

SOUTH AFRICA / JUDGMENT

Wessels N.O and Others v Master of the High Court, Pretoria and Others (83560/17) [2018] ZAGPPHC 892 (18 December 2018)

[2018] ZAGPPHC 892**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mavundla

CASE / FILE NUMBER

83560/17

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**IN THE HIGH COURT OF SOUTH
AFRICA,
GAUTNEG DIVISION, PRETORIA
CASE**

**NUM BER: 83560/17
18/12/2018**

In**the matter between:**

**JOHANNES STEPHANUS WESSELS N.O.
FIRST APPLICANT**

**(In
his capacity as Trustee of the Hannes
Wessels
Family Trust IT no 7618/98)**

**BAREND
JACOBUS DU TOIT
SECOND APPLICANT**

**JOHANNES
STEPHANUS WESSELS
THIRD APPLICANT**

**and
THE
MASTER OF THE HIGH COURT,
FIRST RESPONDENT
PRETORIA
ESIAS JOHANNES JANSE VAN RESNBURG
N.O.
SECOND RESPODNENT
FAROUK-SHARIEF N. O.**

THIRD RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] The applicant approached this Court seeking an order in the following terms:

1.1 That the first respondent be compelled to implement its ruling dated the 8 September 2017 to appoint a Liquidator in the insolvent estate of Boschpoort Ondernemings (Pty) Ltd in terms of section 374 of the Companies Act 61 of 1973; and

1.2 That the first respondent be compelled to make a ruling on the applicant's request to convene an enquiry in terms of section 381(2) of the Companies Act, Act 61 of 1973 to enable the first respondent to properly investigate the conduct of the second and third respondents in administration in the insolvent estate of Boschpoort Ondernemings (Pty) Ltd (in liquidation).

1.3 That the first respondent pays the costs of the application on an attorney and client scale;

1.4 That the second and third respondents pay the costs of the application, jointly and severally with the first respondent, only in the event that the second and third respondents oppose this application;

1.5 Further and or alternative relief.

[2] The founding affidavit was deposed to by the second applicant, who described himself as a businessman residing at Mabalingwe Nature Reserve, Bela Bela/ Rooiberg Rad Bela Bela Limpopo. He is further authorized to bring the application on behalf of the Hannes Wessels Family Trust IT No 7618/98. In this regard he attached annexure "JW1" co-signed by himself and the third applicant.

[3] The first and second applicants are the duly appointed trustees of Hannes Wessels Family Trust, an inter-vivos trust duly registered in terms of the statutes of the Republic of South Africa. The Hannes Wessels Family Trust holds 50% interest in the liquidated company known as Boschpoort Ondernemings (Pty) Ltd, hereinafter referred to as BPO. of which the third applicant was the director.

[4] The first respondent is the Master of the High Court of South Africa, whose opposing affidavit was deposed to by the Deputy Master.

[5] Although the application is voluminous, consisting of 1064 pages, substantial of the papers is in fact copies of correspondence between the first applicant and the first respondent through their respective attorneys, as well as copies of litigation which preceded this application. It is not necessary to traverse all the annexures because the issues in this matter are crisp and matter of law, in particular the interpretation and implication of sections 374 and 381(2) of the Companies Act 61 of 1973.

- [6] It is common cause that BPO is a profit company with limited liability which was duly incorporated in terms of the laws and statutes of The Republic of South Africa. On 15 June 2012 BPO was placed in final liquidation by one of the creditors, ABSA Bank Ltd. On 28 August 2012 the joint liquidators obtained an order for the extending their powers.
- [7] It is common cause that since their appointment , various assets of BPO in liquidation were sold by the joint liquidators. The applicant' s chagrin is that almost 5 (five years) after the liquidation of BPO, no Liquidation and Distribution Account was forthcoming, despite the fact that all immovable asses having been sold and transferred and the going concern being sold and transferred as well.
- [8] According to the applicant: round about March 2017 he approached the Master to raise his concerns about the dilatory manner the liquidators were handling the matter. On the 3 April 2017 the applicant's attorney's requested the Master to appoint a co-liquidator for Boschpoort in terms of section 374 of the Companies Act. The Master on the 8 September 2017 communicated to the applicant's attorneys that: "Please be advised that the Master has taken a decision to appoint an additional liquidator in terms of section 374 of the Companies Act, 61 OF 1973." However instead of implementing the aforesaid decision, the Master decided to appoint a florescence investigator, Tracy Hills, to investigate the books and vouchers of the liquidators.
- [9] The report of the investigator was delivered only on 13 March 2018. After the report of Ms Hill was filed, highlighting several serious irregularities in the Liquidator's L&D account and vouchers, the Master embarked on an informal section 381 enquiry by issuing a query sheet dated 29 May 2018 to the liquidators. As of that date, the liquidators have failed and or refused to answer to the "informal enquiry".
- [10] The applicant contend that the avenue embarked upon by the Master in refusing to make a ruling as to the convening of a formal section 381 enquiry, as requested, is causing the estate irreparable harm in so far as the Master attempts to embark on an "informal" inquiry, by addressing the query sheet to the liquidators, is simply being ignored by the liquidators and the Master has failed and or refused to take any further steps in this regard for eight months since June 2018, despite written requests to the Master in this regard.
- [11] The applicant contended in its papers that the second and third respondents, as appointed liquidators of the Boschpoort, filed voluminous opposing affidavit with annexures, which are irrelevant for purposes of adjudicating this application . They were only joined in their capacities as liquidators, in so far as they may have an interest in the relief sought, but the relief sought does not materially affect their rights or interests in so far as no sanction is prayed for against them. For that reason, the second and third respondents' opposition to this application is wholly unnecessary, improper and therefore the second and third respondents should be ordered to pay the costs of their opposition of this application de bonis propriis.

[12] The applicant contend that it approached the Master on 3 April 2017 to appoint a co-liquidator in terms of s374 of the Companies Act, and to convene a section 381 enquiry in the liquidation of Boschpoort.

[13] Section 374 of the companies Act provides that;

"374. Master may appoint co-liquidators at any time . -Whether the Master considers it desirable he or she may, in accordance with policy determined by the Minister, appoint any person not disqualified from holding the office of liquidator and who has given security to his or her satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned."

[14] According to the applicant, once the Master has taken a decision to appoint an additional liquidator, he is functus officio and therefore his subsequent decision that:

"After revisiting the information at hand, (he) has made use of (his) discretion afforded to him by the Act and have come to the decision to appoint Ms Hill in terms of section 381(3) of the Companies Act, 61 of 1973 to proceed with an independent investigation into the books and vouchers of the liquidators. The Master will thus not be adding a liquidator in the matter as this stage." stands to be reviewed and set aside because the Master cannot review her own decision not to appoint a co-liquidator but to embark on a different process instead.

[15] It was further contended by the applicant that the decision dated 5 September 2017, to not appoint a co-liquidator" at this stage" constitutes a nullity, since the Master had no authority to review her own decision and that such decision can be ignored without having to be first rescinded by the Court; in this regard reliance is made on the authority of Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Another.[1]

[16] The applicant further contended that:

16.1 whereas section 381(2) stipulates that:

"(2) The Master may at any time require any liquidator to answer any query 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." and

16.2 whereas the applicant requested the Master to convene an inquiry in terms of section 381 of the Companies Act; and

16.3 whereas the liquidators have blatantly refused and failed to adhere to the instructions of the Master to answer to the comprehensive query sheet to date, contrary to the demand of section 392; and

16.3 the Master decided on an informal inquiry;

16.4 it is clear that the Master has dismally failed for the last three and a half years, to convene such formal section 381 enquiry, will in all probabilities, not convene such n formal section 381 enquiry .

[17] The applicant contended that the only judicial oversight under these circumstances, would have been for the Master to convene a section 381 inquiry, which he has failed to do, and therefore the orders prayed for should be granted.

AD LOCUS STANDI

[18] The applicant contended that he has locus standi to bring this application by virtue of the fact that he is a surety and therefore has an interest

[19] On behalf of the first respondent it was submitted that the applicant is the shareholder and director in the liquidated company and therefore does not have a direct and substantial interest in the liquidation proceedings and therefore lacks the necessary locus standi to bring this application. The liquidation proceedings are for the benefit of the creditors. Citing the matter of GCC Engineering (Pty) Ltd and Others v Lawrence Maroos and Others (901/2017) [2018] ZASCA 178 3 December 2018) at paragraph 21 where Seriti JA held that the directors of a company at liquidation are stripped of their control and management of the company placed in winding -up by the court . Similarly, in casu the applicant as the director of the company in liquidation, in my view, does not have locus standi to bring this application in his personal capacity.

[20] Where a person is no longer a director or a shareholder in a company in liquidation, having withdrawn before commencement of the winding-up proceedings, they are not creditors. They accordingly do not have sufficient interest in the liquidation of the company to entitle him to object to the way in which the joint liquidators do their job. He is a person against whom a claim may be lodged by the liquidators in due course . Such a person is a potential defendant in a claim that might be lodged against him by the liquidator.[2]

[21] Patel went to cite from the matter of Neuhaus v The Master of the High Court and Another 1932 SWA 30 where it was held that although the expression 'every person aggrieved' was a very wide one:

'(l)t cannot mean that every person who feels annoyed or hurt at a ruling of the Master is entitled to bring such ruling under review.' The Court was of the view that unless a legal right is affected the person cannot be regarded as an aggrieved per son.

In the matter of Francis George Hill Family Trust v South African Reserve Bank 1992 (3) 91 (AD) it was held that a shareholder , by virtue of his entitlement to a share in the distribution of surplus assets when the company was wound up, had a financial interest in the success or failure of the company, but had no right or title to any assets of the company . The dictum in Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) and Another 1962 (1) SA 548 (A) applied .

[22] In the matter of Nieuwoudt v The Master the High Court and Others NNO[3] the Appellate Court held that section 407(1) of the Companies Act 61 of 1973 gives locus standi to object to a person having an interest in the company and not to a person whose interest is merely to see that liquidation is properly handled or that the liquidator does his duty.

- [23] In my view, the applicants' interest or chagrin in this matter is that the second and third respondents as liquidators are not properly handling the liquidation of the company in liquidation . In the light of the authorities referred to herein above, I find that the interest of the applicants, is that of directors and or shareholders of the company in liquidation, as such their interest is purely financial and does not vest them with a real right and accordingly they do not have any locus standi to bring this application. For the aforesaid reason the application stands to be dismissed with costs. Assuming that I am wrong in the aforesaid decision, which is not conceded, I shall deal nonetheless with the further aspects pertaining to this matter, as set out herein below.
- [24] The first respondent further contended that the applicant cannot approach the court for orders compelling the first respondent to act in a manner suitable to the applicants in the first respondent's exercise of discretion in terms of the Companies Act of 61 of 1973. It was further contended that the applicant ought to have reviewed the decision of the first respondent in terms of Promotion of the Administrative Justice Act, 3 of 2000, in which case the court is empowered to grant any order that is just and equitable.
- [25] On behalf of the second and third respondents, it was submitted that according to the applicant, the Master has made a decision in response to the applicant's request in terms of section 181(2). That being the position, just like in respect of section 374 relief, the applicants are entitled to utilise section 51 of the Insolvency Act, if they are dissatisfied with such Master's decision.
- [26] On behalf of the second and third respondent it was further submitted that in so far as the applicants contend that the Master became functus officio after the decision of 8 September 2017, and that the decision of 15 September 2017 was an attempt to review the decision of 8 September 2017, this contention is wrong. It was submitted that:

26.1 the expression functus officio encapsulates the principle that once an administrator has given a decision by exercising a discretionary power, i.e. he or she may not reverse or alter his or her decision. The rule is concerned with the official's own power to alter or reverse his or her decision without the intervention of the Court. It is general and not absolute rule; vide *Financial Service Board v De Wet* 2002 (3) SA 625 © para [147]; *Thomson t/a Maharaj & Sons v Chie Constable*, Durban 1965 (4) SA 662 (d); *LWASA* (3RD ed) vo; 2, para 18; *Baxter Administrative Law* AT 372 ;

26.2 In the matter of *Financial Service Board V De We*[4]t supra Roger held that:

"[147] Whether an official is functus in this sense or whether he has the power to alter or reverse his decision is itself a matter of statutory construction. The official may be given such power expressly or impliedly.."

26.3 On no interpretation can it be concluded that a Master who has decided to appoint an additional liquidator in terms of section 374 of the Companies Act, but who subsequently revisits the issue and resolves that appointment of section 381(3) investigator is a better solution, before the appointment of an additional liquidator, has become *functus officio*;

26.4 Just as the Master is empowered to decide to appoint an additional liquidator in terms of section 374 of the Companies act, is empowered to decide not to do so. The legal consequences of a decision by the Master not to appoint a co-liquidator in terms of section 374, on the one hand, and a decision not to proceed with such an appointment after an initial decision to do so, on the other hand, are exactly the same. In both cases decisions would have been made by the Master which would be subject to the provisions of section 151 of the Insolvency Act, 24 of 1936, which is applicable by virtue of section 339 of the Companies Act.

26.5 In the circumstances, so it was submitted, the Master cannot be said to be *functus officio* and precluded from exercising his discretion not to proceed with the appointment of an additional liquidator, but resolve to act in terms of s381(3).

[27] I find the submissions made on behalf of the respondents persuasive. In my view, so long as the Master had not implemented his decision to appoint an additional liquidator, such decision was not cast in stone, as such he was not *functus officio*.

[28] In the matter of *Janse Van Rensburg v The Master and Others*[5] Patel J held that: "The appointments by virtue of section 374 are those appointments where the Master does not act pursuant to the statutorily provided nomination and appointment process, but where he or she acts in his or her own discretion. This section is a blanket provision. It empowers the Master, whenever he or she considers it desirable to appoint any person not disqualified from holding the office of a liquidator and who gives the necessary security as a co-liquidator. vide: *The Minister of Justice v Firststrand Bank Ltd and others* 2003

(6) SA 636 (SCA) at 640F."

[29] Section 379(1) (b) empowers the Master to remove a liquidator from his office on the ground that he has failed to perform satisfactorily any duty imposed upon him by the Court or to comply with a lawful demand of the Master or commissioner appointed by the Court under this Act; The mere failure to perform a duty will not necessarily cause the Master, in the exercise of his discretion, to remove the liquidator; he will in all the circumstances consider whether the failure is such that unless there were to be removal there is or may be prejudice to persons interested in the winding-up[6].

[30] In the matter of *Pellow NO v The Master of the High Court* 7[7] it was pointed out that: "...a court will not lightly interfere with the exercise of an admittedly discretionary power entrusted with the Master under s479(1) of the Companies Act. See, for instance, *Krumm and Another v The Master and Another* 1989

(3) SA 944 (D) at 9511.

- [31] It needs mentioning that the applicants were not seeking the removal of the second and third respondents, but that the Master be compelled to make a ruling on the applicant's request to convene an enquiry in terms of section 381(2) of the Companies Act, Act 61 of 1973, to enable the first respondent to properly investigate the conduct of the second and third respondents in the administration of the insolvent estate of Boschpoor Ondernemings (Pty) Ltd (in liquidation).
- [32] I find it apposite to cite the following: "In the matter of Patel v Master of the High Court , Western Cape Division, Cape Town and Others (7163/14, 21236/2014) [2015] ZAWWCHC 63 (15 May 2105), the Court held that when regard is had to the plain language of ss381 and 417 (and s418), the context in which they appear, and the apparent purposes to which they are directed, it appears clear that the intention of the legislature was to exclude from the ambit of s417 as read with s418 the convening of an inquiry for the sole purpose of having a commissioner interrogate a liquidator about the performance of his duties and functions in the management and administration of the winding-up of a liquidated company".[8] It would seem that this is exactly what the applicants seek to achieve, namely that the Master, must convene an interrogation of the second and third respondents by convening an inquiry in terms of s381(2) , which goes against the grain of this herein above cited authority .
- [33] In casu, the Master decided to resort to s381(3) in terms of which he appointed Tracey Hills, to investigate the books and vouchers of the liquidators. This was done after applying his mind to further information presented to him. In the matter of Krumm and Another v The Master and Another[9] it was held that a court is unable to interfere with a due and honest exercise of discretion, even if it considers the exercise inequitable or wrong. The exercise of such a decision can only be attacked on review on the basis that the person entrusted with the duty failed to exercise his discretion at all; that he acted mala fide, or was motivated by improper considerations.
- [34] The respondents further submitted that the applicants, should have resorted to have the alleged decision of the Master reviewed in terms of S6(2) of PAJA as prescribed in terms of s151 of the Insolvency Act, 24 of 1936. The applicants must satisfy the court that the impugned decision was materially influenced by errors of law, must be reviewed and set aside in terms of S8(1)(C) (II) of Promotion of Administration Justice Act 3 of 2000 (PAJA). Where the Board's decision was materially influenced by errors of law it stands to be reviewed and set aside in terms of S8(1)(C) (II) of Promotion of Administration Justice Act 3 of 2000 (PAJA); vide Tertiary Retirement Fund v Registrar of Pension Funds.[10]
- [36] In casu, I find myself constrained to come to the assistance of the applicants because I have not been persuaded that the decision taken by the first respondent in resorting to employ section 381(3) was wrong in law, or mala fide taken. Consequently, the application for all the aforesaid reasons stands to be dismissed with cost.

- [37] It is trite that the costs follow the event. The first respondent merely performs its statutory duties to oversee the administration of winding-up of insolvent or liquidated estate. It does not derive any monetary benefits, unlike a commercial entity engaged in the business of trading for gain. It must not be out of pocket where it has been dragged to court for no good reason. The first respondent, is entitled to ask for a punitive costs order.
- [38] The second and third respondents in respect of their fees, they derive these from the liquidated estate after they have furnished their liquidation and distribution account, which must be approved by the Master. Any amounts they expend has a potential of reducing the benefits of general body of creditors who prove their claims. Where they have been dragged to court, they are entitled to ask that the other party be mulcted with costs on an attorney and client scale .
- [39] In my view, the matter was important to all the parties and complex. It deserved the employment of senior counsel and or two counsel.
- [40] In the result the following order is issued:
1. That the application is dismissed;
 2. That the applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the respondents, which cost to include the costs of employment of senior counsel and or two counsel.

N.M. MAVUNDLA J

DATE OF JUDGMENT :

18/10/2018

APPLICANT'S ADV.

: ADV F.G. VAN RENSBURG

APPLICANT'S ATT.

: HAASBROEK & BOEZAART INC

1ST RESPONDENT'S ADV : ADV. A GXOGXA

1ST RESPONDENTS' ATT : STATE ATTORNEY PRETORIA

2ND RESPONDENT'S ADV : ADV. BH SWART SC

2ND RESPONDENTS' ATT :

ATTORNEYS

[1] 2019 (1) SA 154 (SCA).

[2] Vide Klerk and Others v Jeeva and Others 1996 (20 SA 573 (at page 576f-).

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- [3] 1988 (4) SA 513 (A) at 530F-531C-H
- [4] 2002 (3) SA 625 © para
- [5] 2004 (5) SA 173 at 178 .
- [6] vide Nieuwoudt v The Master 1988 (4) SA 513 (A} at 528.
- [7] 2012 (2) 491 (GSJ} at 497C -D.
- [8] Vide Henochsberg on the Companies Act, 71 of 2008 [Issue 11] APPl-174.
- [9] 1989 (3) SA 944 (D&CLD) at 952D-E.
- [10] 2009 (5) SA 366 {SCA) at 375 .
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