

SOUTH AFRICA / JUDGMENT

Botha N.O and Others v Master of the High Court and Others (480/2025)

[2025] ZAFSHC 118 (4 April 2025)

[2025] ZAFSHC 118**COURT**

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

480/2025

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**IN THE HIGH COURT OF
SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN**

Not reportable**Case No.: 480/2025****In the matter between:**

DEON MARIUS BOTHA

N.O.

First Applicant

alternatively, DEON

MARIUS BOTHA

JOHANNES ZACHARIAS

HUMAN MULLER N.O.

Second Applicant

alternatively,

JOHANNES ZACHARIAS HUMAN MULLER

LOUISA SIBIYA

N.O.

Third Applicant

alternatively,

LOUISA SIBIYA

and

THE MASTER OF THE

HIGH COURT, BLOEMFONTEIN

First Respondent

LOUIS JONKER

Second Respondent

LAND AND

AGRICULTURAL DEVELOPMENT BANK

Third Respondent

OF SOUTH AFRICA

Coram: Van Rhyn J

Heard: 6 March 2025

Delivered: 4 April 2025

Summary: Urgent application - for interim interdict pending review - decision of Master to remove appointed liquidators.

Costs to stand over for
later adjudication- applicable principles restated.

ORDER

1

The decision of the First
Respondent:

(a) to remove
the Applicants as liquidators in the estate of Jonker Produkte CC (in
liquidation);
(b) directing the
Applicants to return their certificates of appointment as liquidators
to the First Respondent; and
(c) that the
Applicants will forfeit the liquidators' fee;
as set out in the letter
of the First Respondent dated 15 January 2025, is suspended pending
the final determination of the review
application under Part B of the
notice of motion.

2.

The costs of the application under Part A of the notice of motion,
including
the wasted costs incurred in respect of the hearing on 13
February 2025, are reserved for adjudication during the review
application
under Part B of the notice of motion.

JUDGMENT

[1] Part A of the application came before court as an urgent application for interim relief pending the final adjudication of Part B of the application. Part B is an application for the review and setting aside of the Master's decision to remove the liquidators from office. The urgent application was to be heard on 13 February 2025. On the said date, and by agreement between the parties, the following order was made:

'1. The decision by the Master of the High Court, Bloemfontein (First Respondent) dated 15 January 2025 is suspended pending final adjudication of Part A of the Notice of Motion.

2. For purposes of the above, the hearing of the urgent application in respect of Part A above is postponed to Thursday, 6 March 2025 on the opposed roll.
 3. The Master of the High Court, Bloemfontein (First Respondent) to file his answering affidavit, if any, by 26 February 2025.
 4. The costs of the application, including the wasted costs incurred in respect of the hearing on 13 February 2025 are reserved for later adjudication together with Part A aforesaid.
 5. The applicants' Replying Affidavit to the Master's Answering Affidavit, if any, to be filed by close of business on 28 February 2025.
 6. Heads of argument to be filed by all parties on Monday, 3 March 2025.'
- [2] The first, second and third applicants are Deon Marius Botha N. O., Johannes Zacharias Human Muller N.O. and Louisa Sibiya N.O. (the 'liquidators'), all three being insolvency practitioners duly appointed on 21 October 2020 as co-liquidators in the estate of Jonker Produkte CC (in liquidation) ('Jonker Produkte'). In the alternative, the liquidators were cited in their personal capacities to the extent that it might be found that they have a personal interest in some of the relief sought. The first respondent is the Master of the High Court, Bloemfontein (the 'Master'). The second respondent is Louis Jonker, the sole member of Jonker Produkte CC at the time of its liquidation. The third respondent is Land and Agricultural Development Bank of South Africa ('Land Bank').
- [3] On 23 July 2020 Land Bank filed an application for the provisional winding up of Jonker Produkte. A provisional liquidation order was granted on 11 September 2020 by order of this court and the applicants were duly appointed as co-liquidators in the estate on 21 October 2020. A final liquidation order was granted on 29 October
2020. The liquidators received their letters of appointment from the Master on 6 November 2020. Due to the failure to summon a meeting of creditors of Jonker Produkte in accordance with the provisions of s 78 of the Close Corporation Act 69 of 1984 (the 'CC Act'), litigation followed which culminated in a judgment by the Supreme Court of Appeal, delivered on 27 May 2024, upholding an order by the High Court that the meeting of 6 May 2021 was invalid and the setting aside of the resolutions adopted at the meeting.
- [4] Further applications followed, firstly an application in terms of the provisions of Rule 42 of the Uniform Rules of Court pertaining to the cost order initially made by this court and secondly, an application by the second respondent and his wife to set aside the final order of liquidation (referred to as the 'rescission application'). The rescission application was dismissed with costs on the 16th of August 2024. The second respondent and his wife applied for leave to appeal the dismissal of the rescission application. The
- application for leave to appeal was unsuccessful and was dismissed with costs on 15 November 2024. The second respondent and his wife thereafter applied for leave to appeal to the Supreme Court of Appeal, which application is still pending. Since the hearing of Part A of the notice of

motion on 13 February 2025, a further urgent application by the second respondent and his wife was heard on 27 February 2025 by Grobler AJ. The application was for an order that the liquidators be interdicted from continuing with the liquidation process of Jonker Produkte pending finalisation of the review application. A further order, seeking the setting aside of subpoenas to secure the presence of the second respondent and his wife at an insolvency enquiry scheduled for 28 February 2025 was sought. The urgent application was dismissed with costs on 27 February 2025.

- [5] On 13 August 2024, which happened to be two days before the judgment in the rescission application was delivered, the attorney acting on behalf of the second respondent, Mr Geyser of Geyser Attorneys, Viljoenskroon, addressed a letter to the Master requesting the Master to remove the applicants as liquidators in the estate of Jonker Produkte. The grounds for such removal are, inter alia, the following:
- (a) the failure of the liquidators to adhere to the provisions of s 78(1) of the CC Act and alleged unlawful and illegal conduct in the administration of the estate of Jonker Produkte;
 - (b) the unlawful conduct of the liquidators by issuing summons against the second respondent and his wife to hold them personally liable for the debts of Jonker Produkte without having been authorised by the Master or the creditors to institute such proceedings;
 - (c) notwithstanding the rebuke from the Supreme Court of Appeal that the liquidators had acted outside the perimeters of the CC Act and the fact that the liquidators were ordered to pay the costs of the application, the liquidators continue with unlawful actions;
 - (d) the liquidators continue to act without the necessary resolution by the creditors and without obtaining the Master's consent.
 - (e) the liquidators have failed to comply with their statutory duty to investigate the claim of Land Bank having regard to the decision in *Trakman N.O. and Others v The Master of the High Court and Others* Case Number 2020/12432

[2012] ZAGPJHC 168.

- [6] On 19 August 2024 the Master provided the liquidators with a copy of the letter by Mr Geyser containing the complaints and requested the liquidators to provide him with reasons, by close of business on 26 August 2024, why they should not be removed in terms of s 379(1) of the Companies Act 61 of 1973 (the '1973 Companies Act') as liquidators. On 21 August 2024 the applicants' attorney at the time, Mr Van Niekerk, addressed a letter to the Master with the liquidators' response to the allegations made in Mr. Geyser's aforesaid letter. The liquidators' response to the complaints levelled against them can be summarised as follows:
- (a) The complaints raised by the second respondent are baseless and raised with an ulterior motive to prevent the second respondent, his wife and officials of Jonker Produkte from appearing at the scheduled insolvency enquiries;

- (b) From the commencement of the liquidation proceedings the second respondent, who has little or no say in the proceedings, acted with a view of obstructing the continuation and finalisation of the insolvency proceedings;
 - (c) The second respondent acted without the consent of the liquidators by selling assets and provided contradictory information regarding a lease agreement;
 - (d) All actions taken by the liquidators were indeed sanctioned by the only major creditor in the insolvent estate of Jonker Produkte, Land Bank, and the liquidators are compelled to act expediently to prevent claims from prescribing against, inter alia, the second respondent and his wife;
 - (e) The case law relied upon by Mr Geyser in his letter to the Master is not relevant in that the liquidators can only consider the claim by Land Bank after a meeting of creditors. The letter by Mr Geyser is merely another ploy aimed at facilitating the removal of the liquidators.
- [7] On 15 January 2025 the Master notified the liquidators in writing of his decision to remove them as liquidators with effect from 17 February 2025. This letter incited the urgent application by the liquidators. The liquidators rely upon the marked similarity between the wording of the Masters' letter and the content of Mr Geyser's letter for their argument that the Master has failed to properly and objectively consider the complaints lodged against them and had merely followed the dictates of Mr Geyser who acts on the instructions of the second respondent. The Master's stance therefore gives rise to an inference of bias against the liquidators. A further argument is that the wording of the Master's letter is indicative thereof that the Master had already formed a view adverse to the liquidators before obtaining their response to the complaints lodged against them.
- [8] Mr Maritz SC, counsel for the liquidators, contends that the Master has failed to call for a response from Land Bank who had successfully applied for the winding up of Jonker Produkte and had voted for the appointment of the applicants as liquidators. It is argued that the removal of the liquidators is an extreme step and will result in a substantial further delay in the finalisation of the insolvency proceedings. The removal of the appointed liquidators at such a late stage in the liquidation process will not be to the advantage and benefit of all persons concerned and will be to the prejudice of Land Bank.
- [9] In respect of costs it is contended that, notwithstanding proper service of the application upon the Master on 31 January 2025, the hearing of Part A of the application was postponed as a result of the Master's representative, Mr Strauss, indicating that he was not aware of the application whereas it is evident that Mr Straus became aware of the application after being informed (per email) by Mr Geyser. On 6 February 2025 the Master enquired from the liquidators' correspondent attorney in Bloemfontein on whom, at the Master's Office, the application had been served which is indicative of the fact that the Master was indeed aware of the existence of the application and failed to act accordingly.

- [10] On the 13th of February 2025 the court was informed (in chambers) that the Master's representative only attended the proceedings at court on 13 February 2025 after being telephonically informed of the hearing of Part A. The Master then indicated that he had not received a copy of the application. On behalf of the applicants, it is therefore contended that the postponement of the application on the 13th of February 2025 was improperly obtained because it is clear that the Master was aware of the application since, at least the 7th of February 2025. A letter by the liquidators' attorney was addressed to the Master (Mr Strauss) dated 14 February 2025 to inform him that a punitive cost order will be sought against the Master for the wasted costs occasioned by the failure of the Master to file an answering affidavit which resulted in the postponement of Part A of the application on 13 February 2025. A punitive cost order is furthermore sought against the second respondent, who opposes the application and who, according to the liquidators, does not have locus standi to oppose the relief sought by the liquidators and whose only motive is to avoid being interrogated about the unlawful dissipation of Jonker Produkte's assets.
- [11] After having been provided with a copy of the letter of complaint, Land Bank through its attorney, responded to the complaints against the liquidators in a letter to the Master dated 27 August 2024. Land Bank disputed the averments made against the liquidators and, notwithstanding being cited as a respondent to the present application supports the relief claimed in the notice of motion. On behalf of Land Bank it is contended that the Master's decision to remove the liquidators primarily on the basis that they were the losing parties in not only the High Court application by the second respondent but also the appeal to the Supreme Court of Appeal is of particular importance within the context of the adjudication of the present application. With reference to case law, Mr Tstangarakis, counsel for Land Bank, argued that the removal of the liquidators will not be granted unless the court is satisfied that a proper case is made out for such relief. Having regard to all the facts and circumstances of the matter at hand and the fact that the realisation of assets and administrative actions in the administration of the estate has been completed, the decision by the Master to remove the liquidators appears not to have appreciated the wishes of the creditor, which reign supreme. The costs order sought by the liquidators are supported by Landbank.
- [12] The relief sought in Part A is opposed by the second respondent. The second respondent contends that the liquidators were primarily cited in their official capacities as liquidators of Jonker Produkte and in the alternative in their personal capacities. The citation of the liquidators in their representative capacities is incorrect since the litigation does not involve the insolvent estate of Jonker Produkte at all. It concerns the personal interests of the liquidators, being their removal from office and subsequent forfeiture of their fees. Having regard to the finding in *Standard Bank of South Africa v The Master of the High Court and others* 2010

- (4) SA 405 (SCA) that the review application in respect of the forfeiture of their fees and the order that the liquidators pay the costs in their personal capacities, I am satisfied that the citation of the liquidators not only in their official capacities but also in

the alternative in their personal capacities dispense of the point in limine raised on behalf of the second respondent.

- [13] The opposition of Part A is on the basis that the Master's decision to remove the liquidators cannot be faulted. The finding that the liquidators are no longer fit to continue with the liquidation process of Jonker Products is supported due to their persistent view that they were not liable for the costs of the initial application notwithstanding the order granted that Jonker Products should not be mulcted with the costs, which finding was confirmed by the Supreme Court of Appeal. Furthermore, the liquidators' failure to disclose how the funds of Jonker Produkte have been affected is a cause of grave concern and a reason for the removal of the liquidators. Newly appointed liquidators will then be able to investigate whether the estate of Jonker Produkte has been refunded or not and to take the necessary steps to recover those funds if need be.
- [14] Mr Janse van Rensburg, on behalf of the second respondent, contends that the argument by the liquidators that the stage at which the liquidation proceedings have reached, taking into consideration the date of their appointment on 21 October 2020, is a factor in favour of the non-removal of the liquidators, is flawed. With reference to the *Standard Bank v The Master* matter, the second respondent argued that the long delay in the finalisation of the liquidation process hardly counts in their favour and is in fact to their discredit.
- [15] Firstly all parties concerned were *ad idem* that the issue of urgency had been adequately dealt with in that an interim order was issued on 6 February 2025, by agreement between the parties, and thus no arguments regarding urgency were entertained at the hearing of the matter. Regarding the merits, the liquidators seek an interlocutory interdict as it appears from the notice of motion. An interlocutory interdict is one which is granted *pendente lite*. "It is a provisional order designed to protect the rights of the complainant party pending an action or application to be brought by him to establish the respective rights of the parties." [1] It does not involve a final determination of the rights of the parties and does not affect such determination. The purpose of the interim order is to 'freeze' the position until the court decides upon the merits of the review application. The requirements for an interim interdict are trite and can be briefly summarised as follows: a *prima facie* right even though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing the right; that the balance of convenience favours the granting of an interim interdict; and the lack of another satisfactory or adequate remedy in the circumstances. In the context of an application for an interim interdict pending the outcome of review proceedings, an applicant has, in order to establish a right (albeit perhaps open to some doubt) to show that he or she has some prospect of success in the review proceedings.

- [16] The different requisites should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought. The proper manner of approach is to take the facts as set out by the applicants, together with any facts set out by the respondents which the applicants cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicants could on those facts obtain final relief at the hearing of the review application. The facts set up in contradiction by the respondents should then be considered. If serious doubt is thrown upon the case of the applicants, they cannot succeed in obtaining the temporary relief as sought in Part A. But if there is mere contradiction, or unconvincing explanation, the matter should be left to the review court and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. [2]
- [17] The removal of a liquidator is a radical form of relief which will not be granted unless the court is satisfied that a proper case is made out for such an order.[3] The duties of liquidators are well established and usefully summarized in paragraph [1] of *Standard Bank of SA Ltd v The Master of the High Court and Others* 2010
- (4) SA 404 (SCA):
- ‘In the winding-up of companies liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vests in them. Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice.’
- [18] The Master acts as a regulator in the South African insolvency law. The administration of insolvent estates and companies or close corporations under winding-up, from commencing the sequestration or liquidation proceedings up to the rehabilitation of the insolvent or the deregistration of the corporate entity, is controlled by the Master’s Office. The duties of the Master include numerous specialised functions and administrative tasks. Having read the reasons for the Master’s decision to remove the liquidators from office as set out in the letter dated 15 January 2025, it is evident that there is indeed a great deal of similarity with the words and phrases used by Mr Geyser in the letter of complaint. It therefore appears as if the Master accepted the second respondent’s ipse dixit without having regard to the submissions and arguments raised on behalf of the liquidators. There is thus merit in the liquidators’ contention that they have a reasonable suspicion of bias on the part of the Master in favour of the second respondent.
- [19] Even though it is contended that this gives rise to the inescapable inference that the Master had failed to properly consider the matter himself and simply followed the dictates of Mr Geyser, the mere fact that the Master’s reasons are similar to the complaints lodged against them does not imply that a finding of bias or partiality on the part of the Master will necessarily follow. This will be a matter for consideration by the review court. On the other

hand, the Master indicated in a supplementary report that the liquidators did not finalise the first liquidation and distribution account and did not submit the second account which was due by 18 March 2022. To my mind these are extremely serious allegations regarding the suitability of the liquidators to proceed with the winding up of the estate. The need for effective, efficient and the swift finalisation of an insolvent estate cannot be overlooked. Obviously, the liquidation process has not been finalised since 2020 and the parties are continuously involved in litigation.

- [20] I agree with the submission by the liquidators, as supported by Mr Tsangarakis, that Land Bank has a material interest in the effective and speedy finalisation of the liquidation process and it appears as if the Master failed to call upon Land Bank for its submissions regarding the decision to remove the liquidators from office. This aspect is not addressed by the Master in an answering affidavit. A factor which militates against the removal of the liquidators is that it appears that the winding up process is nearing its end. However, the second respondent argues that the liquidators still intend to institute actions to retrieve assets allegedly dissipated by the second respondent (and others). The second respondent contends that any such actions on behalf of the estate have become prescribed. If this is indeed correct, the averment that such claims have become prescribed furthermore bears upon the suitability of the applicants to hold office as liquidators. The second requirement for an interim interdict is that of harm. The liquidators are registered members of the national and professional regulatory body for insolvency practitioners. The liquidators' removal from office, pending the hearing of the review application, will be reported to the said institution and will undoubtedly have a prejudicial repercussion for them in respect of future appointments.
- [21] Having regard to the Master's letter of 15 January 2025, I was unable to find any indication that the Master took into consideration the contentions of Land Bank. On behalf of Land Bank it is argued that where creditors' resolutions are binding on the liquidators, they are obliged to implement such resolutions. A resolution adopted, or which is subsequently deemed to have been adopted at a second or the adjourned second meeting, binds not only the creditors at the meeting but also a creditor who failed to attend the meeting. The resolutions were passed at the first and second meeting of the creditors held on 4 October 2024 and there exists no suggestion that the said meeting was held improperly.
- [22] This aspect was not addressed by the Master in that no answering affidavit was filed. Furthermore, the Master indicated that Part A of the application is not opposed. I am accordingly of the view that the liquidators have established the right contended for. The applicants will suffer irreparable harm if the interim relief is not granted, and the ultimate relief is eventually granted. In my view, if the interlocutory interdict in this matter is granted pending the finalisation of the review relief, no prejudice will be suffered by the Master and the second respondent. It is uncontested that there will be a substantial shortfall in the estate and that there is no chance of the second respondent receiving any benefit from the liquidation process. The balance of convenience therefore is in favour of the liquidators.

Having regard to the content of the Master's reports, it is assumed that the review application will be opposed by the Master. Having regard to the fact that the Master failed to file an answering affidavit and taking cognizance of the contradictory explanations and arguments by Mr Martiz SC and Mr Tsangarakis on the one hand and Mr Janse van Rensburg on the other hand, I am of the view that the matter should be left to the review court and the right be protected in the meanwhile.

- [23] In all the above circumstances I am satisfied that a proper case has been made out for the interim relief sought by the applicants.
- [24] The issue of costs emanates from the fact that the Master failed to file a notice to oppose within the time period set out in the notice of motion and requested for the matter to be postponed on 13 February 2025 to enable him an opportunity to consider the application. Mr Maritz SC contends that the postponement of the matter on 13 February 2025 was the contrived stratagem of Mr Geyser, on behalf of the second respondent and the Master. The postponement resulted in substantial wasted costs which should never have occurred and which in itself justifies a punitive attorney and client cost order against the second respondent and the Master.
- [25] The Master did not address the issue of costs per se, apart from indicating in his supplementary report that he was on leave from 13 January 2025 to 7 February 2025 and therefore only returned to office on Monday 10 February 2025. The Acting Master did not provide him with any directions and when his answering affidavit was due on 6 February, he was on leave. There is no reason for this court to doubt the version proffered by Mr Strauss that he was on leave at the time when his notice to oppose and answering affidavit (if any) were due. The liquidators indicated that some of them were on leave during January 2025, which caused a delay in the issuing of the urgent application. The grounds raised by the liquidators as to whether a cost order should be awarded against the Master and the second respondent, seeks to impute wrongdoing upon them. The second respondent was ready to proceed with the matter and did not ask for a postponement.
- [26] On 13 February 2025 I informed the legal representatives on behalf of the liquidators, the second respondent and Land Bank, that the Registrar has received an email from the Master, per Mr J Strauss, requesting an indulgence for the postponement of the application. Mr Strauss indicated that he did not have the opportunity to peruse the application due to being on leave. He tendered his apologies for the inconvenience caused. Having regard to the vital role of the Master in liquidation proceedings, I found favour with the request and informed the parties that the matter will not proceed. The parties soon thereafter provided this court with a draft order for the postponement of Part A and further interim orders, as set out above. The Master filed a report and shortly prior to the hearing on 6 March 2025, a supplementary report. I am therefore not inclined to adjudicate the issue of a punitive cost order against the Master without any arguments provided in this regard in the Master's report and Mr Strauss not being in court when the matter was heard. I am of the view that the issue of the wasted costs of the 13 February

2025 and the costs of Part A of the application should stand over until the adjudication of Part B during the review procedure.

[27] Consequently, the following order is made:

1.

The decision of the First Respondent:

- (a) to remove the Applicants as liquidators in the estate of Jonker Produkte CC (in liquidation);
- (b) directing the Applicants to return their certificates of appointment as liquidators to the First Respondent; and
- (c) that the Applicants will forfeit the liquidators' fee;

2.

The costs of the application under Part A of the notice of motion, including the wasted costs incurred in respect of the hearing on 13 February 2025, are reserved for adjudication during the review application under Part B of the notice of motion.

I VAN RHYN

JUDGE OF THE HIGH COURT,

FREE STATE DIVISION, BLOEMFONTEIN

Appearances On behalf of the Applicants: Adv. M C Maritz SC with Adv J S Griessel Instructed by: Symington De Kok Attorneys Bloemfontein On behalf of the first Respondent: No appearance On behalf of the Second Respondent Adv F G Janse van Rensburg Instructed by: Hendre Conradie Attorneys Bloemfontein On behalf of the Third Respondent Adv S Tsangarakis Instructed by: E G Cooper Majiedt Attorneys Bloemfontein

[1] *Airoadexpress Pty Ltd v Chairman Local Road Transportation Board*, Durban [1986] ZASCA 6; 1986

(2) SA 663(A) at 681D-F.

[2] *Webster v Mitchell* 1948

(1) SA 1186 (W); *Gool v Minister of Justice* 1955

(2) SA 862 (C).

[3] *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell* NNO 1997

(1) SA 547 (C) 566B-E.

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