

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 5057/2011

In the matter between:

FOIL LAMINATORS CC
UNIVERSAL VENEERS CC
ESENCO 1006 CC

First Applicant
Second Applicant
Third Applicant

and

THE MASTER OF THE HIGH COURT
TSIU VINCENT MATSEPE N.O.

First Respondent
Second Respondent

JUDGMENT BY: KRUGER, J

HEARD ON: 1 MARCH 2012

DELIVERED ON: 9 MARCH 2012

INTRODUCTION

[1] This is an application in terms of section 408 of the 1973 Companies Act read with section 66 of the Close Corporations Act 69 of 1984 for the setting aside of the Master's Confirmation of the First and Final Liquidation and Distribution Account ("the Account") in respect of the insolvent estate of Rendus Timbers CC ("Rendus"). The first respondent is herein referred to as the Master. The second respondent is the duly appointed liquidator of

Rendus. The applicants also seek an order that the said liquidation and distribution account be re-opened as contemplated in section 408.

- [2] The Master abides the decision of the court. The Master filed a report wherein he says that the account lay open for inspection at his office from 28 August 2009 to 14 September 2009, and during that period no objections were lodged. On 7 June 2010, the first applicant lodged an objection to the account on the basis that the second respondent had not convened an interrogation to deal with certain undue preferences and other issues. The Master rejected this objection after the second respondent informed him that he was going to proceed with litigation. The second respondent wrote to the Master that litigation could “take quite some time to finalise”, and stated that there was no need to hold over confirmation of the Account, because after completion of the litigation a Second Liquidation and Distribution Account could be drawn. The Master confirmed the Account on 15 March 2011.

THE LAW

- [3] Section 407(4)(a) of the Companies Act provides that a person aggrieved by a decision of the Master to refuse an objection may apply to court for an order setting aside the Master's decision within 14 days after the date of the Master's decision. That 14-day period expired on 29 March 2011. The present application was launched on 21 November 2011, some eight months out of time.
- [4] The court can condone the late bringing of the application where the reason for the delay is satisfactorily explained. All that is required is substantial compliance (**CASSIM v THE MASTER AND OTHERS** 1960 (2) SA 347 (D) at 349D – 350D). The provisions as to the 14-day period are not peremptory and prejudice is considered (**LEIMAN v LIEF NO** 1958 (1) SA 376 (T) at 378A – E).
- [5] Where a dividend has been paid the account cannot be reopened. It appears that the receipt of property by the applicants from the insolvent should not be regarded as a dividend; the applicants say they merely vindicated their

property, it was not a dividend. Actual payment of a dividend is required before it can be regarded as paid (**WISPECO (PTY) LTD v HERRIGEL NO AND ANOTHER** 1983 (2) SA 20 (C) at 26F – 27B, 27H).

- [6] The applicants have to establish fraud or *justus* error to have the Account re-opened (**CRONJE NO AND OTHERS v HILLCREST VILLAGE (PTY) LTD AND ANOTHER** 2009 (6) SA 12 (SCA) par 37).

THE FACTS

- [7] In September 2008 the second applicant, Universal Veneers CC launched a liquidation application against Rendus Timbers CC trading as Timbaboard Bloemfontein (“Rendus”). A provisional liquidation order was granted on 9 October 2008, and a final order on 20 November 2008.
- [8] According to what is set out in counsel’s opinion dated 23 December 2010, for the period ending 31 July 2008, Rendus had four major creditors, which it owed the amounts stated below:
- (i) First applicant, Foil Laminators CC – R684 813,00

- (ii) Second applicant, Universal Veneers CC – R1 145 830,00
- iii) Third applicant, Esenco 1006 CC – R58 160,00
- iv) Sonae Novaboard – R253 097,00.

[9] According to the First and Final Liquidation and Distribution Account, the applicants were not paid the following amounts:

- (i) First applicant – R657 526,17
- (ii) Second applicant – R405 453,82
- (iii) Third applicant – R48 072,20
- (iv) Sonae Novaboard was settled in full during the six-month period prior to the liquidation of Rendus.

[10] During the period July 2008 to September 2008 Rendus paid R438 006,26 to Sonae Novaboard. During that same period no payments were made to first and third applicants. The second applicant received R600 000,00 in that period. The second applicant, Universal Veneers, was the largest creditor at the end of July 2008.

[11] On 10 May 2009 the second respondent, the liquidator,

certified the First and Second Liquidation and Distribution Account.

[12] On 22 April 2010 the second respondent addressed a letter to the first applicant, stating (incorrectly) that the Liquidation and Distribution Account had been confirmed by the Master, demanding payment of a contribution by first applicant of R81 460,07.

[13] On 1 June 2010, first applicant's attorney lodged an objection to the Account with the second respondent because an interrogation to deal *inter alia* with undue preferences had not been convened.

[14] On 22 June 2010, the second respondent informed the Master of the objection, and stated that an enquiry was to be held. He stated that the interrogation would have no effect on the dividend.

[15] In a letter, dated 13 July 2010, the first applicant informed the Master that it persists with its objection.

- [16] The interrogation was apparently held on 26 July 2010.
- [17] On 10 August 2010, the second respondent informed first applicant's attorney that the inquiry had been finalised and requested payment of the account of "Blue Platinum", which evoked the response on 20 August 2010 as to who "Blue Platinum" was.
- [18] On 23 August 2010, the second respondent requested the confirmation of the first applicant that he could proceed with the confirmation of the account.
- [19] On 23 August 2010, the second respondent informed first applicant's attorney that Blue Platinum were forensic auditors.
- [20] On 25 August 2010, the Master requested counsel's opinion on undue prefaces.
- [21] On 5 November 2010, the second respondent asked the Master to confirm his account pending counsel's opinion.

- [22] On 15 March 2011, the Master confirmed the Account.
- [23] On 10 May 2011, the second respondent informed first applicant's attorney that the Master had confirmed the Account and requested payment of the contribution within seven days.
- [24] On 23 June 2011, first applicant's attorney informed the second respondent that his Liquidation and Distribution appeared to be incorrect for a number of reasons. (This can be called the second objection.)
- [25] On 21 November 2011, the applicants launched the present application for review.

APPLICANT'S CONTENTIONS

- [26] The applicants want the second respondent to first claim the amounts from Sonae Novaboard before the Account is confirmed by the Master. Mr Williams says that the claim against Sonae Novaboard is an asset in the estate, and the Account should not have been confirmed whilst claims with a prospect of success are contingent claims in the estate.

Applicants are the only proven creditors. It will be prejudicial to them to have to pay a substantial contribution of R81 460,07 at this stage, only to be reimbursed at a later stage when litigation against Sonae Novaboard has been finalised. The second respondent's prejudice is that he will have to wait for payment of his fees.

SECOND RESPONDENT'S CONTENTIONS

[27] Mr Gilliland, for the second respondent, says that the applicants have not satisfactorily explained their delay. He points out that at best for the applicants by 10 May 2011 they were apprised of the fact that the Master had confirmed the account. Instead of approaching the court, they raised new objections. The applicants' case is that they were not made aware that the Account was laying for inspection with the Master, after their attorney had lodged complaints.

CONDONATION

[28] It is common cause that this application is some eight months out of time. There is no prayer for condonation. Mr Gilliland refers to the following dates:

- (i) 23 December 2010: Counsel's opinion obtained, stating that there is a claim against Sonae Novaboard.
- (ii) 15 March 2011: Liquidation and Distribution Account approved by the Master.
- iii) 23 June 2011: Applicants' attorneys write to the second respondent and state that his Liquidation and Distribution Account is incorrect, *inter alia*, because the second respondent's fees have been calculated incorrectly. (Mr Gilliland describes this as the second objection, the first having been the objection that no inquiry was held).
- iv) 25 July 2011: Second respondent informs applicants' attorney that the Master confirmed the Account on 15 March 2011. (This is the latest date on which the applicants were aware of the confirmation of the Account).
- v) 21 November 2011: This application is launched.

[29] In the Founding Affidavit, the applicants do not address the delay from July to November 2011 in bringing the application. Mr Williams does not deal with the late

bringing of the application.

MERITS

[30] On the merits, Mr Gilliland says that there are only three creditors in this insolvent estate, being the three applicants. After the litigation against Sonae Novaboard, they will still be the only three creditors, therefore the percentage of their dividend will not change although the quantum thereof may be different. Mr Williams disagrees. He says if the second respondent succeeds in the claim against Sonae Novaboard, the latter then becomes a creditor in the insolvent estate and can put in a claim. That claim would influence the dividend.

CONCLUSION

[31] The facts of this case are unusual. The applicants say that the second respondent is just keen to get his fee, that is why he asked the Master to confirm the Account. They say it is undesirable to confirm the Account if it has not been finalised. The second respondent says the applicants only started raising problems when he demanded payment of a contribution so that his fees could be paid. And even then they still delayed for eight months before bringing this

application.

[32] The applicants bear the onus to convince the court that they are entitled to the relief they seek. Their first problem is the unexplained delay in bringing this application – eight months is a substantial period.

[33] This is in fact an application to review the Master's decision to confirm the Account. The Master knew of the pending litigation against Sonae Novaboard when he took the decision to confirm the account. He accepted the second respondent's suggestion that at a later stage, if need be, there could be a Second Liquidation and Distribution Account. Courts are reluctant to interfere with the exercise of discretion by a specialised official.

[34] The fact that the Master abides the decision of the court does not assist the applicants. It is the proper attitude of the Master not to become involved in disputes between the parties.

[35] The delay of the applicants in bringing the application is

unexplained, and their prejudice in having to pay a contribution now is not of such a nature as to call for the re-opening of the account.

[36] The application is dismissed with costs.

A. KRUGER, J

On behalf of the applicants:

Adv. A. Williams
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of the second respondent:

Adv. J G Gilliland
Instructed by:
Matsepes Inc
BLOEMFONTEIN

/EB