REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/49832

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 SUMMARY

Review of appointment of liquidator – power of Master's office to overturn its own decision to appoint liquidators – s 371 of the Companies Act 61 of 1973 – locus standi of joint liquidators to challenge appointment – meaning of 'aggrieved persons' – rejection of narrow interpretation – identity of person challenging appointment not sole determiner of locus standi – should account for decision giving rise to grievance and its effect on the legal rights or interests of applicant – pathway to review – applicability of s 151 of Insolvency Act 24 of 1936 – regard to be had for the nature of grievance concerning the legal validity of decision in conflict with previous decision – s 151 not excluded by s 339 of Companies Act as grievance not provided for in Act – applicability of Promotion of Administrative Justice Act 3 of 2000 – decision constituted administrative action

– no empowering provision permitting Master to change decision – functus officio once decision made – Master acted ultra vires in overturning previous decision.

Background

The applicants were joint liquidators of a private company. One of the liquidators passed away, and, a second Deputy Master appointed the second and third respondents as replacements in conflict with a previous decision not to appoint them. The applicants sought to review and set aside the second decision appointing the second and third respondents. The applicants relied on s 151 of the Insolvency Act 24 of 1936, and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') for the review.

The first decision refusing the appointment of the liquidators was taken in terms of s 370(1) of the Companies Act 61 of 1973 ('Companies Act'). The second decision resulted in two conflicting decisions from the same office, in respect of the same issue. In seeking to set aside the second decision, the applicants argued that the Master did not have the authority to overturn its own decisions. The second decision was arbitrary, capricious, irrational, and procedurally unfair.

Although the second decision maker stated that he was entitled to overturn the first decision because it was made in error, he failed to provide reasons to justify this assertion. The initial decision maker, who had declined to make the appointment, disputed that she had committed an error of fact and/or law. The Court found no indication that the first decision had not been made legitimately.

The second and third respondents argued that the applicants did not have *locus standi*, as they did not qualify as an 'aggrieved person' in terms of the legislative provisions. They also argued that the applicants were not entitled to rely on s 151 of the Insolvency Act or PAJA.

The Court

The Court held that the joint liquidators had the requisite *locus standi*, and qualified as 'aggrieved persons' for the purposes of the relief sought.

The court departed from the interpretation in *Janse Van Rensburg v The Master and Others* 2004 (5) SA 173 (T), which stated that for the purposes of s 371, an 'aggrieved person' was limited to a creditor. It rejected a narrow interpretation of who qualifies as an 'aggrieved person', stating that it did not accord with the overall scheme of the 2008 Companies Act.

The Court stated that an undue emphasis should not be placed on the identity of the complainant or category of the complainant, and that it should not be the sole determiner of *locus standi*. The Court held that the nature of the decision giving rise to the grievance, and the effect of that decision on the legal rights or interests of the person, are important considerations to be taken

into account. In this case, the liquidators' application raised allegations of an unlawful decision made by the Master in respect of the estate that they were administering. They should not be excluded from seeking relief.

In so far as the correct pathway to review, the respondents submitted that s 339 of the Companies Act did not permit recourse under the Insolvency Act, as a remedy was provided for in the Companies Act. They argued that the correct route to relief was s 371 of the Companies Act, which entitles an aggrieved person to approach the Minister where they are dissatisfied with the decision of the Master to appoint a liquidator. Relying on *Patel v Master of the High Court* 2014 JDR 0346 (WCC), they submitted that the failure to approach the Minister excluded recourse to PAJA, as the applicants had not exhausted their internal remedies as required by s 7(2).

The Court differed from the decision in *Patel*, and found that s 371 was not the only available means to the applicant to obtain relief. The respondents had mischaracterised the nature of the case – it was not an application to remedy a grievance about fees – instead, it was about the legal validity of the second decision to appointing the second and third respondents, and the authority of the Master to overturn its own decisions. The applicants could therefore rely on s 151 of the Insolvency Act.

Furthermore, it was superfluous to argue that the applicants should have exhausted an internal remedy. In terms of s 371, the Master would have to provide reasons for its decision to the Minister where an aggrieved party sought a reconsideration of the decision. In spite of a court order requiring him to do so, the Master had not provided reasons for the second decision.

The Court found that the decisions of the Master are an administrative action. There is no empowering provision which empowers the Master to revoke or amend its previous decisions. The first decision refusing the appointment of the liquidators was final, and once made and communicated, the Master was *functus officio*. The second decision was therefore declared invalid and set aside and, based on s 151, the Court entered the merits de novo and revoked the second certificate of appointment.

Coram: Siwendu J
Delivered: 19 February 2020