



WHY BEE?



Hillary Platjies

The issue of Black Economic Empowerment is seen by some as the only alternative open to transform the business community in South Africa to ensure some form of equal access whilst others view it as a major impediment to domestic and foreign investment and therefore an inhibitor to growth.

While embracing globalisation and South Africa's new openness to the world economy as a globally competitive nation, attention has to be given to the promotion of women and black people in business so that their exclusion does not become entrenched.

Do we need BEE?

The BEE Commission defined BEE as a strategy aimed at substantially increasing black participation at all

levels in the economy.

The systematic dispossession and disempowerment of black people that was the legacy of apartheid requires an equally systematic response from government so that disadvantaged people are supported to enter the mainstream economy. There is little that can be criticised in the intention behind the Broad-based Black Economic Empowerment Act. South Africa's economy still excludes the vast majority from ownership of productive assets and the possession of advanced skills.

Purpose of the Act

The Broad-Based Black Economic Empowerment Codes which were published in the Government Gazette on 9 February 2007, have sound economic as well as constitutional objectives in mind. The purpose of the Codes is to provide principles and guidelines to assist and advise both public and private sectors in their implementation of the objectives of BBBEE. It is to promote the economic unity of the nation, protect the common market and promote equal opportunity and equal access to government services.

The Act was enacted:

1. To promote the achievement of the constitutional right to equality in terms of S9 of the Equality clause in the Constitution.
2. To increase broad-based and

effective participation of black people in the economy and also to promote a higher growth rate, increased employment and more particularly equitable income distribution.

Measuring BEE-Framework and Scorecard

The BBBEE Codes of Good Practice set out the key element of BBBEE and the ways of measuring it. This Code establishes the overall framework for BBBEE and contains a detailed scorecard that includes clear targets, weightings and indicators that can be used to measure progress towards BEE of businesses. It contains clear targets for ownership, management and enterprise development.

Do Industry Charters affect Liquidators?

Sector Charters are industry-driven documents put together by major stakeholders in that particular sector, together with valuable input from government representatives. The South African Economy has been divided into various industries and although the Insolvency Industry does not have its own Sector, the industry forms part of the South African Economy. Various Industries have their own industry charters and scorecards. Examples of industries that have or are about to receive their own scorecards are: Agriculture, Mining, Maritime, Construction, ICT, Tourism, Financial Services,

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Petroleum and the Legal Industry. The list is not exhaustive. All businesses subject to industry charters are to adhere to the charters. The Insolvency Industry is not subject to an industry charter. The question is whether the industry is subject to the financial services charter as some of the liquidators are accountants or the legal services charter as some liquidators are lawyers or DTI scorecards. The Insolvency industry is regulated by the Department of Justice which is also a stakeholder in drafting the Legal Services Charter.

When business relationships are of a governmental nature, DTI Scorecards are required. As a company dealing with other companies and with government, insolvency practitioners will be asked for BEE Scorecards. By supplying clients with BEE Scorecards, you are giving a commitment to BEE and ensuring that business relationships are maintained. Even if this does not yet apply, BEE Scorecards will apply to all companies in the near future.

Conclusion

The measure of success of BEE is not the number of institutions created that are BEE compliant but the extent to which businesses allow for the participation of the disempowered in the empowerment process and in the economy.

Although government has provided the framework, the future success of BEE will depend on fostering a spirit of co-operation with and encouraging initiatives from the private sector. South African businesses needs to commit to broad-based black economic while at the same time ensuring growth and continued investment in the South African economy.

Failure to acknowledge the imperatives of BEE is no longer an option and government's BEE strategy, coupled with contributions from the private sector, must be embraced if the challenge of achieving

broad-based black economic empowerment and therefore a truly representative economy is to be achieved. Each business has a positive obligation to comply with governments BEE initiatives-it cannot merely consider and elect to disregard!

Analogy: If you shoot a zebra on a black stripe, the zebra dies. Likewise if you shoot it on a white stripe. We are all linked in this economy, and its health and our prosperity are intertwined. If we can make it grow together, then both the black and white stripes of the zebra will retain their beauty.



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WHAT CONSTITUTES A "TRADER" FOR SECTION 34 OF THE INSOLVENCY ACT TO APPLY?



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It is common knowledge in the insolvency community that, in terms of section 34(1) of the Insolvency Act 24 of 1936 ("the Act"), read with section 340 of the Companies Act 61 of 1973, a trader who concludes a contract to transfer his business, or the goodwill thereof, or any goods or property forming part of his business, in circumstances where

the transfer is not in the ordinary course of his business or effected for purposes of securing a debt, must, between 60 and 30 days prior to the date of the intended transfer, publish a notice announcing the transfer, otherwise the transaction will be void as against the trader's creditors and as against the trustee of his estate (in the event that he is sequestrated) for a period of six months from date of transfer.

In the decision *McCarthy Limited v Stephen Malcolm Gore N.O.* [2007] SCA 32 RSA ("*McCarthy Ltd v Gore N.O.*"), an appeal from a decision of the Cape High Court, reported as *Gore N.O. v McCarthy Ltd* 2006 (3) SA 229 (C), the business of the company in liquidation, Ramsauer Transport (Proprietary) Limited ("the company"), was that of long-haul transport haulage by means of a fleet of between 60 and 80 heavy vehicles. From time to time vehicles in the fleet were sold and new vehicles purchased in order to keep the fleet in good

condition. However, the recoupment of vehicles sold reached R 3.1mil and R 87 000 for the 1996 and 1997 financial years respectively - as compared to an average annual income from the conveyance of goods of between R 32m and R 35m between 1996 and 1999. The evidence showed that during this period vehicles were sold with the additional objective of boosting the company's cash flow in order to allow it to carry on with its transport business.

During 1996, also in an effort to improve the liquidity of its business, the company concluded a factoring agreement with Cutfin (Proprietary) Limited ("Cutfin") in terms of which its book debts were sold to Cutfin on a monthly basis in return for discounted advanced payments to the company.

The transaction which was the subject of the High Court application launched by the Liquidator involved the sale of 28 vehicles by the company to

McCarthy Limited ("the purchaser"), for a purchase price of R 2 052 000.00, including VAT. The sale (which was not advertised in terms of section 34(1) of the Act) was concluded less than two weeks before the winding-up of the company. Upon the liquidation of the company, the liquidator averred that the sale was void by virtue of section 34(1) and applied to the Cape High Court for a declaratory order to confirm this.

Preconditions for the operation of section 34(1) which have been addressed by our courts include the issue as to whether or not particular goods form 'part' of a business for the purposes of section 34 (1)¹ and what amounts to an alienation "in the ordinary course of that business"².

In *McCarthy Ltd v Gore N.O.*, the prerequisite for the application of section 34(1) in dispute was whether or not the company which had effected a transfer of assets was indeed a "trader" for purposes of section 34(1).



Section 2 of the Act contains a detailed description of the contents of the term "trader". The broadest category of trader is "any person who carries on any trade, business, industry or undertaking in which property is sold, or is bought, exchanged or manufactured for purpose of sale or exchange",³ and it was with reference to this category that the liquidator argued the company qualified as a "trader".

Naturally the liquidator was obliged to contend, firstly, that, despite the fact that the primary business of the company clearly did not fall into any of the categories listed in section 34(1), it was nevertheless a trader within the meaning of section 34(1)

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in so far as "it sold its vehicles from time to time on a substantial basis and also sold its book debts as a regular and integral feature of its business". Secondly, the liquidator made the necessary allegation that the company had alienated and transferred the vehicles other than in the ordinary course of its business.

The purchaser denied that the company was a trader as defined in section 2 of the Act, and averred that section 34(1) was therefore not applicable to the transaction.

It was admitted on behalf of the liquidator that the sale of vehicles and the factoring of the book debts were incidental to the company's primary haulage business, but counsel argued that such activities were not incidental to the degree where this would cause the company to fall outside the definition of "trader".

The court *a quo*, per Davis J, found in favour of the liquidator on the grounds that the term "trader"

should be construed widely so as to encompass transactions concluded in the ordinary course of the business of a company, although ancillary to its primary business. In the present instance, the court *a quo* declared, the company had sold vehicles "regularly" and "pursuant to and as part of its business". The court accordingly held that the transfer of the vehicles to the appellant was void for want of compliance with the provisions of s 34(1).

The Court on appeal did not agree. According to the Supreme Court of Appeal, "once it is established that [the relevant] undertakings are incidental activities, that is the end of the matter". The Court reasoned that

the interpretation of 'trader' advanced on behalf of the liquidator would apply too widely - on the basis, *inter alia*, that the legislature would not, by way of the definition of trader in section 2 of the Act, have limited the types of trades, businesses, industries or undertakings affected by section 34(1) if section 34(1) was intended to apply "to any business in which property is sold for whatever reason" - it being difficult to envisage a business in which it is *not* necessary at some stage to sell or buy goods.

Accordingly, it is now certain that an enterprise will only qualify as a "trader" if the particular business activity which corresponds to one of the classes of trades, businesses, industries or undertakings listed in section 2 of the Act is part of the core business of the company. As was emphatically stated by the court on appeal, "[t]here are no degrees of incidentality", that is to say, it is only by virtue of its primary business activities that an enterprise will be a "trader" for purposes of section 34(1).

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1. See for example *Joosab v Ensor N.O.* 1966 (1) SA 319 (A).
2. See for example *Ensor N.O. v Rensco Motors (Pty) Ltd* 1981 (1) SA 815 (A).
3. The additional, more specific categories are: any person who carries on any trade, business, industry in which building operations of whatever nature are performed, or an object whereof is public entertainment, or who carries on the business of an hotel keeper or boarding-house keeper, or who acts as a broker or agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property. There is a rebuttable presumption that an entity is a trader for purposes of the Act, with the caveat that the trade, business, industry or undertaking of selling property produced by virtue of farming operations is not hit by any of the provisions of the Act relating to traders.



JOINT LIQUIDATORS MUST ACT JOINTLY, OR RUN THE RISK OF BEARING COSTS PERSONALLY

Although you may be the liquidator who is *de facto* attending to the winding-up of the affairs of the company, if you take action such as the launching of proceedings in terms of Section 69 of the Insolvency Act (as read with the Companies Act) without recourse to your fellow liquidators, you could be held personally liable for the costs if an application is brought to set aside the Section 69 Warrant.

This is what happened to Mr G C Kachelhoffer, one of three liquidators appointed in the matter of Maple Wine Exporters (Pty) Ltd (“Maple”) which was placed in final liquidation during January 2006.

In ordering Mr Kachelhoffer to pay the costs of the application from his own pocket on the scale as between attorney and his own client, the Honourable Mr Justice Louw summarized the facts as follows:- Messrs Kachelhoffer, Paris and Bester were the liquidators of Maple which was finally liquidated on 25 January 2006.

- The Applicants in the application before Louw, J carried on business as producers, exporters and wholesalers of wine from certain premises in Paarl. Prior to the liquidation of Maple it had carried on a similar business to that of the Applicants from the premises.
- On 24 April 2006 the Magistrate, Paarl, on an application purportedly brought by the liquidators had issued a Warrant in terms of Section 69(3) of the Insolvency Act for the attachment of goods situate at the premises and of the business conducted at the premises. The basis of the application was that Mr Kachelhoffer indicated in an affidavit that he had reason to believe that property of Maple was held at the same premises.

- The Court held that it was common cause that the application for the Section 69 Warrant had been brought by Mr Kachelhoffer without first obtaining consent of his two co-liquidators. The Court referred to the position in law that “**joint liquidators must act jointly and by reason of their failure to do so, the application to the Magistrate was a nullity**”.
- The Applicants’ attorneys had written an urgent letter to Mr Kachelhoffer the day after the execution of the warrant pointing out that the warrant had been obtained without a joint decision by the liquidators and inviting Mr Kachelhoffer to agree to a resolution of the matter without resorting to litigation. Mr Kachelhoffer declined this invitation, although he admitted that he did not have the prior consent of his co-liquidators to launch the application.

It appeared from the papers in the application before the Court that Mr Paris had been appointed as a PDI (“Previously Disadvantaged Person”). The letter from the Applicants’ attorneys had confirmed to Kachelhoffer that:-

“You have furthermore confirmed to us that this application was launched without the knowledge of your joint liquidators although Mr Bester has subsequently approved your course of action. You have had no contact with Mr Paris, notwithstanding that he is purportedly an Applicant in the Section 69 application”.

In his letter in response, Mr Kachelhoffer replied that:-

“Mnr Paris neem glad nie deel aan die administrasie nie, toon tot dusver nie enige belangstelling daaraan nie, en het ook geen kennis van die aangeleentheid nie. Hy is ‘n diskresionêre aanstelling deur die Meester, ons glo as PDI, en weet skrywer trouens op die oomblik,

sonder om dit te gaan nagaan, eers nie wie of wat of waar hy is nie”.

In May 2006 an Order had been made by agreement between the parties, the effect of which was that the Magistrate’s decision to issue the Warrant was reviewed and set aside and that the assets attached were restored to the Applicants. It was further ordered that all questions of costs were to stand over for later determination, which was the issue now before the Court.

As the Applicants had been substantially successful in the relief sought, they were therefore entitled to be awarded the costs of the application and the only questions before the Court were whether Mr Kachelhoffer himself should be ordered to pay such costs *de bonis propriis* and if so, upon which scale. The Applicants had sought *de bonis* costs on the punitive scale of attorney and own client.

The Court quoted with approval an extract from Blou vs Lampert and Chipkin N.N.O. and others 1973 (1) SA 1 (AD) where Holmes, JA had held that **“the trustees in that matter had been held by the Court *a quo* to have instituted the proceedings without *locus standi* to do so which meant that they had no authority to represent the insolvent estate in those proceedings and that, *de jure* the insolvent estate was not before the Court, and did not litigate, and could therefore not be ordered to pay costs. The right persons to be mulcted in costs for the abortive application are the trustees who purported to bring it on behalf of the insolvent estate without right or authority to do so. This seems to me logically inescapable”.**

The Court noted that Mr Kachelhoffer was a professional liquidator and a practising attorney but had nevertheless brought the Section 69 application in disregard of the provisions of Section 382 of the Companies Act. This section, *inter alia*, provides that when two or more

liquidators have been appointed, they must act jointly in performing their functions as liquidators.

Mr Kachelhoffer, instead of agreeing to a reversal of the situation without resort to litigation, had persisted in his view that his conduct was correct. This necessitated the application which he had first opposed but had then conceded. The Court went on to rule that:-

“Instead of accepting that he had to pay the costs out of his own pocket, he waited until the hearing to concede that he should do so. In my view this is a case where the conduct of the First Respondent

may be said to have been “vexatious” within the extended meaning that has been placed upon this term in a number of decisions, that is when such conduct has resulted in unnecessary trouble and expense which the other side ought not to bear.

As a professional liquidator the First Respondent should not have embarked on the application to the Magistrate with no regard to the provisions of Section 382 of the Companies Act. Thereafter, having been alerted to his error, he could have avoided the litigation before this application was brought.”

The Court accordingly adopted the view that:-

“I see no reason why the Applicants should be out of pocket in this case and the costs should be taxed on a basis that will come closest to avoid that from happening by including all costs except costs unnecessarily incurred and costs that are of an unreasonable amount”.

In the circumstances, Mr Kachelhoffer was ordered to pay the costs of the application for his own pocket on the scale as between attorney and his own client.

EDITOR'S NOTE



Adam Harris

There have been many developments in our industry over the last few months. The Business Rescue legislation is gaining some momentum, the new policy for the appointment of liquidators or Trustees is being finalised, and of course we had the pleasure of hosting the INSOL conference in Cape Town earlier this year.

INSOL Cape Town 2007 was, without doubt, a great success. I didn't have any negative comment although I gather that the delegates from the Cayman Islands who were unceremoniously put back on a flight heading in the direction from which they had just come, were less than enthusiastic about the

warmth of their welcome or the duration of their stay in sunny South Africa. They now know that blank pages are apparently required in your passport to gain entrance to the home of the rainbow nation.

As you can see from the photocollage in this edition, and as you may have read in *INSOL World*, there was not only an extensive range of material, focused at a high level, but in addition the social interaction and networking opportunities were outstanding. The gala dinner at Moyo was superb, and many memories were made that evening.

Incidentally, the conference also set a record for the highest attendance of any of the INSOL regional conferences to date. So, my thanks again to the whole team who put so many hundreds of hours into ensuring the success of the conference. Thanks also to those of you who managed to attend and support us.

On the legislative scene, a workshop to gather feedback as to whether the chapter 6 business rescue provisions should in fact be debtor-friendly, or creditor friendly, was hosted by the DTI in early June, and varied input was given. Personally, I believe that this is a

fundamental issue of policy which should more appropriately have been addressed before the legislation was actually drafted. Nevertheless, valuable comment was made from a variety of role-players, including of course AIPSA.

The Master's policy directive and the draft Ministerial Guidelines for the appointment of Liquidators or Trustees continue to be developed and one of the "hot topics" is whether white women will be included in part 2 of the National List (roughly equivalent to the old PDI list). At time of writing this, we are told that this is a policy issue upon which the Minister will decide, and various options have been put forward. AIPSA is making submissions in this regard.

By the way, this note as always emanates from the editor's pen. I can be viewed in my new pen, at Bowman Gilfillan in the SA Reserve Bank Building in Cape Town where the procession of armoured trucks presumably bearing cash attests to a continued buoyancy in the economy and a dearth of Insolvency work.

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THE CORRECT PERSON TO CITE IN LEGAL PROCEEDINGS ✓ UNDER S 386(4)(A) OF THE COMPANIES ACT



Prof. Alastair Smith

If a liquidator brings or defends actions or legal proceedings under 386(4)(a) of the Companies Act 61 of 1973 ('the Act'), may he or she be cited in an official capacity, or must the company in liquidation itself be cited?

This was the issue for Epstein AJ to decide in *Eileen Margaret Fey NO v Lala Govan Exporters (Pty) Ltd and Fey NO & another v Allimpex CC and Fey NO & another v Gowan* 2006 JDR 0715 (W) ('Fey').

Section 386 of the Act deals with the general powers of liquidators. More specifically, section 386(4)(a) states that the liquidator, with the appropriate authority, has the power

'to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the [appropriate] authority ..., the Master may authorize, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts...'

In *Fey*, Lala Govan Exporters (Cape) (Pty) Ltd ('LGE Cape') was wound up provisionally in June 2004 and finally a month later. Ms Fey and Ms Cloete, the plaintiffs, were its joint liquidators. They sued the three defendants separately in order to impeach dispositions made to those parties by LGE Cape under section 340(1) of the Act read with sections 26, 29, or 30 of the Insolvency Act 24 of 1936.

The liquidators thus sought to recover those dispositions made to the defendants so that the assets concerned might be realized and their proceeds incorporated into the free residue of the insolvent estate of LGE Cape that would be distributed among its creditors.

The court heard all three applications together, which involved the same issue. The court focused on the liquidators' action against the first defendant, Lala Govan Exporters (Pty) Ltd, and the conclusion by the court also governed the other applications.

The defendant objected by way of exception to the following citation of the plaintiffs (para [4] at 3):

'Eileen Margaret Fey N.O., an adult woman who sues in her capacity as joint liquidator with the Second Plaintiff of Lala Govan Cape (Pty) Ltd (Reg. No. 2002/029247/07), in liquidation ("Lala Govan") and is employed by Price Waterhouse Coopers Business Recovery & Insolvency (Pty) Ltd, of 1 Waterhouse Place, Century City, Cape Town.

Nawaal Cloete N.O., an adult woman who sues in her capacity as joint liquidator with the First Plaintiff of Lala Govan and conducts business as Nawaal Cloete & Associates of 38 Langhouse, 60 Kloof Street, Gardens, Cape Town.'

The plaintiffs, so the defendant objected, alleged themselves to be the liquidators of Lala Govan Cape and cited themselves in their official capacities as liquidators. They based their claims on section 340 of the Act read with sections 26 and 30 of the Insolvency Act. Section 386(4)(a) of the Act entitled the plaintiffs to claim in the name and on behalf of the company in liquidation, but not in their names as liquidators. Here they ought to have cited the company in liquidation as the plaintiff. So they lacked standing (*locus standi*) to bring the claim.

In *Fey* the dispute thus turned not on whether the dispositions by the company had actually been made, but on whether the action to set them aside had been brought by the right claimants.

Rather than answering the defendant's exception, the plaintiffs indicated that they intended to amend their summons and particulars of claim. The amended citation of the first plaintiff would read: "*The First Plaintiff is Eileen Margaret Fey N.O., an adult woman who sues in her capacity as joint liquidator with the Second Plaintiff on behalf of and in the name of Lala Govan Cape (Pty) Ltd (Reg. no. 2002/029247/07), in liquidation*" (para [6] at 5, original italics and underlining). If this change were approved, the second plaintiff's citation would be amended accordingly.

This proposed amendment still failed to satisfy the other side. Rather than bringing the claim on behalf of the company in liquidation, it was argued, the plaintiffs would still be bringing the claim of the company in liquidation in their own names. This course of action conflicted with section 386(4)(a) of the Act.

The plaintiffs then approached the court under Rule 28(4) for permission to amend their particulars of claim. The court dealt with the exception and the application to amend together.

Counsel for the plaintiffs argued that a liquidator bringing proceedings in his official capacity acts not in his personal capacity but in his representative capacity and for another person, the company in winding-up. To this the defendant's counsel replied by pointing out that this was not one of the instances in the Companies Act in which a liquidator is mentioned as suing in his or her own name. In particular, under section 386(4)(a) of the Act it is the company in winding-up that can sue, not the liquidator in the liquidator's own name.

Legal authority was divided. In *Airborne Express CC & another v Theodor Wilhelm van der Heever NO & others* (WLD date (case number 05/18568) unreported), a similar exception was given short shrift. Msimeki AJ held (paras [12]-[13], quoted in *Fey* supra at [9] at 7):

'[I]t surely is pedantic and unnecessary to draw the distinction between the cases where the liquidator acts in the name of the company in liquidation and where he acts in his capacity as

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liquidator *nomine officio*. It is, indeed, a question of form over substance whether the liquidator is cited as Plaintiff representing the company or whether the company is cited as the Plaintiff'.

In *Fey*, however, Epstein AJ began by confirming that the name of a company being wound up by the court had to have the statement 'in liquidation' added to it (s 49(5) of the Act). A liquidator was described not by his individual name but as the liquidator of the particular company to which he had been appointed (s 376). As regards section 386(4)(a), it had been suggested that the liquidator instituting action might cite the relevant company by its name with the additional phrase '(in liquidation)'; that this was the correct method of citation; and that the liquidator should be cited by name when acting or when exercising a statutory power to bring proceedings under sections 311, 340(1), 423 or 424 of the Act (see *Henochsberg on the Companies Act* (vol 1, p 801 [issue 20]). (Those sections deal respectively with compromises and arrangements between a company, its members and creditors; the application of insolvency law on impeachable dispositions to companies; the liability of delinquent directors and others to restore property and to compensate the company; and the liability of directors and others for the fraudulent conduct of business.)

Another work on company law took a similar approach to the present question. A liquidator bringing civil proceedings should, under his authority conferred by section 386(3), do so in the name of the company (MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* (looseleaf; 2002-) vol 3 at 14-336, citing *Fundstrust (Edms) Bpk (in Likwidasie) v Marais en andere* 1997 (3) SA 470 (C)). In *Fey* (supra para [12] at 8), Epstein AJ pointed out that *Fundstrust* had been relied on by counsel for the defendant when arguing that, in practice, section 386(4) actions are brought in the name of the liquidators in their representative capacities.

Epstein AJ continued by identifying *Fundstrust* as the opposite of *Fey*. *Fundstrust* involved an action under section 424 of the Act against the directors of a company in liquidation. The citation of the first defendant had been challenged by way of an exception. There the plaintiff had been described as '*Fundstrust (Pty) Ltd (in liquidation) represented herein by its duly appointed liquidators*'. Section 424 states the persons who may apply to court for a declarator of liability of persons who were knowingly parties to the fraudulent carrying on of the business. The section reads: '*... on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company,*'. The defendant in *Fundstrust* objected that the company itself was not one of those authorized, and that the action could be brought only by the liquidators. The court held that the company could not sue under section 424, and that only the liquidators had legal standing. The liquidator's bringing an action under section 424 was a step in the administration of the company in liquidation. The proceeds of the successful action were company assets. There was no reason why a liquidator acting under section 424 could not sue in the name of the company. The exception thus failed.

In actions or legal proceedings under section 386(4)(a) of the Companies Act, the proper party is the company, not its liquidator(s)

In so far as this ruling in *Fundstrust* decided that a liquidator might bring section 424 proceedings 'on behalf of the company', it had not convinced the court in *Ex parte Liquidator, Vautid Wear Parts (Pty) Ltd (in Liquidation)* 2000 (3) SA 96 (W) at 103. Only the applicants envisaged in section 424(1), Vorster AJ held there, could bring section 424 proceedings. That section itself gave the liquidator the legal standing for those proceedings. The company lacked legal standing because it could not apply for relief under section 424. Without that legal standing, it could not have those proceedings instituted on its behalf by someone else.

Epstein AJ then turned to discuss the case of *Shepstone & Wylie & others v Geyser NO*. In the court a quo (*Shepstone & Wylie & others v Geyser NO* 1998 (1) SA 354 (N)), Hugo J said (at 359):

'Although s 386(4)(a) of Act 61 of 1973 empowers the liquidator "to bring . . . in the name and on behalf of the company any action" (my emphasis) in practice such actions are frequently brought in the name of the liquidator with the letters NO (*nomine officio*) appended. I have been unable to find any rule that distinguishes the two forms of citation and it seems until now to have been up to the whim of the liquidator concerned.'

Counsel for the liquidators in *Fey* relied on the appellate decision in *Shepstone & Wylie & others v Geyser NO* 1998 (1) SA 1036 (SCA) to support the argument that the original citation of the plaintiffs in *Fey* was valid. The appeal court in *Shepstone & Wylie* considered the relevance of section 13 of the Act to the liquidator's bringing statutory claims.

(Section 13, concerning security for costs in legal proceedings by companies and bodies corporate, states:

'Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.'

The appeal court in *Shepstone & Wylie* held that section 13 applied to proceedings under section 386(4)(a) and to proceedings under statutory powers. Hefer JA said (at 1044):

'The express reference in s 13 to a company which is being wound up and to its liquidator indicates that the Legislature envisaged cases where the plaintiff or applicant is a company in liquidation. It could not have been unaware of the fact that in such cases the company is always represented by the liquidator, whether the latter sues *nomine officii* or not. There can be no doubt that the reference in the opening words to a company must be

interpreted to include a liquidator suing on behalf of a company in liquidation’.

Epstein AJ proceeded to distinguish the circumstances of *Shepstone & Wylie* from those of *Fey*. *Fey* concerned the standing of liquidators in legal proceedings that they had brought, the word in section 386(4)(a) stressed by Epstein AJ. Further, section 13 mentioned only a ‘company’, not a liquidator. Nor did *Shepstone & Wylie* concern the issue of legal standing. So Hefer JA’s ruling in *Shepstone & Wylie* did not support the liquidators in *Fey*.

Epstein AJ acknowledged Hugo J’s reference in the court a quo in *Shepstone & Wylie* (supra 1998 (1) SA 354 (N) at 359) to the practice of the bringing of the actions ‘at the whim of the liquidator’ in the latter’s name and with the letters ‘NO’ added. Yet the frequency of this practice, Epstein AJ held, did not justify it.

The crux of Epstein AJ’s judgment is paragraph [20] (*Fey* supra at 12, original underlining):

‘We are dealing in the present application with an action instituted by the liquidators pursuant to their

powers in terms of section 186 (4) (a) [a misprint for s 386(4)(a)]. We are also dealing with the peremptory terms of a statute. The liquidators cannot exercise a discretion based on a whim, nor is it a question of being pedantic. The section provides expressly that the liquidator is given the power to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature. Thus, any action instituted by a liquidator in terms of section 386 (4) (a) must be brought in the name of the company as opposed to the sections of the Act which envisage an action or application being brought by the liquidator himself or herself, eg. proceedings in terms of section 424 of the Act.’

Epstein AJ found support for this conclusion on two grounds:

- the implications of winding-up; and
- the terms of the relevant court order regarding the vesting of company assets.

In the first place, as Kirk-Cohen J held in *De Villiers & others v Electronic Media Network (Pty) Ltd* 1991 (2) SA 180 (W) at 184 the company in winding-up retains its identity,

continues to exist, and remains vested with its assets. The liquidation of the company thus differs from the sequestration order regarding an individual, whose assets vest in the Master and later the trustee.

Second, the plan and provision of the Act is for circumstances (besides the special powers of the liquidator) in which the liquidator may sue in his own name so long as the court order directs that company assets shall vest in him in his official capacity. Then, under section 361(3), the liquidator may in his official capacity bring or defend actions or legal proceedings which concern that property or which are necessary for winding up the company or recovering its property. (Section 361 deals with custody of or control over, and vesting of property of, the company.)

Thus Epstein AJ concluded that actions or legal proceedings under section 386(4)(a) of the Act had to be brought in the name of the company, not the liquidator. Accordingly, in his judgment the view in *Airborne Express* was incorrect and not to be followed. The defendant’s exception in *Fey* therefore succeeded. Nor did the liquidators’ application to amend their

CONGRATULATIONS

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held at Steenberg Golf Estate.



From left: Bradley Stevens (Auction Alliance),
Christopher Van Zyl, Bryan Shaw and Brian Mitchell
(All of Progressive Administration)

Thank you to all those who were in attendance. We thoroughly enjoyed having you with us and look forward to hosting you in the next CBS tournament.

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pleadings solve the problem, because they were still the plaintiffs attempting to sue in their representative capacities on behalf of their principal, the company; a step that was not allowed (*Sentrakoop Handelaars Bpk v Lourens & another* 1991 (3) SA 540 (W)).

Nevertheless, counsel for the liquidators had another string to his bow: a further proposed amendment of the paragraphs in the particulars of claim describing the liquidators, together with a prayer for the appropriate changes to the summons and the headings of the plaintiffs' pleadings. The main change proposed was the following: 'The Plaintiff is Lala Govan Cape (Pty) Ltd (Reg. No. 2502/029247/07) (in liquidation), duly represented by its joint liquidators, Eileen Margaret Fey N.O. and Nawaal Cloete N.O. of Co Pricewaterhouse Coopers Business Recovery & Insolvency (Pty) Ltd, 1 Waterhouse Place, Century City, Cape Town' (*Fey* supra para [26] at 15-16). Opposing counsel complained that the liquidators had not justified this proposal (*Luxavia (Pty) Ltd v Gray*

Security Services (Pty) Ltd 2001 (4) SA 211 (W) para [6] at 216). On this point, however, the authorities favoured the granting of the amendments. Usually, amendments were permissible unless sought in bad faith or likely to cause injustice to the other side that could not be remedied by a costs order. This principle also applied to applications for substituting a party (see *Page v Malcomess & Co* 1922 EDL 284; *Curtis-Setchell & McKie v Koeppen* 1948 (3) SA 1017 (W); *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening)* 1994 (2) SA 363 (C); *Luxavia* supra).

Epstein AJ held that here it would be pointless to order the liquidators to apply afresh for the substitution of the company in liquidation as the plaintiff. The present application was not seen as being in bad faith. Granting the application to amend would not cause injustice to the other side. Costs would follow the result. So as regards all three applications the court upheld the exceptions with costs, refused the applications to amend the pleadings brought in terms of Rule 28(4), and

granted the applications to amend the summonses and particulars of claim to show the company in liquidation as the plaintiff in each case. The decision in *Fey* illustrates the principle that the company in winding-up continues as a separate person with its own identity and vested with its own assets. Against this background the provisions of a particular section of the Companies Act should be read carefully in order to determine which person (for example, the company itself or its liquidator) those provisions govern.

Prof. Alastair Smith
University of South Africa

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FROM THE CHAIRMAN



Juanito Damons

Our industry is going through somewhat of a difficult period. The Master's offices in Pretoria and Johannesburg are clearly understaffed and this creates serious delays and frustrations for our members. The current strike action has also not helped the situation.

We have liaised with the Department of Justice and Constitutional Development and will continue to do so to address the various issues raised by some of our members. We have a Master's Office Liaison Committee and urge our members to bring to us issues to us that which concerns them relating to the various Master's Offices. We can only address the Master on issues that are formerly formally

brought to us. Any complaints either against members or officials at the Master's office should either be addressed to the latter Liaison Committee or our Disciplinary Committee. Once again we can only deal with complaints that are lodged in writing with the necessary proof, if necessary where applicable. We undertake to deal with these issues appropriately.

I believe that we should take some responsibility for our industry and in this way we may, through AIPSA, be able to alleviate many of the problems we are facing in our industry today. We have sent out many e-mails for comment especially regarding the Chief Master's Directive and it is a pity that so few of our members make an effort to comment on issues so vital to their livelihood. Any contribution, however small, will be appreciated.

The editor's note contains details of the Chief Master's Directive and where the process currently stands. We recently entertained some of our white female members at a meeting. Certain concerns were raised and a sub-committee was formed to deal with these concerns and to engage the Chief Master around these concerns. Some of the issues raised

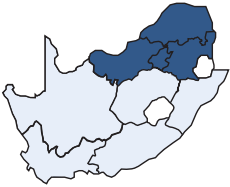
were challenging and the engagements were not always that friendly. I believe that these types of debates will in future only serve to strengthen our organisation. I am pleased to say that we left the meeting more united than ever. We are saddened by the passing of one of our members, Daphney Lindup, and send our deepest condolences to her family, business partners and friends.

The struggle to organise our industry still continues and we hope that at our next AGM we will be able to report to our members that we have now moved some way towards regulating our industry. The Chief Master's Directive and the new Ministerial Policy Guidelines, (with some amendments), will go a long way in achieving this goal.

Lastly, there is a very important issue of training and transfer of skills that has to be addressed in our industry. We have an Education Committee and would like to invite our members to send some ideas through so that we can engage government on this vital issue.

Best Regards

Juanito Damons
Chairman



DEVELOPMENTS AT AIPSA - NORTHERN REGION JUNE 2007

NEW CHAIRPERSON

Gideon Bochedi was appointed as the Chairperson of the Northern Region Committee in March 2007, following the stepping down from the role by the previous chairperson, Ansie Venter.

Due to changes in her professional responsibilities, Ansie requested that the Committee excuse her from her function as Chairperson but we were fortunate that she will still fulfil a role as a Committee member for the remainder of the term. The committee was disappointed by Ansie's decision as she has managed the committee with poise and assertion since her election in 2005.

Gideon joined the Committee as the representative of non-practising members. His role at CGIC has seen him at the coalface of liquidations, and his portfolio until now has been to liaise with the Master of the High Court, Pretoria, which has further exposed him to the bureaucratic challenges that practitioners face.

His varied roles thus afford him and, as a result the Committee, a unique broad perspective. Gideon has also been prominent in voicing his views in the recent meetings with the Chief Master.

NORTHERN REGION CONFERENCE

The Northern Region held another successful conference, this time on the draft Companies Bill, presented by Professor David Burdette and Dr Sulette Lombard and hosted most graciously by Routledge Modise Attorneys.

The event was well-attended by major banks, firms of attorneys and Northern Region practitioners.

ANNUAL GENERAL MEETING

The Annual General Meeting of the Northern Region of AIPSA will be held on 5th September 2007 at 2pm at the Bytes Conference Centre in Midrand.

The guest speaker will be Mr Allan Heyl of the once-notorious Stander gang.



Invitations and nomination forms were sent out on the 21st May 2007 and the closing date for nominations is the 13th July 2007.

Nomination forms must be received by the Administration office of AIPSA by no later than Friday, 13th July 2007. They may be posted to AIPSA Northern Region, P O Box 10527, Johannesburg, 2000, or faxed to (011) 291 1391 or e-mailed to zkajee@westrust.co.za.

FEES AND REMUNERATION POST INTRAMED - "LOOKING IN THE MIRROR" LOOKING IN THE WIBBOB



Hans Klopper

"Mr Terblanche, do you honestly think that R21, 2 million is a reasonable fee for the liquidators?"¹ This was opening question by The Honourable Harms

AJ at the hearing of the matter in the Supreme Court of Appeal ("SCA") in **Nel and Another NNO v The Master (Absa bank and others intervening)**.² Adv F Terblanche S.C represented the appellants ("the liquidators") in that matter. **"Yes, my Lord"** was Adv Terblanche's reply. Arguing the case from that point onwards proved to be a losing battle. But more on this matter to follow below.

The present position is that South African Insolvency Practitioners ("IP's") are, by statute, remunerated on a "commission- or percentile based" system.³

Sections 63 (1) of the Insolvency Act and 384 of the Companies Act, respectively, provide for the role of the Master of the High Court and provide, in essence, that an IP shall

be entitled to a reasonable remuneration for his/her services to be taxed by the Master and which the Master may increase or decrease where good cause has been shown for doing so.

In jurisdictions such as Holland and Germany where commission- or percentile based systems are followed IP's earn a commission based fee which appears to be not negotiable. However in most jurisdictions time based remuneration seems to be the order of the day whilst, for example, in France⁴ a combination a minimum remuneration and "activity based" remuneration related to the number of employees treated, a sliding scale on the value of assets realised and an amount calculated on the number of claims checked seems to be the more accepted norm whilst, in other jurisdictions, creditors, IP's and other

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role players agree the remuneration before drafting accounts distributing the proceeds of realisations to creditors. This agreement is reached on the basis of many factors such as the value added, the time spent and the complexities of the matter.

In **Nel and Another NNO v The Master (Absa bank and others intervening)** (the "Nel matter") the liquidators were enjoined with the liquidation of a company by the name of Intramed. Intramed was a subsidiary of the Macmed Group, a high-profile collapse during or about 1999 onwards. The liquidators continued trading the affairs of Intramed with a view to selling Intramed's business as a going concern. During the process of attending to their duties the liquidators were pressurised by BOE, one of the secured creditors, to accept an offer of some R94m for the business. They refused to do so and then later sold Intramed's business as a going concern for R154, 3 m being some R60m more than BOE had been prepared to accept.

In their first liquidation and distribution account, the liquidators' fees, calculated on tariff,⁵ amounted to R21, 2 million. Upon querying the account reflecting their fees as such the Master informed the liquidators that he was of the opinion that there was good cause to reduce their remuneration in terms of section 384(2) of the Companies Act. The Master, inter alia, stated in his queries to their account that:

- Intramed was a profitable and well-run company;
- the books of account of Intramed were written up to the date of liquidation and audited financial statements were prepared to that date;
- all of the above are usually absent in a normal liquidation and therefore the liquidators did not have as many onerous duties as is normal in a liquidation of this magnitude.

In the interim, initial and further written

representations on the issue of the liquidators' remuneration were submitted to the Master by the banks and after the liquidators did not take the opportunity to reply to him upon an invitation to do so, the Master fixed their total remuneration for the work done and still to be done by the Liquidators at an amount of R3 250 000.00, provided that their remaining duties were carried out to his satisfaction

The liquidators thereafter responded to this ruling by submitting a second liquidation and distribution account to the Master on 3 July 2001, reflecting liquidators' remuneration in the total amount of R21 049 941.74. This was followed by the institution of review proceedings in Eastern Cape Division which the liquidators lost, hence the Appeal.

Allow me to digress. What is noteworthy is that the liquidators seemed to have maintained the status quo, protected value and run the business effectively. Other agents (which liquidators who earn fees in a percentile based system are) in other spheres of commerce, such as high profile estate agents, who do well in the process of selling high value assets are awarded for doing so whilst liquidators who wish to earn extraordinary fees for extraordinary work are treated with contempt and accused of be unconscionable conduct!

What is quite significant is that Van Heerden AJA, in her Judgment, made reference to and accepted the fact that the Master, ultimately, required the liquidators to provide details - **or at the very least an estimate** - of the time spent by them in the administration of the estate. It is therefore my opinion that the Master is the architect of time based remuneration.

The liquidators told the Master that they had not kept time records as they were not required by law to do so and that they were unable to furnish the

Master with any estimate of the time spent by them. They informed the Master that they had been fully involved and committed to the matter for a period of ten and a half months.

It is evident from the Judgment that the SCA also accepted that the time spent by the liquidators was the most important consideration by the Master as the SCA consequently accepted that the Master ultimately based his assessment on a "generous allowance for the time spent" by the liquidators⁶

Counsel for the Master, submitted that the Master, by virtue of the rate applied to the time estimate, also took the following into account:

- the liquidators' seniority ,
- their expertise as insolvency practitioners; and
- the complexity of the matter.

The Master thereafter used a calculation⁷, which was entirely time based and which the SCA accepted, i.e, he allowed for 15 months spent on the administration of the estate - this being double the 7½ month period which had expired from the date of liquidation to the date of filing of the first liquidation and distribution account - an average of 2½ hours per day, 22 days per month at an hourly remuneration of R1800 per hour for each of the liquidators. This figure totalling R2 970 000 was then increased to R3 250 000,00 taking into account the further work that had to be undertaken by the liquidators in carrying out their remaining duties. No other factor, other than the time spent, was taken into consideration in arriving at this figure.

The SCA furthermore, in upholding the Master's methodology, held that the liquidators⁸

- did not take the trouble of contesting the merits of the Master's decision on its own terms;
- failed to join issue with the Master's time estimates or the adequacy or reasonableness thereof;
- did not dispute the appropriateness of the hourly tariff applied by the Master having due regard to their expertise as insolvency practitioners and to the remuneration of comparably experienced professionals and businessmen engaged in affairs of comparable complexity and importance.

The SCA also accepted that The Master applied an hourly rate of a reasonable time and effort which should have been expended by the liquidators in winding-up the estate and applied a test of reasonableness in relation to the criterion of a percentage of the total projected assets.

The SCA also held that the amount of remuneration derived by the application of the rate to the time estimate by the Master was evaluated by him to result in a remuneration which would still be in excess of 1% of the eventual total projected asset situation in the Intramed estate and which would, in his view, adequately remunerate the liquidators for the amount of work and the complexity of the work done by them.

Although the entire rationale in arriving at the final figure of the liquidators' remuneration was a time based calculation the further gist of the Judgement, in dismissing the Appeal, in my view, was as follows:

1. The Master, as a statutory functionary, is not free to choose whether or not to tax the liquidator's remuneration;

2. The Master must tax in accordance with the tariff (s 384(1)), but having done so, may reduce or increase the amount arrived at by applying the tariff if, in his or her discretion, there is 'good cause' to do so;

3. The dominant provision in s 384(1) remains that the remuneration to which a liquidator is entitled is remuneration for work or services rendered, not a set commission, and that it must be reasonable;

4. The tariff serves as a point of departure for the determination of the appropriate fee;

5. However, once taxation is complete, the Master has a flexible discretion to increase or decrease the amount of remuneration arrived at by the previous application of the tariff ;

6. The concept of 'good cause' is very wide and there is nothing in s 384 of the Act which indicates that it should be interpreted so as to exclude any factor which may be relevant in determining what constitutes reasonable remuneration for a

liquidator's services in the circumstances of each case;

7. Obviously, what factors are relevant will vary from case to case, but one of the factors which may be taken into account (and which was undoubtedly taken into account in the Nel decision is the time spent by the IP in the discharge of the duties involved;

8. This would undoubtedly constitute 'good cause' entitling the Master to increase the tariff remuneration.

All four major banks in South Africa intervened in the matter and strongly argued and supported the Master's argument that the 'swings-and-roundabouts' principle, from the 1908 case of *In Re Insolvent Estate A. McWilliam* was unsupported by any authority since then. Van Heerden AJA agreed and went on to say that it *"...is, more importantly, an untenable and unjustifiable proposition. There is no legal or other reason why creditors in large estates should, albeit indirectly, fund the administration of smaller, less profitable estates"*.

It therefore is no longer competent for the Master or any creditor to argue that the IP must work at a loss in a specific matter because he will earn a substantial fee in a later matter.

Often, IP's having finalised the entire process of winding-up the affairs of and the administration of a small insolvent estate or liquidation, have to be satisfied with the statutory minimum remuneration of R2 500,00 plus VAT or a similarly low amount.

The minimum fee has not been reviewed since March 1995 and statistics revealed that the majority of estates are small! Furthermore, as a consequence of BBEE⁹, there are no longer any sole appointments for IP's. At least one, and often two IP's are joined in each and every matter with a Previously Disadvantaged Appointee regardless of the size of the matter. At present therefore IP's, in such matters, effectively earn R1250, 00, if not R833, 00, each.

Let's assume that the appointed IP's are dissatisfied with their remuneration and apply to the Master for an increase of their remuneration based on an estimate of the time spent in finalising the matter. Let's also assume that the Master refuses to do so and

that the IP's launch, as a so-called "test case", an Application to the High Court to take the Master's decision to refuse an increased remuneration on review and the Master opposes the application.

Having regard to the SCA Judgment in the Nel case, as set out above, please let's "look in the mirror" in so far as the abovementioned "test case" is concerned.

What is therefore "sauce for the goose is sauce for the gander". Regardless of the complexities of the matter, the difficulties experienced by the IP or any other factor, the time spent in the administering an estate of the simplest of nature ought to be taken into consideration in increasing the IP's remuneration for the work done based on the Nel judgment.

Imagine the Presiding Judge at the hearing of the review (in the abovementioned "test case") asking Counsel for the Master in such a review application: **"do you honestly think that R1250.00 / R625,00 is a reasonable fee for the work done in this matter?"**

The answer by Counsel acting for the Master, in our "test case", in order to save face, clearly, ought to be: **"Yes, My Lord"**.

*Hans Klopper
Independent Trustees (Pty) Ltd
Stellenbosch
Cape*

1. Personally conveyed to the writer by Adv Freek Terblanche S.C
2. 2005(1) SA 276 SCA
3. Tariff B of Schedule 2 to the Insolvency Act, 24 of 1936, and read with the Companies Act, 61 of 1973 (Annexure CM 104 read with regulation 24 of the Winding-up Regulations)
4. Article by Isabelle Didier "All you need to know about becoming an Insolvency Practitioner in Europe; France" in Autumn 2006 Newsletter of Eurofenix - www.insol-europe.org
5. See 4 above.
6. Para 40 Page 296
7. Para 40 page 296
8. Para 40 page 297
9. Broad-Based Black Economic Empowerment Act 53 of 2003.

THE AIPSA MISSION STATEMENT

“To create a transparent environment in which our members irrespective of race, creed or gender, can practise their profession in accordance with the Constitution of the Republic of South Africa, so as to provide an effective, professional service to all stakeholders by skilled, independent practitioners with the highest integrity and being mindful of:

- community interests
- the Constitutional Rights of individuals; and
- a sustainable economy.”

DISCLAIMER: The views of those who have contributed to this edition of AIPSA News are not necessarily those of AIPSA. Our aim is to bring you relevant, interesting and hopefully thought-provoking content. If you would like to comment on any of the issues raised, we would be happy to hear from you.

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