SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY – JUDGEMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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Please note that the media summary is for the benefit of the media and does not form part of the judgement of the Supreme Court of Appeal.

ENVER MOHAMED MOTALA

v

THE MASTER OF THE NORTH GAUTENG HIGH COURT, PRETORIA

The appellant, Mr Enver Mohamed Motala, was appointed as a joint liquidator in a number of companies known as the Pamodzi Group which had been placed into liquidation. The liquidation was complex and lengthy. A company known as Aurora Empowerment Systems, whose directors included a grandson of former President Mandela, a nephew of former President Zuma and Mr Michael Hulley, an attorney employed by President Zuma for his personal matters, became the preferred bidder for certain of the mines. It was vital for the retention of the

companies' mining rights that they continue to operate and this led to the liquidators concluding agreements with Aurora designed to enable the latter to carryon mining activities while it secured payment and completed the process of purchasing the mines.

Unfortunately, Aurora's governance and conduct of the mines and their operations became a matter of public concern. Complaints against Aurora were many and serious. *Inter alia*, it was alleged that the mines were being stripped of their assets. Concerned by this, the Master took these matters up with the liquidators. Dissatisfied by their response, the Master invoked s 417 of the Companies Act 61 of 1973 to hold an enquiry.

This enquiry was held in May 2011. It painted a bleak picture of the situation on the mines. The Master therefore invoked s 381 of the Companies Act to hold a formal enquiry with the liquidators testifying under oath. The appellant appointed attorneys to represent him at the enquiry which developed into a tense affair at which the appellant refused to answer any questions concerning the administration of the mines. The Master regarded his refusal to answer queries as a failure to perform his duty satisfactorily which she felt constituted grounds envisaged by s 379(1)*(b)* of the Companies Act justifying his removal.

After the enquiry, the Master received further information that the appellant had loaned R3 million to Aurora which, in the Master's view, resulting in a conflict of interest that had helped Aurora to limp along at a time when he ought rather to have considered terminating its running of the mines in the interest of creditors. On the strength of this additional information, and the appellant's refusal to

answer questions at the enquiry, on 23 May 2011 the Master removed him as one of the Pamodzi liquidators.

By way of an application issued in August 2011 but served on 9 September 2011, the appellant sought to review his removal and have himself restored as joint liquidator. In doing so, he contended *inter alia*, that the decision to remove him had been arbitrary, irrational and unreasonable. This application was duly opposed.

In the meantime, a further issue had arisen. An article in a newspaper gave rise to the suspicion that the appellant had a number of previous convictions of fraud and theft which would have disqualified him from appointment as a liquidator under s 372*(f)* of the Companies Act. This led to a further enquiry being held by the Master during the course of which the appellant testified under oath and stated that he had no such convictions. The fact of the matter, however, was that the appellant was indeed the person who had been convicted but under the name Enver Mohamed Dawood, and that he had lied about this to the Master under oath. This, together with certain other information, led to the Master deciding to remove the appellant from the panel of liquidators kept by the Master from which appointments as liquidators and trustees were made.

Accordingly, when the Master delivered an answering affidavit in the review proceedings mentioned above, a declaratory order was sought in a counter-application confirming the appellant's removal from the panel.

Instead of seeking to have his removal from the panel set aside, as he had done when removed as a Pamodzi liquidator, the appellant applied to the Department of Justice for a presidential pardon and, when subsequently advised that it would be more appropriate to do so, he sought an expungement of his convictions under s 271B of the Criminal Procedure Act 51 of 1977. In doing so he alleged that he had not committed the offences but had taken the blame for doing so in order to protect his uncle. Eventually on 28 November 2013 the State President granted him the expungement, not only of his theft and fraud convictions, but for some inexplicable reason a conviction of driving at an excessive speed.

Armed with this, on 11 December 2013 the appellant applied to the Master to reinstate him to the panel. The Master refused to do so. This decision, taken in January 2014, was not challenged and a further year passed without the appellant taking any steps to challenge the refusal.

However in February 2015, more than three and a half years after the counter-application mentioned above had been lodged, the appellant filed a supplementary founding affidavit in which he sought to amend his notice of motion to seek an order declaring him qualified to be appointed as a liquidator or trustee, reviewing and setting aside the decision of 5 September 2011 to remove him from the panel, and ordering that he be reinstated.

This application to amend the notice of motion as well as the original application for reinstatement as a Pamodzi liquidator were dismissed in the high court. An appeal to the Supreme Court of Appeal against that decision has been dismissed.

In dismissing the appeal, the Supreme Court of Appeal found that when the decision to remove the appellant from the panel was taken in September 2011 he was at the time disqualified from being a liquidator due to his previous convictions. The fact that those convictions and sentence were subsequently expunged was therefore irrelevant to the consideration of the lawfulness of the decision of September 2011.

Although this point alone probably was sufficient to dispose of the appeal, the court went on to deal with various other issues. It held that the compilation of the Master's panel of persons suitable to be appointed as a liquidator or trustee was an administrative action as envisaged by PAJA. The appellant had therefore been obliged to seek to review his removal from the panel within a 180 days by reason of s 7(1) of PAJA. No application for an extension of that period had been made by the appellant under s 9(2) of PAJA. For this reason as well, the application to challenge his removal from the panel had to succeed.

The Supreme Court of Appeal also held that on the facts of the matter, the decision to remove the appellant from the panel as a result of his evasiveness, untruths and previous convictions and various other factors, could not be seriously challenged.

The court therefore concluded that the decision of 5 September 2011 to remove the appellant from the panel must stand which rendered nugatory any consideration of whether the Master's earlier decision to remove him as a liquidator from the Pamodzi companies should be set aside. Moreover the refusal of the Master to readmit the appellant to the panel in January 2014, which also

constituted an administrative action, had never been impugned by the appellant and remained binding. That rendered nugatory the relief that the appellant had sought.

The appeal was therefore dismissed, with costs of two counsel.