IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no.: 2423/2023

Reportable: NO/YES

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED (Registration number: 1962[…])	Applicant
And	
THE MASTER OF THE HIGH COURT, BLOEMFONTEIN	First Respondent
ELRICH RUWAYNE SMITH N.O.	Second Respondent
TSIU VINCENT MATSEPE N.O. (In their capacities as trustees of the Insolvent Estate of J.N. Herselman, Master's reference: B109[…])	Third Respondent
F.J. SENEKAL INC. (Registration number: 2017[…])	Fourth Respondent

Coram: Mhlambi *J et* Opperman J

Heard: 19 February 2024

Delivered: 22 May 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 22 May 2024. The date and time of hand-down is deemed to be 15h00 on 22 May 2024

Judgment by: Opperman J

Summary: Review in terms of sections 111(2)(a) read with section 111(2)(b) of the Insolvency Act 24 of 1936 of the decisions of the Master of the High Court - the issue of "double dipping" and claims on account of an erstwhile service provider to the estate

JUDGMENT

[1] The decision of the Master of the High Court, Bloemfontein (first respondent) not to uphold Standard Bank's (applicant) objections in the Insolvent Estate of J.N. Herselman, is at the core of this review.

[2] The applicant objected to the confirmation of 'The Amended Second Final Liquidation, Distribution & Contribution Account'.[1] There were two objections, respectively dated 16 March 2023[2] and 24 April 2023.[3] The objections will be depicted later in detail.

[3] It is only the applicant and the F.J. Senekal Inc. (fourth respondent) that entered into the arena in this review application. The first, second and third respondents did not oppose.

[4] In his opening address and heads of argument[4] to the court on the merits of the application for review, counsel for the applicant indicated that, in

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[1] Annexure 'C' at pages 56 to 73 of the bundle "Index" dated 20 - 09 - 2023 ("the Bundle"). See paragraph 2.2 of the heads of argument for the applicant.
[2] Pages 74 to 75 of the Bundle.
[3] Pages 79 to 80 of the Bundle.
[4] See paras 5.2 and 5.3.

regard to the second prayer as per the notice of motion dated 16 May 2023, he will only rely on the relief as far as: '2. That the Applicant's objections against aforesaid liquidation and distribution account be upheld and that the aforesaid account be amended accordingly;'[5]

[5] The applicant maintained that relief shall be sought in terms of prayer I of the notice of motion to be a legality review[6] and not in terms of the Promotion of Administrative Justice Act 3 of 2000 as per prayer 3 and sought in the alternative.

[6] They affirmed the relief on costs in that if opposed such costs to be paid by any party opposing the application. It was only the fourth respondent that opposed the application.

[7] Numerous issues *in limine* were taken by the fourth respondent but only the issue on hearsay apparently remained and was argued in the beginning of the hearing of the matter. It will be addressed later.

[8] The factual context and arguments by the applicant set out in their heads of argument are the following:

> 2.1 The aforesaid review lies upon the amended second and final liquidation and distribution and contribution account filed by the Second and Third respondents on or about the **14th of February 2023** annexed as Annexure ··C" to the founding papers.

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[5] The notice of motion contains five prayers as per pages 2 to 4 of the Bundle. Only prayers I, 2 as amended now, and 4 remain applicable.

[6] According to Harms, judicial review has bifurcated into two genera: reviews under PAJA and those under the principle of legality. It depends on, *inter alia,* the nature or source of the public power that was exercised: executive or administrative. When a power was sourced in legislation or subject to substantial constraints. it is likely to be administrative in nature. See Civil Procedure, Civil Procedure in the Superior Courts, Part B High Court, UNIFORM RULE 53 REVIEWS, REVIEWS IN GENERAL: April 2024 - SI 79, https://www.mvlexisnexis.co.za/Index.aspx on 14 May 2024 with reference to *Mbuthuma and Another v Walter Sisulu University and Others* [2019] ZAECMI-IC 79: 2020 (4) A 602 (ECM) and *CompCare Wellness Medical Scheme v Registrar of Medical Schemes and Others* [2020] ZASCA 91; 2021 (1) SA 15 (SCA).

2.2 The Applicant objected to the confirmation of the aforesaid account, when the account laid for inspection, on the **16th of March 2023,** and a second objection on the **24th of April 2023.**

2.3 The main issue about such objections is based upon the contribution account whereby the Applicant will be liable to pay a contribution to the Insolvent Estate of JN Herselman in the total amount of **R1,085,723.12.**

2.4 The review also, amongst others, turn on vouchers 9A to 9H, being the accounts rendered by Fourth Respondent for legal costs incurred.

2.5 From the aforesaid vouchers 9A to 9H, the Honourable Court will note that such vouchers, with reference to Fourth Respondent's accounts, are dated **2 December 2019** and **12 February 2020,** although for legal fees since **15 November 2013.**[7]

2.6 The Applicant summarised the basis or the review application in para 9 of its founding affidavit, with reference to paras 9.1, 9.2 and 9.3[8]

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[7] This fact is important since F.J. Senekal Inc. was only established in 2017. In essence the claim is for services rendered by Matsepes Inc; F.J. Senekal was a director of Matsepes Inc. at the time.

[8] 9.1 In summary it seems that the contribution in the insolvent estate was caused by legal fees and enquiry *costs raised by the Fourth Respondent for work done by Mr FJ Senekal, whilst he was a director and employee of Matsepes Inc.*

9.2 Matsepes Inc. could never have raised such fees or enquiry costs against the insolvent estate in and because of s 63(2) read with s 73 of the Insolvency Act 24 of 1936.

9.3 As explained above, whatever fees and/or costs are applicable, should have been in and because of the direct agreement or agreements between Matsepes Inc. and/or FJ Senekal Inc. and/or FJ Seneka.l and/or Hector Van Aardt Attorneys on behalf of Farmsecure.

9.4 **As referred to above, I invite the Fourth Respondent to furnish any written proof of any instruction to it by the insolvent estate to render services for the estate.** (My emphasis.)

9.5

thereof.

2.7 The main contentions in the review is that the Fourth Respondent only came into existence on 27 October 2017, and although the accounts of the Fourth Respondent are dated **2 December 2019** and **12 February 2020,** such accounts are for legal costs and fees claimed by Mr FJ Senekal since **2013** to **November 2018,** which costs and fees are taken up in the amended second and final liquidation and distribution and contribution account debited against the Insolvent Estate of JN Herselman as set out in Annexure "C" to the founding papers.

2.8 It is the Applicant's case that the services rendered by Mr Senekal since **2013** for the Insolvent Estate, and the remuneration thereof out of the Insolvent Estate are illegal insofar as it is contrary to the provisions of Section 63(2) of the Insolvency Act 24 of 1936.

2.9 The aforesaid remuneration to Mr FJ Senekal, which is now included in the amended second and final liquidation and distribution and contribution account forms the basis of the bulk of the contribution now levied against the Applicant in the contribution account (part of Annexure "C").

2.10 The aforesaid objections to the amended second liquidation and distribution account are argued as aforesaid mainly on the second objection dated **20 April 2023.**

[9] Mr. F.J. Senekal admitted that the fees that are the bone of contention here, involve work done by him since 2014 until 2017 and was done in his capacity as a director of Matsepes Inc. Mr. T.V. Matsepe, the third respondent, was also a director of Matsepes Inc. and a co-trustee of the estate of J.N. Herselman. This fact is common cause. This fact was admitted by Mr. Senekal in the replying affidavit of a case filed under number I

251/2022 in paragraph 19.9 thereof.[9] The 1251/2022 court order will become relevant later, as justification for the finding of the Master on one of the objections by the applicant.

[10] Section 63 of the Insolvency Act 24 of 1936 (insolvency Act) prescribes as follows:

> 63. Remuneration of trustee or curator bonis.-
>
> (2) A person who employs or is a fellow employee or is ordinarily in the employment of the trustee shall not be entitled lo any remuneration out of tlie insolvent estate for services rendered to the estate, and a trustee or his partner shall not be entitled to any remuneration out of the estate for services rendered to the estate, except the remuneration to which under this Act he is entitled as trustee.

[11] The argument for the fourth respondent as presented by counsel for the said respondent in their supplementary heads of argument is that:

> 3.1. In paragraph 7.1to 7.6 of the answering affidavit Senekal makes the point that:
>
> 3.1.1. The initial Liquidation and Distribution account did not include his fees and expenses as part or the administration costs of the estate;
>
> 3.1.2. He raised an objection to the Master which objection was opposed by the co-liquidator Smith on the basis that that (sic) Farmsecure is liable for Senekal's fees, not the estate.

[9] See pages 418 to 419 of the Bundle.

3.1.3. On 20 April 2021 the Master made a ruling that Senekal's fees should be included in the Second and Final Account.

3.1.4. The Liquidators did not take the Master's decision on review and Standard Bank did not object to the inclusion of Senekal's fees as administration costs of the estate when KS 1.1 lay for inspection.

3.2. Mars: The Law of Insolvency in South Africa, with reference to Baard v Estate Baard 1928 CPD 505, confirmed the principle that the Master acts in a judicial capacity when deciding on objections lodged with him and that his decisions are binding unless set aside.

3.3. This principle is also in line with the often-quoted passage of the SCA in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*

> ·'… No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

3.4. In *MEC for Health. Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at paragraphs [99] to [101] the Apex Court has showered the Oudekraal principle with constitutional authority:

> "[99] …
>
> [100] …
>
> [101] The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process."
>
> (footnotes omitted)

3.5. It is thus respectfully submitted that the Bank"s failure to review and set aside the_Master's decision of 20 April 2021 is fatal. The decision - that Senekal's fees are_administration_costs in_the estate -_stands until_reviewed or set aside. (My emphasis.)[10]

[12] The Oudekraal principle is not as simple as stated above and much have been said and ruled on the subject. I align myself with the conclusion by OM Pretorius after intensive research and with reference to case law in his paper *'Oudekraal* After Fifteen Years: The Second Act (or, A Reassessment of the Status and Force of Defective Administrative Decisions Pending Judicial Review':[11]

Oudekraal thinking should properly be confined to *Oudekraal* contexts and should be utilized having due regard to the relevant statutory framework, and not as general propositions ... Otherwise. we might extend *Oudekraal* thinking to situations where it is not gennane.[12]

[13] Reading of the papers and the arguments beg the question as to what the real issue is here. The core issue does not lie exclusively in the provisions of section 63(2) of the Insolvency Act. This is that Mr. Senekal may not claim for legal costs incurred during his tenure as director based on the so-called principle of double dipping. This principle was referred to by Bertelsmann J in the arbitration matter of *ABJ Knipe and others v CB St Clair Cooper NO and others,*[13] and relied upon by the fourth respondent in their supplementary heads of argument.

[14] *The question is whether the fourth respondent may claim for legal costs incurred by Matsepes Inc. before 2017 and without authorization from*

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[10] See Moleya, NI 'The effect of the Oudekraal principle on the rule of law' *De Rebus,* August 2018 *(De Rebus* in 2018 (Aug) DR 28).

[11] DM Pretorius ·*Oudekraal* After Fifteen Years: The Second Act (or, A Reassessment of the Status and Force of Defective Administrative Decisions Pending Judicial Review)' (2020) STELL LR 3.

[12] Ibid at 36.

[13] *ABJ Knipe and others v CB St Clair Cooper NO and others* was an arbitration hearing in Bloemfontein and presided over by retired judge Bertelsmann. The award was made on 22 May 2021.

Matsepes Inc. The claim for the costs is between Matsepes Inc. and the Insolvent Estate. As the Master indicated in the reasons supplied to the court: 'Matsepes was substituted as the firm of attorneys by F.J. Senekal Inc.' Again, the fourth respondent was only established in 2017 and the claim is in the name of the entity F.J. Senekal Inc. and not in the name of Mr. F.J. Senekal for work he had done at Matsepes Inc. before 2017.

[15] The argument that the neglect of the applicant to take the Master's decision of 20 April 2021 on review is fatal, may not be accurate. The Master apparently ruled in the 20 April 2021 decision that Mr. Senekal's fees, whilst a director of Matsepes Inc.: 'should be included in the Second and Final Account'. That said, it remains a claim for the benefit and the account of Matsepes Inc. not the fourth respondent, and the Master did not rule on this issue. It is money that must go to Matsepes Inc., not the fourth respondent. In *Standard Bank of South Africa Limited v Master of the High Court Johannesburg and Others*[14] the court held:

> [29] In *Constantia Insurance Company limited* ..., the Court dealing with the provisions of s 151 stated the following:
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> > [19] ... *this court confirmed that in a review of this kind a court enters into and decides the whole matter afresh. For this purpose, it has powers of both appeal and review and may receive new evidence. In a review under s 151 of the Insolvency Act, a party may therefore raise an issue that was not placed before the Master. Whether an issue was properly raised in the review application must, be determined on the ordina,y principles applicable to motion proceedings. (My emphasis.)*

[16] The review is in terms of sections 111(2)(a) and 111(2)(b) of the Insolvency Act and it reads as follows:

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[14] *Standard Bank of South Africa limited v Master of the High Court Johannesburg and Others* [2023] ZAGPJHC 989.

111. Objections to trustee's account.-

(1) The insolvent or any person interested in the estate may, at any time before the confirmation of the trustee's account, in terms of section one hundred and twelve, lay before the Master in writing any objection. with the reasons therefor, to that account.

(2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection. he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted mala tide, negligently or unreasonably in incurring any costs included in the account and that the account should be amended. he may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit: Provided that-

(a) any person aggrieved by any such direction of the Master or by the refusal of the Master 10 sustain an objection so lodged, may apply by motion to the court within fourteen days as from the date of the Master's direction. or as from the date of intimation 10 the objector of the Master's refusal to sustain his objection, after notice to the trustee. for an order to set aside the Master's decision and the court may thereupon confirm the account or make such order as it thinks fit; and

(b) when any such direction affects the interests of a person who has not lodged an objection with the Master, the account so amended shall again lie open for inspection by the creditors in the manner and with the notice hereinbefore prescribed, unless the person affected as aforesaid consents in writing 10 the immediate confirmation of the account.

[17] A review in terms of section 111(2) is generally about illegality, procedural irregularity or irrationality which is such as to justify intervention by the court. If a judgment was exercised unreasonably, irregularly, or wrongly so as to lead to a patently inequitable result, a court will interfere.[15]

[18] LAWSA[16] noted that any person aggrieved by a decision, ruling, order or taxation of the Master, or by a decision, ruling or order of an officer presiding at a meeting of creditors, may bring it under review by the High Court. A person is 'aggrieved' if his rights have been infringed or if he has been wrongfully deprived of some advantage to which he is legally entitled. The aggrieved person may be a creditor, the trustee or the insolvent himself.[17]

[19] Further, that the powers of review conferred are of the widest kind, which means that the court is not restricted to cases where some irregularity has occurred. *Not only does the court possess the powers of a court of review in the legal sense, but it also has the functions of a court of appeal, with the additional power, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a court of first instance.*[18]

<u>OBJECTION</u>[19]

[20] The main issue that lured the objections is based upon the contribution account whereby the applicant will be liable to pay a contribution to the Insolvent Estate in the total amount of R1 085 732.12.[20]

> We refer to the above-mentioned estate as well as the *"Amended Second and Final L & D Account"* dated 31 January 2023 alternatively 14

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[15] Harms D *Civil Procedure in the Superior Courts:* ·uniform Rule 53 Reviews, Reviews in General'. Last Updated: April 2024 - SI 79. Also available online: https://www,mylexisnexis.co.za/Index.aspx. Accessed 15 May 2024.
[16] 11 *LAWSA* 2ed para 372.
[17] See in this regard *Jeeva and Another v Tuck NO and Others* 1998 (1) SA 785 (SE) at 792-793.
[18] *Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903* TS 111 at 117.
[19] Pages 74 and 75 of the Bundle.
[20] Para 2.3 of the heads of argument for the applicant.

February 2023 as published on 10 March 2023.

We record that we object against the contribution payable in the amount of R1 085 703.12 should the account be confirmed.

The above objection is based upon the fact that ii was not Standard Bank but Farmsecure livestock a further creditor in the estate who instructed the liquidators to proceed to arrange an enquiry and to instruct Mr Senekal to attend to same.

We further confirm that subsequent to the enquiry the mentioned Farmsecure Livestock also instructed the liquidators to proceed to appoint Mr Senekal to attend to further legal steps as to collect certain assets.

On both the abovementioned instances it was clearly agreed that Farmsecure livestock will be liable for all costs incurred by Mr Senekal and that all benefits derived from such proceedings will be in terms of section 104(3) of the Insolvency act for the account of Farmsecure livestock.

We confirm that it is our submission that Farmsecure Livestock on their own and as a concurrent creditor of the estate with significant smaller claim than Standard Bank proceeded to appoint Mr Senekal and subsequently incurred various legal costs in order/or them alone to benefit from any proceeds obtained in terms of section 104 (3) of the Insolvency act.

Due to section 104 (3) being applicable Standard Bank would never have received any benefit derived from such proceedings.

It is important to note that all mentioned facts only came to the attention of Standard Bank during 2022 and was Standard Bank never consulted, informed neither did Standard Bank consent to such costs incurred.

During 2022 Standard Bank was informed of an application brought by Mr Senekal for certain relief sought against the Trustees regarding payment of the mentioned costs incurred.

Standard Bank was not a party to such proceedings and that we through our attorneys informed the Trustees that our Standard Bank denies liability regarding any contribution payable.

We refer to section 111 of the Insolvency act which states: ...

Based on the contents of section 111 and taking into account the facts as staled above Standard Bank request (sic) that the objection be upheld and that the Master direct (sic) that the account be amended and that Standard bank be exonerated from payment of any contribution relating to the mentioned costs incurred by Trustees and/or Mr Senckal.[21] (My emphasis.)

[21] The case above for the applicant on this aspect was summarised in their heads of argument as follows:

5.

CONCLUSION:

5.1 It is humbly submitted that the Fourth Respondent, through the backdoor, when Farmsecure was liquidated, entered into a Settlement Agreement with the trustees (Second and Third Respondents) to raise remuneration against the Insolvent Estate, *contrary to the provisions of Section 63(2)* of the Insolvency Act. To settle the aforesaid with the trustees and to have the Settlement Agreement made an Order of Court, to the detriment of other creditors in the Insolvent Estate, especially the Applicant and Wesbank. (My emphasis.)

[22] Succinctly as alleged by the applicant, Farmsecure employed Senekal and undertook to carry the costs of his work. Farmsecure was liquidated. Senekal was involved in the liquidation. F.J. Senekal Inc. now claims from the remaining entities, such as the applicant, to contribute to his fees. This claim caused litigation and a subsequent settlement agreement that was made an order of the court.

[23] The defence of the fourth respondent and the justification of the Master is the settlement that was made an order of the court in case 1251/2022. The applicant is constrained by it, and unequivocally so.

[21] Pages 74 and 75 of the Bundle.

[24] The question is however if the fourth respondent; F. J. Senekal Inc. may claim.

[25] Imperative is the fact that the 125 l /2022 court order is not under attack here nor is there any application for the setting aside thereof. What is on the papers are suspicions of untoward conduct by some of the parties in the making of the settlement agreement and the subsequent court order. The allegations by the applicant from paragraphs 7.1 to 7.13 in its founding affidavit were ruled to be based on inadmissible hearsay evidence that was struck out *in limine* in the hearing and before the arguments on the merits in the main application proceeded. The fact that it is allegedly made on statements by the defendant does not rescue the situation. Even if the allegation were accepted, it did not change the fact that there is not an application before the court to set aside the court order or the settlement agreement. The allegations will accordingly be disregarded on the basis of inadmissible hearsay evidence.

[26] The court will be amiss if it does not supply reasons for the ruling that the evidence in paragraphs 7.1 to 7.13 of the founding affidavit of the applicant is hearsay and inadmissible. It is undisputed that Mr. Pillay is not the primary source of the evidence and that the veracity of the information is dependent on others. Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (LEAA) as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. There was not any application before the court to allow said evidence on any of the exceptions provided for in the act. The prejudice to the administration of justice is obvious; evidence must carry veracity and be admissible, if not it may not be allowed in the adjudication of the case.[22] If the court was wrong in this ruling, it does not add much to the case because the 1251/2022 court order was not a target of the

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[22] See S *v Ndhlovu and Others* [2002] ZASCA 70; [2000] 3 All SA 760 (SCA) para 14. See also *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* [1958] 3 All SA 241 (A) at 250-251.

review to be set aside and the issue of the hearsay evidence moot and peripheral.

[27] Also, the parties to the settlement that caused the 1251/2022 court order, which was also by agreement, were F.J. Senekal Inc. (Applicant) v Elrich Ruwayne Smith N.O. (Trustee and first respondent), Tsui Vincent Matsepe N.O. (Trustee and second respondent) and the Master of the High Court, Bloemfontein (Third respondent).

[28] The settlement that became the order decreed that:

> PLEASE TAKE NOTICE THAT First- and Second Respondents, with prejudice and in full and final settlement, offer to settle the abovementioned application on the basis set out below:
>
> > 1. That the First-and Second Respondent be directed *to collect from each creditor liable to contribute to the administration costs of the insolvent estate of Jacobus Nicolaas Herselman, Master Reference B109[…],* such amount which he/she/it is liable to contribute in terms of the provisions of section 113[23] of the Insolvency Act, 24 of 1936 ("the Act") *after taxation of the Applicant's costs and following the procedure* prescribed by the Act

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[23] '113. Distribution of estate and collection of contribution from creditors.-

(1) Immediately after the confirmation of a trustee's account, the trustee shall give notice of the confirmation in the Gazette and shall state in that notice according to the circumstances, that a dividend to creditors is in course of payment or that a contribution is in course of collection from the creditors and that every creditor liable to contribute is required to pay to the trustee the amount for which he is so liable.

(2) If any contribution is payable. the trustee shall specify fully in that notice the address at which the payment of the contribution is to be made, and shall deliver or post a copy of the notice to every creditor liable to contribute.

(3) Immediately after the confirmation of a trustees account the trustee shall in accordance therewith distribute the estate or collect from each creditor liable to contribute the amount for which he is liable.'

regarding amendment of the liquidation and distribution account;

2. That the First- and Second Respondent be directed to claim a contribution from the proven creditors of the estate lo defray such sequestration and administration cost, as is provided for in Section 106(a) - (c)[24] of the Act following taxation of the Applicant's costs and amendment of the account;

3. That the costs of this Application shall form part of the administration costs of the insolvent estate. (My emphasis.)[25]

[29] Important to note at this stage is that the court was conditional by stating

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[24] '106. Contributions by creditors towards cost of sequestration when free residue insufficient.- Where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in section ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preferent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that-

(a) if all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim;

(b) if a creditor has withdrawn his claim, he shall be liable to contribute in respect of any deficiency only so far as is provided in section fifty-one, and if a creditor has withdrawn his claim within five days after the date of any resolution of creditors he shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution;

(c) if all the creditors who would have ranked upon the surplus of the free residue. if there had been any, have withdrawn their claims and, after payment of their contribution in terms of paragraph (b) there is still a deficiency, the remaining creditors whose claims have been proved against the estate shall, notwithstanding the fact that they would not have ranked upon the the surplus of the free residue, if there had been any, be liable to make good such deficiency, each in proportion to the amount of his claim.'

[25] Pages 52 to 55 of the Bundle.

that:

> ... directed to collect from each creditor *liable to contribute* to the administration costs of the insolvent estate of Jacobus Nicolaas Herselman, Master Reference BI 09/2013. *such amount which he/she/it is liable to contribute*...
>
> and
>
> ... *after taxation of the Applicant's costs and following the procedure prescribed by the Act regarding amendment of the liquidation and distribution account:*...

[30] Following from the undisputed facts, it is apparent that the applicant, F.J. Senekal Inc. did not incur the costs claimed before 2017; it was possibly Mr. F.J. Senekal as director of Matsepes Inc. The process in terms of the Insolvency Act had to be concluded which would have involved any objections to the decisions by the Master and the review application in terms of section 111 of the Insolvency Act. The issue was the liability to F. J. Senekal Inc., which ought to have been picked up during taxation.

[31] The Master, without observing the conditional provisions of the court order, relied directly and exclusively on the 1251/2022 court order and supplied the following reasons[26] to the court *in casu* against the objections:

1.

> The notice of motion and applicant's founding affidavit have been served on me.

2.

> I am the First Respondent and I do not oppose the application.

3.

[26] Pages 85 to 129 of the bundle "INDEX OF RECORD OF PROCEEDINGS'" dated 7 June 2023 compiled by the Master. Hereafter referred to as the “Master's Bundle".

Applicant's founding affidavit contains the background which led to this application.

4.

I can confirm that the Second meeting of creditors took place at the Magistrate's court, Petrus Steyn on 14 July 2014. In terms of the stipulations of sections 40(3)(a) of the Insolvency Act, 24 of 1936, as amended. the purpose of the Second meeting of creditors is the proof of claims against the estate and the receiving of the report of the trustees on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate. The Trustees report and directions by creditors are dealt with in section 81 of the Insolvency Act, *supra.*

5.

According to MARS, The Law of Insolvency in South Africa, Ninth Edition, paragraph 15.14 on page 329:

"After consideration of the trustee's report and documents submitted therewith, it is competent for creditors to give him (the trustee) such directions as to the future administration of the estate as they deem fit." MARS confirms further on the same page: "If a resolution has been duly carried at a meeting of creditors it is binding on all creditors, unless set aside by the court."

6.

On page one of the Index of Record of Proceedings the Honourable Court will note that a Mr L.S. Stoffberg appeared by proxy on behalf of the creditor Standard Bank (applicant) at the Second meeting of creditors.

7.

The Honourable Court will note on page 11 of the Index of Record of Proceedings that the very same Mr Stoffberg who appeared on behalf of Standard Bank also voted for the acceptance of the resolutions at the Second meeting of creditors. The Master never received notice that any creditor applied to the court for the setting-aside of the resolutions adopted at the Second meeting of creditors.

8.

The Master received an objection (The First objection) from applicant on 17 March 2023, annexure "A."

Applicant objected against the contribution payable in terms of the trustees Amended Second and Final Liquidation. Distribution and Contribution Account signed by the trustee E.R. Smith on 3l January 2023 and signed by trustee T. V. Matsepe on 14 February 2023, a copy of the Account is attached and marked annexure "B."

9.

The Master rejected the First objection and the reason for the Master's decision is the Court order dated 06 October 2022 issued by the High Court of South Africa, Free State Division Bloemfontein in case number 1251/2022, annexure "C."

[32] Imperative is that on reading the order and settlement agreement, the ultimate result is that there was no instruction that the claim by F. J. Senekal Inc. must be paid; but was it ordered that due process must be followed after taxation and establishment of the legality of the claim.

[33] The liability of Standard Bank to contribute was to be established and processed in terms of the law. The liability to contribute was correctly placed on Standard Bank in terms of the court order/settlement agreement in terms of sections 113 and I 06 of the Insolvency Act and as per the court order.

[34] The failure to establish who has the right to the claim is where the case derails. This calamity links to the second objection.

OBJECTION 2[27]

[35] A major issue is whether Mr. Senekal, in his capacity as director of

[27] Pages 79 to 80 of the Bundle.

Matsepes Inc. or subsequently as F.J. Senekal Incorporated, has a right to the fees he claimed whilst he was working as a director at Matsepes before his resignation. The contract was entered into between Matsepes and the estate; not the estate and Mr. Senekal. It does not follow that if Mr. Senekal took over the file from the firm Matsepes, that he automatically took over their claims against the estate before he took control of the file. The claim still lies with Matsepes.

[36] The fourth respondent, F.J. Senekal Inc. only came into existence on 27 October 2017. Although the accounts for the fourth respondent are dated and came into existence on 2 December 2019 and 12 February 2020, such accounts are for legal costs and fees claimed by Mr. F.J. Senekal since 2013 to November 2018. These costs and fees are taken up in the Amended Second and Final Liquidation and Distribution and Contribution account debited against the estate of J.N. Herselman as set out in Annexure 'C' to the founding papers. It is further the summary of the applicant in their founding affidavit that:

9.

SUMMARY

9.1 In summary it seems that the contribution in the insolvent estate was caused by legal fees and enquiry *costs raised by the Fourth Respondent for work done by Mr FJ Senekal, whilst he was a director and employee of Matsepes Inc.*

9.2 Matsepes Inc. could never have raised such fees or enquiry costs against the insolvent estate in and because of section 63(2) read with section 73 of the Insolvency Act 24 of 1936.

9.3 As explained above, whatever fees and/or costs are applicable, should have been in and because of the direct agreement or agreements between Matsepcs Inc. and/or FJ Senekal Inc. and/or FJ Senekal and/or Hector Van Aardt

Attorneys on behalf' of Farmsecure.

9.4 **As referred to above, I invite the Fourth Respondent to furnish any written_proof of any instruction to it by the insolvent estate to render services for the estate.** (My emphasis.)

[37] These were the reasons from the Master:

10.

On 24 April 2023 the Master received another objection (the Second objection) from applicant against annexure "B."

11.

A copy of the Second objection is attached hereto and marked annexure “D.” The Second objection stands on three legs and I will now deal with them separately:

A. Objection against the admissibility of voucher 6 dated 2015/08/21, which reflects the amount collected through enquiry and paid to F.J. Senekal Inc. (fourth respondent). This amount is reflected on page five. item 6 of annexure "B." The reason for this objection by the applicant is that the amount collected during 2015 could not have been paid to F.J. Senekal Inc. (Registration number: 2017[…]) as the named entity did not exist at that time.

Objection A was rejected by the Master and the reason for the Master's decision is that Mr F.J. Senekal was appointed to conduct the enquiry and litigation, when he was a director at Matsepes Inc. Matsepes was substituted as the firm of attorneys by F.J. Senekal Inc. When Mr Senekal left Matsepes as director on 01 October 2017, no fees were due, owing or payable to Matsepes from the enquiry or litigation, because a suspensive condition existed in terms whereof the litigation and enquiry fees would only be paid once the litigation is successfully completed. This is confirmed on the following pages in the Index of Record of Proceedings: page 12. page 14 and pages 22-31.

B. Objection against voucher 7, reflected as item 7 on page *5* of

Annexure "B." According to the objector (applicant) there was an agreement between the trustees and Farmsecure that all expenses relating to the livestock would be paid directly by Farmsecure.

Objection B was rejected by the Master and the reason for the Master's decision is that there is no agreement to that effect on the Master's file.

C. Objection C was against vouchers 9A to 9H being accounts rendered by FJ Senekal Inc. for legal costs incurred. These are reflected as items numbers 9A to 9H on page *5* of Annexure "8," The reason for the objection being that Matsepes Attorneys was appointed to attend to all litigation and enquiry related matters and these legal services were rendered before 2018 and again, the entity F.J. Senekal Inc. did not exist before 2017.

Objection C was rejected by the Master and the reason for the Master's decision is that Mr F.J. Senekal was appointed to conduct the enquiry and litigation, when he was a director at Matsepes Inc. Matsepes was substituted as the firm of attorneys by F.J. Senekal Inc.

When Mr Senekal left Matsepes as director on 01 October 2017, no fees were due, owing or payable to Matsepes from the inquiry or litigation, because a suspensive condition existed in terms whereof the litigation and enquiry fees would only be paid once the litigation is successfully completed. This is confirmed on the following pages in the Index of record of proceedings: page 12. Page 14 and pages 22 - 31

12.

I have no further facts to bring under the attention of the Honourable Court and I abide by the decision of the Honourable Court. (My emphasis.)

[38] The above is based on the double dipping principle in *De Jager's Trustees v The Master*[28] in that F.J. Senekal Inc. did not receive any duplicated remuneration or double compensation. The aim of the prohibition in section 63(2) is to prevent a trustee and his partner from recovering double remuneration. The fourth respondent refers to the arbitration matter of *ABJ Knipe and others v CB*

[28] *De Jager's Trustees v The Master* 1918 CPD 535.

St Clair Cooper NO and others[29] that he attached to his heads of argument and made the following observation:

> 18.8 Simply put: Section 63(2) is a prohibition against payment of remuneration (if the jurisdictional facts have been established) and not, as the Bank wants to have it, tacit essentialia of an agreement between a trustee and a service provider of an estate.
>
> 18.9 The facts in *casu* are that:
>
> > 18.9.1 Matsepes Inc. did not raise an invoice as service provider to the estate for any work done by Senekal.
> >
> > 18.9.2 Senekal did legal work for the estate on the basis that his fees will only become due and payable at the end or the sequestration process, but the estate will carry the legal costs and legal expenses, like for instance, advocates fees, sheriff's costs etc., during the litigation process.
> >
> > 18.9.3 Senekal parted ways with Matsepes Inc. during 2017.
> >
> > 18.9.4 Senekal raised his invoices against the estate only after the litigation on behalf of the estate was finalised and at a time when there was absolutely no relationship between him, Matsepes Inc and/or Mr Matsepe.
> >
> > 18.9.5 There is no evidence of double dipping between Senekal, Mr Matsepes and/or Matsepes Inc. Standard Bank's reliance on section 63(2) is misconstrued and the application ought to be dismissed with costs.

[39] If counsel for the fourth respondent is correctly understood, then he agrees that Mr. Senekal, in his personal capacity, could not claim for work done by Matsepes Inc. in terms of section 63(2) whilst he was the director there; however, the position is different now. Now he may claim because there were no claims at the time when the tile was taken over. In the result, there would not be any double payment or prejudice to the estate.

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[29] Footnote 13.

[40] Despite the above argument, the relevant question remains whether one service provider may claim on a legal relationship between two other entities. There did not exist a contract or agreement with F.J. Senekal Inc. before it was established and instructed in that capacity, notwithstanding the fact that the payments were suspended on the order of the Master. Senekal was merely a director at Matsepes Inc. and, although he did work for the estate, it was in his capacity as director of Matsepes Inc. He cannot claim for such work as the claim belongs to Matsepes Inc. up until 2017.

CONCLUSION

[41] It follows that:

1. The 1251/2022 court order mandated the collection from each creditor liable to contribute to the administration costs of the insolvent estate of Jacobus Nicolaas Herselman, Master Reference B109[…] and directed to claim a contribution from the proven creditors of the estate to defray such sequestration and administration costs. Standard Bank does not apply for the court order to be set aside; it suspects it as illegal and maintains that the Farmsecure estate should carry the costs but that is not the order of the court and that does not take their case further. Standard Bank was represented at the 14 July 2014 meeting of the creditors and condoned the resolutions. Standard Bank is liable as a contributor in terms of the 1251/2022 order. If Standard Bank wants for the 1251/2022 order to be set aside it is another case for another day; it is not the application here. The question is whether F.J. Senekal Inc. has a claim for the contributor to honour?

2. The claims of F.J. Senekal Inc. against the insolvent estate of J.N. Herselman before 2017 for services provided by Matsepes Inc. cannot be lawful. Even if Matsepes Inc. did not claim, it is not for Senekal Inc. to just step in and claim the monies without any

mandate and because F.J. Senekal Inc. "took the file over". This is an issue between F.J. Senekal Inc. and Matsepes Inc. It is not an issue of double dipping; it is an issue of the rightful claimant.

3. The decision of the master to cause the applicant to contribute the amount of R1 085 723.12 payable to F.J. Senekal Inc. was based on unsound legal principles, irregular and unlawful. The prejudice to the administration of justice in that entities may claim from insolvent estates for services rendered by another entity and without authority of the actual service provider at the time; may cause severe detriment to the control of the veracity of claims. The authority and discretion of the Master do not comprise and allow for this.

4. Costs must follow the cause and Standard Bank is the successful party in that the claim of R1 085 723.12 is not payable by them to the fourth respondent. The fourth respondent shall carry the costs of the application.

[42] **ORDER**

1. The first respondent's decision not to uphold the applicant's objections against the Amended Second Final Liquidation, Distribution & Contribution Account of the Insolvent Estate of J.N. Herselman, Master's reference: B109[…], which objections were dated the 16th of March 2023 and 23rd of April 2023, is reviewed and set aside in terms of section 111 (2)(a) read with section 111 (2)(b) of the Insolvency Act 24 of 1936;

2. The applicant's objections against aforesaid Liquidation, Distribution & Contribution Account are upheld and the aforesaid account must be amended accordingly;

3. The costs of this application for review shall be paid by the fourth respondent.

OPPERMAN J

I **concur**

MHLAMBI J

<u>Appearances</u>

For applicant:	**ADVOCATE P ZIETSMAN SC** Instructed by: Phatshoane Henney Attorneys Bloemfontein
For the fourth respondent:	**ADVOCATE P.J.J. ZIETSMAN SC** Instructed by: F.J. Senekal Inc. **Bloemfontein**