

18/4/2018
✓

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 53071/2016

In the matter between:

FIRST RAND BANK LIMITED

Applicant

And

MASTER OF THE HIGH COURT (PRETORIA)

First Respondent

THE BODY CORPORATE OF VICTORY PARK

Second Respondent

CORNELIA CAROLINA MIENIE N.O.

Third Respondent

**IGNATIUS CLEMENT MIKATEKO
SHIRELELE N.O.**

Fourth Respondent

NEDBANK LIMITED

Fifth Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Sixth Respondent

**MINISTER OF RURAL DEVELOPMENT
LAND REFORM**

Seventh Respondent

JUDGMENT DELIVERED ON 18 APRIL 2018

VILAKAZI AJ:

1. This is an unopposed application for review and setting aside a decision of the First Respondent (the Master) dismissing the applicant's objection to the First and Final Liquidation, Distribution and Contribution Account prepared by the Third and Fourth Respondent (trustees) under Master Reference No T76/2011. The Liquidation and Distribution Account relates to the insolvent estate of Joseph Zakes Msimango who was the owner of the sectional title unit (Unit 92 Villa Lucca Sectional Title Scheme SS943/2004) situated at Die Hoewes Extension 203, 540 local authority: City of Tshwane Metropolitan Municipality. The said unit is bonded to the applicant.

2. The Applicant seeks two forms of the relief. First, it seeks an order that its objection it lodged on 9 June 2015 be sustained and that the trustees be directed to amend the First and Final Liquidation, Distribution Account by reflecting the applicant, Second Respondent and Fifth Respondent are liable pro rata to contribution of R46 663,16 alternatively reflect the Second Respondent as liable solely to pay the contribution of R46 663,16.
3. Second, the applicant seeks a declaratory order of the legal costs (including interest) incurred by the Body Corporate in sequestrating the owner of the sectional title unit do not form part of the costs in terms of section 15B(3)(a)(i)(aa) of the Sectional Title Act, No 95 of 1986 (Sectional Title Act).
4. The First Respondent has filed a Notice to abide the decision of this court.
5. The Second Respondent on 5 September 2016 withdrew its Notice of Opposition.
6. In the addition thereto the applicant has filed and served a Notice in terms of Rule 16A of the Uniform Rules of Court wherein it raises a constitutional issue in its review application. "The constitutional issue(s) raised are:-
 1. The proper interpretation of section 14(3) of the Insolvency Act, No 24 of 1936;
 2. The proper interpretation of section 89(1) of the Insolvency Act, No 24 of 1936;
 3. The proper interpretation of section 106 of the Insolvency Act, No 24 of 1936;
 4. The proper interpretation of section 15B(3)(a)(i)(aa) of the Sectional Titles Act, No 95 of 1986"
7. The applicant submits that the misinterpretation of the Master of the above-mentioned sections will result in the infringement of section 9(right not to be discriminated against), section 10 (right to dignity), section 22 (right to practise a trade of its choice) and section 25(right not to be deprived arbitrarily of property) of the Constitution.
8. The Sixth Respondent, the Minister of Justice and Constitutional Development did not file a Notice of Intention to Oppose the review application.
9. The applicant disputes the Master's decision which directed that the applicant, and Nedbank, Fifth Respondent are liable pro rata to pay the legal cost incurred by EY Stuart Attorneys, the legal representatives of the Body Corporate of Victory Park, Second Respondent, the petitioning creditor in the amount R 46 663,16 (Forty Six Thousand Six Hundred Sixty Three Rand and Sixteen Cents).

10. The First and Final Liquidation, Distribution and Contribution Account in respect of the items which are subject of a dispute reads as follows:

"Taxed Bill of costs owing to EY Stuart-the insolvent estate	R 43 680,36
Advertisement costs of second meeting	R 518,83
Registered circular and Vat	R 74,56
Destruction of record	R 77,30
Bank charges	R 921,11
Petties, postages and stationery vat inclusive	R 741,00
Provision for advertisement	R 650,00
TOTAL	R 46 663,16

11. The facts giving rise to the dispute are briefly the following;

1. J.Z. Msimango, the insolvent owned a sectional title unit, Unit 5 in the scheme known as SS Victory Park, Scheme No 325/2000 managed and administered by the Second Respondent. The Fifth Respondent, Nedbank is the bondholder in terms of a mortgage bond registered in its favour wherein the insolvent tendered the sectional title unit as collateral security over its indebtedness to the Fifth Respondent. The other Sectional Title Unit, Unit 92 in the scheme known as Villa Lucca, Scheme No SS943/2004 is managed by the Body Corporate of the Villa Lucca. Equally so, the insolvent has caused a mortgage bond registered in favour of the applicant as security over its indebtedness.
12. As a result of insolvent having fallen behind with payment of the levies owing and payable to the Second Respondent, EY Stuart Inc, legal representatives of the Second Respondent instituted action proceedings against the insolvent for the recovery of levies in the sum of R 8 895,64 together with interest thereon at a rates of 18% per annum.
13. On 19 September 2008, the Magistrate Court for the District of Pretoria granted default judgment for the payment of the aforesaid sum together with interest thereon. On 7 October 2009, the Second Respondent instituted sequestration proceedings in this Honourable Court. The Second Respondent, a petitioning creditor claimed arrear levies, owing over R 22 000,00.
14. On 29 April 2010, this Court granted a provisional sequestration order. On 14 June 2010, the insolvent estate was placed under final sequestration. The Third and Fourth Respondents were appointed provisional joint trustees by the First Respondent on 22 June 2011 which appointments were confirmed on 12 August 2011.

15. The applicant and Nedbank, the bondholders proved their secured claims in the insolvent's estate at separate meetings of creditors in the respective amounts of R645 840,86 (together with interest thereon) and R679 512,82 and relied exclusively on their security. On 1 April 2015, the trustees prepared a L & D Account reflecting that contribution of the amount R 46 663,16 levied pro rata on the applicant and Nedbank. The applicant must pay a sum of R 17 028,82 and Fifth Respondent must pay a sum of R 29 634,33.
16. The Second Respondent, the petitioning creditor was not reflected as liable pro rata to contribute in the amount of R 46 663,16.
17. The matter concerns the interpretation of section 14(3) of Insolvency Act 24 of 1936 (Insolvency Act) and its interplay with section 15B(3)(a)(i)(aa) of Sectional Title Act.
18. Section 14(3) of the Insolvency Act provide that:

"In the event of a contribution by creditor under section one hundred six, the petition creditor, whether or not he has proved a claim against the estate in terms of section forty-four, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition".
19. In terms of section 15B(3)(a)(i)(aa) of Sectional Title Act, it stipulates that the Registrar shall not register a transfer of as unit or undivided share therein, unless there is produces to him-
 - (a) a conveyancer certificate confirming that as at date of registration –
 - (i) (aa) if a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, that body corporate has satisfied that all money to body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof:...
20. The applicant's objections to the L & D Account were based on the following grounds;
 - (1) The First Respondent conflated the costs of sequestration incurred by the petitioning creditor in terms of section 14(3) of the Insolvency Act and the legal costs incurred in the recovery of arrear levies due and payable by the owner of a sectional title unit in terms of section 15B (3)(a)(i)(aa) of Sectional Title Act;

- (2) Mr Msomi in his capacity as Master on behalf of the First Respondent, erred in law in concluding that the sequestration costs incurred by the legal representative of the Second Respondent, such costs, he treated them as part of realization costs in terms of section 89(1) of the Insolvency Act and thus the Second Respondent does not have to prove its claim in terms of section 44 of the Insolvency Act.
- (3) The said Mr Msomi incorrectly relied in the case of ***C H J Barnard N.O v Regspersoon van Aminie Pro Admin Eiendomsbestuur en Ander [2001] 3 All SA 433(A)*** as authority for the proposition that body corporate are not liable to pay contribution.

21. The First Respondent dismissed the applicant's objection holding that the Second Respondent is not liable for contribution according to his legal interpretation of section 14(3) of the Insolvency Act. The bases for his decision are the following:

- "2. whilst on the one hand noting Rorich Wolmarans Luderitz Attorneys, (applicants attorneys) reference to section 14(3), and their view that the petitioning creditor whether or not he has proved a claim against the estate shall be held liable for the payment of contribution. On the other hand the section clearly states that a creditor will be liable to contribute not less than he would have contributed if he had proved a claim.
3. For a claim to be admitted against an estate, the claim must have arisen prior to sequestration. For a claim to be paid it must be proved against the insolvent estate.
4. *The exceptions to this rule are namely arrear rates owing on fixed property (in terms of section 89(1) and (5) of the Insolvency Act) and arrear levies owing in respect of sectional title units (in terms of the provisions of the Sectional Titles Act 95 of 1986, as interpreted by the courts in ***Nel v Body Corporate of Seaways Building 1996 (1) SA 131(A) and Barnard (supra)***.*
5. Arrear taxes on fixed property and arrear levies in respect of sectional title units are considered to form part of the administration expenses, despite the fact that the obligation to pay these amounts arose prior to sequestration.
6. The arrear levies are part of the costs to be paid prior to the Registrar of Deeds giving effect to the transfer of the property. Therefore there can never be a claim for arrear levies in law currently.
7. The Supreme Court of Appeal has determined that the claims by the Body Corporate for arrear levies are not affected by the provisions of the Insolvency Act.

8. Can the Body Corporate, as the applicant creditor then be held liable for contribution in terms of section 14(3) of Insolvency Act?
 9. Section 14(3) states that the applicant creditor whether or not such creditor has proved a claim against the estate is liable for contribution. In the proviso to section 14(3) it is further stated that the applicant creditor must not pay less contribution than he would have had to pay if the creditor had formally proved a claim.
 10. The Body Corporate does not have to formally prove a claim in terms of section 44 of Insolvency Act. When applying the provisions of section 14(3) this in effect means that the Body Corporate must not pay less than nothing.
 11. If one considers the effect of **Barnard** decision where it stated that legal expenses incurred in trying to recover the levies, or costs involved in bringing the application for the sequestration of the debtor's estate, form part of the levies and may be claimed from the proceeds of the sectional title unit. If this aspect of the Barnard decision is to be applied consistently, it would mean that any contribution payable by Body Corporate in terms of section 14(3) will also form part of the levy and the amount will ultimately be paid from the proceeds of the sectional title unit. This in turn means that there will be less funds available with which to pay the secured creditor and indirectly has the effect that the secured creditor is paying the contribution.
 12. For the reasons stated above, the Body Corporate is not liable for contribution".
22. This application is premised upon the provisions of section 111 2(a) of the Insolvency Act which provides that:
- "if the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted mala fide, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the or may give such other direction in connection therewith as he may think fit: Provided that-
- (a) any person aggrieved by any such direction of the Master to sustain an objection so lodged, may apply by motion to the court within fourteen days as from the date of the Master's direction, or as from the date of intimation to the objector of the Master's refusal to sustain his objection, after notice to the trustee, for an order to set aside the Master's decision and the court may thereupon confirm the account or make such order as it thinks fit, and"

23. The applicant has not set out in its papers the bases of its attack of the constitutionality of section 14(3) of the Insolvency Act and its interplay with section 15B (3)(a)(i) (aa) of the Sectional Title Act, except its averment that the Master misapplied the law and misinterpreted section 14(3), section 89(1), section 106 of the Insolvency Act and section 15B(3)(a)(i)(aa) of the Sectional Title Act.
24. In order for the applicant to succeed in a review application it must show amongst others the following;
- (1) It must show that the administrative action taken by administrator was irrational.
 - (2) The administrative action was materially influenced by error of law.
 - (3) Or the administrative action took in account irrelevant consideration or excluded irrelevant consideration, or the administrative action is otherwise unconstitutional and unlawful.
 - (4) The administrative action is unconstitutional or unlawful.
25. It not clear to me why the interpretation of the relevant sections by the Master raises a constitutional issue. The Master may have misinterpreted the sections the sections concerned but the fact that he may have done so does not in itself raise a constitutional issue.

APPLICABLE STATUTORY PROVISIONS

26. The determination of the issues that I have identified involves an exercise of statutory interpretation as they concern in one way or another ascribing meaning to the provisions of section 14(3), section 106, section 89 of Insolvency Act and section 15B (3) (a) (i) (aa) of the Section title Act.
27. Section 14(3) stipulates that:
- "In the event of a contribution by creditor under section *one hundred six*, petitioning creditor, whether or not he has proved a claim against the estate in terms of section *forty- four*, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition."
28. My interpretation of section 14(3) of Insolvency Act is that it makes the petitioning creditor compulsory liable to contribute to the costs whether or not it as proved its claim.

29. Section 89(1) of the Insolvency Act provides as follows:

"The cost of maintaining, conserving, and realizing any property shall be paid out of the proceeds of that property, if sufficient, and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims."

30. Section 106 provides that:

"where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in section ninety-seven, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preference creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that

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

31. Section 106 prescribes how to deal with creditors whom must contribute in the event where the residue is insufficient in the estate of the insolvent.

32. In terms of section 15B(3)(a)(i)(aa) of Sectional Title Act, it stipulates the Registrar shall not register a transfer of as unit or undivided share therein, unless there is produces to him-

(a) a conveyancer certificate confirming that as at date of registration –

(i) (aa) if a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, that body corporate has satisfied that all money to body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof: ...

33. In my view the legal costs incurred or associated with the recovery of unpaid or arrear levies fall within the ambit and protection of section 15B(3)(a)(i)(aa) of the Sectional Title Act. In simple terms section 15B(3)(a)(i)(aa) reinforce the protection of levy payment.

34. The reliance by the First Respondent on section 15B(3)(a)(i)(aa) of the Sectional Title Act, as a basis to absolve the Second Respondent from being liable pro rata to pay contribution is misplaced.
35. The Second Respondent set the machinery of law in motion by instituting sequestration proceedings against the insolvent. Section 89(1) read with section 106 of the Insolvency Act, makes it clear that the legal costs incurred in sequestrating the insolvent are not associated with payment of the levies. Those costs fall outside the protection of section 15 B (3) (a) (i) (aa) of the Sectional Title Act.
36. I hold therefore that the Second Respondent is not immuned from contribution.
37. In respect of *Barnard's case* (supra), the court extended the protection of the costs associated with sequestration. I am of the view that Barnard's case is distinguishable from this matter before me in that sequestration costs stand on different footing. Those costs have no connection with the recovery of unpaid levies. If I ignore the objective and the intention of section 14(3), section 89 and section 106 of the Insolvency Act, which prescribes how to deal with payment of creditors and the pro rata contribution, the interpretation of the Master does not promote the Bill of Rights as enunciated in section 9 and 25 of the constitution.
38. In light of the above reason the First Respondent is incorrect in concluding that the Second Respondent is not liable to contribute pro rata with the applicant and Nedbank. The Master conflated the 2 scenarios namely the sequestration costs incurred by the petitioning creditor in terms of section 14(3) of the Insolvency Act and the payment of levies in terms of section 15B(3)(a)(i)(aa) of the Sectional Title Act.
39. It follows that the Second Respondent, (the Body Corporate of Victory Park) applicant and the Fifth Respondent (Nedbank Limited) are liable to contribute pro rata to the administration costs.
40. I therefore grant the following the order:
1. That the decision/direction of the First Respondent handed down on 20 June 2016 whereby the applicant's objection to the First and Final Liquidation, Distribution and Contribution Account under Master's Reference No. T76/2011 was refused and/or dismissed, be reviewed, set-aside and corrected with a decision/direction in the following terms:-
 2. The applicant's objection to the First and Final Liquidation, Distribution and Contribution Account under Master's Reference T76/2011 is sustained; and

3. The Third Respondent and Fourth Respondent are directed to amend the First and Final Liquidation, Distribution and Contribution Account by (i) reflecting the applicant, Second Respondent and Fifth Respondent as liable pro rata to pay the contribution of R46 663,16.
4. That it be declared that the legal costs (including interest) incurred by the Second Respondent in order to sequestrate the estate of Joseph Zakes Msimango (ID 741215 6181 083) do not form part of and/or are not subject to section 15B(3)(a)(i)(aa) of the Sectional Title Act, No 95 of 1986.
5. No order as to costs.



T. D VILAKAZI
ACTING JUDGE OF THE GAUTENG DIVISION
OF THE HIGH COURT OF SOUTH AFRICA

DATED AND SIGNED AT PRETORIA ON 18th DAY OF APRIL 2018

FOR THE APPLICANT
INSTRUCTED BY
DATE DELIVERED

ADV L. MEINTJES
RORICH WOLMARANS & LUDERITZ INC
18th APRIL 2018