IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A127/19

BEFORE THE HONOURABLE MADAM JUSTICE KHUMALO

BEFORE THE HONOURABLE JUSTICE MANOIM

BEFORE THE HONOURABLE ACTING JUSTICE NCONGWANE AJ

In the matter between:

WERNER CAWOOD N.O.	APPELLANT
And	
CLOETE MURRAY N.O.	1ST RESPONDENT
KISHOR NATHOO RAMA N.O.	2ND RESPONDENT
MMAMAHLOL GLORIA RABYANYANA N.O.	3RD RESPONDENT
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	4TH RESPONDENT
JOHAN CHRISTIAAN BEER N.O	5THRESPONDENT

JUDGMENT

MANOIM J (Khumalo J and Ncongwane A.J. concurring)

[1] This appeal raises the central question of whether a court can make an order of forfeiture of a business rescue practitioner's fees in appropriate circumstances. This is not a question that has been previously decided.

[2] The question arose when the business rescue practitioners 'BRP's appointed for two companies, Phehla Umsebenzi Trading 48 CC (Phehla) and Tiar Construction CC (Tiar), applied in terms of section 141(2)(a)(ii) of the Companies Act, 71 of 2008, (the Act) to discontinue the business rescue proceedings and place the company into liquidation.

Litigation History

[3] The appellant (Cawood) and the fifth respondent (Beer) are the business rescue practitioners in question. The first to third respondents are the liquidators who were appointed following the order of the court a quo.

[4] The applications were brought separately but were consolidated for the purpose of hearing. The fourth respondent the Commissioner for the South African Revenue Service, (hereinafter referred to as SARS) applied and was given leave to intervene in the proceedings. SARS opposed the relief to convert the business rescue process to liquidation. Nevertheless, it brought a counterclaim that also sought to place the companies in liquidation. The difference between the BRP's relief and that of SARS, is that SARS also sought an order setting aside the resolution that placed the companies in business rescue and an order declaring the BRP's were not entitled to fees. The court a quo awarded the SARS relief and refused the BRP's relief.

[5] Effectively both sets of relief place the companies into liquidation although by different means. The real dispute is over the forfeiture of the fees. That dispute in turn can be broken down further into two aspects: the courts competence to make such an order and, assuming it does, whether such an order is justified on the present facts.

[6] The court a quo refused leave to appeal but the BRP's then successfully petitioned the Supreme Court of Appeal (SCA) which then ordered the matter to be heard by a full bench of this division, hence the current appeal.

Background

[7] It is common cause that Phehla and Tiar are related parties. Within a few days of one another the members placed the two firms in business rescue and Cawood and Beer were appointed as the business rescue practitioners of both firms. Both resolutions to commence business rescue were taken by the companies on 28th May 2013, and Cawood and Beer were appointed as their BRP's by the CIPC on 3 June 2013.

[8] The business rescue process continued until 29 November 2013, when, at the same time, but in separate applications, the BRP's applied in terms of section 141(2)(a)(ii) of the Act read with section 81(4)(a), to have the business rescue process terminated and for the companies to be placed in liquidation.

[9] These applications were brought almost 2 ½ years after the BRP's were first appointed.

[10] The basis for the applications was that following a longstanding dispute with SARS over outstanding tax liability (for both VAT and income tax) SARS had conducted an audit after which, it in 2015, issued what are termed letters of finding, resulting in huge tax liabilities for both companies.

[11] By way of illustration, in the case of Tiar, the tax liability for VAT for the period of 2009 - 2011 was R21 391 237.00, but SARs also levied an understatement penalty of R 42 782.474.00. The income tax liability was R 40 079 989.00 and SARS levied an understatement penalty of R 80 159 978.00.

[12] But the BRP's say that in their preliminary business plan for Tiar they had expected a SARS claim in the region of R 800 000. In the case of Phehla the outstanding tax liability was set at R 47 million rand.

[13] Both firms were engaged in the construction industry and were largely dependent on winning public sector tenders for which a tax compliance certificate was required. As a result of these unresolved tax liabilities the BRP's brought an application for the

winding up of each of the companies in November 2015. SARS then applied to intervene in the matters and brought its counter applications in May 2016.

[14] The BRP's argued that SARS' counter applications to liquidate were bad in law because their applications to convert were already pending. They contend that SARS' applications were only brought in this manner in order for it to be able to claim back the BRP's fees.

[15] They complain that what SARS should have done was to bring proceedings in terms of section 139(2) of the Act. Briefly put that section allows an affected person (which SARS is as a creditor) to bring an application to remove a business practitioner. But, they argue, instead of doing so SARS had for several months participated in the business rescue process including attending meetings with them.

[16] SARS' reason for opposing the application and its counterapplication is driven by two considerations – that from the outset business rescue should not have been embarked on as the companies were hopelessly insolvent and second, that the BRP's had colluded with the members of the company to prolong the business rescue process.

[17] SARS highlights the fact that both companies had in their annual financial statements (drawn up by the same firm of accountants) reflected large sums as loans. But it contended, these loans were not genuine transactions and were made to related parties without provision for interest payments. By way of example. in 2012 Phehla had loans to related parties of R 90 million and Tiar R115 million.

[18] Yet later, when it suited the companies, and which the BRP's accepted, these were treated as dividend payments, despite the fact that no Secondary Tax on Companies (STC) had been paid in respect of them.

[19] SARS contends that the BRP's should have been aware from the outset that the loans were not genuine transactions. At least two of the entities which had received loans were no longer trading. The BRPs took no steps to recover these amounts. Moreover, the BRP's apparent justification for the business rescue – that if the companies could settle their tax affairs with SARS, they could get tax certificates and commence trading again, was specious given the size of their tax bill.

[20] SARS is not certain how much the BRP's have earned from the two firms in fees but based on the one monthly fee it was aware of, which was R 40 000 for the one firm, it estimates that for both, the BRP's had most likely earned R2.4 million over the period. (30 months x R80 000).

[21] SARS concludes that the companies were never candidates for business rescue. The reason they were was because of collusion between the BRP's and the members of the companies. SARS contended that the likely purpose of the business rescue proceedings was "…*probably to get rid of the SARS claim*."

[22] SARS argues that if the BRP's had properly discharged their functions, they would have on reading the annual financial statements then extant, have called up the loans to satisfy the claims of creditors, but they made no attempt to do so.

[23] As SARS' deponent put it in the one affidavit, *"It would appear that their duty to act honestly towards the court and strictly in the best interests of their client was sacrificed on the altar of personal enrichment."*

[24] SARS argued that the court should show its disapproval of this conduct by disallowing the BRP's fees.

[25] The BRP's countered by saying that they did not initially know that some of the entities to whom the loans had been extended were not trading as they did not have access to this type of information. They accuse SARS of not sharing its intelligence with them that these loans were with related parties. They also blame SARS for not providing certainty on the tax liability until early 2015. They contend that until then they had an expectation that they could settle the tax liability with SARS relying on a provision in the Income Tax Act, relating to business rescue. With that done the companies could get their clearance certificates and resume trading, which they anticipated they would be able to, given their good reputation with their public sector client base.

[26] The court a quo did not accept these explanations from the BRP's. The court held:

[27] *"The conclusion is inescapable that the applicants failed to fulfil their functions as business rescue practitioners as set out in the Companies Act. I am of the view that*

a *case for the setting aside of the resolutions has been made and that the applicants conduct is worthy of censure."*

[28] The court went on to discuss whether in the light of this conclusion the practitioners were entitled to their fees:

[29] "I am troubled by the fact that the application is brought years after the business rescue practitioners were appointed. This means possibly large fees have been earned and large disbursements have been Incurred. Business rescue practitioners who do not perform In accordance what their appointment demands, have only themselves to blame when caught out. The flaccid approach which they opted for is to the detriment of the general body of creditors as well as shareholders. The court must show its disapproval through the fees they earned and stood to earn."

[30] The court ordered that they were not entitled to the fees that they had earned.

[31] The learned judge did not set out the legal basis for why the court had such a power in his original decision. But in the judgment in respect of the application for leave to appeal, he developed this further saying the court had an inherent power to do so. As his authority he cited the Supreme Court of Appeal's (SCA) decision in the case of *Diener N.O. v Minister of Justice and Others*.[1] There the court had to decide whether BRP's fees were entitled to a preference on their remuneration. The SCA held they were not. Although the learned judge acknowledged that the judgment was not directly in point, he relied on it as authority for the proposition:

> *"to demonstrate that the business rescue's remuneration is not beyond the reach of the court as argued before me."*

Arguments on appeal

[32] Both parties acknowledge that there is no case directly in point in which a court had to decide whether it could disallow a BRP's fees.[2]

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[1] (2018) 1 All SA 317 (SCA).

[2] Some cases refer critically to the conduct of the BRP. But they are not related to the issue of conversion, nor did they involve an order declaring the fees forfeited. Rather they imposed other forms of sanction to show their displeasure at the conduct. . In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* [2015] 3 All SA 10 (SCA) the court finding that a

[33] Both considered an SCA decision in relation to the power of the court to sanction advocates for unprofessional conduct, by refusing them their fees, was relevant. But each had different interpretations of the consequences of that decision for the present matter.

[34] In *General Council of the Bar of South Africa v Geach and others*, Wallis JA, albeit writing the minority decision, posed the issue facing the court in this way:

The true question was not whether there was no reason for the court not to have that power, but whether the court did indeed have the power to make that order.[3]

[35] In my view this is also the true question to ask in the present matter.

[36] *Geach* involved several members of the Pretoria Bar who had been sanctioned for unprofessional conduct. Part of the sanction that had been imposed upon them by the court a quo was an order that they pay back certain amounts to their client the Road Accident Fund. The question was whether a court had such a power to order the repayment of fees. Some practitioners had been struck off the roll whilst others were still practising.

[37] On appeal the majority of the court held that in respect of those practicing it had such a power. Nugent JA explained that the power derived from the courts inherent power.

"I agree with the court below that a court has an inherent power to do so, as this court, and other courts, have said before. That it has its roots in antiquity, and that we no longer employ the disciplinary remedies of earlier times, seem to me to be neither here nor there. I see no reason why that inherent power does not permit a court to order a practitioner to repay moneys as a condition for further practice." [4]

[38] However, in relation to those who had been struck off the roll Nugent JA stated:

BRP's conduct evoked severe criticism gave an adverse costs order. In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another* [2017] 1 All SA 862 (WCC), the sanction imposed was to order the court's judgment to be sent to the Company and Intellectual Property Commission for consideration.

[3] 2013 (2) SA 52 (SCA) at paragraph 195.
[4] *Geach*, supra paragraph 78.

"The GCB submitted that those orders were not competent in relation to the advocates who were struck off the roll and I agree. Once the court struck them from the roll its disciplinary powers over them were exhausted." [5]

[39] Are business practitioners who continue to practice, in an analogous position to practicing advocates in respect of a court's competence in an appropriate case to order them to repay their fees wholly or partially? SARS answers this question in the affirmative. It does so because in terms of section 140(3)(a) of the Companies Act, "*During a company's business rescue process proceedings, the practitioner –*

> *(a) is an officer of the court and must report to the court in accordance with any applicable rules of, or orders made by, the court.;"*

[40] The argument then is since BRPs, like advocates and attorneys, are officers of the court, they too, are subject to the court's inherent powers recognised by the majority in *Geach,* and hence can be ordered, in appropriate circumstances as a consequence of the court's disapproval of the way they have conducted themselves, to forfeit their fees.

[41] But in his minority judgment, Wallis JA had this to say about the inherent power: *"Courts as much as, if not more than, other constitutional institutions are bound by the principle of legality that requires that the exercise of public powers be authorised by law. The power in question is not authorised by law and does not arise from an inherent disciplinary power that courts may exercise over legal practitioners. These orders should not have been made. As regards the concern that it would be laughable in the public eye for it to hold otherwise, the law provides appropriate and adequate remedies to a party that has been overreached to recover the extent of its losses from the party responsible and the Fund had already instructed attorneys to pursue its remedies in this regard."* [6]

[42] Although in *Geach* the majority and minority disagreed about the extent of the consequences of the courts inherent powers, both still recognised that the court has an inherent disciplinary power over legal practitioners. In this case we have to

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[5] *Geach*, supra, paragraph 77.
[6] *Geach*, supra, paragraph 195.

decide whether the same be said over the courts powers over BRP's, for without it the power to order a repayment of fees cannot be inferred?

[43] There is only one case in which the nature of the concept of '*officer of the court'* as it is used in section 140(3)(a) has been discussed. This again is a decision of Wallis JA in the SCA, although here he speaks for the majority.

[44] In *Knoop NO and another v Gupta (Tayob as Intervening Party)* the learned judge expressed reservations about whether this term means what we traditionally think it means: [7]

> *"In any event, I do not think that describing a BRP as an officer of the court adds anything to their duties or responsibilities. The expression "officer of the court" is most commonly used to refer to advocates or attorneys who are admitted by the courts and ethically owe special duties to the court that may at times conflict with the interests of their clients" …. "To say that someone is an officer of the court conveys little practical meaning. It "is a vague term without legal content." At most it conveys that a fairly high standard of personal integrity is called for from the person so described. But that flows in any event from the duty of good faith and as there was no attack on the personal integrity of Messrs Knoop and Klopper this was not a relevant consideration."*

[45] This case suggests that the despite the fact that practitioners are described as officers of the court they are not, simply by reason of that label, in an analogous position to advocates or attorneys.

[46] If that is so, the court may not have the power over BRP's that has in respect of legal practitioners who are officers of the court. Both the majority and minority in *Geach* derive the courts powers over legal practitioners because courts exercise, and have traditionally done so, a disciplinary power over them. Even with that common recognition of this power there were certain limitations to it. All agreed it could not apply to those who were once in practice on the roll but are no longer. The

[7] [2021] [1] All SA 726 (SCA) at paragraph 33.

minority, whilst recognising the existence of the power, did not believe it extended to the power to order those still practising to repay their fees.

[47] I find that the court does not have an inherent power over BRPs. I say so for the following reasons.

[48] In the first place *Knoop* is authority for the proposition that when we consider BRPs as officers of the court this does not add anything to their duties and responsibilities. Put differently the court limited the meaning of the concept in respect of BRPs, albeit it is not directly on point in respect of the issue of ordering the repayment of fees.

[49] But this is not the only source. The language and structure of section 140(3)(a) also suggests a limited meaning should be given.

[50] First, the section says the BRP's are only officers of the court '… *during a company's business rescue proceeding."* This limited duration suggests that BRP's are officers of the court only temporarily whilst they appointed in a specific case. Thus, they are unlike the legal practitioners, who are still on the roll, for whom being an officer of the court is a continuous, uninterrupted obligation.

[51] Second, the subsection couples the notion of BRP's being officers of the court to their reporting duty in terms of "…*any applicable rules of, or orders made by, the court."* This means that when they report to the court, they are subject to a higher fiduciary duty because in this respect they are officers of the court. But there is no suggestion that beyond this specified function they are subject to further obligations as officers of the court, akin to those of legal practitioners.

[52] Third, the structure of the section which goes on to say that the BRP has the responsibilities and duties of a director suggest that this is an office holder *sui generis.* Not quite an officer of the court or a company director in the traditional sense.

[53] But there is also a purposive sense in which the concept of officer of the court must be given a limited meaning.

[54] In the *Geach* case the fees overreach, for which the majority held a forfeiture order was competent, related to a violation of a professional rule about charging multiple trial fees.

[55] The business rescue practitioner unlike the advocate or attorney is not subject to the same set of ethical rules which carry with them disciplinary consequences for non-compliance.

[56] The conduct complained of in this matter ranges in a spectrum, from negligence to gross negligence, to bad faith. That is a different kind of misconduct to that in the *Geach* case, because it does not entail a contravention of a professional rule which sets out how fees must be charged.

[57] Remedying the charging of multiple days of trial fees is of a different order to remedying the prolonging of a business rescue process if that is what the present conduct may amount to.

[58] I find therefore that the court does not have an inherent power to order a business rescue practitioner to repay fees for misconduct. Such an order would be beyond the courts powers in terms of the principle of legality

[59] There is another argument to consider. In its heads of argument SARS also argued that the court has a statutory power in terms of the Act to order that BRP's repay their fees when they apply for conversion.

[60] The court's power to convert a business rescue process to liquidation is derived from sub-section 141(2)(a)(ii) of the Act. But this provision must be read with subsection 141(3), which gives the court an additional residual power when considering such an application. In terms of section 141(3):

> *"A court to which an application has been made in terms of sub-section 2(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances."*

[61] The argument then is that the residual power set out in this subsection, the power to give "*any other order*," is wide enough for a court to order that a BRP must repay its fees. But this reads too much into this residual power. The residual power is principally dealing with a situation where the court decides not to convert a business rescue into a liquidation. Otherwise, there might be a lacuna. It could of course be given a wider reading to include a condition attached to the conversion order. But even if that reading is possible, given the way it is drafted, it would be

going too far to hold that it includes the power to order a repayment of the BRP's fees.

[62] This does not mean that the conduct cannot be remedied. In terms of section 140(3)(c):

"During a company's business rescue process proceedings, the practitioner –

…

(c) other than as contemplated in (b) –

(i) ….

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the practitioner."

[63] I accept that the standard of gross negligence is not one that is easy to establish. In the *Diener* case, when it got to the Constitutional Court, Khampepe J remarked:

"It was argued that there are sufficient mechanisms to hold practitioners accountable for incurring fees where there is little chance of the business being rescued. These mechanisms do exist, for example in sections 138 to 141 of the Companies Act. Furthermore, practitioners have the same fiduciary duty to the company as a director. If they do not exercise their duty properly, they can be removed and held liable for fruitless expenses. However, it must be noted that the standard of gross negligence is a high one and in cases where there is good faith the courts have been reluctant to find that practitioners should be held liable for fruitless expenses." [8]

[64] Nevertheless, whilst I accept the correctness of this observation, it does not follow that because recovery may prove difficult that a wider interpretation must be given to the either the court's inherent power or the residual power in section 143(2).

[65] In the same case *Diener*, both the SCA and the Constitutional Court made decisions about the rights of preference of BRPs' to their fees in cases where the company in question is liquidated. The cases resolve the question by looking at the

[8] *Diener N.O. v Minister of Justice and Correctional Services and Others* 2019 (4) SA 374 (CC), paragraph 61.

interface between the Insolvency Act and the Companies Act. The SCA decision holds that on liquidation, the fees of a BRP become akin to those of a creditor requiring them to be proved as claims in contradistinction to those of a liquidator which do not. [9]

[66] There is no suggestion in either decision that the payment of these fees is subject to some prior inherent power of the court. Rather they are considered the business of the liquidator.

[67] Whilst I accept the cases are not directly in point, they do illustrate that the fees issue is capable of a solution that does not require the invocation of the inherent power of the court.

Remaining relief appealed against.

[68] This then leaves the remaining relief. The court a quo ordered that the resolution of the companies to place the firms under business rescue should be set aside. However, there is insufficient evidence in the record to justify this. Accordingly, this aspect of the court a quo's order must be set aside.

[69] There is also something irregular, as was argued by the BRP's, for SARS to oppose the conversion to liquidation but at the same time, in their counterclaim, to seek liquidation. This it seems was relief premised on denying the BRP's their fees using another mechanism. However, at best for SARS on this record there is a case for a fee reduction not for setting aside the resolution nor for opposing conversion given both parties wanted the same endpoint namely liquidation. SARS approach in this respect just introduced confusion.

[70] This order too is set aside.

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[9] *Diener N.O. v Minister of Justice and Correctional Services and Others* 2018(2) SA 399(SCA), paragraph 61: *"Those who render services in connection with the sequestration proceedings and the administration of the insolvent estate are identified in s 97. They are the sheriff, the Master, a debtor who has voluntarily surrendered his or her estate, a creditor who has applied for the sequestration of an estate, a curator bonis, a trustee, persons employed by a curator bonis or a trustee to administer an insolvent estate and a presiding officer. A BRP is not included in this list. He or she could not be included because of the distinction between business rescue proceedings and liquidation proceedings. [62] In the result, Diener, in his capacity as BRP, was a creditor of J D Bester and, in respect of his remuneration and expenses, he was required to prove his claim in terms of s 44 of the Insolvency Act."*

[71] The appellants have made it clear in their practice note that they do not seek to set aside the order of liquidation, and this is left undisturbed.[10] Thus the order placing the firms in final liquidation stands with effect from the date of the court a quo's order namely 6 June 2018.

Costs

[72] Costs must follow cause. The appellant is entitled to his costs.

ORDER

The following order is granted:

Case No.: 93289/2615 (Tiar Construction CC (in business rescue))[11]

1. The following paragraphs in the order of the court *a quo* are set aside:
    1.1. Paragraph 2, dismissing the application to convert the business rescue proceedings to liquidation;
    1.2. Paragraph 3, setting aside the resolution to place the respondent under business rescue;
    1.3. Paragraph 4, declaring that the applicants in the court *a quo* (the BRP's) are not entitled to their fees earned during the business rescue process.
2. The remaining paragraphs of the order of the court *a quo* are confirmed.
3. SARS is liable for applicant's costs including the costs of the application for leave to appeal in the court *a quo* and in the Supreme Court of Appeal.

Case No.: 93289/2015 (Phehla Umsebenzi Trading 48 CC (in business rescue))

1. The following paragraphs in the order of the court *a quo* are set aside:
    1.1. Paragraph 2, dismissing the application to convert the business rescue proceedings to liquidation;

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[10] See Case Lines 030-9 where counsel for the appellant states in his practice note: "*The Appellant appeals the whole of the judgement, safe(sic) the liquidation order. Leave to appeal was granted by the SCA under case number 012/2019 and 023/2019, the court a quo having denied the initial application for such leave to appeal."*

[11] The court a quo, granted separate orders in respect of each application for conversion. See Case lines page 074-655

1.2. Paragraph 3, setting aside the resolution to place the respondent under business rescue;

1.3. Paragraph 4, declaring that the applicants in the court *a quo* (the BRP's) are not entitled to their fees earned during the business rescue process.

2. The remaining paragraphs of the order of the court *a quo* are confirmed.
3. SARS is liable for applicant's costs including the costs of the application for leave to appeal in the court *a quo* and in the Supreme Court of Appeal.

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N MANOIM

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 12TH December 2021

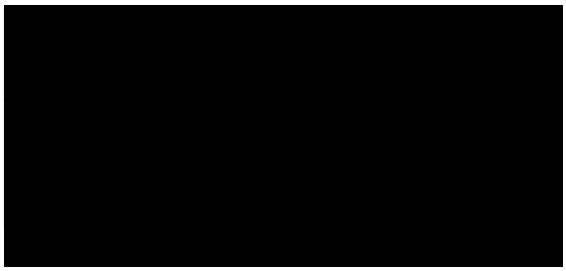
I agree

N. KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

I agree



T. NCONGWANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

Appearances:

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