



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 12477/2020

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 12 October 2022
Date of judgment: 28 October 2022

In the matter between:

VINCEMUS INVESTMENTS (PTY) LTD

Applicant

and

MARTHINUS JACOBUS BEKKER N.O.

First Respondent

OTTLIE ANTON NOORDMAN N.O.

Second Respondent

AVIWE NTANDAZO NDYAMARA N.O.

Third Respondent

**(in their respective capacities as the joint liquidators
of Travea (Pty) Ltd (in liquidation))**

in re:

VINCEMUS INVESTMENTS (PTY) LTD

Applicant

and

TRAVEA (PTY) LTD

Respondent

JUDGMENT

BINNS-WARD J:

[1] On the extended return day of a rule *nisi* issued by this court on 21 May 2021 in an opposed winding-up application, the applicant does not - as would ordinarily happen - seek confirmation of the provisional winding-up order that accompanied the rule. It does not do so because, in the circumstances to be described presently, the company concerned, Travea (Pty) Ltd, has already been placed into final liquidation. That happened in parallel proceedings instituted by a different creditor. The applicant-creditor in the other application was Vital Fleet (Pty) Ltd ('Vital Fleet'). At this stage, pursuant to an amendment to paragraph 4 of its notice of motion, the applicant therefore seeks only an order in the following terms:

'That the costs of this Application be costs in the estate of the Respondent company [Travea (Pty) Ltd], alternatively that the costs of this Application shall be paid as administrative costs in the estate of the Respondent company consequent upon the provisional order of liquidation under case number 2474/2021, issued by (sic) Vital Fleet (Pty) Ltd against Travea (Pty) Ltd which was heard on 23 February 2021 and granted on 2 March 2021, and which order was made final on 20 April 2021 consequent upon the hearing thereof on 13 April 2021.'

[2] The relief sought by the applicant was opposed by the liquidators of Travea (Pty) Ltd, who have been jointly substituted as respondents in the proceedings, pursuant to a notice given by the applicant in terms of Uniform Rule 15(2). The applicant delivered two supplementary affidavits in support of its amended prayer for costs, to which the respondents have responded. To the extent necessary, condonation is granted in respect of the delivery of the additional affidavits.¹

¹ Condonation for the delivery of the additional affidavits was sought by the applicant, and not opposed by the respondents. I doubt that condonation was required. It seems to me that as the hearing was on the extended return date of a rule *nisi*, the parties did not require leave to deliver such further affidavits as they might consider appropriate for the purpose of the order to be sought on the return day.

[3] Proceedings in the current matter, in which the applicant obtained a provisional order of winding-up and rule *nisi* in May 2021, were commenced on 20 September 2020. The application was opposed by the company. Argument was heard (by Nyati AJ) on 22 February 2021 after the exchange of papers was completed. Judgment was thereupon reserved.

[4] On 8 February 2021, at a time when the applicant's application had already been set down for hearing in the opposed motion court, Vital Fleet launched a parallel winding-up application and set it down for hearing (before Samela J) on 23 February in the court reserved for urgent matters. Vital Fleet's application was therefore heard on the day after judgment had been reserved in the prior application brought by the applicant for the same relief.

[5] Notwithstanding the dates mentioned in paragraph 4 of the applicant's aforementioned amended notice of motion, it appears that Vital Fleet succeeded in obtaining a provisional winding-up order in respect of Travea on 23 February 2021. There was a passing reference in Vital Fleet's supporting affidavit to the pending application for the same relief by the applicant, but it is nevertheless not altogether clear that the judge who granted the winding-up order on 23 February 2021 was astute to the fact that judgment had been reserved in that matter on the previous day. I was informed from the bar that the judge was informed at the hearing of Vital Fleet's application of the existence of a competing application, but there is no record before me as to precisely what was said in that regard.

[6] It is evident that the applicant's attorneys were informed that Vital Fleet's application would be moved on 23 February, but it appears that they took no measures to alert the court seized of the matter on that date that judgment had been reserved in their client's competing application. They also took no steps to pre-empt a final order being taken in Vital Fleet's application on the return day in that matter in April 2021. It is common ground that the judge

who had heard the applicant's application was not informed of the aforementioned developments before she delivered the reserved judgment on 21 May 2021.

[7] It is trite that once a winding-up order has been made at the instance of a petitioner, it is not competent for a court to make a subsequent order to the same effect whilst the first mentioned order remains operative. The reason is obvious: the later order would be incapable of being carried out at a stage when the company concerned was already in the process of liquidation and the *concursum creditorum* already constituted. It is unsurprising in the circumstances that, despite some initial irresolution, the applicant has abandoned any idea of seeking confirmation of the legally ineffectual provisional order made at its instance, and proceeds for relief only in respect of its costs in the now redundant application.

[8] The history of events is a sad one. As counsel for the applicant observed in their heads of argument, the circumstances in which two orders were taken for the liquidation of a company in separate proceedings in the same court appear to be unique. As they also remark, it is something that should not have occurred. Vital Fleet was ill-advised to have moved its application in the manner described. The difficulties that have since presented could have been avoided had it instead applied to join as a co-petitioner in the applicant's already pending application. It was also unfortunate that the court entertained Vital Fleet's application apparently without any consideration of the jurisprudence concerning the Court's practice with regard to competing winding-up and sequestration applications.² It is unclear whether counsel representing Vital Fleet directed the judge's attention to the relevant case law, as should have happened.

[9] My impression is that the legal representatives of the applicants in both liquidation applications were remiss in not raising the issue pertinently either at the hearing of Vital

² See e.g. *Kriel & Co (Pty) Ltd v Pienaar* 1937 CPD 152, *Helling v Dorfman* 1949 (2) SA 266 (C), *Courier Townhouse (Pty) Ltd v Myers* 1986 (4) SA 1038 (C) at 1039 F-G and the other cases cited there, and *First National Bank Ltd v E U Civils (Pty) Ltd*; *First National Bank Ltd v E U Plant (Pty) Ltd*; *Basset v E U Civils (Pty) Ltd*; *E U Holdings (Pty) Ltd v E U Plant (Pty) Ltd* 1996 (1) SA 924 (C).

Fleet's application on 23 February or on the return day of the provisional order granted on that day. Ideally, the Master's report in the Vital Fleet matter should also have drawn to the court's attention that a bond of security had been lodged in respect of an earlier application by a different party for the liquidation of the same company. There was a longstanding practice in this Division, discontinued 20 or so years ago, that an applicant in sequestration and liquidation matters was required to present with his petition an affidavit of search by his attorney confirming that a security bond had not been lodged in the Master's Office in respect of a potentially competing application. The facts of the current matter suggest that consideration might usefully be given to reinstating that practice.

[10] The final order granted to Vital Fleet included a provision that its costs of suit be treated as costs in the winding-up, with the result that Vital Fleet's claim in that regard will enjoy the preference allowed in terms of s 97(2)(c) of the Insolvency Act³ in respect of the '*taxed costs of sequestration*'. Section 97(3) defines that term to mean '*the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included*'.

[11] Section 97 of the current Insolvency Act is, in material respects, the reincarnation of s 83 of its statutory predecessor, the 1916 Insolvency Act.⁴ In *Ex Parte The Merchants' Trust Ltd* 1930 TPD 142, Barry J was called upon to answer the question '*whether the words in*

³ Act 24 of 1936.

⁴ Act 32 of 1916. Sec 83 provided in relevant part:

'*The costs of sequestration shall be paid in the following order:*

(1)...

(2) ...

(3) *the following costs and charges which shall rank pari passu and abate in equal proportions if necessary, that is to say: - the taxed costs of sequestration "Taxed costs of sequestration" shall include costs incurred upon the petition of the insolvent or a creditor, in so far as any such costs have been necessarily or rightly incurred, but shall not include costs of opposition unless the Court so order. Costs in any legal proceedings awarded against the estate shall be included under costs of administration.'*

sec 83 “upon the petition of ... a creditor” mean a creditor who has obtained sequestration, or whether they mean a creditor in the usual sense of the term’. The learned judge gave the following answer: ‘Now it seems to me that the words “upon the petition of a creditor” should be construed to mean on the petition of any creditor, and should not be confined to a creditor who has obtained sequestration. The reason for that construction is, firstly, that provision is made for the costs of the sequestrating creditor in sec. 13 [the equivalent of s 14 of the current Act] and, secondly, read with the definition, “creditor” includes a creditor in the usual sense of the term. But a more important consideration is that I do not think the words “necessarily or rightly incurred” would be necessary if only the sequestrating creditor were meant, because under sec. 13 the taxed costs have to be paid out of the free residue, and it seems to me that the taxing officer, in taxing those costs, would decide whether the costs had been necessarily or rightly incurred. And there is this further reason, the practice of this Court before 1924 has been to allow the costs of a creditor who petitions for sequestration of an estate but who does not obtain the sequestration; those costs, have been treated as preferent if the costs have been bona fide incurred’.

[12] Despite the differences between s 83 of the 1916 Act and its equivalent in s 97 of the current Insolvency Act - notably the absence in the current iteration of any reference to costs ‘*necessarily or rightly incurred*’ - the construction applied by Barry J has been consistently followed in the subsequent jurisprudence in relation to the current Act.⁵ It was accordingly not in contestation in the current proceedings that as a matter of law the applicant’s claim for payment of its taxed costs as ‘costs of sequestration’ within the meaning of s 97(2) is not excluded from consideration. The question in this case is whether the court should, at least at this stage, grant the applicant an order directing that its taxed costs should be costs in the winding-up with the resultant preference.

⁵ *Lipworth & Co v Bhyat* 1938 WLD 86, *Helling v Dorfman* supra, at p.269 fin, *Cooper and Others v Trustee in Insolvent Estate of Pretorius and Another* 1967 (3) SA 602 (O) at 610, *Jones v The Master and Others* 1986 (2) SA 220 (T) and *Ex parte Jordaan: In re Grunow Estates (Edms) Bpk v Jordaan* 1993 (3) SA 448 (O) at 452F-G.

[13] It is appropriate to address that question with reference to the evidence in the affidavits delivered by the parties for the purposes of the extended return date.

[14] The applicant approached the liquidators in respect of their claim for costs and was advised that it would be premature for it to press for a costs order at that stage. The liquidators' attorneys referred to the judgments in *Ex parte Aithchison* 1924 TPD 570 and *Simms Service Station v Maharaj* 1960 (3) SA 465 (N) at 466G in support of their clients' position. The liquidators advised that should the applicant press for a costs order on any extended date of the rule *nisi* made by Nyati AJ prior to the first meeting of creditors the liquidators would be constrained to oppose such a measure, as only once their appointment was made final after the holding of such a meeting would they be in a position to consider abiding the judgment of the court or to raise substantive opposition to the claim.

[15] The liquidators' appointment was thereafter made final on 4 March 2022 and the applicant's attorneys were given notice of that on 11 April 2022. The applicant was advised that the creditors had 'provisionally agreed' to accept the applicant's costs as costs in the liquidation, but that a final decision on the issue could be made only after the creditors had been afforded the opportunity to consider a bill of costs.

[16] The liquidators were not provided with a bill of costs, but they nevertheless put a proposal to the second meeting of creditors, held on 1 July 2022, that the applicant's taxed costs be allowed and treated as an administration expense. Eighteen creditors apart from the applicant proved claims at the meeting, and the applicant was the only creditor to vote in favour of the proposal that its costs in the first winding up application be treated as costs in the administration of the liquidation.

[17] In an email, dated 8 July 2022, the liquidators' attorney advised the applicant's attorney that allowing the applicant to obtain a costs order 'would go against the wishes of

the Creditors as noted at the second meeting of creditors' and that the liquidators accordingly would be constrained to oppose the applicant's application for costs.

[18] The applicant furnished the liquidators with a bill of costs in a very substantial amount in early August 2022. The liquidators thereafter made a settlement proposal to the applicant premised on the idea that a settlement would save on the irrecoverable costs of opposing further litigation by the applicant to press its claim. It was made clear, however, that any settlement would be subject to the approval of the general body of proved creditors. By pressing for relief at the hearing before me on 12 October 2022, the applicant tacitly signally its rejection of the liquidators' proposal.

[19] The liquidators delivered opposing papers in which they raised *in limine* the contention that the application was premature because it was, so they contended, not the practice of the court to entertain such applications for costs before the liquidator had determined whether to include such costs in the final account submitted to the Master. They also contended that '[t]here is no basis in law for the Applicant to claim an order for costs ... given the provisions of Section 97(3) of the Insolvency Act ... given that the Applicant's costs was (sic) not incurred in connection with the petition of Vital for the liquidation of Travea'.

[20] As discussed above, the decision in *Ex parte The Merchant Trust Ltd* supra, is adversely dispositive of the second of the forementioned contentions by the liquidators. The first was advanced on the basis of the judgment in *Aitchison* supra, and the cases in which that judgment has been followed.

[21] The essence of the decision in *Aitchison* is captured in the following passage of the judgment of Mason JP (De Waal and Tindall JJ concurring):

'If the solicitor's costs in cases such as the present [applications for sequestration competing with that of the petitioner who obtained the order] are preferent by the law, then he is entitled to them, but the persons really interested in the determination of

that question are the creditors in the estate, and not the trustee. If those costs are not preferent under the statute the creditors have the right to object, and I do not think it is right that this Court should at this stage close the mouths of the creditors by making an order saying that these costs shall be preferent. The law gives every creditor who proves the right to object to the trustee putting into an account any costs or charges which he ought not to put in. The creditors are the proper people to object because they are the ones who are interested, and we do not know at this stage who the creditors are. Nobody will know who the creditors are, in fact, until the account is filed, because till then anybody may prove in the estate. That seems to me to show quite clearly that, in respect of the practice of so many of us in making these orders as to costs, it is not a right procedure to make an anticipatory order at this stage, but the proper course is for a solicitor to claim his costs and make his claim on the trustee. If the trustee ranks him for those costs, then any creditor can object. If the trustee declines to rank him for those costs, then the solicitor can object, and there is provision made in the Insolvency Law for the decision of this question, by the proper and ordinary method of procedure under which those interested in the estate can make their voices heard.'

The court declined to make what it called 'an anticipatory order' allowing costs in a competing application before the process described in the extract from the judgment quoted above had been followed.

[22] The judgment in *Aitchison* has been followed in numerous cases, including in matters decided in this Division. In *Ex parte Hankins and Another: in re Cellocrete Manufacturing Co (Pty) Ltd* 1950 (2) SA 611 (N), Selke J endorsed the approach stated in *Aitchison*, saying:

'In its application to winding-up proceedings, this imports that, in future, the question whether any costs incurred by a petitioner for a winding-up order, whose proceedings have proved to be abortive, are or are not to be treated as part of the costs in the winding-up is a question which should, in the first place, be submitted to the liquidator, and that normally, the Court will not make any order in regard to such costs at the stage at which a petition for a winding-up order is before it.'

In *Simms Service Station* supra, Henning AJ construed that extract from the judgment in *Ex parte Hankins* to allow that while such an order would not *normally* be made, the court retains a discretion to make it if the circumstances merited that. (The learned judge used the expression ‘exceptional circumstances’.⁶)

[23] The situation in *Aitchison*’s case was distinguishable from the current matter in more than one respect. The competing application in that matter had not been entertained by a court. As discussed earlier in this judgment the current matter is quite unique, in that Vital Fleet obtained a winding-up order from one judge of the court after another judge had already heard and reserved judgment in an equivalent application brought earlier by the applicant. The applicant in the current case has already obtained a rule *nisi* in respect of its costs. Whilst the provisional winding-up order granted by Nyati AJ was ineffectual in the peculiar circumstances, the rule she issued in respect of the applicant’s costs was not. Furthermore, in the current matter the creditors – at least those that have proved claims – have already indicated that they object to the applicant’s claim in respect of the costs of its application being accepted as costs in the winding-up.

[24] I think it can fairly be inferred in the circumstances that the liquidators will not include the applicant’s costs in the liquidation and distribution account. In my view, in the face of the creditors’ objection to the claim, it would in any event not be open to them to do so, nor to the Master to allow it insofar as treating it as preferent under s 97(2)(c) of the Insolvency Act. In *Ex parte The Merchants’ Trust Ltd* supra, at p. 146, Barry J held, with reference to s 51 of the 1916 Insolvency Act (the equivalent whereof is s 53 of the current Act), that the creditors had ‘*no power to make preferent a charge which the law does not allow to be preferent*’. I read that to mean that, in order to obtain preference, the applicant’s

⁶ At 467B.

costs have to be allowed as costs in the liquidation by the court.⁷ The essential effect of *Aitchison's* case is that such an order should not be made before the interested parties have been given an opportunity to be heard.

[25] In the special circumstances of the current case, it seems to me that little purpose would be served by deferring the decision on the applicant's costs until after the completion of the process provided for in ss 403-408 of the Companies Act 61 of 1973, and that the appropriate course to follow would be to issue a further rule in the terms set forth below. An order is made accordingly.

[26] *Order*

1. The application is further postponed for hearing on the semi-urgent roll on 6 March 2023.
2. A rule *nisi* shall and does hereby issue calling on all interested parties to show cause on 6 March 2023 at 10h00, or so soon thereafter as counsel may be heard, as to why an order should not be made directing that the applicant's costs in this application, inclusive of the fees of two counsel where such were engaged, be costs in the liquidation of Travea (Pty) Ltd.
3. Any party wishing to oppose the granting of the order contemplated in paragraph 2 above may access a copy of the papers in this application by directing a request therefor, by no later than 13 January 2023, to the applicant's attorneys (De Jager & Lordan Inc, 2 Allen Street, Makhanda, ref: JJM Coetzee/lw/KW219, email: marius@djlw.co.za), who will furnish a copy thereof at the requester's cost, or by accessing same free of charge at <https://tinyurl.com/TRAVEA>, and shall deliver his, her

⁷ That seems to me also to be the import of the phrase '*in the first place*' in the extract from *Ex parte Hankins* quoted in paragraph above.

or its notice of intention to oppose by no later than Friday, 20 January 2023 and his, her or its answering affidavit (if any) by no later than Friday, 10 February 2023.

4. A copy of this judgment and order shall:
 - 4.1. be provided, by means of their usual form of communication with them, by the liquidators to the creditors of Travea (Pty) Ltd (in liquidation) who have proved claims against the company in liquidation;
 - 4.2. be served by the applicant's attorneys upon the Master of the High Court, Cape Town, by no later than Friday, 9 December 2022; and
 - 4.3. be published by the applicant's attorneys in one edition of the Business Day newspaper, by no later than Friday, 9 December 2022.
5. The liquidators are directed to deliver an affidavit of service confirming compliance with the direction in para 4.1 above, by no later than Friday, 9 December 2022.

A.G. BINNS-WARD
Judge of the High Court

