THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: A9/03
Reportable

In the matter between

BRIAN BASIL NEL N.O.	**First Appellant**
MICHAEL DE VILLIERS N.O.	**Second Appellant**
and	
THE MASTER OF THE HIGH COURT EASTERN CAPE	**First Respondent**
ABSA BANK LTD	**First Intervening Respondent**
THE STANDARD BANK OF SOUTH AFRICA LTD	**Second Intervening Respondent**
BOE BANK LTD	**Third Intervening Respondent**
FIRSTRAND BANK LTD	**Fourth Intervening Respondent**
NEDCOR BANK LTD	**Fifth Intervening Respondent**

CORAM: ***HOWIE P, HARMS, ZULMAN JJA, JONES, VAN HEERDEN AJJA***

HEARD: ***9 MARCH 2004***

DELIVERED*: 1 APRIL 2004*

Summary: Liquidator's remuneration – reduction of by Master for 'good cause' – interpretation of s 384(1) and (2) of Companies Act 51 of 1973 – ambit of court's powers to review such ruling by Master

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JUDGMENT

VAN HEERDEN AJA

[1] This appeal turns primarily on the proper interpretation of s 384(1) and (2) of the Companies Act 51 of 1973 relating to the determination by the Master of the High Court of the 'reasonable remuneration' to which a liquidator is entitled for his or her services as such. It raises the question of the nature and extent of the Master's powers to reduce or increase such remuneration if, in the Master's opinion, there is 'good cause' for so doing, as well as the ambit of the court's powers under s 151 of the Insolvency Act 24 of 1936, read with s 339 of the Companies Act, to review a ruling by the Master in this regard.

[2] The remuneration to which the liquidator of a company is entitled is regulated by s 384 of the Companies Act, the relevant provisions of which read as follows:

'(1) In any winding-up a liquidator shall be entitled to a reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration . . .

(2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.'

[3] The 'prescribed tariff of remuneration' is provided for in Annexure CM104 to regulation 24 of the Regulations for the Winding-up and Judicial

Management of Companies. In the case of a liquidator 'appointed to liquidate the company', as in the present case, the tariff of remuneration is the same as that which applies in the case of a trustee of an insolvent estate in terms of s 63(1) of the Insolvency Act, ie Tariff B as contained in the Second Schedule to this Act ('the tariff'). In terms of the tariff, the liquidator's remuneration is determined on the basis of specified percentages of various different items, such as, for example, ten per cent on the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income; three per cent on the gross proceeds of immovable property, shares or similar securities sold, life insurance policies and mortgage bonds recovered and the balance recovered in respect of immovable property sold prior to liquidation; one per cent on money found in the estate; six per cent on sales by the liquidator in carrying on the business of the company in liquidation, or any part thereof.

[4] The appellants are the joint liquidators of Intramed (Pty) Limited (in liquidation) ('Intramed'). Purporting to act in their capacity as liquidators, the appellants applied to the High Court (Eastern Cape Division) to review and set aside a ruling made by the first respondent, the Master of that Court, reducing the prescribed tariff remuneration for their services as liquidators to

the sum of R3 250 000. They sought an order declaring that they were entitled to remuneration in the amount of R21 049 941.74, calculated in accordance with Tariff B of the Second Schedule to the Insolvency Act. In the alternative, the appellants requested the court itself to fix their remuneration.

[5] The intervening respondents are five major South African banking institutions, all of which are substantial creditors of Intramed or of its holding company, Macmed Health Care Limited (in liquidation) ('Macmed'), or of both companies. These respondents were granted leave to be joined as parties to the review application. They supported the Master's ruling.

[6] The court *a quo* (per Froneman J, Pillay AJ concurring) dismissed the appellants' application and ordered that the costs of such application and of the joinder application be paid by the appellants personally. Hence the present appeal, brought with the leave of the court below. The appellants do not, however, contest the order joining the intervening respondents as parties to the review proceedings.

Background

[7] Intramed was a wholly-owned subsidiary of Macmed. Macmed was provisionally wound up on 15 October 1999, and the provisional order was made final on 9 November 1999. The first appellant was appointed as one of six liquidators of Macmed and was subsequently nominated by Macmed's major creditors to be the 'lead liquidator' in the Macmed estate. The affairs of Macmed were inextricably interlinked with those of its approximately 45 operating subsidiaries, including Intramed, and the winding-up of Macmed led in turn to the winding-up of these subsidiary companies over a period of approximately six weeks.

[8] Intramed was placed in liquidation, provisionally on 29 November 1999 and finally on 16 February 2000. It is common cause that Intramed was a well-run company and that it traded profitably as a going concern. It was one of only two companies in South Africa which manufactured large volume parentals such as intravenous fluids, oncology products and other pharmaceuticals and appears to have been of strategic importance to the South African medical industry. Its liquidation resulted from large debts which it had incurred, especially to Macmed, in respect of the initial acquisition of its business and also as surety for certain liabilities of Macmed.

[9] On the liquidation of Intramed the appellants were appointed as its liquidators. After investigating Intramed's affairs, the appellants decided not to liquidate its business but to continue trading, with a view to selling the business as a going concern in due course. After trading for some months, the appellants succeeded in selling Intramed's business as a going concern for R154 300 000, the suspensive conditions to this sale being fulfilled by 31 July 2000. The sale price thus achieved was approximately R60 million more than a much earlier offer which the third intervening respondent, BOE Bank Limited, had 'pressurised' the appellants to accept.

[10] The first Intramed liquidation and distribution account was lodged with the Master during July 2000. In this account the appellants claimed liquidators' remuneration of R21,2 million allegedly calculated in terms of the tariff. By means of a query sheet dated 20 July 2000, the Master advised the appellants that he was of the opinion that there was good cause to reduce this remuneration in terms of s 384(2) of the Companies Act. The relevant part of the query sheet read as follows:

'It is evident from the comments in the joint liquidators report that the above Company was a profitable and well-run Company, which had to be placed under winding-up order only because of guarantees signed in favour of two financial institutions for loan

obligations of its ultimate holding company, Macmed Healthcare Limited, which Company was placed under winding-up order on 15 October 1999.

In addition to the above, the books of account of the Company were written up to the date of liquidation and audited financial statements were prepared to that date. All of the above is usually absent in the normal liquidation and therefore the liquidators did not have as many onerous duties as is normal in a liquidation of this magnitude.

In addition to the above the liquidators advertised the sale of the business, which included an immovable property, as a going and profitable concern to prospective buyers and also advertised in the press. It is apparent that only three prospective buyers responded to the above and the highest offer of R154,3 million was then accepted. The liquidators' fee of ± R15,4 million as a result of the aforementioned transaction obviously forms a lion's share of the total fee of R21,2 million.

In the circumstances I am of the opinion that there is good cause to reduce the liquidators' remuneration of R21,2 million in terms of section 384(2) of the Companies Act. However, before I do this I hereby afford you the opportunity to motivate the fee bearing in mind the favourable conditions of this liquidation and the infrastructure that was intact.'

[11] Following a series of discussions and letters between the Master and the appellants, the latter submitted an amended first liquidation and distribution account on 11 September 2000, claiming liquidators' remuneration in the sum of R18 521 736,74. The decrease in the remuneration claimed was due to the fact that the appellants, 'without prejudice and subject to [their]

rights', had recalculated their remuneration by claiming only 3% of the proceeds of the sale of the immovable property, and not 10% as reflected in the previous account. The appellants had initially claimed 10% in respect of the sale of this property as they regarded it as part of Intramed's business which was sold as a going concern.

[12] On 19 September 2000, the Master advised the appellants that a final decision would be taken in respect of the appellants' fees after the amended first account had lain for inspection, but before confirmation. During October 2000, the Master required the appellants to provide him with details – or at the very least an estimate – of the time spent by them in the administration of the Intramed estate. In response, the appellants adopted the stance 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 'other than to state that we [the liquidators] have both been fully involved and committed to this assignment for a period of ten and a half months'.

[13] Also during October 2000, various banks, including the intervening respondents ('the banks'), lodged an objection with the Master in respect of the amount of the fee claimed by the appellants in the amended first account.

Subsequently, during November 2000, the appellants made detailed written representations to the Master, setting out a full account of all aspects of their administration of the Intramed estate and requesting the Master to tax their remuneration in accordance with the prescribed tariff.

[14] On 6 February 2001, the Master made a ruling in regard to an interim fee. He advised the appellants that he was of the opinion that there was good cause to reduce their remuneration in terms of s 384(2) of the Companies Act and directed them to limit their remuneration in the first account to R2 million and to carry forward to the final account the difference between this amount and the amount claimed by them according to the tariff. The Master further advised the appellants that the quantum of their remuneration would be 'considered and fixed once the administration of the estate has reached finality and all the work done by the Liquidators has been assessed and the value of further assets to be accounted for is known'.

[15] The appellants amended the first account in accordance with this direction. In the interim, initial and further written representations on the issue of the appellants' remuneration were submitted to the Master by the banks. These were forwarded to the appellants who were given the opportunity to reply. They did not avail themselves of this opportunity.

During May 2001, the appellants requested the Master finally to determine their remuneration and,

on 29 May 2001, the Master made the following ruling in regard to the appellants' remuneration, which ruling was relayed to the appellants on 28 June 2001:

'In the circumstances I hereby fix a 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 are carried out to my satisfaction. This amount should still be in excess of 1% of the eventual total projected asset situation in the estate and in my view adequately remunerates them for the amount of work and complexity of work that they have done and must still do in this estate.'

[16] The appellants responded to this ruling by submitting a second liquidation and distribution account to the Master on 3 July 2001, claiming liquidators' remuneration in the total amount of R21 049 941.74. This was followed by the institution of the abovementioned review proceedings in the court *a quo.*

The statutory framework

[17] Section 384 of the Companies Act and the statutory provisions governing the 'prescribed tariff of remuneration' for liquidators have been set out above.[1] It was common cause that, in their administration of the Intramed estate, there was no failure or delay by the appellants in the discharge of their duties and that the essential question for determination was therefore the nature and ambit of the Master's powers, in terms of s 384(2) of the Act, to reduce (or increase) a liquidator's remuneration 'if, in his opinion, there is good cause for doing so'. The court *a quo* analysed the provisions of s 384 and held, in effect, that the dominant provision of this section is the entitlement of the liquidator to 'a reasonable remuneration' for 'his services' in terms of subsection (1). Any reduction or increase in the liquidator's remuneration by the Master in terms of subsection (2) must still result in a reasonable remuneration for the liquidator's services. This being so, the words 'such remuneration' in subsection (2) must be read as referring to the 'prescribed tariff of remuneration' mentioned in subsection (1), viz the amount of remuneration arrived at by applying the tariff.

[18] In attacking the findings of the court below, the appellants attempted to attach significance to the fact that the (signed) Afrikaans text of s 384 differs from the English text. Relying on the phrase 'redelike vergoeding vir sy

[1] See paras [2] – [3] above.

dienste wat getakseer *moet* word deur die Meester volgens die voorgeskrewe skaal van vergoeding' (my emphasis) in subsection 384(1), the appellants appeared to contend that the Master is *obliged* without more to apply the tariff; that remuneration and, on determined on the basis of the tariff is per se reasonable, and that a liquidator is entitled to receive exactly what the tariff provides in all cases, save only for a 'disallowance' in terms of the second part of subsection (2) for failure or delay in the discharge of his or her duties. According to counsel for the appellants, remuneration determined according to the tariff acts as an incentive to liquidators to recover as much as possible for an estate, while remuneration 'determined on a time basis' may in certain instances actually operate as a disincentive to liquidators and will not always be for the benefit of the estate. Thus, so counsel contended, it is artificial to draw 'an imaginary line' between 'reasonable remuneration' and 'the prescribed tariff of remuneration' referred to in s 384 (1).

[19] This argument is plainly incorrect. As pointed out by counsel for the intervening respondents, the Master, as a statutory functionary, is not free to choose whether or not to tax the liquidator's remuneration – 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. 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.* The determination of 'reasonable remuneration' by the Master involves, in the first instance, 'taxation' in accordance with the tariff, which includes the categorisation of assets under the various tariff items in order to apply the (percentile-based) tariff to each of the items thus identified. The tariff serves as a point of departure for the determination of the appropriate fee. 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 – the jurisdictional fact for the exercise of this discretion is the forming by the Master of the opinion that 'good cause' exists for doing so. On this approach, there is no difference in meaning between the phrase 'getakseer moet word' and the corresponding phrase 'to be taxed'.

[20] It is also clear that the discretion vested in the Master by s 384(2) is a wide one.[2] I agree with the argument advanced both by the Master and by the intervening respondents that, in taxing a liquidator's remuneration for services rendered, the Master has a duty to satisfy himself or herself as to the reasonableness of the remuneration arrived at by the application of the tariff.

This means that where, in the Master's view, there is 'good cause' for departing from the tariff, the Master has the power to do so. The concept of 'good cause' is very wide[3] 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.[4] Obviously, what factors *are* relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him or her in the discharge of the duties involved. If, in the winding-up of a company, particular difficulties are experienced by the liquidator because of the nature of the assets or some other similar feature connected with the winding-up, this would undoubtedly constitute 'good cause' entitling the Master to *increase* the tariff remuneration. On the other hand, in a situation where, having regard to all the relevant factors, the Master forms the view that the remuneration calculated according to the tariff is excessive in relation to the work done or the responsibility involved, this would likewise entitle the

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[2] See *Thorne v The Master* 1964 (3) SA 38 (N) at 49F-H.
[3] See, for example, *Cohen Brothers v Samuels* 1906 TS 221 at 224.
[4] See C*ollie NO v The Master* 1972 (3) SA 623 (A) at 630D-E; *Rennie NO v The Master; Glaum NO v The Master* 1980 (2) SA 600 (C) at 618D-F; *Gore and Another NNO v The Master* 2002 (2) SA 283 (E) at 293G-H; *Elliot Brothers (East London) (Pty) Ltd v The Master* 1988 (4) SA 183 (E) at 190G-H.

Master – and the Master will be obliged – to depart from the tariff figures by *decreasing* the tariff remuneration to an amount which would be reasonable in the circumstances.[5]

[21] The analysis by the court *a quo* of the relevant provisions of s 384 is, in my view, entirely consistent with the approach set out above. I am not persuaded that Froneman J erred in his interpretation of these statutory provisions. Nor do I agree with counsel that there is any difference of consequence between the meaning and ambit of the phrase 'good cause' used in the English text of s 384(2) and that of the corresponding phrase 'gegronde redes' used in the Afrikaans text. The evaluation by the court below of the exercise by the Master of his discretion under s 384(2) in the circumstances of the present case, and the various attacks launched by the appellants on the court's findings in this regard, will be discussed at a later stage in this judgment.

The nature and basis of the review sought

[5] See *Ex Parte Wells NO: In Re Auto Protection Insurance Co Ltd* 1968 (2) SA 631 (W) at 634A-B, where Galgut J commented that there may well be occasions when the prescribed tariff may be 'over-generous and may allow remuneration in excess of the value of the actual work done. It may well be that there is a large property centrally situated in one of the bigger cities of the Republic which has to be sold and the act of selling it may not involve a great deal of work. To allow a remuneration of 2½ per cent on the proceeds of such sale may in some circumstances constitute an overpayment of remuneration. Similar considerations may well apply if the moveable assets are of a very high value or if the amount of cash found is large.'

[22] In terms of s 151 of the Insolvency Act, read together with s 339 of the Companies Act[6] -

'…any person aggrieved by any decision, ruling, order or taxation of the Master…may bring it under review by the court…'

South African courts have long accepted that the review envisaged by s 151 of the Insolvency Act is the 'third type of review' identified more than a hundred years ago in *Johannesburg Consolidated Investment Co v Johannesburg Town Council,*[7] ie where Parliament confers a statutory power of review upon the court. In the *Johannesburg Consolidated Investment Co* case, Innes CJ stated,[8] with reference to this kind of review, that a court could –

'…enter upon and decide the matter *de novo*. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at…, to deal with the matter upon fresh evidence…'.

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[6] Section 339 of the Companies Act makes the provisions of (*inter alia*) s 151 of the Insolvency Act applicable *mutatis mutandis* to the winding-up of a company.
[7] 1903 TS 111.
[8] At 117.

[23] Thus, when engaged in this third kind of review, the court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred.[9] However, while it is sometimes stated that the court's powers under this kind of review are 'unlimited' or 'unrestricted',[10] this is not entirely correct. The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review.[11] A statutory power of review may be wider than the 'ordinary' judicial review of administrative action (the 'second type of review' identified by Innes CJ in the *Johannesburg Consolidated Investment Co* case),[12] so that it combines aspects of both review and appeal,[13] but it may also be narrower, 'with the

[9] See, for example, *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1991 (1) SA 648 (A) at 655H-656A; *Millman and Another NNO v Pieterse and Others* 1997 (1) SA 784 (C) at 789A-C; *Van Zyl NO v The Master* 2000 (3) SA 602 (C) at 606C-607G; *Gore and Another NNO v The Master* above (n 4) at 288C-289B, and the other authorities referred to in these cases.

[10] See *Johannesburg Consolidated Investments Co* above (n 7) at 117, *Thome v The Master* above (n 2) at 49B-C; *De Hart NO v The Master* 1971 (3) SA 399 (O) at 372A; M S Blackman, R D Jooste & G K Everingham *Commentary on the Companies Act* Volume 3 (2002) 14-325.

[11] See *Van Zyl NO v The Master* above (n 9) at 607 G-H where Griesel J stated the following: 'In considering this question I bear in mind that the Master is the official entrusted by the Legislature with the administration of all insolvent estates (as, indeed, of all other estates as well), including companies in liquidation. As such the Master's rulings ordinarily deserve some deference'.

[12] Above (n 7) at 115-116.

[13] One of the instances of this 'wider' form of statutory review specifically mentioned by Innes CJ in the *Johannesburg Consolidated Investment Co* case was s 105 of the Insolvency Law 13 of 1895 by which 'the remuneration allowed to a trustee by the Master may be reviewed by the Court upon the petition of the trustee or any person interested', the learned Chief Justice remarking (at 116-117) that 'it would be absurd to attempt to review a trustee's remuneration if the grounds of interference were confined to those

court being confined to particular grounds of review or particular remedies'.[14]

[24] It was submitted on behalf of both the Master and the intervening respondents that, in taxing the remuneration of a liquidator under s 384 of the Companies Act, the Master performs a function akin to that performed by a Taxing Master of the High Court or the Supreme Court of Appeal in his or her capacity as the official entrusted with the taxation of bills of costs in litigious matters. The test on review in relation to decisions of the Taxing Master should therefore, so it was contended, be equally applicable to a review of a decision of the Master when he or she performs the function of taxing the remuneration due to a liquidator. This test has recently been re-affirmed by the Constitutional Court in *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another*[15] in the following terms:

'[13] It is settled law that when a court reviews a taxation it is vested with the power to exercise the wider degree of supervision identified in the time-honoured classification of

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mentioned in sec 19 of the Proclamation [the Administration of Justice Proclamation 14 of 1902, dealing with the grounds of judicial review of the proceedings of lower courts – grounds now set out in s 24 of the Supreme Court Act 59 of 1959] or to those irregularities and illegalities which would alone justify the intervention of Courts, say, in regard to the proceedings of a Licensing Board.'

[14] See Cora Hoexter with Rosemary Lyster (edited by Iain Currie) *The New Constitutional and Administrative Law* Volume II: Administrative Law (2002) 67.

[15] 2002 (2) SA (CC) paras [13]-[14] at 73C-74A, footnotes included.

Innes CJ in the *JCI* case [*Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111]. This means

"...that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him ... viz that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his ruling." [*Ocean Commodities Inc and Others v Standard Bank of SA Limited and Others* 1984 (3) SA 15 (A) at 18F-G. See also the discussion by Botha J in *Noel Lancaster Sands (Pty) Limited v Theron and Others* 1975 (2) SA 280 (T) at 282D-283D for a discussion of the nature and limits of the judicial function in this context.]

This *dictum* has not only been re-affirmed fairly recently by the SCA in *JD van Niekerk en Genote Ing v Administrateur, Transvaal* [1994 (1) SA 595 (A)] but has been approved and followed by the Namibian Supreme Court in *Hameva and Another v Minister of Home Affairs, Namibia* [1997 (2) SA 756 (Nms)].

[14] To this there is a qualification, however. Not all decisions by the Taxing Master are equally insulated from judicial interference. In some instances, for example, where the dispute relates to the *quantum* of fees allowed by the Taxing Master, the Courts are slow to interfere with the Taxing Master's assessment. But there are other cases

"...where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion." [Per Millin J in *Wellworths Bazaars Limited v Chandlers Limited and Others* 1947 (4) SA 453 (T) at 457 *in fin*.]

The prime example of such cases is where the Court has better knowledge of the particular question than the Taxing Master, for instance where a point as to admissibility of a segment of evidence is determined by the Court and subsequently bears materially on costs items in dispute.'[16]

[25] On the other hand, counsel for the appellants argued that there is a marked difference between a ruling by the Taxing Master on taxation and the exercise by the Master of his or her discretion, in terms of s 384 of the Companies Act, to reduce or increase the remuneration of a liquidator. I must admit that I fail to see what this 'marked difference' is. The appellants appear to approach this matter on the basis that the court's powers when reviewing a ruling by the Master in this regard are unrestricted and that it is not necessary to find that the Master was 'clearly wrong', the enquiry simply being whether the Master's conclusion was right or wrong. I disagree. As I have indicated above,[17] it is important to have regard to the nature of the functions entrusted to the person whose decision is under review. In my view, there is no reason to draw any distinction between the test on review in relation to decisions of a Taxing Master and that applicable to a review of a decision of the Master when he or she performs the function of taxing the

[16] See also *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa* 2003 (3) SA 54 (SCA) para [25] at 63E-F.
[17] In para [23].

remuneration due to a liquidator. In both cases, where the dispute concerns the *quantum* of remuneration allowed, the court should be slow to interfere.

[26] This is not, however, the end of the matter. The only ground of review specifically articulated by the appellants in their founding papers reads as follows:

'It will, at the hearing of this application, be argued that the Respondent [the Master] erred in fixing the liquidators' remuneration based on an assumption of the time spent by the liquidators in the administration of the estate and that the Respondent should have had regard to the tariff when fixing the liquidators' remuneration.'

The appellants make no reference whatsoever in their founding papers to the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('the AJA'). The date of commencement of the AJA was 30 November 2000 and it was therefore in operation at the time that the Master's final ruling was made on 29 May 2001. In his answering affidavit, the Master alleges that it was incumbent upon the appellants pertinently and clearly to bring their review application within the provisions of the AJA. The relevant paragraphs of the answering affidavit are in the following terms:

‘22. I contend that the provisions of the AJA are indeed applicable to this review, and that accordingly in terms of the provisions of Section 6 thereof the review must be judged within the terms of that section particularly Sub-section 2 thereof. The principles and procedures of the AJA must be satisfied . . .

23. Presumably the Applicants [the appellants] do not and will not allege that the administrative decision that was taken by me falls within any reviewable context other than that referred to in Section 6(2)(*h*), which must, to be reviewed, constitute the exercise of a power which is: “ . . . *so unreasonable that no reasonable person could have so exercised the power or performed the function . . . ”,* alternatively that I have acted capriciously or arbitrarily.

24. Indeed in answering the founding papers in this matter I must confess to some difficulty in appreciating the actual basis upon which the review is brought, based on the broad “*unfocussed”* allegations contain in the founding papers . . . .

. . . .

27. It ought to be said that I do not understand the Applicants to be alleging bias, that the action was procedurally unfair or was constituted by an error of law, that I acted with any ulterior purpose or motive or took into account irrelevant considerations or alternatively failed to consider relevant considerations. No bad faith is alleged believing [sic: leaving?] only unreasonableness as the supposed basis of the application.’

In the replying affidavit, the appellants, dealing with the Master’s reference to the AJA, baldly state the following:

'As is apparent from what is set out in the founding affidavit, the respondent [the Master] took into account irrelevant matters because of the unauthorised and unwarranted dictates of creditors and purported creditors, and acted arbitrarily and capriciously.'

Moreover, in response to the Master's detailed exposition in his answering affidavit of the various factors and circumstances, over and above the time spent by the liquidators, taken into consideration by him in making his ruling, the appellants simply persist with the contention that assumptions made by the Master in regard to the time spent by them in the administration of the Intramed estate were the *only* basis for the Master's ruling. They dismiss summarily, as an 'afterthought', the Master's allegation of the other factors considered by him in coming to his eventual finding.

[27] The court *a quo* dealt with the provisions of the AJA as follows:

'The AJA seeks to give effect to the fundamental right to lawful, reasonable and procedurally fair administrative action and the right to be given written reasons, entrenched in s 33 of the Constitution. It is, in a certain sense, a codification of the principles relating to the second kind of review referred to by Innes CJ in the *JCI* case . . . . Previously those principles derived their authority from the constitutionally allowed inherent common-law jurisdiction or competence of the superior courts. They now find their authority in the written Constitution (*Pharmaceutical Manufacturers Association of*

South Africa: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)). The third kind of review, however, derives its existence from specific statutory enactments that provide for powers of review far wider than the powers of the first two kinds of review (compare the remarks of Innes CJ at 116-117 of the *JCI* case). This kind of review thus incorporates constitutional review (based previously on the common law and now on the written Constitution), but also extends it beyond constitutional review grounds. The extension does not offend the constitutional separation of powers, because it is the legislature that expressly authorises the courts to go further than the constitutional review founded upon that separation of powers.

To the extent that a review under s 151 of the Insolvency Act (applicable to companies by virtue of s 339 of the Companies Act) is based on constitutional review, it must fall within the codified categories of review under the AJA. To the extent that it goes beyond constitutional review (something that, by definition, implies no conflict with the grounds of constitutional review), it falls outside the ambit of the AJA or, perhaps, it resorts under the catch-all category of *"action . . . otherwise. . . unlawful"* in s 6(2)(*i*) of the AJA.

As mentioned earlier, the only specific basis for review set out in the liquidator's papers is the alleged misconceived reliance by the Master on a time-related assessment to determine the liquidators' remuneration. This may conceivably amount to a ground under s 6(2)(*d*) ("*materially influenced by an error of law"*) or s 6(2)(*e*) ("*taking irrelevant considerations into account"*). In argument, however, reliance was also placed on the extended 'appeal-type' power of review. In either case the nature and extent of the Master's power to fix the remuneration of a liquidator is crucial to determine the outcome of the review application.'

[28] To my mind, there is certainly something to be said for the view that, in attacking the Master's ruling, the appellants should have formulated their grounds of review so as clearly to bring such grounds within the purview of those enumerated in s 6(2) of the AJA. The Master's ruling in this case would certainly seem to fall within the ambit of the definition of 'administrative action' in s 1(i) of the AJA, viz

> ' . . any decision taken, or any failure to take a decision, by –
>
> (*a*) an organ of state, when –
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in term of any legislation; or
>
> *(b*) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect . . .'.

[29] By giving 'legislative form and detail to the fundamental principles of administrative law entrenched in s 33 of the Constitution',[18] the AJA introduced a new era in South African administrative law, placing the

[18] See Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) para 1.1.

control of administrative power – including the judicial review of administrative action – largely on a statutory footing.[19] As is evident from the abovequoted passage from the judgment of Innes CJ in the *Johannesburg Consolidated Investment Co* case,[20] the third (wider) kind of review appears to have more to do with the powers of the court of review and the evidence which such court may take into consideration rather than with the grounds of review. It can therefore be argued that the 'material disparity' ground of review referred to by the Constitutional Court in the *Gauteng Lions Rugby Union* case[21] now also falls within the grounds of review listed in s 6(2) of the AJA. There is, however, another view, namely that there is a very real possibility that some actions by administrative officials may fall outside the ambit of the definition of 'administrative action' in s 1(i) and hence *not* be governed by the AJA.[22] The breadth (or narrowness) of the sphere of application of the AJA and the precise relationship between the Constitution, the AJA and the common law are issues that will undoubtedly exercise South African courts for some time to come.[23] However, as I am satisfied,

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[19] See Hoexter et al *op cit* (n 14) 66-67. See also *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* (Case CCT 27/03, unreported decision of the Constitutional Court delivered on 12 March 2004, paras [22]-[25].

[20] See para [22] above.

[21] Above para [24].

[22] See *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C) at 192G–193A and the other authorities there cited, in particular Cora Hoexter 'The Future of Judicial Review in South African Administative Law' (2000) 117 *SALJ* 484 at 514 *et seq*.

[23] See the *Bato Star Fishing* case *op cit* (n 19) paras [21], [22] and [25]; see also Hoexter et al *op cit* (n 14) 66-67, 87-89, 110-113; also GE Devenish, K Govender & D Hulme *Administrative Law and Justice in*

for the reasons set out below, that the appellants have not made out a case either under the AJA or under the wider 'appeal-type' of review, it is neither necessary nor desirable to say anything further in this regard.

The exercise of the Master's discretion

[30] As indicated above, I am of the view that the Master's approach to the nature of his functions under s 384(2) of the Companies Act is the correct one and that, in the exercise of his duties in this regard, he has to consider each case on its own facts and properly exercise his discretion under s 384(2) so as to ensure that the remuneration calculated according to the tariff is reasonable and justifiable in the light of the actual services rendered by the liquidator or liquidators concerned. In determining whether there is 'good cause' for reducing the tariff remuneration, the Master is perfectly entitled to have regard, *inter alia,* to the fact that such remuneration –

'. . . is seen to be disproportionate to the value of the work done in the particular estate or where the property is of a very high value and calculation of the remuneration according to tariff has an inflationary effect which results in a remuneration which is seen to be excessive in the circumstances or induces a sense of shock.'[24]

South Africa (2001) 177-178, 424-427; Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 4ed (2001) 497 *et seq.*

[24] See the Master's ruling in respect of an interim fee dated 6 February 2001, Annexure 'BN 52' to the appellants' founding papers.

[31] I agree with the finding of the court *a quo* that, while it is neither desirable nor possible to define 'good cause' in this regard, the Master's opinion as to what constitutes good cause must have as its purpose the determination of a *reasonable* remuneration for the liquidators' *services:*

'This implies some objectively determinable limits to the exercise of the Master's discretion informing his or her opinion. If the factors that lead the Master to the opinion are not rationally related to the object of determining a reasonable remuneration for services rendered or done by the liquidator, the exercise of the discretion will not be proper and may, on those objectively justifiable grounds, be set aside on review'.

[32] In the court *a quo*, the appellants contended that it was impermissible for the Master *at all* to take into account the amount of time spent by them in the fulfilment of their duties in administering the Intramed estate in order to decide whether there was good cause for the reduction of the tariff remuneration. In argument before this court, the appellants tempered this submission to a certain (albeit limited) extent, but still insisted that the Master had 'put the cart before the horse' by first calculating the time that would have been spent, according to him, on the performance of their task by the appellants; then deciding that good cause existed for the reduction of

the appellants' remuneration; and then awarding an amount more or less in accordance with his time-based calculation.

[33] According to the appellants, the reasons given by the Master for his final ruling, the events leading up to the exercise of his discretion in making such ruling, and the methodology adopted by him illustrated that he, from the outset and at all times, approached the matter on the basis that the appellants should be paid per hour for the work done by them. Following this approach, so it was contended, the Master compared the amount of the remuneration assumed to be appropriate on this 'time basis' with the tariff amount which induced a sense of shock in him, whereupon he decided that good cause existed for the reduction of the appellants' remuneration.

[34] The voluminous papers before us clearly show that this 'slant' placed by the appellants upon the Master's approach is not factually correct. As indicated above, the question of a possible reduction of the appellants' tariff remuneration was first raised by the Master in his query sheet dated 20 July 2000.[25] In that document, the Master noted various factors which, in his view, cumulatively indicated that there may be 'good cause' to reduce the appellants' remuneration in terms of s 384(2) of the Companies Act. The

time spent by the appellants in the administration of the Intramed estate was not one of the factors specifically mentioned. Both at this time, and on several subsequent occasions, the appellants were given the opportunity to motivate their tariff remuneration and to comment on the various written representations received by the Master from the banks in substantiation of their objections to this tariff remuneration. Moreover, as will be discussed in further detail below, the appellants are not correct in suggesting (apparently as a further 'string to their bow') that the Master took the approach that a liquidator who properly performs his or her functions in terms of the Companies Act should forfeit some of the tariff remuneration to which such liquidator is entitled *simply* by virtue of the size of the estate concerned, irrespective of the actual degree of care, skill, diligence and competence with which the liquidator's duties have been performed.

[35] The court *a quo* correctly held that the appellants' stance that the Master's ruling was 'based on assumptions made by First Respondent [the Master] in regard to time spent by the liquidators in the administration of the Intramed estate' and that the time factor was, in essence, irrelevant, was an untenable proposition. As pointed out by Froneman J, the appellants are only entitled to a '*reasonable remuneration'* for their services in terms

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[25] See para [10] above.

of s 384(1). The time spent by them in rendering these services is, at the very least, *one* of the factors that may legitimately be taken into consideration by the Master in deciding whether there is good cause for the reduction of the tariff remuneration. It is clearly not the *only* factor to be considered and, depending upon the circumstances of each particular case, it may not be the most important factor, but a consideration thereof is clearly rationally related to the object of determining a reasonable remuneration for services rendered. The appellants' attempt, in both their founding and replying papers, to contest the Master's averment that the issue of time was not the only factor taken into account by him in making his final ruling, is not convincing. The facts on the papers indicate that the Master considered a relatively wide range of other factors relevant to the administration by the appellants of the Intramed estate in coming to his final assessment. To my mind, therefore, the court *a quo* was correct in finding that the appellants had not made out any case on the papers for the setting aside of the Master's ruling on 'constitutional review grounds under the AJA' for having regard to the time spent by the appellants in the administration of the Intramed estate as one of the factors to be taken into account in determining whether good cause for reduction of the tariff remuneration existed.

[36] What then of the appellant's argument that the Master was in any event wrong or clearly wrong in his conclusion that good cause for a reduction of the tariff remuneration did exist in this case? In this regard, counsel for both the Master and for the intervening respondents contended that a determination of the extent of the services rendered by a liquidator necessarily involves an assessment of the time and effort expended by the liquidator in winding-up the estate concerned. The fee prescribed by the tariff must be assessed for reasonableness by way of a critical assessment of such prescribed fee in the light of the time and effort expended by a liquidator, taking into account (*inter alia*) the degree of complexity of his or her duties in the winding-up. I agree with this submission and it is borne out by the approach adopted by this court in *Collie NO v The Master*.[26] The appellants submitted that, before the Master may '*move away'* from the tariff remuneration, either by increasing or reducing such remuneration, the circumstances of the case concerned must be 'extraordinary', 'exceptional' or 'entirely different to the general run of cases'. In this regard, the appellants relied quite heavily on what they called the 'swings–and–roundabouts' principle, emphasising the following *dictum* of Beaumont J in the 1908 case of *In Re Insolvent Estate A. McWilliam*:[27]

[26] Above (n 4) at 627B, read with 629H-630H.
[27] 29 NLR 42 at 43-44.

'I am strongly of opinion that the fee which has been charged is quite out of proportion to the work which has been done. It seems to be out of reason that where the work is exactly the same whether the land is worth £50 or £5 000, in the one case the trustee should get a fee of 25s and in the other £125; but we have to remember that in all these estates the trustees have to take the fat with the lean – in some portions of the administration they may lose money, and in others perhaps gain.

The law states very distinctly that in the case of immovable property 2½ per cent is to be considered as a reasonable fee to be charged – it makes no difference what the value of the land is. Before the Court can exercise its discretion and alter that rate, I think it should be satisfied that there is something entirely different in this case to the general run of cases. I am unable to say that the circumstances of this case are different from those in any other case where land is sold by a trustee, and therefore it would, in my opinion, be unwise to interfere. The fact of our interfering would at once create great uncertainty as to the proper charge to be made, and we should continually applied to, to exercise our discretion, and to modify or vary charges which had be made by trustees. Trustees would be in uncertainty – the public would be in uncertainty, and the trustees might possibly feel themselves pressed to reduce their charges, or to face litigation . . . '.

[37] This 'swings–and–roundabouts' principle is apparently based on the premise that an insolvency practioner may administer a substantial number of small and relatively unprofitable insolvent estates, but will, from time to time, be appointed to administer a large and particularly profitable estate, where the size of the liquidator's percentile-based fee calculated in

accordance with the tariff will 'compensate' him or her for the relatively poor returns on the numerous 'unprofitable' estates which he or she administers. I agree with the submission made by counsel both for the Master and for the intervening respondents that this 'swings–and-roundabouts' principle is unsupported by any authority since the 1908 decision in the *McWilliam* case[28] and 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.

[38] The appellants maintained that it would be quite impossible for them to furnish the Master with even an estimate of the time spent by them in administering the Intramed estate. Moreover, they argued, it is common cause that the Master did not require them to keep any record of time spent by them in winding-up the estate at the time that they accepted their appointments, nor at any other stage prior to the dispute regarding their

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[28] In any event, the principle appears to have been rejected, at least by implication, by this court in the *Collie* case, above (n 4). This case concerned the application of s 51(3)(*a*) of the Administration of Estates Act 66 of 1965, which empowers the Master, when in any particular case there are special reasons for doing so, to reduce or increase the remuneration of an executor calculated in accordance with (*inter alia*) the prescribed tariff. There too, the Master had indicated that the fees calculated according to the tariff 'appear to be excessive' and had requested 'motivation or representations why same should not be reduced' at (627D). There too, part of the answer given by the executor was that 'many of the smaller estates are distinctively unprofitable and are dealt with by us largely as a public service. Very infrequently an estate of the calibre of the present one is handled and this helps to balance our costs as professional executors' (at 627F). It is evident from the rest of the reported judgment that this argument did not find favour with the

remuneration arising. According to the appellants, the Master considered the necessity for time records as a material and extremely important factor in assessing the remuneration to which they were entitled and, incorrectly, adopted the approach that he could not adequately comply with his obligation to confirm the relevant account unless he had been referred to estimates of time kept by the appellants. The answer to these complaints is a simple one: while the appellants were not under any legal or other duty to keep time records regarding the fulfilment by them of their duties in administering the estate, it is clear from the correspondence exchanged between them and the Master that this was *not* what the Master required of them. The Master did not demand that he be furnished with time sheets, but rather requested details regarding the time and effort spent by the appellants in administering the estate – at the very least an estimate of the time spent on the various administrative duties performed by the appellants in this regard. The appellants, in response, declined to furnish the Master with even an estimate of the time spent by them, seeking to justify their fees by reference to the broad general categories of work performed by them in the winding-up of the Intramed estate without attempting properly to detail the ambit and extent of their involvement or the time which they devoted to the winding-up. Contrary to what is suggested by the appellants, it is clear from the

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court which held that the Master had correctly fixed 'a fee as remuneration for an executor's services taking

papers that the Master did not seek to place any *onus* on the appellants to justify the fee claimed by them in the amended liquidation and distribution account by furnishing him with time sheets or records. What the Master did, quite properly, was to give the appellants various opportunities to furnish him with details of facts and circumstances relevant to the exercise of his discretion.

[38] In their founding papers, the appellants complain that 'neither the respondent [the Master] nor the creditors [the banks] have the remotest idea of the actual time spent and do not even venture a suggestion in this regard'. In his answering affidavit, the Master points out – quite logically – that this was precisely why he initially sought guidance from the appellants themselves in this regard by requesting them to furnish him with estimates of the time spent. However, because of the appellants' failure to do so, the Master 'was then obliged to make my own informed estimate of the time factors and deny that I do not have a good idea what result this renders'. The appellants complained that the manner in which the Master ultimately calculated their remuneration was nothing more than a 'thumb suck, based on imaginary hours and on imaginary hourly rate to which the Master added a totally arbitrary amount in respect of work, as yet unknown, still to be

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into account work done and the circumstances of the case, with the tariff as a guideline (at 629B-D).

done in future'. This complaint too is not well-founded. As regards the amount added by the Master in respect of work to be done by the appellants in the future, the court *a quo* correctly pointed out that the final ruling was insisted upon by the appellants themselves despite the fact that, in terms of his interim ruling dated 6 February 2001, the Master had advised the appellants that the final *quantum* of their remuneration would be fixed upon finalisation of the liquidation, once all the work done by the appellants had been assessed and the value of further assets to be accounted for was known.[29] In this interim ruling, the appellants had been directed to limit their remuneration in the first account to R2 million, but to carry forward to the final account the difference between this amount and the amount claimed by them according to the tariff. By insisting upon a final ruling, the appellants to my mind precluded themselves from complaining, as they sought to do before us, that the remaining work includes extensive, substantial and complex litigation, which is unlikely to be finalised in the immediate foreseeable future. For the finality of the Master's ruling, the appellants have only themselves to blame.

[39] As regards the other complaints levelled by the appellants against the Master's final ruling, I am of the view that both the ruling itself, as also the

[29] See above para [14].

preceding correspondence between the parties, indicates that the Master ultimately based his assessment on a generous allowance for the time spent by the appellants for the full period of their appointment, in addition to making allowance for work still to be done in winding-up the balance of the estate. As submitted by counsel for the Master, the Master's allowance, by virtue of the rate applied to the time estimate, takes into account the appellants' seniority,[30] their expertise as insolvency practitioners and the complexity of the matter. In determining the extent of the remuneration finally awarded, the Master allowed for 15 months spent on the administration of the Intramed 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 appellant. This figure totalling R2 970 000 was then increased to R3 250 000, taking into account the further work that had to be undertaken by the appellants in carrying out their remaining duties. As pointed out by the court *a quo*, the appellants did not take the trouble of contesting the merits of the Master's decision on its own terms, adopting an 'all-or-nothing

[30] In *Stubbs v Johnson Brothers Properties CC and Others* 2004 (1) SA 22 (N) at 28B-D, Magid J pointed out that the *actual* experience and seniority of a legal practitioner who appears in a matter, rather than the experience and seniority *required of* the legal practitioner to present the case, is not relevant to the assessment of a proper fee to be allowed on taxation. This would probably also apply to the taxation of a liquidator's remuneration. However, in the present case, the appellants have certainly not been prejudiced

approach'. They failed to join issue with the Master's time estimates or the adequacy or reasonableness thereof. They 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 application of an hourly rate to the Master's assessment of a reasonable time and effort which should have been expended by the appellants in winding-up the estate was further subjected by the Master to a test of reasonableness in relation to the criterion of a percentage of the total projected assets. 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 appellants for the amount of work and the complexity of the work done by them. Even on a wider 'appeal-type' review, it cannot be said that the Master was wrong in the exercise of his discretion in terms of s 384(2). As pointed out by the court *a quo* –

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in any way by the Master's having taken their actual seniority and level of experience into account, in their favour, in determining an appropriate remuneration for them.

'…the banks' representations to the Master showed that the prescribed tariff remuneration was far in excess of ordinary commercial remuneration for that kind of endeavour. On these facts I do not think one can make a finding that the Master was wrong informing the opinion that good cause for the production of the tariff remuneration existed.'

[40] The appellants argued in the court *a quo*, and persisted in this argument before this court, that the words 'such remuneration' in s 384(2) of the Companies Act, which may be reduced or increased by the Master in exercise of his discretion, refer *only* to the percentages allowed in the tariff and do not, on any interpretation, import the reasonable fees to which other professionals would be entitled for similar work. Since the Master is directed in the first instance to tax the liquidators' remuneration in accordance with the tariff, he or she is obliged to follow that course when reducing the remuneration – he or she must look at the tariff and reduce *it* accordingly.

[41] The grounds upon which the court *a quo* rejected this argument are, in my view, entirely correct:

'The taxation process involves, amongst other things, the categorisation of assets in order to determine what prescribed tariff applies to the particular asset. Sometimes disputes arise about the correctness of the Master's categorisation of assets in the taxation . . . .,

but those are disputes still falling squarely within the ambit of the taxation process in s 384(1). It is only once the taxation process in this form is complete, namely the category of item established and the prescribed tariff for that item identified, that it become possible for the Master to consider whether good cause exists for the reduction of the already prescribed tariff for the already established category. Without that having been established first, the application of s 384(2) is impossible. There would be no "*such remuneration"* to reduce or increase. Only with the tariff for a particular item established, is the Master able to consider whether "*such remuneration*" should be reduced on good cause. In so doing the tariff may serve as a guideline, but other factors such as the amount of work done, may also be considered. . .

There is nothing in the wording of s 384(2) of the Companies Act that prescribes how the Master should determine the extent to which the remuneration taxed in accordance with the prescribed tariff under s 384(1) should be reduced. The Master may do this in a number of ways, provided that his method is rationally connected to the purpose of determining a reasonable remuneration for the liquidators' services . . .

Applying that the approach to the facts, no fault can be found with the Master's assessment . . .'

Costs

[42] As I have indicated above, the appellants purported to bring their review application in their capacity as the duly appointed joint liquidators of Intramed, contending that they were duly authorised in such capacity to

institute the review proceedings. As correctly pointed out by the Master in his answering affidavit, the appellants failed to annex any evidence which supported this contention. The review proceedings were in fact proceedings which should obviously have been brought by the appellants in their personal capacity and not in their capacity as joint liquidators − the proceedings relate to their entitlement to remuneration and not to a matter falling within the ambit of their role as liquidators of the Intramed estate. As contended by counsel for both the Master and the intervening respondents, the appellants were simply seeking to secure a higher fee for their services than that fixed by the Master. In so doing, they were acting in their personal capacities and not in any sense in the interests of the creditors of the Intramed estate. Indeed, the appellants were − and still are − acting against the interests of the creditors, solely for their own benefit.[31] This being so, there is no reason whatsoever why the costs of the review application or of the appeal should be borne by the company in liquidation .

Order

[44] In the circumstances, the following order is made:

[31] See *Rennie NO v The Master; Glaum NO v The Master* above (n 4) at 605C-D; *Gore and Another NNO v The Master* above (n 4) 5 at 294F-I.

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel where applicable, such costs to be paid by the appellants in their personal capacities jointly and severally.

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VAN HEERDEN AJA

Concur:
HOWIE P
HARMS JA
ZULMAN JA
JONES AJA