorneys
For Applicants' Attorneys:	Adv Kruger SC
For Second Respondent's Attorneys:	Adv De Klerk SC
Date of Judgment:	14 February 2020