



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 167/2025

In the matter between:

FJ SENEKAL INC

APPELLANT

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED FIRST RESPONDENT

THE MASTER OF THE HIGH COURT, BLOEMFONTEIN SECOND RESPONDENT

ELRICH RUWAYNE SMITH N O THIRD RESPONDENT

TSIU VINCENT MATSEPE N O FOURTH RESPONDENT

Neutral citation: *FJ Senekal Inc v The Standard Bank of South Africa Limited and Others* (167/2025) [2026] ZASCA 137 (5 October 2026)

Coram: MATOJANE, COPPIN and WINDELL JJA and MBHA and
MPHAHLELE AJJA

Heard: 4 September 2026

Delivered: 5 October 2026.

Summary: Insolvency – Insolvency Act 24 of 1936 – s 63(2) – remuneration out of the estate for services rendered by a firm of which the trustee was a director – whether prohibited – firm subsequently established by the practitioner who did the work cannot recover remuneration for those services – no cession of claim – s 112 – finality of confirmed liquidation and distribution account – amended account reallocating burden of prohibited charge lies open afresh under s 111 – creditor entitled to object – consent

order in proceedings between the firm and the trustees does not bind creditor who was not a party and does not validate prohibited charge – review under s 111(2)(a) – high court has powers of appeal and review – substitution appropriate.

ORDER

On appeal from: The Free State Division of the High Court, Bloemfontein (Opperman J and Mhlambi J sitting as court of first instance):

1. The appeal is reinstated.
 2. The appeal is dismissed with costs.
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JUDGMENT

Matojane JA (Coppin, Windell JA and Mbha and Mphahlele AJA concurring):

[1] Section 63(2) of the Insolvency Act 24 of 1936 (the Act) forbids a trustee of an insolvent estate, the trustee's partner, and any person who employs the trustee or is a fellow employee of the trustee, from receiving remuneration out of the estate for services rendered to it, save for the remuneration to which the trustee is entitled as trustee. The question in this appeal is whether its operation can be avoided by the simple expedient of the person who did the work leaving the trustee's firm, establishing a firm of his own, and then invoicing the estate in the name of the new firm for the work done while he was still with the trustee's firm.

[2] A second question is whether a creditor who was not required to contribute towards the fees in a confirmed liquidation and distribution account, but was required to do so for the first time in a later amended account, is precluded by the confirmation of the earlier account from objecting to the fees. The Free State Division of the High Court, Bloemfontein (the high court), in a judgment of Opperman J in which Mhlambi J concurred, answered the first question adversely to the appellant and the second in favour of the first respondent. The appeal is with the leave of the high court.

[3] The appellant, FJ Senekal Inc (Senekal Inc), is an incorporated firm of attorneys of which Mr F J Senekal (Mr Senekal) is the sole director. It was registered on 27 October 2017. The first respondent, The Standard Bank of South Africa Limited (Standard Bank), is a creditor which has proved claims against the insolvent estate of Mr J N Herselman (the estate). The second respondent is the Master of the High Court, Bloemfontein (the Master). The third and fourth respondents, Mr E R Smith (Mr Smith) and Mr T V Matsepe (Mr Matsepe), are the trustees of the estate and are cited in their official capacities (the trustees). Neither the Master nor the trustees opposed the review in the high court, and none of them participated in the appeal. The Master furnished reasons for the decision under review and abides by the court's decision.

[4] Standard Bank instituted review proceedings in the high court against the Master's dismissal of its objections lodged to the trustees' account. Senekal Inc opposed the review. The Master furnished reasons for the decision under review but did not oppose the review and abided by the decision of the court. The trustees likewise did not oppose the review. Neither the Master nor the trustees participated in the appeal.

[5] Senekal Inc also applied for reinstatement of the appeal, which lapsed because the record was lodged late. The application was not opposed. The explanation tendered is adequate, and the delay caused no prejudice to Standard Bank. The application is granted.

Factual background

[6] The high court sequestrated Mr Herselman on 5 December 2013. The Master appointed Mr Smith, of the firm Symington & De Kok, and Mr Matsepe, of the firm Matsepes Inc, as the co-trustees of the estate. At all material times until October 2017, Mr Senekal was, like Mr Matsepe, a director of Matsepes Inc. That fact is common cause. Mr Senekal admitted it in an affidavit in earlier litigation, and it formed the basis of his counsel's argument before us.

[7] The second meeting of creditors was held before the magistrate at Petrus Steyn on 14 July 2014. Two creditors proved their claims: Standard Bank, in the amount of approximately R7 483 710, and Farmsecure Livestock (Pty) Ltd (Farmsecure), in the

amount of R1 367 245. Standard Bank held security for its claims, but when it proved them, it did not state in its affidavit that it relied solely on the proceeds of its security to satisfy its claims. The consequence of that election, as I explain below, is that Standard Bank became exposed, in terms of s 106 of the Act, to a contribution towards the costs of sequestration in the event of the free residue proving insufficient to meet those. That was the position adopted by counsel for Senekal Inc, and counsel for Standard Bank did not contend otherwise.

[8] At the second meeting, the creditors adopted the trustees' report and several resolutions. Paragraph 9 of the report recorded that the trustees were investigating the affairs of the estate, as contemplated by s 152 of the Act, and that a firm of investigators, Blue Platinum, and Matsepes Inc were conducting the investigation on a contingency basis. The trustees had earlier, in a letter of 10 March 2014, recorded that Farmsecure was financing the investigation. This creditor had requested the issuance of warrants under s 69(3) of the Act, and that Mr Kobus Senekal of Matsepes Attorneys would conduct the proceedings. On 4 August 2014, Mr Noordman of Matsepes Inc wrote to the attorney for Farmsecure in these terms: 'Farmsecure betaal die koste van die ondervraging en gaan ook die opbrengs kry van die vrugte van die ondervraging.'

[9] Resolution 7 adopted at the meeting authorised the trustees to appoint attorneys, advocates and Blue Platinum to conduct the interrogation of the insolvent and other witnesses and to prepare warrants under s 69(3), and provided that all costs so incurred, 'met uitsluiting van die ondervragingskoste (sien verslag)', would be regarded as costs of administration. The costs of the interrogation were thus, by the express terms of the resolution, excluded from the costs of administration of the estate. Standard Bank was represented at the meeting by proxy and voted in favour of the resolutions.

[10] Mr Senekal conducted the interrogation and the recovery proceedings that followed it. He did so until October 2017 as a director of Matsepes Inc. The Master's record states that he left Matsepes Inc on 1 October 2017. Senekal Inc was registered on 27 October 2017. Mr Senekal thereafter continued to attend to the matters he had been dealing with, on what Matsepes Inc later described in a letter of 25 February

2020 to Mr Smith, as an agreement between Matsepes Inc and Senekal Inc in terms of which Senekal Inc 'took over the matters when he commenced practice for his own account'.

[11] No document evidencing that agreement, and no cession by Matsepes Inc of any claim against the estate, appears in the record. The same letter asserted that the inquiry had raised about R2.2 million, that Mr Smith had throughout been involved as trustee, that s 63(2) refers to a 'partner' and not to a 'director', and that Mr Smith could not rely on the section to avoid payment by the estate. The letter was written in response to correspondence from Symington & De Kok, on behalf of Mr Smith, which had questioned Mr Senekal's entitlement to fees under s 63(2).

[12] On 2 December 2019 and 12 February 2020, Senekal Inc rendered five invoices to the trustees. The invoices claim fees at the tariffs prevailing from time to time for work performed from November 2013 onwards. The Master's reasons describe them as accounts 'for legal costs and fees claimed by Mr F J Senekal since 2013 to November 2018'. Most of the work reflected in the invoices was done before Senekal Inc existed. The invoices were addressed to the estate and not to Farmsecure. At that time, Senekal Inc held about R698 000 in its trust account, which the inquiry recovered and later recorded as having been 'paid' to Senekal Inc on account of its fees.

[13] The trustees submitted a second and final liquidation and distribution account to the Master in June 2020 as this account made no provision for any fees owing to Senekal Inc. Mr Senekal objected to the Master. Mr Smith opposed the objection on the basis that Farmsecure, and not the estate, was liable for Mr Senekal's fees. On 20 October 2020 the Master directed the trustees to amend the account 'to reflect the cost of the interrogation and for it to be deducted from the dividend awarded to the creditor who financed the interrogation'. On 20 April 2021 the Master issued an amended query sheet requiring the trustees to reflect in the account all the costs of the interrogation, including the costs of litigation entered into and necessary for it. The trustees complied, though under protest. The correspondence between them shows that Mr Smith was not persuaded that the fees were recoverable at all.

[14] The substituted second and final liquidation, distribution and contribution account that resulted (the June 2021 account) was signed by the trustees on 14 and 18 June 2021. It reflected Senekal Inc's fees, totalling R1 306 642.77, as administrative costs. It recorded that R698 000 had already been paid, leaving a balance of R608 642.71. It provided for a contribution of R894 919.71 to be paid by Farmsecure 'according to section 104 of the Insolvency Act'. Standard Bank was not called upon to make any contribution. It did not object. The account lay open for inspection, and the Master confirmed it on 15 September 2021.

[15] Farmsecure had already been placed in liquidation by 2019. There was thus no prospect of recovering the contribution from it. On 17 March 2022, Senekal Inc brought an application under case number 1251/2022 against the trustees and the Master (the contribution application), seeking to compel the trustees to levy a contribution from the creditors who had proved claims. Standard Bank was not a party to the application, although it learnt of it and, through its attorneys, informed the trustees that it denied liability for any contribution. The trustees opposed the application.

[16] The parties to that application agreed to a settlement on 26 September 2022, and the court made the settlement agreement an order of court on 6 October 2022 (the October 2022 order). The order directed the trustees to collect from each creditor 'liable to contribute to the administration costs of the insolvent estate' the amount which that creditor 'is liable to contribute in terms of the provisions of section 113 of the Insolvency Act . . . after taxation of the Applicant's costs and following the procedure prescribed by the Act regarding amendment of the Liquidation and Distribution Account'; directed the trustees to claim a contribution from the proven creditors as provided in s 106 of the Act 'following taxation of the Applicant's costs and amendment of the account'; and provided that the costs of the application would form part of the costs of administration.

[17] The trustees then prepared an amended second and final liquidation, distribution and contribution account, signed by Mr Smith on 31 January 2023 and by Mr Matsepe on 14 February 2023 (the February 2023 account). This account retained the fees of Senekal Inc as costs of administration, added the costs of the contribution application in the amount of R210 583.33, removed the allocation of the contribution

to Farmsecure, and levied contributions to Standard Bank, in the amount of R1 085 723.12, and from Wesbank, in the amount of R19 799.92. The account was published and lay open for inspection from 10 March 2023.

[18] Standard Bank lodged two objections with the Master under s 111(1) of the Act. The first, dated 16 March 2023, objected to the contribution on the ground that it was Farmsecure, and not Standard Bank, which had instructed the trustees to hold the inquiry and to appoint Mr Senekal; that it had been agreed that Farmsecure would be liable for all the costs incurred by Mr Senekal and would receive the benefit of the proceedings 'in terms of section 104(3)'; that Standard Bank had never been consulted about, or consented to, those costs; and that it should be exonerated from the contribution.

[19] The second, dated 24 April 2023, objected to specific vouchers in the account. Voucher 6, dated 21 August 2015, reflected that an amount collected through the inquiry had been paid to Senekal Inc, an entity that did not exist then. Voucher 7 was said to relate to expenses which Farmsecure had agreed to pay directly. Vouchers 9A to 9H were the invoices of Senekal Inc, which were objected to on the ground that Matsepes Inc had done the work before Senekal Inc existed and that the fees were, by reason of s 63(2), not recoverable from the estate.

[20] The Master dismissed both objections on 3 May 2023. In the reasons later furnished to the high court, the Master explained that the first objection was rejected because of the October 2022 order; that the objection to voucher 7 was rejected because there was no agreement to the effect contended for on the Master's file; and that the objections to vouchers 6 and 9A to 9H were rejected because Mr Senekal had been appointed to conduct the inquiry and the litigation while a director of Matsepes Inc, since 'Matsepes was substituted as the firm of attorneys by F J Senekal Inc', and because, when Mr Senekal left Matsepes Inc, no fees were yet due to that firm. There was a suspensive condition in terms of which the fees would be paid only once the litigation was completed. The Master's reasons did not engage with s 63(2).

[21] Standard Bank applied to the high court on 16 May 2023, under s 111(2)(a) of the Act, to review and set aside the Master's decision. Only Senekal Inc opposed that

application. At the hearing, Standard Bank abandoned its claim that it be exonerated from paying any contribution. It confined the relief it sought to the setting aside of the Master's decision and the upholding of its objections.

[22] The high court struck out, as hearsay, paragraphs of the founding affidavit alleging improper conduct in the settlement agreement's conclusion. It held that the October 2022 order was not under attack and was conditional in its terms; that the real question was whether Senekal Inc could claim for services rendered by Matsepes Inc before 2017; that the claim for those services belonged to Matsepes Inc and could not be recovered by Senekal Inc merely because it took over the file; and that the Master's decision was accordingly based on unsound legal principles. It reviewed and set aside the Master's decision, upheld the objections, directed that the account be amended accordingly, and ordered Senekal Inc to pay the costs.

The issues

[23] The issues that arise are these. The first is whether the confirmation of the June 2021 account, and the Master's earlier directions that the fees be included in the account, precluded Standard Bank from objecting to the inclusion of the fees in the February 2023 account. The second is whether the October 2022 order had that effect. The third is whether s 63(2) of the Act bars recovery from the estate of remuneration for the services rendered by Mr Senekal while he was a director of Matsepes Inc; and, if so, whether Senekal Inc's invoicing for those services after its incorporation escapes the bar. The fourth is whether the high court was entitled to substitute its own decision for that of the Master rather than remit the objections back to the Master for reconsideration. A subsidiary question, raised by counsel for Senekal Inc in the alternative, is whether a distinction falls to be drawn between services rendered before and after 27 October 2017, ie before and after the establishment of Senekal Inc.

The legal framework

[24] Section 63 of the Act provides for trustee remuneration. Subsection (1) entitles every trustee to reasonable remuneration for his services, to be taxed by the Master

according to tariff B in the Second Schedule, subject to the Master's power for good cause to reduce, increase or disallow it. Subsection (2) provides:

'A person who employs or is a fellow employee or is ordinarily in the employment of the trustee shall not be entitled to any remuneration out of the insolvent estate for services rendered to the estate, and a trustee or his partner shall not be entitled to any remuneration out of the estate for services rendered to the estate, except the remuneration to which under this Act he is entitled as trustee.'

[25] The subsection thus addresses two categories of persons. The first consists of those in an employment relationship with the trustee, whether as employer, fellow employee, or employee. The second consists of the trustee and the trustee's partner. Both categories are denied any remuneration out of the estate for services rendered to it, other than the trustee's prescribed statutory remuneration.

[26] The trustee is a fiduciary who administers the estate for the benefit of the creditors. He is remunerated for doing so on a fixed tariff. If he, or those with whom he is in business, could in addition charge the estate professional fees for work that he causes to be done in the course of the administration, the conflict between his duty to the creditors and his own interest would be obvious. The section thus removes the temptation by removing the entitlement. It is framed in terms of entitlement, not of recovery. The person concerned 'shall not be entitled to any remuneration out of the insolvent estate'. An account that includes such remuneration as a charge against the estate includes an 'improper charge' within the meaning of s 111(2).

[27] Sections 108 to 112 of the Act regulate the trustee's account. The trustee must lodge the account with the Master and give notice that it will lie open for inspection (s 108). Section 111(1) permits the insolvent or 'any person interested in the estate', for 14 days before the confirmation of the account in terms of s 112, to lay before the Master a written objection, with reasons, to the account. Section 111(2) empowers the Master, if he thinks that the objection is well founded, or if, apart from any objection, the Master thinks that the account is in any respect incorrect or contains any improper

charge, to direct the trustee to amend the account or to give such other direction as the Master thinks fit. Paragraph (a) of the proviso permits a person aggrieved by the Master's direction, or by the Master's refusal to sustain an objection, to apply to the court within 14 days for an order setting aside the Master's decision, and provides that 'the court may thereupon confirm the account or make such order as it thinks fit'. Paragraph (b) provides that when any such direction affects the interests of a person who has not lodged an objection with the Master, 'the account so amended shall again lie open for inspection by the creditors in the manner and with the notice hereinbefore prescribed', unless the person affected consents in writing to immediate confirmation.

[28] Section 112 provides that once the account has lain open for inspection and no objection has been lodged, or any objection filed has been resolved as prescribed, the Master shall confirm the account, 'and his confirmation shall be final, save as against any person who the court may have permitted before any dividend has been paid under the account, to reopen it'. Confirmation is thus final as between the persons whose rights the account determines, subject to the court's power to permit the account to be reopened before a dividend has been paid. The Appellate Division considered the corresponding provision in the Companies Act 61 of 1973 in *Kilroe-Daley v Barclays National Bank Ltd*¹ (*Kilroe-Daley*). I return to that decision below.

[29] Section 106 provides that where there is no free residue in an estate, or when the free residue is insufficient to meet the costs of sequestration mentioned in s 97, all creditors who have proved claims against the estate are 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 was any. A secured creditor who, in proving his claim, states that he relies solely on the proceeds of his security is, by s 89(2), exempted from liability for the costs of sequestration other than those there mentioned.

¹ *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A).

[30] This Court explained the scheme and the rationale for the exemption in *FirstRand Bank Ltd v Master of the High Court Pretoria and Others*². Section 104(3), which Standard Bank invoked in its first objection, deals with a different subject. It provides that where a creditor has, under s 32(1), instituted proceedings to recover the value of property or a right under s 25(4), to set aside any disposition of or dealing with property under ss 26, 29, 30 or 31, or to recover damages or a penalty under s 31, no creditor who was not a party to the proceedings shall derive any benefit from the proceeds before the claim and costs of every creditor who was a party have been paid in full. The section governs the ranking of creditors to the proceeds recovered in proceedings brought by a creditor in the trustee's name under s 32. It does not apply to an interrogation under s 152.

[31] Finally, the nature of a review under s 111(2)(a) is settled. In *Nel and Another NNO v The Master (Absa Bank Ltd and Others Intervening)*³(*Nel*) this Court held that in a review of this kind the court enters into and decides the whole matter afresh, and for that purpose has the powers both of a court of appeal and of a court of review, including the power to receive new evidence. The principle was reaffirmed by this Court in *Constantia Insurance Co Ltd v Master, Johannesburg High Court and Others*⁴(*Constantia*) in relation to s 151. The court's powers are not confined to correcting an irregularity. It may confirm the account or make such order as it thinks fit.

Analysis

The finality of the June 2021 account

[32] Counsel for Senekal Inc placed the finality of the June 2021 account at the forefront of his argument. He accepted, when pressed, that the point had to be taken before any consideration of s 63(2), because if Standard Bank was precluded from

² *FirstRand Bank Ltd v Master of the High Court, Pretoria and Others* [2021] ZASCA 33; 2021 (4) SA 115 (SCA) paras 31-36.

³ *Nel and Another NNO v The Master (Absa Bank Ltd and Others Intervening)* [2004] ZASCA 26; 2005 (1) SA 276 (SCA) paras 22-23.

⁴ *Constantia Insurance Co Ltd v Master, Johannesburg High Court and Others* [2022] ZASCA 179; 2023 (5) SA 88 (SCA) para 19.

objecting to the inclusion of the fees at all, the interpretation of s 63(2) did not arise. His submission was that the June 2021 account included the fees of Senekal Inc as costs of administration; that the account was laid open for inspection; that no one, including Standard Bank, objected; that the Master confirmed it on 15 September 2021; that the confirmation is final under s 112; and that the inclusion of the fees thereby became final as between the estate, the trustees and all the creditors.

[33] The February 2023 account, so it was argued, amended the June 2021 account in three respects: it added the costs of the contribution application and removed the allocation of the contribution to Farmsecure, and levied the contribution from the proven creditors in accordance with the Act. Standard Bank was entitled to object to those amendments, but not to the contents of the account that had already been confirmed. To permit it to do so, counsel submitted, would be to reopen a confirmed account otherwise than by an application to court under the proviso to s 112, and would leave trustees unable to know where they stood. He relied on *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another*⁵ (*Gilbey Distillers*) and, in oral argument, on *Kilroe-Daley*.

[34] The argument has a surface attraction, but it does not withstand scrutiny. The starting point is the text of s 111(1). It permits any person interested in the estate to object to 'the trustee's account' at any time before its confirmation in terms of s 112. The account that laid open for inspection from 10 March 2023 was the February 2023 account. It was a new account. It had not been confirmed. It was the account to which Standard Bank objected, and it did so within the time allowed. Nothing in the language of s 111 confines an objection to those parts of an account that has been amended and that, consequently, differ from an earlier account. Counsel was constrained to concede that the section does not say so, and that the limitation he contended for had to be found elsewhere. He located it in the finality that s 112 attaches to the earlier confirmation.

⁵ *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1991 (1) SA 648 (A).

[35] That is where the argument breaks down. Confirmation under s 112 has the effect of a final judgment. A judgment is final as to what it decides, and as between the persons whose rights it determines. The June 2021 account determined that Senekal Inc.'s fees were administrative costs and that the resulting deficiency would be made good by a contribution from Farmsecure. It decided nothing against Standard Bank. Standard Bank was allocated no contribution. It was to receive its dividend undiminished by the fees. It had no interest in the account being adversely affected and had no reason to object. When the Master's direction of 20 October 2020 was given, ie that the costs of the interrogation be included in the account, it was coupled with the direction that they be deducted from the dividend of the creditor who had financed the interrogation, namely Farmsecure. That was a direction in Standard Bank's favour, not against it.

[36] Counsel's submission that Standard Bank, by proving its claim without confining itself to its security, 'assumed the risk' of a contribution, and was therefore bound by the inclusion of the fees from the moment the June 2021 account was confirmed, conflates two different things. The exposure to a contribution under s 106 is a statutory incident of proving a claim. The liability to contribute towards a particular charge arises only when an account puts that charge at the creditor's door. That happened for the first time in the February 2023 account. The determination that Standard Bank must bear a contribution of R1 085 723.12, the greater part of which consists of the fees of Senekal Inc, was made in that account and in the Master's decision of 3 May 2023 dismissing the objections to it. The review concerned that decision. The finality of the June 2021 account cannot extend to a determination which that account never made.

[37] There is a further and more fundamental difficulty with the argument. The reallocation of the contribution in the February 2023 account was not an independent event, unrelated to the fees. It was a direct consequence of including the fees. But for the fees, there would have been no deficiency and no contribution. To say that Standard Bank may object to being made to contribute, but may not object to the charge that gives rise to the contribution, is to say that it may object to the effect but not to the cause. Section 111(2) itself refutes the distinction. It empowers the Master,

apart from any objection, to direct the amendment of an account that 'contains any improper charge'. The proviso in para (b) then requires that where a direction affects the interests of a person who has not objected, the amended account must again lay open for inspection. The scheme of the section is that every person whose interests an account affects must have an opportunity to object to it before it is confirmed against him. Standard Bank's interests were affected for the first time by the February 2023 account. It was entitled to object to that account, and to the improper charge that it contained.

[38] *Kilroe-Daley* does not assist Senekal Inc. That case concerned a creditor who had failed to object to a liquidation account and, after its confirmation, sought to reopen it to assert its own claim against the estate. The court held that confirmation was final and that a creditor in that position had to bring itself within the proviso, by showing that its failure to object was induced by *justus error* or by fraud, before the account could be reopened against the persons in whose favour it was final. Standard Bank is in an entirely different position. It does not seek to reopen the June 2021 account. It seeks to object to a later account, which was laid open for inspection in the ordinary course, and which, for the first time, imposed a burden on it.

[39] Nor does *Gilbey Distillers* take the matter any further. That case confirmed that a confirmed account is final; it did not hold that the confirmation of one account renders a creditor powerless to object to a subsequent account that for the first time affects it. In any event, and as counsel for Senekal Inc had to accept, the trustees themselves, at the instance of Senekal Inc and in compliance with the October 2022 order, reopened the matter by preparing and publishing an amended account. Having invoked the statutory procedure for amending the account, Senekal Inc cannot be heard to say that the procedure does not carry with it the right of objection that the Act confers.

[40] The reliance on *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁶ and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute*⁷ is misplaced for the same reason. Those cases hold that an administrative act, even if unlawful, has legal consequences until a court sets it aside in judicial review proceedings. The Master's directions dated 20 October 2020 and 20 April 2021 were that the costs of the interrogation be included in the account and deducted from the dividend payable to the financing creditor. They have not been set aside, and they stand. But they do not decide the question that arises here. They do not decide that Standard Bank must bear the costs. And the decision that does purport to decide that question being the decision of 3 May 2023, was taken on review within the time allowed under the bespoke remedy that s 111(2)(a) provides. The high court was correct to hold that the *Oudekraal* principle must be applied to the statutory framework within which the impugned decision was taken. Where the statute itself provides that an amended account must lie open for inspection and objection, the earlier confirmation cannot be invoked to defeat the objection.

The October 2022 order

[41] Counsel for Senekal Inc submitted that the October 2022 order bound the estate, the trustees, the Master and the creditors; that it directed the trustees to levy a contribution from the proven creditors; that Standard Bank had not sought to rescind it; and that its objections were an impermissible collateral attack on it. The Master's reasons for rejecting the first objection were to the same effect.

[42] The submission misreads the order. A court order is interpreted in the same manner as any other document. The court's intention is to be ascertained from the language of the order, read as a whole and in the light of its purpose and the circumstances in which it was granted.⁸ The order directed the trustees to collect from

⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

⁷ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC).

⁸ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-H; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

each creditor 'liable to contribute' the amount which that creditor 'is liable to contribute' in terms of the Act, 'after taxation of the Applicant's costs and following the procedure prescribed by the Act regarding amendment of the Liquidation and Distribution Account'. Each of those phrases is significant.

[43] The October 2022 order did not determine who was liable to contribute or in what amount. It did not determine that Senekal Inc.'s fees were recoverable from the estate. It required taxation of the applicant's costs, which had not occurred. And it required the trustees to follow the procedure prescribed by the Act for amending the account. That procedure, as I have shown, requires the amended account to lie open for inspection and allows any interested person to object. The order thus contemplated, rather than excluded, the objection that Standard Bank lodged. The high court was right to describe the order as conditional, and the Master erred in treating it as dispositive.

[44] Counsel submitted that the reference to the procedure for amendment could not have been intended as a condition, and that the taxation referred to could only have been the taxation of the costs of the contribution application, because the fees had already been confirmed in the June 2021 account. Neither submission can be accepted. The first asks the court to disregard words the parties chose to include in their settlement agreement and that the court included in its order. The second assumes the very finality that I have rejected. Moreover, there is an obvious reason the parties would have included the words. The settlement was between Senekal Inc and the trustees. The creditors were not parties in the application concerned.

[45] A settlement between a claimant against the estate and the trustees cannot, by being made an order of court, impose liability on creditors who were not before the court or validate a charge prohibited by the Act. A court asked to make a settlement agreement an order must be satisfied that the order is competent and not at odds with the law.⁹ An order that purported to determine, as against creditors who were not parties, that they must contribute towards a charge that s 63(2) forbids, would have

⁹ *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) paras 25-26.

been objectionable on that ground. The order avoided that objection precisely by leaving the creditors' liability to be determined in accordance with the Act. Standard Bank was accordingly not obliged to apply for the rescission of the order before it could object. Its objections were not a collateral attack on the order. They were the exercise of a right that the order itself preserved.

Section 63(2)

[46] I turn to the substance of the objections. The facts relevant to s 63(2) are not in dispute. Mr Matsepe was one of the two trustees. He was at times a director of Matsepes Inc. Mr Senekal was, until October 2017, a fellow director at the same firm. The trustees' report to the second meeting of creditors recorded that Matsepes Inc was conducting the interrogation. The trustees' letter of 10 March 2014 recorded that Mr Senekal 'van Matsepes Prokureurs' would conduct it. The work for which the invoices of 2 December 2019 and 12 February 2020 claim remuneration was for the greater part done between November 2013 and October 2017. Mr Senekal did so in his capacity as a director of Matsepes Inc, in the course of a mandate given to that firm. All of this is not in dispute. Appellant also accepted that, had Matsepes Inc invoiced the estate for the work, the invoice would have fallen foul of s 63(2). His submission was that Senekal Inc, which was not the trustee, the trustee's partner or the trustee's employer or fellow employee, fell out of the reach of the section.

[47] This submission cannot be accepted for three reasons. The first concerns the nature of the right Senekal Inc. asserts. A firm of attorneys that renders services under a mandate acquires a claim for its fees. The claim belongs to the firm. It does not belong to the individual practitioner who performs the work, whether as a director, partner, or employee. If Mr Senekal, while a director of Matsepes Inc, rendered services to the estate under a mandate given to that firm, any claim for remuneration for those services vested, if it vested at all, in Matsepes Inc. Senekal Inc did not exist when the services were rendered. It could not have rendered them, nor could it have acquired a claim to them. The only way in which it could have come to hold a claim for those services was by cession to it from Matsepes Inc.

[48] When counsel was asked at the outset of the argument where in the record the cession was to be found, he could not point to one. He referred to the letter of 25 February 2020, which speaks of an agreement under which Senekal Inc 'took over the matters'. The transfer of files to a departing practitioner is commonplace. It does not, without more, transfer to the practitioner's new firm the old firm's accrued claims for work already done. An analogy put to counsel in argument makes the point. An attorney who leaves one firm to establish another, and who is given certain files to take with him, is not thereby entitled to invoice the client for the work that the first firm did on those files before he left. Counsel answered that it depended on the agreement between the firms. But the agreement, if there was one, was not produced, and Standard Bank's express invitation in the founding affidavit to Senekal Inc to produce proof of its instruction by the estate went unanswered. The high court correctly held that the claim for pre-2017 services, if any, belonged to Matsepes Inc.

[49] The second reason is that, even if there had been a cession, it would not have availed Senekal Inc. A cessionary acquires no better right than the cedent had. Matsepes Inc employed the trustee, Mr Matsepe, and he was a director of the company. It fell squarely within s 63(2), which counsel conceded. It was not entitled to any remuneration out of the estate for the services rendered to the estate. It had nothing to cede.

[50] A statutory disentitlement of this kind cannot be circumvented by transferring the claim to a person who does not fall within the section. Otherwise the section would be a dead letter, because the trustee's firm could always evade it by assigning its claim to an outsider. Counsel's submission that the mischief at which s 63(2) is directed is confined to the same commercial entity receiving both the trustee's remuneration under s 63(1) and professional fees, and that there was no such 'double dipping' here because the fees were paid to Senekal Inc and not to Matsepes Inc, mistakes the means for the end.

[51] The section is not merely a prohibition on duplicated payment. It is a prohibition

on entitlement. Its purpose is to eliminate the conflict of interest that arises when a trustee causes work to be given to himself or to those with whom he is in business. That conflict was present in full measure when Mr Matsepe, as trustee, caused his own firm to conduct the interrogation and the recovery proceedings.

[52] The third reason concerns the contingency on which counsel relied. He submitted that the fees were payable on a contingency, namely successful recovery; that the contingency was fulfilled only after Mr Senekal had established his own firm; that no fee was due to Matsepes Inc when he left; and that the entitlement to the fee therefore arose in the hands of Senekal Inc. The Master's reasons adopted the same approach, describing the arrangement as a 'suspensive condition'.

[53] Counsel for Senekal Inc was at pains to say that its case was not one of fraud or contrivance, and that the sequence of events could not have been designed, from 2013, with a view to a firm that was established only in 2017. That is so. But the question is not whether Mr Senekal or Mr Matsepe set out in 2013 to evade s 63(2). The question is whether, when the invoices were rendered in 2019 and 2020 in the name of a firm that had not done the work, the section could be evaded by that means. It could not. Nor was it necessary for Standard Bank to allege or prove a dishonest scheme.

[54] The facts speak for themselves. Matsepe Inc did the work. The Master's reasons and the correspondence between the trustees confirm that Mr Smith at least knew that it could not charge the estate for it. Matsepe's Inc did not invoice the estate. When Mr Senekal left, he took the files with him.

[55] When the recoveries were to hand, Mr Senekal's new firm invoiced the estate for the whole of the work, including the years during which he had been Mr Matsepe's co-director. It was put to counsel, and he was unable to gainsay it, that the invoices would in all probability never have been rendered to the estate had Farmsecure, which had undertaken to pay the costs of the interrogation, remained solvent. Whatever the intentions of those involved, the result is one that s 63(2) expressly forbids.

[56] One further point requires mention. The letter of 25 February 2020 asserted that s 63(2) refers to a 'partner' and not to a 'director', and the point was faintly echoed in argument. It is without merit. The section is not confined to the trustee's partner. It extends to a person 'who employs' the trustee and to a 'fellow employee' of the trustee.

[57] Matsepes Inc, of which Mr Matsepe was a director and through which he practised, employed him in the sense that the section contemplates. Mr Senekal was his fellow director in the same firm. The section applies in terms to the firm and to Mr Senekal alike. Whether a director of an incorporated practice is in every context an "employee" of the company is a question that need not be decided, because the prohibition in the second part of the subsection, directed at the trustee and his partner, is in any event engaged.

[58] An incorporated law practice is the statutory equivalent of a partnership. Its directors are, by s 34(7) of the Legal Practice Act 28 of 2014, as they were by s 23(1)(a) of the Attorneys Act 53 of 1979, jointly and severally liable together with the company for its debts and liabilities incurred during their term of office. A construction of s 63(2) that reached the partner of a trustee practising in partnership, but not the co-director of a trustee practising through a company, would defeat the purpose of the section for no reason other than the form of the practice. The section must be read purposively, and so read, it reaches both.

The resolution of 14 July 2014 and the position of Farmsecure

[59] There is a further reason why including the interrogation costs as administrative costs was improper, and it is one on which the Master's own reasons founder. The Master relied on the resolutions adopted at the second meeting of creditors as binding on all creditors, including Standard Bank, unless set aside. That is correct as far as it goes. But resolution 7 provided in terms that the costs of the interrogation were excluded from the costs of administration. The trustees' report, to which the resolution referred, recorded that the interrogation was being conducted on a contingency basis and, in the letters of 10 March 2014 and 4 August 2014, that Farmsecure would pay

its costs and take its fruits. That was the arrangement under which the work was done, and under which the creditors authorised it.

[60] The resolution bound the trustees and the creditors. It was not set aside. The Master's own directions of 20 October 2020, that the costs of the interrogation be deducted from the dividend of the financing creditor, and the June 2021 account, which allocated the contribution to Farmsecure, both gave effect to it. What the February 2023 account did was to convert costs which the creditors had resolved were not costs of administration, and which one creditor had undertaken to bear, into costs of administration to be borne by the general body of creditors, because the creditor that had undertaken to bear them had become insolvent.

[61] Counsel for Senekal Inc submitted that this was the inevitable consequence of the trustees' liability under s 106 to levy a contribution when the free residue was insufficient. But s 106 is engaged only by 'the expenses, costs and charges mentioned in section ninety-seven', namely the costs of sequestration. Costs which the creditors resolved were not costs of administration, and which s 63(2) in any event disentitled the service provider from recovering out of the estate, are not such costs. Farmsecure's insolvency did not transform them into such costs. Counsel's frank acknowledgement that the reference in the objection and in the June 2021 account to s 104(3) was 'amiss' does not affect the point. The substance of Standard Bank's first objection was that the interrogation costs were, by agreement and by resolution, for Farmsecure's account and not for the estate. That objection was well founded.

[62] Counsel for Senekal Inc contended that Standard Bank benefited from the interrogation because the recoveries it produced reduced the shortfall on its claims. There is no evidence of the extent of any such benefit on the record, and the point was not raised in the answering affidavit. Even if some benefit accrued, it does not convert a charge that the creditors excluded from the costs of administration, and that the Act disentitles the claimant from recovering, into a charge that the creditors must bear.

Services rendered after 27 October 2017

[63] Counsel for Senekal Inc submitted, in the alternative, that if the interpretation of s 63(2) went against him, the section could not apply to services rendered by Senekal Inc after its incorporation, because after that date neither Senekal Inc nor Mr Senekal stood in any relationship with the trustee that the section contemplates. As a proposition of law, that is correct. Services rendered to the estate after 27 October 2017 by Senekal Inc, under a mandate from the trustees, would not be affected by s 63(2).

[64] The difficulty for Senekal Inc lies in applying the proposition to the record. The invoices are not divided between services rendered before and after that date. Counsel, when invited from the bench to identify the items related to work done after October 2017, referred to a single entry on one invoice and to the costs of the contribution application, which are a separate item in the account and not in issue. Nor does the record establish that the trustees, acting jointly as they were required to do, mandated Senekal Inc after its incorporation. The correspondence shows that Mr Smith disputed the existence of any such mandate. Standard Bank's invitation to produce proof of the instruction was not taken up. On this record, the high court cannot be faulted for upholding the objections without embarking on an apportionment that the appellant neither pleaded nor proved.

[65] The amended account will again lie open for inspection under s 111(2)(b), and any creditor whose interests are affected will be entitled to object to it. Nothing in this judgment forecloses that process. What this court finds is that the remuneration claimed for services rendered before 27 October 2017 cannot lawfully be included.

Substitution

[66] The final contention was that, even if it was right to set aside the Master's decision, the high court should have remitted the objections to the Master rather than upholding them itself. Counsel for Senekal Inc submitted that the Master had not applied his mind to s 63(2), and that the statute creates a bespoke mechanism under

which the Master, and not the court, is the functionary charged with the examination of accounts. Counsel for Standard Bank indicated that his client would be content with a remittal, while supporting the order made by the high court.

[67] The submission misconceives the nature of the remedy. A review under s 111(2)(a) is not a review under the Promotion of Administrative Justice Act 3 of 2000, in which substitution is exceptional and governed by the considerations identified in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*¹⁰. It is a statutory remedy in which the court enters into and decides the whole matter afresh, with the powers of a court of appeal and of review, and in which the court ‘may thereupon confirm the account or make such order as it thinks fit’. *Nel* and *Constantia Insurance* make that clear.

[68] The high court was not confined to asking whether the Master had erred and, if so, sending the matter back. It was entitled to decide the objections. The objections turned on questions of law and on facts that were not in dispute. Remittal would have served no purpose other than delay in an administration that has already run for more than a decade. The high court exercised its discretion judicially, and this Court has no basis to interfere.

Conclusion

[69] The Master's decision of 3 May 2023 was based on a misreading of the October 2022 order and on a failure to apply s 63(2) of the Act. The high court correctly set it aside and correctly upheld the objections. The appeal must fail. Standard Bank was represented by one counsel and sought its costs on that basis. There is no reason to depart from the ordinary rule.

¹⁰ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 47– 48.

[70] The following order is made:

1. The appeal is reinstated.
2. The appeal is dismissed with costs

KE MATOJANE
JUDGE OF APPEAL

Appearances

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