REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/49832

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. YES

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SIGNATURE **DATE:** 19 February 2020

In the matter between:

SUMAIYA ABDOOL GAFAAR KHAMMISSA	First Applicant
BETHUEL BILLYBOY MAHLATSI	Second Applicant
KEHEDITSE DESIREE JUDITH MASEGE	Third Applicant
ALBERT IVAN SURMANY	Fourth Applicant

and

THE MASTER OF THE HIGH COURT, GAUTENG	First Respondent
GERT LOUWRENS STEYN DE WET	Second Respondent
JOHAN FRANCOIS ENGELBRECHT	Third Respondent

JUDGMENT

SIWENDU J

INTRODUCTION

[1] The applicants are the joint liquidators of Duro Pressing Pty Ltd ('Duro'). They seek a review of the appointment of the second and third respondents ('respondents') as liquidators and an order to set aside the appointment in terms of s 151 of the Insolvency Act 24 of 1936 (the 'Insolvency Act'), alternatively the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). They claim the review arises because two conflicting decisions pertaining to the same appointment were made and communicated to interested parties when the Master was *functus officio.*

[2] Ms Dube, an assistant Deputy Master made the first decision on 31 August 2017. She had refused to appoint the respondents in terms of s 370(1) of the Companies Act 61 of 1973 (the 'Companies Act'). On 25 October 2017, Mr Maphaha, also a Deputy Master, made the second decision. He purported to revoke the decision by Ms Dube and appointed the respondents as liquidators. Hence, there were conflicting decisions in respect of the same appointment. When asked for the reason for the decision, Mr Maphaha posited that Ms Dube's refusal was made in error. He persisted his appointment certificate was the valid one. Ms Dube twice disputed that the refusal to appoint the second respondent was an error of fact and/or law. The applicants now seek to review and set aside the decision of 25 October 2017 by Mr Maphaha, appointing respondents as joint liquidators.

BACKGROUND

[3] The background is a common cause. Duro was wound up by special resolution on 27 February 2014. The applicants were appointed as provisional liquidators of Duro by the Master on 8 April 2014. The winding-up was subsequently converted to one by court order on 25 July 2014. Amongst the initial joint liquidators was CF De Wet. Mr CF De Wet, a brother to Mr Gert De Wet the second respondent. Mr CF De Wet died in office on 23 May 2017. As required, the Master convened a meeting of creditors on 24 August 2017 to nominate a replacement. The meeting, presided over by Mr Maphaha, reconvened on 29 August 2017. The second and third respondents were not appointed.

[4] The applicants claim the Master convened the meeting of creditors to nominate new liquidators in the stead of CF De Wet. In terms of s 377 of the Companies Act. As stated, on 31 August 2017, Ms Dube declined the appointment of the respondents in terms of s 370(1). It is a further common cause that the respondents did not avail themselves of her invitation to seek reasons. Instead, on 22 September 2017, Senekal Simmonds Attorneys dispatched a letter to the Master on behalf of undisclosed creditors. It claimed these creditors were materially affected by the refusal to appoint the respondents. It requested reasons on behalf of the undisclosed creditors.

[5] Incredulously, the letter proceeds on the basis that only 'the relevant Master who has jurisdiction over this insolvent estate', could issue the amended certificate of appointment. Mr Maphaha, and not Ms Dube, presided over the meeting to nominate a replacement. The letter demands reasons for the change of the 'decision-maker' in the Master's Office, and called on the Master to convene another meeting of creditors within 14 days. Simultaneously, there was a threat to review the decision.

[6] In response, Ms Dube furnished the reasons for not appointing the respondents on 28 September 2017. These were inter alia that:

6.1. De Wet did not enjoy support from the majority of creditors;

6.2. Engelbrecht was appointed by creditors who had not proved their claims; and that

6.3. The Administration of the estate was at its final stages.

She iterated that the duties at the Office of the Master were assigned and performed by all officers appointed in terms of the Administration of Estates Act 66 of 1965 and were subject to s 370. After this, the undisclosed creditors did not follow the threat to review Ms Dube's decision but requested a reconsideration instead.

[7] As said, Ms Dube disputed she made an error of fact and law. In her view, once the decision is made, the Office of the Master was *functus officio* and could not overrule its own decisions. Only the Minister had the power to set aside the Master's decision to refuse an appointment.

[8] Other undisputed factual foundations for the review application are that the appointment comes late in the liquidation. The applicants collected and sold the assets over a period of 3 years. The winding-up was largely complete, and the preparation of the Liquidation and Distribution account finalised. The only outstanding issue is an inquiry into the trade dealings of Duro prior to liquidation, as well as pending litigation by Duro against Mercantile Bank, funded by Credit Guarantee Insurance Corporation of Africa Limited. Credit Guarantee Insurance Corporation of Africa Limited has indemnified the liquidators of all costs incurred in the litigation. Conjoined with the complaint about the legality of the second decision, the applicants protest that the impugned decision effectively allows the respondents to share in the fees without doing the work.

SUBMISSIONS

[9] The applicants claim the decision to appoint the respondents is *ultra vires* on a number of interrelated grounds. The Master was *functus officio* when Mr Maphaha purported to appoint the respondents. A decision not to appoint them had already been made. There is no empowering provision for a further appointment once the decision was made. Only the Minister could validly make an appointment and, only after an aggrieved person has invoked s 371. Additionally, they claim the appointment was not taken pursuant to a nomination process, nor was it connected to the information placed before the Master. They also impugn the appointment on account that the decision is arbitrary, capricious, irrational, and procedurally unfair.

[10] Curiously, the Master elected to abide and not oppose the review application. Pointedly, the applicants had to launch an application for a court order directing the Master to dispatch the record of the proceedings as well as reasons for Mr Maphaha's decision. The Master furnished the record, but not the reasons for Mr Maphaha's decision, only after the order of August 2018. The error of law alleged (which Ms Dube disputes) remained unexplained.

[11] The respondents stand by their appointment. Although they oppose the application, they have not filed an opposing affidavit, but instead issued a notice in terms of Rule 6(5)(*d*)(iii). They claim certain legal questions arise and the applicant is not entitled to relief. They contend that:

11.1. The applicants lack *locus standi* to seek relief;

11.2. Section 151 of the Insolvency Act and PAJA do not apply; and

11.3. The applicants have disregarded s 371 of the Companies Act.

[12] The matter proceeds on the foundation of the facts alleged in the Founding Affidavit. The reasons twice furnished by Ms Dube for declining to appoint the respondents, as well as the opinion she formulated to base those reasons, remain unchallenged. There are no reasons for Mr Maphaha's decision. A point made in the respondents' heads of argument is that whether valid or unlawful, Mr Maphaha's decision stands until set aside by a court.

[13] Given the above, the Pointus Pilate posture adopted by the Master is baffling. I agree with Mr Suttner SC, on behalf of the applicants, that it cannot be gainsaid that the matter is serious because the Master seats at the apex of Insolvency Law and Practice, presides over important decisions affecting the appointment of liquidators and governs the custody of large assets. Which decision and appointment certificate prevails in this case involves important questions of law, and is of importance to insolvency law practitioners and liquidators.

ISSUES FOR DETERMINATION

[14] The contested issues expose two fundamental legal considerations. The first is, who can legitimately challenge an appointment of a liquidator? In this case, can the applicants challenge the appointment of another liquidator? The second is, what is the correct gateway to relief when there is a challenge to an appointment of a liquidator?[1] There is limited and conflicting authority on these issues.

[15] Mr Terreblanche SC, who appears for the respondents, agreed that *locus standi* could be dispositive of the contention between the parties. Therefore, the *locus standi* of the applicants must be disposed of first.

[1] Whether such a decision is reviewable under PAJA was raised but not pursued.

LOCUS STANDI

[16] Mr Terreblanche SC submits that the applicants are nonsuited because liquidators have no legal right and/or interest to challenge the appointment. The applicants are not 'aggrieved persons' because the thrust of their complaint is that they would have to share their fees with the respondents.

[17] Three authorities about who qualifies as an 'aggrieved person' by the courts is at issue.[2] Mr Terreblanche SC submits that Patel J's decision in *Janse Van Rensburg v The Master and Others* settles the dispute.[3] He argued that a different conclusion means every busybody would come to court to have decisions of the Master set aside. In *Janse Van Rensburg* the court held that an 'aggrieved person' means a person with a legitimate grievance. When construed within the bounds of s 371,[4] it means a creditor and not an 'interested', 'disappointed' or 'disgruntled' person because of a benefit he might have received. Patel J further held that where an appointment is by virtue of the discretion conferred on the Master by s 374,[5] and not as a result of the nomination process, an aggrieved person cannot invoke s 371 to challenge the appointment.

[18] Mr Suttner SC contends *Janse Van Rensburg* was wrongly decided. The case is distinguishable because it was not based on an unlawful administrative action. He argued I should follow Davis J in *Geduldt v The Master and Others*.[6] In *Geduldt,* the

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[2] *Janse Van Rensburg v The Master and Others* 2004 (5) SA 173 (T); *Geduldt v The Master and Others* 2005 (4) SA 460 (C); and *Patel v Master of the High Court* 2014 JDR 0346 (WCC).

[3] *Janse Van Rensburg* (note 2 above).

[4] Section 371 provides as follows:

(1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit reasons for such appointment or refusal to the Minister.

….

(2) The Minister may, after consideration of the reasons referred to in ss2 and any representations made in writing by the person who made the request referred to in ss (1) and all the relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and in the event of the refusal by the master being set aside, direct the Master to accept the nomination of the liquidator concerned and to appoint him as the liquidator of the company concerned.

[5] Section 374(1): Whenever the Master considers it desirable he may appoint any person not disqualified from holding the office of liquidator and who has given security to his satisfaction, as a co-liquidator with the liquidator or liquidators of the company concerned.

[6] *Geduldt* (note 2 above).

applicant, who was a member of a close corporation sought an interim interdict to halt an appointment of a liquidator pending a review. Confirming that the applicant had a legal grievance, Davis J had this to say about *Janse Van Rensburg*:

'I do not consider this particular dictum necessarily correct. If the source upon which this dictum rests, namely the judgment of Hoexter JA in Francis George Hill Family Trust v South African Reserve Bank and Others 1992 (3) SA 91 (A) at 98-100 is examined, it does not appear that the words "person aggrieved" were given the restricted interpretation adopted by Patel J in Janse Van Rensburg (supra) and urged upon me by Mr Potgieter…'[7]

[19] To this, Mr Terreblanche SC submits the *Geduldt* case was decided on a balance of convenience. In addition he argues that based on the principle in *Shifren*,[8] I should not lightly depart from a principle that has withstood the test of time. He contends I am bound to follow *Janse Van Rensburg* as the judgment of this Division unless I am persuaded that it is wrong. He argues that even if the decision sought to be reviewed is unlawful, I must consider whether the applicants are proper applicants.

[20] The conspectus of the applicable provisions pertaining to the appointment of liquidators under the Insolvency Act and the Companies Act is set out in the *Minister of Justice v First Rand Bank*,[9] which is referred to in *Janse Van Rensburg.* It is not necessary to revisit those provisions. I accept that at inception, Insolvency Law developed on the main to protect the interest of creditors. As pointed in *Janse Van Rensburg,* also referred to in *Geduldt*—

'A "person aggrieved" must surely be a person who had a legitimate grievance, for example, a person against whom a decision has been pronounced that wrongfully deprives him or her of something...or wrongfully affected his or her title to do something…'[10]

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[7] Ibid at 464H-I.
[8] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).
[9] *Minister of Justice v First Rand Bank* 2003 (6) 636 (SCA).
[10] *Janse van Rensburg* (note 2 above) para 23; *Geduldt* (note 2 above) at 465A-B.

[21] Henriques J, in *Applemint Properties 45 (Pty) Ltd and Others v Master of the High Court, KwaZulu Natal Division, Pietermaritzburg and Others*,[11] finding that the applicants who were creditors fall within the category of a 'person aggrieved' and therefore entitled to institute review proceedings in relation to the rejection of their claims, referred to long-standing cases, and held that:

'A "person aggrieved" for the purposes of s 151 of the Insolvency Act is someone who is injured or wronged in his rights or interests. The term a person aggrieved is capable of a wider meaning in that it also includes a person who has a legal grievance as well as a trustee who may also institute review proceedings in terms of this section.'[12]

[22] I have considered the issue in the context of the myriad of the decisions the Master makes. At the outset, the courts have been careful not to create an exhaustive definition of a 'person aggrieved'.

[23] In my view, the decision giving rise to the legal grievance ***and*** the effect of that decision on the legal rights or interests of the parties before the court are important considerations. An undue emphasis on the identity of the complainant or the nature or category of the complaint cannot be the sole determiner. It would unduly exclude a range of persons who, though not nominated and are or not 'a creditor' might have a legitimate legal grievance and are affected by the decision. I am of the view that an inquiry into the nature of the decision complained of, its legal validity, as well as its effects on the rights of the applicants should weed out the 'busybodies' raised by Mr Terreblanche SC.

[24] For these reasons, I disagree with the narrow construction adopted in *Janse Van Rensburg.* Curiously, *Patel v Master of the High Court*,[13] a decision Mr Terreblanche SC relies on albeit for different reasons dealt with later in this judgment, by implication does not limit a liquidator from a range of 'persons aggrieved'. Significantly, *Janse Van Rensburg* was decided before the current company law regime which seeks to take account of a range of stakeholders. Adopting the approach

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[11] *Applemint Properties 45 (Pty) Ltd and Others v Master of the High Court, KwaZulu Natal Division, Pietermaritzburg and Others* [2019] JOL 41553 (KZP).
[12] Ibid para 29, with reference to *Jeeva & Another v Tuck NO & Others* 1998 (1) SA 785 (SE) 792G-J; *Millman & another NNO v Pieterse & Others* 1997 (1) SA 784 (C).
[13] *Patel v Master of the High Court* 2014 JDR 0346 (WCC) para 12.

proposed would be inconsistent with the prevailing regime. This brings me to the argument about the applicants' grievance, particularly the rights or interests they seek to protect.

[25] The essence of the grievance pertains to an allegation of an unlawful, arbitrary, capricious appointment and decision in an estate they are charged with. The legal grievance is beyond merely acting to secure their fees. Barring the requirements for qualification to be included in the Master's Panel, the scheme of the Insolvency Act requires that the Master appoints a liquidator who is nominated by creditors who hold the majority votes in number or value. Ms Dube's decision was based on this fact amongst others. As said, the respondents have not disputed it.

[26] Serious allegations of an unlawful appointment in respect of the estate they oversee points a finger at the internal workings of the Master's office. The allegations were not opposed by the Master. They have not been explained. While the applicants do not have the right to stop a legitimate appointment in accordance with the law and the rules, I find the decision giving rise to the grievance, as well as the nature of the grievance, legitimate. It pertains to allegations of an unlawful decision and action by the Master in respect of the estate they are administering. They are not busy bystanders or strangers to the issue. Accordingly, I find that the applicants have the *locus standi* to review and set aside the unlawful appointment alleged.

IS SECTION 371 THE ONLY GATEWAY TO RELIEF FOR THE APPLICANTS?

[27] Even though during the argument, I agreed with Mr Terreblanche SC that the disputed *locus standi* could be dispositive of the issue, there is a second contention relating to the correct gateway to the review challenge. Mr Terreblanche SC argues that s 151 of the Insolvency Act[14] is not available to the applicants because s 339 of the Companies Act 71 of 2008[15] states that recourse under the Insolvency Act is

[14] **151. Review.** – Subject to the provisions of section 57 any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected.

[15] Section 339 – **Law of Insolvency to be applied mutatis mutandis** - In the winding up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act. A provision of the law relating to insolvency will not apply if the matter is 'specifically provided'

available only to the extent that a matter is not provided for under the Companies Act. The thrust of this argument is that the applicants have used an incorrect gateway and the correct route to relief is s 371.[16] For this reason, he submits that a review under PAJA is not available to the applicant either, because the applicants ought to have exhausted their internal remedies under s 7(2) of PAJA. He argues that s 371 affords the applicants the remedy to have a dispute about the nomination referred to the Minister.

[28] Mr Terreblanche SC's contention is based on the decision in *Patel v Master of the High Court* where, as in this case, the applicant challenged an appointment of a co-liquidator.[17] In *Patel,* Traverso DJP held that even if the applicant had the *locus standi* to seek the review and have the appointment set aside, s 371 provides the applicant the ***only*** means of obtaining redress. Notwithstanding s 371 of the Companies Act, the applicant failed to exhaust the internal remedy in s 7(2) of PAJA. She held that:

'In my view for the reasons that follow, it is not open to Mr. Patel to challenge the nomination of Mr. Terblanche in the fashion that he did. His remedy, in my view, is misconceived. The old Companies Act provides a remedy for those aggrieved by the appointment of a liquidator, to wit, section 371 (which also applies to closed corporations in winding up). The authors of Henochsberg on the Companies Act, Vol. 1, p. 796, have the following to say about this provision:

"This section provides the only means of obtaining redress in respect of the Master's appointment of a liquidator or liquidators ... save that the decision by the Minister under subsection 3 is no longer final ... and such decision may be brought under review by the High Court ..."

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for in the Companies Act.[15] The Constitutional Court has approved this approach.[15] (*Woodley v Guardian Assurance Company of SA Ltd* 1976 (1) SA 758 (W) at 763. J A Kunst, P Delport and Q Voster, Henochsberg on the Companies Act 5 ed (2011) at 668; *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC) para 96.)

[16] Section 371 - 'Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator may within a period of seven days from the date such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister.'

[17] *Patel* (note 13 above).

If this conclusion is correct, which I believe it is, the Act prescribes an administrative appeal against the appointment of a liquidator by the Master. The process contemplates a reconsideration of the appointment by the Minister. Only once the Minister has made a decision can the aggrieved party, if still aggrieved, approach the High Court for review of the Minister's decision. This ground too does not come to Mr. Patel's assistance.'[18]

[29] There is no dispute between Mr Suttner SC and Mr Terreblanche SC about the import of s 151. It affords the court the power to enter the merits and decide the disputed issues afresh. Interestingly, both agreed during the argument that s 371 applies to a decision taken by a Master in relation to a nomination at a meeting of creditors. In particular, s 371 provides a remedy for a grievance resulting from an appointment or non-appointment of a person duly nominated within the meaning of the Act. It seems to me the provisions would be most compatible if the respondents or the creditors had taken up the cudgels. They did not.

[30] Firstly, s 371 ***is not*** the only provision dealing with a complaint about appointment and non- appointment of a liquidator. Secondly, the answer also boils down to the grievance before the Court. On the contrary, the dispute is not about a nomination or a failure to appoint a liquidator. It is about the legal validity of the second appointment by Mr Maphaha, ***after*** a decision was made on the same issue – practically resulting in two conflicting decisions and two conflicting appointment certificates. Accordingly, it is not an issue provided in the Companies Act in terms of s 339 as argued. On these grounds, I find that recourse to the Insolvency Act remained available to the applicants.

[31] Ms Cirone, who appeared with Mr Suttner SC in reply for the applicants, argued that s 57(7) to (10) also creates an inexpensive alternative procedure to challenge the decision of the Master. These provisions are not intended to supplant or derogate from the powers of the court under s 59 or the Master under s 60 of the Insolvency Act.[19] I am persuaded because of the variety of decisions made by the Master and the wider definition of 'persons aggrieved'.

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[18] Ibid paras 9-10 (original emphasis omitted).
[19] *Jordaan v Richter en Andere* 1981 (1) SA 490 (O).

[32] Given the nature of the grievance and the unique facts of this case, it is incorrect and superfluous to argue the applicants should have called on the Master to submit reasons to the Minister to exhaust some internal remedy. There were no reasons for the decision and none were furnished, even after a court order. Whether inadvertently or not, the argument incorrectly excludes the recourse to s 57[20] and s 59[21] of the Insolvency Act. On this score, the applicants correctly invoked s 151 of the Insolvency Act.

[33] Lastly on the merits, as a creature of statute, the Master exercises public power and perfoms a public function. The decisions of the Office are administrative action in the widest sense. The power to revoke or amend administrative decisions once communicated is limited. Whether the Master is *functus officio* must be answered with reference to the language of the legislation. The legislation must expressly authorise for the power to revoke the decision, and by implication, prescribe the procedure to be followed.[22] The Administration of Estates Act does not confer that power to the Office of the Master. Once the decision is communicated to interested and affected parties, it is final and irrevocable.[23] Accordingly, I find that the Master was *functus officio* and not empowered to issue a second decision once the decision not to appoint the second and third respondent was made.

[34] I am at large under s 151 of the Insolvency Act to enter the matter *de novo.* Accordingly, I make the following order:

34.1. The Master's decision on 25 October 2017 to appoint the second and third respondents as liquidators to Duro Pressing (Pty) Ltd is reviewed and set aside;

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[20] Section 57 has similar provisions with s 371 and also deals with appointment of liquidators and the powers of the Master relative thereto. Section 57(7) reads: 'Any person aggrieved by the appointment of a trustee or the refusal of the Master to confirm the election of a trustee or to appoint a person elected as a trustee, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his or her reasons for such appointment or refusal to the Minister.'

[21] Section 59 deals with court's powers to declare certain persons disqualified from appointed and the removal of such persons whether before or after appointment.

[22] *Afdelingsraad van Swartland v Administrateur Kaap* 1983 (3) SA 469 (C).

[23] *Nkosi v Khanyile* 2003 (2) SA 63 (N); M Wiechers 'Administrative Law' at 169. *Lek v Estate Agents Board* 1978 (3) SA 160 (C).

34.2. The Certificate of Appointment dated 25 October 2017 purporting to appoint the second and third respondents as liquidators is set aside;

34.3. The Master's Certificate of Appointment dated 31 August 2017 is declared the valid Certificate;

34.4. The second and third respondents are ordered to pay the costs, including the costs of two counsel.

T SIWENDU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances for the applicants:	Suttner SC
	With Ms Cirone
Instructed by:	Goodes & Seedat Inc Attorneys
Appearances for the respondents:	Mr Terreblanche SC
	With Mr Mokoena
Instructed by:	Senekal Simmonds Attorneys