VONNISSE

LIABILITY OF A BODY CORPORATE AS APPLICANT CREDITOR TO CONTRIBUTE TOWARDS THE COST OF SEQUESTRATION

***First Rand Bank Ltd v Master of the High Court (Pretoria)* (53071/2016) [2018] ZAGPPHC 806 (18 April 2018)**

OPSOMMING

'n Regspersoon as applikant-skuldeiser se kontribusiepligtigheid vir sekwestrasiekoste

Die uitleg van die bepalings van die Insolvensiewet 24 van 1936 wat handel oor die kontribusiepligtigheid van skuldeisers bly 'n netelige kwessie. In die onlangse saak van *First Rand Bank Ltd v Master of the High Court (Pretoria)* het dit weer onder die loep gekom. Die hof moes twee aspekte oorweeg: eerstens of 'n regspersoon in sy hoedanigheid as applikant-skuldeiser om die boedel van die eienaar van 'n deeltiteleenheid te sekwestreer, kontribusiepligtig is vir sekwestrasiekoste; tweedens, indien die regspersoon kontribusiepligtig is, of dit alleen aanspreeklik is vir die sekwestrasiekoste of *pro rata* saam met die ander skuldeisers wat eise teen die boedel bewys het. Die ander skuldeisers in hierdie saak was verbandhouers (versekerde skuldeisers) wat op hulle sekuriteit gesteun het. 'n Verdere vraag was of hulle kontribusiepligtig sou wees indien daar 'n tekort in die vrye oorskot was om sekwestrasiekoste te delg. 'n Soortgelyke situasie is bespreek in *Snyman v The Master* 2003 1 SA 239 (T). Die regter in *First Rand* het egter glad nie na *Snyman* verwys of met hierdie vraag gehandel nie.

Die regter moes artikels 14(3), 89 en 106 van die Insolvensiewet asook artikel 15B(3)(a)(i)(aa) van die Wet op Deeltitels 95 van 1986 uitlê. Dit word verwelkom dat die regter artikel 14(3) korrek uitgelê en beslis het dat die regspersoon wel kontribusiepligtig is indien daar 'n tekort is in die vrye oorskot, selfs al word daar nie van die regspersoon verwag om in sulke gevalle 'n eis te bewys nie. Dit is egter teleurstellend dat die onduidelikheid wat bestaan oor versekerde skuldeisers wat op hulle sekuriteit steun se kontribusiepligtigheid nie opgeklaar is nie.

1 INTRODUCTION

The interpretation of the provisions of the Insolvency Act 24 of 1936 regarding the liability of creditors for contribution is a contentious issue. This is apparent from the recent decision in *First Rand Bank Ltd v Master of the High Court (Pretoria)*. The central issue in *First Rand* was twofold. The first question was whether the body corporate in its capacity as applicant creditor in the proceedings sequestrating the estate of the owner of a sectional title unit within a scheme administered by the said body corporate, was liable to contribute towards the costs of sequestration. The second question was, if the body corporate was indeed liable, whether it would be liable *pro rata* together with the other creditors who proved claims or whether it would be liable solely to pay the contribution. The other creditors who proved claims against the insolvent estate were bondholders in terms of mortgage bonds registered over two sectional title units owned by the insolvent. Both these secured creditors relied on their security

for the satisfaction of their claims against the insolvent estate and the question arose as to whether they would, in these circumstances, be liable to contribute towards the shortfall in the free residue of the insolvent estate concerned. The latter question has been dealt with previously in *Snyman v The Master* 2003 1 SA 239 (T). However, the court in *First Rand* did not refer to *Snyman* and, in fact, did not deal with the latter issue at all.

Vilakazi AJ, who delivered the judgment in *First Rand*, stated that the above issues all involve an exercise in statutory interpretation in order to give meaning to the provisions of sections 14(3), 89 and 106 of the Insolvency Act and section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 (para 26).

The purpose of this discussion is to analyse and evaluate the decision in *First Rand* specifically in respect of the court's interpretation of the relevant statutory provisions.

2 APPLICABLE STATUTORY PROVISIONS

For a proper understanding of the facts and decision in *First Rand* it is necessary to provide a brief analysis of the relevant provisions of the Insolvency Act and the Sectional Titles Act.

Section 14(3) of the Insolvency Act deals with the liability of an applicant creditor to contribute towards the cost of sequestration, should there be a shortfall in the free residue of an insolvent estate. Section 14(3) reads as follows:

> "In the event of a contribution by creditors under section [106], the petitioning creditor, whether or not he has proved a claim against the estate in terms of section [44], shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition."

The correct interpretation of section 14(3) is not a settled matter (see Burdette "New problems relating to contribution in insolvent estates" 2000 *THRHR* 458). The question arises as to who the petitioning (applicant) *creditor* is. Burdette 2000 *THRHR* 461 asks whether the provision in section 14(3) is wide enough to cover an applicant creditor who *need not* prove a claim. Another issue pertains to the amount for which an applicant creditor will be liable. Section 14(3) provides that he is liable to contribute *not less* than the amount of the claim *stated in his petition*. Therefore, if the applicant creditor proves his claim and it amounts to more than the claim stated in his application, he will be liable for the larger amount (Burdette "Kontribusiepligtigheid van skuldeisers in insolvente boedels" 1993 *De Rebus* 1004 1006). However, a further question is whether the applicant creditor will always be regarded as a concurrent creditor when determining his liability to contribute. Burdette is of the view that the applicant creditor's liability for contribution should be determined with reference not only to the amount of his claim, but also to the nature of his claim, in other words, whether he is a concurrent, secured or statutory preferent creditor (1993 *De Rebus* 1006; 2000 *THRHR* 461).

Section 14(3) must be read with section 106. For purposes of this discussion the main part of section 106 as well as paragraph (a) of the proviso to section 106 are relevant. Section 106(b) deals with the instance where creditors have withdrawn their claims, while section 106(c) governs the liability of statutory preferent creditors (see iro the interpretation of s 106(c), *Ongevallekommissaris v Die Meester* 1989 4 SA 69 (T) 76–77; Burdette 1993 *De Rebus* 1005). (Section 106(b) and (c) is not relevant for the purposes of the present discussion and is not

dealt with further.) The main part of section 106 and paragraph (a) of the proviso 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".

The main part of section 106 deals with the situation where there is no free residue or insufficient free residue in an insolvent estate to meet the expenses, costs and charges in terms of section 97 of the Insolvency Act (the so-called "sequestration costs"). It is important to understand what "sequestration costs" entail. In terms of the Act, it includes "taxed costs of sequestration" (s 97(3)) that is, the cost incurred in respect of the sequestration application (the attorney's legal fees). It is important to note that the latter costs are paid from the "free residue" of an insolvent estate. The "free residue" is the portion of the estate which is not subject to any security (see the definitions of "security" and "free residue" in s 2) but also includes any possible surplus remaining after paying a secured claim from the proceeds of the encumbered asset concerned (s 83(12)).

An attorney's legal fees in respect of a sequestration application, being sequestration costs in terms of section 97, are thus paid from the proceeds of the free residue and not from the proceeds of the encumbered assets in an insolvent estate. As explained below, the legal fees in respect of a sequestration application must be distinguished from the legal costs incurred by a body corporate when recovering arrear levies due to it by the insolvent owner of the sectional title unit concerned. These costs amount to the so-called section 89 costs, which include the cost of realising of the encumbered asset concerned (see s 89(1); *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 3 SA 362 (SCA) para 27; Bertelsmann *et al Mars The law of insolvency* (1998) 494). Section 89 costs therefore must be distinguished from sequestration costs as the section 89 costs are set off against the proceeds of the encumbered asset concerned and not from the proceeds of the free residue. As regards arrear levies, section 15B(3)(a)(i)(aa) of the Sectional Titles Act provides as follows:

> "(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 36(1), 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."

Although section 15B(3)(a)(i)(aa) does not create a preference in the ordinary sense, the body corporate is given the power to resist transfer of a unit until "all moneys" owed to the body corporate in respect of the unit have been paid or guaranteed to the satisfaction of the body corporate (*Nel v Body Corporate of the Seaways Building* 1996 1 SA 131 (A) 135). Arrear levies payable to a body

corporate in terms of section 15B(3)(a)(i)(aa) amount to section 89 costs, which must be set off against the proceeds of the encumbered asset (the sectional title unit concerned) before the surplus may be applied to pay a bondholder who may have a bond over the said unit (Burdette 2000 *THRHR* 460). In *Barnard v Regspersoon van Aminie* [2001] 3 All SA 433 (A) para 18 it was held that the words "all moneys" in section 15B(3)(a)(i)(aa) include not only the arrear levies but also the legal costs incurred in the recovery of the levies prior to sequestration. The latter costs together with the amount of the arrear levies are thus both regarded to be an administration expense in terms of section 89(1) of the Insolvency Act which is set off against the proceeds of the sectional title unit concerned. Since the arrear levies and legal costs associated with it are administration expenses, the body corporate need not prove a claim in terms of section 44 of the Insolvency Act as the arrear amounts will be paid as part of the section 89 costs before a clearance certificate will be issued by the body corporate for the transfer of the unit out of the insolvent estate. As the body corporate need not prove a claim, Burdette 2000 *THRHR* 461 submits that the provisions of section 14(3) cannot be applied and thus the body corporate cannot be held liable for contribution if there is a shortfall in the free residue of the estate.

Once it has been established that there is a shortfall in the free residue of an insolvent estate in terms of the main part of section 106, the next step is to determine which creditors will be liable for contribution. In terms of the main part of section 106 "all creditors *who have proved claims* against the insolvent estate would be liable to contribute towards the deficiency" which liability must be calculated *pro rata* with reference to the amounts for which they are held liable. The main part of section 106 first deals with the liability of the "non-preferent" creditors, that is, the concurrent creditors who are liable *pro rata* in respect of the amount of their claims. Secondly, it deals with the secured creditors whose claims "would have ranked upon the surplus of the free residue, if there had been any", that is, the creditors who do not rely on their security for the satisfaction of their claims. As regards the secured creditors in an insolvent estate, a distinction should thus be drawn between creditors who *rely* on their security, and secured creditors who do *not rely* on their security and thus elect to claim the unsecured part of their claim as concurrent creditors (see s 83(12)). In terms of the main part of section 106, secured creditors who do *not rely* on their security will be liable for the concurrent portion of their claim, should there be a shortfall in the free residue (cf *Ongevallekommissaris* 73–74; Burdette "Contribution 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 *THRHR* 521 524).

As regards secured creditors who *rely* on their security, section 89(2) provides that a secured creditor (excluding the creditor who brought the sequestration application) may "state 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" and further that such creditor, if he relies on his security, "shall not be liable for any cost of sequestration other than the costs specified in section 89(1) and other than costs for which he may be liable under paragraph (a) or (b) of the proviso to section [106]". Secured creditors who rely on their security can thus only be liable in terms of section 89(1) or section 106(a) or (b) (cf *Ongevallekommissaris* 76; Burdette 2003 *THRHR* 523). Section 89(1) deals with the situation where the proceeds of a security

are insufficient to cover the cost of maintaining, conserving and realising in terms of section 89(1). In such an instance the secured creditor(s) who hold the relevant encumbered asset as security will be liable to contribute (see Burdette 1993 *De Rebus* 1008). (A secured creditor's liability in terms of section 89(1) is not relevant for the present discussion and is not dealt with further.)

Section 106(a) deals with the liability of secured creditors who rely on their security for the satisfaction of their claims. In terms of section 106(a), if "all creditors who have proved claims are secured creditors who would *not* have ranked upon the surplus of the residue, if there had been any" (our emphasis) they will be liable. The latter part of section 106(a) refers to the situation where the only proved creditors were secured creditors who relied on their security. In other words, if the secured creditor(s) who relied on his/their security(ies) was/were the only creditor(s) who proved a claim and there were no other creditors in terms of the main part of section 106, that is, concurrent creditors (including secured creditors with concurrent portions on their claims) or no applicant creditor who could make good the deficiency, the secured creditor(s) who relied on the security will be liable (cf Burdette 1993 *De Rebus* 1005; 2003 *THRHR* 525–526).

However, in *Snyman* the court came to a different conclusion and held that the secured creditor *in casu* who relied on its security was liable despite the fact that there was an applicant creditor who could make good the deficiency. The facts were briefly as follows: Snyman was the applicant creditor in a friendly sequestration who, for obvious reasons, did not prove his claim. The only asset in the estate was immovable property mortgaged to ABSA Bank Ltd. ABSA proved its claim and relied on its security should there be a danger of contribution. The court held that such a conditional invocation of section 89(2) was not permissible. However, it assumed for purposes of the judgment that the proof of the claim complied with the requirements of section 89(2) (*Snyman* 242). In the first liquidation, distribution and contribution account, the trustee reflected both the applicant creditor and ABSA to be liable for contribution. However, the Master queried the account on the basis that ABSA had relied on its security. As a result, the Master held that ABSA was not liable to pay any contribution and Snyman was thus reflected as the only contributory in the amended account. This resulted in Snyman bringing a review application to reinstate the apportionment of the contribution reflected in the first account.

In *Snyman* 243 the court construed the main part of section 106 as meaning that "all creditors" (including secured creditors and irrespective of whether or not they relied on their security) who have proved claims will be liable to make good any deficiency in the free residue (cf Burdette 2003 *THRHR* 524). However, as pointed out by Burdette, the court ignored the fact that in *Snyman* the secured creditor relied on its security and therefore did not rank on the surplus of the residue in terms of the main provision in section 106. According to Burdette 2003 *THRHR* 524

> "[t]he court reached an illogical conclusion from a section that is very clear in what it was designed to achieve. It cannot be denied that a cursory reading of the main part of section 106 binds all the proved creditors as contributories, but the section goes further and states *to what extent* proved creditors will be held liable for such contribution".

Burdette points out (*ibid*) that the court in *Snyman* was referred to the decision of the same division of the High Court in *Ongevallekommissaris* where section 106

was construed in its entirety. However, the court in *Snyman* was apparently of the opinion that the decision in *Ongevallekommissaris* did not apply to the matter before it.

3 FACTS

First Rand entailed an unopposed application in terms of section 111(2)(a) of the Insolvency Act for the review and setting aside of a decision of the Master (first respondent) dismissing an objection by the applicant (First Rand Bank – hereafter FRB) to the first and final liquidation, distribution and contribution account, prepared by the trustees (third and fourth respondents) of the insolvent estate of the owner of two sectional title units (paras 1 22).

One of the sectional title units was managed by a body corporate (second respondent) in a scheme known as Villa Lucca while the other unit was managed by a body corporate in a scheme known as SS Victory Park. FRB was a bondholder in terms of a mortgage bond registered in its favour over the Villa Lucca unit and the fifth respondent (Nedbank) was a bondholder in respect of a mortgage bond registered over the SS Victory Park unit (para 11).

The insolvent fell in arrears with the payment of levies owed to the body corporate (second respondent) and the latter instituted action proceedings against the insolvent for the recovery of the arrear levies in the amount of R8 895.64 with interest (para 12). On 19 September 2008, the Magistrates' Court granted default judgment for payment of the latter amount with interest (para 13).

On 7 October 2009 the body corporate applied to the High Court for the sequestration of the estate of the insolvent sectional title owner. The application was based on its claim for arrear levies which, at that stage, amounted to more than R22 000 (para 13). On 29 April 2010 a provisional sequestration order and on 14 June 2010, a final sequestration order was granted by the High Court (para 14).

The two bondholders, FRB and Nedbank, proved their claims (amounting to R679 512.82 and R645 840.86 respectively) against the insolvent estate at two separate meetings. Both creditors relied on their securities for the satisfaction of their claims (para 15).

On 1 April 2015, the trustees prepared a liquidation, distribution and contribution account in terms of which a contribution in the amount of R46 663.16 was levied *pro rata* on FRB and Nedbank. However, the body corporate, the applicant creditor in respect of the sequestration proceedings, was not reflected as being *pro rata* liable for contribution (paras 15 16).

In its application for review, FRB requested two forms of relief. The first was that its objection against the Master's decision be sustained and that the trustees be directed to amend the liquidation, distribution and contribution account by reflecting FRB, the body corporate and Nedbank to be liable *pro rata* for contribution, alternatively, to reflect the body corporate to be liable on its own for the said contribution. Secondly, FRB requested a declaratory order that the legal costs incurred by the body corporate in respect of the application for sequestration of the insolvent owner's estate do not form part of the costs pertaining to section 15B(3)(a)(i)(aa) of the Sectional Titles Act (paras 2 3 9).

The items in the liquidation, distribution and contribution account which were subject to dispute related to the cost of sequestration in terms of section 97 of the Insolvency Act and included the taxed bill of costs owed to the legal

representative of the body corporate in the amount of R43 680.36 (s 97(2) read with s 97(3)) as well as a number of other expenses relating to general costs of administration and liquidation in terms of section 97(2) in the amount of R2 982.80 (para 10).

The Master filed a notice to abide by the decision of the court. The sixth respondent, the Minister of Justice and Constitutional Development, did not file a notice of intention to oppose the review application. On 5 September 2016, the body corporate withdrew its notice of opposition (paras 4 5 8).

FRB also filed and served a notice in terms of rule 16A of the Uniform Rules of Court in which it raised a constitutional issue in its review application, namely, the proper interpretation of sections 14(3), 89(1) and 106 of the Insolvency Act and section 15B(3)(a)(i)(aa) of the Sectional Titles Act. FRB submitted that the misinterpretation of these provisions by the Master amounted to an infringement of section 9 (the right not to be discriminated against), section 10 (the right to dignity), section 22 (the right to practise a trade of his choice) and section 25 (the right not to be deprived arbitrarily of property) of the Constitution (paras 6 7).

FRB's objections to the liquidation, distribution and contribution account were based on the following (para 20):

(a) The Master conflated the sequestration costs incurred by the body corporate and applicant creditor in terms of section 14(3) and the legal costs the body corporate incurred in respect of the recovery of arrear levies due by the owner of the sectional title unit in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act.

(b) The Master erred in law in concluding that the sequestration costs, that is, the legal costs in respect of the sequestration application, formed part of the realisation costs in terms of section 89(1) of the Insolvency Act and that the body corporate, therefore, was not required to prove its claim in terms of section 44 of the Insolvency Act.

(c) The Master incorrectly relied on *Barnard* as authority for the proposition that the body corporate is not liable for contribution.

The Master dismissed FRB's objection and held that the body corporate was not liable for contribution in terms of section 14(3) of the Insolvency Act (para 21.12). The reasons for his decision appear to be the following (para 21):

Arrear levies in respect of sectional title units that form part of the encumbered assets of an insolvent estate are considered to be an administration expense (s 89 costs) and should thus be paid from the proceeds of the encumbered asset concerned. The body corporate therefore need not prove a claim as the arrear levies are paid before a clearance certificate will be issued by the body corporate for the transfer of the unit out of the insolvent estate. The arrear levies can thus not be considered to be a *claim* and the body corporate cannot be considered a *creditor* for the purposes of the provisions of the Insolvency Act.

Although section 14(3) states that the applicant creditor is liable for contribution whether or not such creditor has proved a claim, the proviso to section 14(3) provides "that the applicant creditor must not pay less contribution that [sic] he would have had to pay if the creditor had formally proved a claim" (para 21.9). As the body corporate does not have to prove a claim formally in terms of section 44 of the Insolvency Act, "when applying the provisions of section 14(3)

this in effect means that the Body Corporate must not pay less than nothing" (para 21.10).

In other words – if the Master's argument is correctly understood – because the body corporate needs not formally prove a claim, it does not have a claim against the insolvent estate and thus needs not pay any contribution in terms of section 14(3).

With reference to *Barnard* the Master finally argued as follows (para 21.11):

> "If one considers the effect of the *Barnard* decision where it 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 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 the secured creditor is paying the contribution."

4 DECISION

Vilakazi AJ stated that the present matter concerns the interpretation of section 14(3) of the Insolvency Act and its interplay with section 15B(3)(a)(i)(aa) of the Sectional Titles Act (para 17). The court pointed out that FRB did not explain in its papers the basis of its attack on the constitutionality of section 14(3) and its interplay with section 15B(3)(a)(i)(aa) (paras 23–25). The court stated that it is unclear why the interpretation, or according to FRB, the misinterpretation of section 14(3) of the Insolvency Act and consequent misapplication of sections 14(3), 89(1) and 106 of the Insolvency Act and section 15B(3)(a)(i)(aa) of the Sectional Title Act raised a constitutional issue.

The applicable statutory provisions which, according to the court, need to be construed, are sections 14(3), 106 and 89 of the Insolvency Act and section 15B(3)(a)(i)(aa) of the Sectional Titles Act (para 26).

As regards section 14(3), the court held that it should be interpreted to mean "that it makes the petitioning creditor compulsory liable to contribute to the costs whether or not it [h]as proved its claim" (para 28).

According to the court, section 106 "prescribes how to deal with creditors who must contribute in the event where the residue is insufficient in the estate of the insolvent" (para 31).

The legal costs incurred or associated with the recovery of arrear levies fall within the ambit and protection of section 15B(3)(a)(i)(aa) which provision according to the court serves to "reinforce the protection of levy payment" (para 33). The court held that the body corporate's reliance on section 15B(3)(a)(i)(aa) in order to absolve the body corporate from being liable *pro rata* to pay contribution was misplaced (para 34). The court thus held that the body corporate is not immune from being liable for contribution and stated as follows (paras 35–36):

> "The Second Respondent set the machinery of law in motion by instituting sequestration proceedings against the insolvent. Section 89(1) read with section 106 of the Insolvency 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 Title Act."

As regards *Barnard* the court's somewhat unclear and incoherent argument reads as follows (para 37):

> "In respect of *Barnard*'s case (*supra*), the court extended the protection of the costs associated with sequestration. I am of the view that *Barnard*'s case is distinguishable from this matter before me in that sequestration costs stand on different footing. Those costs have no connection with the recovery of unpaid levies. If I ignore the objective and the intention of section 14(3), section 89 and section 106 of the Insolvency Act, which prescribes how to deal with payment of creditors and the pro rata contribution, the interpretation of the Master does not promote the Bill of Rights as enunciated in sections 9 and 25 of the Constitution."

The court finally held that the Master erred in concluding that the body corporate is not liable to contribute *pro rata* with FRB and Nedbank. According to the court the Master conflated two scenarios, namely, the sequestration costs incurred by the applicant creditor in terms of section 14(3) and the payment of levies in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act. Consequently, the court held that the body corporate, FRB, and Nedbank are *pro rata* liable to contribute towards the cost of sequestration (paras 38–39).

The court ordered that the Master's decision whereby FRB's objection be dismissed, should be reviewed, set aside and corrected as follows (para 40):

(a) FRB's objection to the liquidation, distribution and contribution account must be sustained.

(b) The trustees are directed to amend the said account to reflect that FRB, Nedbank and the body corporate should be *pro rata* liable to pay the contribution;

(c) The legal costs incurred by the body corporate in sequestrating the insolvent estate of the sectional title unit owner do not form part of and/or are not subject to section 15B(3)(a)(i)(aa) of the Sectional Titles Act.

4 ANALYSIS AND EVALUATION

It is trite that the Constitution influences all areas of the law and ever since *Harksen v Lane* 1998 1 SA 300 (CC) insolvency law is no exception. Numerous fundamental human rights could be under attack in any insolvency related matter and the Constitution plays an important role in ensuring that these rights are not infringed unnecessarily (see Van Der Linde and Van Staden "Judicial development (and activism) in insolvency law" 2017 *TSAR* 414 and Boraine *et al* "The pro-creditor approach in South African insolvency law and the possible impact of the Constitution" 2015 *NIBLeJ* 59). On the other hand, it must be emphasised that these fundamental human rights cannot be seen as an aspect to be considered in all insolvency related matters. It must be relevant and contribute to the outcome of the case. Vilakazi AJ's refusal to entertain the alleged constitutional issue raised by FRB is therefore to be welcomed. As pointed out by the court, the conclusion that the Master may have misinterpreted the relevant statutory provisions certainly does not in itself raise a constitutional issue (para 25).

The first part of the Master's argument in *First Rand* regarding the question as to whether the body corporate is liable for contribution (para 21) is in line with Burdette's viewpoint discussed above, namely, that section 14(3) read with section 106 is "not wide enough" to include the body corporate which *does not need* to prove a claim in order to be paid the arrear levies due to it. The body corporate cannot be seen as a *creditor* and the arrear levies due to it thus cannot

be seen as a *claim* for the purposes of sections 14(3) and 106 of the Insolvency Act (cf Burdette 2000 *THRHR* 461). However, Vilakazi AJ held the opposite viewpoint that section 14(3) should be interpreted to mean that the applicant is liable to contribute, whether or not it has proved its claim (para 28). Therefore, no distinction is drawn between applicant creditors who are not required to prove a claim and those who choose not to prove a claim. In our view, section 14(3) is indeed susceptible to such a "wide" interpretation.

It is submitted that Burdette's interpretation of section 14(3) unnecessarily complicates the matter. It is a primary rule of interpretation of any statute, that where the meaning of the section is clear, such plain meaning should be applied (Botha *Statutory interpretation: An introduction for students* (2012) 91). The intention of the legislature in section 14(3) clearly is to ensure, at least in compulsory sequestration proceedings, that there will always be someone who would be able to contribute, should there be a shortfall in the free residue of the insolvent estate concerned. As pointed out by the court in *First Rand*, the body corporate "set the machinery of law in motion by instituting sequestration proceedings against the insolvent" (para 35). Therefore, it is submitted that it would be reasonable to expect the latter to make good the deficiency and, as noted by the court, that the body corporate should not be exempted from being liable for contribution (para 36). It is furthermore submitted that the court's decision that the body corporate is liable to make good any deficiency in the free residue, implies that the nature of the body corporate's "claim" is irrelevant. We agree. In our view there is nothing in the Insolvency Act which supports Burdette's viewpoint discussed above, namely, that the liability of the applicant creditor to contribute should be determined by the nature of his claim.

The Master's application of *Barnard* to the facts in *First Rand* (para 21.11) is clearly incorrect. *Barnard* did not deal with the legal costs pertaining to sequestration applications. As explained above, the court merely held that the legal costs in respect of the body corporate's attempts to recover arrear levies prior to sequestration form part of the section 89 costs. The taxed costs in respect of the sequestration application must, in terms of section 97(3), be deducted from the proceeds of the free residue, not from the proceeds of the encumbered asset concerned. Sequestration is in any event not considered to be a debt enforcement procedure (see *Investec Bank Ltd v Mutemeri* 2010 1 SA 265 (W) 274–275; *Naidoo v Absa Bank Ltd* 2010 6 SA 597 (SCA) para 7) and the costs incurred in bringing a sequestration application therefore cannot be considered to be legal costs associated with the collection of arrear levies. The Master's further argument that the amount of the contribution must, if *Barnard* is to be correctly applied, eventually be deducted from the proceeds of the sectional title unit concerned, is thus equally unfounded. Vilakazi AJ therefore correctly found that legal costs associated with the sequestration application fall outside the protection afforded by section 15B(3)(a)(i)(aa) (para 35).

Unfortunately, the court's analysis (para 37) of *Barnard* is unclear. The court commences its argument by stating that *Barnard* "extended the protection of the costs associated with sequestration". This statement is incorrect as *Barnard*, as explained above, merely extended the protection afforded in respect of arrear levies to include the amount of the legal costs associated with the body corporate's endeavours to collect unpaid levies before sequestration. Be that as it may, the court correctly held that sequestration costs should be distinguished from the legal costs associated with the recovery of unpaid levies.

Finally, and without any further discussion or explanation, the court appears to be of the opinion that the Master's interpretation of sections 14(3), 89 and 106 of the Insolvency Act will not promote the Bill of Rights as enunciated in sections 9 and 25 of the Constitution (para 37), despite its earlier conclusion that the Master's alleged misinterpretation did not raise a constitutional issue (para 25).

It is submitted that the court correctly held that the body corporate was liable to contribute towards the deficiency in the free residue. However, it is not clear why the two bond-holders who relied on their security should have been held liable *pro rata* together with the body corporate. As mentioned earlier, FRB's alternative request for relief was for an order amending the liquidation, distribution and contribution account to reflect the body corporate to be liable *on its own* for the amount of the contribution. However, as mentioned above the court did not deal with this issue at all. Since *Snyman* was a decision of the former Transvaal Provincial Division, the court in *First Rand*, being a decision of the Gauteng Division, would have been bound by the decision in *Snyman* to hold that FRB and Nedbank were liable for contribution together with the body corporate. We agree with Burdette 2003 *THRHR* 522 that the decision in *Snyman* regarding the liability of secured creditors who rely on their securities is incorrect. As explained above, section 106(a) read with section 89(2) clearly provides that secured creditors who rely on their securities will only be liable if there were no concurrent, including secured creditors with concurrent portions on their claims, or no applicant creditor that could pay the contribution (cf *idem* 524–525).

5 CONCLUSION

Vilakazi AJ's interpretation of section 14(3) of the Insolvency Act that the body corporate is liable to contribute towards any deficiency in the free residue, even where it is not required to prove a claim in terms of the Act, is to be welcomed. Moreover, the court's decision that the legal costs incurred in sequestrating the insolvent are not in any way associated with the legal costs related to the recovery of arrear levies in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act, is to be similarly applauded. However, it is a pity that the issue regarding secured creditors' liability to contribute in the instance where they elected to rely on their securities has still not been resolved. Burdette's view (2003 *THRHR* 525 530) that they should only be liable when they are the only proved creditors is clearly the correct interpretation of section 106(a) of the Insolvency Act. As pointed out by Burdette, any other construction would result in section 89(2), which allows secured creditors to avoid liability for contribution by relying on their security, becoming obsolete (*ibid*).

The uncertainty regarding the correct interpretation of the provisions of the Insolvency Act pertaining to contribution is clearly an issue which needs to be addressed by the legislator (see, in this regard, cl 94 of the Draft Insolvency Bill – South African Law Reform Commission *Report Project 63* "Review of the law of insolvency" (2000) Vol 2: Draft Bill) which has simplified the current provisions to a great extent). In the meantime, one can only hope that the Supreme Court of Appeal may bring some clarity in this regard.

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