



THE REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

CASE NO: 18748/2021

Before ALLIE, J

Hearing: 25 November 2024

Judgment Delivered: 28 November 2024

In the matter between:

STEPHEN MALCOLM GORE N.O.

1st Applicant

JURGENS JOHANNES STEENKAMP N.O.

2nd Applicant

EUGENE JANUARIE N.O.

In their capacities as joint liquidators of Brick Art Construction (Pty) Ltd (in liquidation)

and

THE MASTER OF THE HIGH COURT: CAPE TOWN

1st Respondent

BRICK ART CONSTRUCTION (PTY) LTD (in liquidation)

2nd Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 28 NOVEMBER 2024

ALLIE, J:

1. This is an application for the review and setting aside of the decision taken by the Master of the Western Cape High Court ("the Master") on 4 May 2021 in terms of section 384(2) of the Companies Act 61 of 1973, to refuse the application to increase the remuneration of liquidators in a first liquidation and distribution ("L&D") account by more than double the prescribed statutory tariff.

2. The relief sought is framed as follows:
 - 2.1. *Setting aside, alternatively reviewing and setting aside the first respondent's determination in terms of section 384(2) of the 1973 Companies Act.... dated 4 May 2021 not to increase the applicants remuneration;*
 - 2.2. *Declaring that the reasonable remuneration to which the applicants are entitled in terms of section 384(1) of the 1973 Companies Act is the sum of R939 598.75 (plus VAT);*
 - 2.3. *Directing and authorising the applicants to record their remuneration in the first liquidation and distribution account as the sum of R939 598.75 (plus VAT);*
 - 2.4. *In the alternative to prayers 2 and 3, directing the first respondent to determine the reasonable remuneration to be paid to the applicants in terms of section 384(1) read with section 384(2) of the 1973 Companies Act, having regard to any findings and/or determinations made by the above Honourable Court;*
 - 2.5. *That the first respondent be ordered to pay the costs of this application..."*

3. BRICK ART CONSTRUCTION (PTY) LTD ("BAC/the Company") was placed in business rescue on 6 December 2019 but on 13 February 2020 the business

rescue practitioner commenced proceedings for winding up and on 20 February 2020, a provisional order of liquidation was granted.

4. On 6 March 2020, the provisional liquidators were appointed. The final winding up order was granted on 18 March 2020. The first meeting of creditors were held on 6 November 2020 on which date the final liquidators were also appointed.
5. In accordance with section 384(2) of the 1973 Companies Act, the Master may reduce or increase the reasonable remuneration that a liquidator should receive for his/her services, which remuneration is to be taxed on a prescribed tariff.
6. The Master invariably embarks upon a process of first taxing the remuneration on the basis of a tariff, and where necessary, will then assess whether the remuneration ought to be increased or decreased and the tariff accordingly departed from in that instance.
7. A starting premise for the determination for the need to depart from the tariff, would be whether good cause has been shown to do so and whether the fee

sought to be granted, is reasonable taking account of the winding up of the estate as a whole.

8. Applicants contend that the Master's determination in terms of section 384(2) amounts to administrative action and is therefore subject to review in terms of The Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), while also relying on section 151 of the Insolvency Act that provides for an internal remedy of review of the Master's decision, in this instance, to refuse to increase the remuneration as well as on the principle of legality as grounds for review.
9. In the founding affidavit as well as in his motivation letter to the Master, Gore alleged that from the outset of the appointment of the three liquidators, the other two liquidators had mandated him to attend to the day-to-day administration of BAC and to do all things necessary to facilitate the efficient winding up of BAC. That included carrying out a forensic investigation which the major creditors had requested.
10. Implicit in that allegation stated above, Gore alleges, he was satisfied to accept the sole responsibility for the day-to-day administration of BAC, in circumstances where BAC had three liquidators appointed to oversee the

winding up of the company. Clearly the internal arrangement among the three liquidators, not to share the workload of the daily administration, could not occur to the detriment of the creditors, however big or small, they may be.

11. A further consequence of the allegation of Gore paraphrased in paragraph 9 above, is the statement that forensic investigations was a sub-set of the day-to-day administration and it had been undertaken at the request of the major creditors. It follows therefore, that the forensic investigations contemplated, were meant to form part of the ordinary duties of the three liquidators and were not a special function requiring the exercise of special powers, for which the provisional liquidators were required to apply to Court for an extension of their powers.

12. Applicants go on to assert in the founding affidavit that the affairs of BAC were complex because: it was a constructor of luxury homes; it held un-profitable yet, un-completed building contracts that were not profitable to complete; it had at that stage liabilities in excess of R40 million with assets of only approximately, R3.6 million; it had about 17 different bank accounts, being one for each building contract as well as separate operational cost related bank accounts.

13. What those allegations make clear, is that as a builder of building structures, BAC, was primarily providing labour-intensive services to its customers as opposed to merely delivering goods. Therefore, its assets would include movable property and funds in the bank. That, however, does not necessarily make the administration complex. The fact that BAC operated a separate bank account for each building project, would, in all likelihood, have made the tracking of the income and expenses of each project more accessible than if those funds were all combined in one bank account.
14. Applicants further set out in the founding affidavit, the various challenges they made to suspected impeachable transactions and the funds they were able to recover, as a consequence. While the challenges to impeachable transactions and the consequential recoveries are indeed commendable, they nonetheless remain part of the discharge of the duties of the three liquidators.
15. Applicants make reference to various outstanding aspects of winding up such as establishing the validity of the disposal of vehicles by the business rescue practitioner, receipts of substantial amounts of cash by the business rescue practitioner, the veracity of allegations made by a director to the business rescue practitioner and whether the directors or other related entities owed

BAC any payments. Alleged impropriety on the part of the business rescue practitioner must be addressed with that individual and it should be part of the liquidators' duties to establish which debtors, if any, exist and whether funds could reasonably and expeditiously be recovered from them.

16. In his motivation letter to the Master, Gore also alleged the following.
17. An inordinate amount of time was spent investigating the affairs of BAC from a forensic perspective spanning the pre- and post -business rescue period.
18. The administration of BAC's winding up was undertaken mostly during difficult pandemic lock down conditions.
19. Challenges to recipients of payments made by BAC which were considered impeachable but where the funds were recovered, without recourse to litigation.
20. In effect, Gore appears to be motivating for an increase in remuneration based on success for the funds collected or uncovered to date.

21. The tariff remuneration due to the liquidators is R374 704,18 but the First Applicant seeks, in his letter of motivation to the Master, sent out on the letterhead of his company, Sanek Trust Recovery Services, payment of an additional fee of R564 894,57, that being over and above, the afore-stated tariff amount.
22. On 24 March 2021, the liquidators lodged, the first liquidation and distribution account with the Master. The Master considered the winding up to not be overly complex by virtue of, *inter alia*, the fact that the first liquidation and distribution account was capable of being lodged so shortly after the liquidators were appointed.
23. First Applicant alleges that from 20 February 2020 until 19 February 2021, he personally utilised 301,25 hours investigating and administering the affairs of BAC and that an external forensic accounting firm employed to do the investigations, would have costs the estate much more. He further alleges that the Auditor-General's recommended tariff rate for a director/partner of an accounting firm with more than 12 years' experience is R3119,00 per hour, which is the hourly rate that First Applicant applied, despite having more than 40 years' experience.

24. On 15 March 2021, the First Applicant applied to the Master for a special fee in excess of the tariff amount and motivated therefor with reference to annexures that included time sheets stipulating his attendances.
25. In that application Mr Gore, under cover of the letterhead of his company, Sanek Trust Recovery Services, states in support of why he applied the hourly rate of the guidelines applicable to fees for audits by private firms, that: "*I hold a Batchelor of Commerce degree and have been practising insolvency for more than 40 years. If I apply R3119 per hour to the 301 1/4 hours I have spent, so far, spent (time sheets attached) then the fee to which I submit I should receive amounts to R939 598, 75. From this I have deducted the tariff fee per the first liquidation and distribution account in the sum of R374 704, 18 leaving an additional remuneration request for R564 894, 57. This is the amount of the additional fee for which I am applying and which has been provided for in the attached account.*" (emphasis added)
26. Clearly Gore was motivating for a higher fee for himself and his company not for all three liquidators as argued by his counsel.
27. The liquidation and distribution account referred to in aforesaid quote from the motivation letter of First Applicant expressly provides under the sub-heading liquidators' remuneration as follows:

"SANEK TRUST RECOVERY SERVICES

Additional Fee	R564 894, 57
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Share of Tariff fee	R174 861, 94
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Total Fee	R739 756, 51
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VAT thereon	R110 963, 46
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R850 719, 97

JJ STEENKAMP

Share of Tariff fee	R99 921, 12
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VAT thereon	R14 998, 16
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R114 909, 28

E JANUARIE

Share of Tariff fee	R99 921, 12
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VAT thereon	R14 998, 16
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R114 909, 28 "

28. On 6 April 2021, the Master issued a query sheet seeking clarity and vouchers in support of the claim for a special fee.

29. On 14 April 2021, the First Applicant, through his company SANEK Trust Recovery Services, responded to the Master's queries. What follows thereafter is the Master's decision of 4 May 2021, in which she refused the application for

an increase in remuneration, i.e. the decision which is sought to be reviewed and set aside.

30. The Master raised the following relevant queries in response to Applicants' motivation for an increased fee:

30.1. Three liquidators were appointed, why was the forensic work not shared with fellow liquidators to avoid doing all the work himself;

30.2. One of the liquidators worked for the largest accounting and auditing firm in the world;

30.3. Does the First Applicant have forensic qualifications;

30.4. The First Applicant's special fee is based on his directorship of the Trust Recoveries company that did the work;

30.5. Mr Gore's special fee is based in his directorship of Sanek. Does the Insolvency Law differentiate between liquidators and trustees who are directors and those who are employees or associates.

31. On 14 April 2021, Sanek on behalf of First Applicant submitted to the Master, a response to the queries raised. The salient parts of the response are as follows:

- 31.1. It would have been impractical and inefficient to try and divide the forensic work among three liquidators and would have meant that three forensic investigators would be involved.
- 31.2. The Forensic work at the largest firm in the world is undertaken by a specialised forensic division.
- 31.3. First Applicant does not have a specific forensic qualification but holds a commercial university degree and 43 years' experience in practise as well as in investigating irregular transactions, many of whom were successfully impeached through the courts.
- 31.4. In applying to court for the extension of the liquidators' powers on 17 March 2020, First Applicant repeated the allegation that he was mandated by his co-liquidators to do the forensic investigation and they confirmed that under oath.
- 31.5. The affairs of BAC was complex and required forensic investigation.
- 31.6. The Covid pandemic made the conditions in which to discharge duties difficult.
- 31.7. The time spent by First Applicant did not only relate to the forensic investigations but also to the administration in discharging the duties of the liquidators.

32. On 4 May 2021, the Master made her decision on the special fee application and cited the following reasons for refusing the application:

32.1 Level 5 lockdown lasted only 3 weeks. During all the other levels, all professionals could do their work in their offices and some worked from home;

32.2. Asking three liquidators to share the forensic work is not the same as appointing three different accountants because the liquidators are meant to operate as a team and to divide the work out among them;

32.3. The Second Applicant's competency to do forensic work cannot be challenged as he has extensive experience of working independently;

32.4. If the affairs of BAC were indeed as complex as First Applicant states, then it begs the question why the skill of the other two liquidators were not employed to alleviate the complexity;

32.5. The fact that Third Applicant is based in Centurion could surely not operate against his ability to perform his duties and do a share of the work as most of the work would have been based on accounting analyses;

32.6. The nature of the work of a liquidator is investigative and forensic in nature, hence First Applicant, who does not possess a specialist

forensic qualification could perform the work and there was not a need to appoint a specialist forensic investigator;

32.7. No proof was lodged of the liquidators having been turned down by specialist forensic investigators due to the Covid pandemic and lockdown, hence First Applicant's allegation that no one could do the investigation is unsupported by objective evidence;

32.8. The liquidators lodged the first liquidation and distribution account within 4 months which is shorter than the 6 months usually taken, hence the complexity of the affairs of BAC is not accepted;

32.9. First Applicant did not lodge a complaint in terms of section 382(2) that his co-liquidators were unco-operative;

32.10. The current distribution account shows a deficiency of R16 168 936, 30 and that does not assist the motivation for a special fee;

33. The First Respondent alleged the following in his answering affidavit.

34. *In limine*, First Respondent takes the point that the liquidators are acting in their personal interests. It is alleged further that the liquidators are seeking to

dissipate the company's funds in bringing this application and therefore should not have cited themselves as *nomine officio*.

35. It is further alleged that the liquidators are acting contrary to the interest of the company in liquidation. The liquidators did not obtain a resolution to institute this review in their official capacities.

36. Clearly, the liquidators seek an increase in their fee by virtue of a special fee assessment by the Master and they do so, as a consequence of services they allege, Mr Gore rendered to the company in liquidation.

37. In representing the company as liquidators, the applicants' duties come with concomitant rights. One such right is the right to seek a special fee. It does not follow, however that they will be granted that special fee but nonetheless they are entitled to seek it.

38. A further point *in limine*, raised by First Respondent, is the grounds of review under PAJA and the principle of legality.

39. First Respondent alleges that the applicants have a statutory remedy for review in section 151 of the Insolvency Act and are not permitted to change the threshold for review under section 151, to a threshold under PAJA and the principle of legality.
40. Section 384(1) grants the liquidators an entitlement to remuneration subject to it being taxed by the Master in accordance with the prescribed tariff, being tariff B of the Second Schedule that provides for remuneration of liquidators as follows:
- 40.1. 10% of the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts or as rent, interest or other income;
- 40.2. 3% of the gross proceeds of immovable property, shares or similar securities sold, life insurance policies or mortgage bonds recovered and the balance recovered in respect of immovable property sold prior to liquidation;
- 40.3. 1% of money found in the estate; and
- 40.4. 6% of sales by the liquidators in carrying on the business of the company in liquidation, or any part thereof.

41. Liquidators are generally, therefore not remunerated on an hourly basis nor on a daily rate.

42. In keeping with the Master's role to protect the public in liquidations, in 2009, the Chief Master issued Directive 6 of 2009, where in item 5.1 it provides that:

"(a) special/increased fee should only be allowed in a final account unless there is good reason for reflecting it in an earlier account and the Assistant Master ...grants approval for this."

43. It is alleged that the item was designed to prevent the dissipation of funds recovered at an early stage in the liquidation process.

44. It is alleged that it is rational and reasonable for the Master not to increase the remuneration of liquidators prior to the final liquidation and distribution account having been lodged, unless there are sufficient safeguards to prevent prejudice to creditors.

45. It is alleged that only at the stage of the final and not the first or second liquidation and distribution account, an assessment can be made as to complexity and magnitude of the work undertaken by the liquidators.

46. After these proceedings commenced, Assistant Master, Mabusela, drafted an internal memorandum on 7 December 2021 motivating why the application ought to be opposed.

47. In that memorandum, the following reasons were given for opposing the application:

"I am of the view we oppose the entire application to prevent a possible abuse of special fee applications. In the present case there is huge estate deficiency of over R16 million as is evident in the Distribution Account.

They are three liquidators appointed in the matter and only one liquidator effectively applies for the special fee for his own benefit.

My ruling is clear, and Mr Gore has not materially challenged the issues raised except arguing in general terms.

Our opposition will go a long way to protect creditors, especially vulnerable creditors, in the future. Even if the Master loses the review, a judgement of the Court may enhance jurisprudence in this area.

This was a fairly new matter with 3 experienced liquidators were appointed but one liquidator felt like doing the work alone when he has other 2 capacitated liquidators who could have assisted him.

One of the liquidators, Mr Steenkamp regularly handles his enquiries and Mr Januari used to be a senior official at the Master of the High Court.

If this matter goes unchallenged, the vulnerable creditors will suffer in future and there will be abuse of special fees."

48. First Respondent relies on the broad powers of review that the court has, including hearing new evidence, to advance additional reasons why the special fee application should not be granted. They are:

48.2. *"While a primary reason Mr Gore provides for an increase in remuneration was that he allegedly spent 301 and a quarter hour administering the BAC, the time sheets begin in February 2020 and ends in February 2021;*

48.3. *"...the hard lockdown period only lasted for five weeks, from when it was first imposed on 26 March 2020. Thereafter, lockdown conditions eased significantly and professionals, including liquidators, were allowed to carry on their business. By September 2020, South Africa was at lockdown level one";*

48.4. *"While Mr Gore indicated that lockdown conditions did not enable him to work with his co-liquidators, the vast majority of entries on his time sheet pertain to emails and other routine administrative matters. There is simply no explanation why he was unable to communicate with the other liquidators by email, telephone or online platforms. In this regard, the timesheets point out that Mr Gore used online platforms such as Zoom to perform his functions. This certainly puts paid to his allegations that the lockdown was an impediment to communicating or working with his fellow liquidators."*

48.5. *Given that both Mr Gore and the other joint liquidators submit that Mr Gore did all the work, instead of submitting a L&D account which proposed that each joint liquidator be paid a share of the prescribed tariff and that Mr Gore in addition be paid an additional amount, the L&D account ought to have proposed that the second and third applicants remuneration be reduced significantly in terms of section 384(2) of the 1973 Companies Act... In light of the aforementioned, should this Court find that Mr Gore ought to receive additional remuneration, it is submitted that this increase is to be borne by the other two liquidators by reducing their remuneration proportionately. There is no reason why creditors of BAC should be prejudiced where the three joint liquidators failed to jointly perform their tasks but instead abdicated their responsibilities to one member of the team and then still attempt to argue for more remuneration".*

49. The Master took issue with the time sheets submitted by Mr Gore and noted that:

49.2. it was usual for a liquidator to keep logs of the time taken to perform administrative tasks and that Mr Gore did not explain why he allegedly noted the times he worked on the matter.

49.3. the time sheets moreover were extremely vague and *"not only does each individual row in the time sheet cover significant periods of time (varying from several days to several weeks), but the time allegedly spent is not particularised. No details whatsoever are given as to the length of the time taken for e-mail correspondence or telecons. What is more, the description of each attendance is markedly cryptic..."*;

49.4. in the time sheet *"there is no explanation what work 'forensics on bank account' entailed and nothing in that description suggests that the work was especially onerous, protracted or complex. The time sheet entries instead reveal that he allegedly performed routine administrative tasks performed over a period of a year"*;

49.5. *The entries in the time sheets therefore do not support Mr Gore's submissions that he encountered difficulties when winding up BAC or that the work was inordinately complex.*

50. The Master noted that the 17 bank accounts by the BAC did not make the winding up complex but simplified it as

"Where each building project has a single bank account this would make a liquidator's task exponentially more simple as it allows for greater transparency and clarity. By contrast had there only been a single bank account with entrees for all 17 projects included therein, it would be hard to discern which entries belonged to which building project."

First Respondent's Submissions

51. The Court's power of review under section 151 of the Insolvency Act is wide and encompasses both appeal and review powers, in which new evidence may be adduced and the relief granted by the court may include a decision on the matter *de novo*. Counsel for both sides agree on this contention.

52. First Respondent relies on section 367 of the 1973 Companies Act to assert that liquidators are required to control and administer the affairs of the company in the interest of creditors. Section 376 reads as follows:

"A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto."

53. On First Respondent's behalf it was submitted that:

- 53.1. The Master exercises a true discretion under section 384(2), the Court is only entitled to interfere if it is satisfied that the decision was "*clearly wrong*". The liquidators completely fail to meet this threshold.
- 53.2. The liquidators sought impermissibly to review the Master's decision under PAJA whereas the Insolvency Act 1936, provides its own internal review mechanism under section 151. Therefore, the liquidators are precluded from seeking a review under PAJA by operation of the principle of subsidiarity.
- 53.3. The liquidators not only failed to provide "*good cause*" for the increased remuneration sought but they also do not attempt to demonstrate why the Master's decision was "*clearly wrong*";
54. It was submitted that it is well within the statutory powers of the Master to oppose strategic litigation that could prejudice creditors of liquidated companies henceforth.
55. Section 391 of the 1973 Companies Act provides that a liquidator:
- " shall proceed to recover and reduce into possession all the assets and property of the company movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto."*

56. Section 382(1) of the 1973 Act expressly required that joint liquidators should act jointly.

57. Section 384 provides as follows concerning the remuneration of liquidators:

- “(1) In any winding-up a liquidator shall be entitled to reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration...”*
- “(2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.*
- “(3) ... no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled under this Act.”*

58. Section 384(3) set out above, clearly prohibits a liquidator from receiving remuneration for his/her services other than the remuneration that he/she is entitled to under the Act.

59. First Respondent's counsel relied on the Commentary to the Companies Act¹ for the submission that the liquidators are not entitled to receive remuneration

¹ Blackman et al (Juta) RS 8,2011 Chapter 14 page 324

for other roles and functions they perform for the company in liquidation in order to prevent abuse of power. Blackman comments as follows:

"Because a liquidator is not entitled to receive out of the assets of the company any remuneration for his services other than the remuneration to which he is entitled under the Act, he may not charge the estate for services he has rendered as an auctioneer, an attorney, or a conveyancer. The fact that the estate would have had to pay some other person for such services had the liquidator not chosen to render them, makes no difference. The purpose of this provision is to prevent abuses by a liquidator of his position of trust, and the creditors cannot waive their rights under it by a resolution that a liquidator be entitled to charge fees for other services rendered by him."

60. In reply, the Applicants allege that the Master gave no consideration to the fact that the creditors in the second statutory meeting, prior to the second meeting of creditors state that due to Covid lockdown and a lack of funding, First Applicant would be performing the forensic investigations into the affairs of BAC and would in due course, seek a special fee for that work. A committee of creditors requested that a forensic investigation be undertaken.
61. In the absence of objections from creditors, the liquidators' resolution to appoint First Applicant to conduct the forensic investigations and to claim a special fee, were passed at the second meeting of creditors.
62. The creditors are not vulnerable creditors, as suggested by the Master, but are large financial institutions and commercial construction enterprises.

63. The Assistant Master's internal memorandum containing the motivation for opposing this application suggests a general policy decision was made in circumstances that would fetter the Master's discretion to grant or refuse applications for special fees in terms of section 384(2).
64. The replying affidavit goes on to update the court on events subsequent to the launching of this application and constitutes new matter in reply, which is being proffered on the basis that the court holds a wide power of review.
65. They are as follows:
- 65.1. The day before the business rescue application BAC re-paid a loan to Mr Gerretsen of R 300 000,00 that was paid by Gerretsen back to the company in liquidation in July 2020;
- 65.2. Mr Grobler, a former employee of BAC that was paid R600 000,00 settled the claim by paying to the company in liquidation, R200 000,00;
- 65.3. The claim against EZS Betonkontrakteurs for an amount of R432 250,00 was settled in full;
- 63.4. There is ongoing litigation in several other claims.

66. The total claims are R4 621 264, 00 of which R932 250, 00 have been collected.
67. The liquidators are funding this application themselves and the funds of the company in liquidation are not being used therefor.
68. First Applicant alleges that the vast majority of liquidation work are undertaken by a single liquidator despite the appointment of joint liquidators and there is nothing untoward about it.
69. Applicants allege that the Master's further reasons ought to be disregarded because they did not form part of the decision to refuse the application for a special fee.
70. Applicants deny that complex work would not have been undertaken as expeditiously by one person.
71. The applicants allege that the fact that one liquidator did all the work is a red herring because the magnitude of the work and time spent thereon remains the same.

72. The Applicants allege that the Master is correct in averring that ordinarily liquidators are not required to keep time sheets but then goes on to criticise the time sheets for lacking particularity.
73. Applicants allege that the Master's circular is not peremptory and only advisory.
74. Applicants concede that some of the work was undertaken prior to their appointment but aver that that period constitutes only 13 hours of work out of the total 301, 25 hours.
75. Applicants allege that the Master did not take account of the fact that the forensic work undertaken was directly related to the impeachable transactions that were and are still being pursued, which calls into question the Master's contention that the liquidation lacked complexity.
76. In support of the Applicants' complexity argument, their counsel referred this Court to the judgment delivered on 3 March 2022 on an exception to particulars of claim, taken by a creditor and the business rescue practitioner to the Applicants' particulars of claim.

77. That exception hearing concerned an alleged collusive scheme that Applicants sought to have set aside in an attempt to recover funds allegedly paid by the Company-in-liquidation. The essential facts were summarised in that judgment as follows: a debtor of the Company, by agreement with the directors and/or the business rescue practitioner caused the debt to be paid into the bank account of the Company held with a bank that was the Company's creditor in that the Company owed the bank an overdraft amount in an amount substantially similar to the amount of the debt that was paid.

78. The facts summarised above are no more onerous or complex than any other transaction in which a Company-in-liquidation through its directors or business rescue practitioner sought to have a debt paid directly in satisfaction, to a creditor to the detriment to the whole body of creditors.

Applicants' Legal Submissions

79. On Applicant's behalf the following submissions were made.

80. In terms of section 384(1) of the 1973 Companies Act, liquidators are entitled to "*reasonable remuneration*" for services rendered to be taxed by the Master in accordance with the prescribed tariff.

81. In terms of section 384(2), the Master may reduce or increase such remuneration, if, in his opinion, there is *good cause* for doing so.

82. In Nel's case, it was held that "*good cause*" in relation to increasing a liquidator's remuneration was described as follows:²

" ... the Master has a duty to satisfy himself or herself as to the reasonableness of the remuneration arrived at by the application of the tariff. This means that where, in the Master's view, there is 'good cause' for departing from the tariff, the Master has the power to do so. The concept of 'good cause' is very wide and there is nothing in s 384 of the Act which indicates that it should be interpreted so as to exclude any factor which may be relevant in determining what constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors are relevant will vary from case to case but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him or her in the discharge of the duties involved. If, in the winding-up of a company, particular difficulties are experienced by the liquidator because of the nature of the assets or some other similar feature connected with the winding-up, this would undoubtedly constitute 'good cause' entitling the Master to increase the tariff remuneration."

83. Section 151 of the Insolvency Act 24 of 1936, is the primary ground for this review, however PAJA is relied upon in the alternative.

84. Section 151 provides as follows:

"151 Review

Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling

² Nel and Another NNO v the Master (Absa Bank Ltd and Others Intervening) 2005 (1) SA 276 (SCA) at para 20.

or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve."

85. In *Nel* the SCA held³ that section 151 of the Insolvency Act provides for the "third type of review" i.e. where Parliament has conferred a statutory power of review upon the Court, in which review a Court may enter upon and decide the matter *de novo*. The Court possesses not only the powers of a Court of review, but also has the functions of a Court of appeal, with the additional privileges of being able – after setting aside the decision arrived at – to deal with the matter upon fresh evidence.
86. However, the nature of those powers depends on (i) the statutory review provision, and (ii) the nature of the functions of the person whose decision is being taken on review:⁴

"... [W]hile it is sometimes stated that the Court's powers under this kind of review are 'unlimited' or 'unrestricted', this is not entirely correct. The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the 'ordinary' judicial review of administrative action ... so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular

³ *Nel supra* para 22.

⁴ *Nel supra* para 23.

grounds of review or particular remedies.”

87. In these proceedings, the statutory review provision – i.e. section 151 of the Insolvency Act – does not confine the Court to particular grounds of review or particular remedies.
88. As to the nature of the powers and functions of the person whose decision is being taken on review, in the present application (as in Nel) they are powers of the Master akin to performing the functions of a Taxing Master (taxing remuneration in terms of the tariff and increasing or decreasing that remuneration, in terms of section 384).⁵
89. The SCA held in Nel that there was certainly something to be said for the appellants in Nel formulating grounds of review under PAJA, as the Master's ruling fell under the definition of “*administrative action*” in section 1(a)(i) of PAJA.⁶
90. The SCA held that the third, wider kind of review had more to do with the powers of the court of review and the evidence the court may have regard to, rather than the grounds of review formulated under PAJA.⁷

⁵ Nel supra paras 24 and 25.

⁶ Nel supra para 28.

⁷ Nel supra para 29 [291A].

91. The SCA however, did not make a final determination of this issue.

92. The SCA in *Nel* approved the following approach of the Court *a quo*:⁸

"There is nothing in the wording of s 384(2) of the Companies Act that prescribes how the Master should determine the extent to which the remuneration taxed in accordance with the prescribed tariff under s 384(1) should be reduced. The Master may do this in a number of ways, provided that his method is rationally connected to the purpose of determining a reasonable remuneration for the liquidators' services."

93. Applicants bring this review in the alternative, on grounds contained in section 6(2) of PAJA, alternatively the common law (in respect of an error of fact):⁹

Those grounds are as follows:

93.1. The Master made an error of law;

93.2. The Master taking into account irrelevant considerations; alternatively, not taking into account relevant ones;

93.3. That the Master's decision was not rationally connected to the purpose of the empowering provision;

93.4. The Master's decision was taken unreasonably, capriciously or arbitrarily; and

93.5. The Master made an error of fact.

⁸ *Nel supra* para 42 [298B-C].

⁹ Section 6 of PAJA

94. In relation to those grounds, Applicants' counsel submitted that:

94.1. The Master made an **error of law** by failing to properly apply section 384(2) for the purpose intended, by applying irrelevant considerations and ignoring relevant ones, and exercising his discretion in a manner not rationally connected to the intended purpose of the provision i.e. determining the liquidators' reasonable remuneration for their services.

94.2. This has been compounded by the Master's lately revealed motivation to develop a jurisprudence for future increased remuneration applications, which have no connection – rational or otherwise – with the services rendered by the present liquidators.

94.3. There were other errors of law in the Master's reasons.

94.4. The Master in his reasons said that Gore's investigative work fell within what was expected of a liquidator and was part of the job.

95. It was submitted that an appeal bench of this Court held in *Klopper*,¹⁰ on the same facts of reviewing the Master's refusal to increase remuneration, that the Master committed an error when she *"dismissed the applicant's detailed motivation by stating that the items were covered by the tariff, and that these related to what she called the 'normal duties of a liquidator'. The tariff does not refer to the duties to be undertaken by a liquidator; it merely sets out the percentages allowed as remuneration for the liquidator on the disposal of*

¹⁰ *Klopper NO v The Master of The High Court* 2010 JDR 0123 (WCC) at p.14-15.

various classes of property. It does no more. The only relevant consideration was whether the application of the tariff resulted in remuneration for the applicant which was reasonable when measured against the various factors mentioned. If it did not, this amounted to good cause to increase the remuneration in accordance with section 384(2) of the Companies Act.”

96. Yet another error of law in that case, was the Master’s reasoning that there was a deficiency for creditors in the L&D account and therefore the increased remuneration ought not to be allowed. In *Klopper*,¹¹ the Court held that:

“A liquidator’s administration is governed by the exigencies of each particular case. A diligent liquidator will discharge the duties imposed on him by law. The reason advanced by the Master that a liquidator’s remuneration must be determined by ‘the result attained’ is, in our view, a misdirection. To the extent that this assertion can be given any content at all it is, at best, irrelevant”.

97. It was submitted, that the same would apply in respect a deficiency in the L&D account. Creditors of a hopelessly insolvent estate would not expect to be paid in full: they would expect the liquidators to conduct the requested forensic investigations to claw back, if possible, whatever realisations may be made.

98. Turning to the ground that the Master allegedly considered irrelevant considerations; alternatively, did not take into account relevant ones. The most

¹¹ *Klopper NO v The Master of The High Court* 2010 JDR 0123 (WCC) at p.15.

glaring relevant consideration the Master did not take into account was the fact that the BAC creditors requested the forensic investigations and were notified when they occurred and that a special fee would be charged.

99. It was argued that, by contrast, and for example, a host of irrelevant considerations were taken into account, such as Gore not providing evidence that a forensic accountant could not be appointed; the extent to which the work could be performed in COVID; that 13 hours of work was performed pre-appointment as provisional liquidators; the liquidators not all participating in the forensic work when what matters is that the work was done and bore fruit in the form of multiple claims against various parties (in itself another factor not considered by the Master); his basis for concluding that the estate was not complex i.e. that an L&D account was swiftly produced and Gore investigated alone.

100. It was argued that the Master's decision and his method i.e. the factors he took into account, were not rationally connected to the purpose of the empowering provision i.e. determining the liquidators' reasonable remuneration for their services.

101. The Master chose factors in determining the reasonable remuneration that were not rationally connected to remuneration for the liquidators' services in BAC. Those are as follows:

- 101.1. Whether a liquidator of 43 years' experience held or required a forensic qualification in order to investigate claims;
 - 101.2. Whether three liquidators instead of one shared the forensic work in the estate;
 - 101.3. Holding that the affairs of the estate were not complex when the investigations had resulted in multiple and extensive litigation;
 - 101.4. Holding that the affairs of the estate were not complex for the irrational reasons that the liquidators did not work together yet speedily produced an L&D account;
 - 101.5. Disputing the timing of the increased fee in the L&D account when creditors had already been notified of same.
102. It was submitted that, by contrast, the Master ignored facts that were rationally connected to determining the reasonable remuneration of the BAC liquidators for their services (thereby ignoring relevant considerations), such as:
- 102.1. The request of the creditors' committee that the forensic work be performed;
 - 102.2. The notification to creditors that the work had been undertaken by Gore and at a special fee, instead of hiring an external forensic investigator;
 - 102.3. The amount of time and effort put into the work recorded by Gore in his time sheets – ignored in the original reasons, but now disputed in the

answering affidavit.

103. It was submitted that the Master made an objectively verifiable error of fact. The Master proceeded on the premise that the increased remuneration was applied for by Gore alone and not by his co-liquidators. That was incorrect. The application for increased remuneration was for the liquidators (plural) over and above the statutory tariff. The co-liquidators signed the first L&D account which reflected the additional fee (Schedule D). Accordingly, the Master's decision was influenced by an error of fact, which was uncontentious and objectively verifiable, and therefore reviewable by the Court.¹²

104. It was submitted that by disregarding so many relevant factors while placing emphasis on irrelevant ones, the Master's decision was taken unreasonably, capriciously or arbitrarily.

105. It was argued that this was only compounded by the liquidators reasonably suspecting that bias¹³ had arisen in the Master's dealing with the review application.

106. It was submitted that the Master's plainly stated motive in opposing the review application (and thereby continuing to oppose the increased remuneration) is

¹² Dumani v Nair and Another 2013 (2) SA 274 (SCA) at paras 31 – 32.

¹³ Section 6(2)(a)(iii) of PAJA.

not rationally connected – indeed not connected at all – to “*reasonable remuneration for the liquidators’ services*” in BAC.

107. It was submitted that the Master’s motive is aimed at “*possible abuse of special fee applications*” “*in future*” and at “*enhancing jurisprudence in this area*” – which has nothing to do with the requirements of section 384(2) and the reasonable remuneration of the BAC liquidators.

108. On all the above grounds, it was submitted that it is apparent that the Master’s decision was unreasonable, alternatively arbitrary or capricious, such that, in any event, and given the multiple misdirection, it was “*clearly wrong*” – even if that were the only applicable test available in terms of section 151.

109. In Klopper the Master undoubtedly mis-directed herself in fewer instances than the Master in the present matter, yet the appeal bench of this Court held:¹⁴

“[T]he reasons stated by the Master for her decision amount to a misdirection and indicate that she was materially influenced by an error of law, that she took into account irrelevant considerations and that she did not consider relevant considerations. She also seems to have acted arbitrarily, her decision was proportionately unreasonable and the exercise of her discretion was not according to law.”

110. The Master’s decision not to increase the liquidator’s remuneration in *Klopper* was accordingly set aside on review.

¹⁴ Klopper NO v The Master of The High Court 2010 JDR 0123 (WCC).

111. It was argued that the Master's decision in the present matter should likewise be set aside – there are far more mis-directions in the present matter that would constitute a "*clearly wrong*" decision than there are in *Klopper*.

112. In addressing the Master's further reasons submitted after the decision had been made, the Applicants counsel made the following submissions.

113. There is a paradox between the Master insisting, on the one hand, that the liquidators ought to have shared the work, while, on the other, simultaneously contending that a single forensic accountant ought to have been and could have appointed during the COVID pandemic.

114. The forensic work was done successfully, to the benefit of the estate, and at the behest of BAC's creditors.

115. Gore's time sheets were not referred to in the Master's original reasons for his decision. He ought not to be allowed to augment his reasons after the decision – the issue is irrelevant as it was not part of the Master's original decision.

116. It is common cause that liquidators are not required to keep time sheets or time records.

117. The time sheets are raised to bolster the Master's contention that the winding-

up of the estate of BAC was not complex.

118. The Master may not now attempt to bolster his case by inventing new reasons to suggest that the matter was not complex

119. BAC's 17 bank accounts were not referred to in the Master's original reasons for his decision. He ought not to be allowed to augment his reasons after the decision – the issue is irrelevant as it was not part of the Master's original decision.

120. The 17 bank accounts are raised to bolster Master's contention that the winding-up of the estate of BAC was not complex.

121. The Master alleges that the number of bank accounts simplified the matter.

122. This contention is unfounded, and the Master has no actual knowledge of the detail or inter-connectedness of the transactions on the bank accounts which had to be analysed.

123. As with the time sheets, the Master may not now attempt to bolster his case by inventing new reasons to suggest that the matter was not complex.

124. Dural oral argument, Applicant's counsel submitted that the contention that First Applicant conducted a forensic investigation is somewhat of a misnomer and

accepted that First Applicant did not hold qualifications associated with those of a forensic investigator *per se*.

125. Applicants' counsel accepted that the Master was correct to say that the alleged forensic work undertaken by First Applicant is work that would ordinarily fall within the scope of the work that a liquidator is expected to do.

126. Applicants' counsel went on to submit that the work undertaken by First Applicant was work that a liquidator would ordinarily do but it was extensive given the number of hours he spent on it.

127. Reliance was placed on an alleged practice prevailing where one liquidator usually does the day-to-day administration work for all the liquidators and suggested that it was a notorious fact that this Court could take cognisance of.

128. Counsel for applicant also accepted that Applicants are required to show that the Master's decision was clearly wrong before this Court could interfere with that decision.

129. Applicant's counsel submitted that the Master made an error of fact in that he operates on the incorrect assumption that the special fee is being sought on behalf of First Applicant, whereas it is being sought on behalf of all the liquidators jointly. In support of the submission that the liquidators could bring the review in their representative capacity, reliance was placed on paragraph

14 of the **Gainsford** ¹⁵ Case where the Supreme Court of Appeal held as follows:

“[14] In my view the divergent views reflect a distinction without a difference. The structure of the Act is such that liquidators are empowered to perform specified acts including applying to court in a voluntary winding-up in terms of s 388(1) to determine any ‘question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court’. Likewise, s 386(5) provides that:

‘In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.’

*As stated above, Mailula J was correct in reaching the conclusion referred to in Gainsford, to have regard to the provisions of s 386(5) which demonstrate that liquidators act in the stead of the company in liquidation. **A distinction between the locus standi accorded to the company in liquidation and that of its liquidators acting in their representative capacity**, is pedantic or illusory. To disqualify liquidators properly appointed from acting on behalf of a company in liquidation would truly be elevating form above substance.”(emphasis added)*

130. Applicants’ counsel submitted that in the case of Nel and Klopper, the Court did not non-suit the liquidators for acting in their representative capacity and neither should this Court.

131. Applicants’ counsel submitted that the existence of 17 bank accounts in the

¹⁵ Gainsford and Others NNO v Tanzer Transport (Pty) Ltd 2014(3) SA 274 (SCA) at[14]

winding up process, does not simplify the process and could conceivably have made it more complex.

132. Applicants' counsel submitted that the Resolutions passed by the creditors on 5 February 2021, before the application for a special fee was made to the Master, encompasses the grant of authority to the liquidators to bring this review application by virtue of the following words: *"That the liquidators be and are authorised to institute or defend legal actions in order to collect debts owing to the Company or in respect of any other matter affecting the Company in liquidation including the holding of enquiries or examinations in terms of the Companies Act, 1973, as amended, or as read with the Insolvency Act, 1936, as amended, as they may deem fit, and for such purpose to employ the services of attorneys and/or counsel of their choice and to pay the costs out of the funds of the Company in liquidation as part of the costs of administration."* (emphasis added)

133. The liquidators assert that they bring this application with their own funds and do not seek to recover the costs from the Company in liquidation. That alone, makes clear they did not commence these proceedings with the intention to rely on the emphasized portion of the resolution stated above. A further reason for that conclusion is the clear words of the relevant part of the resolution which contemplates taking legal action in order to recover debts of the Company or an ancillary purpose directly connected to administering and winding up the Company.

134. It is incontrovertible that applications for review of the Master's assessment of liquidators' fees are causes that benefit the liquidators not the Company in liquidation. The Supreme Court of Appeal said as much in paragraph 43 of Nel's case.

Applicable Law and Evaluation

135. In **Nel and Another NNO v The Master (Absa Bank Ltd and others intervening)** 2005 (1) SA 276 (SCA) held that:

" [43] As I have indicated above, the appellants purported to bring their review application in their capacity as the duly appointed joint liquidators of Intramed, contending that they were duly authorised in such capacity to institute the review of proceedings. As correctly pointed out by the Master in his answering affidavit, the appellants failed to annex any evidence which supported this contention. The review proceedings were in fact proceedings which should obviously have been brought by the appellants in their personal capacity and not in their capacity as joint liquidators — the proceedings relate to their entitlement to remuneration and not to a matter falling within the ambit of their role as liquidators of the Intramed estate. As contended by counsel for both the Master and the intervening respondents, the appellants were simply seeking to secure a higher fee for their services than that fixed by the Master. In so doing, they were acting in their personal capacities and not in any sense in the interests of the creditors of the Intramed estate. Indeed, the appellants were — and still are — acting against the interests of the creditors, solely for their own benefit. This being so, there is no reason whatsoever why the costs of the review application or of the appeal should be borne by the company in liquidation."

136. The Applicants, in *casu*, fall squarely within the realm of liquidators that seek a special fee in their own interest as enunciated in the above-quoted paragraph of Nel's case.

137. In Nel's case, the Master did not raise as a point *in limine*, the fact that the Appellants had no *locus standi*. The court refers to it being raised in the answering affidavit in the context of the Appellants not being entitled to having their costs paid by the company-in-liquidation.

138. In the judgment of Klopper NO in the Supreme Court of Appeal, the court similarly considered the basis on which the liquidator came to court, namely in a representative capacity while seeking a challenge to the amount of remuneration due to the liquidator, which the court found was a claim based on the liquidator's self-interest and therefore the company-in-liquidation should not bear the costs.

139. Therefore, this application ought to have been brought in the names of the liquidators personally and not in their representative capacity.

140. The liquidators had every opportunity to have applied to substitute themselves in their personal capacity but failed to do so.

141. Clearly, the case of Gainsford is distinguishable on the facts with regard to the liquidators being cited in their representative capacity of the Company-in – liquidation being cited.

142. In **Gore NO v Master of the High Court** ¹⁶ the Court was not seized with an *in limine* point concerning the *locus standi* of the liquidator and his authority to bring the Application in their representative capacity. The Court considered the liquidator's authority to bring the application in that case, only in the context of the costs order sought by the Applicant which was that the Company-in-liquidation bear the costs. That case is consequently not authority for the proposition that Courts permit an application of the kind that this Court is seized with, to be brought by liquidators in their representative capacity without express authority to do so.

143. The fact that the Applicants have used their own financial resources to litigate in this case, does not confer *locus standi* on them to bring this Application in their representative capacity.

144. It was submitted on Applicants' behalf, during argument, that a finding in their favour would necessitate an amendment to the liquidation and distribution account, and that will impact upon the company-in-liquidation, hence they brought the Application in their representative capacity.

145. However, in all instances where liquidators litigate to obtain an increase in their fee, an amendment to a liquidation and distribution account would follow.

146. The possible amendment to the liquidation and distribution account did not

¹⁶ [2002]All SA334 (E) at 345c to f

clothe the liquidators in Nel's case, with the authority to act in their representative capacity. The Supreme Court of Appeal saw fit to express itself on the nature of applications by liquidators where they challenge their fee and pronounced it to be a self-interest cause.

147. The Applicants *in casu*, bring this Application in their own personal interests, therefore this Application should fail on the ground that they do not have the authority to bring this Application nor the *locus standi* to do so.

148. Out of an abundance of caution and in the event that this Court is wrong on the *locus standi*, and authority point, I will continue to consider all the grounds upon which the Applicants base their challenge.

149. Turning to the contention by the Applicants that it was necessary to employ the services of a forensic investigator, without alleging what the duties of that investigator would be apropos the liquidators, the **Estate Wilson v Estate Giddy** case is relevant.

150. In Standard Bank's case, ¹⁷ the court cited with approval the following extract from Estate Wilson v Estate Giddy, Giddy & White & Others 1937 AD 239 at 245, that underscores the role of liquidators or trustees, to establish with sufficient proof and particularity, the true state of the financial affairs of a

¹⁷ Standard Bank of South Africa v The Master of the High Court 2010 (4) SA 405 (SCA)

company in liquidation or an individual whose estate is sequestered:

'By virtue of section 43 of the Insolvency Act it is the duty of the trustee to examine every claim proved against the estate and to satisfy himself that the estate is indebted to the creditor in the amount of the claim. It seems to me that for this purpose the trustee is entitled to a clear and unambiguous statement of the causa debiti and in this case the trustees were justified in objecting to the contradictory statements in the proofs of debt.'

151. As the Supreme Court of Appeal continued in discussing the duties and extent of the exercise of diligence and care of liquidators in Standard Bank's case, the following paragraphs are relevant.

" [96] In *Commentary on the Companies Act* ¹⁸ the learned authors, under the title *Duty thoroughly to acquaint himself with the affairs of the company and to act openly*, state the following concerning a liquidator:

*'He owes a duty to the whole body of members and the whole body of creditors, and to the court, to make himself thoroughly acquainted with the affairs of the company, and to suppress nothing and conceal nothing, which has come to his knowledge in the course of the investigation, which is material to ascertain the exact truth.'*¹⁹

[97] Furthermore, a liquidator must act with care and diligence. In *Commentary on the Companies Act* the learned authors state the following:

'A liquidator must act with care and skill in the performance of his duties. He has a duty to exercise particular professional skill, care and diligence in the performance of his duties, and will incur liability if he fails to display that degree of care and skill which, by accepting office, he holds himself out as possessing. Thus a high standard of care and diligence is required of a liquidator. He must act reasonably in the circumstances. The test as to what is or is not reasonable in any given circumstances is not whether the conclusion

¹⁸ M S Blackman, R D Jooste, G K Everlingham, M Larkin, C H Rademeyer, J L Yeats Vol 3 at 14–376.

¹⁹ Ex Parte Clifford Homes Construction (Pty) Ltd 1989 (4) SA 610 (W) at 614.

arrived at is reasonable, but is that of a reasonable man "applying his mind to the conditions of affairs", which means "considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide".

Relevant here is the fact that in cases of uncertainty or doubt, the liquidator has the opportunity of safeguarding himself either by obtaining the directions of the Master or the court or by obtaining the directions of the creditors or members. Where, in such circumstances, the liquidator, for example takes upon himself the burden of deciding on the validity of a claim, he also takes upon himself the risk of its turning out that the payment constituted a misapplication of the funds under his control.²⁰

152. When section 384(2) of the 1973 Companies Act is read with section 151 of the Insolvency Act, it becomes clear that the court's review powers are limited by the Master's discretion. The court can only interfere with a decision made by the Master if it is "*clearly wrong*". This means that the court can only interfere if it is clear that the Master's decision was the result of a failure to exercise their discretion or if the discretion was exercised in a materially incorrect manner.

153. The principle of subsidiarity relied on by First Respondent to oust PAJA and the principle of legality as grounds for review, means that power must be exercised at a local level unless it is best exercised at a higher level.

154. In **My Vote Counts NPC**,²¹ the Constitutional Court considered the ambit and circumstances in which the principle of subsidiarity may be invoked and held as

²⁰ Blackman et al 14–378.

²¹ *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (30 September 2015)

follows:

"[69] The principle provides that one may not rely directly on the Constitution in the face of legislation designed to give effect to it; one must treat the Constitution as subsidiary to the legislation. But the crucial point is that the principle operates only if the legislation is not under constitutional attack. This Court has already noted, in Doctors for Life, that validity of legislation can only be impugned in two circumstances: when the content or substance of the legislation does not comply with the Constitution, or because there is a procedural defect in its enactment. By contrast, when a litigant does attack the legislation, as here, saying that it falls short of a standard embodied in the Constitution itself, then they are free to invoke the Constitution directly. That, indeed, is the essence of constitutionalism: it allows all legislation to be subjected to constitutional scrutiny. So a litigant may invoke the Constitution to gauge the extent to which legislation meets a constitutional obligation – but the litigant may not evade addressing that legislation."

155. In light of there being no challenge to the validity of section 151 of the Insolvency Act, the principle of subsidiarity ought not to apply, and the review will be considered under that section as well as under PAJA and the principle of legality.

156. The alleged error in law that the Master was accused of making is based on alleged irrelevant considerations that the Master made, such as: the finding that the work undertaken by First Applicant is in fact work ordinarily undertaken by a liquidator.

157. Although as stated in Klopper, there is no definition in the tariff of what constitutes the duties of liquidators, the Act makes clear what the duties of liquidators encompass. They are: to reduce into their possession, all assets and

income belonging to the company-in-liquidation, to cause creditors to prove their claims, to pursue transactions that have the potential to be impeachable, and where necessary, apply to court to have suspected impeachable transactions set aside.

158. No liquidator can investigate potential impeachable transactions without devoting time, expertise and skill toward establishing the nature and source of those transactions. In so doing, liquidators invariably become involved in a forensic process to establish the legal validity, enforceability and cogency of transactions and the relationship among the parties thereto.

159. Among the reasons offered by Applicants for requesting an increased special fee, is that Mr Gore embarked on a forensic exercise in difficult circumstances and did so alone without the assistance of his co-liquidators and he employed his extensive expertise and skill to do so.

160. The Master's considerations of why Mr Gore undertook the forensic work alone; the finding that the conditions under which some of the work was performed during Covid-19 lockdown being no more onerous than before lockdown, given that the work would be conducted alone, in the privacy of an office; failure by the Applicants to establish an objectively ascertainable and independent basis for alleging that no forensic accountant would perform the forensic investigations; and the conclusion that the type of forensic investigations undertaken was not outside the scope of the normal duties of the liquidators nor

beyond the capacity of two of the three liquidators who were very experienced, are not irrelevant considerations nor are they not rationally connected to the Master's decision to determine what constitutes a reasonable remuneration for the liquidators. Those are factors that are inextricably bound up with the manner in which the Applicants conducted the winding up and the results that they achieved at the stage when the special fee application was made.

161. An uncritical and immutable application of the finding concerning irrelevant considerations found by the court in Kloppe's case, to the facts of this case, is to be deprecated.

162. It is in fact the Applicants and First Applicant in particular, who tied an increased remuneration to his success in recovery of certain funds from what he considered to be impeachable transactions without the need to litigate, to the motivate for that remuneration.

163. Contradictorily, Applicants seek to rely on the Master's finding that the remuneration ought not to be increased at that stage given the amount of funds not recovered in comparison to the funds that were recovered, to assert that the Master's reliance on the deficiency in the amounts available to creditors in the liquidation and distribution account is an error in law being made by the Master. In support of this contention, Applicants rely on Kloppe's case.

164. Applicants place much store on the major creditors' request that a forensic investigation be conducted, as justification for conducting the investigation and claiming an increased remuneration for doing so.
165. The Master raised the fact that creditors who sought a forensic investigation, did so during the period when the Company was under business rescue and not when it was in liquidation.
166. Applicants concede that the time sheets include a period when forensic work was undertaken before their appointment as liquidators but aver that the number of hours spent doing that work is only 13 making it miniscule in comparison to the total hours of 301, 25 hours. Nonetheless, Applicants offer no reduction in the calculation of the fee sought proportionate to the 13 hours. That stance underscores the First Respondent's position that the Applicants' stated reasons for seeking the special fee, include reasons that place the time sheet motivation outside the scope of the work that the liquidators were bound to do and constitutes work that liquidators can't expect to receive additional remuneration for.
167. The Master's stance concerning the expectation of additional remuneration based on time spent by Mr Gore is completely in keeping with the Applicants' failure to show good cause that the manner of winding up at the relevant stage, justified a special fee that would constitute reasonable remuneration. Therefore the reasons for the Master's decision do not constitute irrelevant considerations.

168. Nothing prevents the creditors from satisfying themselves about alleged impeachable transactions, the Companies Act 1973, in section 360, authorises a creditor as well to inspect the books and papers of the company in liquidation. It provides as follows in section 360(1):

"360. Inspection of records of company being wound up.

(1) Any member or creditor of any company unable to pay its debts and being wound up by the Court or by a creditors' voluntary winding-up may apply to the Court for an order authorising him to inspect any or all of the books and papers of that company, whether in possession of the company or the liquidator, and the Court may impose any condition it thinks fit in granting that authority."

169. Liquidators, however are duty bound to act in the interests of the body of creditors as a whole, i.e. a *concursus creditorum* and not only in the interests of major creditors.

170. Liquidators cannot do the bidding of major creditors only, and expect to be remunerated with an increased fee for doing so, when that increased fee may operate to the detriment of all creditors, including those that did not make the request for a forensic investigation.

171. In this instance, it has to be borne in mind that the creditors who sought a forensic investigation, did so at the stage of business rescue, when a profitable outcome was contemplated.

172. Turning to the Master's stated motivation for opposing this Application,

including a desire to prevent possible abuse of the special fee applications, in general.

173. The Master is statutorily mandated with supervising and controlling the winding up process.

174. As part of those statutory powers, the Master issues practice directives aimed at implementing uniform policy.

175. Concerning the test for rationality, being objectively justifiable in the interests of public good, the Constitutional Court in **Rafoneke** ²² held as follows:

“[74]...The complaint seems to be rather focused on whether, in doing so, the State has acted in an objectively rational manner that is related to a legitimate governmental purpose as stated in Affordable Medicines Trust. Therefore, as long as the power to regulate is exercised in an objectively rational manner related to a legitimate governmental purpose, a court’s interference would not be warranted. It is also helpful to highlight that in Prinsloo this Court further stated that

“[the state] should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.”

²² *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* 2022 (6) SA 27 (CC) at [74]

176. There is no prohibition against the Master wishing to obtain clarity on its approach to special fee applications in particular, in this case and in general. Steps taken by the Master to obtain judicial clarity concerning the grounds for seeking a special fee in this instance, do not, rationally, amount to additional reasons for his decision sought to be impugned.

177. The Master did not state that a single forensic investigator ought to have been appointed, as argued in Applicant's counsel's heads of argument.

178. In fact, the Master merely questioned the cogency of the allegation by Applicants that a single forensic investigator could not be appointed due to Covid-19.

179. The Master also went on to point out that statutorily the liquidators are obliged to share the work.

180. The Act provides as follows in section 374:

374 Master may appoint co-liquidator at any time.

Whenever the Master considers it desirable he may appoint any person not disqualified from holding the office of liquidator and who has given security to his satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned.

181. Section 382 of the Act provides for co-operation among joint liquidators and for the Master's intervention in the event of non- co-operation as follows:

382 Plurality of liquidators, liability and disagreement.

(1) When two or more liquidators have been appointed they shall act jointly in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly.

(2) Whenever two or more liquidators disagree on any matter relating to the company of which they are liquidators, one or more of them may refer the matter to the Master who may thereupon determine the question in issue or give directions as to the procedure to be followed for the determination thereof.

182. In light of the liquidators holding a statutory duty to act jointly, Applicants' contention that in practice, one liquidator invariably does all the administrative work, has two consequences of note. Firstly, where the alleged practice does not accord with the statute, the statute must prevail. Secondly, the creditors ought not to be disadvantaged by having a substantial amount of money deducted from the balance available for distribution by virtue of an increased special fee, when, on Applicants' contention, the phenomenon of one liquidator doing all the work is a common place occurrence. If it is indeed a common practice, then the basis for a special fee on the ground that one liquidator did all the work, must fall away as an exceptional or distinguishing feature evincing complexity.

183. The dispute concerning the keeping of time sheets arose because First applicant submitted time sheets with his motivation for a special fee. Once he

had relied on time sheets, it was open to the Master to delve into the consistency and particularity of the time sheets or the lack thereof.

184. The Master's role in using overarching considerations for the purpose of exercising his function as overseer of liquidators and protector of public interest clothes him with the power to measure the special fee claimed against the nature and circumstances of the work undertaken by the liquidator and the results achieved up until the stage of the submission of the first liquidation and distribution account.

185. In addition to the Master's powers to remove liquidators, Section 381 of the 1973 Act sets out the further role of the Master in exercising control over liquidators. It provides in no small measure as follows:

381 Control of Master over liquidators.

(1) The Master shall take cognisance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action there anent as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.

(4) The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator de bonis propriis.

(5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of that company.

186. This Court therefore finds that the Master's decision taken on the 4 May 2021 sought to be set aside does not fall foul of any of the ground in section 6 of PAJA nor does it offend the principle of legality.

187. The said decision is further objectively sustainable in that the reasons advanced by Applicants for seeking an increased amount of fee beyond the tariff amount at the stage of filing the first liquidation and distribution account, when viewed against the nature of the work that liquidators must undertake in discharge of their duties and the results achieved up until that stage by the liquidators, do not justify a time-based approach to the evaluation of a reasonable fee.

188. In applying section 151 of the Insolvency Act, therefore, there are no grounds upon which this Court can find that the Master's decision was clearly wrong.

189. The First Respondent has been completely successfully and therefore, costs should follow the result.

190. First Respondent litigates with the public purse and there are no reasons why it should bear attorney and client costs in circumstances where the Applicants advanced grounds that were not sustainable.

191. Given the complexity and breadth of the arguments raised, an appropriate scale of costs is scale C.

IT IS ORDERED THAT:

The application is dismissed with costs, such costs to be on an attorney and client scale, where scale C is applicable.




JUDGE R. ALLIE