

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 27131/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED NO
8 August 2022

In the matter between:

WILLEM JACOBUS VENTER N.O.

FIRST APPLICANT

KAREN VAN NIEKERK N.O.

SECOND APPLICANT

KARINA ALETTA VAN NIEKERK N.O.

THIRD APPLICANT

And

THE MASTER OF THE HIGH COURT, PRETORIA

FIRST RESPONDENT

TIRHANI SITOS DE SITOS MATHEBULA N.O

SECOND RESPONDENT

LAILA ENVER MOTALA N.O

THIRD RESPONDENT

SOUTH AFRICAN RESTRUCTURING AND

INSOLVENCY PRACTITIONERS ASSOCIATION NPC.

FOURTH RESPONDENT

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

FIFTH RESPONDENT

Coram: Millar J

Heard on: 21 July 2022

Delivered: 8 August 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 8 August 2022.

Summary: Application to set aside the appointment of co-liquidators – whether Master empowered in terms of Sections 368 and 374 of the Companies Act 61 of 1973 to make any discretionary appointments while no extant policy determined by the Minister operable – provided Master makes discretionary appointments in accordance with Section 15(1A) discretion properly exercised and such appointments valid.

JUDGMENT

MILLAR J

1. The applicants applied by way of urgency for an order setting aside the first respondent's ('the Master') appointment of the second and third respondents as their co-liquidators of Finalmente Global (Pty) Ltd (in liquidation).

2. The application was brought by the applicants on 7 June 2022 but was not heard that day and was referred to the office of the Deputy Judge President for the allocation of a special date for hearing.

3. The circumstances leading to the present application are uncontentious and common cause between the parties. On 13 January 2021, an order was granted in this Court for the final liquidation of Finalmente Global (Pty) Ltd. On 21 January 2021, the applicants were appointed as the provisional joint liquidators of the company. At a first meeting of the creditors was held on 29 September 2021 and the applicants were appointed as the final liquidators of the company.

4. On 20 April 2022, the Master of the High Court, Pretoria, the first respondent in these proceedings ('the Master'), appointed the second and third respondents as additional joint liquidators. On 25 April 2022, the representatives of the applicants wrote to the Master enquiring why 2 additional joint liquidators had been appointed. On 29 April 2022, the Master replied and informed the applicants that the appointment of the second and third respondents had been made by the Master in the exercise of his discretion in terms of Section 374 of the Companies Act 61 of 1973.

5. The applicants raised 2 main issues – the first regarding the legality of the appointments of the second and third respondents and the second in regard to the rationality thereof. The respondents for their part raised several issues in defence which included a challenge to urgency, applicant's locus *standi*, the non-joinder of creditors and the failure to institute review proceedings instead of resorting to an urgent application. By the time this application was called, the issues for determination had been narrowed by the parties.

6. The crux of the applicants' case, the determination of which is dispositive of this matter, is whether the Master's appointment of the second and third respondents was unlawful because the Master had failed to act in accordance with the

provisions of Section 374 of the Companies Act¹ and also directives issued by the Chief Master².

7. The Section provides:

'374 Master may appoint co-liquidator at any time

Whenever 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.'

8. The construction of the section prior to 2003 was identical to its present construction save that the clause “, *in accordance with policy determined by the Minister,*” was inserted in 2003.³ The effect of this amendment was to temper the unfettered discretion of the Master in regard to the appointment of provisional and joint liquidators by providing that such appointments should be made in accordance with the policy determined by the Minister.

9. In addition, Section 15(1A)⁴ of the Companies Act, introduced at the same time as Section 374 was amended, provides:

“(1A) (a) The Minister may determine policy for the appointment of a provisional liquidator, co-liquidator, liquidator or provisional judicial manager by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.”

¹ 61 of 1973

² Section 2 of the Administration of Estates Act 66 of 1965 provides for the appointment of a Chief Master. Section 2(1)(b)(iii) specifically provides that one of the functions of the Chief Master is to ‘*exercise control, direction and supervision over all the Masters*’.

³ Section 15 of The Judicial Matters Amendment Act 16 of 2003. The preamble to that Act makes clear that the relevant Minister is the Minister of Justice and Correctional Services.

⁴ Section 17 of The Judicial Matters Amendment Act 16 of 2003

10. The applicants also argued that besides the policy of the Minister, the directives of the Chief Master also informed the Master's exercise of discretion with regards to the appointment of provisional and additional co-liquidators. It was argued that the exercise of the discretion, without regard to either the policy or the directives, would render the exercise of that discretion and any appointment made in its exercise unlawful and liable to be set aside⁵.

11. Although the present construction of Section 374 became effective on 9 July 2004, it was only on 31 March 2014⁶ that the policy referred to in Section 374 was gazetted. The life of the policy was a short one. The policy was successfully challenged in the Western Cape High Court and set aside on 13 January 2015⁷. This decision to set the policy aside was then taken on appeal to the Supreme Court of Appeal which confirmed the order of the High Court on 2 December 2016⁸ and the Constitutional Court⁹ did likewise on 5 July 2018.

12. So, despite the amendment of section 374 to provide for the consideration of a policy, there is no extant policy and there has not been any lawful policy that is implementable for almost 20 years.

13. It was argued for the respondents, that if it were to be found that in the absence of a policy, the Master was unable to exercise his discretion and make any discretionary appointments of co-liquidators, then this would mean that not only would the appointment of the second and third respondents be impeachable, but also the appointment of the second and third applicants, who had all been appointed by the Master in the exercise of his discretion as provisional liquidators – before the first meeting of creditors.

⁵ Barnes v Mangaung Metropolitan Municipality & Another (996/2020) ZASCA 77 (30 May 2022) at paragraph 4.

⁶ Government Gazette No 37287 published on 7 February 2014

⁷ SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development 2015 (2) SA 430 (WCC)
Minister of Justice and Constitutional Development & Another v South African Restructuring & Insolvency Practitioners Association & Others 2017 (3) SA 95 (SCA)

⁹ Minister of Justice and Constitutional Development & Another v South African Restructuring & Insolvency Practitioners Association & Others 2018 (5) SA 349 (CC)

14. Furthermore, section 368¹⁰ amended at the same time as section 374, which relates to the appointment of provisional liquidators, provides:

“As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered in terms of section 200, the Master may, in accordance with policy determined by the Minister, appoint any person suitable as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.”

15. It is readily apparent that both sections 374 and 368 require that the discretion of the Master in regard to appointments, is to be exercised in accordance with the same policy. If the argument advanced for the applicants is sustainable, then the Master has no discretion, absent an extant policy, to appoint anyone as either a provisional liquidator or as a co-liquidator. If this is indeed the position, the consequences for the administration of justice, the Master’s office as well as for insolvency practitioners, (including the applicants and second and third respondents) would be dire – no appointment of any provisional liquidator can be made or of any co-liquidators.

16. Two issues arise – firstly, are Sections 374 and 368 of the Companies Act, in their present construction and properly construed, capable of interpretation consistent with the purpose for which they were legislated? Secondly, if so, are they operable, notwithstanding that the policy in accordance with which the appointments made in terms of those sections is not in existence?

17. The test to be applied in the interpretation of statutory provisions such as in the present instance and confirmed by the Constitutional Court in *Minister of Police v Fidelity Security Services (Pty) Ltd*¹¹ is as follows:

¹⁰ Section 16 of The Judicial Matters Amendment Act 16 of 2003

¹¹ [2022] ZACC 16 – decided on 27 May 2022

“[34] The interpretation of the Act must be guided by the following principles:

(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification “reasonably possible” is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.”

18. Both Sections 374 and 368 prior to their amendment in 2003, conferred upon the Master an unfettered discretion¹² to appoint provisional and co-liquidators. The

¹² In *Janse Van Rensburg v The Master and Others* 2004 (5) SA 173 at 178B-C it was 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

amendment did not serve to limit the discretion but only to temper its exercise with regards to a policy to be determined by the Minister. Perhaps absent any indication as to what the nature or purpose of that policy would be, it could be argued that the two statutory provisions properly construed, in the absence of the existence of the policy, were rendered nugatory and effectively inoperative.

19. However, having regard to the test set out in *Minister of Police v Fidelity Security Services (Pty) Ltd*, it is undesirable, without further ado, to interpret the provisions in this way. The simultaneous introduction of Section 15(1A) together with the amendments to Sections 374 and 368, states clearly and unequivocally the nature, scope and purpose of the policy that was to be determined by the Minister.

20. The purpose of the policy was to assist the Master in facilitating ‘the promotion of consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.’ Section 15(1A) is clear in this regard.

21. Accordingly, if the Master in making appointments of either provisional liquidators (as provided for in Section 368) or co-liquidators (as provided for in Section 374) does so, in a manner that is consistent and consonant with the provisions of Section 15(1A), then it cannot be said that either Section 368 or 374 in their present construction are inoperable. Both Sections are indispensable to the functioning of the Master’s Office

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”

In *Wessels NO. v The Master of the High Court*, Pretoria 2019 JDR 1033 (GP) the exercise of the discretion was expressed as follows:

“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.”

with regards to liquidations and without them, the entire machinery of justice for liquidations would grind to a halt.

22. Both provisions are operable provided however that the Master in the exercise of his discretion, does so in a manner that is consistent with the provisions of Section 15(1A). It is common cause in the present matter that both the second and third applicants as well as the second and third respondents all fall within the category of 'persons previously disadvantaged by unfair discrimination.' In the case of the second and third applicants, the Master exercised his discretion in their favour in terms of Section 368 at the time that he also appointed the first applicant as provisional liquidator and their appointments were subsequently confirmed that the first meeting of the creditors of Finalmente Global (Pty) Ltd. The appointment of the second and third respondents was made in terms of Section 374 when they were appointed as co-liquidators in terms of the Master's discretion to make such appointments.

23. Four of the five liquidators appointed in this matter by the Master, exercising his discretion in terms of Sections 368 and 374 respectively, fall specifically within the category of persons referred to in Section 15(1A) and for whose benefit the policy was to be determined.

24. It is for these reasons that I find that the Master has properly exercised his discretion in the appointment of the second and third respondents as co-liquidators and that such appointments, being consistent with the provisions for which the policy was to be determined, are valid and lawful in all respects.

25. Turning now to the question of costs. The applicants, and in particular the second and third applicants were quite prepared to acquiesce to the master's exercise of his discretion in their favour when they were appointed in terms of Section 368. The present application seems to me to have had nothing to do with the existence or not of an extent policy but rather to attempt to prevent the appointment of any further co-liquidators.

26. Had there indeed been any prejudice to the winding up or general body of creditors by the appointment of further co-liquidators – it would have been expected that one or more of the creditors would have been joined or intervened in the proceedings. This point was raised by the Master.

27. The present application was actuated by self-interest and the applicants sought to impugn the appointment of the second and third respondents, primarily in raising the exercise of the Master's discretion in the absence of a policy, when they themselves had been beneficiaries of such exercise but also in respect of the third respondent by making scandalous and irrelevant allegations in the replying affidavit. Although such allegations were struck out at the commencement of the proceedings with no opposition to the application to do so from the applicants, the fact that such allegations were made is indicative of the desire to prevent the appointment of any further co-liquidators and in particular the third respondent.

28. The application is clearly self-serving and destructive of the very purpose for which Sections 374 and 368 were amended. It is for this reason that I intend to make the costs order that I do.

29. In the circumstances, it is ordered:

29.1 The application is dismissed.

29.2 The applicants are ordered to pay the first, second and third respondents' costs on the scale as between attorney and client which costs are to include, the costs consequent upon the employment of two counsel where so employed.

29.3 The costs are to be paid by the applicants *de bonis propriis*, jointly and severally, the one paying the others to be absolved.

29.4 None of the costs of the present application will form part of any of the costs of the liquidation of Finalmente Global (Pty) Ltd.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 21 JULY 2022
JUDGMENT DELIVERED ON: 8 AUGUST 2022

COUNSEL FOR THE APPLICANTS: ADV. J CILLIERS SC
ADV. J WESSELS
INSTRUCTED BY: MAGDA KETS INCORPORATED
REFERENCE: MS M KETS

COUNSEL FOR THE 1ST RESPONDENT: ADV. D MOSOMA
INSTRUCTED BY: THE STATE ATTORNEY,
PRETORIA
REFERENCE: MS A MOODLEY

COUNSEL FOR THE 2ND & 3RD RESPONDENTS: ADV. J BLOU SC
INSTRUCTED BY: KNOWLES HUSSAIN LINDSAY
INC.
REFERENCE: MR I LINDSAY

NO APPEARANCE FOR THE 4TH AND 5TH RESPONDENTS.