

SOUTH AFRICA / JUDGMENT

Motala v Master of the North Gauteng High Court, Pretoria (48748/11) [2017] ZAGPPHC 665 (9 October 2017) [2017] ZAGPPHC 665

COURT
North Gauteng High Court, Pretoria

BEFORE
DS Fourie

CASE / FILE NUMBER
48748/11

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IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 48748/11
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
In

the matter between:

ENVER
MOHAMMED
MOTALA Applicant
and
THE
MASTER OF THE NORTH
GAUTENG First
Respondent
HIGH
COURT, PRETORIA
&
12
OTHERS Second
toThirteenth Respondents

JUDGMENT

D S FOURIE, J:

[1] This is an application for an order reviewing and setting aside the first respondent's decisions to remove the applicant as joint provisional liquidator and liquidator of certain companies in provisional or final liquidation and for certain ancillary relief in support thereof. There is also a counter application by the first respondent conditional upon the granting to the applicant any of the relief sought by him. The relief sought in this regard is for the applicant to be removed as liquidator and/or joint provisional liquidator from the companies concerned. In both the application and counter application an order for costs on a punitive scale is sought.

[2] The applicant is a liquidator and administrator of estates by profession. He started working for an insolvency practice in 1998 and started to receive sole appointments in 1999. The first respondent is the Office of the Master of the North Gauteng High Court, but it is the Deputy Master of the Pretoria High Court who took the impugned decisions.

BACKGROUND

[3] On 20 April 2009 the applicant, together with some of the other respondents, were appointed provisional liquidators of six companies

in provisional liquidation and two in final liquidation. These companies are the sixth to thirteenth respondents and are collectively referred to as "the Pamodzi Group" of companies. These companies were all involved in gold mining and were holders of mining rights situated on the East Rand, at Orkney and in the Free State. The Pamodzi Group held a large number of assets in the form: of mining equipment and land, but in particular mining rights which constituted the most valuable portion of the assets. In

terms of the relevant mining legislation, those rights would be forfeited if the holders of the rights were allowed to be placed into final liquidation prior to the transfer of the mining rights.

[4] It was therefore the attitude of the joint provisional liquidators that the interests of creditors would be best served if the mines could be sold as going concerns with the retention of their mining rights. The joint provisional liquidators then became engaged in an effort to ensure at least the maintenance of the various mines through negotiations with various stakeholders. Those stakeholders included the creditors, employees represented by trade unions and possible purchasers. In order to assist them, the joint liquidators engaged the Standard Bank of South Africa to advise them. As there was not sufficient capital available at the time of liquidation, some funding had to be obtained from a major secured creditor, Uni Credit, a German bank. This bank provided a loan of R50 million as an administration expense for the purpose of providing funds to pay workers' salaries and for the care and maintenance of the mines.

[5] Pursuant to their decision to sell the mines as going concerns, a bidding process was undertaken by the joint liquidators. As a result of this engagement the provisional liquidators were successful in disposing of one of the Pamodzi mines to Harmony Gold Mining Company Ltd. In respect of the East Rand companies and Orkney, Aurora Empowerment Systems (Pty) Ltd ("Aurora") was selected as the preferred bidder.

[6] Pending the conclusion of a contract with Aurora (which depended on obtaining Malaysian financial support) the liquidators entered into interim trading and contract mining agreements with Aurora. In terms thereof Aurora undertook to conduct the necessary care and maintenance of the mines and certain limited mining operations. This was done at Aurora's costs and risk. Aurora however encountered difficulties because it failed to obtain the Malaysian financial support.

[7] In the meantime, complaints were heard from the unions about the manner in which Aurora was running the mines. According to the answering affidavit the Master read numerous articles in the newspaper and in other journals identifying certain events that were taking place on the mines in question. At the same time she received numerous calls from, inter alia, the press and representatives of the National Union of Mineworkers and Solidarity.

[8] The nub of what was drawn to the Master's attention was that the mines were being stripped to the extent that the headgear and

machinery on one mine were removed and it was left inoperable. These matters were causes of concern to the Master. According to the Master, all of the duties that Aurora had undertaken, had been undertaken subject to the supervision, direction and control of the liquidators. It has been pointed out that the liquidators complained that they did not receive affidavits from people confirming the stripping of assets. According to the Master there was no indication that the liquidators had visited the mines to see asset-stripping for themselves.

[9] On 18 November 2010 the Master decided to call an urgent meeting with the liquidators. Concerns were raised about the lack of transparency and accountability to the Office of the Master. Despite the joint liquidators undertaking to furnish the Master's Office with a comprehensive report they, according to the Master, failed to do so. The Master then decided to investigate what was transpiring in the liquidation of the companies concerned.

[10] On 10, 17 and 21 May 2011 an enquiry was held in terms of section 417 of the Companies Act. Several witnesses testified whereafter the Master decided to call all of the liquidators to attend an investigation in terms of section 381 of the Companies Act No 61 of

1973. According to the Master the applicant refused to answer any question which (according to the Master) undermined the Master's ability to control the administration of the Pamodzi group of companies. It also transpired, according to bank statements of Aurora, that the applicant had made a payment of R3 million to Aurora which, according to the Master, placed him in a position of a conflict of interest.

[11] One of the witnesses who testified at the section 317 enquiry was an attorney, Mr Smit. It was pointed out by the Master that, according to his evidence, Mr Smit prepared a fraudulent letter which contained a deliberate misrepresentation with regard to an amount of R20 million he allegedly had on trust on behalf of another company and which amount was available for payment on behalf of Aurora. According to the Master this letter was fraudulent and its recipient, the applicant was instrumental in the letter being written, knowing that it was not the truth. On 16 May 2011 a section 381 enquiry was held. This enquiry was in the Pamodzi group of companies. It was then decided, on 23 May 2011, to remove the applicant as a joint provisional liquidator of the Pamodzi group of companies.

[12] After the applicant had been removed as a joint provisional liquidator of the companies in question, the Master called upon him to appear and to answer questions about certain other matters that had come to the Master's attention. At that stage the applicant's

name was still appearing on the Master's panel of approved liquidators and trustees. According to an article which had appeared

in the Citizen newspaper on 3 June 2011 the applicant had been issued an identity document with an identity number identical to that which had been given to a convicted person. During July 2011 the Master requested the applicant to indicate whether he had any previous convictions for theft and/or fraud. His answer was that he had no previous convictions "that disqualifies me from acting as a trustee or liquidator". In a subsequent explanation his attorney pertinently stated that "our client does not have any fraud or theft convictions". The Master then decided to conduct another section 381 enquiry to ascertain whether or not the applicant had previous convictions for theft or fraud. According to the Master it later transpired that the applicant indeed had convictions for fraud and theft. It was then decided, on 5 September 2011, to remove the applicant from the panel of approved liquidators and trustees.

THE RELIEF SOUGHT

[13]The relief sought by the applicant in his amended notice of motion (reduced to its essential features) are the following:

(a)Reviewing and setting aside the decision of the Master on 23 May 2011 to remove the applicant as a joint provisional liquidator of the companies concerned;

(b)Declaring that the applicant is entitled to be reinstated as a joint provisional liquidator and joint final liquidator of the companies concerned;

(c)Alternatively to the relief sought in paragraph (b) above, appointing the applicant as a liquidator to those of the companies that have subsequently been placed in final liquidation;

(d)Reviewing and setting aside the decision of the Master on 20 July 2011 to conduct an inquiry in terms of section 381 of the Companies Act and the entire proceedings conducted in terms of that decision;

(e) Declaring that the applicant is qualified to be nominated or appointed as a liquidator or trustee in terms of the Companies Act 61 of 1973 and the Insolvency Act 24 of 1936;

(f) Reviewing and setting aside the decision of the Master on 5 September 2011 to remove the applicant from the panel of approved liquidators and trustees;

(g) Ordering the Master to reinstate the applicant to the approved panel of liquidators and trustees.

[14] As I have already pointed out above, the Master filed a conditional counter-application. The relevant part thereof is contained in prayer 1.1 of the notice of counter-application. In terms thereof it is requested, conditional upon this Court granting to the applicant any of the relief sought by him, that the applicant be removed as liquidator and/or joint provisional liquidator of the companies referred to in the applicant's notice of motion in terms of sections 379(1)(b), 379(1)(e) and 379(2) of the Companies Act 1973.

THE IMPUGNED DECISION OF 23 MAY 2011

[15] In the Master's first answering affidavit a long and detailed explanation is given for having invoked section 381. The nub of what came to the Master's attention was, inter alia, that assets of the mines had been stolen and/or otherwise removed; one of the mines had been stripped to the extent that the headgear and machinery were removed and it was left inoperable; employees of the mines were not receiving their food or wages and were subsequently retrenched or dismissed from their employment; illegal underground mining was occurring; and Aurora was involved in the removal of valuable equipment from the mines. According to the Master these matters were causes of great concern to her as all the duties that Aurora had undertaken, had been undertaken subject to the supervision, direction and control of the liquidators.

[16] On 18 November 2010 the Master decided to call an urgent meeting with the liquidators. The meeting took place on 19 November 2010 and was attended by all of the joint liquidators. Concerns were raised about the lack of transparency and accountability to the office of the Master. Despite the joint liquidators' undertaking to furnish the Master's office with a comprehensive report they, according to the Master, failed to do so. On 26 November 2010 the Master directed a letter to the joint liquidators wherein she placed them on terms and demanded that they furnish her with the documentation as requested by 20 December 2010. According to the Master the documentation flowed into her office "sporadically and in no particular order".

[17] On 3 May 2011 the Master summoned the applicant and the other joint provisional liquidators to a section 381 enquiry which was to be held on 16 and 17 May 2011. On 11 May 2011 the applicant's attorneys responded to the summons on his behalf. In that letter it was pointed out, inter alia, that:

- (a) the applicant had at all times cooperated and would continue to cooperate with the office of the Master;
- (b) the applicant did not dispute the Master's right to receive information regarding the continued course of the winding up of the companies, provided the information sought is done properly, fairly and in a correct manner;
- (c) the applicant was "more than happy to appear before you in the spirit of ... continued cooperation".
- (d) the Master had been regularly informed about the progress in the estates;
- (e) the requirement to produce documentation was impracticable in the light of the volume thereof and that an inadequate notice period had been given;
- (f) section 381 envisages a complaint, alternatively that the Master has reason to believe that the liquidators have not faithfully performed their duties. The Master was then called upon to provide a copy of the complaint or to provide the basis of the Master's belief.

[18] The Master responded to this letter on 12 May 2011. In her response the Master:

- (a) stated that the Master was conducting the enquiry in terms of the provisions of section 381 as a whole;
- (b) pointed out the obligations of the Master in terms of sections 381(1) and (2) of the Companies Act;
- (c) pointed out that the appointees are required, at all times, to cooperate with the Master and to answer each and every reasonable

query put to them by the Master or his/her representative.

[19] The applicant was in attendance at the Master's office on 16 May

2011. He was represented by his attorney and counsel. The record of proceedings indicates that counsel acting on behalf of the Master pointed out that the liquidators were to be asked questions in terms of the Master's duty under section 381 with regard to the running of the insolvent estates and the conduct of the liquidators. It was also brought to the attention of the applicant and his legal representatives that "if there are questions that deal with matters that they are unable to deal with at this stage because of an inability to get prepared in time, then that will be the subject of a request on their behalf or an objection".

[20] Counsel on behalf of the applicant requested to be informed about the basis of the enquiry insofar as it emanates from section 381(1). He also indicated that, unless they receive an answer, they will 'Just have to reserve our position on that and take such steps if we want to'. He also argued that there must have been a complaint or there must be grounds in the Master's mind as to why irregularities have occurred in the estate. He then indicated that "we cannot answer questions which emanate from complaints and of which we are not

aware, or which are based on grounds which are not advised to use".

- [21] Counsel for the applicant was then requested to indicate whether his clients would be prepared to testify on the basis that as and when an objection or questions raised, objection thereto may be taken. In response thereto it was indicated, inter alia, that if the questions are directed towards "their administration and any ... and there is any implication in any question concerning the merits of their administration, they will not reply - they are advised not to reply now, because of the irregularity of these proceedings". It therefore appears that the applicant refused to answer any question put to him by the Master relating to the merits of the administration of the insolvent estates.
- [22] It was contended on behalf of the applicant that the Master had abused section 381 in seeking to obtain answers which did not relate to any winding-up in which a liquidator was engaged and by failing to observe procedural fairness as contemplated in section 3 of PAJA. It was also submitted that one of the salient purposes of the enquiries was to target the applicant. That, according to counsel emerges from the nature of the questions and the time spent in this endeavour. Counsel for the Master argued that the applicant's responsibility to answer the Master's queries concerning the insolvent estates is a duty imposed on him by the Companies Act. The summons to attend the enquiry was a lawful demand. According to him the applicant's refusal to testify amounted to a failure to perform his duty satisfactorily and a failure to comply with a lawful demand from the Master. This conduct, so it was argued, are grounds in terms of section 379(1)(b) and (e) for the removal of a liquidator.
- [23] It was also pointed out by counsel for the Master that it was not only the applicant who had been summoned to a section 381 enquiry. All other liquidators (but for Gainsford), immediately after argument, testified and made themselves available to do so.

Furthermore, the Master had also removed Gainsford and pursued the investigations with the liquidators who did testify. Therefore, so it was submitted, there is no merit in the contention that the purpose of the enquiries was to target the applicant. I agree with this submission.

[24] The relevant part of section 381 provides as follows:

"381. Control of Master over liquidators. - (1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3)The Master may at any time appoint a person to investigate the books and vouchers of a liquidator."

[25] Subsection (1) imposes a duty on the Master to enquire into the matter if he or she has reason to believe that a liquidator is not faithfully performing his duties. Taking into account the alleged removal of valuable equipment from the mines and the conditions

regarding employees of the mines, I have no doubt that the Master was not only entitled, but also obliged to conduct an enquiry in terms of section 381. Subsection (2) empowers the Master to require any liquidator at any time to answer any enquiry in relation to any winding-up in which such liquidator is engaged. The effect of this subsection, as I understand it, is twofold: first, it empowers the Master to conduct an enquiry and, second, it puts the liquidator under an obligation to answer any such enquiry. The Master's right and the liquidator's obligation are to be inferred from the words "may at any time require... to answer". Any other interpretation, negating this right and obligation, would render this subsection without any force and meaning. In this case the liquidators were given notice on 3 May 2011 of a section 381 enquiry which was to be held on 16 and 17 May 2011. Having regard to the circumstances and the fact that the Master had already requested copies of the documentation during November 2010, this period of twelve days was, in my view, sufficient notice.

[26] As was pointed out in *Ma-Africa Groepbelange (Pty) Ltd and Another v Millman and Powell NNO and Another* 1997 (1) SA 547 (C) at 566 it goes without saying that 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 therefore. The Court is obliged to assess the conduct of the liquidator in its full context with reference to all relevant facts and circumstances. In this regard I take into account the following:

(a)the alleged removal of value equipment from the mines;

(b) the circumstances relating to employees of the mines;

(c)all of the duties Aurora had undertaken, had been undertaken subject to the supervision, direction and control of the liquidators;

(d)the fact that Master had already met with the liquidators in this regard on 19 November 2010 when the liquidators undertook to furnish the Master with a comprehensive report which, according to the Master, they have never done;

(e)the fact that the Master had already by 20 December 2010 requested documentation which, according to the Master, "flowed into my office sporadically and in no particular order";

(f)the fact that the Master on 3 May 2011 summoned the applicant and the other joint provisional liquidators to a section 381 enquiry which was to be held on 16 and 17 May 2011;

(g)the applicant's initial response, i.e. that he would continue to cooperate with the office of the Master, that he did not dispute the

Master's right to receive information regarding the winding-up of the companies and that he was "more than happy to appear ... in the spirit of ... continued cooperation";

(h) the fact that the applicant (and the other joint liquidators) was given the assurance that he could answer the questions he was able to answer and that he was entitled to object to those questions he was unable to deal with;

(i) the fact that the applicant subsequently, through his legal representatives refused to answer any question "concerning the merits of their administration".

[27] As far as procedural fairness is concerned, was it not necessary, before having removed the applicant as a liquidator, to afford him an opportunity of being heard? Section 3(2)(a) of PAJA provides that a fair administrative procedure depends on the circumstances of each case. Subsection (2)(b) seems to impose five compulsory elements and three discretionary ones. One of the compulsory elements is an opportunity to make representations. According to the learned authors Curry & De Waal, *The Bill of Rights Handbook*, 6 Edition, p 677 this apparently mandatory nature is deceptive. They give the following explanation:

"First, the elements are always subject to interpretation informed by a circumstance-based understanding of procedural fairness. Their content will thus tend to vary from case to case. Secondly, in several elements the scope for variation is increased by the use of inherently flexible standards. Thirdly, the Constitutional Court has held that s 3(2)(a) must be read as giving the Courts discretion in enforcing the minimum requirements under s 3(2)(b) even when s 3(4) is not invoked. In other words, the Court is not bound to enforce even the compulsory requirements, and an administrator may be able to depart from them without relying on s 3(4)."

[28] In *Joseph & Others v City of Johannesburg & Others* 2010 (4) SA 55 (CC) the following was pointed out by Skweyiya J (par 57-59) in this regard:

"A literal approach to s 3 of PAJA would hamstring the Courts in cases such as this one, where an administrator fails to recognise that it is bound by the procedural fairness requirement under PAJA Section 3(2)(a) must therefore be read as an empowering provision that allows Courts to exercise a discretion in enforcing the minimum procedural fairness requirements under s 3(2)(b)".

[29] In the case before me the applicant was given the opportunity to attend the section 381 enquiry, to answer questions put to him by the Master and to give whatever explanation that was necessary. He was not only entitled to answer the enquiry, but also obliged to do so. He refused to cooperate and to answer any questions concerning the merits of the administration of the insolvent estates. His refusal to answer questions undermined the Master's ability to control the administration of the companies in provisional liquidation. It also undermined the Master's ability to carry out a statutory duty imposed in terms of section 381. He left the Master with no alternative - he had to be removed. As was also pointed out above, a party need not necessarily be afforded in every case an audience to make representations in answer to prejudicial administrative action that may be taken (cf

also Pellow NO v The Master of the High Court 2012 (2) SA 491 (GSJ) at 510). This is in my view such a case. I am therefore not convinced that the applicant was entitled to be given another opportunity to make any further representations before he was removed as a liquidator. His refusal to answer questions regarding the merits of the administration of the insolvent estate was sufficient to warrant his removal as liquidator in terms of section 379(1) (b) or (e) without any further notice. In view of my conclusion in this regard, I do not deem it necessary to also consider the applicant's conflict of interest with regard to the payment of R3 million to Aurora or the fraudulent letter prepared by Mr Smit. The review application with regard to the decision of 23 May 2011 can therefore not succeed.

THE IMPUGNED DECISIONS OF 20 JULY AND 5 SEPTEMBER 2011

- [30] It has been pointed out by the Master that the relief sought to review and set aside the decision of 20 July 2011 (to conduct an inquiry in terms of section 381 of the Companies Act) and the decision of 5 September 2011 (to remove the applicant from the panel of approved liquidators and trustees) were first introduced on 5 February 2015. That, according to counsel for the Master, is more than three years after the decisions had been taken without a proper explanation for the delay been given.
- [31] Although there is not a formal application for the extension of time (or condonation) in terms of section 9 of PAJA, there is a request in the supplementary affidavit that the late filing of that affidavit be condoned. As the amendment of the notice of motion (introducing two further grounds of review, the decision of 20 July 2011 and 5 September 2011) is attached to the founding affidavit and also intended to form part thereof, I shall accept that this request for condonation also applies to the late amendment of the notice of motion and the introduction of the two further grounds of review.:(

THE DELAY

- [32] The relevant part of section 7(1) of PAJA provides that "any proceedings for judicial review" must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of it or might reasonably have been expected to have become aware of it. Section 9(1) makes provision for the extension of time-periods. It provides that the 180- day period may be extended for a fixed period, by agreement between the parties or, failing such agreement , by a Court on application by the person or administrator concerned. In terms of section 9(2) the Court may grant such an application "where the interests of justice so require".
- [33] Two different stages are envisaged by section 7(1), i.e. a stage before the effluxion of 180 days and another one thereafter. It has been explained as follows by Brand JA in *Opposition to Urban Tolling Alliance v SANRAL* [2013] 4 All SA 639 (SCA) par 26:

"Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable . But after the 180-day period the issue of unreasonableness is pre determined by the Legislature; it is unreasonable per se. It follows that the Court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section

9. Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay .. "

[34] The onus is on an applicant who has delayed in bringing review proceedings to make out a proper case that the delay be condoned in the interests of justice. An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. In short, a reasonable explanation must be given (*Van Wyk v Unitas Hospital & Another* [2007] ZACC 24; 2008 (2) SA 472 (CC) par 22). The other factors ordinarily considered by a Court in deciding whether "the interests of justice so require" are, inter a/ia, the nature of the relief sought, the extent and cause of the delay, the importance of the issue to be raised in the intended proceedings and the prospects of success (*Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) par 54).

- [35] The original notice of motion in this matter was issued on 25 August 2011 and served on 9 September 2011. Prior to the launching of his amended notice of motion no relief was sought with regard to the Master's decision on 20 July 2011 (to conduct an inquiry in terms of section 381 of the Companies Act) and the decision of 5 September 2011 (to remove the applicant from the panel of approved liquidators and trustees.) That relief was introduced for the first time in the amended notice of motion attached (as annexure "SFA1") to the supplementary founding affidavit dated 23 January 2015 which is more than three years after the impugned decisions were taken. Having regard to the dictum of Brand JA in *OUTA* (para 16 above) it means that in this matter the delay fits into the second stage (after the 180- day period) where the issue of unreasonableness is pre-determined by the Legislature and the Court is only empowered to entertain the review application with regard to those decisions, if the interest of justice dictates an extension in terms of section 9 of PAJA.

REASONS

FOR THE DELAY

- [36] The explanation given by the applicant for the delay in filing the supplementary affidavit (and the amended notice of motion) is linked to the Master's failure to dispatch the record of proceedings timeously, his attempts to obtain a full record, his application for expungement of his previous convictions and his attempts to seek reinstatement by the Master.

The Master's failure to dispatch the record timeously

[37] After the founding papers were filed on 9 September 2011, the applicant's attorneys received no notification from the Master that the record had been dispatched to the Registrar, nor did they receive any notification from the Registrar that the record had been delivered. On 5 December 2011 the applicant's attorneys received the Master's answering affidavit which was, at the same time, the founding affidavit in the counter-application seeking confirmation of the applicant's removal from the panel of liquidators and trustees. It appeared from this affidavit that the Master delivered a record to the Registrar on 3 October 2011. This record, according to the applicant, was not only filed out of time, but is also incomplete.

The applicant's efforts to obtain a full record

[38] Following a search conducted at the Registrar's office, the record could not be found. An exchange of correspondence between the attorneys then followed, whereafter the applicant received a copy of the record on 30 January 2012 from the State Attorney. According to the applicant it was incomplete as it did not contain the record of the decision(s) and complete transcripts of the proceedings. During October 2012 the applicant was provided with a copy of the transcript of the section 381 inquiry conducted in May 2011. On 24 January 2013 the Master was informed that certain documents had still not been made available to the applicant. According to the applicant the time of disposing to his supplementary founding affidavit, the full record relevant to the decisions under review had still not been provided to him by the Master.

Applicant's application for expungement of his previous convictions

[39] According to the applicant the central reason given for the Master's decision to remove him from the panel was that he had previous convictions for theft and fraud and that this, in the view of the Master, disqualified him from appointment as a liquidator or trustee. He was convicted during 1978. During September 2011 he applied to the Department of Justice for a pardon of his previous convictions. On 27 March 2012 the Department informed him that it would be more appropriate for him to apply for an expungement of his convictions in terms of section 271B of the Criminal Procedure Act. On 28 May 2012 he made an application for the expungement of his convictions and withdrew his application for a pardon.

[40] According to the applicant it was necessary for him to await the processing and the granting of the requested expungement before proceeding with his application in this matter. He was advised that such an expungement "would be a complete answer to the decision to remove him from the panels and, for that matter, from the Pamodzi companies". Any supplementary affidavit which did not make reference to this would have been premature. The process of considering his application for expungement took some 20 months to finalise. The expungement was granted on 28 November 2013.

The applicant's attempts to seek reinstatement

[41] On 11 December 2013 the applicant's attorneys wrote to the Master attaching copies of the relevant certificates regarding the

expungement and requested his reinstatement to the Master's panel. On 20 January 2014 his attorneys received an email from the Master refusing his request to be reinstated. The Master also referred for justification of this refusal to her letter of 5 September 2011.

Discussion

[42] These reasons, when reduced to its essential features, can for practical purposes be regarded to fall into two main categories.

First, the delay was caused by the late filing of an incomplete record of proceedings and, second, a further delay was caused by the application for pardon and later expungement of the applicant's previous convictions.

[43] The Master's decision of 20 July 2011 to conduct an inquiry in terms of section 381 of the Companies Act was conveyed to the applicant in a letter dated 20 July 2011 (annexure "AA23"). Shortly thereafter it transpired that the applicant had left the country on the same date. However, in a letter dated 22 July 2011 (annexure "AA25") the applicant's attorney pointed out that the Master's letter of 20 July 2011 only came to the applicant's attention "late on 20 July 2011 after he left the office". Bearing in mind that the present application was launched on 9 September 2011, it is clear that the applicant had already known about this decision on 20 July 2011. The question is why did the applicant not include this impugned decision for review in his

initial notice of motion and founding affidavit? No specific explanation has been given in this regard.

[44] The applicant was able to formulate his initial review application without the assistance of any record. After an incomplete record was obtained, he could still amplify the application by adding or amending the

terms of the notice of motion and supplement the supporting affidavit. Put differently, if an incomplete cause of action was set out with regard to a particular decision to be reviewed and set aside, the applicant could still amplify his papers after the record had been obtained. Fact of the matter is the decision in question was not introduced at all. It was not necessary to wait for such a long time before this decision could be taken on review. In terms of section 7(1) of PAJA any proceedings for judicial review must be instituted without unreasonable delay.

[45] The subsequent decision of 5 September 2011 (to remove the applicant from the panel of approved liquidators and trustees) was preceded by a letter dated 25 August 2011 addressed by the Master to the applicant (annexure "AA34"). In that letter reference was made to "matters that are of great concern to this office" and also to an instruction to Masters not to appoint the applicant as provisional liquidator and/or provisional trustee in any new estates. In the last paragraph thereof the applicant was invited "to advance reasons by close of

business on Monday 29 August 2011, why he should not be removed from the Master's panel of liquidators and trustees". The implication of this letter is clear. If the applicant fails to take advantage of the invitation extended to him, he runs the risk of being removed from the panel of liquidators and trustees.

[46] On 29 August 2011 the applicant's attorney replied to the Master's letter of 25 August 2011 without advancing reasons why he should not be so removed (annexure "AA36"). A few days later, on 29 August 2011, the applicant personally responded to the letter of 25 August 2011 without taking advantage of the invitation to advance reasons why he should not be removed from the panel (annexure "AA37"). It was only thereafter, on 5 September 2011, that the Master informed the applicant of the decision to remove him from the panel of approved liquidators and trustees. It is not explained by the applicant when the letter of 5 September 2011 (informing him of the decision to remove him from the panel) came to his attention. The Master points out in the answering affidavit that he has never contradicted that letter or responded to it. According to the Master the applicant's conduct demonstrates acquiescence in the Master's decision to remove him from the panel. In reply to these allegations the applicant states the following:

"I deny that I have 'acquiesced' in my removal. The purpose of this application is precisely to have the decision to remove me reviewed and set aside. Given Rossouw's clear prejudice against me there is no point to debating her reasoning with her in correspondence as there is no prospect that she would reverse her decision."

[47] The fact that the applicant was notified by letter dated 5 September 2011 of the decision to remove him from the panel, the absence of any explanation in the supplementary founding affidavit about when the contents of this letter came to his attention and the applicant's failure to address this issue in his replying affidavit, justify the conclusion that he knew about this decision before his initial notice of motion and founding affidavit were served and filed on 9 September 2011.

[48] This again raises the question why did the applicant not include the decision of 5 September 2011 (to remove him from the panel) for review in his initial notice of motion and founding affidavit, or soon thereafter? According to the applicant it was necessary for him to await the processing and the granting of the requested expungement before proceeding with his application in this matter. He was advised that such an expungement would be a complete answer to the decision of the Master to remove him from the panels.

[49] There are, in my view, two problems with this approach. First, on 5 September 2011 when the decision was taken, the applicant was still a convicted person. It was an existing and relevant fact which could be taken into account by the Master. Furthermore, the initial application for pardon was only submitted during September 2011 (without specifying the date), whereas the application for expungement was made on 28 May 2012, long after the impugned decision had already been taken.

[50]Second, I find it difficult to understand how an expungement granted more than two years after the impugned decision had been taken, can render that decision reviewable. Expungement was not even a relevant consideration which could and should have been taken into account when the decision was taken.. Furthermore, it is only the applicant who is to be blamed for his failure to apply timeously for the expungement of his previous convictions.

[51]In an attempt to overcome the 180 days requirement of PAJA, counsel for the applicant contended that, to the extent that the applicant in his supplementary founding affidavit seeks to defend himself against the counter application, this constitutes a collateral defence. It was submitted that there is no time bar on the right to raise such a defence in response to an attempt by the State to enforce administrative action that the respondent challenges as invalid. There is, in my view, no merit in this argument. The relief sought by the applicant in this regard, as set out in the amended notice of motion, is not formulated as a weapon of defence, but as a weapon of attack. Both the prayers in this regard seek to introduce a new cause of action with regard to two different decisions based upon a different set of facts. These decisions function independently of the one taken on 23 May 2011 (to remove the applicant as a joint provisional liquidator of the Pamodzi group of companies).

[52] Taking into account all the above considerations, I am not convinced that a full and reasonable explanation has been given by the applicant for the extraordinary long delay in bringing review proceedings with regard to the aforesaid two decisions introduced for the first time in the amended notice of motion. However a reasonable explanation (or the absence thereof) for the delay is not the only consideration in deciding whether the interests of justice require that condonation be granted. I shall also consider the prospects of success.

THE PROSPECTS OF SUCCESS

[53]When considering the prospects of success the merits with regard to the impugned decisions of 20 July 2011 and 5 September 2011 should also be taken into account. This only requires a consideration of the merits, not their determination. (*Asia Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23 par 12.) I shall now consider the merits and prospects of success with regard to each of the impugned decisions referred to above.

THE DECISION OF 20 JULY 2011

[54] When considering the prospects of success I have to consider whether the decision to enquire under section 381 constitutes administrative action as contended for by the applicant. In terms of section 1 of PAJA "administrative action" means (insofar it is relevant) any decision taken which adversely affects the rights of any person and which has a direct, external legal effect. Both these requirements i.e. which adversely affects the rights" and "direct external legal effect" have been explained as follows by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) at par 23:

"The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

- [55] According to the wording of section 381(1), (2) and (3), it appears that the purpose of the procedure set out therein is to enquire into and investigate matters in relation to a winding-up. The operative words indicating this are to "enquire into the matter" (subsection (1)), "to answer any enquiry" (subsection (2)) and "to investigate" (subsection (3)). According to the wording of these subsections the overall purpose appears to be investigative and not that of a procedure which adversely affects the rights and impacts directly and immediately on individuals. I therefore have difficulty in seeing how the enquiry in question can be characterised as administrative action (cf *Nedbank Ltd v Master of the High Court, Witwatersrand Local Division* 2009 (3) SA 403 (W) par 96 and further with regard to section 417 of the Companies Act). However, in the event that I have misdirected myself in this regard, I shall now also consider whether, factually, an irregularity occurred.
- [56] The alleged irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA (*Al/pay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) par 28). It would have to include a consideration of whether the irregularity or non-compliance was material or, put differently, egregious (*SANRAL v Cape Town, City* 2017 (1) SA 468 (SCA) para 81). Having said that, I still bear in mind, when considering the application for condonation, that this requires a consideration of the merits, not a determination thereof.
- [57] It is not in dispute that the Master's decision of 20 July 2011 to conduct an enquiry in terms of section 381(1) of the Companies Act was conveyed to the applicant in a letter dated 20 July 2011. In paragraph 2 the purpose of the enquiry is explained as follows:
- "For the record I inform you that I do not enquire about anything pertaining to a complaint against you. I record that the purpose of the enquiry will be to discuss the content of the Citizen article and your various responses to me dated 13, 15 and 19 July, which responses I am not satisfied with."
- [58] It was contended on behalf of the applicant that the right to enquire in terms of section 381(1) implies a failure or breach by the liquidator and connotes that the Master has *prima facie* arrived at some view which is unfavourable to the liquidator. Therefore, so it was argued, the enquiry is an administrative step or action which is part of a potentially adversarial process. This means the liquidator is entitled to procedural fairness, whether in terms of PAJA or under the principle of legality.

[59] As far as the principle of legality is concerned, it was pointed out in *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 96 that a litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the

Constitution or the common-law. Also in *Sita v Gijima Holdiftgs* 2017 (2) SA 63 (SCA) par 38 it was concluded that the proper place for the principle of legality in our law is for it to act as a safety net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. There appears to be no indication, neither was it so contended, that in the matter before me the law allows no other avenues to challenge the

alleged unlawful exercise of public power and therefore, as a last resort, the principle of legality may be relied upon.

[60] This brings me back to the question whether, factually, an irregularity occurred? It has been contended on behalf of the applicant that the enquiry called for by the Master is an administrative action which can be likened "to a disciplinary enquiry of an employee". This implies that the applicant was entitled to procedural fairness that would include adequate notice of the nature and purpose of the enquiry. According to the applicant the Master failed to disclose a material fact, namely a complaint and she also refused to indicate what her motivation for the enquiry was. Put differently, according to the applicant this is a clear indication that an irregularity occurred which amounts to a ground of review under PAJA.

[61] I do not agree with these submissions. The Master, in her letter dated 20 July 2011, clearly indicated what the nature of the proceedings was I.e that of an enquiry. According to this letter the purpose of the enquiry was to discuss the content of the Citizen article and the applicant's various responses dated 13, 15 and 19 July with which the Master was not satisfied. It is also clear from this letter, that the motivation for the enquiry was not about a complaint, but the applicant's responses which did not find favour with the Master. It related to the question whether or not the applicant (at that stage) had previous convictions for theft and/or fraud which, on the face of it, appear to be a serious matter. Why should the Master not be entitled to enquire about these allegations under circumstances where the applicant's responses thereto were unsatisfactory? Taking into account that at this stage the applicant's name was still appearing on the Master's panel of approved liquidators and trustees, I can see no reason why the Master should not be entitled to enquire about the suggestion that the applicant had previous convictions for theft and/or fraud. Having regard to these considerations, I am not convinced that, factually, an irregularity occurred as contended for by the applicant.

[62] It was also contended that section 381(1) cannot be used for something other than its intended purpose, because doing so would

amount to using the powers under subsection (1) for an ulterior purpose as envisaged by section 6(2)(e)(ii) of PAJA. The intended

purpose of subsection (1) appears not to be so tightly formulated as suggested by counsel for the applicant. The words "observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties" would also include directions of the Master or the Court (Henochsberg on the Companies Act, No 71 of 2008, Vo/ 2, Appendix 1, p 173, commentary on section 381). I can see no reason why a lawful request by the Master should not also be included. In this matter the Master requested the applicant on more than one occasion to indicate whether or not he had previous convictions for dishonesty. This was obviously of great concern to the Master. As pointed out by the Master, also of great concern was that the general public must have confidence in the process whereby the Master appoints liquidators and that the Master would not, in principle, appoint persons suspected of involvement in crime. Unfortunately the applicant failed to give a proper and direct answer to the Master's enquiry. On 18 July 2011 and in a last attempt to get a proper answer, the following question was posed to the applicant: "Do you have previous convictions for theft and/or fraud? If yes, please provide the details of such convictions ...". To this the applicant replied as follows: "I ... have no previous convictions that disqualify me from acting as a trustee or liquidator". Thereafter, on 20 July 2011, the applicant was requested to attend another enquiry at the Master's office in terms of section 381(1) of the Companies Act.

[70] In the South African Rugby Football Union matter the principle with regard to "policy" has been explained as follows (par 142):

"As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and Premiers and Members of Executive Councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for purposes of s

33. It follows that some acts of members of the executive, in both the national and provincial spheres of Government will constitute 'administrative action' as contemplated by s 33, but not all acts by such members will do so."

[71] The policy referred to by Tuchten J (as far as I could ascertain) is a policy determined by the Minister of Justice and Constitutional

Development (and not the Master) in terms of, inter alia, section 158 of the Insolvency Act, No 24 of 1936 read with section 339 of the Companies Act. Although I was not addressed on the meaning and import of this policy, it appears that the last edition thereof was published in GR 77 of 7 February 2014 and was to come into operation on 31 March 2014. The constitutional validity of this policy was considered in *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others*

- [2015] 1 All SA 589 (WCC) when the Court (par 232) made a declaration in terms of section 172(1) (a) of the Constitution that the policy is inconsistent with the Constitution and therefore invalid. This was confirmed on appeal in *Minister of Justice v SA Restructuring & Insolvency Practitioners* [2017] 1 All SA 331 (SCA). Notwithstanding this outcome, the Master's list or panel still exists and arises from policy determined by the Master (and not the Minister) as explained in the supplementary answering affidavit. However, it still remains a compilation according to policy. I therefore agree with Tuchten J that the compilation thereof does not constitute administrative action. Furthermore I am also of the view that action taken by the Master in adding or removing a person's name, i.e. by restructuring the compilation of the list according to the current policy and discretion of the Master, is likewise not administrative action as contemplated in PAJA. However, I need not have to make a determination or finding in this regard as I only have to consider the merits.
- [72] If my view in this regard is not correct, the next step would be to establish, factually, whether an irregularity occurred. It is not in dispute that on 17 August 2011 the Master wrote to the applicant and pointed out, inter a/ia, his denial that he had ever been convicted of theft or fraud and that he had no idea of the identity of the person referred to in the Citizen article sharing his identity number. Attached to the letter was a copy of the SAP 69 form disclosing the convictions and the sentence imposed upon a certain Mr Dawood. It was also disclosed that in the course of investigations undertaken by the Master, an application to the Department of the Interior for the change of the name of Enver Mohammed Dawood to Enver Mohammed Motala was uncovered. A copy thereof was also attached. The applicant was then invited to consider all this information and to provide the Master with his response by the close of business on Friday 19 August 2011.
- [73] On 26 August 2011 the applicant's attorneys responded on his behalf and stated, inter a/ia, that the Master's efforts to have held an inquiry in terms of section 381 amounted to a gross abuse of power and that the Master had "artificially and unlawfully created an 'inquiry' and forced our client into 'participating' in a procedure you must have known was unlawful."
- [74] The Master responded on 25 August 2011 and pointed out that the applicant's response did not deal with the matters raised in her last letter. The applicant was then informed as follows :
- "Moreover, it appears that the absence of an answer to my letter dated 17 August 2011 is attributable to the fact that your client has no answer thereto. That being the case I hereby invite your client to advance reasons by close of business on Monday 29 August 2011, why he should not be removed from the Master's Panel of Liquidators and Trustees."
- [75] On 29 August 2011 the applicant's attorney responded to the Master's letter dated 25 August 2011. Save for alleging that there are conflicts between numbers of alleged counts, differences in ID numbers and that the "conviction" does not fall within the confines of item 9 of Schedule 5 of the Companies Act of 2008 (read with section 372(f) of the Companies Act

of 1973) no other reasons were advanced as requested. On 5 September 2011 the Master wrote to the applicant informing him of her decision to remove him from the Panel of Approved Liquidators and Trustees. This letter also sets out various reasons for having made that decision. These reasons include, inter alia, the applicant's failure to admit or deny allegations concerning previous convictions for dishonesty and that he and Mr Dawood are in fact one and the same person.

- [76] From the above it appears that the applicant was give proper notice and also the opportunity to advance reasons why he should not be removed from the Master's Panel of Approved Liquidators and Trustees. He opted to not take advantage of the invitation. Furthermore, from all the correspondence it is clear that the applicant not only kept the Master in the dark about his previous convictions, but that he also told a blatant lie on 17August 2011 (at the Master's office) by stating that "don't have any previous convictions". Taking into account all these considerations, I am not convinced that an irregularity has been committed by the Master as alleged. Therefore, in my view, there is no reasonable prospect of success on the merits with regard to the decision of 5 September 2011.

CONCLUSION

- [77] I must now finally decide whether it will be in the interests of justice to grant condonation and to allow for an extension of time as envisaged by section 9 of PAJA. In this regard I take into account the excessive delay of more than three years after the decision of 20 July 2011 and 5 September 2011 had been taken. I also take into account the inadequate explanation given for this delay as well as the absence of reasonable prospects of success on the merits with regard to both these decisions. Furthermore, there is also a public interest element in the finality of decisions taken and the exercise of functions in connection therewith (*Associated Institutions Pension Fund v van Zyl* 2005 (2) SA 302 (SCA) par 46). Ultimately, the decision whether to condone a delay is based on whether the interests of justice so require. In my view that has not been demonstrated and therefore condonation for the late introduction of review proceedings with regard to these two decisions is refused. The result is that these two decisions, and the decision of 23 May 2011, remain valid and in force.

THE OTHER RELIEF SOUGHT

- [78] As pointed out above (par 13) the applicant also applies for other relief such as a declaratory order and ordering the Master to reinstate him to the approved panel of liquidators and trustees. This additional relief is dependent on one or more of the impugned decisions being reviewed and set aside. Put differently, the additional relief cannot be granted if one or more of the impugned decisions are not reviewed and set aside. In view of my conclusion that not one of the impugned decisions should be reviewed and set aside, the application for the granting of additional relief cannot succeed. It also means that the conditional counter application falls away. Finally, I have considered the request for costs on a punitive scale. Although I was tempted to grant such an order, I have decided that it is not necessary to do so.

ORDER In the result I make the following order: The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

Date 9 October 2017

DS FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

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