

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

**CASE NO: 4332/02**

In the matter between:

**AFRICAN BANK LIMITED**

Applicant

and

**MELVYN WEINER**

First Respondent

**NW FINANCIAL ADMINISTRATORS  
(PROPRIETARY) LIMITED**  
(Registration No. 2000/028159/07)

Second Respondent

**ANTHONY JOHN WEBBSTOCK**

Third Respondent

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**JUDGMENT: DELIVERED 1 SEPTEMBER 2003**

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**GRIESEL J:**

***Introduction***

1]The present application for declaratory relief arises from the ever-growing South African micro-lending industry and concerns the rights and duties of administrators appointed in terms of the provisions of sec 74 of the

Magistrates' Courts Act, 32 of 1944 (as amended) (*the Act*). The issues for determination concern the parties' competing interpretations of various provisions of sec 74 (including secs 74A – 74W), more particularly those provisions relating to the remuneration of administrators; the extent of their right to recover legal expenses; their duty to furnish security; their entitlement (if any) to interest on moneys collected; their duty to keep a separate trust account; as well as the duty to make quarterly distributions to creditors.

2]Certain of these issues were dealt with in recent litigation involving the present first respondent.<sup>1</sup> In view of the *Weiner* SCA judgment, which was handed down after the launch of the present application, some of the issues debated before us have undergone a slight shift in emphasis, as will become apparent in due course.

3]The applicant is a registered commercial bank, which specialises in the provision of micro-loans to individuals who do not otherwise qualify for loans from traditional financial institutions. It describes itself as '*the largest micro-lender in the country*'. At the close of its financial year ending 30 September 2001, the applicant's debtors' book stood at R3,78 billion, derived from loans to some 600 000 clients countrywide, with an average loan of R4 400 per client.

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<sup>1</sup> *Weiner N.O. v Broekhuysen* 2001 (2) SA 716 (C) (*'the Weiner CPD judgment'*); and, on appeal, *Weiner N.O. v Broekhuysen* [2002] 4 All SA 96; 2003 (4) 301 (SCA) (*'the Weiner SCA judgment'*).

4]The first respondent, Mr *MELVYN WEINER*, is an attorney, who practises as a sole practitioner under the name '*Weiner & Associates*' in Goodwood. According to the first respondent, the nature of his legal practice '*is exclusively confined to matters arising from the provisions of section 74 of the Act*' and he accepted nomination as an administrator under sec 74 of the Act '*in approximately 80% of administration orders granted in the Western Cape during the past five years*'. Currently there are some 10 000 debtors under administration with the first respondent in the Cape Peninsula and elsewhere in the country, of which approximately 5 500 are debtors of the applicant.

5]The first respondent controls various corporate entities, through the medium and with the assistance of which he conducts the administration of such debtors. One of these entities is the second respondent herein, *NW FINANCIAL ADMINISTRATORS (PTY) LIMITED*, a private company with its principal place of business at the same address as the first respondent's law offices. (For ease of reference, I shall refer herein only to the role of the second respondent as the corporate entity concerned, although it must be borne in mind that, from time to time, the first respondent also utilises other corporate entities in the administration process.)

6]The third respondent is Mr *ANTHONY JOHN WEBBSTOCK*, an attorney,

practising as such in Alberton, Gauteng. He also does a great deal of work as an administrator. He applied for, and was granted, leave to intervene as a respondent in this application. He subsequently filed voluminous affidavits in support of a counter-application, the nature of which will be dealt with later in this judgment.

7]In the proceedings before us, Mr *Seligson SC* appeared with Mr *Gamble SC* for the applicant; Mr *Stephens* appeared with Mr *Goldberg* for the first and second respondents; while the third respondent appeared in person.

8]Before discussing the issues in more detail, it is necessary briefly to examine the statutory framework regulating administration orders issued in terms of sec 74 of the Act.

### ***Purpose and Scope of sec 74***

9]Administration orders, which came into operation in 1944 with the introduction of the present Magistrates' Courts Act, have been regarded by the Courts as '*a modified form of insolvency*'. This was recently reaffirmed in the *Weiner SCA* judgment, where CAMERON JA commented as follows:<sup>2</sup>

*'The new provisions [of sec 74] created a procedure that was at the time rightly dubbed a "modified form of insolvency", since it is parti-*

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<sup>2</sup> Para [3] (footnotes omitted).

*cularly suited to dealing with small estates where sequestration proceedings would swallow the debtors' assets. As Caney AJ explained more than 50 years ago:*

“This is designed, it seems to me, as a means of obtaining a *concursum creditorum* easily, quickly and inexpensively, and is particularly appropriate for dealing with the affairs of debtors who have little assets and income and genuinely wish to cope with financial misfortune which has overtaken them. Creditors have certain advantages under such an order, including the appointment of an independent administrator and the opportunity of examining the debtor. They are not debarred from sequestrating the debtor if the occasion to do so arises.”

10]Importantly, while the granting of an administration order does not preclude steps to sequester the estate of the debtor,<sup>3</sup> the aim of the order *‘... is, no doubt, to assist a debtor over a period of financial embarrassment without the need for sequestration.’*<sup>4</sup> It may be accepted, therefore, that it was never the intention of the legislature that a debtor should be bound up in an administration order indefinitely, where there is no reasonable prospect of such order being discharged within a reasonable period of time. On the contrary, I am of the view that the mechanism of an administration order is intended to provide a debtor with a relatively short moratorium to assist in the payment of his or her debts in full and to ward off legal action and execution

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<sup>3</sup> See sec 74R of the Act.

<sup>4</sup> Per CORBETT J in *Cape Town Municipality v Dunne* 1964 (1) SA 741 (C) at 744G.

proceedings during such period.

11]Insofar as an administration order is to be regarded as '*a modified form of insolvency*', it follows that the role and function of the administrator is akin to that of the trustee in an insolvent estate. The most important duty of an administrator is to collect the payments to be made in terms of the administration order concerned and to distribute such payments *pro rata* among the creditors.<sup>5</sup> In doing so, generally speaking, the administrator –

- occupies a position of trust *vis-à-vis* both the creditors of the person under administration as well as the debtor him- or herself;<sup>6</sup>
- should be completely independent and impartial, carrying out his or her duties in the interest of all creditors and the debtor;<sup>7</sup>
- like a trustee, should take expeditious steps for the purpose of enabling the creditors to obtain as extensive a payment as possible of their debts.<sup>8</sup>

12]This construction is borne out, *inter alia*, by sec 74J(7)(a) of the Act, which provides that –

*'No amount with which such account is credited shall be deemed to*

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<sup>5</sup> sec 74J(1).

<sup>6</sup> Compare *Desai v Assignee Estate Desai* 1935 CPD 503 at 508.

<sup>7</sup> *Goldseller v Hill* 1908 TS 822 at 835.

<sup>8</sup> Meskin *Insolvency Law* (Butterworths 1990, with loose leaf updates) para 4.18 at 4-26(1).

*be part of the administrator's assets'.*

From the foregoing, it is apparent that, in receiving and depositing payments made by or on behalf of from the debtor for later distribution to the creditors on a *pro rata* basis, the administrator has a fiduciary duty in respect of such moneys and, in particular, is not entitled to apply any part thereof for his or her own benefit.

13]Sub-sections 74E(3) and (4) of the Act, which govern the provision of security by administrators, distinguish between two categories of administrators, namely (a) '*officers of the court or practitioners*'; and (b) those who are neither such officers nor practitioners. An administrator who is not an officer of the court or a practitioner is obliged to give security to the satisfaction of the court, whereas one who is an officer of the court or a practitioner need not give security.

14]The provisions of sec 74J(7) likewise recognise two distinct categories of administrator, viz (a) those who are '*practising attorneys*' with trust accounts kept in terms of the relevant legislation ('*attorney-administrators*'); and (b) those who are not practising attorneys ('*non-attorney administrators*'). Attorney-administrators are required to deposit all moneys received in their attorney's trust account, whereas non-attorney administrators must deposit such moneys in a separate trust account.

15]Before distributing any moneys to creditors, the administrator is entitled to deduct '*necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules*'.<sup>9</sup> The computation of such '*expenses*' and '*remuneration*' forms the largest part of the applicant's case before us, as well as the subject of the third respondent's counter-application. In order to follow the parties' respective contentions in this regard, it is necessary to set out in some detail the (rather convoluted) provisions of the Act and the Rules, as well as the relevant Annexures to the Rules. The statutory scheme is the following:

- Sec 74L(1)(a) of the Act makes provision, *inter alia*, for '*a remuneration determined in accordance with a tariff prescribed in the rules*'.

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- Rule 33(5)(a) of the Magistrates' Courts Rules regulates '*the scale*

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<sup>9</sup> Subsec 74L(2).

<sup>10</sup> The full sec 74L reads as follows:

- (1) *An administrator may, before making a distribution—*
  - (a) *deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;*
  - (b) *retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.*
- 2) *The expenses and remuneration mentioned in subsection (1)(a) shall not exceed 12½ per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.*

of fees to be taken by attorneys as between party and party' in relation, *inter alia*, to proceedings under secs 65 and 74. Rule 33(5) (a)(iii) stipulates:

*'The scale of fees to be taken by attorneys as between party and party shall in relation to proceedings under section 74 and 74A to 74W, inclusive, of the Act and all matters ancillary thereto be that set out in Part III of Table B of the said Annexure' [being Annexure 2].<sup>11</sup>*

- Table B, in turn, has three parts, two of which are relevant to this matter: **Part I** contains '*General Provisions*' and a '*Tariff*' in respect of '*Proceedings in Terms of Sections 65 and 65A to 65M of the Act*'; and **Part III** also has a '*Tariff*' and '*General Provisions in Respect of Proceedings in Terms of Section 74 of the Act*'.
- In terms of para 3(b) of the General Provisions contained in Part I, an *attorney* is entitled to recover –

*'A fee of 10% on each instalment collected in redemption of the capital and costs of the action, subject to a maximum amount of R300.00 on every instalment. Where the amount is payable in instal-*

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<sup>11</sup> In terms of Rule 33(5)(b), the same scale of fees also applies between attorney and client.

*ments the collection fees shall be recoverable only on payment of every instalment. Such fees shall be in substitution for and not in addition to the collection fees prescribed in paragraph 13 of Part I of Table A.'*

- The 'paragraph 13' referred to above is contained in the 'General Provisions' in Part I of Table A of Annexure 2 relating to the recovery of costs by an *attorney* in litigation in the magistrates' courts and reads as follows:

*'13. Where the judgment debt is payable in instalments in terms of the judgment or an agreement, a fee of 10% on each instalment collected in redemption of the capital, costs and interest shall be allowed, subject to a maximum of R300,00 on each instalment. No additional fee shall be charged for any attendance in connection with the receipt or payment of any instalment.'*

- Reverting to Table B, para 1(b) of Part III thereof provides:

*'1(b) In addition to the fees stated below, the adminis-  
trator shall be entitled a fee of 10% on each instalment collected for the redemption of capital and costs.' [Emphasis added].*

***Factual Background***

16]As mentioned above,<sup>12</sup> the first respondent conducts his functions as administrator through the medium and with the assistance of various corporate entities controlled by him. He explained that '*(i)t made good sense to channel ... administration applications through the medium of a separate entity*'.

17]It appears from the uncontested evidence that there is a close working relationship between the first respondent's legal practice and the operation of the various corporate entities, including the second respondent. They operate from the same office premises and, as pointed out by the applicant, there is no demarcation in the offices of the second respondent of a separate law practice operated by the first respondent.

18]In conducting their business operations, the first and second respondents adopt the following *modus operandi*:

- The second respondent (or any of the other corporate entities controlled by the first respondent) solicits business through advertising from debtors who are financially embarrassed and who are unable to meet their commitments to creditors.

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<sup>12</sup> Para *supra*.

- Staff members of the corporate entities are offered commission for administration client referrals.

- The second respondent prepares the debtor's statement of affairs and the application for an administration order; notifies creditors of the application; and obtains details of creditors' claims.

- The application for an administration order is moved in court by the first respondent (*qua* attorney) or one of his professional assistants on behalf of the individual debtor.

19]The nature of the first respondent's activities subsequent to the granting of an administration order is described as follows in his opposing affidavit:

*'Put simply my capacity changes subsequent to the granting of an administration order only inasmuch as I implement and monitor the administration order by utilising the administrative services of second respondent as opposed to my legal practice.'*

20]It appears that, in practice, the administration order in all its facets is actually administered and implemented almost exclusively by the second respondent. Thus, the second respondent –

- collects and receives payments due in terms of the administration

order, which moneys are paid into a separate bank account in its name;

- utilises the interest earned to cover bank charges levied on this account and to obtain fidelity insurance for, *inter alia*, its staff;
- prepares the distribution accounts, circulates them to creditors and makes payments to creditors pursuant thereto;
- files the distribution accounts with the clerk of the court reflecting the name of the second respondent and a signature other than that of the first respondent as administrator;
- makes deductions in respect of fees and costs as reflected in the distribution orders and recovers such fees and costs; conducts correspondence with creditors and their representatives as if it were acting as administrator and the debtors were its clients;
- maintains the files and documents relevant to the administration at its offices; and
- treats the files and documents relating to the administration as if they were its own.

It seems clear from the foregoing, therefore, that it is somewhat of an understatement for the first respondent to depict the second respondent's

role as being limited to supplying '*clerical and administrative support services*' before and after the granting of an administration order.

21]The first respondent's legal practice on occasion represents debtors during administration when legal steps are taken by creditors under sec 74 of the Act against such debtors.

22]In the light of the above facts, it seems fair to say, as was submitted on behalf of the applicant, that the first respondent offers a '*one-stop*' service to embarrassed debtors, providing them with protection under sec 74 of the Act through the offices of second respondent (or any other relevant corporate entity) and, where convenient, through his law practice. It is further apparent that, in substance, there is no real distinction between the roles played by the first respondent (as attorney-administrator) and the second respondent. This so-called '*blurring of functions*', as it was dubbed by the applicant, was also reflected in the relief claimed when the application was originally launched. Reference was made in the original Notice of Motion to the first respondent being appointed as an administrator '*in his capacity as a representative of second respondent*'. Elsewhere, the applicant sought to impose a duty on '*first respondent and/or second respondent*' to give security in terms of secs 74E(3) and (4), and to deposit moneys collected in a separate trust account.

23]In this regard, it is important to note that, in terms of the *pro forma* draft

court orders used by the first and second respondents, the first respondent is invariably described as '*Melvyn Weiner of NW Financial Administrators (Pty) Limited*' (my emphasis) when appointed as administrator. The first respondent denies that he is ever appointed '*as a representative of the second respondent*'. By the close of argument before us, it was accepted on behalf of the applicant that – irrespective of any '*blurring of functions*' that may exist in the structure of the first respondent's business and professional affairs – it is the *first respondent* and he alone who is appointed as administrator and who bears the responsibility for complying with the statute. As will be seen below, this acceptance gave rise to the final amendment to the Notice of Motion, omitting all the relief originally claimed *vis-à-vis* the second respondent.

24]In the circumstances, the question before us is not whether or not there is an element of '*blurring*' between the roles and functions of the first and second respondents, but, more fundamentally, what legal consequences (if any) flow from such '*blurring of functions*' in the context of sec 74 of the Act.

### ***The Relief Claimed***

25]In the Notice of Motion, as finally amended, the applicant seeks a series of declaratory orders in the following terms:

**A] AN ORDER DECLARING THAT THE FIRST RESPONDENT, WHENEVER APPOINTED AND ACTING AS AN ADMINISTRATOR IN TERMS OF SEC 74 OF THE MAGISTRATES' COURTS ACT, 32 OF 1944 ('THE ACT'), IS ENTITLED TO RECOVER IN RESPECT OF NECESSARY EXPENSES AND REMUNERATION NO MORE THAN 12,5% OF COLLECTED MONIES RECEIVED FROM OR ON BEHALF OF ANY DEBTOR FOR DISTRIBUTION TO THE CREDITORS OF THAT DEBTOR, SUCH LIMIT OF 12,5% TO APPLY ALSO IN RESPECT OF COSTS ARISING FROM RECOURSE TO THE PROVISIONS OF SECS 65A – L OF THE ACT.**

**B] (i) An order declaring that no legal costs in respect of the preparation and bringing of an application for an administration order under sec 74 of the Act are payable to or recoverable by the second respondent.**

**26](ii) An order declaring that no legal costs in respect of the implementation of an administration order under sec 74 of the Act are payable to or recoverable by the first respondent when he does not act as an administrator in his capacity as a practising attorney.**

**C] An order declaring that the first respondent is obliged to give security in terms of secs 74E(3) and (4) of the Act in all instances where he is appointed and acts as an administrator other than in his capacity as a practising attorney.**

**D] An order declaring that any interest which may accrue on any sums of money received by the first respondent from or on behalf of a debtor under administration in terms of sec 74 of the Act and deposited into a separate trust account in terms of sec 74J(7)(a) shall form part of the monies available for distribution in accordance with the provisions of sec 74 of the Act.**

**E] AN ORDER DECLARING THAT ALL MONIES RECEIVED BY THE FIRST RESPONDENT WHEN HE TAKES APPOINTMENT AND ACTS AS AN ADMINISTRATOR OTHER THAN IN HIS CAPACITY AS A PRACTISING ATTORNEY SHALL BE DEPOSITED INTO A SEPARATE TRUST ACCOUNT IN HIS NAME<sup>13</sup> AS ADMINISTRATOR HELD WITH ANY BANK IN THE REPUBLIC OF SOUTH AFRICA AS REQUIRED BY SEC 74J(7)(A) OF THE ACT.**

**F] An order declaring that the first respondent is required to make**

<sup>13</sup> The underlined words do not appear in the amended Notice of Motion, but we were asked by counsel for the applicant, in the course of his reply, to insert the words as part of the applicant's entitlement to '*alternative relief*'.

**a quarterly distribution of monies available for distribution in accordance with the provisions of sec 74J(1) of the Act except where the creditors have otherwise agreed or the relevant Magistrate's Court has otherwise ordered in any particular case.**

27]Before dealing with the merits of the individual prayers as set out above, it is necessary to deal briefly with a point *in limine* raised on behalf of the first and second respondents, namely that the applicant is – in principle – not entitled to declaratory relief.

***The Applicant's Entitlement to Declaratory Relief***

28]The first and second respondents have challenged, as a point *in limine*, the applicant's *locus standi* to seek the declaratory relief sought under prayers B, C, D and E of the Notice of Motion. In addition, whilst not disputing that the applicant has the necessary *locus standi* to apply for the relief sought in prayers A and F of the Notice of Motion, they aver that the matter is not a proper one for the exercise of this court's discretion under section 19 of the Supreme Court Act, 59 of 1959.

29]It appears that the first of these contentions is based on the argument that the applicant has failed to identify or establish the right in respect of which it has an interest, as contemplated by the relevant provision of the Supreme Court Act. The respondents further aver that the fact that the applicant might have a commercial or financial interest in obtaining the relief claimed is inadequate to found an application for declaratory relief.

30]The second contention is based on the submission that '*no tangible and justifiable advantage – with reference to an existing, future or contingent right – would accrue to Applicant in the wake of the grant of the declaratory order sought*'.

31]Although these matters were raised on behalf of the respondents in their

opposing papers and were dealt with in the written heads of argument filed herein, very little time was devoted to this aspect during the oral arguments before us and the point *in limine* was all but abandoned on behalf of the respondents. In my view, there is in any event no merit in the point *in limine*, as I shall briefly attempt to show.

32]The jurisdiction of the High Court to grant a declaration of rights is derived from sec 19(1)(a)(iii) of the Supreme Court Act, which empowers a division of the High Court –

*‘(i)n 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.’*

It is a requirement for the exercise of the court’s jurisdiction under this provision ‘... *that there should be interested parties upon whom the declaratory order would be binding.*’<sup>14</sup>

33]In deciding whether or not a declaratory order should be made, the court applies a two-stage test: firstly, the court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation. Secondly, if so satisfied, the court must decide whether the case is a proper

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<sup>14</sup> *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another* 1995 (4) SA 1 (A) at 14G and other cases referred to therein.

one for the exercise of the discretion conferred on it.<sup>15</sup>

34]As to the first stage of the enquiry, it is in my view self-evident that the applicant is '*an interested person*' as contemplated by sec 19(1)(a)(iii) of the Supreme Court Act. Indeed, it has a direct and substantial interest in relation to an existing, future or contingent right or obligation, arising from its situation as a creditor of some 5 500 debtors who are currently subject to administration orders being administered by the first respondent with the assistance of the second respondent. As a creditor with proved claims against such debtors, the applicant has a manifest entitlement – and therefore an interest – in ensuring that the administrator conducts the administration in compliance with the relevant provisions of the Act.

35]This interest extends to ensuring that distributions are properly – and promptly – made so that it and other creditors may receive what is due to them when it is due to them in compliance with the statutory rights accorded to creditors. The various provisions of sec 74 make it abundantly clear that creditors of the debtors concerned, such as the applicant, have recognised interests and rights in relation to the administrator's compliance with his statutory duties, including those relevant to the declaratory relief sought by

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<sup>15</sup> *Shoba's case*, *supra*, at 14H – I; *Reinecke v Incorporated General Insurances Limited* 1974 (2) SA 84 (A) at 93A – B.

the applicant.<sup>16</sup> These interests and rights attach to the applicant personally and directly and are not simply matters affecting the applicant's commercial and financial interests in an indirect way, as suggested by the respondents. On the contrary, the matters in issue directly affect the amounts available for distribution to the applicant and other creditors in relation to existing administration orders, and the relief sought goes to the protection of their abovementioned interests and rights. So, for example, a declaratory order in terms of prayers A or D of the Notice of Motion would ensure that the applicant and other creditors would receive more by way of *pro rata* distributions than would otherwise be the case in respect of the estates being administered by the respondents under existing administration orders.

36]If it is so, as was submitted on behalf of the applicant, that the first respondent is acting in breach of the provisions of the statute, it would mean that the applicant's rights are likely to continue to be infringed in the future. It is also, therefore, justified in seeking a declaration of rights in advance, without waiting until further infringements occur in the context of existing administration orders and future orders which will be granted in respect of debtors of the applicant, having regard to the existence of the dispute between the applicant and the first and second respondents. Where it is clear that an interested party's rights might be infringed, it is entitled to obtain a

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<sup>16</sup> Compare, in this regard, the *Weiner* SCA judgment, para [9] at 101 e, where it was held that a creditor is 'clearly' an interested party for the purposes of an application in terms of sec 74Q.

declaration of rights before such infringement occurs, and it is not necessary for it to wait until its rights are infringed.<sup>17</sup>

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<sup>17</sup> See *Afdelingsraad van Swartland v Administrateur, Kaap en Andere* 1983 (3) SA 469 (C) at 484F – 485H and authorities referred to therein.

37]As to the second stage of the enquiry, it was submitted on behalf of the applicant that the matter is eminently one that qualifies for the exercise of the court's discretion under sec 19(1)(a)(iii) of the Supreme Court Act. There is an existing dispute between the applicant, on the one hand, and the first and second respondents, on the other, as to whether or not the respondents are acting contrary to the relevant statutory provisions in their administration of the relevant debtors' estates. The debate around that dispute occupied some four days of this court's time. To my mind, it is self-evident that this is the type of situation that cries out for clarification.

38]Moreover, in view of the potential multiplicity of future applications in order to redress perceived irregularities in individual administrations, declaratory relief is clearly preferable.

39]A further reason for the court to exercise its discretion in favour of declaratory relief is that it would be in the public interest to establish the correct legal position in respect of the disputes which have arisen regarding the duties of the administrator and the rights of creditors in relation to administration orders – a contention with which the third respondent agrees. It is well established that considerations of public policy come into play when the court determines whether or not it should exercise its discretion to grant

declaratory relief.<sup>18</sup> The existence of other statutory remedies to which creditors may have recourse in terms of the Act does not preclude the grant of appropriate declaratory relief.<sup>19</sup>

40]In all the circumstances, I am satisfied that the applicant has established that it is a person interested in an existing, future or contingent right or obligation, and that (in principle) the case is a proper one for the exercise of the court's discretion in favour of declaratory relief. I conclude, therefore, that the preliminary point raised on behalf of the respondents that the applicant lacks the requisite *locus standi* to bring the application and that this is not an appropriate case for declaratory relief, should be dismissed. I accordingly turn to consider the individual prayers, as set out in the amended Notice of Motion.

### ***Prayer A: Remuneration of the Administrator***

41]As noted above,<sup>20</sup> the remuneration that may be deducted and the expenses that may be retained by an administrator are prescribed in sec 74L of the Act. The applicant initially sought an order simply declaring that, in terms of sec 74L of the Act, the first respondent is entitled to recover in respect of '*necessary expenses and remuneration*' no more than 12,5% of

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18 See *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service* 2000 (3) SA 564 (C) at 571C – D.

19 Cf *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 (1) SA 1109 (CC) para [43] at 1134G – 1135B and paras [46] to [47] at 1136F – 1137E.

20 Para *supra*.

the collected monies. At that stage, there was a dispute between the applicant, on the one side, and the first respondent, on the other, as to the amount of remuneration which an administrator was entitled to recover. The applicant has always maintained that an administrator's remuneration is to be limited to a maximum of 12,5% of monies collected from a debtor, from which the administrator must also defray '*necessary expenses*'.

42]The first respondent – and various other administrators (including the third respondent) – were initially of the view that they were entitled to deduct a minimum of 22,5% from each such distribution. Their contention was based on the above-quoted provisions of para 1(b) of Part III,<sup>21</sup> which the respondents sought to interpret as a cumulative entitlement, over and above the 12,5% laid down by sec 74L(2).

43]In the *Weiner* SCA judgment, however, the respondents' interpretation was rejected in clear and unequivocal terms. As appears from the above synopsis, sec 74(L)(1) of the Act deals with three different categories of expenditure that may be deducted from moneys collected, viz (a) '*necessary expenses*' and '*remuneration*'; and (b) '*costs*'. The *Weiner* SCA judgment only dealt with the categories mentioned in (a). CAMERON JA held<sup>22</sup> that the 12,5% deduction which an administrator may make from a distribution in

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<sup>21</sup> *Ibid.*

<sup>22</sup> Para [26].

respect of '*necessary expenses*' and '*remuneration*' in terms of sec 74L(2) includes the aforementioned 10% referred to in paragraph 1(b) of Part III. The court, however, did not find it necessary to say anything about the meaning of 'costs'.<sup>23</sup>

44]After the judgment in the *Weiner* SCA matter was handed down, the first respondent initially contended that the above finding by the Supreme Court of Appeal was an *obiter dictum*. In his opposing affidavit filed herein, however, the first respondent acknowledged the correctness of the *Weiner* SCA judgment and undertook to apply its approach in future. For this reason, the first respondent contended that there is no dispute between the parties and accordingly denies the applicant's entitlement to a declaratory order.

45]To the extent that the first portion of Prayer A is concerned, the first respondent is undoubtedly correct. It is clear that Prayer A, as originally framed, has been overtaken by the authoritative pronouncement in the *Weiner* SCA judgment. By means of its latest amendment, however, the applicant seeks to add an additional element, which was not dealt with in the SCA judgment, viz that the limit of 12,5% also includes costs arising from recourse to the provisions of secs 65A – L of the Act.

46]This amended relief is being opposed on behalf of all of the respondents.

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<sup>23</sup> *Ibid* .

It was submitted on behalf of the respondents that the 12,5% cap applies only to '*necessary expenses and remuneration*'. They draw attention to the wording of para (b) of sec 74L(1), which refers to the concept of '*costs*' as separate and distinct from '*necessary expenses*', referred to in para (a). The concept '*necessary expenses*' in para (a), according to the respondents, refers to those expenses incurred by an administrator arising from work performed in respect of which he earns remuneration. It relates specifically to the expenses incurred by the administrator in effecting a distribution.

47]The first respondent also states that he has always dealt with costs arising from the application of secs 65A – 65L of the Act as falling outside the 12,5 % limit provided in section 74L(2). He points out that an administrator is empowered, and is in fact directed, to employ the mechanisms of the relevant provisions of secs 65A – 65L of the Act, *inter alia* by the provisions of secs 74D and 74I(2) and (5). When recourse to secs 65A – 65L is necessary, it is in any event not the administrator, but rather the attorney acting on behalf of the administrator, who employs the tariff provided by the rules, such tariff being that set out in Parts I and II of Table B of Annexure 2 to the rules.

48]The first respondent points out, further, that legal costs may also be incurred in the situation contemplated by secs 74J(8) and (9). These provisions deal with the situation where the debtor is in arrear with payments or

if he has disappeared. The administrator is required forthwith to notify the creditors and to request their instructions. Should the majority of the creditors instruct him to do so, or fail to respond, the administrator '*shall institute legal proceedings against the debtor for his committal for contempt of court or take such steps as may be necessary to trace the debtor who has disappeared, as the circumstances may require*'. As far as the costs of such proceedings are concerned, sec 74L(1)(b) provides for the retention of a portion of the money collected to cover the costs that may have to be incurred if the debtor is in default or disappears. In terms of Rule 48(4), the amount that may be *retained* may not exceed 25% of the amount collected, provided that such amount may not exceed R30. It will be noted, however, that the Rule does not prescribe that the amount that may be *recovered* may likewise not exceed 25% or R30.

49]The question for decision, raised by the applicant's amended Prayer A, is thus whether the *costs* arising from recourse to the provisions of secs 65A – L of the Act fall under (a) or (b). To put it differently, the question is whether the administrator should pay such costs from his remuneration, or whether it should be deducted from moneys collected.

50]The approach adopted and interpretation proposed by the first respondent

is supported by the learned authors of *Jones & Buckle*,<sup>24</sup> who submit that the costs of an administrator (or his attorney, where one is employed) for taking the necessary steps under the above-mentioned sections are recoverable as 'costs' under subsec (1)(b). I am satisfied that this interpretation is preferable to the one advanced on behalf of the applicant. In the result, I find that the amended declarator sought by the applicant cannot be granted.

### ***Prayer B: Costs***

#### *Prayer B(i):*

51]In **prayer B(i)** (as amended) the applicant seeks a declaratory order directing that no legal costs in respect of the preparation and bringing of an application for an administration order under sec 74 of the Act are payable to or recoverable by the second respondent.

52]The applicant's argument in relation to this prayer proceeds as follows: in the ordinary course, it is the first respondent, *in his capacity as a director of the second respondent*, who is appointed as administrator. It is the second respondent, *de facto*, which does all the work. The second respondent deducts an amount in respect of legal costs from moneys collected. Such

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<sup>24</sup> *Civil Practice of the Magistrates' Courts in South Africa* (9<sup>th</sup> edition 1997 with loose-leaf updates) Vol I p322

legal costs are never paid over to the first respondent's practice, nor does the first respondent submit an account to the second respondent in respect of such costs. *Ergo*, the legal costs are retained by, and for the benefit of, the second respondent, which is not entitled to such costs.

53]Accepting, for purposes of argument, the factual basis of the applicant's argument, it does not follow, in my view, that the applicant is entitled to the declaratory relief sought. Section 74O of the Act provides that the costs of the application for an administration order can be recovered from the administrator concerned, and then as a first claim against the moneys controlled by him. It is not clear whether the applicant's complaint is simply directed at the insufficiency of the bookkeeping entries in relation to legal expenses, or whether it is alleged that there is some duplication in the costs recovered by the first and second respondents, respectively. What is clear, however, is that, in any scenario, legal costs for the preparation and bringing of the application for an administration order will necessarily be incurred. Such costs are payable by the debtor and may be deducted by the administrator – as a first claim – from moneys collected. Whether such costs are paid to the first or the second respondent, or to some other legal practitioner, can make no difference to the applicant. The latter's *pro rata* share is not affected in any way by the identity of the recipient of such legal costs. The applicant, therefore, fails to meet the first requirement for declaratory relief, as

discussed above.<sup>25</sup>

54]In any event, the second respondent has never contended that it is entitled to legal costs in respect of the preparation and bringing of an application for an administration order. On the contrary, in the answering affidavit filed on behalf of the first and second respondents herein, they expressly disavowed the second respondent's entitlement to legal costs of any nature in respect of either an application for, or the implementation of, an administration order. It follows, therefore, that no dispute exists between the parties which is properly susceptible to declaratory relief. The court does not lend itself to declaring rights where there is no dispute or to making an order where no relief is necessary.<sup>26</sup> For these reasons, the relief claimed cannot in my view be granted.

*Prayer B(ii):*

55]By means of this prayer, the applicant seeks to limit the right of the first respondent to recover '*legal costs*' in respect of the implementation of an administration order '*when he does not act as an administrator in his capacity as a practising attorney*' (my emphasis).

56]The applicant's argument in this regard follows much the same line as

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<sup>25</sup> Para *supra*.

<sup>26</sup> *SAPDC (Trading) Ltd v Immelman* 1989 (3) SA 506 (W) at 509A.

with the previous point. In advancing its claim, the applicant introduced an additional qualification which gave rise to much debate before us, namely the rider as to the first respondent's '*capacity as a practising attorney*'. The problem with this construction is that the first respondent is not appointed, nor does he act, in any particular capacity. It is true – as argued by the applicant – that, in the process of administration, the first respondent often wears more than one hat. The fact remains, however, that the first respondent *is* a practising attorney. Wearing his hat as administrator, he is entitled to remuneration on the basis set out above.<sup>27</sup> As attorney, he is entitled to the prescribed fees for legal work actually done by him or his legal practice in relation to the administration. As with the application for an administration order (dealt with in relation to prayer B(i) above), the simple fact is that, where legal work has to be done or is done, legal costs will be incurred. The legal work will be performed either by the first respondent's legal practice, or by another attorney. Whichever route be followed, an attorney will be entitled to fees for such work, with the result that the relief sought under this head can make no difference to the applicant's prospective distributions.

57]In the circumstances, I am of the view that this prayer must likewise fail.

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<sup>27</sup> See para *supra*.

### ***Prayer C: the Provision of Security***

58]In **prayer C** the applicant seeks a declaratory order that the first respondent is obliged to give security in terms of sec 74E of the Act in all instances *‘where he is appointed and acts as an administrator other than in his capacity as a practising attorney’*.

59]Section 74E(3) provides as follows:

*‘An administrator who is not an officer of the court or a **practitioner** shall, before a copy of the administration order is handed or sent to him by registered post, give security to the satisfaction of the court and thereafter as required by the court for the due and prompt payment by him to the parties entitled thereto of all monies which come into his possession by virtue of his appointment as an administrator.’*  
[my emphasis]

The corollary hereto is that an administrator who is *‘an officer of the court or a practitioner’* is not obliged to give security, as contemplated by the section.

60]In the *Weiner* CPD judgment, it was held that the appellant in that case (the first respondent *in casu*) was not obliged to provide security because he was *‘an admitted attorney’*. After referring to the definition of *‘practitioner’* in sec 1 of the Act, which includes *‘an advocate, an attorney, an articled clerk ... and an agent as is referred to in sec 22’*, the court held as follows:

*'This definition appears to have amplified the ordinary dictionary meaning of practitioner, which is "one engaged in the practice of any art, profession or occupation especially in medicine, surgery or law" (The Shorter Oxford English Dictionary), so as to encompass practising as well as non-practising attorneys. We say so because when the Legislature employs that concept in a narrower sense, for example practising attorney, it specifically states so (see s 74J(7)). In our view, the concept attorney in the definition of practitioner means an attorney admitted to practice as such (see s 1 of the Attorneys Act 53 of 1979). The magistrate in his judgment accepted that it was common cause that the appellant is an admitted attorney. On the basis of that finding, in our view, he could not have held that the appellant was obliged to provide security.'* 28

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28 at 725I – 726A.

61]The applicant attempted to persuade us that the *Weiner* CPD judgment falls to be reconsidered on this point in the light of the facts which have been deposed to in this matter. It was argued that the issues before the court in the previous case were limited by virtue of the matter being an appeal from the magistrates' court based on the record in that court, as opposed to an application for a declaratory order in which all material facts are set out. In that case, so the argument went, the court did not specifically look at the question of the capacity in which the first respondent took his appointment as administrator. That court was not aware – according to the applicant – of the fact that the first respondent held monies deposited with him by or on behalf of debtors in an account other than his attorneys' trust account. The applicant further contended that it could never have been the intention of the court to have exempted the first respondent from providing security where the monies received by him were held in an account which did not enjoy automatic fidelity cover, purely on account of the fact that he was an admitted attorney. In the present case, so it was argued, the first respondent's status as an admitted attorney is quite incidental to any functions he performs as an administrator in view of the following facts:

- the first respondent himself stated that the administrations conducted by him were done outside his law practice;

- the first respondent elected to set up corporate entities through which to channel his administration business;
- the first respondent himself alleges that he is appointed administrator '*as a director of second respondent*';
- all facets of the administration process are administered and implemented by the second respondent.

62]It was accordingly submitted that the approach followed by the court in the *Weiner* CPD case was wrong. We were urged to follow a '*purposive*' interpretation to the requirement of security, which would – so it was contended – lead to a restrictive interpretation of the concept '*practitioner*' so as to exclude administrators who are not acting in their capacity as practising attorneys. Such an interpretation, according to the applicant, would serve to advance the object of providing adequate security in respect of monies collected, particularly where the administrator carries out his or her functions through the medium of a corporate entity which necessarily employs non-professional persons to implement the administration.

63]In this regard, the applicant also referred to sec 26(a) of the Attorneys Act, 53 of 1979, which shows that the cover afforded by the Fidelity Fund only applies to the theft by a *practising* attorney or his or her staff of money

entrusted by a person to the attorney in the course of his or her practice. Moreover, it is only practising attorneys who are required to keep a trust account in terms of sec 78(1) of the Attorneys Act.

64]These examples do not persuade me that the applicant's contentions are sound. In the first place, the same problem referred to in the preceding section<sup>29</sup> arises also in relation to this prayer as framed, insofar as the applicant seeks to import a qualification which will apply where the first respondent is appointed and acts as an administrator '*other than in his capacity as a practising attorney*'. This is not a distinction required or recognised by the Act – certainly not as far as section 74E(3) is concerned – and can only lead to endless debate, as the argument before us in the present case amply illustrates.

65]Secondly, it is clear from the provisions of sec 74J(7) of the Act that the legislature is well aware of the concept of a '*practising attorney*'.<sup>30</sup> This awareness on the part of the legislature is further demonstrated by the provisions of sec 78 of the Attorneys Act, which recognises the concept of a '***practising** practitioner*'. Where the concept '*practitioner*', is, therefore, used (without any such qualification) in sec 74E(3), it may confidently be accepted that the legislature did not intend to refer to a '*practising attorney*' or

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<sup>29</sup> Para *supra*.

<sup>30</sup> Cf the *Weiner* CPD judgment at 725J – 726A.

*'practising practitioner'*, but to a wider group, which may include, but is not limited to, a practising attorney.<sup>31</sup>

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<sup>31</sup> See also the definition of *'practitioner'* in sec 1 of the Act (para [59] *supra*).

66]Thirdly, I am in any event not persuaded that the '*purposive*' approach that we were urged to follow necessarily leads to the conclusion that the concept '*practitioner*' in sec 74(3)E must be interpreted to mean '*practising attorney*'. In this regard, I am satisfied that the existence of an attorney's trust account and fidelity fund are not the only reasons for exempting '*practitioners*' from the obligation of furnishing security. Of equal importance, in my view, is the fact that '*practitioners*' have at least two further advantages over non-practitioners when appointed as administrators, viz (a) their legal training and experience, and (b) the discipline of a professional body (such as the Law Society or the Bar Council) to oversee their professional activities.

67]In the circumstances, I conclude that the applicant has failed to make out a proper case for the relief sought in prayer C.

***Prayers D & E – Interest on Moneys received and the Duty to keep a separate Trust Account***

68]I find it convenient to deal with these two prayers together, as they both involve the interpretation of sec 74J(7) of the Act, which provides as follows:

(7) *An administrator shall deposit all moneys received by him from or on behalf of debtors whose estates are under administration—*

(a) *if he is not a practising attorney, in a separate trust*

*account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, of his deceased or insolvent estate;*

- (b) *if he is a practising attorney, in the trust account that he keeps in terms of section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934.'* <sup>32</sup>

69]The evidence shows that the first respondent does not deposit moneys collected from or on behalf of debtors into his attorney's trust account. In this regard the first respondent explains that he has –

*'adopted the practice of putting all monies received into one separate trust account for each entity through which I conduct the relevant administration orders and such funds, where possible, are placed on call which generates a higher interest rate. The interest which accrues on such trust account is then applied to cover bank charges as well as payment of the premium of a fidelity insurance policy of R3 million which covers not only myself, but all the staff of first and second respondents. I am of course not obliged to procure this fidelity cover, but have done so for the sake of good order and indeed I have mentioned this fact to numerous judicial officers throughout the Western Cape as well as during press and radio interviews.'*

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<sup>32</sup> Now sec 78 of the Attorneys' Act, 53 of 1979.

70]The question for determination is whether this practice is permissible, or whether the interest earned on moneys received ought to be available for distribution to creditors. The further question is why the first respondent, a practising attorney who keeps a trust account in terms of sec 78 of the Attorneys Act, does not utilise such trust account for holding monies deposited with him prior to distribution in terms of the Magistrates' Courts Act. Indeed, in terms of sec 78(2)(a) of the Attorneys Act –

*'Any practitioner may invest in a separate trust savings or other interest-bearing account opened by him with any banking institution or building society any money deposited in his trust banking account which is not immediately required for any particular purpose.'*

71]In terms of sec 78(3) of that Act –

*'The interest, if any ... on money invested in terms of sub-section (2) shall be paid over to the [Fidelity] fund by the practitioner concerned at the prescribed time and in the manner prescribed.'*

However, on instructions of a client, an attorney may invest such monies in an interest-bearing account for the benefit of such client. In such circumstances the interest would accrue to the client (see sec 78(2A) of the Attorneys Act).

72]The issue raised by these prayers illustrates the ambivalence in the first respondent's position: on the one hand, it suits him to rely on his status as a '*practitioner*' in order to gain exemption from the duty of having to furnish security. On the other hand, when it comes to the duty of keeping moneys in his attorney's trust account, it suits him to contend that he is not acting in his capacity as a '*practising attorney*' and is therefore not bound by the provisions of sec 74J(7)(a) of the Act.

73]I agree with the applicant's submission that the only reasonable inference to be drawn from the practice adopted by the first respondent is that it is beneficial to both himself, the second respondent and any of the corporate entities through which he operates *not* to use his attorney's trust account. The use of the trust account would have the effect of channelling interest earned on monies deposited for distribution to creditors to the Fidelity Fund (or the client under sec 78(2A)), whereas the system employed by the first respondent enables him to have full control of any such interest which accrues, without the supervision of the Law Society.

74]In line with the approach adopted above,<sup>33</sup> I am of the view that the first respondent ought to be regarded as a '*practising attorney*' for purposes of sec 74J(7) of the Act, even where he is appointed as '*Melvyn Weiner of NW Financial Administrators*' (or of any other corporate entity). It follows, there-

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<sup>33</sup> Para *et seq, supra*.

fore, where he is personally appointed as administrator, that he is subject to the rights *and obligations* of a practising attorney. This would entail, *inter alia*, that the first respondent is *not* obliged to furnish security in terms of sec 74E, but that he *is* obliged to pay moneys received into his attorney's trust account and to deal with the interest as provided for by the Attorneys' Act. It follows from the foregoing that the relief claimed by the applicant in terms of prayer E ought to be modified to read as follows:

*'An order declaring that all monies received by or on behalf of the first respondent when he takes appointment and acts as an administrator shall be deposited into the trust account that he keeps in terms of section 78 of the Attorneys' Act, 53 of 1979.'*

75]In view of the foregoing conclusion, prayer D would strictly speaking become redundant. However, in view of the fact that there are many instances where moneys have already been deposited into different accounts by or on behalf of the first respondent, it is necessary in any event to deal with this aspect.

76]The Magistrates' Courts Act, unlike the Attorneys Act, does not specifically provide for interest earned on moneys collected. Be that as it may, given the fiduciary nature of the administrator's office as well as the provisions of sec 74J(7)(a) to the effect that *'no amount with which such account is credited shall be deemed to be part of the administrator's assets'*, it is clear

that the legislature does not permit an administrator to claim any portion of such amounts credited – whether capital or interest – as being for his or her benefit. Yet, this is precisely what the first respondent says that he does: he claims to use the interest earned to cover bank charges allegedly incurred by the second respondent (and any of the other corporate entities which administer debtor estates) and to pay for fidelity cover in order that he, and such entities, are covered by some form of insurance. Were it not for his use of the interest, first respondent or his corporate entities would have to finance these expenses from monies obtained elsewhere.

77]The first and second respondents resist the relief claimed, *inter alia*, on the grounds that the computation of such interest is problematic and, in any event, prohibitively expensive if use is made of an appropriate computer programme. The third respondent likewise opposes the granting of this relief on the basis that the provisions of sec 74J(7)(a) of the Act are clear and unequivocal and, more particularly, that there is no reference in that section to interest.

78]The applicant, on the other hand, denies that it is impossible or prohibitively expensive to effect such calculations. In an affidavit filed in reply to the third respondent's intervention, the applicant contends that there is computer software available – at an affordable price – which can readily

calculate the amounts of interest that accrue to each debtor and, further, that the respondents are not entitled to appropriate such interest for themselves, due regard being had to the clear wording of the Act and the fiduciary nature of an administrator's office.

79]As pointed out above,<sup>34</sup> the first respondent allegedly deposits moneys received in an interest-bearing call account. The first respondent, however, furnishes no details of such account. Assuming, for purposes of illustration, that the average monthly instalment in respect of 10 000 debtors apparently under administration with the first and second respondents is an arbitrary amount of R300 per debtor, and assuming further that such amounts are invested in a call account at 10% *per annum*, it would follow that an amount of R25 000 would accrue monthly by way of interest on such moneys, adding up to quite a substantial amount of R300 000 *per annum*. The respondents have not placed any evidence before us to indicate that monthly bank charges and insurance premiums would be anywhere close to this amount. As matters stand at the moment, all of those funds find their way into the coffers of the respondents.

80]I am not satisfied that the respondents' complaints regarding the alleged difficulties with calculating interest are valid or that a *bona fide* dispute of fact is created thereby. Even if it were so that the computation of interest is

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<sup>34</sup> Para *supra*.

problematic or '*prohibitively expensive*', this would not justify the respondents in applying any part of such interest for their own benefit.

81]In the circumstances, I am satisfied that the applicant has made out a proper case for the relief sought in prayer D of the Notice of Motion and that it is entitled to such relief.

***Prayer F – Quarterly distributions to creditors***

82]Finally, in **prayer F** the applicant seeks an order '*declaring that the first respondent is required to make a quarterly distribution of monies available for distribution in accordance with the provisions of sec 74J(1) of the Act except where the creditors have otherwise agreed or the relevant Magistrates' Court has otherwise ordered in any particular case*'.

83]The salient portions of sec 74J(1) of the Act provide as follows:

*'An administrator shall collect the payments to be made in terms of the administration order concerned and shall keep up to date a list ... of all payments and other funds received by him from or on behalf of the debtor, ... and shall ... distribute such payments **pro rata** among the creditors at least once every three months, unless all the creditors otherwise agree or the court otherwise orders in any particular case.'*

84]In my view, the relief sought in prayer F ought not to be granted. In the

first place, it incorrectly paraphrases the provisions of the section by introducing a concept not defined in the section, namely '*monies available for distribution*'. Section 74J(1) simply obliges the administrator to distribute '*such payments*', (i.e. '*all payments and other funds received by him from or on behalf of the debtor*'). As pointed out by the respondents, it can only lead to unnecessary uncertainty and dispute if the applicant's prayer were to be granted in its present form.

85]In any event, even if this terminological inaccuracy were to be corrected, declaratory relief would to my mind still not be justified, because the prayer would then simply '*parrot*' the provisions of the Act, as submitted by the third respondent. There is no ambiguity or uncertainty in the actual provisions of the section. What *did* give rise to problems and delays, was the first respondent's practice of obtaining authorisation from the court *in anticipando* to make distributions less frequently, should he be of the view that there were insufficient funds to ensure a '*viable*' distribution.

86]This practice has been firmly condemned, both in the *Weiner* CPD and *Weiner* SCA judgments. The duty resting on an administrator to make quarterly distributions has been placed beyond any doubt by CAMERON JA in the *Weiner* SCA judgment, where he remarked that the granting of a discretion to an administrator (as some of the *pro forma* administration orders

have done) *'leaves the creditors at the mercy of the administrators' subjective perception of what duty and convenience may require.'*<sup>35</sup>

87]The learned Judge proceeded to say:

*'Court orders should not be formulated so as to leave compliance at the discretion of the person bound by them. This infringes not only the principle that such orders should be capable of enforcement, but the principle of certainty by legal regulation. Such a state of affairs is intolerable ...'*<sup>36</sup>

88]As mentioned previously, the present application was launched before the *Weiner* SCA judgment was handed down. In my view, it would be both inappropriate and unnecessary for this court to echo what has already been decided (authoritatively) by the Supreme Court of Appeal. I accordingly conclude that the applicant is not entitled to declaratory relief.

### ***Counter-application by Third Respondent***

89]In the Notice of Motion filed together with his opposing affidavit, the third respondent seeks a declaratory order in the following terms (which, for ease of reference, I shall number 1 and 2 respectively):

*'1. Any administrator duly appointed under*

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<sup>35</sup> Para [15].

<sup>36</sup> Para [16].

*section 74 of the Magistrates' Courts Act, No 32 of 1944 ("the Act") is entitled to charge, in terms of Rule 33(5)(a)(iii) of the Act as limited by Rule 33(5)(b) and in relation to any proceeding under section 74 and 74A to 74W, inclusive, of the Act and for all matter ancillary thereto, the scale of fees as set out in Part III of Table B of Annexure 2.*

2. *The remuneration and expenses referred to in section 74L(1)(a) of the Act does not include Items 1 and 2 of the General provisions of Part III of Table B of Annexure 2 and refers only to the remuneration and expenses that an administrator incurs in attending to his duty to distribute under section 74J(1) and not any other proceeding/s taken by the administrator in terms of the other sections enumerated above.'*

90]In the view I take of the matter, this aspect of the case may be disposed of briefly. As far as para 1 is concerned, it is to be noted, first of all, that it is framed in terms that are unduly wide (*'any administrator...'*) – as if it were a class action. If it were the third respondent's intention to bring a class action on behalf of all administrators, it is not clear that he has succeeded in achieving this goal.<sup>37</sup> However, since this aspect was not dealt with in argument, it is not necessary for me to come to any firm conclusion in this regard.

91]There is a further basic flaw in the third respondent's case in that Rule 33(5)(a)(iii) – as I have shown above<sup>38</sup> – is only applicable to the scale of fees *'to be taken by attorneys'* (my emphasis), whereas an administrator does not have to be an attorney.

92]Moreover, even if this were not so, a declarator would not be justified,

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<sup>37</sup> Cf *Permanent Secretary, Department of Welfare, EC v Ngxuza* 2001 (4) SA 1193 (SCA).

<sup>38</sup> Para *supra*.

because – in the third respondent’s own words – it would simply ‘parrot’ the wording of the Rule, about which there is no dispute.

93]With regard to para 2 of the counter-application, the third respondent attempts to reopen the debate that has already been decisively closed in the *Weiner* SCA judgment. The thrust of the third respondent’s case is that the judgment of the Supreme Court of Appeal in the *Weiner* SCA matter is *obiter*; alternatively, that it is distinguishable; alternatively, that it is wrong.

94]I am quite satisfied that the conclusion of the court in para [26] of the *Weiner* SCA judgment is neither *obiter*, nor distinguishable. In view of the doctrine of *stare decisis*, that is the end of the matter as far as this court is concerned.<sup>39</sup> It follows, therefore, that the third respondent’s counter-application is without any merit and falls to be dismissed.

### **Costs**

95]It appears from the foregoing that the applicant was partially successful in obtaining *some* relief. In my view, however, and bearing in mind the extent and duration of the debate before us, the degree of success is not sufficient to justify a costs order in its favour. Moreover, it cannot be gainsaid that a considerable portion of the costs were incurred – and wasted – as a result of

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<sup>39</sup> Cf *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC) para [57].

the applicant's late amendment to its Notice of Motion.

96]Taking all things into account – including the fact that the present application was in the nature of public interest litigation, rather than purely adversarial proceedings between individual litigants – I am of the view that it would be fair to direct each party to pay their own costs. This, in my view, ought to apply to the third respondent's counter-application as well.

### ***Order***

97]For the reasons set out above, I would grant an order in the following terms:

- 1. An order is granted, declaring that all monies received by or on behalf of the first respondent when he takes appointment and acts as an administrator shall be deposited into the trust account that he keeps in terms of section 78 of the Attorneys' Act, 53 of 1979.***
- 2. An order is granted, declaring that any interest which may accrue on any sums of money received by the first or second respondent from or on behalf of a debtor under administration in terms of sec 74 of the Act and deposited into a separate trust account in terms of sec 74J(7)(a) shall form part of the monies available for distribution in accordance with the provisions of sec 74 of the Act.***
- 3. Save as set out above, the application and the third***

*respondent's counter-application are dismissed.*

*4. Each party is directed to pay their own costs.*

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**99]B M GRIESEL**

100]**S**ELIKOWITZ **J**: I agree. It is so ordered.

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**102]S** ELIKOWITZ