# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

1.1 Case no: 173/2001
1.2 REPORTABLE

In the matter between:

**MELVYN WEINER NO** Appellant

and

**JIM GERARD PAUL BROEKHUYSEN** Respondent

---

**Before:** Nienaber, Howie and Cameron JJA
**Appeal heard:** 16 May 2002
**Judgment:** 31 May 2002

*Administration orders – Magistrates' Courts Act 32 of 1944, s 74 – Interpretation of – Administrator's entitlement to fees*

---

**JUDGMENT**

---

**CAMERON JA:**

***INTRODUCTION***

[1] In the Magistrate's Court at Wynberg, the appellant was on 11 May 1998 appointed the administrator in the estate of a married couple who were unable to meet their financial obligations. The order was granted in terms of s 74(1) of the Magistrates' Courts Act 32 of 1944 ('the Act'). This provides for the administration under court supervision of the estate of a debtor in financial straits. Such an order structures the debtor's liabilities and provides for their repayment under the direction of the administrator,[1] thus keeping the creditors from the door. But the terms of the order granted in this case gave rise to a dispute between the appellant ('the administrator') and the respondent,

[1] Section 74(1):
Where a debtor-
(a) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations; and
(b) states that the total amount of all his debts due does not exceed the amount* determined by the Minister from time to time by notice in the Gazette,
such court or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor or under section 65I, subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34 of the Land Bank Act, 1944 (Act 13 of 1944)), or otherwise, make an order (in this Act called an administration order) providing for the administration of his estate and for the payment of his debts in instalments or otherwise.

who was at the time, because of loans he had advanced to them, the couple's biggest creditor ('the creditor'), and therefore most likely to be affected.

[2] The appeal originates in an application the creditor brought some months after the grant of the original order to amend it. At first instance in the Wynberg Magistrates' Court the creditor was largely successful. The Magistrate granted relief substantially amending the original order, and ordered the administrator to pay the costs of the amendment application from his own pocket on an attorney and client scale. Against that order the administrator then appealed to the Cape High Court, which pruned the relief the creditor had obtained, and reduced the burden of the costs order imposed on the administrator. But in substantial respects the Cape Court ('the Court below') endorsed the approach the magistrate had taken in amending the original order,[2] and despite the administrator's limited success it ordered the creditor to pay only half of the administrator's costs of appeal. Against that order the administrator now appeals with the leave of the Court below (obtained after an abortive appeal to a three judge court of that

[2] *Weiner NO v Broekhuysen* 2001 (2) SA 716 (C) (van Reenen J and Revelas AJ).

division had first been lodged and then struck from the roll).[3] More than four years after the grant of the original order, the affairs of the couple – whose modest income, his as a local authority administration assistant, hers as a cleaning supervisor – have paled in the legal contest. The struggle now concerns primarily the powers and duties of a professional administrator, the conflicting interests of an administrator and a creditor in how an administration order is executed, and what benefits each derives from it.

[3] Administration orders were first introduced when the Act came into force in 1944. Its predecessor, the Magistrates' Court Act 32 of 1917, had no such mechanism. The new provisions created a procedure that was at the time rightly dubbed a 'modified form of insolvency',[4] since it is particularly suited to dealing with small estates where sequestration proceedings would swallow the

[3] For a similar conclusion that leave cannot be granted to appeal to a three judge bench of a provincial or local division from a decision of a two-judge appellate court, see *S v McMillan* 2001 (1) SACR 148 (W).

[4] Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 5ed (1946), approved in *Madari v Cassim* 1950 (2) SA 35 (D) 38, though criticised by CP Joubert (1956) 19 *THRHR* 135 at 138.

debtor's assets.[5] As Caney AJ explained more than fifty years ago:

> 'This is designed, it seems to me, as a means of obtaining a *concursus creditorum* easily, quickly and inexpensively, and is particularly appropriate for dealing with the affairs of debtors who have little assets and income and genuinely wish to cope with financial misfortune which has overtaken them. Creditors have certain advantages under such an order, including the appointment of an independent administrator and the opportunity of examining the debtor. They are not debarred from sequestrating the debtor if the occasion to do so arises.'[6]

[4] The provisions, which have frequently been amended,[7] are now spelt out in prolific detail in s 74 and its associated provisions, s 74A to 74W. The upper limit of the liabilities of a debtor wishing to benefit from the procedure, which the Minister of Justice determines by promulgation from time to time, is currently R50 000.[8] Despite the detail the statute contains, this appeal demonstrates the extent to which disputes about its implementation can nevertheless arise. The pivotal question it raises is whether the creditor had good cause in terms of s 74Q[9] to obtain an amendment of the original order. Underlying that

---

[5] Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 9 ed (1997) page 305.

[6] *Madari v Cassim* 1950 (2) SA 35 (D) 38.

[7] Particularly by Act 63 of 1976, which inserted sections 74A to 74W; see JC du Plessis and others *De Rebus* June 1978 289-292.

[8] GN R1441, *Government Gazette* 19435 of 30 October 1998, with effect from 1 November 1998.

[9] Section 74Q (1) reads:

(1) The court under whose supervision any administration order is being executed, may at any time upon application by the debtor or any interested party re-open the proceedings and call upon the debtor to appear for such further examination as the court may deem necessary, and the court may thereupon on good cause shown suspend, amend or rescind the administration order, and when it suspends such an order it may impose such conditions as it may deem just and reasonable.

question is a dispute between the creditor and the administrator about the manner in which the original order was obtained, questions about the inter-relation between the relevant statutory provisions, and perhaps most importantly (not only to the parties to the appeal, but also to debtors subject to such orders) the emoluments to which an administrator is entitled. To deal with these questions adequately some factual background is necessary.

***FACTS***

[5] Although the debtors themselves formally applied for the original order, it bore the name and appears to have emanated from the office of the administrator, the present appellant, whom they asked the court to appoint. The application was, as the statute requires (s 74A(5)),[10] delivered to each of the couple's creditors. The respondent in the appeal, being the largest creditor, objected to the size of the monthly amount the couple tendered to pay

[10] Section 74(5):
The debtor shall lodge an application for an administration order and the statement referred to in subsection (1) with the clerk of the court and shall deliver to each of his creditors, at least 3 days before the date appointed for the hearing, personally or by registered post a copy of such application and statement on which shall appear the case number under which the original application was filed.

(R830, 00 per month).[11] He thought it too small. So he despatched an attorney to the Wynberg court. Before the matter was called, his attorney arranged with the administrator (himself an attorney, and who appears of record for himself in this matter, but who is apparently engaged largely in the business of statutory debtors' administration), for the amount to be increased to R1 130,00.

[6] In his capacity as an attorney the administrator then moved the application. He handed the Magistrate a draft order. This was made an order of court. On 15 June 1998 the creditor's attorneys received a copy. The result was a strenuous objection and a protracted wrangle resulting in this appeal.

[7] The first paragraph of the original order gave rise to the trouble. It reads thus (for clarity I have numbered its five distinct components):

(1) The applicant is, in terms of section 74 of the Magistrates' Court Act 1944, placed under administration. Melvyn Weiner of NW Financial Administrators CC is, in terms of section 74E,[12] appointed Administrator and applicant is to pay R1 130 per month to the

[11] Section 74A(2)(l), read with Form 51, requires that the debtor's statement of affairs lodged with the application for an administration order state 'the amount of the weekly or monthly or other instalments which the debtor offers to pay toward settlement' of current debts.

[12] Section 74E(1):
(1) When an administration order has been granted under section 74 (1), the court shall appoint a

Administrator as from 30 May 1008 and thereafter on the 30th day of each month, for pro rata distribution amongst all proven creditors.

(2) The first distribution shall be for payment to the Administrator up to and including end August 1998, subject to the Administrator's right to delay the distribution if in his opinion there is not sufficient money to cover all costs and to still do a viable distribution.

(3) Thereafter, every subsequent distribution shall be in respect of each three payments received by the Administrator.

(4) The costs of the application for administration shall be costs in the Administration, and the Administrator shall be entitled to deduct the said costs from the money paid to him by the Applicant in terms of this order, before calculating and effecting the first distribution.

(5) Before effecting a distribution the Administrator may also deduct his costs in respect of sections 74L, 74M and paragraphs 1(a) and (b) of the general provisions to the tariff for section 74.

[8] The Magistrate deleted components (2), (3) (4) and (5) of the original order. (He also gave other relief and a costs order that the Court below set aside and which is accordingly not now relevant.) The Court below confirmed the deletion of components (2) and (3). It considered component (4) either unexceptionable as being in accord with the provisions of s 74O[13] or for that reason superfluous (and therefore also subject to deletion).[14] In respect of component (5) the Court below held that 'costs' had a narrow signification and that the application of the term in relation to the remuneration that may be deducted in terms of s 74L(1)(a),[15] as

person as administrator, which appointment shall become effective only after a copy of the administration order has been handed or sent to him by registered post and, in the event of his being required as administrator to give security, after he has given such security.

[13] S 74O:

Unless the court otherwise orders or this Act otherwise provides, no costs in connection with any application in terms of section 74 (1) shall be recovered from any person other than the administrator concerned, and then as a first claim against the moneys controlled by him.

[14] 2001 (2) SA 716 (C) 723C-H and 725B.

[15] Section 74L:

(1) An administrator may, before making a distribution –

(a) deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;

well as the additional fees that are provided for by para 1(b) of the General Provision in respect of Proceedings in terms of Section 74 of the Act (Part III of Annexure 2 to the Rules of the Magistrates' Courts)[16] 'clearly inappropriate', as was the reference to s 74M. Component (5) was therefore also deleted. It is against this order (apart from the deletion of the reference to s 74M), together with the costs order the Court below granted, that this appeal is brought.

***DID THE CREDITOR HAVE 'GOOD CAUSE' FOR AMENDING THE ORIGINAL ORDER?***

[9] Section 74Q(1)[17] requires that 'good cause' be shown before a subsisting administration order can be amended. The creditor objected to the order granted on two bases: that it differed materially from that to which his attorney had consented on his

(b) retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.
(2) The expenses and remuneration mentioned in subsection (1) (a) shall not exceed 12% per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.

[16] Part III provides in part:

1. The following fees shall be allowed in addition to those laid down in the Tariff to this Part:
   (a) All necessary disbursements incurred in connection with the proceedings.
   (b) In addition to the fees stated below, the administrator shall be entitled to a fee of 10% on each instalment collected for the redemption of capital and costs.
2. [Stipulates the number of printed or written words or figures that constitute a folio for purposes of the Tariff.]

(A nine-item Tariff then follows under a separate heading.)

[17] Set out in footnote 9 above.

behalf and had thus been obtained without his consent; and that it conflicted with the provisions of the statute. It is unnecessary to consider in detail what 'good cause' in s 74Q comprehends, since it is plain that an order granted in conflict with the statute is subject to amendment in terms of s 74Q, and that any interested party (the creditor clearly being one) would have cause to seek its amendment. For the same reason it is unnecessary at this stage to examine the creditor's complaint about the manner in which the administrator obtained the order during the court proceedings on 11 May 1998; I consider that later in connection with costs.

***Component (2)***

[10] The creditor's complaint about component (2) is that it makes the first distribution subject to the administrator's power to delay it indefinitely and thus violates the basic scheme of the statute. These submissions are well founded. Section 74J deals with the duties of an administrator. It reads in part:

> (1) An administrator shall collect the payments to be made in terms of the administration order concerned and shall keep up to date a list (which shall be available for inspection, free of charge, by the debtor and creditors or their attorneys during office hours) of all payments and other funds received by him from or on behalf of the debtor, indicating the amount and date of each payment, and shall, subject to section 74L, distribute such payments pro rata among the creditors at least once every three months, unless all the creditors otherwise agree or the court otherwise orders in any particular case.

[11] This provision must be read with Section 74C(1). Sub-paragraph (a) specifies that an administration order 'shall be in the form prescribed by the rules' and requires that it 'lay down the amount of the weekly or monthly or other payments to be made'. Sub-paragraph (b) provides additionally that the order 'may specify' certain other matters, including

> '(v) such other provisions or conditions as the court may deem necessary or expedient.'

[12] It is plain from s 74J(1) that a court granting an administration order must in general require the administrator to effect distributions to creditors 'at least once every three months'. That is the position by default. Deviation is licensed in two circumstances: where the creditors all agree, or where 'the court otherwise orders'. Here the creditors did not agree. The only basis for deviation was therefore an order by the Magistrate. But such an order, though the Magistrate has clear power to make it, is not there merely for the asking. It must be sought for reasons disclosed in the application that is served on the creditors. Notice to the creditors is essential precisely because the provision

envisages a different order even if they withhold agreement or actively oppose it. The implication is that their consent will first be sought. If they are not notified that deviation will be sought, they are entitled to assume that the order will specify that distributions must occur 'at least once every three months'.

[13] In the present case, the original application gave no inkling that distributions were contemplated on any basis other than at least once every three months. The application served on the creditors told them merely that the debtors would apply for an order placing their estate under administration in terms of s 74 'and asking the Court to add such further conditions as it may deem necessary or expedient in terms of section 74C(1)(b)(v)'. The appellant's counsel contended that the order as granted falls within the express powers conferred on a court in granting an administration order. That misses the point, which is both procedural and substantive. If deviation from the basic scheme of the Act is to be licensed, it must be for reasons disclosed in the application. Deviation by stealth or ambush or oversight is not permitted.

[14] The Court below considered that because the creditor was content to agree to an order alluding to s 74C(1)(b)(v), he in anticipation 'resigned himself to the insertion of such provisions and conditions as the court deemed necessary or expedient'.[18] I cannot agree. The statute contemplates distributions at least three-monthly, unless all the creditors agree or the court orders otherwise. Either the creditors' consent to a different scheme of distribution must be procured in advance or, if that is lacking, their attention must be alerted to the fact that such an order will be sought. An anodyne allusion to s 74C(1)(b)(v) cannot obliterate the structure of the Act or the creditors' just expectations under it. The order granting the administrator the 'right' to delay distribution was therefore inappropriate on the ground of absence of notice to the creditors alone.

[15] Component (2) in any event suffers from further vices. The order places the date of the first distribution at the behest of the administrator. That date is to be fixed when he forms an 'opinion' as to a certain state of affairs. Such an order contemplates a delegation of the Magistrate's power to specify the terms of the

[18] 2001 (2) SA 716 (C) 722G-H.

administration that the legislation does not authorise. It is therefore inherently bad. What is more, the order granted permits the opinion to be formed on the occasion of an event in which the administrator has a direct interest, namely whether there is 'sufficient money to cover all costs'. The conflict is patent, and it is undesirable. The order also expresses that event with manifest imprecision: what is a 'viable distribution'? This leaves the creditors at the mercy of the administrator's subjective perception of what duty and convenience may require.

[16] Counsel for the appellant contended that interested parties are protected because subsections 74J(11) and (12)[19] create supervisory mechanisms and controls, and because s 74E(2) provides that an administrator may on good cause be relieved of his appointment.[20] Reference may be made also to s 74N.[21]

[19] Section 74J (11) and (12):
(11) If an administrator fails to lodge a distribution account with the clerk of the court within one month from the time his obligation to do so commenced, any interested party may apply to the court for an order directing him to lodge a distribution account with the clerk of the court within the time laid down in the order or relieving him of his office as administrator.
(12) If an administrator has lodged a distribution account with the clerk of the court but has failed to pay any amount of money due to any creditor in terms of such account within one month thereafter, the court may upon the application of the creditor order the administrator to pay the creditor the amount concerned within such period as may be fixed in the order and furthermore to pay to the debtor's estate an amount which is double the amount which he failed so to pay.
[20] Section 74E(2):
(2) An administrator may on good cause shown be relieved of his appointment by the court, and the court may appoint any other person in his place.
[21] 74N **Failure by administrator to perform his duties**
An administrator shall take the proper steps to enforce an administration order, and if he fails to

These protections are no doubt important. But they do not suffice where the order is inherently flawed. This one clearly is. As the Court below observed, court orders should not be formulated so as to leave compliance at the discretion of the person bound by them.[22] This infringes not only the principle that such orders should be capable of enforcement, but the principle of certainty by legal regulation. Such a state of affairs is intolerable, and component (2) was vitiated in all its essentials.

***Component (3)***

[17] This component upends the basic scheme of the statute. Similar reasoning to that under component (2) applies. Unless otherwise agreed or ordered, the statute contemplates that debtors under administration must make regular payments, which are to be converted into regular distributions to their creditors. Instead of providing for distributions at least once every three months, component (3) made distributions subject to receipt by the administrator of three payments from the debtors. But what if the debtors paid irregularly? In that case component (3) provided

---

do so, any creditor may, by leave of the court, take those steps, and the court may thereupon order the administrator to pay the costs of the creditor de bonis propriis.

[22] 2001 (2) SA 716 (C) 722-3.

that the creditors were to receive not even irregular distributions, as the payments came in: they were to be paid only after the third payment came in. As the Court below pointed out, 'the Legislature in s 74J(1) intended making the distribution of moneys received from debtors to be time- and not event-related'.[23] The third component was therefore also bad.

***Component (4)***

[18] The administrator contended that since the Court below found this component to accord with the statute, it should not have been deleted. Counsel for the respondent however submitted that component (4) 'does not accord entirely' with s 74O.[24] She rightly pointed out that the costs of applying for the order, which are recoverable under s 74O, differ entirely from the costs of the actual administration, with which s 74L[25] deals. She conceded

[23] 2001 (2) SA 716 (C) 723A-B.

[24] Section 74O **Costs of application for administration order**
Unless the court otherwise orders or this Act otherwise provides, no costs in connection with any application in terms of section 74 (1) shall be recovered from any person other than the administrator concerned, and then as a first claim against the moneys controlled by him.

[25] 74L **Remuneration and expenses of administrator**
(1) An administrator may, before making a distribution-
(a) deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;
(b) retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.
(2) The expenses and remuneration mentioned in subsection (1) (a) shall not exceed 12« per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.

that where the costs are recoverable from the administrator, they are a first claim against the money the administrator controls. However, she rightly emphasised that s 74O does not entitle an administrator simply to deduct his application costs from the payments the debtors make (although these costs would be a first charge against the moneys he controls). Section 74J(5)[26] requires the administrator to complete a distribution account (Form 52). That form, as counsel pointed out, makes provision for the deduction of only s 74L administration costs. No express mention is made of s 74O application costs. Form 52 however clearly provides for 'other payments' to be made during the administration, and these would if necessary obviously encompass also s 74O application costs. Respondent's counsel fell back on the contention that it was 'undesirable' that the administrator should have been granted an order that he could deduct his s 74O costs where he was also given the power to delay distribution indefinitely. That is no doubt so; but the offending portions of the order have already been condemned to

[26] Section 74J(5):
(5) Every distribution account in respect of the periodical payments and other funds received by an administrator shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, shall be signed by the administrator and shall be lodged at the office of the clerk of the court where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours.

excision. It follows that the conclusion of the Court below that component (4) accorded with the Act is right. I can also however not fault its conclusion that if component (4) was merely intended to reflect the relevant provision in the Act, there could be no point in including it. By corollary there can be no objection to excluding it. No costs or any other issue of consequence in any event turns on this.

***Component (5)***

[19] The most opaque part of the parties' dispute concerned component (5). As already noted, the administrator conceded that the reference to s 74M[27] was inappropriate. Section 74M licenses the collection of charges, not their disbursement. As it stands, the rest of component (5) may seem uncontentious, since it merely permits the administrator to deduct his s 74L administration costs as well as those in 'paragraphs 1(a) and (b) of the general provisions to the tariff for section 74'.

---

[27] Section 74M **Furnishing of information by administrator**
The administrator shall upon payment of the fees prescribed in the rules-
(a) furnish any creditor applying therefor with such information about the progress made in regard to the administration as he may desire; and
(b) furnish any person applying therefor with a copy of the debtor's application and statement of his affairs mentioned in sections 74 and 74A (1), or with a list or account mentioned in section 74G (1) or 74J, or with the debtor's statement of his affairs mentioned in section 65I (2).

[20] This blandness masks a dispute of substance, however, since the administrator and the creditor in their opposing papers took diametrically opposite views on the interpretation of s 74L and the costs it licenses. The Court below, in addition, held that the word 'costs' as it appears in component (5) was inappropriate, since s 74L and the general provisions of the tariff do not contemplate 'compensation for the expense of litigation incurred'.[28] And this conclusion the administrator specifically challenged on appeal. What is more, the decision of the Court below has been interpreted in a way that makes it desirable that this Court resolve the issue.[29]

[21] The starting point in doing so must be s 74L, which empowers an administrator, before making a distribution, to (a) 'deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules'; and (b) retain a portion of the money collected to defray costs if the debtor defaults or disappears. Section 74L(2) goes on to provide:

---

[28] 2001 (2) SA 716 (C) 724H-I.
[29] Jones and Buckle (above) Service 7, 2001, Act 321-322.

> 'The expenses and remuneration mentioned in subsection (1)(a) shall not exceed 12½ per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.'

[22] The difficulty arises from the Tariff promulgated under the Rules. It is contained in Part III of Annexure 2 to the Rules. This has already in part been footnoted. Its significance to this portion of the appeal however makes it necessary to set it out more fully:

> PART III
> GENERAL PROVISIONS IN RESPECT OF PROCEEDINGS IN TERMS OF SECTION 74 OF THE ACT
>
> 1. The following fees shall be allowed in addition to those laid down in the Tariff to this Part:
>    (a) All necessary disbursements incurred in connection with the proceedings.
>    (b) In addition to the fees stated below, the administrator shall be entitled to a fee of 10% on each instalment collected for the redemption of capital and costs.
> 2. For the purposes of items 4 and 5 of the Tariff to this Part, a folio shall consist of 100 written or printed words or figures and four figures shall be reckoned as one word.

Under a separate heading, a nine-item Tariff then follows. The items the Tariff enumerates, as the Court below pointed out,[30] make provision for fees in relation to applications for administration orders as well as for proceedings after they have been granted. Included is a general item, item 9, alluding to 'correspondences and attendances'.

[23] The problem in reconciling Part III with section 74L is this. Section 74L(1) gives an administrator an entitlement to necessary

[30] 2001 (2) SA 716 (C) 724F.

expenses and a remuneration determined in accordance with a prescribed tariff, while s 74L(2) states that the 'expenses and remuneration mentioned in subsection 1(a) shall not exceed 12½ per cent of the amount of collected moneys received'. But Part III appears to contemplate recovery for the items expressly specified under the Tariff, *plus* necessary disbursements, *plus*, in addition to the Tariff fees, a fee of 10% on each instalment collected. This led the administrator to contend that he was entitled to a 10% fee on collections over and above his necessary expenses and the allowances specified under the Tariff. In effect, the administrator contended, while the statute caps his expenses and Tariff items at 12½ % of moneys collected, his 10% allowance is additional to that.

[24] The creditor contended, conversely, that the 10% fee Part III allows must be reckoned as part of the 12½ % cap s 74L(2) imposes. It is not difficult to see why the parties' contentions differ so widely. The impact on small distributions of calculating and deducting fees in the one way rather than the other will be substantial, with a significant resultant impact on creditors'

recovery. We were told during argument that administration orders have assumed far greater importance since the burgeoning of the micro-lending business, with resultant friction between money-lenders and administrators, which the contentions in this case seem to illustrate.

[25] As indicated, the difficulty arises from the fact that Part III seems to create three heads of recovery, namely (i) Tariff fees; (ii) necessary disbursements; and (iii) an additional 10% fee, while s 74L contemplates only 'necessary expenses' and a 'remuneration', the two together being limited to a 12½ % cap. There thus appears to be a conflict. If so, it must of course be resolved within the terms of the authorising statute. Section 74L makes no mention of a 'fee'. The drafters of the Rules must therefore be taken, in referring in Part III to a 10% fee, to have acted within the s 74L power to determine 'a remuneration determined in accordance with a tariff prescribed in the rules'. That provision is the sole source of any power to determine a 'fee' in Part III. But that same remuneration s 74L(2) expressly states

(together with expenses) to be subject to a maximum, namely 12½ % of moneys collected.

[26] I therefore conclude that the creditor's contentions must prevail, and that Part III must be read as subordinating the administrator's entitlement to a 10% fee on moneys collected to the 12½ % total cap the statute lays down. Put differently, the 'tariff' referred to in s 74L(1) is Part III in its entirety, and not just the nine-item list headed 'Tariff". It follows that to the extent that component (5) of the original order granted could be read as securing to the administrator any recovery (whether for fees, expenses or remuneration) in excess of a 12½ % maximum of the moneys collected, it was also bad and should be excised. This approach is somewhat different from that of the Court below,[31] and I do not find it necessary to say anything about the meaning of 'costs' in component (5).

***COSTS***

[27] It follows from this that the appeal must be dismissed. The administrator appealed also against the refusal by the Court

[31] 2001 (2) SA 716 (C) 724H-I.

below to intervene more radically in the costs order imposed at first instance. The Magistrate ordered the administrator to bear the costs of the amendment application on an attorney and client scale from his own pocket (*de bonis propriis*). The Court below altered that in two respects: (a) the administrator was to pay only half of the amendment application costs, albeit still from his own pocket; (b) the costs were to be taxed on the ordinary party-and-party scale.

[28] Before us, counsel for the administrator contended that the Court below had misdirected itself in intervening in this limited fashion. The submission is unsound. The Magistrate rightly took into account the fact that the terms of the order the administrator sought, which deviated from the default position the statute creates, had not in advance been drawn to the attention of the creditors, nor, as he found, to the attention of the Magistrate who issued the original order. In argument counsel for the administrator properly conceded that the terms of the draft order the administrator handed up to the Magistrate in the original

application should have been drawn to the creditor's attention. That concession puts paid to any suggestion of misdirection.

[29] As for the costs of appeal, it was not suggested that the administrator prosecuted the appeal in the interests of or because of some necessity related to the debtors' estate. The costs should therefore come from his own pocket.

[30] In the result, the appeal is dismissed with costs, which the appellant is to pay *de bonis propriis*.

**E CAMERON**

**JUDGE OF APPEAL**

**NIENABER JA ) CONCUR**

**HOWIE JA )**