IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO
(3) REVISED
_____ _____
DATE SIGNATURE

Case no: 10387/2022

In the matter between:

STRAUSS RYNO JACOBUS **Applicant**

and

HILL TRACY N.O. **First Respondent**

TSHIVASE NTSHENGENDZENI N.O. **Second Respondent**

MASTER OF THE HIGH COURT, JOHANNESBURG **Third Respondent**

HILL TRACY **Fourth Respondent**

TSHIVASE NTSHENGENDZENI **Fifth Respondent**

JUDGMENT

FRIEDMAN AJ:

1 Section 407 of the Companies Act 61 of 1973 ("the 1973 Companies Act") provides, to the extent relevant to this application, that:

> "(1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.
>
> . . .
>
> (4) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit."

2 This is an application for varied relief, which I describe more fully below, in terms of this section. It includes a prayer for condonation for the failure to comply with the 14-day period envisaged by the provision.

3 The applicant ("Mr Strauss") and his wife, Hannelie Strauss ("Mrs Strauss"), each hold a 25% interest in the Waenhuiskraal Boedery CC ("the CC"), which is in liquidation. The CC was placed in liquidation by order of this Court because Mr and Mrs Strauss were deadlocked with the other member of the CC, the holder of a 50% interest in it,

Ms Anna Sophia Kruger ("Ms Kruger"), as to the management of the CC. The court order was obtained by Ms Kruger in an application which Mr and Mrs Strauss did not oppose.

4 Mr Strauss objected to the CC's first liquidation and distribution account ("the first L&D account"), but the third respondent ("the Master") overruled the objection (except to a limited extent, not relevant here). The main relief sought in this application is to set aside the Master's decision to overrule the objection. Mr Strauss, in addition to seeking condonation for the late launching of this application, also seeks orders:

4.1 That the first and second respondents must provide certain documents and vouchers to the Master and to Mr Strauss (prayer 3 of the notice of motion).

4.2 Reducing the fee payable to the first and second respondents by 50%, or a percentage deemed appropriate by this Court (prayer 4 of the notice of motion).

4.3 Declaring the fourth and fifth respondents to be personally liable to the CC for a payment of R123 963.64, and ordering them to pay the sum to the CC (prayer 5 of the notice of motion).

5 Mr Strauss has cited the liquidators of the CC in their official capacity as the first and second respondents and then again in their personal capacity as the fourth and fifth respondents. For convenience, I shall simply describe them below as "the liquidators". Only the liquidators have opposed this application and filed an answering affidavit. The Master, who is cited as the third respondent, abides the decision of this Court.

6 Broadly speaking, one may divide Mr Strauss's case into two categories: the first category – reflected in paragraph 3 of the notice of motion – relates to what Mr Strauss

sees as a failure on the part of the liquidators to substantiate expenses incurred during the liquidation. The second – reflected in paragraphs 4 and 5 of the notice of motion – involves a more substantive attack on some of the decisions made by the liquidators. It is convenient to deal with these two categories separately. I do that below, after mentioning some background facts. It is also necessary for me, before dealing with the merits, to dispose with the question of condonation.

THE FACTS

7 The CC carried on the business of conducting wedding functions and related services. When it was placed in liquidation, the liquidators elected to continue to operate the business. The CC was only placed into liquidation because of the deadlock of its members and was solvent throughout this process. If I understand correctly, it has now stopped trading.

8 On 29 March 2021, the liquidators gave notice that the first L&D account would lie for inspection at the Master's office from 16 to 30 April 2021. Mr Strauss took up the opportunity to inspect the account and says that he "became gravely concerned by what [he] considered to be wasteful expenditure and misuse of [the CC's] funds in the process of winding-up" the CC. He says that he drew this conclusion from several items in the first L&D account as well as the lack of supporting documentation in respect of some expenditure reflected in the account.

9 On 28 April 2021, Mr Strauss objected to the first L&D account in terms of section 407(1) of the 1973 Companies Act, the text of which I have quoted above. This provision applies to close corporations as well as companies by virtue of section 66 of

the Close Corporations Act 69 of 1984 read with item 9 of Schedule 5 to the Companies Act 61 of 2008.

10 On 20 July 2021, one of the liquidators responded to Mr Strauss's objection. Mr Strauss says that the response was required, by "regulation 6 of the Insolvency Act 24 of 1936" (a reference to the regulations made under the Insolvency Act), within 14 days but came more than two months late. It is not clear to me on what basis Mr Strauss claims regulation 6 to be applicable to this matter, given that he elsewhere argues (as I show below) that insolvency law is irrelevant to the present matter because the CC was not liquidated because of an inability to pay its debts. In any event, nothing was made of this issue on behalf of Mr Strauss in argument and it is not necessary to take the matter any further. It is, of course, possible that I am missing something in this regard.

11 On 25 February 2022, the Master made a decision on Mr Strauss's objection. Save for upholding it in certain limited respects, not relevant here, the Master did not sustain Mr Strauss's objection.

CONDONATION

12 Although section 407(4) of the 1973 Companies Act does not itself mention the possibility of condonation being granted for non-compliance with the 14-day rule, our courts have held that the 14-day period is "directory and not peremptory" and that condonation, although not merely for the asking, may be granted in respect of an application brought outside of this period.[1]

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[1] Swift Trailer Co (Pty) Ltd v The Master 1983 (4) SA 781 (T) at 785-6 (referring to the similar provision in s 111(2) of the Insolvency Act, which is essentially identical to s 407(4), at least as it relates to this issue.

13 Mr Strauss says that he received the Master's ruling on 25 February 2022 and sought legal advice on 1 March 2022. He then sets out in his founding affidavit the steps which were taken between 1 March 2022 and 11 March 2022 (the day on which the 14-day period expired) by his legal team to prepare this application. The application was launched on 15 March 2022, and the narrative goes quiet on 11 March 2022, when apparently a first draft of the application had already been circulated and counsel had asked for further documents. My interpretation of the narrative in the founding affidavit is that the period between 11 March 2022 (when, according to the affidavit, further documents were provided to counsel) and 15 March 2022, was used by counsel to finalise settling the papers.

14 In the answering affidavit filed by the liquidators, in response to Mr Strauss's allegations supporting his claim for condonation, the liquidators say: "Save to state that Strauss has made no valid case for condonation to be granted, the remaining contents are noted."

15 In the heads of argument filed by the liquidators it is argued that condonation is not merely for the asking (a proposition which is undoubtedly correct) and that the explanation given by Mr Strauss for the 5-day delay in launching the application is not reasonable. I disagree. I may take judicial notice – most notably, because my phone's calendar confirms this for me – of the fact that the date on which Mr Strauss received the Master's ruling was a Friday, and he approached his attorney the following Tuesday (the second business day on which he could do so). I may similarly take judicial notice of the fact that the day on which the 14-day period expired – and the day on which counsel asked for more documentation to finalise the application – was also a Friday. The application was launched the following Tuesday. Again, although the founding

affidavit does not spell this out, it seems clear that counsel used the weekend and the Monday to settle the application, presumably in consultation with his or her attorney and client.

16 I suppose that some might be critical of the failure of the founding affidavit to record how each hour of the day was used during this period, but I do not intend to be. The delay in launching the application was only 2 court days and the liquidators have not suggested that they have been prejudiced in any way by the slight delay before the application was launched. Furthermore, Mr Strauss (as appears below) clearly has a triable case, and prospects of success have always been taken into account in condonation applications. I accordingly find that a proper case has been made out for the granting of condonation and I intend to grant an order to that effect.

THE LIQUIDATORS' "IN-LIMINE POINT"

17 Before dealing with each of the grounds on which Mr Strauss challenges the Master's ruling, I must address an argument which the liquidators advance, and which they describe as an "in limine point". In their answering affidavit, the liquidators framed it, somewhat optimistically, as follows:

> "It is trite law than an application in terms of section 407 of [1973 Companies Act] ought only to be relied upon by an applicant in instances where he intends to adduce new facts to those adduced in the objection to the Master pursuant to section 407(1) of the [1973 Companies Act]."

18 In their heads of argument, the liquidators described the point this way:

> "The applicant has failed to place new facts before this Honourable Court other than the facts adduced to the [Master]. This is confirmed in the applicant's heads of argument. Additionally, the applicant has not indicated that the [Master's] ruling was tainted by irregularity or error".

19 In short, the liquidators' argument is that Mr Strauss's application discloses no cause of action. As far as I understand the liquidators' argument, they suggest that an application under section 407(4) of the 1973 Companies Act can only succeed if the person in the position of Mr Strauss places new facts before the court to demonstrate that the Master's decision was wrong. But, at the same time, they seem to argue that an application under section 407(4) can only succeed if it may be demonstrated that the Master's decision was tainted by irregularity or error (which is not dissimilar to the language of review). They seem to say that, because Mr Strauss has neither adduced new facts nor demonstrated any irregularity or error on the part of the Master, his application discloses no cause of action.

20 The liquidators rely on two cases for these arguments: *Van Zyl NO v The Master*[2] and *South African Bank of Athens Ltd v Sfier (also known as Joseph)*.[3]

21 In their heads of argument, the liquidators reproduced the following extract from *Sfier*, and the emphasis placed on certain words is theirs, not mine:

> "In an application in terms of s 407 or of the similarly worded s 111 of the Insolvency Act 24 of 1936, the applicant is not limited to the material placed before the Master. It is not a review, and not even an appeal in the wide sense, limited to the facts which had been before the Master. It is indeed, as suggested, by Mr *Joseph*, a fresh application where new facts and in appropriate cases also oral evidence will be allowed. Compare *Cassim v The Master and Others* 1960 (2) SA 347 (D) and *Divine Gates & Co Ltd v Assigned Estate Greenblo, Stone & Co* 1933 CPD 176. The purpose of s 407(4)*(a)* is to enable the objector to take the matter further when he does not obtain the relief he seeks from the Master, that is where the Master refuses to sustain his objection, and also where the Master, perhaps correctly, refuses to sustain the objection because he is unable to resolve the dispute on the facts.
>
> It is conceivable that a Court, hearing an application in terms of s 407, may find that the Master on the facts he had before him correctly refused to sustain the objection <u>but that new facts show that the application has to succeed, and that the</u>

2 2000 (3) SA 602 (C)

3 1991 (3) SA 534 (T) at 536G.

> objection is to be sustained. Clearly such an application has to succeed and even though the Master cannot be faulted, his refusal to sustain the objection will have to be set aside."

22 It seems – and I can see no other way to understand the "in-limine point" based on the way that it has been framed in the answering affidavit and heads of argument of the liquidators – that the liquidators interpret this extract to mean that only when new facts (ie, facts which were not placed before the Master) are adduced by an applicant in a section 407(4) application may the applicant succeed. Because, according to this argument, Mr Strauss has not adduced any facts which were also not placed before the Master, his application (according to the liquidators) discloses no cause of action.

23 It appears to me – and I mean no disrespect to whomever on the liquidators' legal team came up with this argument – that the liquidators' in-limine point is based on a profound misunderstanding of the impact of *Sfier*.

24 As *Ms Butler*, who appeared for Mr Strauss, ably demonstrated in her heads of argument, there is a strong line of cases which establish the following two propositions:

24.1 First, an applicant such as Mr Strauss is limited, in a section 407(4) application, to raising grounds of objection which were included in the objection before the Master.[4]

24.2 But, secondly, an application under section 407(4) is a unique application (described sometimes as a "fresh application") which goes even wider than a wide appeal, and in which new evidence (and even oral evidence) may be led to demonstrate that the Master's decision was wrong.[5]

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4 See Scop v Lambert NO 1961 (1) SA 681 (O) at 685G

5 In addition to Sfier (supra), see Hudson v The Master 2002 (1) SA 862 (T) at 867I

25 When we speak of “wrong” in this context, we do not mean it in the blameworthy sense. It may be, for instance, that the existence of a new fact demonstrates that the Master’s decision cannot be sustained. But the Master could not be blamed in such a situation, of course, because the fact would not have formed part of the material which the Master could possibly have taken into account when considering the applicant’s objection.

26 But, in any event, the case law clearly demonstrates that, as long as an applicant confines himself or herself to the grounds of objection which formed part of the objection to the Master, he or she may raise any argument, or adduce any fact, to demonstrate that the Master’s conclusion or conclusions should be set aside. In fact, the *Sfier* decision on which the liquidators rely is directly against them on this point. If one reads even the whole extract which is reproduced by the liquidators in their heads of argument, let alone the judgment as a whole, it becomes clear that it is authority for this very proposition.

27 The mistake, I believe, which the liquidators have made when assessing that extract is that they seem to have conflated two concepts: permission to adduce new facts and a necessity to adduce new facts. Clearly, the full bench in *Sfier* was making the point that it is permissible in appropriate cases to adduce new facts; not that it was obligatory to do so to sustain a cause of action under section 407(4). The part of the extract in their heads of argument which the liquidators should have noticed, and taken into account, is the part where the full bench says that the “purpose of s 407(4)(a) is to enable the objector to take the matter further when he does not obtain the relief he seeks from the Master, that is where the Master refuses to sustain his objection”. That phrase encapsulates the purpose of section 407(4), and it is quite obvious, reading those words

in the context of the whole quote, that the court then proceeds to give examples of why the Master's decision might, in appropriate cases, be overturned.

28 What is also important about these cases is that they demonstrate that an application under section 407(4) is not a narrow review, in which the applicant is confined to traditional review grounds such as demonstration of an irregularity or misdirection. The reach of section 407(4) encapsulates, at the very least, a wide appeal in which any argument may be advanced to demonstrate that the Master's decision was wrong. The fact that the application is a "fresh application" means that Mr Strauss is permitted simply to argue that, on the facts before court, the Master's ruling is wrong. Whether he is right or wrong (which is the subject-matter of the rest of this judgment), it is clear that he has placed facts (whether new or not is irrelevant) and argument before court in support of his contention that the Master's ruling is unsustainable in various respects. There is simply no sense in which, therefore, his application could be said not to sustain a cause of action.

29 The only remaining question is whether the decision of the Cape High Court in *Van Zyl NO v The Master* undermines anything which I have said above. The court in *Van Zyl NO* was well-aware of the *Sfier* decision and addressed it in its judgment. The liquidators rely on paragraph 20 of the judgment, but it is necessary to have regard to paragraphs 14 to 20,[6] in order to appreciate the full context in which the court's remarks were made. If one reads those paragraphs, it seems clear that the court in *Van Zyl NO* interpreted *Sfier* to have two, separate categories of decision-making under s 407(4) in mind:

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[6] In the reported version of the judgment, the numbering appears to have gone awry and there are no paragraphs 15 or 17. I am confident that this is a case of a numbering mistake, rather than there being missing paragraphs, because the discussion in paragraphs 14 to 20 flows logically and does not appear to be missing anything.

29.1 First, a situation in which no new facts are adduced and the application is based on the premise that the "Master erred on the facts before him or where his conduct is such that it is open to criticism".

29.2 Secondly, a situation where the court is asked to invoke its wide powers to consider essentially a new application, which necessarily involves facts which were not placed before the Master.

30 The court in *Van Zyl NO* found itself within the first category. It was within that context that it said, in paragraph 20, that in cases where the court is in the first category, deference is due to the Master as the official designated by the legislature to administer insolvent estates. The court held that, where no new facts were placed before the Master, the "Court should hesitate to substitute its own opinion for that of the Master in exercising its wide powers under s 407(4)(a) of the [1973 Companies Act] unless it is clear that any particular ruling by the Master is tainted by irregularity or error".

31 The wording used by the court in this last sentence is open to more than one interpretation. The turn of phrase – "tainted by irregularity" – read in the context of the court's reference to deference implies the language of review. On the other hand, what is the difference between saying that a particular decision was "tainted by error" and saying that a particular decision was "wrong". Describing a decision as tainted by error could arguably simply be a fancy way of saying that it was wrong.

32 It is, in any event, unnecessary in my view to parse the wording of *Van Zyl NO* to try to render the judgment consistent with *Sfier* and other cases which adopt the same approach as *Sfier*. There is nothing, in the case law or the wording of section 407(4) itself, to suggest that there are two different standards: one where new facts are adduced

and one where they are not. If a section 407(4) application is a fresh application, then it must follow that an applicant is permitted to refer to any basis – factual or legal – for disputing the conclusion of the Master. If the Master's decision is wrong (or, if one likes, tainted by error), then it must be set aside.

33 I should say, though, that I have no difficulty with the proposition that deference is due to decisions of the Master where no new facts are adduced. In a situation where the court has the same information before it which was before the Master, it is essentially performing the same task already performed by the Master, and it is appropriate to show respect for the Master's institutional role. However, it is undesirable to draw distinctions which have no real meaning. Saying that courts may intervene when the Master has made an "error", is the same thing as saying that courts must intervene when the Master got something wrong. Without the other limiting rules which one finds in the context of classical reviews – such as the rule of intervening only in the case of irrationality or unreasonableness and the rule against second-guessing the administrator on the merits – there is not much room for deference when the court's job is to decide whether the Master got the decision right or wrong.

34 I must make clear that everything which I have said above relates to objections under section 407 of the 1973 Companies Act. There is also the totally separate possibility of reviewing certain decisions of the Master, to which a different, deferential standard of review might apply, depending on the circumstances (to which I return below).[7] There is the potential oddity of two different standards being applied to the same decision of the Master, depending on which vehicle is used to challenge it. I return to discuss this

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7 See Nel v The Master (Absa Bank Intervening) 2005 (1) SA 276 (SCA)

again below. But, for now, it seems clear to me that section 407 has the breadth which I have described above.

35 In any event, Mr Strauss has raised several reasons why, in his submission, the Master's decision is wrong. He relies on grounds which were placed before the Master. The approach adopted in the founding affidavit falls comfortably within the parameters of what is permitted by section 407(4). It follows that the "in-limine point" must be dismissed.

THE DOCUMENTS COMPLAINT

36 As indicated above, it is convenient for me to deal separately with the complaints made by Mr Strauss about documentation which he considers to be inadequate and then, later, the more substantive components of his case.

Supporting documents and vouchers

37 In prayer 3 of the notice of motion, Mr Strauss seeks an order that the liquidators are directed to provide supporting documents and vouchers to the Master and Mr Strauss, for various categories of expenses, within 14 days of this Court's order.

<u>The issue</u>

38 Mr Strauss's complaint, in essence, is that there are various expenses in the L&D account which are not adequately explained by supporting documents.

39 There are two categories of expenses:

39.1 First, the "items set out in annexure "FA9", alternatively "FA9.1" to the founding affidavit"; and

39.2 Secondly, the expense of R309 783.94 listed under the heading "Administration Expenses" in the Free Residue portion of the first L&D account.

40 Annexure FA9 to the founding affidavit contains a list of 197 different expenses incurred by the liquidators (some of which do not have a monetary value but are simply recorded as "invoices"). The value of the expenses which are listed is R170 441.19. The items in FA9 track entries in the first L&D account. So, for example, in Schedule C of the L&D account, which is "Administration Expenses", there is a payment dated 25 February 2019 and described as "Marelize". If one then looks at Annexure FA9 to the founding affidavit, the entry is included there.

41 Annexure FA9.1 contains a significantly truncated list of expenses, all of which appear in Annexure FA9 too. They have a value of R34 803.00. The reason why they have been extracted from Annexure FA9, and why Mr Strauss seeks supporting documents in respect of them in the alternative, is that they are items which do not form part of the trading account of the CC. The relevance of this is explained below.

Mr Strauss's complaints

42 Regarding the first category of expenses (see paragraph above), Mr Strauss's case is that, when he inspected the first L&D account, he could find no supporting documentation for the 197 expenses listed in Annexure FA9 to the founding affidavit.

He took this point as part of his objection to the Master. His objection took the following form:

42.1 In the body of his objection, Mr Strauss explained his complaints in various paragraphs. In some cases, they take the form of a simple objection that there is no supporting documentation (invoices or vouchers) to corroborate the expense. However, in other cases, there appears to be a more substantive component to the objection. For example, in the case of one of the expenses, the entry relates to "Facebook and Google Marketing". Mr Strauss's complaint is framed as follows: "I object to these expenses as they included personal advertising for Ms Ansie Kruger in respect of which expenses the liquidators have not differentiated. No invoices have been provided." In other words, there is not only an objection that there is no supporting documentation. There is also a substantive objection as to the nature of the expense.

42.2 Then, in an annexure to his objection, Mr Strauss listed the various expenses with which he took issue, and then explained the complaint. For example, as I have already mentioned one of the expenses under Schedule C – Administration Expenses, is recorded as "Marelize" and the amount of R28 685 is given. In the annexure to his objection, Mr Strauss recorded "No invoice. No description. Unknown Expense".

43 In response to this component of the objection, the Master said the following:

> "I would like to point out at this juncture that case law dictates that an interested party's right to object are limited to the liquidation account and plan of distribution, but not the trading account."

44 This was the only way in which the Master dealt with this component of Mr Strauss's objection. Mr Strauss points out that the short list of items reflected in Annexure FA9.1, to a value of approximately R34 000, do not form part of the trading account. At the very least, he says, one would have expected the Master to explain why Mr Strauss's objection in respect of those expenses was not sustained. Mr Strauss's founding affidavit does not address why the Master was wrong to say that expenses relating to the trading account cannot form the basis of a valid objection under section 407(1). However, he argues that the Master should have upheld the objection in respect of all of the expenses, alternatively those which do not relate to the trading account.

45 There is then the second category (see paragraph above). In this regard, Mr Strauss points out that, under the heading "Administration Expenses" in the Free Residue account of the first L&D account, an expense of R309 783.94, described as "compliance certificates", is listed. The first L&D account is presented in the way one would expect documents of this nature to be presented – ie, it has a summary at the beginning, which breaks down the different expenses and income into categories, each of which is then said to be supported by information contained in various schedules. In the summary, under the heading "Administration Expenses" (which I note, for the sake of the parties, is at Caselines 001-53), there are two categories. First, there is the category described "As per Schedule C" and, then, secondly, the category relevant to the present discussion, which is "Compliance Certificates".

46 To support this expense, the liquidators provided a voucher (described by Mr Strauss as "voucher 1"), which is annexed to the founding affidavit, and the bank statements of the CC. Mr Strauss said in his objection, and persists in the point now, that voucher 1 is inadequate: its contents relate to certain municipal approvals which were granted, or for

which application was made, in 2016. But the voucher does not say when the municipal approvals were granted or payable. He also complains that the bank statements of the CC do not corroborate the R309 783.94 payment having been made.

47 Mr Strauss refers to what the liquidators said in response to his complaint. They said:

> "Should the Master not be satisfied with any of the entries and respective vouchers which formed part of the liquidation and trading accounts, the liquidators are more than amenable to attend at the Master's office to go through them. Strauss' queries should however be seen in the bigger context of his conduct throughout the liquidation process."

48 The last sentence relates to the liquidators' persistent complaint, which I address again below, that Mr Strauss's approach to the liquidation has been vexatious. In any event, Mr Strauss says that this response is inadequate and that the Master did not address the objection properly in the ruling. He therefore says that the liquidators should now be ordered to provide the relevant documentation.

The liquidators' response

49 In their answering affidavit, the liquidators respond to the arguments summarised above as follows:

49.1 In respect of the first category (ie, the 197 expenses), the liquidators say that "[a]ll the vouchers in respect of the liquidation and trading account are physically contained in approximately 10 lever arch files" and that this supporting documentation is roughly 2700 pages. They say that they asked whether hardcopies or softcopies should be provided to the Master, and were told by the Master's office that softcopies would be sufficient. They say that the Master's ruling was delayed because of the "sheer volume of the vouchers

which the Master needed to peruse in order to apply her mind and give her rulings". On this basis they deny that the expenses listed by Mr Strauss were not supported by documentation.

49.2 In respect of the second category – the objection relating to the so-called "voucher 1" and the bank statement – they say that the voucher was in the form provided by the municipality and Mr Strauss has no right to complain about the format chosen by the municipality for the voucher, over which the liquidators have no control. They also say that the bank statements show clearly when the payment was made. They therefore say that "the objection should be rejected with the contempt it deserves".

50 In reply, Mr Strauss points out that the bank statements of the CC have been annexed as "FA11" to the founding papers. He says that he has gone through them, and can find no evidence that the payment was made. He surmises from this that the evidence to support this payment does not exist, and that the liquidators have a strategy of burying him with paper, to obscure the fact that no evidence exists for this expense.

Finding in respect of the first category

51 There is a temptation, when considering Mr Strauss's objection regarding the supporting documentation, to write it off as trivial –ie, to assume that, as long as the expenses in the account appear legitimate, there is no need to become overly pedantic about seeing each scrap of supporting documentation. But section 403(2) of the 1973 Companies Act, which forms part of the provision dealing with the duty of liquidators to file liquidation and distribution accounts, provides that accounts such as the first L&D account "shall be fully supported by vouchers, including liquidator's bank

statements . . . showing all deposits and withdrawals". There is therefore a statutory rule which determines the parameters of a liquidation account and what must be provided to support it, and this cannot simply be disregarded. I have no reason to believe that any of these expenses were not genuinely incurred. But compliance with section 403(2) remains necessary.

52 When it comes to the first category of expenses, there is no evidence before me of any substantiating documents. There is also no evidence before me which addresses the substantive complaints raised by Mr Strauss about some of these expenses. But the relief sought in the notice of motion relates to the provision of the documents, and not to substantive criticisms of the expenses, so for present purposes the only issue is whether Mr Strauss has made out a case to be provided the documents.

53 The first issue which must be resolved is the Master's explanation for rejecting this objection. The Master's position was that "case law" holds that objections are "limited to the liquidation account and plan of distribution, but not the trading account".

54 *Ms Butler*, in her heads of argument, addressed this issue comprehensively and persuasively. In short, her submissions may be summarised as follows:

54.1 First, while the winding up provisions of the 1973 Companies Act apply to close corporations by virtue of section 66 of the Close Corporations Act 69 of 1984, insolvency law does not apply to the CC. This is because the 1973 Companies Act provides for the application of insolvency law in cases where a company (and by virtue of s 66 of the Close Corporations Act, a close corporation) is unable to pay its debts, and the CC is not in that position.

54.2 Since insolvency law does not apply to the CC, one should approach with caution those cases which might be read as precluding access to the trading account decided in the context of insolvency law. In any event, the case law is inconclusive in this respect and there is in fact some support for the notion that an objection against the trading account is permissible even in cases of insolvency.

54.3 The interpretation adopted by the Master is, in any event, inappropriate in a case such as this where the entity was not liquidated because it was insolvent. This is because "in instances where a corporation is wound-up but able to pay its debts, oversight over the trading account . . . is crucial. This is due to the heightened risk that liquidators use solvent companies as a vehicle to fund their personal expenses".

55 The last proposition is particularly important, and I agree with it. I have been referred to no authority to support the proposition that a person such as Mr Strauss cannot object to issues related to the trading account in an objection of the nature relevant to this case. I can see no reason of logic or principle to exclude objections in relation to the trading account from the ambit of section 407(1) of the 1973 Companies Act, in a context where the company or close corporation is able to pay its debts and continues to be operated as a going concern. One of the clear purposes of the right to inspect, and if necessary object to, a L&D account is to assess the legitimacy of the expenses which the liquidators have incurred. The expenses in the trading account are meant to be used as part of the operation of the CC. Whether they are being used for this purpose may only be determined if there is a right to interrogate them as part of an assessment of the L&D account.

56 Once one leaves that issue aside, the question becomes what to make of the complaint in relation of the 197 expense items listed in annexure FA9 to the founding affidavit. In this regard, the attitude of the liquidators, as summarised in paragraphs and above, becomes relevant. As may be seen from the direct quotes which I have provided from their responses, they essentially took the view that (a) in the case of the objection, the onus was on the Master to raise any concerns which she may have had in respect of the underlying documentation and (b) in the case of Mr Strauss's application in this Court, Mr Strauss and the Court should simply accept that the underlying documentation exists by virtue of the delay in the finalisation by the Master of her response to the objection (caused, according to them, by the voluminous collection of supporting documents which the Master had to consider before making a ruling in this matter).

57 One gets the sense that the liquidators' judgement is somewhat clouded by their view of Mr Strauss. They have made several remarks in their papers in this Court, and also in their correspondence with the Master, which suggest that Mr Strauss has been vexatious and obstructive. I return to this issue again below and, as I discuss again, it is hard for me to reach a conclusion in this regard, on the facts before me. It is, in any event, largely irrelevant because the question simply has to be: has Mr Strauss made out a case for the different forms of relief which he seeks, in the light of the evidence placed before court by both parties (taking into account issues to do with the onus, burden of proof and the like)? That being so, the liquidators had a duty to make out a defence to the allegations made by Mr Strauss on the issue of the documentation, and they have simply failed to do so. Since I can see no evidence of supporting documentation in respect of the 197 expenses, and the liquidators have offered no real substantiation that they exist, Mr Strauss's complaint clearly has merit. I address the question of remedy below.

Finding in respect of the second category

58 It would have been a simple matter for the liquidators to draw to the Court's attention which parts of the bank statements demonstrate, according to them, that the payments in respect of "compliance certificates" were made. They did not do so, and to my immense sadness I was left to trawl through the bank statements myself. In doing so, I discovered an entry on 18 April 2019 in which R261 665.33 was paid to the Ekurhuleni Metro, with reference 3399999998. If one considers annexure FA10, which purports to be Voucher 1, one may see that this payment correlates with two contributions which the CC was required to make to a conference centre which I presume (because this is not ventilated on the papers) was to be developed by the CC.

59 The sum is made up of two sub-components: a contribution of R181 808.84 for roads and stormwater and R79 856.49 for "water and sewer" [sic]. Handwritten annotations next to those sums, reflect dates of 1 December 2016 and 30 June 2017. It is not clear to me why the combined total of these payments (ie, the R261 665.33) was only paid to the council in 2019. In any event, other than the payment of R261 665.33, I could find no other payments to the council. In particular, I could find no other payment (or payments, for that matter) which reflects the difference between R261 665.33 and the sum of R309 783.94. The latter, it will be recalled, is said in the first L&D account to reflect "compliance certificates".

60 Two mysteries present themselves to me based on my consideration of the bank statements and Voucher 1. First, it is unclear from the material before me how either the bank statements or Voucher 1 is said to constitute evidence that the sum of R309 783.93 was paid to the council. Secondly, it is unclear to me how payments as contributions to roads, stormwater measures, water and sewage constitute "compliance

certificates". What Voucher 1 appears to demonstrate is that development by the CC of a conference centre was approved, subject to the condition that payment of R261 665.33 by the CC as a contribution towards the various municipal services was made. It is common for municipalities to impose such conditions on new developments. They are what is known as development charges as envisaged by the Spatial Planning and Land Use Management Act 16 of 2013. It is possible – and I simply do not know the answer to this – that on payment of development charges it is necessary to obtain a compliance certificate evidencing that. And it is possible that the documentation described as Voucher 1 is meant to explain that. None of this information – indeed, even what development, if any, was contemplated – is ventilated on the papers.

61 However, even if one reads the reference in the L&D account to "compliance certificates" generously, and concludes that the term is meant to cover the payment of R261 665.33, there appears to be no evidence to substantiate payment of the remaining R48 118.60. In other words, if one considers the first L&D account alone, one sees an entry of R309 783.93 under the heading "Administration Expenses". One then looks at the rest of the document and finds no substantiation for this expense at all. One then looks to Voucher 1 and the bank statements and, as I have explained above, they also do not serve to substantiate the figure of R309 783.93.

62 There may well be a proper explanation for this discrepancy. But, I have conducted the precise exercise that Mr Strauss presumably conducted before filing his objection. In other words, I too have considered the first L&D account and supporting material in detail, and, like him, can find no substantiation of the expense of R309 783.93. In this situation, and taking into account that the present application is in essence a fresh application (notwithstanding the submissions of the liquidators, which I have already

rejected above, in their so-called "in limine point"), it was essential for the liquidators to provide a clear explanation of the situation. In the absence of such an explanation, I am left in the same position as Mr Strauss – ie, left to speculate about whether there is any proper substantiation of this expense and, if so, why it has not been brought to my attention.

63 In the circumstances, Mr Strauss's complaint about the compliance certificate expense must be upheld. I address the question of the appropriate order to make below.

THE SUBSTANTIVE COMPLAINTS

64 As I have mentioned briefly above, there are two prayers in the notice of motion (prayers 4 and 5) which seek what are essentially punitive measures against the liquidators for what, on Mr Strauss's version, could broadly be framed as misconduct. I deal with my findings on them together, but it is first necessary for me to explain the arguments of the parties on these issues.

Personal liability of the liquidators

65 In prayer 5 of the notice of motion, Mr Strauss seeks an order that the liquidators (cited in their personal capacity) are liable to the CC in an amount of R123 963.64. This arises from various expenses incurred by the liquidators, which falls broadly into two categories. First, legal expenses which Mr Strauss says should not have been incurred by the CC. And, secondly, expenses which Mr Strauss says were negligently incurred by the liquidators.

Mr Strauss's contentions

66 Regarding the legal expenses, the combined total of which is R82 650,[8] Mr Strauss complains about the following:

66.1 First, a sum of R25 127.50 which the liquidators incurred on behalf of the CC in respect of a complaint which Mr Strauss made against the fourth respondent to the South African Restructuring and Insolvency Practitioners Association ("SARIPA").

66.2 Secondly, a sum of R17 182.50, which the liquidators incurred on behalf of the CC in respect of legal fees for employees of the CC, including Ms Kruger (who was, it will be recalled, one of the three members of the CC), who were arrested after a tip-off to the police that the CC was employing illegal foreigners.

66.3 Thirdly, a sum of R40 250.00, which the liquidators incurred on behalf of the CC for the drafting of certain agreements which were intended to facilitate the purchase by Ms Kruger of the Strauss' interest in the CC.

67 Mr Strauss says that the legal fees described above ought to have been paid by the fourth respondent, the employees and Ms Kruger respectively, and there was no basis for rendering the CC liable for those costs.

68 The second category, reflecting the expenses which Mr Strauss says that the liquidators negligently incurred, includes the following (to a total value of R41 403.64):

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[8] It should be noted that, in the founding affidavit, Mr Strauss quantifies this expense as R82 536. This is clearly an error. Not only do the individual amounts equal R82 560, but the ultimate sum of R123 963.64 sought in the notice of motion only makes sense if one treats the legal expenses as amounting to R82 560.

68.1 The failure to cancel key-man insurance policies, which resulted in R15 403.64 being spent, according to Mr Strauss, unnecessarily.

68.2 A failure to pay certain monthly vehicle instalments to Absa Bank, which resulted in unnecessary interest payments of R26000.

69 Mr Strauss relies on section 64 of the Close Corporation Act, which renders a person personally liable for expenses incurred with gross negligence in the operation of a close corporation. Section 64(1) reads as follows:

> "If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

70 Although there is a little imprecision in the founding affidavit in the description of the liquidators' conduct – sometimes referring to negligence and sometimes gross negligence – it is clear that Mr Strauss relies on the contention that the liquidators were grossly negligent in incurring the expenses described above. In particular, he says that, while the failure to notice these items at first might have constituted mere negligence, as opposed to gross negligence, the "prolonged failure" of the liquidators to consider the insurance policies and to notice the failure to pay the monthly instalments amounts to gross negligence – ie, "obtuseness of mind and/or complete lack of interest in the affairs of the CC", as envisaged in the case law.

<u>The liquidators' response</u>

71 In their answering affidavit in this Court, the liquidators say the following in defence of Mr Strauss's complaints:[9]

71.1 The liquidators say that, if anything, Mr Strauss should be compelled to pay the costs in relation to the SARIPA complaint. They say that the complaint was found by SARIPA to be baseless, and must be understood in the context of other complaints and litigation which demonstrate that Mr Strauss is a "vexatious and aggressive litigant" who "has caused the liquidators to incur legal expenses defending and opposing his numerous frivolous complaints". The liquidators set out examples of what they consider to be vexatious litigation and conduct on the part of Mr Strauss.

71.2 Regarding the legal costs related to the employees of the CC who were arrested following the tip-off which I have described above: the liquidators say that they have good reason to believe that Mr Strauss was behind the tip-off because he also tried to have the liquidators arrested for employing illegal foreigners. They also say that the arrest of the employees during the scope of their employment attracts vicarious liability on the part of the CC, which shows that the fees were legitimately incurred by the CC. They say that, in any event, the employees would have been unable to pay the legal expenses from their own pocket.

71.3 Regarding the expense in relation to the legal agreements intended to facilitate the sale of the Strauss' interest in the CC to Ms Kruger: the liquidators say that the expenses were incurred as a result of Mr Strauss behaving deceptively and

[9] Something has gone awry in the numbering in the answering affidavit. In the ad seriatim section, which is where the liquidators deal with each of Mr Strauss's complaints, the direct paragraph responses which contain the liquidators' responses to the expenditure complaints purport to respond to different parts of the founding affidavit. This could only have been a typographical error, because it is quite clear that it is meant to respond to this component of Mr Strauss's complaint.

in bad faith. According to the liquidators, Mr Strauss suggested that he would be keen to sell his interest (and that Mrs Strauss would also be willing to do so), only to renege after the agreements were prepared. They say that they were negotiating on behalf of all of the members of the CC in good faith and so the expense should be paid by the CC. They then go on to say that, in fact, the expense should be paid by Mr Strauss for negotiating in bad faith.

71.4 Regarding the key man insurance and the vehicle finance, the liquidators say the following:

71.4.1 In regard to the insurance, they stand by what they said in their response to the Master in regard to Mr Strauss's objection. They say that it "is noteworthy that Strauss, having had a lot to say throughout the winding-up, said nothing about the key man insurance until it came time to object to the account. This is odd since Strauss had full access to the bank account after the liquidation and continued to be responsible for the finances of the Corporation until at least 31 March 2019."

71.4.2 In regard to the Absa payments, they say that in June or July 2019, Absa stopped debiting the CC's account in respect of the vehicle finance and did not inform the liquidators. The liquidators note that they explained to the Master in their response that they only became aware of the stopping of the debits much later. Then, "[a]fter the venue closed due to Covid, the vehicle was sold for sufficient value to discharge the indebtedness to Absa". They say that they actually

saved the CC interest by making a lump sum payment to Absa of the balance of the finance agreement.

72 A feature which flows throughout the responses given by the liquidators, both in their response to the Master and in their papers in this Court, is that the bare minimum of information is provided at every turn. No context is given to anything which I have summarised above. The reader is left to infer various things; for instance, that the key-man insurance continued to be paid at a time when Mr Strauss had control over the CC's bank accounts, and that the CC operated a venue but then had to close it because of Covid. I return to this issue shortly.

Reduction of fees

73 In prayer 4 of the notice of motion, Mr Strauss seeks an order reducing the fees of the liquidators by 50% "alternatively by such percentage as the Court may deem appropriate". I have dealt with this prayer last, even though it is not the last substantive prayer in the notice of motion, because as far as I understand Mr Strauss's argument, it is based in part on the contentions summarised above. In other words, it is contended by Mr Strauss that the allegations of, for instance, the allegedly negligent expenditure of R123 963.64 "provide this court with reason to reconsider the tariff-based remuneration of the liquidators" (this is a quote from the heads of argument filed by *Ms Butler* on behalf of Mr Strauss). This becomes even clearer later in the heads of argument, where it is expressly said that, in addition to the main complaint which I discuss next, the claim for the 50% reduction of the liquidators' fee is based on (a) the failure of the liquidators to discharge their duties by providing supporting documentation for expenses incurred (or, in the case of Voucher 1, adequate vouchers) (b) the misapplication by the liquidators of funds for their own benefit or the benefit of third

parties (this being a reference to the fees in respect of the SARIPA complaint, the legal fees for the employees who were arrested and the fees for the drafting of the contract in the aborted sale of the Strauss' interest in the CC) and (c) the gross negligence, alternatively negligence, of the liquidators in incurring the expenses discussed above (this being a reference to the R123 963.64).

74 But the main complaint on which the claim for the reduction of fees is based is Mr Strauss's allegation that the "liquidators incurred outrageous expenses in operating the company for a period of approximately 18 months". Mr Strauss's dissatisfaction relates to the fact that the liquidators outsourced a large component of the management of the CC and then charged their own fee too. So, the sum spent on outsourcing was R415 884.23 (the whole amount being paid to a company called Insolvency Support Services ("ISS")) and then the fees charged by the liquidators themselves were R523 396.23. Mr Strauss says that, for a "small, alternatively medium, enterprise with a straight-forward business", a sum of R982 075.46 for administrative and liquidation fees is outrageous and not in the interests of the CC. When it comes to the payment of R415 884.23 to ISS, Mr Strauss's complaint is that evidence presented by the liquidators to the Master (in response to a query sheet from the Master) demonstrates that ISS was used for the preparation of trading and liquidation accounts and preparing and collating all vouchers. And, that all but one of the invoices provided to support the expenses related to administration and accounting services (the one exception being an invoice issued by ISS for attending a meeting with the owners and liquidators). Mr Strauss highlights that the liquidators paid a firm called Kemp and Moolman R19 698.50 to provide expert accounting services and that payments to ISS for accounting services were therefore "redundant".

75 There is one aspect of Mr Strauss's complaints which I find somewhat puzzling. As I noted above, the liquidators responded to a query sheet from the Master by providing details about the services rendered by ISS. Mr Strauss annexed their response to his founding affidavit. He says in the body of his founding affidavit that the "liquidators confirmed that the scope of the services of Insolvency Support Services included (i) the preparation of trading and liquidation accounts and (ii) preparing and collating all vouchers". He then refers to the invoices provided by ISS and says they all relate to "administration and accounting services". These allegations appear partially to be aimed at making the point that there was some sort of duplication between the services provided by ISS and the services provided by Kemp and Moolman. But I understand the allegations also to make a broader point: Mr Strauss seems to be saying that the liquidators themselves confirmed to the Master that ISS only prepared trading and liquidation accounts and prepared and collated all vouchers, their invoices all relate to "administration and account services" and therefore the amount charged by them is excessive. In other words, the implication is that, given the modest nature of the tasks which the liquidators said ISS performed, the sum charged by them was excessive.

76 The reason I find this puzzling is that the annexure on which Mr Strauss places reliance – ie, the document he himself annexed to the founding affidavit – seems to say something different. In response to the Master's query, the liquidators provided the following list of tasks which ISS apparently fulfilled:

76.1 Liaising with the wedding co-ordinators at the venue.

76.2 Liaising with suppliers, staff and clients.

76.3 Setting up the accounting software.

76.4 Checking quotations.

76.5 Invoicing and receipting.

76.6 Checking all requests for supplier payments.

76.7 Making payments to suppliers.

76.8 Preparing and maintaining cashbooks.

76.9 Preparing and collating all vouchers.

76.10 Preparing and maintaining a comprehensive wedding schedule showing all weddings booked, deposits paid, amounts owing and final payments per client so that there could be no double bookings.

76.11 Tracking the progression of each wedding.

76.12 Calculating and paying wages every week.

76.13 Paying monthly salaries.

76.14 Preparing PAYE and UIF returns and making payments.

76.15 Preparing VAT schedules.

76.16 Liaising with the accountants on the VAT returns and making VAT payments.

76.17 Regular attendances at the venue to deal with administrative queries.

76.18 Impromptu attendances at weddings to ensure proper services were being rendered.

76.19 Meeting with bridal parties to discuss wedding cancellations due to lockdown.

76.20 Processing of refunds due to lockdown.

76.21 Preparing trading and liquidation accounts.

77 One then looks to the invoices and, although they are admittedly terse (and describe the services rendered simply, in many cases, as “administration services”) they do not contradict the list provided by the liquidators. In other words, it is not unreasonable to conclude from these documents that ISS performed the range of services summarised in paragraph above on a monthly basis, and then charged for “administrative services” each month.

78 Although the liquidators’ response to Mr Strauss’s allegations in the founding affidavit on this point is characteristically parsimonious, this seems to be broadly the stance which they take. They say:

78.1 First, that Mr Strauss was informed in 2019 that ISS would be assisting the liquidators “with certain aspects of the running of the Corporation” and has waived the right to object two years’ later.

78.2 Secondly, that Mr Strauss and his wife were initially still involved (for two months after liquidation) in running the business and received a salary of R27 500 per month (although this is not clarified by the liquidators in their answering affidavit, it is clear from Mr Strauss’s replying affidavit that this

sum was shared between him and Mrs Strauss; ie, it was not R27 500 each). They argue (with reference to the sum charged by ISS per month, over the 21 months in which their services were retained) that they saved the CC approximately R217 000 when one compares what the Strausses would have been paid, to what ISS was paid.

78.3 Thirdly, far from charging an excessive fee, the liquidators have "earned their fees three times over." They say that the winding-up has been extremely arduous and time-consuming, mostly because of Mr Strauss's conduct (but also "the onslaught of Covid") and that they have already intimated (in their response to the Master to Mr Strauss's objection to the first L&D account) that they will be requesting an increased fee.

79 The liquidators also point out in their answering affidavit that their remuneration is determined in accordance with the applicable tariff (Tariff B) of the Insolvency Act.[10]

80 In reply, Mr Strauss says:

80.1 While it is true that he was informed of the involvement of ISS he did not know what the total cost of the services rendered by ISS would be and that the services would be rendered over a period exceeding 3 years.

80.2 The members did not receive a "clinical" salary, but were remunerated per month according to their interests in the CC – ie, Mrs Kruger received R27 500 per month (because of her 50% interest) and Mr and Mrs Strauss received R13 750 each (because of their 25% interest each). He says that, this being the

[10] This issue is addressed and explained in Nel v The Master (Absa Bank Ltd and others intervening) 2005 (1) SA 276 (SCA) at para 3

case, the liquidators should either have ceased payments to all three of the members or should have continued them to all three members. In the event, the liquidators continued to pay Mrs Kruger the R27 500 per month, but stopped paying the monthly sums to Mr and Mrs Strauss.

Analysis

81 The power of a court to reduce liquidators' fees arises by the operation of section 384(2) of the 1973 Companies Act, which provides that 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." As part of his objection, Mr Strauss asked the Master to reduce the liquidators' remuneration. Since the Master declined to do so, the present application invites this Court to revisit the Master's decision. In doing so, the Court must, of course, adopt the same approach as the Master was required to adopt – ie, to determine if there is "good cause" to reduce the liquidators' remuneration and whether there is a basis to disallow some or all of the liquidators' fees because of a failure to discharge their duties.

82 The Supreme Court of Appeal in *Nel*[11] described the approach as follows:

> "As pointed out by counsel for the intervening respondents, the Master, as a statutory functionary, is not free to choose whether or not to tax the liquidator's remuneration - the Master *must* tax in accordance with the tariff (s 384(1)), but having done so, *may* reduce or increase the amount arrived at by applying the tariff if, in his or her discretion, there is 'good cause' to do so. The dominant provision in s 384(1) remains that the remuneration to which a liquidator is entitled is *remuneration for work or services rendered*, not a set commission, *and* that it must be *reasonable.* The determination of 'reasonable remuneration' by the Master involves, in the first instance, 'taxation' in accordance with the tariff, which includes the categorisation of assets under the

11 Supra

> various tariff items in order to apply the (percentile-based) tariff to each of the items thus identified. The tariff serves as a point of departure for the determination of the appropriate fee. However, once taxation is complete, the Master has a flexible discretion to increase or decrease the amount of remuneration arrived at by the previous application of the tariff - the jurisdictional fact for the exercise of this discretion is the forming by the Master of the opinion that 'good cause' exists for doing so."[12]

83 And on the discretion vested in the Master:

> "It is also clear that the discretion vested in the Master by s 384(2) is a wide one. I agree with the argument advanced both by the Master and by the intervening respondents that, in taxing a liquidator's remuneration for services rendered, 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. On the other hand, in a situation where, having regard to all the relevant factors, the Master forms the view that the remuneration calculated according to the tariff is excessive in relation to the work done or the responsibility involved, this would likewise entitle the Master - and the Master will be obliged - to depart from the tariff figures by *decreasing* the tariff remuneration to an amount which would be reasonable in the circumstances."[13]

84 Some complexity arises in the present case because the remarks quoted above arose in the context of a judicial review of the Master's decision outside of the context of section 407 of the 1973 Companies Act (or any of its equivalent provisions in insolvency law). This presents the following difficulty:

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12 Nel (supra) at para 19

13 Nel (supra) at para 20

84.1 There is a body of case law which says that reviews of the decision of the Taxing Master (a different, but analogous position to the Master's role in this case) should be approached from the perspective that the court should interfere only when the Taxing Master is clearly wrong.

84.2 In *Nel*, the SCA held that the same approach must be followed when it comes to decisions of the Master in regard to liquidators' fees taken in terms of section 384 of the 1973 Companies Act. It said the following:

> "The appellants appear to approach this matter on the basis that the Court's powers when reviewing a ruling by the Master in this regard are unrestricted and that it is not necessary to find that the Master was 'clearly wrong', the enquiry simply being whether the Master's conclusion was right or wrong. I disagree. As I have indicated above, it is important to have regard to the nature of the functions entrusted to the person whose decision is under review. In my view, there is no reason to draw any distinction between the test on review in relation to decisions of a Taxing Master and that applicable to a review of a decision of the Master when he or she performs the function of taxing the remuneration due to a liquidator. In both cases, where the dispute concerns the *quantum* of remuneration allowed, the Court should be slow to interfere."

84.3 These remarks of the SCA have to be understood in the context that it was engaged with an appeal in respect of a review brought in terms of section 151 of the Insolvency Act in the High Court against a decision by the Master to reduce the liquidators' fees. So, the Court did not have to address the test to be applied when considering the decision of the Master to reject an objection under section 407 of the 1973 Companies Act.

84.4 It should be apparent from what I have said earlier in this judgment, when dealing with the in-limine point, that there is a risk of creating two different approaches to decisions of the Master in respect of liquidators' fees. If the

Master's decision is revisited in a review (as in *Nel*), then courts must be "slow to interfere". But, if the Master's decision is challenged because he or she failed to uphold an objection to the liquidators' fees under section 407, then the challenge constitutes an appeal in the very widest sense, in which the court must approach the Master's decision essentially afresh.

84.5 Although the Court in *Nel* was not concerned with the standard applicable to section 407 applications, its judgment provides a roadmap as to how to resolve this issue. Van Heerden AJA pointed out that a review under section 151 of the Insolvency Act is akin to an application under section 407 because it involves a de novo consideration of the Master's decision including by the receipt of new evidence (just like in the case of section 407). But, importantly, van Heerden AJA warned that:

> "while 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 (the 'second type of review identified by Innes CJ in the *Johannesburg Consolidated Investment Co* case), so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular grounds of review or particular remedies'".[14]

84.6 This demonstrates that the focus should not so much be on the provision under which an application is made (ie, section 151 of the Insolvency Act or section 407 of the Companies Act) but rather on the nature of the decision which is the subject of the application. In other words, it will depend, as the SCA put it, on

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[14] Nel (supra) at para 23

"the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review".

84.7 So, even though section 407 proceedings are, in essence, de novo proceedings, it may be that a higher degree of deference should be accorded to the Master's decision, depending on the function which he or she exercises. So, it may be that a higher degree of deference is to be accorded to a Master's decision on the reasonableness of liquidators' fees, even in section 407 proceedings.

85 As interesting as this issue is, it is not necessary for me to decide how to resolve it in the present case. In my view, Mr Strauss has not made out a case to object to the liquidators' fees as reflected in the first L&D account. He has also, in my view, not made out a case to require the liquidators to pay the sum of R123 963.64 to the CC. I would reach this conclusion, regardless whether a more or less deferential approach to the Master's decision were to be adopted.

86 I had the privilege of being taught by the great Professor Andrew Paizes, when I was a student in his class *Selected Topics in Evidence* at the University of the Witwatersrand in 2003. It pains me to realise that this was 20 years ago. His chapter on the onus in the textbook *The South African Law of Evidence* by Zeffert, Paizes and Skeen remains, in my respectful view, the seminal work on the onus in South Africa. I was incredibly lucky to have the experience of being explained, first hand, by the man himself, his theory of how the onus actually operates. I do not intend to try (and no doubt fail) to do justice to this topic here. One of the main components of his thesis is that the onus has little use and application when it comes to disputes of law, because courts must simply resolve such disputes in the light of the applicable legal principles. The true function of the onus is to resolve deadlock in the case of uncertainty, and a court should never be

uncertain about what the law requires. So, the onus does its work when it comes to the facts. If a court is in genuine doubt about the true factual position, and if the outcome of a case (or parts of a case) turns on a question of fact and not law, then it should resolve the issue before it with reference to the onus. In cases of true doubt, the party bearing the onus must lose. The term used by Paizes is equipoise, which is defined as a situation where "the probability of the truth of the averment in question is *exactly* the same as the probability of its being untrue".[15] When the facts are in equipoise, the onus is a deadlock-breaking mechanism.

87 This does not relate to the *Plascon-Evans* test.[16] That is a related, but different tie-breaking mechanism: in cases of genuine disputes of facts, an application must be decided on the respondent's version. In other words, the relief may only be granted if, in the light of the facts set out in the respondent's affidavit and the allegations in the founding affidavit which the respondent admits, the relief sought by the applicant may be granted as a matter of law.

88 When it comes to applications, as opposed to actions, *Plascon-Evans* is likely to be used as a tiebreaker more often than the onus. If one has to assume (and I admit that this may be unduly optimistic) that in most applications each side will put up a comprehensive version of how it sees the facts, then in most cases a court will quickly be able to see whether there are genuine factual disputes or not. And, if there are, *Plascon-Evans* will provide the roadmap of how to deal with them.

89 But there will be cases where the factual material contained in the affidavits of the respective parties is simply inconclusive. In such a case, one would struggle to

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15 Zeffert et al The South African Law of Evidence (2003) p 48, emphasis in the original

16 See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5

characterise the situation as engaging a true dispute of fact, because the factual material placed before court is not comprehensive enough even to rise to that level. In such a case, the onus does the work of resolving who must win.

90 I do not mean to suggest that these categories are hermetically sealed. The *Plascon-Evans* test and the onus may sometimes work together to provide a roadmap on how to determine the approach of the court to the facts in motion proceedings. The point that I simply wish to make is that there may be cases where the true factual position is unclear, not because of a genuine dispute of fact but rather because there is not a comprehensive enough picture of what actually happened. In that situation, the onus may play a decisive role in determining the outcome of the application. As I attempt to show below, this is one such case.

91 The complaints raised by Mr Strauss summarised above (ie, what I have called the substantive complaints) may be broken down into three categories. There are those in respect of which the facts are relatively clear, and the issue may be determined on the applicable legal principles. And then there are those in respect of which I simply cannot discern the factual position. Lastly, there is the SARIPA complaint, which falls into its own category. The three categories comprise the following:

91.1 When it comes to the issues addressed in paragraphs and above (the legal fees for the employees and the costs of drawing the contracts), the facts are clear, and the issue of the onus does not arise.

91.2 When it comes to the issues summarised in paragraph above (ie, the complaint about the key-man insurance, and the ABSA debit order), as well as the complaint summarised in paragraph above (ie, the question whether there was

a duplication of fees and excessive charging by the liquidators), I simply have insufficient information to determine what actually happened.

91.3 When it comes to the SARIPA complaint (see paragraph above), it is essentially a hybrid of the above two categories.

92 I return to the second and third categories shortly. But first to dispense with the first: when it comes to the legal fees for the CC's employees and the costs of drawing the contracts relevant to the sale of the Strauss' membership interests – it seems to me that the liquidators acted reasonably in using the CC's funds for this purpose. The question of the legal fees for employees could go both ways, but it seems to me that the appropriate way to look at the issue is to put the liquidators in a similar position to directors of a company. Both have fiduciary duties to the company, and both have certain discretionary powers in the management of the company (which is a good analogy here, because the liquidators were running the CC as a going concern at the relevant time). When it comes to the latter, there should be a certain margin of appreciation, taking into account that the fiduciary duties must be discharged at all times. In the circumstances of this case, had this been a company and had the managing director elected to use the company's funds to pay the employees' legal fees, could it be said that that conduct was a breach of the director's fiduciary duties? Put differently, could it reasonably be said that the director's exercise of his or her discretion in running the affairs of the company was unreasonable? I think not.

93 The same applies, with even more force, to the legal fees in relation to the intended contract. There may have been something special about the conduct of Ms Kruger to justify Mr Strauss's assertion that she ought to have been made to pay the fees in her personal capacity, but there is nothing on the papers to suggest that this is so. On the

facts before me, it seems perfectly reasonable for the liquidators to have used the funds of the CC to draw up the contract. This is because, in doing so, they effectively ensured that the members of the CC took on a 50/50 share of the fees designed to give effect to the planned transaction. I cannot see why the purchaser of the interest would be required to pay 100% of those fees, in the absence of an express agreement to that effect. I have not been made aware of any such agreement in this case.

94 There is then the second category of complaints. On the evidence before me, I simply cannot determine on the facts whether the fees charged by the liquidators were unreasonable. The list of functions provided by ISS is detailed and comprehensive and would appear, at face value, to justify its monthly fee. But sitting here, as I do now, I have insufficient information about the nature of the CC's business at the time, how much work was involved in managing it, and related issue. The same applies to the issue of the key man insurance and the Absa debit order. The liquidators have put up a terse explanation of how these two issues did not actually cost the CC any money. It is simply not clear to me how it could be said that the liquidators were grossly negligent in respect of these costs.

95 Sitting, as I do, without a clear picture of the facts on these issues, I have to resolve the dispute in relation to the second category with reference to the onus. Although there is not much caselaw on the question of the onus in the specific context of section 407 of the 1973 Companies Act (at least, that I have been able to find), the general rule would be that the applicant bears the onus. It follows that, where I am in doubt as to the factual position, the application must be resolved in favour of the respondents. As I have already explained, this has nothing to do with *Plascon-Evans*, and would apply with

equal force in a trial in which the factual position simply could not be resolved on the evidence before the Court.

96 Lastly, there is the issue of the SARIPA complaint: *Ms Butler* referred me to case law, relevant to the SARIPA issue, which is authority for the proposition that liquidators cannot use the funds of the estate to pay for litigation in their private interest. For instance, in *Standard Bank v The Master*,[17] on which *Ms Butler* relied in argument, the SCA held that liquidators could not use estate funds to fund litigation against the Master relating to their fees. *Ms Butler* says that that situation is analogous to the present situation in which the liquidators used the CC's money to pay for the fourth respondent's legal fees in defending Mr Strauss's SARIPA complaint.

97 Each case must be resolved in the light of its own facts. While it is tempting to draw analogies to the *Standard Bank* type of case, they are not always helpful. In this case it seems to me that the distinguishing feature – ie, what makes the SARIPA legal fees different to a case where a liquidator uses the company's funds to pay for litigation relating to his or her fee – is that where one of the members of the CC lodges a complaint in these circumstances, the liquidator has no choice but to defend it. The liquidators have a fiduciary duty to discharge their work as appointed liquidators. The fourth respondent could not elect simply to ignore the SARIPA complaint or give up her appointment in the face of it.

98 I must acknowledge that I do not have detailed facts about the nature of the complaint and the extent to which it impacted on the first respondent's duties and that is why the SARIPA issue is essentially a hybrid of the two categories which I identified in paragraph above. But Mr Strauss, as the complainant, must take responsibility for not

17 2010 (4) SA 405 (SCA)

explaining it in the founding affidavit in more detail. From the papers as a whole, it seems very unlikely that the SARIPA complaint was not something which the first respondent could simply ignore while at the same time continuing to discharge her duties. And, if that is correct, then it follows that she was entitled to use the CC's funds to finance her defence of the complaint. If I am somehow wrong – and in the unlikely event that the SARIPA complaint did not have a bearing on the first respondent's duties and could simply have been left unopposed (or funded from her own pocket) – then Mr Strauss must take the consequences of not having explained the complaint in more detail in the founding affidavit.

99 In concluding this discussion, I must make clear that I have not been influenced at all by the allegations made by the liquidators relating to Mr Strauss's supposedly vexatious conduct. It is an issue which I cannot determine on the papers. It is easy to see from the stance taken by both sides to this dispute that there is some bad blood between them. And there is certainly quite a collection of evidence on the papers which, at least at first blush, would seem to suggest that Mr Strauss has not made life easy for the liquidators. But it is not something which I can, or need to, resolve in this case and the evidence is inconclusive. I simply find that Mr Strauss has not established that the liquidators were grossly negligent, or even negligent, in discharging their duties, or that the fees which they were paid were inappropriate in any respect.

CONCLUSION AND ORDER

100 It follows from everything said above that the bulk of Mr Strauss's objections to the Master did not, in my view, have merit. The only objection which I believe ought to have been upheld is the one which relates to the provision of supporting documentation. The way that the notice of motion was drafted, when read with Mr Strauss's objection,

makes it difficult for me to formulate an appropriate order with reference to the paragraphs of the objection itself. This is because there is not a clean overlap between the paragraphs of the objection listed in the notice of motion and the issues in respect of which the objection ought to have been held (in part because, in some cases, Mr Strauss's objections were set out in annexures). I shall therefore formulate an order which is hopefully a little clearer than what was envisaged by the notice of motion.

101 On the question of costs: although the application has largely failed, I find the combined attitude of the liquidators to the issue of documentation to be difficult to understand. As I understand the answering affidavit, the liquidators were given the opportunity to provide an electronic, rather than hardcopy, version of all the supporting documentation. If the supporting documentation relating to FA9 and FA9.1 is easily accessible, then it is something of a mystery as to why it was not tendered to Mr Strauss. In argument, it was suggested to me that, if I were to order that the documents should be provided, I should also order Mr Strauss to pay the costs of photocopying the documents, which apparently occupy 10 lever-arch files. Again, I do not understand why, if a softcopy of this documentation exists, it was not simply provided.

102 The liquidators' inexplicable conduct does not stop there. There is a range of topics, discussed above, in respect of which the liquidators satisfied themselves with the barest of denials. Their answering affidavit was, frankly, largely of little assistance to me in understanding the underlying facts. If they had provided a clearer version of their side of the case, then it would perhaps have been appropriate to penalise Mr Strauss for persisting in his application. Given that they did not, my view is that the fairest outcome would simply be to make no order as to costs.

103 I accordingly make the following order:

1. **The applicant's non-compliance with section 407(4)(a) of the Companies Act 61 of 1973 in his failure to institute these proceedings within the prescribed 14-day period is condoned.**

2. **Save as provided in paragraph 3 below, the applicant's application to set aside the Master's ruling of 25 February 2022 ("the Master's ruling") in relation to the applicant's objection to the first liquidation and distribution account of Waenhuiskraal Boerdery CC (in liquidation) ("the CC L&D account") is dismissed.**

3. **The applicant's application to set aside the Master's ruling is upheld to the following extent:**

    3.1. The CC L&D account is held to be incomplete in so far as there is no supporting documentation for all of the expenses listed in annexure FA9 to the founding affidavit in this application.

    3.2. The voucher provided by the first and second respondents (annexed as FA10 to the founding affidavit) and the bank statements (annexed as FA11 to the founding affidavit) to support the expense of R309 783.94 in the Free Residue account under the heading "Administration Expenses" and the bank statements are declared to constitute inadequate corroboration of the expense.

4. **The first and second respondents are ordered as follows:**

    4.1. Within 30 days of this order, the first and second respondents shall provide, to the applicant and third respondent, supporting documentation to confirm all of the expenses listed in annexure FA9 to the founding affidavit.

    4.2. Within 30 days of this order, the first and second respondents shall provide substantiating documentation to the applicant and the third respondent to support the expense of R309 783.94 in the Free Residue account under the heading "Administration Expenses".

4.3. It shall be sufficient, for the purposes of compliance with paragraphs 4.1 and 4.2 above, for the documentation to be provided by the first and second respondent in softcopy, by emailing it to the applicant's attorneys and the third respondent within 30 days of this order being granted.

5. **There is no order as to costs.**

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ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 3 April 2023.

APPEARANCES:

Attorney for the applicant:	GJ Vonkeman Attorneys
Counsel for the applicant:	J Butler
Attorney for the first, second, fourth and fifth respondents:	Eugene Marais Attorneys
Counsel for the first, second, fourth and fifth respondents:	JK Maxwell

Date of hearing: 23 November 2022

Date of judgment: 3 April 2023