THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1. Case no: 051/2004
2. REPORTABLE

In the matter between:

AFRICAN BANK LTD	Appellant
and	
MELVYN WEINER	First Respondent
NW FINANCIAL ADMINISTRATORS (Pty) Ltd	Second Respondent
ANTHONY JOHN WEBBSTOCK	Third Respondent

Before:	Mpati DP, Zulman JA, Cameron JA, Van Heerden JA and Comrie AJA
Appeal heard:	1 March 2005
Judgment:	Tuesday 29 March 2005

Administration orders – Magistrates' Courts Act 32 of 1944, s 74 – Inter-relation to s 65 proceedings – Meaning of 'costs' in s 74L – Attorney acting as administrator – Entitlement to fees/costs – Collection fee not to be duplicated –

Attorney-administrator to deposit moneys collected in trust account in terms of s 78 of Attorneys Act 53 of 1979

JUDGMENT

CAMERON JA:

INTRODUCTION

[1] This appeal concerns the working of the system of court-supervised debt administration created for small debtors in 1944 when the legislature enacted s 74 of the Magistrates' Courts Act (the Act).[1] The provision, which currently applies to debtors whose liabilities total less than R50 000,[2] offers an alternative to sequestration, which in such cases usually has no advantage for creditors. Use of s 74 procedures has increased enormously in recent years, and with it disputes between creditors and court-appointed debt administrators.

[2] The appellant is a commercial bank whose client base is heavily affected by administration orders. The main respondents are Mr Melvyn Weiner, an attorney whose practice is confined to managing debt administrations, and a company he controls and employs in his

[1] Act 32 of 1944 ('the Act'). Section 74 was extensively amended when Act 63 of 1976 inserted sections 74A to 74W. An informative overview: André Boraine, 'Some thoughts on the reform of administration orders and related issues' 2003 *De Jure* 217-251.
[2] GN R1441, *Government Gazette* 19435 of 30 October 1998, with effect from 1 November 1998.

business (the administration company). In the Cape High Court the bank applied for a range of declaratory orders against Weiner and the administration company. It had but modest success: the court refused the bank the main relief it sought, but granted two declarations concerning attorneys' trust accounts and interest. It ordered the parties to pay their own costs.[3] With leave granted by the court below the bank now appeals, seeking a broader range of orders. Weiner and his company with similar leave appeal against the two orders that were granted. In the court below the third respondent, Mr Anthony John Webbstock, a Gauteng attorney whose work also focuses exclusively on administration orders, was granted leave to intervene as third respondent. The court refused the counter application he filed. Against that he did not appeal. He nonetheless appeared in person before this court to oppose the bank's appeal.

[3] This court considered important aspects of s 74 debt administration in *Weiner NO v Broekhuysen*[4] (*Weiner 1*). But significant questions remained. Although the bank instituted its application just before *Weiner 1* was handed down in May 2002, questions not at issue there inevitably became the central focus of the parties' contest. Those

[3] *African Bank Ltd v Weiner and others* 2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) (Griesel J; Selikowitz J concurring).
[4] 2003 (4) SA 301 (SCA).

questions have wide significance in view of the burgeoning use of administration orders. Their use has expanded because in recent years 'micro-lenders' such as the bank – which Weiner describes as the biggest 'micro-lender' in the country – have extended credit services to large numbers of wage- and salary-earners who previously did not have access to the credit market. 'Micro-loans' are generally made without credit checks and without security being exacted. Those black-listed for past defaults may qualify, provided they have regular wage- or salary-earning jobs, since the creditor, instead of demanding security, secures a direct debit from the employer. The recompense for risk is high interest, because 'micro-loans' fall outside the Usury Act 73 of 1968.[5] But as the credit market has bloomed, so too has the number of defaulters; and with them, completing the circle, has come a huge increase in the number of s 74 administrations.

[4] The result all too often has been statutory restructuring of a debtor's debts – but at the cost of an additional burden on the debtor's income, namely the administrator's fees.[6] This has led to clashes of interest between lenders such as the bank and administrators such as Weiner

[5] Loans of R10 000 and below are 'micro-loans': in General Notice 713, *Government Gazette* 20145 of 1 June 1999, the Minister of Trade and Industry used the powers granted by s 15A (inserted by s 8 of the Usury Amendment Act 100 of 1988 and substituted by Act 91 of 1989) to exempt money lending transactions not exceeding R10 000 from the central provisions of the Usury Act.
[6] See M A Greig 'Administration Orders as Shark Nets' (2000) 117 *SALJ* 622 at 626.

and his company. The former, who want rapid repayment of outstanding loans, accuse debt administrators of seeking – not always scrupulously – to protract debt administration, creating a perpetual and lucrative income stream for themselves, collected directly from source under court order, while debtors remain yoked indefinitely to burdensome repayments. To these general allegations Weiner retorted by accusing the bank of conducting a campaign 'falling little short of a vendetta' against administrators.

[5] In this setting it would be easy to dismiss the parties' dispute as a 'turf war' between self-interested contestants; but that would not do justice to the complexity of the underlying issues or to the impact their resolution may have on creditors, administrators and the debtors themselves, for whose ultimate protection s 74 procedures exist.[7]

[6] On appeal, the issues between the parties narrowed considerably. This was no doubt in part because the judgment of Griesel J (whose general exposition and factual account I am grateful to adopt),[8] in dealing with the very wide issues before the High Court, gave a lucid exposition of the purposes and scope of s 74. I agree with his main general

[7]Compare *Fortuin v Various Creditors* 2004 (2) SA 570 (C); *ex parte August* 2004 (3) SA 268 (W).
[8]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) paras 1-26.

conclusions, which deserve to be underscored, since they bear also on the issues in this Court.

- In interpreting the contested provisions, Griesel J emphasised that it was never the intention of the legislature that a debtor should be bound up indefinitely in an administration order: on the contrary, 'the mechanism of an administration order is intended to provide a debtor with a relatively short moratorium to assist in the payment of his or her debts in full and to ward off legal action and execution proceedings'.[9]
- Griesel J also affirmed that the role and function of the s 74 administrator 'is akin to that of the trustee in an insolvent estate': in collecting and distributing payments, the administrator occupies a position of trust vis-à-vis both the debtor and his or her creditors, and must carry out the duties of administration in the interests of creditors and the debtor independently and impartially.
- He also concluded that an administrator occupied a fiduciary position in relation to moneys collected[10] and, like a trustee, 'should take expeditious steps for the purpose of enabling the creditors to obtain as extensive a payment as possible of their debts'.[11]

[9]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) para 10.
[10]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) para 12.
[11]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) para 11.

First issue: inter-relation between s 74 and s 65 proceedings – administrator's entitlement to s 65 'costs'

[7] The first issue concerns the inter-relation between s 74 and its associated provisions and s 65 and its retinue (s 65A – s 65M), which aim to create a relatively cheap and effective mechanism of execution for judgments obtained in the magistrates' courts. Before the High Court the bank's notice of motion as eventually amended sought an order that Weiner, 'whenever appointed and acting as an administrator' under s 74, may claim as necessary expenses and remuneration no more than 12.5% of collected monies received from or on behalf of any debtor for distribution to creditors.

[8] In seeking this relief the bank aimed to elevate the 12.5% limit mentioned in s 74L (which deals with the administrator's entitlement to expenses, remuneration and costs) to a general cap on all amounts claimable. Section 74L reads:

(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 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.

[9] The 'tariff prescribed in the rules' is set out in Part III of Table B of Annexure 2 to the Rules:

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.

…

[10] The problem *Weiner 1* confronted was that the tariff could be read as granting an administrator a 10% fee on top of all 'necessary disbursements'. *Weiner 1* reconciled this with s 74L by holding that the statutory formula ('necessary expenses and remuneration') was decisive: it contemplated that *all* tariff items, including the 10% fee, could in total amount to no more than 12.5%.[12] But this approach did not require a decision on the meaning of 'the costs' mentioned in s 74L(1)(b). In the wake of the 12.5% total cap *Weiner 1* imposed on administration expenses and remuneration, these 'costs' have become

[12]2003 (4) SA 301 (SCA) paras 19-26.

a central source of contention between micro-lenders and administrators, especially attorney-administrators.

[11] This was the issue that underlay the main relief the bank sought in para 1 of its notice of motion. The question is whether, when a debtor under administration defaults or disappears, s 74L(2) offers an avenue for recovery of 'costs' beyond 'expenses and remuneration', and if so to what extent. Does the 12.5% cap in s 74L(2) cover also 'the costs' envisaged in s 74L(1)(b)? If not, what costs can be recovered under subsec (1)(b)? What does the statutorily permitted retainer cover? And of greatest practical importance, can an attorney-administrator pocket the collection costs the rules separately envisage for s 65 proceedings?

[12] The bank contended that the s 74L(2) cap limited all recovery by an administrator, from whatever source, to 12.5% 'of the amount of collected moneys'. That cannot be. The cap applies only to 'expenses and remuneration'. The phrase appears twice in s 74L – in subsec (1)(a) (which inserts the indefinite article before 'remuneration') and in subsec (2). It does not appear in subsec (1)(b). That mentions only 'costs'. The wording thus draws a distinction between 'expenses and remuneration' on the one hand, and 'costs' on the other. Only the former are capped at 12.5%.[13]

[13]This accords with the reasoning of van Reenen J and Revelas AJ in *Weiner NO v Broekhuysen* 2001 (2)

[13] The ‘costs’ that subsec (1)(b) envisages must be inferred from the contingency for which it provides, namely the debtor’s default or disappearance. For this it permits a specific retention to be made. The retention must be ‘in the manner and up to an amount prescribed in the rules’. Rule 48(4) states that an administrator may in terms of s 74L(1)(b), before making a distribution, ‘detain’ an amount not exceeding 25% of what is collected to cover costs occasioned by the debtor’s default or disappearance, provided that the amount in the administrator’s possession for this purpose may not at any stage exceed R30.

[14] That was promulgated 27 years ago in 1978. It has never been revised. The bank calculated that at present-day values the equivalent would be about R600. If R30 constitutes a cap on all costs recovery, it would of course have a very significant impact on the administrator’s position.

[15] It seems clear, however, that the provision distinguishes between retention and recovery, and that it does not limit the costs the administrator can recover to the R30 retainer. If the retainer was meant to place a limit on recovery, that could and would have been expressed much more clearly. The provision does not specify the precise nature of the costs that the administrator ‘may have to incur’, nor does it limit their

SA 716 (C) 724H-I, but which *Weiner 1* 2003 (4) SA 301 (SCA) para 26 found unnecessary to decide.

recovery. It merely permits the administrator to retain some money 'to cover' – meaning 'to help cover', or 'towards covering' – the costs actually incurred in the case of default or disappearance.

[16] As Griesel J pointed out, there are a number of cross-links between s 74's provisions and s 65.[14] The expression 'defaults or disappears' brings s 74I(2) into play. This provides that where the debtor fails to make the payments to the administrator required under the administration order, the provisions of ss 65A to 65L apply with the necessary changes. These create a procedure whereby the debtor can be called up and interrogated and a fresh order to pay by instalments can be made.

[17] There are other cross-links. Where an administration order provides for payments out of future emoluments or income, s 74D requires the court to authorise so far as is applicable the issue of an emoluments attachment order (s 65J) or a garnishee order (attaching debts owed to the debtor)(s 72), but permits the suspension of the orders. Where the debtor breaches the conditions of suspension, s 74I(3) provides a quick way to activate a suspended emoluments attachment order or a

[14]See 2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) paras 46-47.

garnishee order. Legal steps entailing costs pursuant to default or disappearance are contemplated also in subsecs 74J(8)[15] and (9).[16]

[18] All this shows that 'the costs' the administrator 'may have to incur' are distinctive and separate from the ordinary expenses of an administration. They are not included under 'necessary expenses and remuneration'. They can be separately recovered. Where the administrator employs an attorney, the attorney's reasonable charges for the steps authorised, duly taxed and scrutinised, will be recoverable as 'costs' under s 74L(1)(b).

[19] What is the position where the administrator is him- or herself an attorney (a situation the provisions clearly contemplate: s 74E(3); s 74J(7)(b))? There was debate before us as to whether an attorney-administrator can instruct him- or herself to take the legal steps authorised, and thus, as attorney, pocket the resultant fees. The point was given currency, and the parties' dispute about it some sting, because Weiner is an attorney, and because the bank contests his entitlement to levy any separate attorney's fees.

[15]'If the debtor should at any time, despite a registered letter of demand from the administrator, be 14 days in arrear with the payment of any instalment and if steps in terms of s 74I(3) cannot be taken [emoluments attachment or debt garnishing] or have been taken unsuccessfully, or if the debtor had disappeared, the administrator shall forthwith notify the creditors in writing thereof and request their instructions.'

[16]'If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, or fail to respond, the administrator shall institute legal proceedings against the debtor for his committal for contempt of court or take such steps as may be necessary to trace the debtor who has disappeared, as the circumstances may require.'

[20] Griesel J found that the 'close working relationship' between Weiner's law practice and the various administration companies he employs (which include the second respondent) led to a 'blurring of functions', since there was no real distinction between his role as attorney-administrator and that of his administration company. Weiner himself alleged that his role 'in applying for an administration order on behalf of the applicant/debtor is separate and distinct from his role as an administrator once an administration order has been granted'. He claimed that once appointed as administrator he uses 'the administrative and infrastructural support' of his administration company 'in order to implement and monitor the proper functioning of an administration order': 'in short', he alleged, he fulfilled the functions of an administrator 'through the offices of' the administration company as opposed to his legal practice. This semantic play led Griesel J to find an 'ambivalence' in Weiner's position, observing that it suited him on occasion to rely on his status as a practitioner, and on other occasions to claim that he is not acting as a practising attorney in conducting the administration.[17] Those comments were well warranted.

[21] It is obvious that an attorney who is appointed as an administrator in terms of s 74E(1) acts in the capacity of an attorney throughout: he or

[17] 2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) para 71.

she does not dispense with professional functions or duties at any point in the administration. The attorney-administrator takes both the benefits and the burdens of a practitioner's professional position and responsibilities.

[22] For the purposes of s 74L(1)(b) this enables an attorney-administrator to carry out the legal work required by the section, and to charge the reasonable costs so incurred to the administration. It was suggested that this kind of 'auto-instruction' or 'self-briefing' could lead the attorney-administrator to generate illusory work and thus charge unnecessary fees. That is true; but such a temptation could arise in any professional setting, and can be monitored in a s 74 administration by the creditors' scrutiny of the steps taken and the reasonableness of the professional fees charged for them.

The 10% collection fee under s 65

[23] A quite different question is whether the attorney-administrator is entitled to levy a collection fee under s 65 and its associated provisions and claim it as a 'cost' under s 74L. Part I of Table B of Annexure 2 to the Rules of the Magistrates' Courts (which contains general provisions in respect of s 65 proceedings) provides, in addition to the tariff

specified in that part, for a 10% collection fee 'on each instalment collected'.[18] We were told that some attorney-administrators levied an additional 10% collection fee in the s 65 setting, adding it as a s 74L(2) 'cost' on top of other s 65 costs and s 74L 'expenses and remuneration'; and in his submissions before us, Mr Webbstock frankly declared that he himself did so.

[24] Neither principle nor the wording of the statute in my view countenances an attorney-administrator levying a collection fee under s 65 in addition to the 'expenses and remuneration' that may be claimed under s 74L.[19] The two statutory debt-recovery mechanisms – s 65 and s 74 – must after all be interpreted together. Section 65 proceedings are invoked to enforce the primary mechanism of s 74 debt administration. Section 65's provisions apply 'with the necessary changes' (*mutatis mutandis*), and s 65I expressly provides that an application for an administration order has preference over s 65 proceedings. Section 65 proceedings are therefore subsidiary to administration order proceedings.

[18]Para 3(b) of Part 1 of Table B reads in part: 'A fee of 10% on each instalment collected in redemption of the capital and costs of the action, subject to a maximum amount of R300.00 on every instalment. Where the amount is payable in instalments the collection fees shall be recoverable only on payment of every instalment.' The provision goes on to state expressly that the 10% collection fee specified is in substitution for and not in addition to the 10% collection fee recoverable where a judgment debt is payable in instalments (para 13 of Part 1 of Table A).

[19] I leave out of account here, and express no view on, the example Mr Webbstock cited in argument – that of an attorney-administrator who collects a debt on behalf of a debtor to whom it is owed.

[25] Against this background it would be unconscionable, on any basis, if the 10% collection fee in Part I of Table B for s 65 proceedings were drawn in addition to the 10% collection fee permitted in Part III for s 74 administrations. There is only one operative collection, and that is the collection under s 74, for which the collection fee of 10% is specified as part of the 12.5% maximum permitted in s 74L(2). If a further collection is alleged to take place by virtue of s 65, no additional fee can be collected in respect of it as a 'cost' under s 74L.

[26] If, in the example debated before us, the administrator gives over the task of collecting from a defaulting debtor to an outside attorney and the administrator allows that attorney the s 65 10% collection fee as a s 74L(1)(b) 'cost', the administrator cannot then him- or herself claim collection commission under s 74. There can be only one collection commission, claimed only once.

[27] In the result, the statutory scheme entails two conclusions. First, only one collection commission can be claimed. There can be no double-levying. Second, where the administrator is an attorney, no collection fee can be claimed under s 65 in addition to s 74L 'expenses and remuneration'. Differently stated, an attorney-administrator can claim

only one collection fee, and that is the collection fee that forms part of the total 'expenses and remuneration' allowed by s 74L(2).

Is the bank entitled to declaratory relief on appeal that it did not pertinently seek in the court below?

[28] The declaration the bank sought in the High Court about the ambit of s 65 costs recovery under s 74L addressed the issue in general terms. The order sought said nothing specific about the s 65 collection fee. Griesel J therefore noted that the question the bank's amended first prayer raised for decision was whether the costs arising from recourse to the provisions of s 65 had to come from the administrator's 'expenses and remuneration' under s 74L(1)(a) or from s 74L(1)(b) 'costs'. Since the answer was the latter, the declaratory relief the bank sought was refused.

[29] On the approach the bank pursued before the High Court, that was clearly correct. But ten weeks after the High Court delivered its judgment, and after both main parties had lodged applications for leave to appeal, the bank applied under Rule 42 for an ambiguity to be removed from the judgment by the insertion of a clarificatory sentence stating that the 'costs' the judgment dealt with did not include 'the fee of

10%' permitted for s 65 collections. The three respondents opposed this application. The bank abandoned it when the High Court granted both the bank and Weiner and his administration company leave to appeal in terms of an agreed draft order. In the bank's notice of appeal there then appeared for the first time a prayer for an alternative order that dealt squarely with the s 65 10% collection fee.

[30] Counsel for the bank conceded that this was an unusual procedure, since the question of the s 65 collection fee and its place in the inter-relation between the two statutory mechanisms was not specifically argued before the High Court. He drew our attention to *Paola v Jeeva NO*,[20] where this Court on appeal stated its views on issues germane to the parties' dispute that were not decided in the court below (though there both parties asked it to do so).

[31] I do not think it is necessary to invoke *Paola's* case. The first prayer the bank sought in its notice of motion (which was amended during the course of argument before the High Court) fairly put in issue all matters relating to the inter-connection between s 65 and s 74, including the collection fee. It is true that in the High Court the matter was not argued on the basis that this was the central question. That emerged only later. But the relief the bank sought, and has at all stages persisted in

[20] 2004 (1) SA 396 (SCA) para 17.

seeking, covered the collection fee issue. In these circumstances I do not think that the bank should be left remediless. The determination of the question added to its notice of appeal depends solely on legal argument; there is no further evidence that can be adduced. That the question was not drawn to the attention of the court below, or pertinently embodied in the declarator sought, will be reflected in dealing with the costs order granted in the court below.

[32] Given the general importance of the parties' dispute, the breadth of the declarator originally sought, and the fact that the issues have been exhaustively covered in evidence and argument, there can be no barrier to granting the bank the declarator it inserted into its notice of appeal.

Second issue: no legal costs claimable by administration company

[33] The High Court also refused the bank a declarator stating that Weiner's administration company cannot recover legal costs for preparing and bringing an application for an administration order. There is really no dispute here, because Weiner does not contend that his company can ever claim such costs. As Griesel J pointed out, both Weiner and his company in the answering affidavits expressly disavowed the company's entitlement to any such costs. On appeal the

bank pointed out that Weiner claimed to 'fulfil the functions of an administrator through the offices of [the administration company] as opposed to my legal practice'. From this the bank sought to extract the inference that Weiner does not act as an attorney-administrator in conducting administrations. Counsel contended that the 'apparently seamless relationship' between Weiner and his administration company suggests that legal costs connected with applications for administration orders are collected and recovered for the benefit of the administration company in a manner contrary to law.

[34] But as already observed (para 21 above), Weiner's semantic shifts about his and the company's role in the administration process cannot detract from his continuing professional responsibilities and duties: an attorney appointed as an administrator acts in a professional capacity throughout, and does not dispense with professional functions or duties at any point in the administration. The bank as creditor is of course entitled to clear proof that legal charges sought to be recovered were properly and reasonably incurred. But that is a different matter. The finding as to Weiner's continuing role and responsibilities as an attorney puts paid to the need for a declarator, and for the reasons Griesel J gave the appeal cannot succeed.[21]

[21]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) paras 50-53.

Third issue: Can Weiner claim legal costs for implementing an administration order 'when he does not act as a practising attorney'?

[35] The third issue the bank raised on appeal yields to the same logic. The bank sought a declaration that Weiner can claim no costs for the implementation of an administration order 'when he does not act as an administrator in his capacity as a practising attorney'. The answer is that Weiner can never so act. That he farms out duties to his administration company can make no difference, for, as Griesel J pointed out, 'the simple fact is that where legal work has to be done or is done, legal costs will be incurred', whether to the credit of Weiner's legal practice or that of an outside attorney.[22]

[36] It is true, as the bank emphasised, that Weiner may be placed in a undesirable conflict in that, as administrator, he can generate additional fees for his legal practice by engaging in litigation related to his functions as administrator. But that, as pointed out earlier (para 22), is a matter for ethical oversight and the creditors' scrutiny: it is not a matter for which a structural solution can be prised from the statute. For reasons similar to those given in relation to the second issue, the appeal here too cannot succeed.

[22]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) para 55.

Fourth and fifth issues (Weiner's appeal):

[37] The High Court granted the bank two inter-related orders declaring that –

1. all monies received by or on behalf of Weiner when he takes appointment and acts as an administrator shall be deposited into the trust account that he keeps in terms of s 78 of the Attorneys Act 53 of 1979;[23]
2. any interest that may accrue on any sums of money received by Weiner or his administration company from or on behalf of a debtor under administration in terms of s 74 and deposited into a separate

[23]Section 78 of the Attorneys Act 53 of 1979 so far relevant reads:
'(1) Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person.
(2) (a) Any practitioner may invest in a separate trust savings or other interest-bearing account opened by him with any banking institution or building society any money deposited in his trust banking account which is not immediately required for any particular purpose.
(b) Any trust savings or other interest-bearing account referred to in paragraph (a) shall contain a reference to this subsection.
(2A) Any separate trust savings or other interest-bearing account –
(a) which is opened by a practitioner for the purpose of investing therein, on the instructions of any person, any money deposited in his trust banking account; and
(b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity,
shall contain a reference to this subsection.
(3) The interest, if any, on money deposited in terms of subsection (1) and the interest on money invested in terms of subsection (2) shall be paid over to the [attorneys fidelity] fund by the practitioner concerned at the prescribed time and in the manner prescribed.'

trust account in terms of s 74J(7)(a)[24] shall form part of the monies available for distribution to creditors.

[38] During argument before us, counsel for Weiner and the administration company rightly abandoned the appeal against the first order. As Griesel J observed in granting it,[25] Weiner invoked his attorney's status when seeking exemption from the obligation to provide security (applicable in terms of s 74E(3) to an administrator 'who is not an officer of the court or a practitioner') – but at the same time disavowed that status when seeking to avoid the duty s 74J(7)(b) imposes on 'a practising attorney' to deposit administration moneys in his attorneys' trust account. Of course this cannot be. The attorney-administrator is appointed as an attorney, takes office as an attorney, executes the administration as an attorney and is not at any stage during that process exempt from the obligations that s 78 imposes.

[39] On appeal Weiner persisted in challenging the second order granted. The evidence showed that instead of opening an account for each debtor's payments – which would entail prohibitive expense and

[24] Section 74J reads in part:
'(7) An administrator shall deposit all moneys received by him from or on behalf of debtors whose estates are under administration –
(a) if he is not a practising attorney, in a separate trust account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, of his deceased or insolvent estate;
(b) if he is a practising attorney, in the trust account that he keeps in terms of [s 78] of the [Attorneys Act 53 of 1979].' [Statutory reference updated.]
[25] 2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) paras 71-73.

administrative complexity – Weiner cumulated all debtors' monies into a s 74J(7)(a) 'separate trust account' for each entity through which he conducted the relevant administration orders, the deposits being on call and thus generating a higher rate of interest. He explained that the interest that accrues to each such trust account is then applied to cover bank charges as well as the premium of a fidelity insurance policy of R3 million covering himself and his staff.

[40] The bank's calculations suggested that a fairly substantial amount of interest accrued in this way to Weiner. Despite s 78 of the Attorneys' Act, the Fidelity Fund drew no benefit from this interest; while despite s 74J(7)(a), Weiner appeared to treat it as part of his assets. That, too, cannot be. Interest received must go either to the Fidelity Fund or to the creditors. This follows from the wording of the statute. Section 74J(1) requires an administrator to distribute 'all payments and other funds' received 'from or on behalf of' debtors pro rata among the creditors.[26] 'Other funds' clearly includes interest. Section 74J(7)(a) insulates from the administrator's private estate all amounts with which

[26] Section 74J(1) reads in part: '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'.

any separate trust account 'is credited': such credits clearly include interest.[27]

[41] These leave room for only one conclusion: net interest received on debtors' payments, if not paid to the Fidelity Fund, must be distributed to creditors. (I say 'net interest' since interest received must naturally be off-set against bank charges directly incurred in its accrual.)

[42] Weiner and Webbstock protested that calculating interest accruing on the payments made by each individual debtor before its distribution would be too difficult or costly. But this complaint lost force in the face of evidence the bank produced that appropriate computer programmes were available for its ready calculation.

[43] Griesel J observed that since the first order obliged Weiner to deposit debtors' payments into his attorney's trust account, the grant of the second order (declaring that interest on a s 74J(7)(a) account is available to creditors) was 'strictly speaking' redundant.[28] He nevertheless granted the order because in the past Weiner had deposited moneys into various s 74J(1)(a) accounts, from which interest had in the past been earned. The order was meant to deal with these receipts. I agree with the learned judge's reason for granting the order.

[27]The wording of s 74J(7) is set out in footnote 24 above.
[28]2004 (6) SA 570 (C), [2003] 4 All SA 50 (C) para 74.

On appeal, counsel for Weiner in addition gave an undertaking that Weiner would give a proper accounting to creditors in respect of past interest earned, and that despite practical problems he would pay it over to creditors as required by the statute.

[44] In conclusion I allude to a question that arose in the course of argument, namely into what type of s 78 attorneys' trust account an attorney-administrator is obliged to deposit debtors' payments. Interest does not have to accrue to the Fidelity Fund. In terms of s 78(2A) of the Attorneys Act, an attorney may on the instructions of a client open a separate trust savings or other interest-bearing account for the benefit of the client. The question was debated whether an attorney-administrator might not secure instructions to deposit moneys received into a s 78(2A) interest-bearing account, and, if so, whether a single such account for all debtors might not ease the administrative load arising from the opening of multiple accounts (subject, of course, to a proper accounting to creditors in respect of interest). The wording of the relevant provisions may not preclude this, but since the question was not fully argued I express no view on it.

[45] Weiner's appeal against the second order must therefore fail.

SUMMARY OF FINDINGS

[46] To summarise the conclusions of this judgment:

46.1 The ‘costs’ the administrator may have to incur in terms of s 74L(1)(b) are separate and distinct from the ordinary expenses of an administration. They are not included under ‘necessary expenses and remuneration’. The 12.5% cap does not apply to them. They can be separately recovered.

46.2 The R30 retention permitted in terms of s 74L(1)(b) does not limit the costs that can be recovered under that provision.

46.3 Where a debtor defaults or disappears, and the administrator employs an attorney, the latter’s reasonable charges for the authorised steps, duly taxed and scrutinised, will be ‘costs’ under s 74L(1)(b).

46.4 An attorney who is appointed as an administrator in terms of s 74E(1) acts in the capacity of an attorney throughout: he or she does not dispense with professional functions or duties at any point in the administration. He or she takes both the benefits and the burdens of an attorney’s professional position and responsibilities.

46.5 For the purposes of s 74L(1)(b) this means an attorney-administrator can carry out the legal work required by the section, and charge the reasonable costs so incurred to the administration.

46.6 The 10% collection fee the Rules allow for s 65 proceedings cannot be claimed in addition to the collection fee the Rules permit for s 74 proceedings. Only one collection commission can be claimed.

46.7 In addition, where the administrator is an attorney, no collection fee can be claimed under s 65 on top of s 74L 'expenses and remuneration. Differently stated, an attorney-administrator can claim only one collection fee, and that is the collection fee that forms part of the total 'expenses and remuneration' allowed by s 74L(2).

46.8 The attorney-administrator is not at any stage of the administration exempt from the obligations that s 78 of the Attorneys' Act 53 of 1979 imposes.

46.9 Net interest received on debtors' payments deposited to a separate trust account by an administrator who is not a practising attorney must be distributed to creditors.

Costs

[47] The bank has established that it is entitled to an order it did not obtain in the court below. That represents substantial success on appeal, and I consider that the bank is entitled to its costs of appeal. (No order was sought against Webbstock.) But the bank did not expressly seek the

order it has now obtained until it filed its notice of appeal. In these circumstances I think the costs order Griesel J made in the court below should be left undisturbed.

[48] The following order is made:

1. The bank's appeal succeeds with costs.
2. The order of the court below is varied only to the extent that an additional order is granted in the following terms:

> 'It is declared that the first respondent, whenever appointed and acting as an administrator in terms of s 74 of the Magistrates' Courts Act 32 of 1944, is entitled to recover in respect of necessary expenses and remuneration no more than 12.5% of collected moneys received from or on behalf of any debtor for distribution to the creditors of that debtor, such limit of 12.5% not to apply in respect of costs arising from recourse to the provisions of sections 65A to 65L of the Act, save that the fee of 10% referred to in para 3(b) of Part I of Table B of Annexure 2 to the Magistrates' Courts Rules shall not be recoverable in circumstances where the first respondent is both the administrator and the attorney seeking to recover such fee.'

3. The appeals of the first and second respondents are dismissed with costs.

E CAMERON

JUDGE OF APPEAL

CONCUR:

MPATI DP

ZULMAN JA

VAN HEERDEN JA

COMRIE AJA