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DISPUTE RESOLUTION
ALERT

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The lawfulness of investments by liquidators of surplus funds in 'corporate saver accounts'

A 'corporate saver account' is an investment account which is commonly used by liquidators to invest monies which are not immediately required by the company. The issue of the lawfulness of investments by liquidators in these so-called 'corporate saver accounts' has recently been the subject of various court cases.

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The lawfulness of investments by liquidators of surplus funds in 'corporate saver accounts'

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A 'corporate saver account' is an investment account which is commonly used by liquidators to invest monies which are not immediately required by the company. The issue of the lawfulness of investments by liquidators in these so-called 'corporate saver accounts' has recently been the subject of various court cases.

By way of background, section 394 of the Companies Act 61 of 1973 (Act) deals with banking accounts and investments. It provides that a liquidator:

- must open a current account in the name of the company;
- may open a savings account in the name of the company; and
- may place moneys deposited in the current account (not immediately required by the company for payments), in an interest-bearing account (i.e. a 'corporate saver account').

In the case of *Standard Bank of South Africa v The Master, Port Elizabeth, and Others* [2018] 4 All SA 871 (ECP), the company in liquidation was Mario Levi Manufacturing South Africa (Pty) Ltd (in liquidation) (Mario Levi) and Gary Shrosbree from Shrosbree Trustees was the joint liquidator (Gary). Gary invested certain funds of Mario Levi in a corporate saver account with Nedbank, through the agency of PW Harvey and Company (Pty) Ltd (PW Harvey).

As part of their business, PW Harvey invests funds placed with it on behalf of their clients with certain financial institutions and charge an agency fee for their service. PW Harvey had an arrangement with Lionel Shrosbree (Lionel), who is Gary's son, whereby Lionel would receive a referral commission for any investments referred by him to PW Harvey.

Pursuant to a complaint from Standard Bank, the Master convened a section 381 enquiry, to investigate the conduct of Gary and his co-liquidators. Standard Bank's main concerns and contentions were that:

- the payment of agency fees to PW Harvey out of funds of Mario Levi was unlawful;
- Lionel had no lawful entitlement to commission;
- Gary possibly unlawfully received a secret referral commission or kickback from PW Harvey; and
- the net interest rate earned on the corporate saver account was significantly lower than interest rate offered by other financial institutions.

The Master ruled that Lionel was not obliged to repay the commission he received from PW Harvey as it was paid to him pursuant to a contractual relationship between the two of them. Standard Bank took that ruling on review.

The court stated that liquidators occupy a position of trust and must act in best interests of creditors.

The lawfulness of investments by liquidators of surplus funds in 'corporate saver accounts'...*continued*

The court further held that the debiting of agent's fees is not unlawful, and PW Harvey was accordingly legally entitled to earn an agency fee.

The court held that, although there was no strict compliance with section 394 of the Act, there was certainly substantial compliance therewith. There is a fiduciary duty on liquidators not to make a secret profit and in this case, Gary did not make a secret commission.

The court further held that the debiting of agent's fees is not unlawful, and PW Harvey was accordingly legally entitled to earn an agency fee. The commission paid to Lionel was also found to be lawful. Furthermore, the court held that there is no requirement that funds be invested in an account with the highest possible interest rate.

In the case of *The Master, Western Cape v Van Zyl* [2019] All SA 442 (WCC), Christopher Van Zyl (Van Zyl) was the co-liquidator of 100 companies. The Master removed Van Zyl as co-liquidator of all these companies on *inter alia* the basis that the manner in which he conducted a Nedbank corporate saver account contravened section 394, in that the agency fee that was paid to BLM Administrative Services (BLM) in respect of the investments was unreasonable and that Van Zyl failed to obtain the Master's consent to engage the services of BLM as agent.

The court *a quo* found that the Master was incorrect to remove him as co-liquidator from 90 of the companies, but that the Master was correct to remove him from 10 of the companies. This case was an appeal to a full bench by the Master of the court *a quo's* decision to set aside the Master's ruling to remove Van Zyl as co-liquidator of 90 of the companies and was also a cross-appeal by Van Zyl in relation to court *a quo's* decision to dismiss Van Zyl's review application in respect of 10 of the companies.

On appeal to the full bench, the court held that the prescripts of section 394 have become outmoded and that no purpose is served in the digital age by insistence on a strictly formalistic application of section 394 of the Act. The court found that, even though there was no strict compliance, Van Zyl did not contravene section 394 and that the object of section 394 was not undermined by the manner in which the corporate saver account was conducted.

The court held that the agency fee paid to BLM was lawful and was not excessive. The consent of the Master to pay an agency fee is not required. There is further no statutory duty to invest company funds and there is also no duty to invest funds at highest possible interest rate.

The lawfulness of investments by liquidators of surplus funds in 'corporate saver accounts'...*continued*

Our view is that the paying of an agency fee is lawful, as long as it is reasonable, justified and not excessive.

The Master's appeal was dismissed and Van Zyl's cross-appeal was upheld with the result that Van Zyl was reinstated as co-liquidator of all 100 companies.

The following conclusions can be drawn from the abovementioned cases:

- Corporate saver accounts are not in contravention of the Act (as long as the objects and purpose of section 394 are not undermined by the manner in which the corporate savings account is conducted).
- It is lawful for a liquidator to pay an agency fee to an agent out of a portion of the interest earned in the corporate saver account.
- The issue seems to be that the Act hasn't kept up with the times and there have been major developments in banking technology. Section 394 no longer coincides with the reality of developments such as electronic banking.
- There are seemingly different approaches between the Master and our courts when applying section 394 of the Act. The Master seems to be applying section 394 very strictly. The courts however appear to be more flexible in their interpretation and application of section 394, which we view as the correct approach.
- One must be mindful of various outdated provisions in the Act, that will need to be dealt with in a more flexible manner until such time as legislation is amended to keep up with the times.

Our view is that the paying of an agency fee is lawful, as long as it is reasonable, justified and not excessive. Liquidators need to strike a balance between investing in a corporate saver account for the benefit of creditors and paying the necessary agent's fee to do so successfully, but at the same time ensuring that the agency fee paid is reasonable and also ensuring that the interest rate earned is at least favourable to creditors, even if it may not necessarily be the highest.

Kylene Weyers and Tobie Jordaan

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