THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1120/2019

In the matter between:

FIRSTRAND BANK LIMITED	**APPELLANT**
and	
MASTER OF THE HIGH COURT (PRETORIA)	**FIRST RESPONDENT**
THE BODY CORPORATE OF VICTORY PARK	**SECOND RESPONDENT**
CORNELIA CAROLINA MIENIE NO	**THIRD RESPONDENT**
IGNATIUS CLEMENT MIKATEKO SHIRILELE N O	**FOURTH RESPONDENT**
NEDBANK LIMITED	**FIFTH RESPONDENT**
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**SIXTH RESPONDENT**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**SEVENTH RESPONDENT**

Neutral citation: *FirstRand Bank Limited v Master of the High Court (Pretoria) and Others* (Case no 1120/19) [2021] ZASCA 33 (7 April 2021)

Coram: WALLIS, SALDULKER and DLODLO JJA and GOOSEN and MABINDLA-BOQWANA AJJA

Heard: 23 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 April 2021.

Summary: Insolvency Act 24 of 1936 – interpretation of ss 106, 89 (2) and 14 (3) – liability for costs of sequestration when there is no free residue or free residue is insufficient – whether secured creditors relying solely on their security are liable to contribute – whether petitioning creditor is solely liable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Vilakazi AJ, sitting as a court of first instance):

1 The appeal is upheld.

2 Paragraph 3 of the order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following order:

> '3. That the Third and Fourth Respondents are directed to amend the first and final liquidation, distribution and contribution account to reflect that the Second Respondent is solely liable to pay the contribution of R46 663.16.'

3 There is no order as to costs.

JUDGMENT

Mabindla-Boqwana AJA (Wallis, Saldulker and Dlodlo JJA and Goosen AJA concurring):

Introduction

[1] This appeal concerns the interpretation of s 106, read with ss 89(2) and 14(3), of the Insolvency Act 24 of 1936 (the Act) dealing with the liability of creditors to pay a contribution where there is insufficient or no free residue in an insolvent estate to meet expenses, costs and charges connected with the

sequestration. Such costs are a charge against the free residue in terms of s 97(2)*(c)* of the Act.

[2] This issue has been a subject of controversy for a while within the insolvency law academic circles.[1] The debate centres on the question of which creditors are liable to pay a contribution for costs where there is a shortfall in the free residue. Does the burden to contribute lie with all creditors who have proved claims against the estate? Does that include secured creditors who have proved their claims but relied solely on their security? And what about the petitioning[2] creditor who applied for the sequestration of the estate in the first place? These questions engaged Vilakazi AJ in the Gauteng Division of the High Court, Pretoria (the high court). But first, the background that led to the application before Vilakazi AJ.

Background

[3] The insolvent, Mr J Z Msimango, prior to his sequestration, owned two sectional title units, which were separately bonded, one to Nedbank Limited in the amount of R577 800 (property 1) and the other to First National Bank (FNB), a division of the appellant (FirstRand), in the amount of R645 840 (property 2) respectively. The unit mortgaged in favour of Nedbank (property 1) fell within the sectional title scheme administered and managed by the second respondent (the Body Corporate).

[4] On 7 October 2009, the Body Corporate launched an application in the high court for the sequestration of the insolvent's estate on the basis that the

[1] P M Meskin, edited by: Professor André Boraine *et al Meskin's Insolvency Law* (1990) LexisNexis Online (updated 2020) para 11.8.1.
[2] This is the sequestrating creditor, the procedure by way of petition having been abolished.

insolvent owed it R22 000 in arrear levies. A year earlier it had obtained a default judgment against the insolvent in the Pretoria Magistrates' Court for payment of the sum of R8 895.64.

[5] The Body Corporate approached the high court on the strength of a *nulla bona* return issued by the sheriff which rendered the insolvent's conduct an act of insolvency within the ambit of s 8*(b)* of the Act. In its sequestration application, the Body Corporate contended that, '[b]oth properties will be sold when the Respondent [the insolvent] is sequestrated and that as such the probability of a substantial dividend becoming available to concurrent creditors is very likely'. A security certificate was issued by the Master of the High Court, Pretoria (the Master) stating that sufficient security had been given by the Body Corporate for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings, and of all costs of administering the estate until a trustee had been appointed and, if no trustee was appointed, all fees and charges necessary for the discharge of the estate from sequestration.

[6] A final order of sequestration was granted by the high court on 14 June 2010 and the third and fourth respondents were appointed as trustees and confirmed on 12 August 2011. Nedbank proved its claim of R679 512.82 at the second meeting of creditors held on 22 November 2012. Property 1 was sold for an amount of R350 000 and transferred to the buyer. To effect registration of transfer, the municipality was paid an amount of R14 643.44 and the Body Corporate R178 647 from the sale of proceeds in accordance with s 15B(3)*(a)*(i)(*aa)* of the Sectional Titles Act 95 of 1986

(the Sectional Titles Act).[3] The property was further sold by its buyer to another purchaser for R580 000. The Body Corporate did not prove a claim.

[7] The appellant alleges that it had no knowledge that the insolvent had been sequestrated. It had started a foreclosure process prior to sequestration and property 2 was sold at a sale in execution on 15 September 2010 for the sum of R330 000.[4] It was then registered on December 2010 in the name of the purchaser. The proceeds from the sale in execution were paid to FNB. FNB proved a claim of R617 686.86 together with interest thereon at 9.25% at a special meeting of creditors on 17 May 2015. It had indicated in its affidavit lodged in terms of s 44(4) of the Act that it relied solely on its security in satisfaction of its claim. Subsequent to that, FNB was called upon by the trustees to refund the insolvent estate an amount of R30 697.91 made up of costs relating to the realisation of the security in terms of s 89(1)[5] of the Act

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[3] Section 15B(3)(*a*)(*i*)(*aa*) of the Sectional Titles Act 95 of 1986 reads:
'(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him-
(a) a conveyancer's certificate confirming that as at date of registration-
(i) *(aa)* if a body corporate is deemed to be established in terms of section 2 (1) of the Sectional Titles Schemes Management Act, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof.'

[4] In addition to the price the purchaser paid the clearance amounts due to the municipality and the body corporate.

[5] '**89 Costs to which securities are subject**
(1) The cost of maintaining, conserving and realizing any property shall be paid out of the proceeds of that property, if sufficient and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention the deficiency shall be paid by those creditors, *pro rata*, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees, and if the property is immovable, any tax as defined in subsection (5) which is or will become due thereon in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realization.'

(R13 587.89), a contribution to the costs of sequestration in the amount of R17 028.82 and costs of a special meeting at R81.20.

[8] The Trustees' First and Final Liquidation, Distribution and Contribution Accounts (the L&D Account), prepared by the third and fourth respondents, reflected a contribution in the amount of R46 663.16 payable by the proven creditors (FNB & Nedbank) on a pro rata sharing basis. Nedbank's share was reflected as R29 634.33 whilst FNB's was R17 028.82. The Body Corporate was not reflected as being liable to pay any contribution at all.

[9] The appellant did not take issue with the s 89(1) costs or the costs for the special meeting, but felt aggrieved with being required to pay a contribution towards the costs of sequestration. It accordingly delivered a written objection to the L&D Account to the Master on the basis that, as the petitioning creditor, the Body Corporate was the creditor liable to pay the contribution as envisaged by s 14(3) of the Act.

[10] The Master's response to this objection was inter alia that, whilst a petitioning creditor would be liable to contribute to the costs of sequestration in terms s 14(3) of the Act, there was an exception to this rule. Relying on selected parts of a publication authored by Dr David Burdette,[6] the Master reasoned:

'4. The exceptions to this rule are namely arrear taxes owing on fixed property (in terms of section 89(1) and (5) of the Insolvency Act) and arrear levies owing in respect of sectional title units (in terms of the provisions of the Sectional Titles Act, 95 of 1986, as interpreted

[6] Then of the University of South Africa.

by the Courts in *Nel v Body Corporate of Seaways Building* 1996 (1) SA 131 (A) and *Barnard v Regspersoon van Aminie* 2001 (3) SA 973 (SCA)).

5. Arrear taxes on fixed property and arrear levies in respect of sectional title units are considered to form part of the administration expenses, despite the fact that the obligation to pay these amounts arose prior to sequestration.

6. The arrear levies are part of the costs to be paid prior to the Registrar of Deeds giving effect to the transfer of the property. Therefore, there can never be a claim for arrear levies in law currently.

7. The Supreme Court of Appeal has determined that the claims by Body Corporate for arrear levies are not affected by the provisions of the Insolvency Act.

. . .

11. If one considers the effect of the *Barnard* decision where it was stated that legal expenses incurred in trying to recover the levies or costs involved in bringing the application for the sequestration of the debtor's estate, form part of the levies and may be claimed from the proceeds of the Sectional Title Unit. If this aspect of the *Barnard* decision is to be applied consistently, it would mean that any contribution payable by a Body Corporate in terms of Section 14(3) will also form part of the levy, and the amount will ultimately be paid from the proceeds of the [Sectional] Title Unit. This in turn means that there will be less funds available with which to pay the secured creditor and indirectly has the effect that secured creditor is paying the contribution.

12. For the reasons stated above, the Body Corporate is not liable for contribution.'

[11] The appellant took this decision on review to the high court on the basis that the Master incorrectly interpreted s 14(3) read with s 106 of the Act and misapplied the *Nel*[7] and *Barnard*[8] decisions. It sought an order directing the trustees to amend the L&D account to reflect that the Body Corporate was solely liable to pay the contribution of R46 663.16, alternatively that the Body Corporate, FNB and Nedbank were liable *pro rata* to pay the contribution. It

[7] *Nel N O v Body Corporate of the Seaways Building and Another* 1996 (1) SA 131 (SCA).
[8] *Barnard N O V Regspersoon van Aminie en 'n Ander* 2001 (3) SA 973 (SCA).

was clear from the founding affidavit that FNB's primary case was that the Body Corporate should pay the entire contribution, although in the prayer this was expressed as the alternative relief. As in this Court, the application in the high court was unopposed. The Body Corporate withdrew its opposition whilst the Master filed a notice to abide.

[12] In its judgment, the high court found that reliance by the Master on s15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act as the basis to absolve the Body Corporate from being liable pro rata to pay a contribution was misplaced. In the high court's view, the Body Corporate 'set the machinery in motion by instituting sequestration proceedings against the insolvent. Section 89(1) read with section 106 of the Act, makes it clear that the legal costs incurred in sequestrating the insolvent are not associated with payment of the levies. Those costs fall outside the protection of section 15B(3)(*a*)(i)(*aa*) of the Sectional Titles Act. I hold therefore that the [Body Corporate] is not immune from contribution'.

[13] The high court further held the *Barnard* case to be distinguishable, in that sequestration costs have no connection to the recovery of unpaid levies and that having regard to the intention behind ss 14(3), 89 and 106, the Master's interpretation went against the spirit of ss 9 and 25 of the Constitution. As a result, the court reviewed and set aside the Master's decision and directed the trustees to amend the L&D Account to reflect that, FNB, Nedbank and the Body Corporate were all liable pro rata to pay the contribution of R46 663.16. The court did not deal with why it found FNB and Nedbank liable. Its judgment focused merely on the Body Corporate's

liability. It is that decision of the high court that is the subject of this appeal with the leave of that court.

[14] The appeal was not opposed by any of the respondents. Given the importance of the matter in the administration of insolvent estates, this Court requested the appointment of an *amicus curiae* to assist the Court by advancing any argument that might be available to bodies corporate in situations similar to the one in this case. We are grateful to Ms Olsen, who appeared with Ms Mbonane, for undertaking this task and for their assistance.

Discussion

[15] It is convenient to dispose of s 15B(3)*(a)*(i)*(aa*) of the Sectional Titles Act at this stage. It was submitted by both counsel that the Master incorrectly relied on *Barnard* and *Nel* as authorities for the conclusion that the Body Corporate was absolved from paying the costs of sequestration. I agree. Neither dealt with the obligation of a body corporate that was the petitioning creditor to make a contribution, where it did not prove a claim and relied on its statutory right to recover arrear levies.

[16] The relevant provisions of the Act are ss 14(3), 89(2) and 106. FirstRand argued that these provisions properly constructed make the Body Corporate solely responsible for any deficiency where it is the petitioning creditor, even though it had not proved a claim, as both Nedbank and the appellant relied solely on their securities. The *amicus curiae* took a different view submitting that on the interpretation of these provisions, all three creditors were liable to make pro rata contributions to the costs of sequestration.

[17] The approach to be followed in interpreting a document, including a statute, is now established and has been deliberated upon in many decisions of this Court. It is still useful to refer to this Court's decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[9] where Wallis JA summarised the correct approach at para 18:

'. . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation, in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes omitted.)

[18] The need for a contribution to be made towards the costs of sequestration arises in the following way. Section 44(1) of the Act provides

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

that any person or representative of a person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may at any time before the financial distribution of the estate, prove that claim in the manner provided. A claim is proved by way of an affidavit as envisaged in s 44(4) detailing among other things, the nature and particulars of the claim and, if a creditor holds a security, the nature of that security.

[19] Section 89(2)*(i)* stipulates that where a creditor relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than the costs specified in s 89(1) and other than costs for which he may be liable under paragraphs *(a)* and *(b)* of the proviso to s 106.

[20] Non-preferent claims (concurrent or unsecured creditors) are paid from the free residue.[10] Free residue is 'that portion of an insolvent estate which is not subject to any right of preference by reason of any mortgage, legal hypothec, pledge or right of retention'.[11]

[21] Section 97 deals with the costs of sequestration. It provides that, after the free residue has been applied to defray funeral and death bed expenses, the balance thereof shall be used in paying the costs of sequestration of the estate with the exception of those mentioned in s 99(1).[12] Taxed costs of sequestration are ranked third among other costs of sequestration as per s 97(2) in order of priority. In terms of s 97(3) the expression 'taxed costs of

[10] Section 103 of the Insolvency Act 24 of 1936 (the Act).
[11] Section 2 of the Act – Definitions.
[12] Section 99(1) of the Act deals with preference in regard to certain statutory obligations.

sequestration', refers to 'the costs (as taxed by the registrar of the court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the court directs that they shall be included'.

[22] Section 106 provides the mechanism for determining which creditors must make a contribution towards the costs of sequestration, when there is no free residue or it is insufficient. It reads as follows:

'Where there is no free residue in an insolvent estate or when the free residue is insufficient to meet all the expenses, costs and charges mentioned in section *ninety-seven*, all creditors who have proved claims against the estate shall be liable to make good any deficiency, the non-preferent creditors each in proportion to the amount of his claim and the secured creditors each in proportion to the amount for which he would have ranked upon the surplus of the free residue, if there had been any: Provided that-

(a) if *all the creditors who have proved claims against the estate are secured creditors who would not have ranked upon the surplus of the free residue, if there had been any, such creditors shall be liable to make good the whole of the deficiency*, each in proportion to the amount of his claim;

(b) if a creditor has withdrawn his claim, he shall be liable to contribute in respect of any deficiency only so far as is provided in section *fifty-one*, and if a creditor has withdrawn his claim within five days after the date of any resolution of creditors he shall be deemed to have withdrawn the claim before anything was done in pursuance of that resolution.' (My emphasis.)

[23] This section must be read together with ss 14(3) and 89(2) which provide:

Section 14(3)

'In the event of a contribution by creditors under section *one hundred and six*, the petitioning creditor, whether or not he has proved a claim against the estate in terms of section *forty-four*, shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition.'

Section 89(2):

'If a secured creditor (other than a secured creditor upon whose petition the estate in question was sequestrated) states in his affidavit submitted in support of his claim against the estate that he relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than the costs specified in subsection (1), and other than costs for which he may be liable under paragraph *(a)* or *(b)* of the proviso to section *one hundred and six*.'

[24] FirstRand contended that in terms of s 89(2) of the Act it had no obligation to make a contribution to the costs of sequestration except in the circumstances set out in either sub-sec *(a)* or *(b)* of s 106. While no concurrent creditor had proved a claim against the insolvent estate under s 14(3), the Body Corporate, as the petitioning creditor, was obliged to make the same contribution as it would have done had it proved a claim against the estate. In the absence of any other concurrent creditor, it was therefore liable for the entire contribution. The *amicus curiae* for her part submitted that the case fell squarely within the language of s 106(*a*) and, because the Body Corporate was obliged to make a contribution under s 14(3), the contributions fell to be determined in proportion to the contributories' claims.

[25] The academic controversy about the interpretation of these sections referred to in para 2 of this judgment is well expressed in the following passage from *Meskin's Insolvency Law*:[13]

[13] Op cit fn 1.

'The controversy relates to the correct interpretation of section 106 read with sections 14(3) and 89(2), and more particularly, whether by the reference in section 106 to "all creditors who have proved claims" the intention is that for the purposes of determining the sequestrating creditor's liability to contribute, he is to be regarded as a creditor who has proved a claim as envisaged by section 106, or whether his liability to contribute arises independently, under section 14(3), and that accordingly he is liable, *together with* those creditors who have *actually* proved claims and who are liable to contribute under section 106. In relation to the liability of a secured creditor or secured creditors envisaged by proviso (a) to section 106, the controversy is whether, where there is a sequestrating creditor who is as such liable to contribute, the entire contribution is payable by the sequestrating creditor alone, or whether the secured creditor, or creditors, envisaged by proviso (a) and the sequestrating creditor are liable for the entire deficiency proportionately to the amounts of their respective claims (the sequestrating creditor being treated as if he had proved the claim upon which the sequestration order was obtained).'

[26] FirstRand's submissions were made against the practical background that the primary cause of the shortfall in the free residue was the costs of sequestration incurred by the Body Corporate and paid to its attorneys. The Body Corporate thus made a full recovery of the arrear levies and FirstRand, which gained no benefit from the sequestration, was mulcted in a contribution towards the costs of sequestration incurred by the Body Corporate. Furthermore, it had no practical connection with this body corporate as its mortgage was over a unit in a different scheme.

[27] A case which dealt with a question similar to the one before us is *Synman v The Master and Others*[14] which was cited by the *amicus curiae* in advancing her submissions. In that case the sequestration was a friendly one.

[14] *Synman v The Master and Others* 2003 (1) SA 239 (T).

The bank (ABSA) in whose favour the insolvent had mortgaged property, was the only proven creditor in the estate. ABSA 'conditionally' relied on its security in its affidavit in case of a contribution. The Master ignored the condition and took the view that ABSA had in fact relied on its security. The court did not decide this issue but assumed on behalf of ABSA that the requirements of s 89(2) were met. As often occurs in friendly sequestrations, there happened to be no free residue. The court found that ABSA was liable to make good the deficiency 'in proportion to the amount for which he (it) would have ranked upon surplus of the free residue, if there be any'. As we shall see, this statement is problematic, given that the court had accepted that ABSA had relied solely on its security, in which event it becomes difficult to understand how ABSA would have ranked upon the surplus of the free residue.

[28] The court further held that '[t]he proviso [s 106*(a)*] relates to the situation where creditors (in the plural) who have proved claims are secured creditors who would not have ranked upon the surplus of the free residue; in that event such secured creditors shall be liable to make good the deficiency in proportion to the amount of their respective claims'. It concluded that s 106*(a)* applied if there were a number of secured creditors, but also applied out of necessity if there is only one. This decision has been criticised.[15]

[29] The *Snyman* decision was at odds with a judgment of this Court in *Bank of Lisbon and South Africa Ltd v The Master and Others*,[16] to which the court

[15] David Burdette, University of Pretoria: 'Contributions by creditors in insolvent estates - has section 89(2) of the Insolvency Act become obsolete? *Snyman v The Master* 2003 (1) SA 239 (T)' (2003) 66 *THRHR* 521.
[16] *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 287I -288A.

in *Snyman* had been referred by ABSA's counsel. In *Bank of Lisbon* this Court said:

'Sections 44(4) and 89(2) must be read together. The intention is clear. A creditor who claims that he is a secured creditor and who does not wish to share in the free residue and who looks only to the proceeds of the security is not liable for any costs of sequestration, nor can he receive more than his security or its proceeds, whether or not there is a free residue. "His security", i.e. the security designated as such by the creditor, may prove to be valueless or may have ceased to exist. There is nothing in the wording of section 89(2) which suggests that that fact will render such a proved creditor liable for any costs of sequestration. As indicated above, the whole purpose of the section is to enable a creditor, who believes when lodging his claim that his security has a value, to limit his claim to the value of his security and to free him from liability for costs. If it should transpire that his security has become valueless the basis on which he proved his claim would fall away. He would not have a claim against the estate. The position cannot be different in the case of a creditor who *bona fide* believes that he holds security and specifically limits his claim and his potential liability. He for all practical purposes ceases to be a creditor of the estate. The bank was in fact in that position. Paragraph 7 of the affidavit of proof of claim, quoted above, is clear and unequivocal.'

[30] The court in *Synman* found the *Bank of Lisbon* case to be inapplicable on the basis that the passage quoted above, did not deal with the final words of s 89(2) referring to paragraph *(a)* of the proviso to s 106, yet, it did not deal with the purpose of s 89(2). Nor did it explore the relationship between the proviso and the main enacting provision of s 106, read in the light of s 14(3).

[31] Now to the relevant sections. Section 106 consists of the main section and three provisos. The first part of the main section requires all creditors with proved claims against the estate to make good the deficiency. On the face of it that would include secured creditors (including those who rely solely on

their security). It however goes on to provide how contributions would be made by making non-preferent creditors liable each in proportion to the amount claimed and secured creditors each in proportion to the amount for which it would have ranked upon the surplus of the residue, if there be any.

[32] This second part of the section must be read in conjunction with s 83(12) in terms of which a secured creditor is entitled to rank against the estate if the claim is more than the amount payable to it in respect of its security. In this event, the secured creditor will be ranked to be paid the concurrent portion (additional portion) of the claim not satisfied from the proceeds of the security from the free residue. That secured creditor would be liable to contribute in proportion to the amount that would have ranked upon the surplus of the free residue (ie the concurrent balance of its claim), if any had been there.

[33] According to Burdette, the proviso in s 106*(a)* 'was introduced in order to make secured creditors liable for contribution where they (or it, if there is only one creditor) had all relied [solely] on their security and there were no other creditors that could pay the contribution in terms of the main provision of section 106 (in other words where there are no concurrent creditors, including secured creditors with concurrent portions on their claims, and no applicant [petitioning] creditor)'.[17] Two circumstances come to mind where that could occur. The one would be where there is a voluntary surrender of the insolvent estate and no sequestrating creditor. The other would be where the sequestrating creditor was financially unable to pay a contribution, in which

[17] Op cit, fn 15 at 525.

event under s 118(2) the required contribution would have to be recovered from the secured creditors under s 106*(a)*.

[34] Burdette illustrates the point quite clearly by using the example of a secured creditor proving a claim of, for example, R120 000 but not relying solely on its security, the security realises R100 000 and the creditor is awarded R80 000 after deducting the costs mentioned in s 89(1) from the proceeds of the security. That creditor will be ranked against the estate's free residue in respect of the balance of its claim (ie for the R40 000, which is R120 000 less R80 000). The R40 000 represents the concurrent portion, which is the portion in relation to which the contribution to costs of sequestration will be levied.

[35] This interpretation makes sense if one has regard to the wording in s 89(2). A secured creditor who relies solely on the proceeds of its security is absolved from liability to contribute to the costs in terms of this section, except costs in s 89(1) and those in the provisos under paragraphs *(a)* and *(b)* of s 106. In this instance there is no concurrent claim payable to those secured creditors. The court in *ABSA Bank v The Master of the Supreme Court Provincial Division & Others*[18] clarified this point appositely when explaining the purpose of s 89(2). It said:

'. . . the section was intended to ensure no more than that the burden of a contribution fell on those creditors in whose interest costs are being incurred in administration of the estate. That generally means the concurrent creditors as the secured creditors are entitled to recover what is owing to them from the proceeds of their security. There is no need for the estate to incur expense to ensure that secured creditors are paid, except for that part of their

[18] *ABSA Bank v The Master & Others NNO* 1998 (4) SA 15 (N) at 24H-25A.

claims which exceeds the value of their security. Ordinarily the estate will only incur expense in realising a security if the liquidators are of the view that the security is worth more than the claim it secures. In such a case the liquidators would be justified in realising the particular security, to pay the secured creditor in full, and to apply the excess to concurrent claims. The expense so incurred is thus for the benefit of concurrent creditors.'

[36] The only apparent motive for a secured creditor to rely solely on their security is to avoid the risk of having to pay a contribution towards costs as was observed in *Bank of Lisbon*[19]. In terms of s 89(2), liability in this instance only arises in terms of paragraphs *(a)* or *(b)* of the proviso to s 106. That would be if all creditors are secured creditors who have relied solely on their security. They will be liable for the whole of the deficiency, each in proportion to the amount of their claim. There is no concurrent part of the claim. Therefore, if the secured creditor's claim was R200 000, it would be liable in proportion to the whole claim of R200 000. This is unlike what is provided in the main part of s 106 where those secured creditors with concurrent claims, would be liable in proportion to the amount they would have ranked upon the surplus of the free residue.

[37] The next question is what happens if the only other creditor (in addition to the secured creditors who rely solely on their security) is a petitioning creditor who has not proved its claim such as in this case? Then s 14(3) comes into play. When there is no free residue or it is insufficient and a contribution is required in terms s 106, a creditor who instituted the sequestration proceedings is required to contribute, whether or not it has proved a claim, not

[19] Op cit fn 16.

less than they would have had to contribute if they had proved the claim stated in his petition.

[38] Section 14(3) must be read with s 106. That much is clear from the wording of the actual provision. Even though the petitioning creditor has not proved a claim, it is compelled to contribute 'in the event of a contribution by creditors under section one hundred and six whether or not he has proved a claim against the estate'. In terms of s 14(3), the petitioning creditor will always have to contribute. The section contains no exceptions. The petitioning creditor is placed in the same position as it would have been in had it proved its claim. This means its liability would be calculated in proportion to the amount of its claim as stipulated in the main part of s 106.

[39] This issue was debated at length with both counsel at the hearing of this matter. The interpretation advanced by the *amicus curiae* was that s 106*(a)* should be read independently from s 14(3) and that the words 'the whole of the deficiency' were only applicable in respect of the secured creditors mentioned in that proviso. In practical terms, when applying the sections, the trustees would then have to look further by also making the petitioning creditor liable to contribute which would result in pro rata liability among the two secured creditors and the petitioning creditor. As observed in *Meskin's Insolvency Law* this is in line with the view supportive of the *Snyman* conclusion. This view holds that s 14(3) 'does not suggest that the sequestrating creditor is to be deemed to have proved a claim and thus to be regarded as a proved creditor as envisaged by section 106, nor that the liability of those proved creditors who are liable to contribute by virtue of section 106 is excluded by the liability attaching to the sequestrating creditor under section

14(3), and accordingly that the sequestrating creditor is liable, together with those creditors who have actually proved claims and who are liable to contribute under section 106, whether under the main provision of section or any of the provisos thereto'.[20]

[40] That interpretation strains the proviso in s 106*(a)* and does violence to s 89(2) and its purpose. It also overlooks the provisions of s 14(3). Construed properly, while not 'deemed' to have proved a claim *stricto sensu*, the provisions of s 106 apply to the petitioning creditor 'whether or not he [it] has proved a claim'. Because of that it should be treated in the same manner as a creditor who has proved its claim. Consequently, when there is no free residue, or it is insufficient, the first port of call would be look to the petitioning creditor to contribute along with concurrent creditors who have proved their claims and secured creditors who would have ranked upon the surplus of the free residue. That is the consequence of reading the enacting part of s 106, together with ss 14(3) and 89(2).

[41] Only if there are no other proved and concurrent creditors (including the petitioning creditor) able to contribute, would the secured creditors who have relied solely upon their security be called upon to pay (s 106*(a)* read with s 89(2). This interpretation is sensible as it does not do violence to the words 'to make good the whole of the deficiency, each in proportion to the amount of his claim [not the concurrent portion]' in s 106*(a)*. These words in fact strengthen that construction. The fact that the proviso operates to oblige secured creditors who rely solely on their security to meet the entire deficiency

[20] Op cit fn 1.

illustrates that there is no other creditor to meet the shortfall. This is consistent with the basic principle that a proviso is not to be construed as if it were an independent enacting provision, but as qualifying the enactment in relation to which it stands as a proviso.[21] Accordingly, in the case where there are two such secured creditors and a petitioning creditor, the petitioning creditor would be solely liable to pay the costs of sequestration based on their claim.

[42] This construction overcomes the potential unfairness, to secured creditors, that may creep in with friendly sequestrations and in instances where petitioning creditors do not prove their claims, such as in this case. When applying for sequestration a claim would be made that the sequestration of the insolvent would be to the advantage of the creditors whereas the facts may not be supportive of that allegation. The insolvent may only have one or two bonded properties and a shortfall would arise with no benefit realised to creditors.

[43] The appellant gave examples of where it suffered losses running into millions of rands, in instances where it was called upon by trustees or liquidators in various matters to make contributions for costs of sequestration notwithstanding that it had relied solely on its security. Section 14(3) seeks to avoid a situation where a creditor would petition for the sequestration of the estate and not prove a claim, only for other creditors 'to pick up the costs'. In a case like the present one, the unfairness is heightened because bodies corporate petition for sequestration, recover outstanding monies in terms of s 15B(3)*(a)*(i)*(aa)* once a unit is sold and, where there is a shortfall in the free

[21] *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 645C-H.

residue other creditors, who have proved their claims (including secured creditors who rely solely on their security), bear the costs, including the costs paid by the petitioning creditor to their attorneys.

[44] This analysis illustrates that *Snyman* was wrongly decided. It further confirms that the Master was wrong in absolving the Body Corporate from paying the contribution on the basis of his reasoning which I have quoted in para 10 above. Lastly, the high court erred by holding FNB and Nedbank liable as co-contributors to the costs of sequestration together with the Body Corporate. For that reason, its decision must be set aside.

[45] In conclusion, having determined the meaning of ss 106, 89(2) and 14(3), it is clear that the Body Corporate as the petitioning creditor is solely liable to pay the costs of sequestration as the other two creditors (FNB and Nedbank) are secured creditors who relied solely on their security. Had there been other creditors found to have been liable to contribute, it would have had to contribute in proportion to the amount of its claim in the petition (R22 000). It is however not necessary to have regard to that amount, as the Body Corporate has been found to be solely liable for payment of the entire R43 680.35 in respect of the taxed bill of costs. Lastly, since this matter is not opposed, there will be no order as to costs.

[46] In the result the following order is made:

1 The appeal is upheld.

2 Paragraph 3 of the order of the Gauteng Division of the High Court, Pretoria is set aside and replaced with the following order:

‘3. That the Third and Fourth Respondents are directed to amend the first and final liquidation, distribution and contribution account to reflect that the Second Respondent is solely liable to pay the contribution of R46 663.16.’

3 There is no order as to costs.

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N P MABINDLA-BOQWANA
ACTING JUDGE OF APPEAL

Appearances

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