



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

31/7/13.

CASE NUMBER: 72380/2012

31/7/13.

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
03 JULY 2013	
DATE	SIGNATURE

In the matter between:

MORGAN ABATTOIR (PTY) LTD

APPLICANT

AND

THE MASTER OF THE HIGH COURT
PRETORIA N.O

FIRST RESPONDENT

MARI HAYWOOD N.O

SECOND RESPONDENT

CONRAD ALEXANDER STARBUCK N.O

THIRD RESPONDENT

SAMUEL MOTSHWANE NKOADI N.O

FOURTH RESPONDENT

FIRST NATIONAL BANK N.O

FIFTH RESPONDENT

JUDGMENT

MAVUNDLA J;

- [1] The applicant approached this Court in terms of section 11 of the *Insolvency Act*, Act 24 of 1936 ("the Act") read with Section 339 of the *Companies Act*, Act 69 of 1973 for an order to set aside the first Respondent's decision to dismiss an objection filed by the applicant against the first Liquidation and Distribution Account in the insolvent estate of *Tshwane Meat Traders (Pty) Ltd* in (liquidation).
- [2] Only the fifth respondent (First National Bank) opposed the application and therefore costs are only sought against the fifth Respondent.
- [3] The applicant was the creditor in the estate of *Tshwane Meat Traders (Pty) Ltd* which was wound-up by this Court on 19 July

2011. The basis for the winding-up was the fact that it was unable pays its debt.

[4] The applicant is a creditor in the estate of *Tshwane Meat Traders (Pty) Ltd* in the amount of R1 683 160. 08. The debt arose from meat products sold and delivered to *Tshwane Meat Traders (Pty) Ltd*. The applicant duly submitted its claim with the second respondent after liquidation of *Tshwane Meat Traders (Pty) Ltd* and the concurrent claim was admitted by the first respondent in the amount of R1 683 160. 08

[5] Various other creditors also submitted claims, including the fifth respondent who filed a claim as a secured creditor in the amount of R732 564. 89. The fifth respondent relied on a cession of debts to establish a secured claim in the estate, as per annexure "JM3".¹

¹ This annexure at paginated page 49 and signed on 11 August 2008 provided, *inter alia*, that the applicant as cedent pledged and ceded its debts in favour of the fifth respondent with effect from date of signature of the Deed as security for the due and proper performance and discharged of the Secured Obligations.

[6] Before liquidation, *Tshwane Meat Traders (Pty) Ltd* received various payments from debtors in their bank account held at a branch of the fifth respondent. On 8 July 2011 *Tshwane Meat Traders (Pty) Ltd* paid an amount of R1 062 132. 15 from their account into the trust account of Vorster Attorneys. A further amount of R700 000. 00 was paid to Blue Sky Trust on the 8th of July 2011. Subsequent to these payments and on 19th of July 2011 *Tshwane Meat Traders (Pty) Ltd* was liquidated by this Court.

[7] At the time of liquidation, *Tshwane Meat Traders (Pty) Ltd* was indebted to the fifth respondent in the amount of R732 564.89 reason being that their bank account was overdrawn in such amount. *Tshwane Meat Traders (Pty) Ltd* had no overdraft facility with the fifth respondent at the time. The liquidators of *Tshwane Meat Traders (Pty) Ltd* (Second to fourth respondents) claimed back the money from Vorster Attorneys and reflected the amount obtained from the attorneys as debt collected and further reflected such payment in the first Liquidation and Distribution Account as payment subject to the fifth respondent's security.

[8] The applicant, in its papers, contended that it did not know what the reason for the above mentioned payment into the trust account of Tshwane Meat Traders' attorneys was. The liquidators claimed the money back from the mentioned attorneys who in fact transferred it to the liquidators. The liquidators reflected the funds collected from Vorster Attorneys' trust account as a collection of a debt subject to the fifth respondent's security, which the applicant objected to.

[9] The fifth respondent dismissed the applicant's objection and ruled as follows:

"Cession of debtors form part of the First National Bank's security and has been proved as such at a second meeting of creditors.

Vorster Attorneys still owed the money in trust to the company in liquidation.

Vorster Attorneys repaid the company in liquidation, upon request, without any objection.

It is the conclusion of the Master that a valid cession of debtors existed between First Rand Bank and the company in liquidation, which all recoveries of any amounts from such debtors, fell within this cession agreement.

All moneys recovered from Vorster Attorneys will be deemed to fall so forth within the ambit with this cession agreement.” It is this decision the applicant seeks that it be reviewed.

[10] The applicant in its papers contended that the money obtained from Vorster Attorneys should have been dealt with in the Liquidation and Distribution Account as an asset not subject to the security of the fifth respondent and that this amount should have been available for distribution between concurrent creditors of the Tshwane Meat Traders. It was further contended that the fifth respondent was not entitled to rely on its security for purposes of the money obtained from Vorster Attorneys and should at most have shared in the relevant amount together with concurrent creditors of the estate.

[11] The crisp question to be answered is whether money held by a person or entity’s attorney on his or trusts account is in fact a debt owed by the attorney to the client. The further question is whether the fifth respondent has a preferent claim regarding such monies.

[12] It was submitted on behalf of the applicant that when a client pays money into the trust account of his/her attorney, ownership of the money does not pass to the attorney and the attorney does not become a debtor of the client. The attorney is the agent and controls the money of and on behalf his client; relying on the decision of *EDS South Africa (Pty) Ltd v Nationwide (Pty) Ltd & Others*.² The money in the attorney's trust account does not belong to the attorney but to the client. The attorney has no other rights to the funds than to comply with the instructions given by his client, vide LAWSA Volume 14(2), par 207. The money is held for another person and for a specific purpose and may be utilised for such purpose; vide *Incorporated Law Society, Tvl v. U*.³ The interest earned by the attorney in respect of the money in his trust account, does not accrue to the attorney but to the Law Society. In this regard reliance is made on s78 (7). It was further contended that the money received from Vorster Attorneys should have been reflected in the *Liquidation & Distribution Account* as an asset rather than a debt.

² 2011 (5) SA 158 (SCA), par [14] and [15].

³ 1964 (2) SA 243(T) 247C-D.

[13] It is indeed correct that the attorney is an agent of his client and the moneys he holds in the trust account do not belong to him but to his client/s. The relationship between the attorney and client is sui generis. However, with regard to the money held in trust account by the attorney, the position is regulated by statute. In this regard it is apposite to cite in full from the matter of *Incorporated Law Society, Transvaal v Visser & Others*⁴ where it was held that:

“Under common law money in the possession of an attorney enjoys no special protection in the event of the death or insolvency of the attorney, because an obligation to pay money gives rise to a personal right and not a real right and such personal right gives no preference over other creditors. During the depression it became necessary for the benefit of trust creditors to protect trust moneys in the hands of attorneys, and sec 33 of the Act was enacted which provided, *inter alia*, that the amount standing in the credit of a trust account in a bank (a) was not liable to attachment at the instance of the ordinary creditors of the attorney, that is to say, creditors other than the persons on whose account the money is being held or has been received by the attorney, and (b) did not form part of the estate of the attorneys to be administered in case of his death, insolvency, or the assignment of his estate. In 1956 this part of the section was amended by sec 17 of Act 18 of 1956, but as it affects the wording of the section more than its content, I shall not refer to it.”

⁴ 1958 (4) SA 115 (TPD) at 131H-132A.

[14] Act No. 18 of 1956, just like all previous Acts governing the attorneys' profession, has since evolved to the current *Attorneys Act No 53 of 1979*. In this regard it is apposite to refer to the matter of *Ex Parte Law Society, Transvaal: In Re Hoppe and Visser*⁵ where Grosskopf J (as he then was) held that:

"In the case of *Fuhri v Geyser* 1979 (1) SA 747 (N) at 750D the court held that

'the effect of the exclusion from an attorney's assets of the moneys in his trust account in terms of s33(7) (s78(7) of the present Act) is that there is a fund which is available for distribution amongst creditors but which does not form part of the estate, which is beyond the reach and control of trustee and which accordingly is not available for distribution among the general body of creditors'.

[15] Section s78 (7) of the Attorneys Act, Act No 53 of 1979 ("the Attorneys Act") provides as follows:

"7. No amount standing to the credit of any practitioner's trust shall be regarded as forming part of the assets of the practitioner or may be attached on behalf of any creditor of such practitioner: provided that any access remaining after payment of all claims of person whose

⁵ 1987 (2) SA 773 (TPD) at 780B-F.

money has, or should have been deposited or invested in such trust account, and / or claims in respect of interest on money so invested, shall be deemed to form part of the assets of such practitioner.”

[16] in the matter of *Fuhri v Geyser*⁶ (confirmed by the Full Bench in *Geyser v Fuhri*⁷) the court considered the question whether a trust creditor of an attorney whose estate had been sequestrated and in whose trust account there was a deficiency, was entitled to prove a claim against the insolvent estate for the full amount owing to him. the court held that:

- (a) despite the separation of trust moneys from an attorney's assets thus effected by s78 (7), it was clear that trust creditors have no control over the trust account: ownership in the money in the account vests in the bank or other institution in which it has been deposited, and it is the attorney who is entitled to make withdrawals from it.
- (b) the only right to payment by the attorney of whatever is due to them, and it is to that extent that they are the attorney's creditors.

⁶ 1979 (1) SA 747 (N).

⁷ 1980 (1) SA 598 (N).

- (c) when an attorney receives an amount of money for the account of a client, a debt immediately arises (subject to any agreement that may exist between the parties) for payment of that amount to the client, or, viewed from client's side, the latter becomes entitled to payment of the amount on demand.

[17] The money in the trust account of an attorney is not an asset, because the money vested with the bank or any institution it was deposited into. The attorney only has a right to operate the trust account, to direct the bank what to do with the money; *vide Wypkema v Lubbe*;⁸ *vide also Ormerod v Deputy Sheriff, Durban*.⁹

[18] *In casu*, *Tshwane Meat Traders (Pty) Ltd* was wound-up on 19 July 2011 on which date "*concursum creditorum* was automatically instituted". In *Mondi Limited v Rhodes*¹⁰ Meskin J held that:

"It has long been the law, and the Legislature must be taken to know, that upon sequestration of a debtor's estate a *concursum creditorum* is automatically instituted (see *Walker v Syfret NO* 1911 AD 141 at 166 and

⁸ 2007 (5) SA 138 (SCA) at 141C-142C (paras [4] –[6].

⁹ 1965 (4) SA 670 (D & CLD) at 673D-E.

¹⁰ 1997 (3) ALL SA 291 (D) at 298f-g.

numerous subsequent cases). The effect of this, in the words of Goldstone AJA (as he then was) in *Incedon (Welkom) Pty Ltd v Qwa Qwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 803, is that “As between the estate and the creditors and as between the creditors *inter se* their relationship becomes fixed and their rights and obligations become vested and complete.”

Section 20(1) (a) of the Act provides:

“The effect of sequestration of the estate of an insolvent shall be—

To divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him.”

Meskin J further referred to the definition of “sequestration order in s2 of the *Insolvency Act* 24 of 1936 and held that:

“The *concursum creditorium* cannot operate at all unless (i) the debtor is divested of his estate, which, in terms of section 20(1)(a), is the effect of the provisional order, and (ii) there is no alteration in this situation except where the *rule nisi* is discharged; for, if the estate remains vested in the debtor, he may alter it by e.g. making dispositions of his property, incurring further liabilities, paying certain creditors and not other.”

- [19] *Tshwane Meat Traders (Pty) Ltd* paid an amount of R1 062 132.15 from their account into the trust account of Vorster Attorneys 8th of July 2011. A further amount of R700 000.00 was paid to Blue Sky Trust on the 8th of July 2011. These payments from the account of *Tshwane Meat Traders (Pty) Ltd* were made: (i) not

more than two years before winding-up;¹¹ (ii) within two years of the winding-up;¹² was therefore a disposition without value and stood to be recovered by the trustees. The money also stood to be recovered for being a voidable preference for having been paid out within six months of the winding-up.¹³ There was no indication from the papers that Vorster Attorneys were the creditors of *Tshwane Meat Traders (Pty) Ltd*. The trustees could also have recovered the payment from the former in terms of s30 if the payment was done with the intention of preferring them above other creditors, or 31 if it were to be shown that the payment was a collusive disposition. In my view, the money was quite correctly repaid to the trustees by the Vorster Attorneys.

[20] It is common cause that Vorster Attorneys repaid this amount to the trustees who in turn reflected it as a debt in the Liquidation and Distribution Account. In the matter of *Ormerod v Deputy Sheriff, Durban*¹⁴ it was held that: “The legal relationship between a banking institution and its customer whose account with it is in credit is that of debtor and creditor; although the customer “deposits” money to the credit of his account with the bank, the transaction is not one of *depositum*, but of

¹¹ S26(1)(a) of the Insolvency Act.

¹² S26(1)(b) of the Insolvency Act.

¹³ Section 29 of the Insolvency Act.

¹⁴ 1965 (4) SA 670 (d & C.L.D.) at 673D-F.

loan without interest. *White v Standard Bank*, (1883) 4 N.L.R 88 at pp. 91, 92. The customer is a creditor who has a claim against the bank in the sense that he has a right to have it make payments to him, or to his order, on cheques drawn by him up to the amount by which his account is in credit. *Duba and Others v Ketsikili and Others*, 1924 E.D. L. 332 at p.341; *Estate Ismail v Barclays Bank* 9D.C.7 O.), 1957 (4) SA 17 (T) at p. 26.” In my view, this legal position similarly applies where a client who pays money into the trust account of an attorney. Axiomatically the same position applies between the attorney and the bank in regard with the amounts held in the trust account of the attorney. In my view, the trustees of the wound-up estate of *Tshwane Meat Traders (Pty) Ltd*, were correct in reflecting the amount received from Vorster Attorneys in the Liquidation and Distribution Account as a debt. Besides, this issue stands so decided and approved by Full Bench in *Geyser v Fuhri*¹⁵ and recognised by the Supreme Court of Appeal in the matter of *Wypkema v Lubbe*.¹⁶ It stands to reason that the decision of the Master in confirming the classification of the relevant amount as a debt cannot be faulted nor disturbed. The applicant stated that he did not know why the money was paid to Vorster Attorneys. There is no room to find that an agreement between *Tshwane Meat Traders (Pty) Ltd* and

¹⁵ Supra.

¹⁶ Supra.

Vorster Attorneys resulted in the form of attorney stakeholder or agent in relation to the funds held by the said attorneys, as envisaged in the *EDS SA v Nationwide Airlines* (supra). In the latter matter it was held that a stakeholder agreement is based on a contract to which the attorney stakeholder must be a party in addition to the other parties to the stakeholding. A stakeholder is not the agent of any of the other parties to the stakeholding. Absent an agreement of stakeholding, the attorney holds the funds as agent, so that they remain under control of the party which transferred the funds.

[21] With regard to the second issue to be decided, whether the fifth respondent has a preferent claim regarding such monies. It is common cause that the fifth respondent submitted his claim based on the relevant cession. It would seem that the fifth respondent proved its claim during the first meeting of creditors and the Master confirmed it.

[22] In *Field NO v Standard Bank Ltd*¹⁷ it was held that book debts are those debts connected with the business of the insolvent, which would normally be included in the books of account of the estate

¹⁷ 1979 (4) SA 451 (ZR) at 544F.

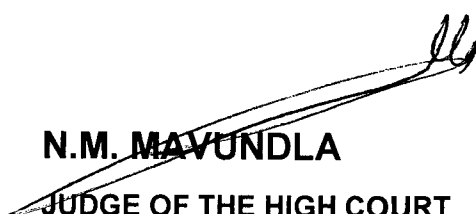
of the insolvent and acquired in the course of the running of the Insolvent's business.

[23] The trustees were obliged to recover the insolvent's debts and pay the entire secured creditor's proven claim. In my view, the fifth respondent was a secured creditor who looked upon, for its payment of the insolvent's debt, on the cession of its debts and therefore had a preferential claim over concurrent creditors¹⁸; I have not been persuaded that the Master was incorrect in his conclusion "that a valid cession of debtors existed between First Rand Bank and the company in liquidation, which all recoveries of any amounts from such debtors, fell within this cession agreement."

[25] In my view the application stands to be dismissed with costs including costs of senior counsel. The employment of senior counsel was justified *in casu*.

[26] In the result the application is dismissed with costs such costs to include the costs of employing the services of senior counsel.

¹⁸ *Vide National Bank v Cohen's Trustee* 1911 AD at 248, *Trust Bank of South Africa Ltd v Standard Bank of SA* 1968 (3) SA 166 at 189A-C; *vide Bank of Lisbon and South Africa Ltd v Master and Others* 1987 (1) SA 276 at 294H-I.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 06 JUNE 2013

DATE OF JUDGMENT : 03 JULY 2013

APPLICANT'S ATT : HOTANE SNYMAN & TALJAARD INC.

APPLICANT 'S ADV : ADV. J. CILLIERS S.C.

1st RESPONDENTS' ATT : RORICH, WOLMARANS 7 LUDERITZ INC.

1st RESPONDENTS' ADV : D.M. LEATHERN S.C.