



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

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

Case No.:5081/2017

In the matter between:

TSIU VINCENT MATSEPE N.O.

OTTLIE ANTON NOORDMAN N.O.

TSIU VINCENT MATSEPE

OTTLIE ANTON NOORDMAN

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

and

**THE MASTER OF THE HIGH COURT
BLOEMFONTEIN**

P FOURIE N.O.

ELIZABETH MARIA VENTER

**SAREL JOHANNES WESSELS
PARTY**

FIRST RESPONDENT

SECOND RESPONDENT

FIRST INTERVENING PARTY

SECOND INTERVENING

CORAM:

VAN ZYL, J et I VAN RHYN, AJ

JUDGMENT BY: I VAN RHYN, AJ

HEARD ON: 18 FEBRUARY 2019

DELIVERED ON: 20 MAY 2019

INTRODUCTION

- [1] This is an application to review and set aside the decision of the first respondent (“the Master”) to remove the first and second applicants as joint liquidators of a company known as Sebal Beleggings (Pty) Ltd (in liquidation), (“the Company”). The applicants furthermore pray that condonation be granted for the late lodging of the review application and an order for costs on a punitive scale.
- [2] First and second applicants are the joint liquidators of the Company. Both liquidators are furthermore cited in their personal capacities as third and fourth applicants respectively on the basis that they are funding this application personally. The first respondent is the Master of the High Court, Bloemfontein (“the Master”) cited in his statutory capacity for purposes of the relief claimed herein. The second respondent, Philip Fourie N.O, an insolvency practitioner of Pretoria, was also appointed as a liquidator in the estate of the Company. No relief is sought from the second respondent and he did not take part in these proceedings.
- [3] The application is opposed by the Master. Ms. E M Venter (the first intervening party), sole director of the Company and her brother, Mr. Sarel Wessels (the second intervening party), launched an application to intervene and leave to intervene was granted by Rapai J on 30 August 2018. The costs of the application to intervene were reserved. The intervening parties did not file answering affidavits in the review application, but heads of argument were filed by and counsel appeared on their behalf at the hearing of the application.

BACKGROUND FACTS.

- [4] On 13 August 2012 the Company was wound-up by way of a special resolution passed on 8 August 2012 by the sole director and shareholder, the first intervening party. The first and second applicants were appointed by the Master as joint liquidators in the insolvent estate of the Company on 22 November 2012. The second respondent was at some later stage appointed as a joint liquidator.
- [5] The Master received three complaints concerning the conduct of the first and second applicants in their capacities as liquidators and was obliged to investigate the conduct of the liquidators in terms of the provisions of section 381 of the Companies Act, No 61 of 1973, as amended ("the Act") read with item 9 of Schedule 5 of the Companies Act No 71 of 2008. The complaints, dated 28 November 2016, 6 December 2016 and 7 December 2016, emanated from the second intervening party, ("Mr Sarel Wessels") and his attorney, Mr. Pieter Willers. On instructions of the Master, the complaints were forwarded via e-mail by an Assistant Master, Ms Antionette Minnie, to the first and second applicants for their comments. On 2 December 2016 the Master requested their written comments on the complaints raised by Mr. Sarel Wessels. On 9 December 2016 the Master requested the first and second applicants to provide a clear exposition of monies received by the liquidators
- [6] An initial response was received from Matsepes Attorneys on 14 December 2016 and it was assumed by the Master that the response was compiled and delivered by Mr. Senekal who acted as the liquidators' attorney. The Master was not satisfied with the reply received and on 22 December 2016 a further request to provide information was dispatched to the first and second applicants. Further responses to the Master's queries were received dated 5 January 2017 and 16 January 2017 respectively.
- [7] On 20 January 2017 the Master informed the first and second applicants of his intention to remove them as liquidators in terms of the provisions of section 379(1)(e) of the Act. The Master indicated that he will remove the first and second applicants as liquidators in the event of them failing to obtain a court order within fourteen days from date of his letter, restraining him from proceeding to remove them from office as indicated.

- [8] The applicants issued proceedings under case number 567/2017 for an interdict restraining the Master from removing them as liquidators pending a review of his decision dated 20 January 2017. The Master undertook not to remove the first and second applicants pending finalization of the interdict proceedings and later it was decided not to remove the first and second applicants as liquidators pending the review application.
- [9] At the hearing of this matter the parties agreed that the true nature of these proceedings is to obtain an order prohibiting the Master from removing the first and second applicants as liquidators. On the basis that the Master had already decided to remove the first and second applicants from office as stated in his letter dated 20 January 2017, and since the execution of his decision was suspended pending the outcome of this application, it was agreed that the adjudication of the matter should then proceed on the basis of a review of the Masters decision to remove the first and second applicants as liquidators of the Company.
- [10] On 15 February 2019 the first applicant, in his representative as well as his personal capacity (as third applicant) entered into an agreement with the intervening parties to settle the dispute between them and to withdraw his review application. The intervening parties and the first and third applicant agreed that, in respect of the review application, each party will pay his or her own costs. With reservation of certain specified rights pertaining to any inference of malpractice as set out in the settlement agreement, the first applicant undertook to take the necessary steps to resign as liquidator of the Company with immediate effect.
- [11] On behalf of the Master it was contended that the settlement agreement was entered into and between the intervening parties and the first and third applicants. He was not a party to the settlement agreement. The Master however did not object to making the settlement agreement between the first and third applicant and the intervening parties, an order of court with the exclusion of paragraphs 3 and 5 thereof. On 19 February 2019, at the hearing of the review application, the settlement agreement dated 15 February 2019, with the exclusion of paragraphs 3 and 5 thereof, was therefore made an order of court.

THE MASTER'S REASONS FOR REMOVING THE FIRST AND SECOND

APPLICANTS FROM OFFICE.

The first complaint.

- [12] The Master found that the first and second applicants contravened the provisions of section 386(1)(c) and section 386(3)(b) of the Act by incurring a financial liability on behalf of the Company in liquidation without the creditors having passed a resolution to that effect.

Section 386(1)(c) of the Act provides as follows:

“General powers.-

(1) The liquidator in any winding-up shall have power-

(a)...

(b)...

(c) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company; provided that no liquidator shall, except with the leave of the court or the authority referred to in subsection (3) or (4), or for the purpose of carrying on the business of the Company in terms of subsection (4)(f) have power to impose any additional liabilities upon the Company;”

(my underlining)

Section 386(3)(b) provides as follows:

“(3) The liquidator of a Company-

(a)...

(b) in a creditors’ voluntary winding –up, with the authority granted by a meeting of creditors; and

(c) ...

shall have the powers mentioned in subsection (4).”

- [13] There are certain powers which the liquidator may exercise only if granted authority to do so. The powers in ss (4) that may be exercised only with such authority, relevant to the present matter, are the powers to carry on or discontinue any part of the business of the company in so far as may be necessary for its beneficial winding-up and to sell any movable or immovable property of the company by public auction, public tender or private contract.

- [14] The first complaint concerns a loan agreement dated 29 January 2013

entered into and between the first and second applicants, on behalf of the Company and the Robyn Trust. The first and second applicants decided to sell some of the Company's immovable properties to settle the amount of R 6 725 395.59 owed to First National Bank in order to facilitate the cancelling of the bonds registered against the title deeds of four farms belonging to the Company. The remaining secured creditor was BKB with a claim amounting to R1 965 153.70. Mr. Senekal negotiated a loan from Robyn Trust in the amount of R3 000 000.00 payable to the first and second applicants. The first and second applicants were to appropriate the amount to settle the claim of BKB and to settle a further amount of R40 000.00 owed by the Company to First National Bank. The balance of the loan was to be paid to the liquidators for their administration costs.

- [15] It was recorded in paragraph 4 of the loan agreement that, due to the liquidation of the Company, the Company cannot incur any liability towards repayment of the loan amount, therefore Mr. Tiaan Wessels (referred to as the fifth party in the agreement) undertook to repay the amount of R2 500 000.00 with interest as set out in paragraph 1 of the loan agreement. Ms. E M Venter (the fourth party to the agreement) undertook to see to the registering of a first bond in the amount of R3 000 000.00, over an unidentified property subsequent to the suspension of the liquidation of the Company. In terms of paragraph 6 of the loan agreement Ms. E M Venter, Mr. Tiaan Wessels and Mr. Sarel Wessels undertook not to amend the written agreement between the parties. Matsepes Attorneys, as represented by Mr. Senekal, furthermore gave an irrevocable mandate for the registration of a bond as envisaged by the parties. How an attorney acting on behalf of the liquidators could provide a mandate for the registration of a bond, without specifying which property would be encumbered and who the owner of the property is, is uncertain and raises questions as to the legality of the proposed registration of the bond. Mr. Tiaan Wessels offered his game, excluding his buffalo, as security for repayment of the amount of R3 000 000.00.
- [16] The contents of paragraph 8 of the Loan Agreement are contentious. Paragraph 8 reads as follows: *“Die partye tot hierdie ooreenkoms kom verder ooreen dat sou die vyfde party hierdie verskuldigde bedrag betaal, die eerste party sy reg in en tot alle sekuriteit hiermee oormak van (sic) die vyfde party.*

Die vierde party onderneem hiermee om die betalings indien enige gemaak deur die vyfde party namens en ten behoeve van die vierde party hiermee terugbetaal word binne dieselfde tydperk soos wat vyfde party aan eerste party betaal het.” For the same reason the content of paragraph 18 is also quoted: *“Die partye bevestig dan verder hiermee dat sou daar enige regsaksie geneem word vir die vordering van hierdie uitstaande bedrae, die eerste party, synde Sebal Beleggings Registrasie nommer 600/012369/07 asook vierde en vyfde en sesde party hulle self hiermee verbind as borg en mede hoofskuldenaar vir die nakoming van die verpligtinge in terme van hierdie ooreenkoms”*. In terms of the agreement the first party was Robyn Trust and not the Company.

- [17] On behalf of the first and second applicants it was argued that the first complaint that the applicants incurred a loan on behalf of the Company is factually incorrect. The loan obligations were incurred by Mr. Tiaan Wessels who had to repay the loan amount. The applicants argued that it was expressly recorded in paragraph 4 of the loan agreement that, as a result of the winding-up of the Company, no liabilities could be incurred by the Company. In his answering affidavit the Master furthermore referred to paragraph 18 of the Loan Agreement which, according to him, caused a liability for the Company.
- [18] The applicants contended that any possible liability incurred by the Company can only arise post winding up. During August 2015 under case number 3671/2015 the Robyn Trust launched an application for the conversion of the voluntary liquidation of the Company to a compulsory liquidation based on the claims of Robyn Trust against it. It was argued on behalf of the applicants that the application for the compulsory liquidation was not based on the non-compliance of the provisions of the Loan Agreement but due to the cession of the claim of BKB to Robyn Trust.
- [19] It is clear from the contents of the Loan Agreement and the averments contained in the founding affidavit that the purpose of the Loan Agreement was to provide financial assistance for the benefit of the Company in liquidation and to settle the Company's debt with BKB and First National Bank. The Wessels family apparently conducted a family business on the farm Oshoek referred to a “Lechwe Lodge”. The object of the Loan Agreement was

to retain the farm Oshoek for the family and to continue with the business of the lodge. In terms of the provisions of paragraph 2.3 and paragraph 3 of the Loan Agreement, which essentially contains the same terms, the director of the Company, Ms. E M Venter, authorised the first and second applicants to settle the debts of the Company and to utilise the remainder of the amount to settle the administration costs of the Company. According to the Master the loan amount was earmarked for the benefit of the Company and the argument advanced by the first and second applicants that the Loan Agreement did not concern the Company as such but was concluded between Mr. Tiaan Wessels and the Robyn Trust, is incorrect.

- [20] In terms of the Loan Agreement the Company is represented by E M Venter in her capacity as the only director of Sebal Beleggings as well as in her “...*persoonlike hoedanigheid as enigste direkteur en hierna verwys as vierde party*” Paragraph 8 provides that the Company will repay the amount paid by Tiaan Wessels on behalf of the Company without stating that such repayments will only commence subsequent to the liquidation order being uplifted. On this interpretation the Company acquired an additional obligation to repay the loan amount to Mr. Tiaan Wessels. In terms of paragraph 18 of the Loan Agreement, the Company furthermore acquired the additional obligation as a surety.
- [21] The parties to the Loan Agreement concluded that the terms of the Loan Agreement will not be amended without the amendment being reduced to writing and “... *deur beide partye geteken (sic) is nie.*” Not only was the amount of the loan reduced from the original amount of R3 000 000.00 to R2 500 000.00 but the parties clearly did not agree on the interest rate to be applicable. It was agreed that interest on the amount of R2 500 000.00, as set out in paragraph 1 of the agreement, will be applicable. However, no mention of the interest rate is made in paragraph 1 of the agreement. The Loan Agreement is a poorly drafted contract which is for the most part vague and furthermore contains incomprehensible terms and conditions. The Master’s finding that the provisions of paragraphs 8 and 18 place a conditional obligation on the Company in liquidation cannot be faulted.

The second complaint.

- [22] The Master held that the first and second applicants contravened the

provisions of section 384(3) of the Act and the common law by allowing Matsepes Attorneys to act as the conveyancers in respect of the transfer of the farms, registered in the name of the Company, to the Robyn Trust.

- [23] In terms of Resolution 3, approved by the creditors, the first and second applicants were authorised to sell the assets of the Company by public auction or private treaty. In terms of Resolution 9 the sale of the assets by public auction was confirmed. Matsepes Attorneys was appointed to attend to the transfer of the property in terms of the provisions of Paragraph 3 of the agreement of sale entered into and between the first and second applicants and the Robyn Trust. Both first and second applicants were practising attorneys at Matsepes Attorneys at the time.
- [24] Section 384 of the Act provides for the remuneration of a liquidator. In particular Section 384(3) provides as follows: "*No person who employs or is a fellow employee or in the ordinary employment of the liquidator, shall be entitled to receive any remuneration out of assets of the Company concerned for services rendered in the winding-up thereof and no liquidator shall be entitled either by himself or his partner to receive out of the assets of the Company any remuneration for his services except the remuneration that he is entitled to receive under this Act.*"
- [25] The applicants opined that the conveyancer did not receive remuneration out of the assets of the Company for his services. The purchaser was obliged to pay to Matsepes Attorneys all fees and costs pertaining to the transfer of the property in terms of paragraph 6 and more particularly paragraph 6.1 - 6.3 of the agreement of sale. It was furthermore argued that the Master has since converted the complaint and added the further proviso that no specific resolution was passed in terms whereof Matsepes Attorneys was authorised to act as conveyancers of the property registered in the name of the Company.
- [26] In the winding-up of a company a liquidator stands in a fiduciary relationship to the company, to the body of creditors of the company as well as to the body of its members as a whole. He/ she therefore occupies a position in some ways analogous to that of a trustee.¹ A liquidator should be wholly

¹ LAWSA (4) 3 para 236 Blackman.

independent, should regard equally the interests of all creditors, and should carry out his duties without fear, favour or prejudice.²

- [27] In Commentary on the Companies Act³ the learned authors state the following regarding the fiduciary relationship of a liquidator: *“He may not act in any matter in which he has a personal interest or a duty which conflicts, or which might possibly conflict, with his duties as liquidator of the Company.”* A good cause for the removal of a liquidator is if it appears that the liquidator, through some relationship, direct or indirect, with the Company or its management or any particular person concerned in its affairs or from his connection with other parties or from circumstances in which he is involved, that he is in a position of actual or apparent conflict of interest and not wholly independent.⁴
- [28] In another insolvent estate referred to by the applicants, the Master, with reference to **Edmeades, de Kock & Orffer v Die Meester**,⁵ decided that creditors could approve by resolution that additional fees be paid to a liquidator, for example conveyancing fees. However, due to the failure of the liquidators, in this matter, to obtain a resolution from the creditors to appoint Matsepes Attorneys as conveyancers, the Master held that the additional fees acquired by the liquidator through the transfer of the property by a partner or co-director of Matsepes Attorneys, was in contravention of section 384(3) of the Act.
- [29] The facts in the **Edmeades** matter concerned the administration of an estate by an executor. In his will the testator appointed a firm of attorneys, Edmeades, De Kok & Orffer Attorneys of Bultfontein in the Free State, as administrators of his estate and a partner of the firm as the executor of his estate with instructions to sell his farm after his death. The executor instructed the firm of attorneys to sell the farm by public auction. Subsequent to the sale of the farm the executor included the firm’s claim for (sales) commission in the amount of R779.47 in the liquidation and distribution account. The Master, at the time, refused to approve the claim. In his judgment M T Steyn J (as he then was) referred to the work of Meyerowitz, The Law and Practice of

² Bertelsman et al, Mars: The Law of Insolvency in South Africa 9th ED (2008) at 293 to 294.

³ M S Blackman et al vol 3 at 14-376.

⁴ Hudson and Others NNO v Wilkins NNO and Others 2003 (6) SA 234 (T) at para 13; LAWSA 4(3) at para 281.

⁵ 1975 (3) SA 109 (O).

Administration of Estates (fourth edition) and quoted the following principles: *“The executor occupies a fiduciary position and must not, therefore, engage in a transaction by which he will personally acquire an interest adverse to his duty. It is for this reason that an executor who also acts on behalf of the estate in a professional capacity cannot charge fees for the work he may perform in that capacity...So strict is the principle that even if the estate is successful in a legal action and costs are awarded against the other party they cannot be recovered, except for disbursements, nor can conveyancing charges for auctioneering fees be recovered from the purchasers of property, although such was the condition of purchase. If any fees are recovered by the executor they must be paid into the estate.”*⁶

- [30] In the case of **re Estate Pretorius**⁷ it was held that: *“If the executor is the partner in a firm of solicitors, the firm can only charge out of pocket expenses even though the business is done by one of the partners who is not the executor, Collins v Carey, 2 Beav. 149; Christophers v White, 10 Baev. 523”* In the **Edmeades** matter, Steyn J referred to both English cases reported in Beaven's Reports, Rolls Court 1838-1866 and quoted the following from the **Christophers v White** case: *“I do not think that the circumstances of this case are such as to warrant the court in making it an exception to the admitted rule. A trustee is not allowed to act as his own solicitor and then charge his cestui que trust with the amount of his professional fees. The rule admits one exception when the testator or creator of the trust expressly authorises the trustee to retain his professional costs, showing thereby, that he would rather run the risk of abuse by uniting the two characters, and pay the solicitor his costs, than lose his services as trustee. The principal fact here stated is that the business was not done by the trustee, he being incapable from ill-health, but that the whole was done by his partner. It was done, however, for his profit as partner, and is the same as if two partners divide their business, one attending to the law departments and the other to the equity, in which case each acts for the profit of the other. Would this Court allow a trustee to say to his partner, ‘You shall act as solicitor, and earn all the profit you can for the*

⁶ Edmeades, de Kok & Orffer v Die Meester 1975 (3) SA 109 (O) at 112 F-H; Estate Fawcus v Van Boeschoten and Lorentz 1934 TPD 94 at 98; In re Estate Cullingworth 1936 NPD 524 at 527.

⁷ 1917 TPD 211 at 214.

concern' I think that could not be maintained. For the business done during the life of Mr. Clement only costs out of pocket can be allowed."

- [31] In **Edmeades** it was held that, due to the distinction between an executor and an administrator, and the appointment of the attorneys as the administrator of the deceased's estate, which had no legal effect, the firm of attorneys was entitled to payment of their fees. The remuneration to which a trustee is entitled covers all the services of whatever nature rendered by him and consequently he may not lawfully charge the estate in addition for services rendered by him as attorney,⁸ auctioneer,⁹ Conveyancer¹⁰ or in any other capacity. The principle therefore remains that, being in a fiduciary position, he is not entitled to make any profit other than his taxed remuneration out of the estate. He consequently cannot lawfully share the remuneration paid to the auctioneer employed on behalf of the estate or receive any allowance from the attorney or other person so employed.¹¹
- [32] Similar to section 384(3) of the Act, section 63(2) of the Insolvency Act No 24 of 1936 provides that no person who employs or is a fellow -employee of or in the ordinary employment of the trustee, is entitled to receive any remuneration out of the estate for any services rendered thereto, and no trustee is entitled by himself or his partner to receive out of the estate any remuneration for services rendered to the estate, except and unless such has been taxed by the Master. The authors of **Mars, The Law of Insolvency in South Africa**¹² explains the principle, by way of an example, that an auctioneer may therefore not, by getting his clerk appointed as a trustee, reap the advantage from the estate by claiming both the trustee's and auctioneer's commission. However, it is specifically pointed out by the learned authors that this disability exists only with regard to the receipt of remuneration out of the estate (my underlining).
- [33] The question in the matter of **Symington NO v Die Meester**¹³ was whether the creditors could consent (by way of a resolution) to the appointment of a

⁸ African Mutual Trust & Assurance Co v Raubenheimer's Trustees 1912 CPD 439; Nieuwoudt v Estate Van der Merwe 1928 CPD 486.

⁹ De Jager's Trustees v The Master 1918 CPD 535.

¹⁰ De Jager's Trustees v The Master 1918 CPD 535.

¹¹ Section 59(a) Insolvency Act 24 of 1936.

¹² 9th edition, p315 para 14.30.

¹³ 1960 (4) SA (O) 70.

firm of attorneys to assist the liquidator in performing certain legal work in the winding-up of the company and receive remuneration out of the estate as if the liquidator is not a partner of the same firm of attorneys. On behalf of the firm of attorneys (the applicants) it was argued that section 144(2) of the Companies, Act 46 of 1926 was enacted for the benefit of the creditors of a company and therefore the creditors could waive their benefits conferred upon them by law. Potgieter J (as he then was) held that where public as well as individual interests are concerned and where public policy demands the observance of a statute, then the benefit of its provisions cannot be waived by the individual, because he is not the only person who has an interest in the liquidation. The court found that the provisions that the fellow employee or a person in the ordinary employment of a liquidator is not entitled to receive any remuneration out of the estate was not enacted with the intent to provide a benefit for the creditors of the Company in liquidation.¹⁴

- [34] In **George Hartman & Kie v Landdros Reitz en Andere**¹⁵ it was held that in an insolvent estate where the trustees themselves had been appointed as attorneys and had also been given the right to payment of their attorneys' fees and disbursements for services which they rendered to the estate in their capacity as attorneys by a resolution, was in conflict with the provisions of section 53 (5) and 63 (2) of Act 24 of 1936.
- [35] The meaning of legislation must be established both in order to apply its provisions and for the sake of assessing its legality. The legislative interpretation is anchored in the intentions of the legislator and it is carried out by way of an examination of the text in which that intention is crystallized by making use of a complex set of rules and guidelines. Where this intention is proclaimed in clear terms, either expressly or by necessary implication, the assistance of these rules need not be sought. The principles of legislative interpretation are explained on the basis that they seek to enable those who are faced with applying the law to give effect to the authority entrusted to those who make the law.
- [36] Legislative interpretation requires that the court should not search for the legislator's intentions behind the legislation, but to treat the legislative text as

¹⁴ Symington NO v die Meester 1960 (4) SA (O) 70 at 73.

¹⁵ 1958 (4) SA 515 (O) at 518 A-E.

the expression of the legislator's intention.¹⁶ Consequently the aim of legislative interpretation is always subject to the court's duty to promote the spirit, purport and object of the Bill of Rights and to arrive at the intention of the legislature. The three basic rule of interpretation is firstly, the Golden Rule of legislative interpretation which requires that the language of the instrument is (usually) given its ordinary grammatical meaning, secondly the purpose of the legislative measure and thirdly the relevance of the context of the instrument. The express inclusion of one situation results in the exclusion of that which is not mentioned. The legislator intends to advance the public interest and does not intend absurd results. Furthermore the legislature does not intend harsh, onerous unjust, unequal of discriminatory treatment.¹⁷

- [37] In **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹⁸ it was held that: *"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document"*¹⁹.

- [38] In applying these principles the following emerges: Section 384 of the Act deals with the remuneration of a liquidator. In any winding-up, including a member's voluntary winding-up where the Company does not determine the liquidator's remuneration, the liquidator is entitled in terms of section 384(1) of

¹⁶ Jaga v Dönges; Bhana v Dönges 1950 (4) SA 653 (A) at 664.

¹⁷ Du Plessis 'Statute Law and Interpretation'. LAWSA vol 25(1) first re-issue para 322.

¹⁸ 2012 (4) SA 593 (SCA) at [18].

¹⁹ See: the (as yet unreported) matter of First Rand Bank Ltd. V Nedbank Ltd. published on SAFLII with reference (1249/17) [2019] ZASCA 47 (29 March 2019).

the Act to receive for his services a reasonable remuneration to be taxed by the Master in accordance with the prescribed tariff of remuneration. A liquidator is entitled to receive out of the assets (my underlining) of the Company only the remuneration specified by the Act.²⁰ A liquidator cannot claim against the Company fees for services rendered by him in a capacity other than that of a liquidator, for example as an attorney or auctioneer.²¹

- [39] The argument that the fees of the conveyancer were paid by the purchaser of the immovable property and as such was not derived out of the assets of the Company is sound. Paragraph 6 of the agreement of sale provides that the purchaser will pay the transfer fees to Matsepes Attorneys as soon as a statement of account has been delivered to the purchaser. However it is paramount that a liquidator must act with care and diligence in the performance of his duties. A high standard of care and diligence is required of a liquidator. One would therefore expect that in cases of uncertainty or doubt the liquidator would, in an effort to safeguard himself, his co-liquidator, the Company's members and the creditors, obtain directions from the Master or the court. As a fiduciary, the liquidator must at all times act openly and in good faith and must exercise his powers for the benefit of the Company and the creditors as a whole and not for his own benefit or the benefit of his fellow employee at the same firm of attorneys.²² Usually the seller will be responsible for payment of the estate agent's commission and then the commission will result in a depletion of the company in liquidation's assets. In the present circumstances where the amount payable to the estate agent is not funded by the seller but by the purchaser, same is not derived out of the assets of the company in liquidation. The same argument applies to the payment of the conveyancer's fees. The purchaser, Robyn Trust was responsible for payment of the transfer costs and not the Company.
- [40] Of concern is the provision in paragraph 23.1 of the agreement of sale that the sale of the farms is subject to the approval of the Master as well as all the creditors of the Company. The agreement of sale was concluded on 23 November 2012 and according to the applicants the Master received a copy of

²⁰ Section 384(3) of the Act.

²¹ Symington NO v Die Meester 1960 (4) SA 70 (O); Niewoudt v Estate Van der Merwe 1928 CPD 486 at 487.

²² Standard Bank v The Master 2010 (4) SA 405 (SCA) at 429 [112] and 430 [113].

the agreement during July 2014. The Master was not requested to approve the sale of the farms as provided for in Resolution 9, nor was the Master informed of the sale of the farms until a year and eight months later, during July 2014. According to the applicants the contents of Resolution 9 provides that the sale of the farms per public auction and with the approval of the Master and the main creditors (my underlining) was accepted. Clearly the creditors were made to believe that the Master has approved the sale of the farms. Not only the creditors, but also the purchaser of the farms, Robyn Trust and the members of the Company were made to believe that the contents of the agreement of sale were approved by the Master and the *concursum creditorium*. The first and second applicants argue that they stand accused of maladministration of the estate notwithstanding the fact that every action they took were in agreement with the “*siblings and on their instructions*”.

- [41] The functions of a liquidator are essentially to control and administer the property and affairs of the Company and to liquidate it. A liquidator has power to sell the immovable property on behalf of the Company after the winding-up thereof, provided he or she is authorised accordingly by meetings of members and creditors, or, where he or she cannot obtain such authority, or the respective directions of the members and creditors, he or she obtains directions from the Master. If the latter declines such authority, the leave of the Court is required. The approval of the Master to sell (auction) the farms of the Company was not obtained as agreed to in the contract concluded between the first and second applicants and the Robyn Trust. The creditors, seemingly only First National Bank, were obviously made to believe that the Master approved the sale of the immovable property of the Company. In **Standard Bank v The Master of the High Court**²³ Navsa JA, on behalf of the majority, held as follows: “*Liquidators must realise that they perform important functions. The Master, creditors and importantly courts rely on them. In the liquidation process they are expected to act impeccable. The profession must be under no illusion that courts, in appropriate circumstances, when called upon to do so, will act to ensure the integrity of the winding-up process.*”

²³ 2010 (4) SA 405 (SCA) at 434 [133].

- [42] The facts of this matter lead to the conclusion that the agreement of sale was negotiated and agreed upon on the basis that the creditors of the Company, its members and the purchaser were all made to believe that they were in fact assenting to the terms of the agreement as approved by the Master. Even though I am in agreement with the contention on behalf of the applicants that the fees payable to the conveyancer were not being paid out of the assets of the Company in liquidation but by the purchaser, the conclusion that the agreement of sale contains certain conditions that were not complied with due to the liquidators failure to abide by the terms thereof, is unsettling and causes grave misgivings about the degree of care, skill and diligence with which they performed their duties as liquidators. The Master's decision to remove the liquidators from office in these circumstances cannot be criticised.

The third complaint.

- [43] This complaint concerns an amount of R5000.00 paid to Matsepes Attorneys by the first and second applicants. In terms of the provisions of section 384(1) of the Act a liquidator is entitled to reasonable remuneration for his services rendered in accordance with the prescribed tariff of remuneration. The tariff does however not make provision for travelling allowances or other disbursements.²⁴ A liquidator is not allowed to pay himself his remuneration until an account providing for it has been confirmed by the Master in terms of section 408 of the Act.²⁵ In the applicants' founding affidavit it was stated that the amount was paid to Messrs Senekal and Haarhoff who attended meetings with the employees and the family members and assisting them to compile "claim documents". However in their letter dated 16 January 2017 the applicants did not inform the Master that the travelling costs in the amount of R5 000.00 were in fact incurred by their attorney, Mr. Senekal, and therefore the Master assumed that the costs were incurred by themselves as the appointed liquidators.
- [44] At the second meeting of creditors, resolutions were taken relating to the appointment of attorneys and advocates, but none of these resolutions allowed for the use of Mr. Senekal to attend to the business activities of the

²⁴ Van Zyl NO v The Master 2000 (3) SA (CPD) at para 7.

²⁵ Strydom NO v The Master 2010 (6) SA (GNP).

Company. The third complaint also entails the amount of R8 942.97 which Matsepes Attorneys debited without the Masters authorization. The applicants contend that the amount of R 5000.00 actually formed part of the amount of R 8 942.97 which was the money obtained from the loan between Mr. Tiaan Wessels and the Robyn Trust. On behalf of the applicants the deponent to the founding affidavit, Mr. Noordman, stated that the monies were earmarked as the liquidators' 'administration costs' and they were in fact entitled to debit such costs at any stage without the necessity to wait until the Master had finally approved the liquidation and distribution account. In the applicants' replying affidavit it was stated that the expenses were incurred by Mr. Senekal during meetings relating to the agreements concluded with the Robyn Trust.

[45] This complaint by the Master also relates to the provisions of section 384(3) of the Act which clearly prohibits an employer of a liquidator to receive any remuneration out of the assets of the Company for services rendered in the winding-up process. A person in the ordinary employment of a liquidator or the liquidator's fellow employee may also not receive remuneration out of the assets of the Company. The question remains whether Mr. Senekal, who acted as the liquidators' attorney, could be paid for his and Mr. Haarhoff's travelling expenses to assist in the liquidation process and to explain to the family members and the employees of the Company their rights.

[46] On behalf of the Master it was submitted that the liquidators, both being attorneys, had no need to appoint an attorney to assist them with the liquidation process. The Master has raised concerns about this practice, stating that the liquidators should and could have dealt with their duties and obligations without the assistance of Mr. Senekal. Clearly there was no need to appoint Mr. Senekal and/or Mr. Haarhoff (also an employee of Matsepes Attorneys) to consult with the family members and explain their rights to them or to assist with the completion of the claim documents. Those were the functions and duties of the liquidators. As in the case of a trustee, a liquidator may appoint an agent to perform an act of administration on his behalf; but he is not allowed to delegate his statutory powers or obligations generally to another.²⁶ His attempt to have done so is

²⁶ Powell and Another v Leach and Another ; Leach and Others v Powell and Others [1997] 4 ALL SA

to be regarded as misconduct which would ordinarily justify his removal from office.²⁷

- [47] Whether Mr. Senekal travelled to the farm of the Company to consult with the family members and employees of the Company or whether he convened meetings to conclude the loan agreement, or the fees agreement or the sale agreement of the immovable property, surely those were the duties of the liquidators. None of the resolutions taken by the creditors at the second meeting authorized the liquidators to appoint an attorney to attend to the functions normally performed by a liquidator. A liquidator may not receive his remuneration or part thereof, unless the Master or the court permits same, until such account has been confirmed by the Master. The Master concluded that the liquidators should be removed from office *inter alia* due to his finding that the liquidators are no longer suitable to be the liquidators of the Company. I agree that the appointment of Mr. Senekal creates a suspicion of partiality or conflict of interest due to the fact that both the appointed liquidators and Mr. Senekal were at the time practicing as attorneys at Matsepes Attorneys. The inference that the liquidators did not act independently and their interest may have caused conflict with their duty as liquidators is not farfetched.²⁸

The fourth complaint.

- [48] The fourth complaint also concerns the sale agreement concluded between the first and second applicants, on behalf of the Company, and the purchaser of the farms on 23 November 2012. In terms of the agreement of sale the purchaser was obliged to pay commission to the estate agent calculated at 2% of the purchase price. According to the first and second applicants and due to the purchaser's unwillingness to continue with the agreement on the basis that the commission calculated at 2% be payable, it was decided to amend the agreement orally on the basis that both the purchaser and the Company will effect payment of the

106 (W) at 117 – 118 and the cases cited.

²⁷ Allan v Erlank's Trustees 1908 TS 1187 at 1192-1193 confirmed on appeal 1909 TS 303 at 306 referred to with approval by the Supreme Court of Appeal in R Miller and Others v Nafcoc Investment Holdings Company Ltd. and Others [2010] 4 ALL SA 44 (SCA) at paras 14-16; Smith & CO v Van Rensburg 1913 TPD 28 at 32 -37.

²⁸ Ma-Afrika Groepbelange (Pty) Ltd and Another v Millman and Powell NNO and Another 1997 (1) SA 547 (C) at 561 H-J.

commission to the estate agent calculated at 1% each.

- [49] On behalf of the applicants it was contended that the purchaser indicated at the last minute that it was only prepared to pay 1% commission and not the agreed 2%. The liquidators, with the consent of the family members, especially Mr. Sarel Wessels, therefore had no hesitation to decide that the Company is willing to accept the amendment of the agreement in terms of which the other 1% commission, owed to the estate agent, will be paid by the Company in liquidation. It was further contended that the decision to amend the written agreement was a business decision and to prevent the cancellation of the sale.
- [50] The Master is of the view that the amendment of the agreement resulted in a loss for the Company and less money being available for distribution amongst the *concursum creditorum* and therefore the amendment placed an additional burden on the Company. The amendment was in furthermore contrary to the non-variation clause contained in paragraph 14 of the agreement of sale. The oral amendment of the agreement of sale was also a contravention of the formalities applicable to the alienation of land.²⁹
- [51] The creditors of a company are interested parties for purposes of section 279(2) of the Act since they have a 'pecuniary or proprietary interest in the winding up'.³⁰ In general terms, the way in which the power to remove liquidators should be exercised has been set out as follows by Blackman, Jooste and Everingham:³¹ *"The general principle is that the court will remove a liquidator from office if it is satisfied on the evidence that it is against the interests of the liquidation, by which is meant all those who are interested in the Company being liquidated, that he remain in office."*
- [52] In **Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO**:³² Van Zyl J held as follows: *"It goes without saying that the removal of a liquidator is a radical form of relief which will not be granted unless the Court is satisfied that a proper case is made out therefor. In this regard it will not be sufficient merely to show that there is an apprehension or perception of bias, partiality,*

²⁹ Section 2(1) of the Alienation of Land Act, 68 of 1981.

³⁰ Master of the Supreme Court v Griffith's Trustees 1909 TS 984 at 985-986; Niewoudt v The Master 1988 (4) SA 513 (T), 528F-J.

³¹ Commentary on the Companies Act (Vol 3) Cape Town, Juta and Co: 2002, 14-313.

³² 1997 (1) SA 547 (C), 566B-E.

lack of independence or unfairness on the part of the liquidator. Nor will it suffice to establish, even prima facie, that the liquidator has not performed satisfactorily, has made questionable decisions or committed errors of judgement. This may well point to a lack of competence or experience, but will not necessarily be regarded as "good cause" justifying the removal of the liquidator. The Court is obliged to assess the conduct of the liquidator in its full context with reference to all relevant facts and circumstances. And at the end of the day it is of cardinal importance that the Court must be satisfied that removal of the liquidator is to the general advantage and benefit of all persons concerned or otherwise interested in the winding-up of the Company in liquidation. In this regard a relevant factor is the expense which will be incurred and inconvenience suffered to appoint a new liquidator for purposes of completing the work already done by his predecessor. A Court would hence be less inclined to remove a liquidator at a late stage in the winding-up process than it would be to replace him at an early stage."

[53] In adjudicating upon this aspect it is important to keep in mind that both liquidators practice as attorneys and furthermore they throughout the liquidation process, employed the professional services of Mr. Senekal who is referred to in the application as *"...a seasoned attorney who specializes in insolvencies, he may even be one of the most experienced attorneys in this field of the law in the province, if not the most"*. The first and second applicants failed to obtain the consent of the creditors regarding the refusal of the purchaser to abide by the provisions of the agreement of sale. The deponent to the affidavits filed by the applicants, Mr. Noordman contended that he does not know *"everything"* concerning insolvencies and was obliged to obtain guidelines regarding the administration of the estate from Mr. Senekal due to the *"complexity of the administration of the estate of Sebal"*. Mr. Matsepe averred in his replying affidavit that *"it was advantageous for [them] to use a colleague attorney who practiced with [them]"*.

[54] As pointed out by counsel on behalf of the Master, Ms. Wright, Mr. Senekal did not depose to an affidavit to confirm the first and second applicants' averments or to provide an explanation for his contributions regarding the winding-up of the Company. On several occasions it was stated that Mr. Matsepe did not take part in the actual administration of the estate and

according to Mr. Noordman, he obviously placed reliance on the opinion and expertise of Mr. Senekal and as such the question arises whether the first and second applicants were in fact capable and suitable to deal with the winding up of the Company. It was not contended by the first and second applicants that Mr. Senekal was appointed as their agent.³³ It was however averred that the Wessels family was satisfied with the way in which Mr. Senekal assisted with the winding-up of the Company, at least in the early stages of the liquidation process. However the good relationship did not last long and the complaints pertaining to the unsuitability of the liquidators were most likely caused by the animosity which developed between Mr. Sarel Wessels and Mr. Senekal. Prior to the hearing of the review application, Mr. Senekal withdrew as the applicants' attorney of record.

- [55] The Master further took note of the allegation made by Mr. Noordman that Mr. Senekal indicated that the books of account of the Company were in a "mess". Immediately after his appointment, the liquidator must open a book or other record wherein he shall enter from time to time a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the Company.³⁴ The liquidator's books or other records must be distinguished from the books or other documents belonging to the Company and the liquidator's books or other records may be inspected at all reasonable times by a creditor and may be required for inspection by the Master. It is not certain at which stage of the winding-up proceedings, Mr. Senekal made the discovery that the books of the Company were in "a mess", but evidently the liquidators failed to take control of and properly administer the property and affairs of the Company. As the Master indicated, the Statement of Affairs forming part of the CM100 Form, included the claim of PWC as an unsecured creditor. Therefore the allegation by Mr. Noordman, that when PWC "suddenly" presented itself as a creditor at a later stage, all the plans pertaining to the speedy and uncomplicated winding-up of the Company fell apart, is a cause for concern. Mr. Noordman obviously did not take cognizance of the claims lodged against the Company and should have investigated the affairs of the Company and made himself thoroughly

³³ *Miller v Nafcoc Investment Holding* 2010 (6) SA 390 (SCA).

³⁴ Section 391 and Section 393 of the 1973 Companies Act.

acquainted with the affairs of the Company in administering the winding-up. The same goes for Mr. Matsepe.

- [56] In **Henochsberg on the Companies Act 71 of 2008**³⁵ the authors refer to the following matter: *"In Lynn NO and Another v Coreejas and Another [2011] JOL 27992 (SCA) the Court held that a liquidator is a creature of statute, deriving his powers from the Companies Act and the Insolvency Act 24 of 1936, and may act within the bounds of those powers only. The Court went on to state that the primary objective of s 382(1) is to ensure joint liquidators act jointly, and that the second part of the section which relates to joint liability was in its view decisive."*³⁶ The second respondent was not mentioned by any of the applicants in this review. His name has not been mentioned in any of the affidavits filed in this matter nor in the correspondence with the Master. I agree with Ms. Wright's submission that it would appear that the first and second applicants and Mr. Senekal acted without the second respondent's input and assistance.
- [57] A liquidator must take all measures needed for the protection and better administration of the affairs and property of a company. The agreement of sale provided for payment of the estate agent's commission at the rate of 2% of the purchase price. The parties imposed a restriction on their own power of subsequent variation of their contract with the laudable object of achieving certainty and avoiding disputes about whether a variation has been agreed to or not by incorporating a non-variation clause in the agreement. The non-variation clause provides that no variation of any of the terms of the contract shall be valid unless in writing. Consequently any attempt to agree informally on the percentage of commission to be paid to the estate agent by the purchaser has to fail.³⁷
- [58] The applicants failed to disclose further information regarding the Robyn Trust's reasons for refusing to pay the agreed 2% commission save for alleging that the sale of the farms was placed in jeopardy. Under the prevailing circumstances one would expect that efforts would have been made

³⁵ Vol 2 at APPI - 175, the authors give a summary of the import of section 382

³⁶ Millman v Goosen 1975 (3) SA 141 (O) 145.

³⁷ Independent Picture Palaces (Pty) Ltd v Independent Film Distributors (Pty)Ltd 1936 NPD 456 at 472-474; SA Sentrale Ko-op Graanmpy Bpk v Shifren 1964 (4) SA 760 (A).

to re-negotiate payment of a lesser amount to the estate agent as a possible solution to the problem. The remedies for breach or threatened breach of contract would have included the following five possible solutions: specific performance, interdict, declaration of rights, cancellation and damages.

- [59] Taking the aforementioned facts and the first and second applicants' fiduciary duty, not only towards the Company but also to the creditors as a whole into consideration, one would have expected that a serious effort would have been made to advise the family members concerning the chances of success on claiming specific performance of the agreement. Such advice would probably have resulted in a better outcome for the Company and its creditors.
- [60] The first and second applicants' failed to provide the court with a full disclosure of the reasons for Robyn Trust's sudden objection to fulfill the terms of the agreement and all the options that were considered. The consequent absence of a satisfactory explanation for the ultimate decision by the first and second applicants and their attorney to split the 2% commission, results in an inference that the first and second applicants lost their exclusive independence in the decision making process and administration of the winding-up of the Company.³⁸

The fifth complaint.

- [61] Section 394(7) of the Act provides that a sum of money received by a liquidator belonging to a Company in liquidation should be paid into the estate bank account by the day after receipt thereof. The first and second applicants received payment of the loan in the amount of R2.500 000.00 as well as the purchase price of the farms. The Master concluded that the amount of R352 182.72 was not paid into the account of the Company on 15 February 2013 but, as depicted on the bank statement of the Company, the said amount less an amount of R 8 942.97 was transferred from Matsepes Attorneys' trust account to the estate bank account on 11 April 2013. The first and second applicants explained that, due to a misunderstanding they were not aware that the money was paid on 15 February 2013 into Matsepes Attorneys Trust account. They were only made aware of the payment of the said amount, and obviously also the transfer of the property, at a later stage.

³⁸ James v Magistrate, Wynberg 1995 (1) SA 1 (C)

- [62] The Master contends that the provisions of the Loan Agreement stipulated that the loan amount had to be paid to the liquidators. This could only be interpreted to mean that the said amount had to be paid into the estate account of the Company and not into the trust account of Matsepes Attorneys. Furthermore, the proceeds of the farms were also not paid directly into the estate bank account, but into the account of Matsepes Attorneys. This state of affairs was detrimental to the Company and the creditors. They did not benefit from any interest on the amounts so received. The Master rejected the explanation provided by the first and second applicants namely that the failure to inform Mr. Noordman that the transfer of the property was registered and payment had been received caused the liquidators to only ascertain the true facts two and a half months later.
- [63] The liquidators would have been informed that the deeds of transfer were lodged with the Registrar of Deeds and that the transfer of the property to the Robyn Trust was imminent. That is the normal procedure followed by any conveyancer. One would expect the liquidators to have kept track of the transfer process and to inform the members of the Company, the creditors and Mr. Senekal of the progress. Surely Mr. Noordman would have received regular enquiries from the “siblings” and the creditors regarding the outcome and progress of all their hard work and to ascertain as to the progress made towards upliftment of the liquidation order.
- [64] Failure to comply with the provisions of section 394(7) of the Act, may *per se* justify the removal of a liquidator by the Master under section 379(1) of the Act. The applicants did not rely on new facts in the review application. In the result, I am of the view that the approach discussed by Griesel J in **Van Zyl NO v The Master**³⁹ is applicable: “*In considering this question I bear in mind that the Master is the official entrusted by the Legislature with the administration of all insolvent estates (as, indeed, of all other estates as well), including companies in liquidation. As such the Master's rulings ordinarily deserve some deference. For this reason I would venture to suggest that where no new facts have been placed before the Court, the Court should hesitate to substitute its own opinion for that of the Master in exercising its*

³⁹ 2000 (3) SA 602 (CPD) at paragraph [20].

wide powers under 407(4)(a) of the Act unless it is clear that any particular ruling by the Master is tainted by irregularity or error.”

RELEVANT STATUTORY PROVISIONS.

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

“381. Control of Master over liquidators. –

(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 requirements 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.”

THE REMOVAL OF LIQUIDATORS

[66] Section 379 of the Companies Act 61 of 1973 regulates the removal of liquidators and provides that The Master may remove a liquidator from his office on the ground that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act.⁴⁰ The majority of creditors, or in the case of a member’s voluntary winding-up, a majority of the members of the company may request the Master in writing to remove the liquidator from office⁴¹. A further ground for the removal of a liquidator from office is that, in the Master’s opinion, the liquidator is no longer suitable to be the liquidator of the Company concerned.

[67] The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

The length of time that liquidators, under threat of removal, have been involved in the liquidation and the proximity of the conclusion of the

⁴⁰ S 379(1) (b) of the Act.

⁴¹ S 379 (1) (d) of the Act.

liquidation, are considerations of great relevance and was stressed by Patel J in **Hudson and others NNO v Wilkins NO and Others**⁴² as follows: “*What is critically important, in exercising the Court's discretion whether or not to remove the liquidators, is the length of time that has continued in the winding-up of the two companies in liquidation and the extent of the likelihood of the disruption as well as the additional expense that is likely to be incurred if new joint liquidators are to take over to complete the finalization of winding-up of Ranch Transvaal.*”

[68] In **Ma-Afrika Groepbelange**⁴³ it was held that a court should be less inclined to remove a liquidator at a late stage in the winding-up process. Both liquidators were appointed as joint liquidators in 2012 and seven years have lapsed and a substantial volume of work has already been done by them. The second respondent was appointed at a later stage during the winding-up and should be in a position to complete the task which has already been done by his co-liquidators.

[69] On behalf of the Master and the intervening parties it was argued that since Mr. Matsepe (first applicant) tendered his resignation as co-liquidator at the hearing of this review application, only Mr. Noordman (the remaining second applicant) should be removed as liquidator in accordance with the decision of the Master. The removal of a liquidator is an extreme step and may negatively impact on the reputation of a liquidator. Having regard to the animosity that developed between the intervening parties, specifically Mr. Sarel Wessels and Mr. Senekal and the loss of trust in the remaining second applicant to perform his duties and functions under the present circumstances, I agree with the decision of the Master that the second applicant should be removed from office.

COSTS.

[70] The review application was postponed on 30 August 2018. Ms. Wright, on behalf of the Master, argued that he did not cause the postponement and therefore the applicants should be ordered to pay the costs of the postponements. In my view these costs are to be costs in the review.

⁴²2003 (6) SA 234 (T), para 18.

⁴³ supra at 566E.

- [71] In so far as any of the applicants are to be held responsible for the payment of costs, the question arises as to whether they should be ordered to pay such costs in their official capacities or their personal capacities. Due to the misconduct of the first and second applicants in the performance of their duties as liquidators of the Company, it is in my view appropriate that the court shows its displeasure with their conduct by making a punitive costs order. The Company should not be burdened with the payment of any costs order. The third and/or fourth applicants are to pay any costs orders made against the first and/or second applicants, in their personal capacities.
- [72] The costs of the application for leave to intervene were reserved. Counsel on behalf of the Master argued that the application to intervene did not contribute to the adjudication of the review application and the intervening parties furthermore did not file opposing affidavits. I cannot agree with this contention. The intervening parties filed heads of argument and were represented by counsel at the hearing of the review application. From the contents of the e-mails sent by Mr. Sarel Wessels to the Master his frustration and concern for the property of the Company and the winding-up process, is evident. A conflict of interests and bitterness ensued due to a breakdown of trust in the liquidation process. The intervening parties have a direct interest in this matter, but the applicants failed to cite them as respondents. They therefore had no other option than to have filed the application for leave to intervene. Their application was consequently not only successful, but also necessary. The third and fourth applicants in their personal capacities should therefore be ordered to pay the costs of the application for leave to intervene.
- [73] The settlement reached between the intervening parties and the first and third applicant (Mr. Matsepe), does not affect the costs incurred by the Master in the review application. Even though the costs as between the intervening parties and the first and third applicants had been settled on the basis that the intervening parties and the first and third applicants will each pay their own costs, the costs of the Master in the review application are to be paid by the third and fourth applicants in their personal capacities.
- [74] The settlement agreement between the intervening parties and the first and third applicants does also not deal with the costs of the intervening parties in the review application *vis-à-vis* the second and fourth applicants. The second

and fourth applicants proceeded with the review application and unsuccessfully so. The costs of the intervening parties in the review application, in so far as those costs are not covered by the agreement between the intervening parties and the first and third applicants, are therefore to be paid by the fourth applicant in his personal capacity.

I therefore make the following order:

- [75] 1. The application for review is dismissed.
2. The third and fourth applicants (in their personal capacities) are ordered to pay the first respondent's costs of the review application, jointly and severally, payment by the one, the other to be absolved.
3. The fourth applicant (in his personal capacity) is ordered to pay the first and second intervening applicants' costs in the review application.
4. The costs of the postponement of the review application on 30 August 2018, if any, are costs in the review application.
5. The third and fourth applicants (in their personal capacities) are ordered to pay the costs of the application to intervene, jointly and severally, payment by the one, the other to be absolved.

I VAN RHYN, AJ

I concur.

C VAN ZYL, J

On behalf of the First and Third Applicant:
Instructed by:

ADV B.H. SWART SC
MICHAEL DU PLESSIS ATTORNEYS

On behalf of the Second and Fourth Applicant:
Instructed by:

MR MATSEPE
MATSEPES ATTORNEYS

On behalf of the First Respondent:
Instructed by:

ADV G J M WRIGHT
THE STATE ATTORNEY BLOEMFONTEIN

On behalf of the Second Respondent:
Instructed by:

No appearance

On behalf of the Intervening parties:
RENSBURG
Instructed by:

ADV. F. J. VAN
WILLERS ATTORNEYS