THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case no: 513/2013

In the matter between:

ANSAFON (PTY) LTD	**FIRST APPELLANT**
DIAMOND CORE RESOURCES (PTY) LTD	**SECOND APPELLANT**
and	
THE MASTER OF THE NORTHERN CAPE DIVISION OF THE HIGH COURT OF SOUTH AFRICA	**FIRST RESPONDENT**
BRIAN ST CLAIR COOPER	**SECOND RESPONDENT**
JOHAN ENGELBRECHT	**THIRD RESPONDENT**
VINCENT MATSEPE	**FOURTH RESPONDENT**
GARY BOTHA	**FIFTH RESPONDENT**
CHRIS EDLING	**SIXTH RESPONDENT**
JOHN WALKER	**SEVENTH RESPONDENT**

Neutral citation: *Ansafon (Pty) Ltd v The Master, Northern Cape Division* (513/2013) **[**2014] ZASCA 170 (14 November 2014)

Coram: Mpati P, Maya, Majiedt and Pillay JJA and Gorven AJA

Heard: **14 November 2014**
Delivered: **14 November 2014**

Summary: Interpretation of a court order – whether interdictory or declaratory relief appropriate in the circumstances.

ORDER

On appeal from: Northern Cape High Court, Kimberley (Hughes-Madondo AJ sitting as court of first instance):

The appeal is dismissed with costs save that paragraph 2 of the order of the court below is altered as follows:

1. By the deletion of the words 'inclusive of the costs of the urgent interlocutory application and the wasted costs of the postponement of the taxation'.
2. By the addition of paragraph 3 as follows:

   '3. The respondents are directed to pay the costs of the urgent interlocutory application and the costs of the application for postponement jointly and severally, the one paying the others to be absolved.'

JUDGMENT

Gorven AJA (Mpati P, Maya, Majiedt and Pillay JJA concurring):

[1] The basic history of the matter is as follows. On 3 July 2009, Diamond Core Resources (Pty) Ltd (Diamond Core) was placed in final liquidation. The second and third respondents were appointed provisional liquidators. At the time, Diamond Core was a wholly owned subsidiary of a Canadian company which had a secondary listing on the Johannesburg Stock Exchange, BRC-Diamond Core Limited (the Canadian company). On 9 September 2009, at the first meeting of creditors, the second and fifth respondents were appointed final

liquidators and the following day the third respondent was appointed a final liquidator. On 4 December 2009 an agreement was concluded between the Canadian company and Ansafon (Pty) Ltd (Ansafon) in terms of which Ansafon purchased the entire shareholding of Diamond Core. After acquiring the shareholding, Ansafon set about settling all legitimate debts owed by Diamond Core to its creditors. During March 2010, after having done so, Ansafon applied to set aside the liquidation of Diamond Core. During May 2010 the fifth respondent was removed as a liquidator and the fourth respondent was appointed in his stead. The application was argued on 9 June 2010.

[2] On 18 June 2010, the court below issued a *rule nisi* returnable on 27 September 2010 calling on interested parties to show cause why the liquidation order should not be set aside. The further relief ordered by the high court which is material to this appeal was as follows:

'THAT the applicant is directed, prior to the return day, to provide security in a form acceptable to the Registrar of this Court in respect of:

2.1 . . .

2.2 The fair and reasonable administration fees and expenses of the joint liquidators relating to the administration of the first respondent as determined by the Master of this court.'

[3] A memorandum relating to the determination of the security to be provided for this aspect was prepared by the third respondent. On 1 September 2010, the Master determined the amount of security for this aspect in the sum of R11 309 750. His determination was framed as follows:

'I hereby determine the amount of security to be provided by the applicant in respect of the fair and reasonable administration fees and expenses of the joint liquidators relating to the administration of the estate of Diamond Core Resources (Pty) Limited (in liquidation) to be the sum of R11 309 750.00 . . . .'

[4] As a result, Ansafon provided an irrevocable undertaking to pay the administration fees and costs as determined by the Master. These were defined in the undertaking as meaning 'the taxed and allowed costs of administration, provisionally estimated by the Master at R11 309 750 . . .'. On the return day of the *rule nisi*, an order was made by agreement which set aside the liquidation of Diamond Core. A dispute arose over paragraph 5 of the consent order which read:

'THAT Ansafon pay the fair and reasonable administration fees and expenses of the second Respondent as determined by the Master of this court, but subject to review and subsequent appeal, if any.'

[5] On 9 March 2011, the second to seventh respondents submitted fee accounts to the Master whose collective amount exceeded R32 million. A further bill was subsequently submitted by the fifth respondent.

[6] An application was launched in the court below by Ansafon. The relief sought was to interdict the Master from confirming the accounts submitted by the liquidators and from determining the administration fees and expenses of the liquidators. In addition, declaratory relief was sought to the effect that the determination made by the Master on 1 September 2010 constituted the determination referred to in paragraph 5 of the order and further orders relating to how the fees of the liquidators should be determined.

[7] The court below dismissed the application with costs. It did not deal with the interdict aspect but only with the declaratory relief after having dealt with an initial application for postponement. It is against this order that Ansafon appealed. The court below granted limited leave to appeal. Before us, Ansafon sought, and was granted, leave to appeal on wider grounds than those granted by the court below.

[8] The crisp issue on appeal is the interpretation of paragraph 5 of the order of 27 September 2010. This resolves itself into whether or not the words 'as determined by the Master of this court' refer to a future determination or to that of 1 September 2010 regarding the amount of security to be put up for the fair and reasonable administrative fees and expenses of the joint liquidators. Ansafon claims that the determination was made by the Master on 1 September 2010 and accordingly sought the interdict and declaratory relief. The joint liquidators claim that a determination must still be made by the Master.

[9] This court has recently said that the process of interpretation is objective and '[t]he "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'.[1]

[10] What is clear is the following. Ansafon undertook to pay an amount. The amount was not specified. The manner of arriving at the amount was specified. It was to be 'as determined by the Master'. A mechanism for reviewing or appealing the determination was provided for. At the time the order was made, the Master had issued a determination. The Master said that he had determined 'the amount of security to be provided by the applicant in respect of the fair and reasonable administration fees and expenses of the joint liquidators relating to the administration of the estate of Diamond Core'. In doing so, he referred to an annexure which set out the way he had arrived at the figure. This was not a determination of the fees and expenses even though the amount of security took what the Master knew about these at the time into account. The Master made no determination after that date.

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[11] There is no indication at all in the order that the determination had already been made. The order embodies an agreement between the parties. They were aware of the determination of 1 September 2010. It does not refer to this determination. Instead, it uses precisely the same words as did paragraph 2.2 of the order of 18 June 2010, being 'as determined by the Master'. This obviously referred to a future determination. Where the same words were used in paragraph 5 of the order of 27 September, Ansafon sought to contend that this now referred to a past determination. The use of the same words suggests that, as with the order of 18 June 2010, the Master had not by then determined what he was required to. In addition, the order of 27 September refers to the fair and reasonable administration fees and expenses whereas the Master had, on 1 September 2010, determined the amount of security, not the actual fees and expenses. This is specifically what he said in his determination. If it was intended that the amount of security was to be that which would be paid by Ansafon, there is no reason why the specific amount was not included in the order or reference made to the determination of 1 September 2010. This was not done. In addition, if this were the case, there would have been no need to provide for review or appeal. If the determination as agreed was already in place, such a provision would have been redundant. A further indication that the determination had not yet been made was contained in paragraph 8 of the consent order which reads as follows:

'THAT Savage Jooste is instructed to disburse the funds so held by them upon agreement between the parties, alternatively upon determination by the Master, or the court as the case may be, of the amount due to the Second Respondent immediately.'

[12] It is clear that this involved a future exercise. The appellants sought to submit that the reference here to the Master is to the Taxing Master of the court and not to the Master referred to in paragraph 5. It is clear that, in the context of a liquidation and particularly after reference to the Master in paragraph 5 in

identical terms, if the taxing master had been intended, the language used would not have been the same language as was used in paragraph 5.

[13] Still further, Ansafon itself, in putting up the irrevocable undertaking to pay, defined liquidators' costs as being 'the taxed and allowed costs of administration, provisionally estimated by the Master at R11 309 750.00'. This shows that, even after the determination of 1 September, it was understood by Ansafon that the determination was not a final one.

[14] The requirements for a final interdict have remained unchanged for 100 years. In *Setlogelo v Setlogelo*,[2] Innes JA said:

'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'

[15] No case was made out which deals with any of these apart, perhaps, from asserting a clear right based on an interpretation of the court order of 27 September 2010. No mention was made in the application of an injury actually committed or reasonably apprehended nor was there mention of the absence of protection by any other ordinary remedy. The latter is of great importance, particularly because the order mentioned that the determination of the Master would be subject to review or appeal.

[16] No case was made out on the papers why the liquidators should account to Diamond Core. All that was said was that in law the liquidators are obliged to account to the company. There was no indication that any demand was made or a basis for such demand was laid prior to the application. Neither was there an indication that such a demand was refused. The present application was clearly

[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

aimed at interdicting the Master from acting in accordance with paragraph 5 of the order. There is no reason why the issue of an account should have been dealt with by the court below.

[17] No basis was laid for the grant of the declaratory relief sought. As indicated, the construction of paragraph 5 of the order requires the Master to make a determination. This has yet to be done. An order had been granted by consent. The fact that, in other situations, the Master does not determine fees once a company has been taken out of liquidation does not in any way invalidate that order. In any event, Ansafon does not seek to set aside paragraph 5 of the order but to interpret it in its favour. It has failed in contending for such an interpretation. It is not necessary to deal with whether the Master can determine the fees under the Companies Act 61 of 1973 since this is not the basis on which the consent order was framed. The Master has been appointed to make a determination and this court is not required to give guidance in this regard.

[18] The one aspect in which there was agreement was that the costs order of the court below was incorrect. The applicant should have been awarded the interlocutory costs and that of a postponement of the taxation.

[19] In the result the appeal is dismissed with costs save that paragraph 2 of the order of the court below is altered as follows:

1. By the deletion of the words ‘inclusive of the costs of the urgent interlocutory application and the wasted costs of the postponement of the taxation’.
2. By the addition of paragraph 3 as follows:

   ‘3. The respondents are directed to pay the costs of the urgent interlocutory application and the costs of the application for

postponement jointly and severally, the one paying the others to be absolved.'

T R Gorven
Acting Judge of Appeal

Appearances

For Appellants:	D J Vetten Instructed by: Thomson Wilks Inc., Sandton Webbers, Bloemfontein
For 2nd to 7th Respondents:	F H Terblanche SC Instructed by: John Walker Attorney, Edenvale Honey Attorneys, Bloemfontein