SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	7 April 2021
STATUS	Immediate

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

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (the SCA) upheld the appeal by FirstRand Bank Limited (FirstRand) against the Master of the High Court, Pretoria and Others (the Master).

The issue before the SCA concerned 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 was insufficient or no free residue in an insolvent estate to meet expenses, costs and charges connected with the sequestration. Such costs were a charge against the free residue in terms of s 97(2)*(c)* of the Act.

The insolvent, Mr J Z Msimango, prior to his sequestration owned two sectional title units, one bonded to Nedbank and the other to First National Bank (FNB), a division of FirstRand. The unit mortgaged in favour of Nedbank fell within the sectional title scheme administered and managed by the Body Corporate of Victory Park (the Body Corporate). The Body Corporate brought sequestration proceedings against the insolvent after it had obtained a judgment against him for payment of arrear levies in the amount of R22 000. FNB and Nedbank were the only creditors who proved their claims against the insolvent estate. They relied solely on their security. The Body Corporate did not prove its claim. It was entitled in terms of s 15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act 95 of 1986 to refuse to consent to the trustees transferring the unit to a purchaser until it had been paid all monies due to it.

The Trustees' First and Final Liquidation, Distribution and Contribution Accounts (the L & D Account), 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. FNB objected to the L&D account stating that the Body Corporate as a sequestrating creditor was liable to pay the contribution to sequestration costs as envisaged in s 14(3) of the Act. The Master disagreed and FirstRand brought a review application against the Master in the Gauteng Division of the High Court (high court). The high court ordered that the Body Corporate, FNB and Nedbank (the two secured creditors who relied solely on their security) should all contribute to the payment of the costs of sequestration on a pro rata basis.

The SCA found that in terms of s 106 all concurrent creditors with proved claims and secured creditors who would have ranked upon the surplus of the residue against the estate, if there be any, were liable to make good the deficiency. In terms of s 89(2) secured creditors who relied solely on the proceeds of their security were absolved from liability to contribute to the costs of sequestration except where they were the only creditors available (s 106(*a*)). In that regard secured creditors would make good the whole of the deficiency each in proportion to the amount of their claim. On the other hand s 14(3) of the Act required the sequestrating creditor, to contribute to the costs of sequestration, whether or not they had

proved a claim against the estate. The SCA concluded that, having determined the meaning of ss 106, 89(2) and 14(3), it was clear that the Body Corporate as the petitioning creditor was solely liable to pay the costs of sequestration as the other two creditors (FNB and Nedbank) were secured creditors who relied solely on their security. Had there been other creditors found to have been liable to contribute, the Body Corporate would have had to contribute in proportion to the amount of its claim in the petition (R22 000). The SCA replaced order of the high court with an order directing the trustees to amend the L&D account to reflect that the Body Corporate is solely liable to pay the contribution.