

SOUTH AFRICA / JUDGMENT

**Grapentin and Another v Sue
McGuinness Communications CC and
Others (2018/15776) [2021] ZAGPJHC 569;
[2022] 1 All SA 228 (GJ) (19 October 2021)
[2021] ZAGPJHC 569**

COURT

South Gauteng High Court, Johannesburg

BEFORE

J.L. Khan

CASE / FILE NUMBER

2018/15776

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: 2018/15776

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED:

NO

19

October 2021

In

the matter between:

GRAPENTIN,
HARALD OTTO FRITZ
First Applicant
McGUINNESS,
SUSAN MARY
Second Applicant
and
SUE
McGUINNESS COMMUNICATIONS CC
(In
Liquidation)
First Respondent
GAIL
LIYN WARRICKER N.O.
Second Respondent
IGNATIUS
CLEMENT MIKATEKO SHIRILELE N.O.
Third Respondent
SCATTERLINGS
OF AFRICA (PTY) LIMITED
Fourth Respondent
THE
MASTER OF THE HIGH COURT
Fifth Respondent
MINISTER
OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT
Sixth Respondent
MINISTER
OF TRADE AND INDUSTRY
Seventh Respondent

Delivered:

This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, and by uploading same onto CaseLines. The date and time for hand-down is deemed to be have been on 19 October 2021.

Summary:

Certificate issue by the Master in terms of Section 70(4) of the Close Corporations Act, 69 of 1984 following on an Enquiry in terms of 414 and 415 of the 1973 Companies Act. Issuing of Certificate not in compliance with Section 3 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). Judgment granted pursuant thereto, set aside.

JUDGMENT**KHAN AJ:****INTRODUCTION**

- [1] This First and Second Applicants (“the Applicants”) seek to review the Certificate issued by the Master in terms of Section 70(4) of the Close Corporations Act, 69 of 1984, (“Section 70(4)”) in terms of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), and to set aside the civil judgement granted pursuant to the issuing of the Certificate aforesaid.
- [2] In addition, the Applicants’ seek condonation in terms of sections 7 and 9 of PAJA, to the extent necessary, for bringing this review outside the 180-day time limit.
- [3] The Applicants’ in the alternative, sought an order declaring Sections 70(4) and 70(5) of the Close Corporations Act 69 of 1984, unconstitutional. At the hearing of the matter, the Court was advised by Counsel for the Applicants’, that in the event the Court granted such an order, same would need to be confirmed by the Constitutional Court, this would result in great expense to the Applicants’. It was submitted that the review in terms of PAJA would achieve the outcome sought by the Applicants and

the Constitutional challenge would not be pursued at this time. The Court will accordingly deal with the issue of the PAJA review and ancillary relief only and will disregard the submissions made in respect of the constitutionality of Sections 70(4) and Sections 70(5), to the extent it is possible to do so.

- [4] This matter was on the opposed Motion Court roll on the 26 May 2021, opposing papers have been filed by the Fifth, Sixth and Seventh Respondents, (“the Respondents”). There was however no appearance on behalf of the Respondents’ when this matter was heard and the Respondents’ have not filed heads of argument, despite a Court order, dated 23 February 2021 directing them to do so.
- [5] The Respondents’ seek condonation for the late filing of the Answering Affidavit, citing the unavailability of counsel, the Fifth and Seventh Respondents and a delay in obtaining various documentation. The Respondents’ contend that this matter is of significant public importance beyond the interests of the parties, as the provisions under attack serve an important public purpose and the Court should have regard to all the facts and contentions in order to determine the matter properly.
- [6] It is noted that the Applicants’ consented to an extension of time to allow the Respondents’ to file this affidavit on the 16th of July 2018. The court is asked to condone this extension of time. The Answering Affidavit, despite the agreement to file same on the 16 July 2018, was only served on the 31 August 2018.

- [7] In *DENGETENGE HOLDINGS (PTY) LTD v SOUTHERN SPHERE MINING & DEVELOPMENT COMPANY LTD AND OTHERS* (619/12) [2013] ZASCA 5; [2013] 2 ALL SA 251 (SCA) at para 11, Ponnann JA held that:

“factors relevant to the discretion to grant or refuse condonation includes the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.”

- [8] Having considered the Respondents’ explanation for the failure to file its Answering affidavit timeously, the Court is of the view that the administration of justice would be better served by condoning the late filing of the Answering Affidavit, given the importance of this case, the public interest element of this application, the fact that there is no judicial precedent in this regard and that the Court would benefit from a contrasting view.
- [9] For those reasons alone, the Court is prepared to condone the late filing of the Respondents Answering Affidavit, whilst recording that it does not condone the Respondents’ failure to appear at court and to file its heads of argument. The Court further notes the various references to argument and authority in the Respondents’ Answering Affidavit, which the Court was advised will be presented at the hearing of this matter, which was not presented.

HISTORY OF THE MATTER

- [10] The Applicants’ are equal members of the First Respondent which conducted business as a medical conference organizer. On the 12th of March 2012, the First Respondent sold its business to the Fourth Respondent for R2 500 000.00. Following a dispute between the First and Fourth Respondents, the Fourth Respondent cancelled the agreement on the 22 November 2012. This dispute was referred to arbitration and on the 17 January 2014, the Arbitrator found that the First Respondent had breached the agreement in circumstances justifying the Fourth Respondent’s

cancellation of the agreement. The Arbitrator ordered the First Respondent to pay R2 500,000.00 to the Fourth Respondent together

with interest at 15.5%. Against such payment the Fourth Respondent was ordered to return the business to the First Respondent.

- [11] The First Respondent did not recover the business and the Applicants’ argue that the Liquidators made no effort to retrieve the business for the benefit of the First Respondent. As a result, the First Respondent was unable to pay its debts on grant of the arbitration award and was wound up effectively from the 7 February 2014 in terms of sections 344(f) and 345(1)(c) and (2) of the Companies Act, 61 of 1973 (“1973 Companies Act”). Following the First Respondents liquidation, an enquiry was conducted into its affairs in terms of sections 414 and 415 of the 1973 Companies Act, read with section 9 of Schedule 5 to the 2008 Companies Act, (“the Enquiry”).

- [12] The Applicants, duly represented by their legal representatives gave evidence at the Enquiry held on the 26 September 2015. It is apparent from the papers filed of record that the Enquiry was not finalised on the 26 September 2015 and was postponed to the 16 February 2016. On the 10 February 2016 the Attorneys for the liquidators wrote a letter to the Applicants' attorneys cancelling and ending the enquiry scheduled for the 16 February 2016.
- [13] On the 24 March 2016, the Attorneys for the Second Respondent, addressed a letter to the Master, requesting him to issue a Certificate in terms of Section 70(4), attached to this letter was a draft Certificate. The Master issued this (my emphasis) Certificate on the 13 April 2016. The Applicants' attorneys delivered a letter to the Master on the 14th of April 2016 denying any basis for the Master to issue a Certificate and requesting an opportunity to respond to the request for the Certificate. Unbeknownst to the Applicants, the Certificate had already been issued and was recorded as a judgement on or about the 22nd of April 2016.
- [14] On the 15 June 2016 the court issued a warrant of execution in favour of the Fourth Respondent. On the 8 August 2016, the sheriff attended at the residence of the Applicants' to attach the Applicants' property pursuant to the judgement. It was at this stage that the Applicants' became aware of the Judgement. The warrant was not executed as it had been entered in error, in the name of the Fourth Respondent, as opposed to the First Respondent as required by Section 70(4).
- [15] On the 9 December 2016, the Applicants applied to the Magistrates Court in terms of Section 70(5) of the Close Corporations Act, 69 of 1984, ("Section 70(5)") for an order setting aside the Master's certificate and the civil judgement recorded by the Magistrates Court. This application was dismissed on the 22 December 2017. A Notice of Appeal was delivered against the judgement on the 30 January 2018, the Appeal is still pending.

THE LEGISLATIVE BACKGROUND

- [16] The first stage of an enquiry into the winding up of a Close Corporation is an enquiry in terms of Sections 414 and 415 of the 1973 Companies Act, this is then followed by the second stage in which the Master issues a Certificate as to the amount payable by any member or former member of the Close Corporation in terms of Section 70(4), (only the relevant paragraphs are reproduced here).

"Section 414- Duty of directors and officers to attend meetings-

- (1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-
- (a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorized him in writing to absent himself from that meeting;

- (b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.
- (2)
- (3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

Section 415- Examination of directors and others at meetings -

- (1) The Master or officer presiding at any meeting of creditors of a company which is being wound up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414(2)(a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding- up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.
- (2) In connection with the production of any book or document in compliance with a subpoena issued under section 414 (2)(b)
- (3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall,
- (4) The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section....on.
- (5)
- (6)
- (7)
- (8)

[17] Section 70 of the Close Corporations Act, 69 of 1984, reads as follows:-

70(1) Subject to the provisions of this section, no member of a corporation shall in the winding-up of the corporation be liable for the repayment of any payment made by the corporation to him by reason only of his membership, if such payment complies with the requirements of section 51(1)[1].

70(2) In the winding-up of a corporation unable to pay its debts, any such payment made to a member by reason only of his membership within a period of two years before the commencement of the winding-up of the corporation, shall be repaid to the corporation by the member, unless such member can prove that:-

- (a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and
- (b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and
- (c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of its business.

70(3) A person who has ceased to be a member of the corporation concerned within the said period of two years, shall also be liable for any repayment provided for in subsection (2) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation.

70(4) A certificate given by the Master as to the amount payable by any member or former member in terms of subsection

- (2) or (3) to the corporation, may be forwarded by the liquidator to the clerk of the magistrate's court in whose area of jurisdiction the registered office of the corporation is situated, who shall record it, and thereupon such notice shall have the effect of a civil judgment of that magistrate's court against the member or former member concerned.

70(5) The court in question may, on application by a member or former member referred to in subsection (3), make any order that it deems fit in regard to any certificate referred to in subsection (4).

[18] Section 70(4) thus empowers the Master to issue a certificate, after the Enquiry as to amounts payable by members of a Close Corporation in terms of sections 70(2) or 70(3) and provides that such a Certificate may be forwarded by the liquidator to the clerk of the Magistrates Court who shall record it. On such recordal, the Certificate shall have the effect of a civil judgement against the member/s concerned. This then forms the basis of the dispute between the parties. The Court will first deal with the Applicants' application for condonation in terms of PAJA.

CONDONATION

[19] The Applicants' seek condonation, (to the extent necessary), for bringing this review Application, their submissions in this regard are twofold. Firstly, that the Applicants' were required to exhaust the internal remedy, set out in section 7(2)(a)[2] of PAJA before this Court could be approached. The Applicants' construed the internal remedy, to mean exhausting the remedy provided for in Section 70(5). In December 2016, the Applicants applied to the Magistrates Court in terms of Section 70(5) for an Order setting aside the

Master's Certificate and setting aside and/or rescinding any civil judgement recorded by that Court consequent upon the issuing of the Certificate. The Magistrates court dismissed this application on the 22 December 2017. The Applicants' submit that the 180-day period started to run from the 22 December 2017, which would imply that the Applicants' were within the 180-day period, when this application was launched on the 23 April 2018.

[20] In the Alternative, if the Court does not accept that Section 70(5) constituted an internal remedy, then the Applicants' seek an extension of time in terms of section 9 of PAJA.

[21] The Constitutional Court, in *DENGETENGE HOLDINGS (PTY) LTD v SOUTHERN SPHERE MINING & DEVELOPMENT COMPANY LTD AND OTHERS* (2014 (3) BCLR 265 CC; 20145 (5) SA 138 CC) [2013] ZACC 52; [2013] ZACC 48 (at 119) elaborated on the duty in terms of PAJA to exhaust internal remedies:

"in clear and peremptory terms, section 7(2) prohibits Courts from reviewing an administrative action in terms of this Act unless any internal remedy provided for in any law, has first been exhausted.

Where, as in this case, there is a provision for internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the Court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exception. Since PAJA applies to every administrative action, this means there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c)."

[22] As to the meaning of "internal remedy", Plasket J, in *REED v MASTER OF THE HIGH COURT* (2005) 2 ALL SA 429 (E), at 20-28, pointed out, this applies to:

"internal remedies, and not simply to any form of potential extra-curial redress. A remedy, in this context, is defined in the New

Shorter Oxford English Dictionary as a 'means of counteracting or removing something undesirable, redress, relief, legal redress'. Inherent in this concept, as it is used in its legal context is the idea that a remedy, in order to qualify to be regarded as such, must be capable, as a matter of law, of providing what the Constitution terms appropriate relief: it must be an effective remedy. Section 7(2) does not, in other words, place an obligation on a person aggrieved by a decision to exhaust all possible avenues of redress provided for in the political or administrative system – such as approaching a parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker. Similarly, it is not required of an aggrieved person that he or she approach one or more of the Chapter 9 institutions – such as the Public Protector or the Human Rights Commission – prior to resorting to judicial review.

The word 'internal' qualifies the word 'remedy' in s7(2) of the PAJA. The New Shorter Oxford English Dictionary defines internal (in this context) to mean 'intrinsic', 'of or pertaining to or interior of something; within the limits of something' and 'used or applying within an organisation'. The dictionary definitions of the words 'internal' and 'remedy' that I have cited are in harmony with the way the composite term 'internal remedy' is understood in the more

specialised context with which this matter is concerned: when the term is used in administrative law, it is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or, less common, an internal review. Often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given the power to confirm, substitute or vary the decision of the initial decision-maker on the merits. In South Africa there is no system of administrative appeals. Instead internal appeal tribunals are created by statute on an ad hoc basis.”

- [23] The Respondents’ submit that there is no justifiable reason why the Applicant’s delayed in bringing the PAJA review and that the application to extend the 180-day period should be dismissed. Further that in the application to the Magistrates Court, the Applicants’ submitted that the Master failed to provide them with procedural fairness, PAJA should have been invoked at this stage. This is then appended by a note that further submissions will be made at the hearing of the application. The Respondent does not refer to section 7(2)(a) of PAJA or provide a response to the Applicant’s submissions in this regard.
- [24] The conversion of the Certificate into a judgement in terms of Section 70(4) and the rights then afforded to a member or former member to approach a Magistrates Court in terms of section 70(5) is a unique process, one which effectively takes power and control of the Certificate/Judgement out of the hands of the Master/administrator and places it in the hands of a Magistrate/judiciary. In so doing Section 70(5) becomes the internal remedy for section 70(4), this is so as it allows a Magistrate on application by a member or former member, “to make any order that it deems fit in regard to any certificate referred to in subsection (4).” There is no other section that allows for Section 70(4) to be reviewed and the only recourse offered to members/former members is that afforded by Section 70(5). There is further no option available to members/former members to appeal to the Master once the certificate becomes a judgement, as this authority then vests in a Magistrate.
- [25] This interpretation appears to be ad idem with the definition of remedy, as defined by Plasket J, in REED v MASTER OF THE HIGH COURT[3], when he indicates, “as it is used in its legal context is the idea that a remedy, in order to qualify to be regarded as such, must be capable, as a matter of law, of providing what the Constitution terms appropriate relief: it must be an effective remedy, “ this is so as the Magistrate, on application can make any order he/she deems fit, “
- [26] It however appears at odds with the first part of the definition of “internal” when Plasket J states, “when the term is used in administrative law, it is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or, less common, an internal review”. In terms of this definition, it would seem that internal review would then lie to someone within the Masters office or higher, as indicated above, this is not possible once the Certificate is recorded as a judgement.

[27] However, when reference to the appellate body is made, “often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given the power to confirm, substitute or vary the decision of the initial

decision-maker on the merits” this would refer to the Magistrates court who would have the power to confirm, substitute or vary the decision in terms of Section 70(5) and would possess greater expertise to deal with a judgement, as opposed to anyone in the Masters Office.

[28] Sections 70(4) and 70(5) is an hybrid of administrative and judicial functions. It represents administrative action up until the point that the Certificate is issued. Once it is recorded by the Clerk of the Court, it becomes a judgement and moves into the domain of the Court, without judicial oversight.

[29] The court is of the view that the Section 70(5) procedure falls within the definition of internal remedy and that the Applicants were justified in exhausting this remedy before approaching the Court, the Applicants are accordingly within the 180-day period envisaged in section 7 of PAJA.

THE PAJA REVIEW

[30] The Court is asked to review the Certificate issued by the Master on the grounds that same does not constitute fair procedure in terms of PAJA.

[31] It is firstly necessary to consider whether PAJA applies to the process established by S70(4). In this regard, PAJA defines Administrative action as

“any decision taken or any failure to take a decision by,

- (a) An organ of state, when
 - (i) exercising a power in terms of the constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) A natural or juristic person, other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision.

which adversely affects the rights of any person and which has a direct, external legal effect.....

Empowering provision is defined as, any law, a rule of common law, customary law or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.”

[32] The Court accepts that the Master, when acting under Section 70(4), is an organ of state which exercises a public power or performs a public function which adversely affects the rights of a person, and has a direct, external, legal effect[4].

[33] The Respondents' do not dispute that the Masters decision to issue a certificate in terms of Section 70(4) constitutes administrative action or the exercise of public power and confirm that to the extent contrary submissions were made in the Magistrates court, this is incorrect. The question is whether the issuing of such Certificate was procedurally fair.

[34] Section 3 of PAJA records:-

“(1) Administrative action which materially and adversely affect the rights or legitimate expectations of any person must be procedurally fair.

(2)

(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) must give a person referred to in subsection (1)-

(i) Adequate notice of the nature and purpose of the proposed administrative action;

(ii) A reasonable opportunity to make representations;

(iii) A clear statement of the administrative action;

(iv) Adequate notice of any right of review or internal appeal, where applicable; and

(v) Adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion also give a person referred to in subsection (1) an opportunity to

(a) obtain assistance and in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

4(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

[35] The Applicants' contend that the letter of the 24 March 2016, was not supported by any evidence under oath to corroborate its content, did not provide an opportunity for the Applicants' to respond to its contents, was not sent to the Applicants' and contained factual allegations that were in dispute. The Certificate that was subsequently issued by the Master was issued without notice to the Applicants' and without having sought or received the Applicants' responses. In addition, the Master did not give the Applicants' any reasons for the decision and did not advise the Applicants' of their right to review the decision.

- [36] The Applicants' argue that the Enquiry is a fact finding exercise, aimed at enabling the liquidator to obtain information about claims that the Close Corporation may have against others, including its members. It cannot be used to ground a decision by the Master that a member/s must pay a particular amount. The Enquiry allows a liquidator to discover facts which he would not be able to ascertain otherwise and which may give rise to financial benefit to creditors. The liquidator may thereafter institute legal proceedings against any person/s implicated in the Enquiry. The Master is not alerted to the case the liquidators will make after the evidence is led. The rights of a witness being cross examined is severely restricted in that he/she is not allowed to lead his/her own evidence or explain the evidence in a context other than that presented by the liquidators. He/she is not allowed to cross examine any witnesses and is not given the opportunity to plead and state his/her defence to any claim, is not entitled to discovery and access to documents and cannot hear the evidence or cross examine other witnesses.
- [37] The powers of the Master or presiding officer to compel the giving of evidence are considerable in a section 415 enquiry. It has powers to subpoena persons as well as inquisitorial powers to interrogate such persons. The witnesses face criminal sanction for failure to fully answer the questions put to them. The scope of the interrogation is defined in the widest terms and nothing concerning the company's affairs are outside it's ambit, the only limitation being that the presiding officer shall disallow irrelevant questions or questions that will unnecessarily prolong the enquiry.
- [38] In addition, the person being examined will not know for what reason or purpose or possible cause of action in the future, the evidence is being elicited by the examiner. This knowledge is an important element of a fair procedure, the court was referred to the matter of CHAIRMAN, BOARD ON TARIFFS AND TRADE AND OTHERS v BRENCO INC. AND OTHERS 2001
- (4) SA 511 SCA, where Zulman JA, referring to the remarks of Lord Mustill in *Doody v Secretary of State for the Home Department and other Appeals*[5] stated (at paragraph 13),
- 'What does fairness require in the present case? (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances..... Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'
- [39] Pertaining to the ambit of a Section 414 and 415 Enquiries, the Court was referred to the following cases, *AGYRAKIS v GUNN* 1963 (1) SA 602 (T), where Galgut J (referring to *Spain N.O and Another v Office Designated and Others*, 1958 (3) SA 488 W at p.492) stated,

“the scope of the interrogation is defined in the widest terms, concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate and concerning any property belonging to his estate. It should be noted in passing that at a meeting of creditors there no defined issues such as that found in judicial proceedings. Witnesses are interrogated to gain information which the creditors and trustees do not possess or cannot effectively establish. The enquiry is for the purpose of discovery and the discovery is directed towards facts which may be of financial benefit to the creditors.”

[40] LORDAN v DUSKY INVESTMENTS (IN LIQUIDATION) 1998 (4) SA 519 (SE), Horn AJ:

“held that an interrogation in terms of section 415(1) is only permissible where such is directed at facts which may be to the financial benefit of creditors. It concerns directly the affairs of the company. The enquiry does not extend to misdemeanours or mismanagement by directors or other officials of the company. Those queries are dealt with by different provisions of the Act (for example section

424) in approving the views expressed by De Vos J in SIMON v THE ASSISTANT MASTER 1964 (3) SA 715 (T) Horn AJ (at 525) it is not an interrogation, the purpose of which is to expose misdemeanours or liability of directors for mismanagement with no

actual or potential effect upon the financial interest of the company or its creditors and should not be permitted by utilisation of the provisions of section 415 or 417.”

[41] In STANDARD BANK OF SOUTH AFRICA LTD v THE MASTER AND OTHERS 1997 (3) SA 178 (C) Albertus AJ stated:

“Despite their differences, ss 415 and 417, each providing for an enquiry into the affairs of companies in liquidation, are intended to facilitate the gathering of information so as to enable the winding-up to be properly and effectively administered for the greatest financial benefit of creditors.”

[42] The Applicants argue that no factual findings or legal conclusions are made at the end of the Enquiry. An Enquiry is accordingly not capable of founding a Court Order against a person and simply provides a vehicle for the liquidators to obtain evidence for later court proceedings. Section 415 is not intended in itself to give an order against a person being examined to pay money to the corporate entity in winding up.

[43] The deponent to the Respondents’ affidavit, Ntuwiseni Netshitahame, (“Netshitahame”) indicates that he chaired the Enquiry which the Applicants’ attended and participated in and that the transcript that was compiled as well as the documents that was submitted formed the basis upon which the Master issued the Certificate in terms of Section 70(4). That the Applicants’ were heard at the enquiry with regard to payments that formed the basis of the certificate issued in terms of section 70(4) and that the Applicants’ must be taken to have been aware of the provisions of sections 51 and 70 of the Act at all material times. It is further submitted that the Enquiry satisfied the requirements of procedural fairness in the circumstances of the case.

- [44] The Respondents concede that Section 70(4) of the Act has to be read subject to section 33[6] of the Constitution and PAJA as well as the principle of legality under the Constitution. This would imply that procedural fairness must be observed alternatively that a rational process must be followed prior to the issuing of the certificate. The Respondents are however silent on the lack of procedural fairness prior to the issue of the Section 70(4) Certificate. It is noted that the Enquiry was held on the 26 September 2015, same was not finalised and was adjourned to the 16 February 2016. Prior to the hearing on the 16 February 2016, the Attorneys for the liquidators notified the Applicants that the meeting for the 16 February 2016 was cancelled and ended the enquiry. At this stage, the Master should have issued the Certificate if he was of mind to do so, he did not. No new evidence was led after the 26 September 2015, effectively, the enquiry ended then and not on the 10 February 2016 when the Liquidators notified the Applicants they are cancelling the enquiry of the 16 February 2016. The Master only issued the Certificate when called upon by the Second Respondent to do so, and after receipt of the letter of the 24 March 2016, with accompanying Certificate. It is evident that no regard to the procedural prescripts in PAJA was considered before same was issued and the Applicants' contention that the Master simply rubber stamped the Certificate drafted by the Second Respondent's Attorneys seems likely.
- [45] The Applicants do not take any issue with the Enquiry but the fact the Section 70(4) confers on the Master the authority to convert that process into a civil judgement against the witness in breach of Section 34[7] of the Constitution.
- [46] The Respondents do not deal with the procedure followed before the issue of the S70(4) Certificate, the letter of the 24 March 2016 and the fact that the Applicants were not given notice of the proposed administrative action or a reasonable opportunity to make representations, prior to the issue of the Section 70(4) Certificate. The Respondents appear to be arguing that because proper procedure was followed at the Enquiry, the Master is entitled to effect judgment in terms of Section 70(4) and the Court must infer that fair administrative procedure was followed in the issue of the Section 70(4) certificate. This the Court cannot do, more especially having regard to the purpose of the Section 415 enquiry.
- [47] The Respondent concedes that the Enquiry does not purport to provide a basis upon which a Court could order a person to pay money. A court would have to make its own determination, based upon evidence presented, before making such an order. The Master does not act as a Judge but as an administrator, in that capacity he may take account of evidence lead at the enquiry that he presided over in order to determine whether or not a certificate should be issued. The Respondents' agree thus, that the Enquiry is not capable of founding a Court Order against a person, however they seem to believe that the Certificate once issued remains as such. This is not so, the Certificate becomes a judgement once recorded by the Clerk of the Magistrates Court.

[48] It is apparent from the case law cited above that the Enquiry is nothing more than a fact finding exercise designed to elicit facts which may be of financial benefit to creditors, it is not a process designed to confer judgement on the members of the Close Corporation, without nothing further.

[49] The Master did not notify the Applicants of his intention to issue the Certificate, the Applicants were not informed of the case against them before judgement was entered, the Applicants were not afforded the opportunity to make submissions, call witnesses or the opportunity to present and dispute any of the information contained in the letter dated 24 March 2016 before judgement was entered against them. The Applicants only became aware that judgement had been granted on the 8 August 2016 when the sheriff of the court came to effect service of the warrant of execution. It is apparent that the Master did not comply with the provisions of Section 3 of PAJA before entering judgement against the Applicants'. The Court is accordingly of the view that proper procedure as required by PAJA was not followed by the Master prior to the issue of the Section 70(4) Certificate.

[50] The Respondent raises notes 2 points in limine:

50.1 That the issues that arise under the PAJA review i.e., regarding procedural fairness, have already been decided by the Magistrates court between the parties and are the same issues in the Applicants' pending appeal in the High Court. As a result, the issue of estoppel applies alternatively res judicata.

50.2 There are pending proceedings in the High Court i.e. the appeal by the Applicants' in which the Applicants' seek the same relief as in the present application, save for the constitutional challenge.

[51] The Magistrate records that the issue she had to decide was the setting aside of the certificate issued by the Master in terms of section 70(5) of the Close Corporations Act, the Magistrate said as much in paragraph 6 of her Judgement. The Magistrate further confirmed that the court has no jurisdiction to pronounce on the constitutionality of section 70(4) and that in dealing with a pronouncement on administrative action, which falls within PAJA, the court did not have jurisdiction. The relief the Applicants seek in this Application is the review of the Section 70(4) Certificate in terms of PAJA and not the setting aside of same in terms of the section 70(5) Certificate. The Court is not in agreement that these proceedings are the same as that instituted in the Magistrates Court.

[52] In the circumstances, I make an order in the following terms:

1. The Certificate issued against the Applicants' by the Master of the High Court on 13 April 2016 in terms of Section 70(4) of the Close Corporation Act, 1984 in the estate of Sue McGuinness Communications CC (in liquidation) is declared to be invalid and is set aside.
2. The judgment granted in the Magistrates Court for the District of Johannesburg held at Johannesburg Central under case number 13144/2016 is set aside.

3. The Fifth, Sixth and Seventh Respondents are directed to pay the costs of their opposition to the Application.

J.L. KHAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard:

26 May 2021

Judgment:

19 October 2021

For Applicants:

W.B. Pye

Instructed by: Bowes & Turner Inc

For Fifth, Sixth, and

Seventh Respondents: No Appearance

- [1] 51.(1) Any payment by a corporation to any member by reason only of his membership, may be made only- 1.
- (a) if, after such payment is made, the corporation's assets, fairly valued, exceed all its liabilities; 2.
- (b) if the corporation is able to pay its debts as they become due in the ordinary course of its business; and 3.
- (c) if such payment will in the particular circumstances not in fact render the corporation unable to pay its debts as they become due in the ordinary course of its business. (2) A member shall be liable to a corporation for any payment received contrary to any provision of subsection (1). (3) For the purposes of this section- (a) without prejudice to the generality of the expression 'payment by a corporation to any member by reason only of his membership', that expression- 1.
- (i) shall include a distribution, or a repayment of any contribution, or part thereof, to a member; 2. (ii) shall exclude any payment to a member in his capacity as a creditor of the relevant corporation and, in particular, a payment as remuneration for services rendered as an employee or officer of the corporation, a repayment of a loan or of interest thereon or a payment of rental; and (b) 'payment' shall include the delivery or transfer of any property.

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- (b) 'payment' shall include the delivery or transfer of any property.
- [2] "Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- [3] (2005) 2 ALL SA 429 (E)
- [4] Constantia Insurance Company Limited V Master Of The High Court, Johannesburg And Others 2016 (6) SA 386 (25) .
- [5] [1993] 3 All ER 92 (HL) at 106 d-h

- [6] Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- [7] Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court, or where appropriate, another independent and impartial tribunal or forum.
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Prepared on 12 October 2026 · Esheria