

Verslagwaardig:	JA / NEE
Sirkuleer Aan Regters:	JA / NEE
Sirkuleer aan Streeklandroste	JA / NEE
Sirkuleer Aan Landdroste:	JA / NEE

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Saakno: / Case number: **631 / 2011**
Datum verhoor: / Date heard: **30 / 04 / 2012**
Datum gelewer: / Date delivered: **08 / 06 / 2012**

In the matter between:

ANASAFON (PTY) LTD
DIAMOND CORE RESOURCES (PTY) LTD

1st Applicant
2nd Applicant

and

**THE MASTER OF THE NORTHERN CAPE DIVISION
OF THE HIGH COURT
BRIAN ST CLAIR COOPER
JOHAN ENGELBRECHT
VINCENT MATSEPE
GARY BOTHA
CHRIS EDLING
JOHN WALKER**

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

***Coram:* Hughes-Madondo AJ**

JUDGMENT

HUGHES-MADONDO AJ

1]The applicants seeks the following order:

1. Interdicting the first respondent from:-

1.1 Confirming the accounts of the second to seventh respondents, and/or any other person asserting a right or entitlement to recover fees arising out of the administration and/or liquidation of the second applicant while in liquidation;
alternatively

1.2 Determining the administration fees and expenses of the second to seventh respondents, and any other person asserting a right or entitlement to recover fees arising out of the administration and/or liquidation of the second applicant while in liquidation.

2. Declaring that:-

2.1 After 27 September 2010, being the date on which the winding up of the second applicant was set aside, the Master has no power or authority to confirm any accounts submitted in the estate of the second applicant; and, the Master has no power or authority to determine the fair and

reasonable administrative fees and expenses of the joint liquidators, or any other person asserting a right or entitlement to recover fees arising out of the administration of the second applicant while in liquidation.

2.2 The Master's determination of the fair and reasonable administrative fees and expenses dated 1 September 2010 constitutes the determination contemplated in paragraph 5 of the Court Order dated 27 September 2010, a copy of which is annexed to the founding affidavit as annexure ST1 "the Court Order";

2.3 The second to seventh respondents and any person asserting a right and entitlement to recover fees or expenses arising out of the administration of the second applicant while in liquidation, entitled to the fair and reasonable fees, jointly and severally, as a *negotiorumgestor* for the second applicant while in liquidation.

2.4 In the absence of agreement between the parties, the recovery of such fees is to proceed by way of action against the second applicant.

3. Ordering the second to seventh respondents to

provide an accounting, including a detailed report of all activities undertaken as agents for the company in liquidation, within 3 months of the date of this order, to the second applicant of their administration of the company while in liquidation; and/or their conduct in relation to the second applicant while in liquidation.

4. Directing that the funds standing to the credit of the account of Savage Jooste & Adams, and contemplated in paragraph 7 and 8 of the Court Order, remain in trust pending the outcome of the proceedings foreshadowed in paragraph 2.4 above: provided that the proceedings foreshadowed in paragraph 2.4 are instituted within 30 days of the date of this Order, failing which the fees are to be paid to the second to the seventh, jointly and severally.

5. Ordering such respondents who oppose this application to pay the costs thereof.

2]At the commencement of these proceedings the 2nd and 3rd Respondents sought that the matter be postponed *sine die* with costs reserved. One of the arguments tendered for seeking the postponement is that, on the advice of senior counsel the

respondents appreciate that they now need to file an answering affidavit to the main application, as they had failed to do so following the advice of their attorney. A further issue was that of insufficient security paid in by the applicants, this aspect needs to be canvassed in their answering affidavit of the main application. There is also the aspect of the respondents advising the applicants on 20 April 2012 that they would be seeking an adjournment. On 23 April 2012 the applicants responded by "*demanding a formal application for the postponement of the matter be launched*" [see paragraph 18 of respondents affidavit dated 26 April 2012 in support of the postponement of this application].

3] The starting point in dealing with an application for a postponement is what was said in **National Police Service Union v Minister of Safety and Security 2000 (4) SA 1110 (CC) at 1112-1113**, that a postponement is not claimed as a right since the applicant requesting the postponement seeks an indulgence from the court, the court must be satisfied that it would be in the interest of justice to do so. Also see **Persadh v General Motors South Africa (Pty) Ltd 2006 (1) SA 455 (SE) at 459** where Plasket J articulated the principles applicable when dealing with

an application for a postponement:

"First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained; where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs."

4] From the outset when the respondents indicated that they would be applying for a postponement they were informed that they should proceed with a formal application. The affidavit in support of the respondent's application for a postponement is scanty to say the least. Armed with the knowledge that there would be opposition from the applicants as they persisted that a formal application be brought, the

respondent's should have taken the time and effort to ensure that their affidavit had sufficient facts and particularity in order for this court to consider. These facts and particularity are necessary to inform and prepare the applicant for the case that they have to meet.

5] To my mind the reason set out in the respondents' affidavit is lacking and weak, to illustrate but a few examples: no date is supplied to indicate when exactly the advice from senior counsel was received; what steps did they take to alert the applicants of their intention to file an answering affidavit which would have been out of time; as answering affidavit would have been out of time, no mention is made of the steps taken to launch the application for condonation; the respondents became aware of the fact that the security filed by the applicants might be insufficient as far back as "*early part of 2012*", nothing is advanced by the respondents as to why they stalled in setting out the security issue in supplementary papers in the main application; although the respondents state that they will be prejudiced nothing is set out in their papers for this court to consider; and lastly, they seek the postponement to an indefinite period without even tendering the wasted cost occasioned by the

postponement sought.

6]In light of the above and the law applicable, **the application for a postponement is refused.**

7]I now turn to deal with the application for an interdict and declaration sought by the applicants.

8]The subject matter of the order sought by the applicant's, centres around the order made on 27 September 2010 ("the Order"). I set out the pertinent paragraphs of this order below:

1. THAT the rule nisi set out in paragraph 1.1 of the order dated 18 June 2010 under case number 318/10 granted by His Lordship Mr Justice Majiedt [the "section 354 order"] is confirmed;
2. THAT the remaining orders granted in terms of the section 354 order are discharged.
3. THAT second Respondent hereby withdraw their opposition to the section 354 application [the "application"];
4. THAT the Applicant ["Ansafon"] pays the Second Respondents taxed or agreed costs on a party

and party scale, including the costs of two counsels in respect of this application.

5. THAT Ansafoḡ pay the fair and reasonable administration fees and expenses of the second Respondent as determined by the Master of this court, but subject to review and subsequent appeal, if any;
6. THAT as security for the costs and expenses set out in paragraph 4 and 5 above, it is recorded that Ansafoḡ has paid an amount into the trust account of its attorney of record, Klagsbrun & de Vries Inc. ["Klagsbruns"], of **R6 309 750.00** **R2 000 000.00** of this amount shall be paid into the first Respondent's bank account to liquidate or partially liquidate the overdraft in the name of the first Respondent at ABSA Bank in Pretoria within two days of the second Respondent providing Klagsbruns with the relevant banking details. This payment shall be made without any admission of liability but will be subject to the taxation referred to in paragraph 5 hereof;
7. THAT the remainder of the aforesaid amount, namely R4 309 750.00 shall be transferred into the trust account of the firm Savage Jooste &

Adams within 2 days of date of this order, which amount is to be invested in the name and for the benefit of the second Respondent in terms of section 78 (2) (A) of the Attorneys Act;

8. THAT Savage Jooste is instructed to disburse the funds so held by them upon agreement between the parties, alternatively upon determination by the Master, or the court as the case may be, of the amount due to the second Respondent immediately;

9. THAT should the aforesaid amount of R6 309 750.00 referred to above is insufficient to meet Ansafo's obligations in terms of paragraphs 4 and 5 above, then the first Respondent make good any shortfall in this regard.

9]After the order was granted the respondent's submitted their liquidation account in terms of this order on or about the 31 March 2011. These accounts total an amount of R32 587 125.35.

10]In the order Ansafo had to pay the fair and reasonable administration fees and expenses of Diamond Core Resources (Pty) Ltd as determined by the Master, but subject to review and appeal, if any. At this juncture I would like to mention that paragraph

2.2 of the order seeks the Masters determination of 1 September 2010 to constitute the determination contemplated in paragraph 5 of the order.

11] The Masters determination of 1 September 2010 reads as follows:

"Masters Determination Of Amount Of **Security** Required For The Fair And Reasonable Administration Fees And Expenses (Heading)

1. In terms of paragraph 2.2 of the Order of Court dated 18 June 2010, and after considering various representations from the liquidators and the applicant, I hereby determine the amount of **security** to be provided by the applicant in respect of the fair and reasonable administration fees and expenses of the joint liquidators relating to the administration of the estate of Diamond Core Resources (Pty) Ltd (in liquidation) to be the sum of R11 309 750.00 (see annexure). **[My Emphasis in Bold]**
2. This is not a usual taxation by the Master of the liquidation fees nor is it a litigation taxation with formal bills of cost usually drawn by cost consultants."

12] The Master's determination of security was issued in

terms of an order dated 18 June 2010. Paragraph 2.2 deals with providing "security...in respect of: the fair and reasonable administration fees and expenses of the joint liquidators relating to the administration of the first respondent (being Diamond Core Resources (Pty) Ltd, in that case) as determined by the Master" before the return date. [**Para 2 2.2 of the order dated 18 June 2010**]

13] The Master considered various representations and the request made of the joint liquidators dated 4 August 2010 [**see Annexure FA4 page 31 to the applicant founding affidavit**]. The Master in his report states categorically that the determination of security that he made does not involve the usual taxation of the liquidation fees and neither litigation taxation.

14] At this point I propose to refer to the Concise Oxford English dictionary to ascertain the meaning of **security**, one of the meanings pertinent to this case scenario is that it is "*a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default.*"

15] As the Master's determination was for the provision

of security, this security was a deposit or pledged as a guarantee, which was required to be made before the return date. This was clearly not the 27 September 2010 when the order was issued. I do not agree that the determination of the 1 September 2010 may be ascribed to the determination required in terms of the order.

16] In the Master's report dated 15 April 2011, in respect of this application, he clearly states that he was complying with his duties in terms of the court order when he accepted the joint liquidator's accounts to determine the fair and reasonable administration fees and expenses. I agree with the Master.

17] The liquidation as it was set aside allows for an accounting and payment of the work done during the liquidation period. The joint liquidators are thus entitled to be paid in terms of Section 384 of the Companies Act no 61 of 1973. More so in this instance as it was ordered on 27 September 2010. **See Henochsberg on Companies Act Vol. 1 at page 812**, *"Where a provisional winding-up order is discharged a provisional liquidator is entitled to payment by the company of his remuneration as such (cf Van Eck v Meyer 1964 (4) SA 609 (GW))"*.

18]As alluded to above, I agree with the Master, that he wouldbe performing his duties in terms of a court order.This is how the Master and the respondent's interpret the order, whilst on the other hand the applicants contend that the taxation of the joint liquidators accounts were not suppose to be submitted or taxed in terms of the order. There clearly exists an issue in respect of the interpretation of paragraph 5 of the order.

19]In terms of Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, this court "*in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*"To my mind there exists a real dispute between the parties in respect of interpretation of the paragraph 5 of the order. The applicant seeking to impress upon this court to do all that is necessary to rubber stamp its interpretation of the paragraph.

20]I am of the view that what the applicant seeks of this court is to wrestle with an abstract and academic issue of interpreting paragraph 5 of the order of 27

September 2010. In so doing I reiterate the principle set out in the quoted case below, that it is not the function of the court to act as an adviser to the litigants. **See Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam; Maphanga v Officer Commanding, SAP Murder & Robbery, Pietermaritzburg 1995 (4) SA 1 (AD) at 14A-H.**

21]In conclusion I do not consider that this case is one that falls to be considered under section 19(1) (a) (iii).

22]Turning to the issue of costs. A settlement agreement was concluded and made an order of court on 18 April 2011. According to this agreement the costs of the urgent interlocutory application and the wasted costs of the postponement of the taxation were to stand over and be determined by the court that considered the application for the declarator.

23]In this application the costs will follow the successful party. Likewise the costs of the urgent interlocutory application and the wasted costs for the postponement will follow the successful party. Therefore costs are awarded to the respondent's.

[24] I therefore make the following order:

- 1. The application for a postponement is refused.**
- 2. The application for a declaration is dismissed with costs inclusive of the costs of the urgent interlocutory application and the wasted costs of the postponement of the taxation.**

W HUGHES-MADONDO
ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

(i) costs of such proce

<u>Obo Applicant:</u>	ADV K W LÜDERITZ SC obo De Jager
Atoorneys	
<u>Obo 2nd and 3rd Respondents:</u>	ADV VAN TONDER obo John Walker
Attorneys	