Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A 276/2018

Before: The Hon. Ms Justice Ndita
The Hon. Mr Justice Binns-Ward
The Hon. Mr Justice Samela

Date of appeal hearing: 28 January 2019
Date of judgment: 6 March 2019

In the matter between:

THE MASTER OF THE HIGH COURT,
WESTERN CAPE DIVISION, CAPE TOWN Appellant

and

CHRISTOPHER PETER VAN ZYL Respondent

JUDGMENT

BINNS-WARD J (NDITA and SAMELA JJ concurring):

Introduction

[1] This appeal had its genesis in a decision by the Master of the High Court, Cape Town, to remove Christopher Peter van Zyl from office, in one fell swoop, as the liquidator (actually co-liquidator) of more than 100 companies. The Master made the decision exercising the power vested in her by s 379(1) of the Companies Act 61

of 1973 ('the 1973 Companies Act').[1] Van Zyl took the Master's decision on judicial review. His application, which came before Engers AJ at first instance, was partly successful, in that the Master's decision was set aside in respect of all but ten of the affected appointments. With the leave of the court a quo, the Master comes on appeal against that part of the judgment that went against her, and Van Zyl cross-appeals against the decision at first instance not to interfere with the Master's decision to remove him from office in ten of the companies.

The nature of the review, with particular reference to the pertinent constraints on the exercise by the Master of the powers conferred in terms of s 379(1) of the 1973 Companies Act

[2] The application to the court a quo was brought *both* in terms of s 151 of the Insolvency Act 24 of 1936[2] and s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The provision in the Insolvency Act is of application, by virtue of s 339 of the 1973 Companies Act, in respect of the liquidation of companies that are being wound up because they were unable to pay their debts.

[3] It is generally accepted that s 151 of the Insolvency Act provides for a review in the very widest sense.[3] It has been characterised as being of the third type of review identified by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, being a proceeding in which the court may enter upon and decide the matter *de novo*, exercising not only the powers of a court of review in the legal sense, but also having the functions of a court of appeal, with the additional privileges of being able, after setting aside the decision arrived at by the tribunal or functionary concerned, to deal with the whole matter upon fresh evidence

[1] All of the provisions of the 1973 Companies Act referred to in this judgment resort in Chapter XIV of the statute and remain in force notwithstanding the repeal of the Act by virtue of the provisions of Item 9 of Schedule 5 to the Companies Act 71 of 2008.

[2] Section 151 of the Insolvency Act provides in relevant part as follows:
'*... any person aggrieved by any decision, ruling, order or taxation of the Master ... may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master ... and to any person whose interests are affected: Provided that ...*'

[3] See e.g. *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* [1990] ZASCA 134; 1991 (1) SA 648 (A) 655G – J, [1991] 1 All SA 406 (A), and *Cooper NO and Others v South African Mutual Life Assurance Society and Others* [2000] ZASCA 64; 2001 (1) SA 967 (SCA); [2001] 1 All SA 355 (A) at para 11.

as if it were the decision-maker of first instance.[4] A review in terms of s 151 therefore affords scope for the court to enter into the merits of the impugned decision in a way that would not be permissible in conventional administrative law review.

[4] The obvious question then was why the dual basis for the application under both the Insolvency Act and PAJA if s 151 has wider breadth than s 6 of PAJA?[5] Van Zyl's counsel (Mr *Muller* SC, assisted by Ms *Reynolds*) explained that resort had been had to s 6 of PAJA in respect of those matters, such as the winding up of Asch Professional Services (Pty) Ltd, in which the liquidation of the company concerned had followed on grounds other than the company's inability to pay its debts, and to which s 151 of the Insolvency Act therefore did not apply. The difficulty is that in the respect of the vast majority of the affected liquidations the record gives no particularity as to what the grounds for the winding-up orders were, or even of the names of the companies or close corporations concerned. Experience suggests however, that most of the liquidations are likely to have followed on the corporations' inability to pay their debts. That, no doubt, explains why counsel gave so much prominence in their submissions to the reach of s 151 in the current proceedings.

[5] The Master's counsel (Mr *Jamie* SC, assisted by Ms *D. Pillay*) argued that the acknowledged wideness of the character of review in terms of s 151 of the Insolvency Act should not mislead us into understanding that the court a quo, or, by extension, this court on appeal, enjoyed anything like an untrammelled power to interfere with the impugned decision. They submitted that, even in a review in terms of s 151, the court owed a considerable measure of deference to the Master's decision, and might properly interfere with it only if it were satisfied that it was '*clearly wrong*'. Mr *Jamie* relied in support of that contention principally on his reading of the Supreme Court of Appeal's decision in *Nel and Another v The Master (Absa Bank Ltd and others intervening)* 2005 (1) SA 276 (SCA) at para. 23 and on a judgment of the full court in this Division in *Laingville Fisheries (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others* [2008] ZAWCHC 28 (30 May 2008).

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[4] See e.g. *Cooper NO v SA Mutual* supra, at para. 11

[5] Section 151 of the Insolvency Act cannot be construed to more limiting effect than s 6 of PAJA because that would derogate from PAJA's role of giving effect to everyone's rights to administrative justice in terms of s 33 of the Constitution. It can only be read to potentially enhance the extent of the court's review power in cases in which it applies.

[6] The judgment in *Nel* and, in particular, the court's dicta in the cited paragraph do not, however, bear out the argument as a general proposition. The point made there was that the level of review occurring under s 151 varies and is determined in each case by '*the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review*'. The statutory provision with which the court was concerned in *Nel* was s 384 of the 1973 Companies Act, and the functions therein provided for were the taxation of liquidators' fees by the Master in terms of s 384(1) and the Master's discretionary power to reduce or increase a liquidator's fee in terms of s 384(2).[6] The court pointed out that those provisions vested what it labelled 'a wide discretion' in the Master,[7] and that due account had to be had of that in the exercise of the court's review powers under s 151.

[7] The expression 'wide discretion' is most commonly used to describe a discretion in the broad or loose sense. It is clear from the context, however, that by '*a wide discretion*' the court in *Nel* actually meant a discretion in the strict or true sense of the concept, more commonly labelled as 'a narrow discretion'.[8] The court held that the review power in terms of s 151 could not be used in a manner that negated the nature of the true discretion vested in the Master by s 384, and accordingly judicial interference with a decision made by the Master under those provisions would be

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[6] Section 384(1) and (2) provide:
Remuneration of liquidator.
(1) In any winding-up a liquidator shall be entitled to reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff of remuneration: Provided that, in the case of a members' voluntary winding-up, the liquidator's remuneration may be determined by the company in general meeting.
(*2) The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.*

[7] Cf. *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union* [2001] ZACC 5; 2002 (1) BCLR 1 (CC); 2002 (2) SA 64 (CC) at para. 13 and the other cases cited there and in footnote 12 to the judgment.

[8] The terminology used by judges to distinguish the senses of the concept of discretion has not always been consistent. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and another* [2015] ZACC 22, 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199, in para. 82 at footnote 65, the Constitutional Court observed '*The two types of discretion are often referred to as a discretion in the strict/narrow/true sense and a discretion in the broad/wide/loose sense*'. A discretion that falls to be exercised with regard to prescribed attendant findings to be made by the decision-maker of an identified factual or a mixed factual/legal character (as in s 379(1) of the 1973 Companies Act) is not a true or strict discretion; cf. *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A), [1992] 2 All SA 453 at 800C-G (SALR).

appropriate only if the decision was 'clearly wrong'; in other words, only if it were apparent that the impugned decision was the product of a failure, or materially misdirected exercise, of the statutory discretion. Indeed, it is also in respect of a judicial decision made in the exercise of a true discretion that an *appellate* court will interfere with another court's decision only if it is 'clearly wrong'.

[8] As I shall explain presently, the exercise of the power conferred on the Master in terms of s 379(1) does not engage the use of discretion in the true sense that is involved when she acts in terms of s 384. The exercise of the court's jurisdiction in terms of s 151 of the Insolvency Act is therefore not constrained in this matter in the way in which it was in the peculiar context of the review in *Nel*.

[9] Section 379(1) of the 1973 Companies Act provides:

Removal of liquidator by Master and by the Court.[9]

(1) The Master may remove a liquidator from his office on the ground—

(*a*) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorized, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or

(*b*) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

(*c*) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator; or

(*d*) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or

(*e*) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

[10] The power vested in the Master in terms of s 379(1) is defined (and confined) by the provisions of paragraphs (a) to (e) of the provision. They do not afford anything like the truly discretionary authority that is entailed in the taxation of fees.

[9] Section 379(2) deals with the removal of a liquidator from office by a court.

In each instance, except that provided for in paragraph (e) (of which I shall treat presently), the exercise of the power is governed by expressly identified objective criteria. The Master cannot exercise the power unless she has satisfied herself that the pertinent criterion for its exercise has been satisfied.

[11] In the current matter the Master stated that she had acted in terms of s 379(1)(b) and/or (e).

[12] Section 379(1)(b) requires a finding by the Master (i) that the liquidator has '*failed to perform satisfactorily any duty imposed upon him by th*[e] *Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under th*[e] *Act'* and (ii) assuming an affirmative finding on (i), a decision whether removal is an appropriate and proportionate consequence in the circumstances. In respect of (ii), the Master is obliged to acknowledge and respect the recognition by the courts that the removal of a liquidator is an 'extreme step',[10] and must weigh why, in that context, the other (less extreme) remedies provided in the Act to deal with shortcomings in the liquidator's conduct would not suffice. A failure by a Master to approach the appropriateness of removing a liquidator from office in a manner consistent with that adopted by the courts would give rise to an arbitrary and irrational discrepancy between the effect of the exercise of the powers of removal by the Master in terms of subsection (1) and the overlapping and wider powers of removal by a court in terms of subsection (2). It would be misdirected to construe or apply the legislation in a manner that would allow such a discrepancy.

[13] Section 379(1)(e) is wholly discrete from s 379(1)(b). Paragraph (e) provides for the exercise of the Master's power of removal in a situation in which a change of circumstances has rendered the person who has been appointed liquidator of the company concerned '*no longer suitable*' to remain as such. The expression '*no longer*' connotes that a state that previously subsisted has ceased to do so.[11] The state

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[10] *Standard Bank of South Africa v The Master of the High Court and Others* 2010 (4) SA 405 (SCA) at para. 135; *Ma-Africa Groepbelange (Pty) Ltd and Another v Millman and Powell NNO and Another* 1997 (1) SA 547 (C) at 566 and *Motala v Master of the North Gauteng High Court, Pretoria* [2017] ZAGPPHC 665 (9 October 2017) at para. 26.

[11] The *Collins Free Online English Dictionary* (accessed on 17 February 2019) defines '*no longer*' in the following way: '*Something that is* ***no longer*** *the case used to be the case but is not the case now*'. The *Oxford Dictionary of English* (Version 2.3.0 (203.16.12), © 2005–2018 Apple Inc.) puts it in the following way: '*not now as formerly; not any more*'

in issue in para. (e) of s 379(1) is '*suitability*'. Its adjectival inflection '*suitable*' is defined in the Oxford Dictionary as meaning '*well fitted for the purpose*'. The '*suitability*' to which the statutory provision relates is not suitability to hold the office of liquidator in general, but suitability determined with regard to a particular company, '*the company concerned*'. '*Concerned*' in the relevant sense is defined in the Oxford Dictionary as '*involved*'. The words or expressions '*no longer*', '*suitable*' and '*company concerned'* taken alone and, as they must be, in their contextual combination in paragraph (e), have a narrowing effect on the ambit of the provision.

[14] In order to determine whether a person is no longer well fitted to be liquidator of '*the company concerned*', the Master has to undertake a dichotomous investigation. On the one hand, she has to identify the characteristics of the liquidator that call his suitability to continue in office into question and then, on the other hand, consider, with reference to the particular needs and demands of the liquidation *of the company involved*, whether the liquidator is, on account of the identified characteristics, no longer well fitted for the purpose of managing *that* company's winding-up. If the enquiry were not intended to be with reference to *a particular company* rather than with the liquidator's suitability to be a liquidator generally, the words '*the company concerned*' would be superfluous. There is a presumption against superfluity in statutory language.

[15] It seems clear that s 379(1)(e) is directed at issues such as conflicts of interest, disruptive discord with creditors, members or co-liquidators and the like; matters that are entirely distinguishable in character from those to which para (b) pertains. It is furthermore difficult to conceive how s 379(1)(e) could find application in respect of any conduct of a liquidator that relates to an issue in the past that has been addressed, has no on-going effect on the administration of the liquidation, and is unlikely to recur during the remainder of the winding-up of the company concerned. That must be so for the matters that had called into question the liquidator's suitability to remain in office in respect of the company concerned would in that scenario have been resolved, and no longer give rise to difficulty.

[16] Mr *Jamie*, however, put special emphasis on the phrase '*in his opinion*' in paragraph (e) of s 379(1) to try to support his contention as to the proper application of s 151 of the Insolvency Act in the circumstances. The essence of the argument was that those words suggested that s 379(1)(e) vested a true discretion in the Master.

But, as with any language in a statute, the words must be understood in their context. A contextual construction makes it clear that the Master is not given carte blanche to form an opinion, or to make what has sometimes been referred to as 'a pure judgment' like, for example, the Minister of Environmental Affairs is in terms of s 81 of the Marine Living Resources Act, to which I shall refer later when I address Mr *Jamie'*s reliance on the judgment in *Laingville Fisheries*. As I have sought to explain, the Master is required by paragraph (e) to weigh two sets of considerations against one another with due regard to the interests of the winding up of a particular company, and to make a judgment informed by those considerations.

[17] The observation of Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] UKHL 6, [1976] 3 All ER 665 (CA and HL), [1976] UKHL 6, [1977] AC 1014, at pp. 681-2 (All ER), is instructive in this connection:

> This form of section [i.e. framed in a "subjective" form - if the Secretary of State "is satisfied"] is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.[12]

[18] Furthermore, irrespective of whether she acts under paragraph (b) or (e) of s 379(1), the Master must, in every case in which she considers removing a liquidator from office, conscientiously take into account the interests of the liquidation and the wishes of the creditors, and even – although this would be a secondary consideration

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[12] Cited with approval in *Pepcor Retirement Fund and Another v Financial Services Board and* Another [2003] ZASCA 56, [2003] 3 All SA 21 (SCA), 2003 (6) SA 38, at para. 36. Compare also the approach in respect of the review of executive conduct under legislation framed using the phrase 'if it appears to the Minister' in *Minister of Home Affairs and Another v Austin and Another* 1986 (4) SA 281 (ZS), at 293H-294, and in similar vein *Office of Fair Trading and others v IBA Healthcare Ltd* [2004] EWCA Civ 142; [2004] 4 All ER 1103 (CA), at para. 45; and *Da Cruz and Another v City of Cape Town and Another* [2017] ZAWCHC 1; [2017] 1 All SA 890 (WCC), 2017 (4) SA 107 (WCC) at paras. 33-34.

– the reputational consequences for the liquidator,[13] in the same manner that a court does when considering an application for the removal of a liquidator; cf. *Re Adam Eyton Ltd ex parte Charlesworth* (1887) 36 Ch D 229, at 306, *Ma-Afrika Groepbelange (Pty) Ltd and Another v Millman and Powell NNO and Another* 1997 (1) SA 547 (C), at 561, *AMP Music Box Enterprises Ltd v Hoffman* [2003] 1 BCLC 319, at paras. 23-27, *Hudson and Others NNO v Wilkins NO and Others* 2003 (6) SA 234 (T) especially at para. 18, *Standard Bank of SA Ltd v The Master of the High Court* [2009] ZAECHC 3, 2009 (5) SA 13 (E) at paras. 7-10, *Standard Bank of South Africa v The Master of the High Court and Others* [2010] ZASCA 4, [2010] 3 All SA 135 (SCA), 2010 (4) SA 405 at paras. 124-135, and *Trustees for the Time Being of the Bermack Trust and Another v Patel N.O. and Another* [2014] ZAWCHC 105 (8 July 2014) at paras. 59-62. The power invested in the Master by s 379(1) provides but one of the devices in the toolkit of measures afforded to her by the statute to be used to promote and further the best interests of liquidations; any punitive effect occasioned by its exercise is incidental. Any identified shortcomings in the conduct of the liquidator must therefore be weighed mindful of the consequences for the winding-up of the company concerned if he or she were to be removed on account of them. A failure to appropriately undertake the indicated balancing of relevant considerations is liable to conduce to decisions that are arbitrary and disproportionate.

[19] In the latter regard, the dicta of Neuberger J (as he then was) in *AMP Music Box Enterprises* supra, loc. cit. bear quoting in full as an informative summary of the applicable principles. They give expression to an approach that has been endorsed on numerous occasions in recent years in the English,[14] Australian[15] and South African[16] jurisdictions:

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[13] Cf. e.g. *Standard Bank of South Africa v The Master of the High Court and Others* 2010 (4) SA 405 (SCA) at para. 135; *Hudson and others NNO v Wilkins NO and Others* 2003 (6) SA 234 (T) at 239D; *Re Edennote Ltd; Tottenham Hotspur plc & Ors v. Ryman & Anor* supra at 398 (BCLC) and *Hobbs & Anor v Gibson & Ors* [2010] EWHC 3676 (Ch) at para. 47

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[14] *Quickson (South and West) Ltd. v Katz & Anor* [2004] EWHC 2443 (Ch) (25 August 2004) at paras. 162-169, *Sisu Capital Fund Ltd & Ors v Tucker & Ors* [2005] EWHC 2170 (Ch) (09 September 2005) at para. 83-88, and for essentially the same approach see *Re Edennote Ltd; Tottenham Hotspur plc & Ors v. Ryman & Anor* [1996] 2 BCLC 389, [1996] BCC 718, [1996] EWCA Civ 1349 in the last six paragraphs.

[15] See *Re St Gregory's Armenian School (in liq)* [2012] NSWSC 1215; (2012) 92 ACSR 588, *SingTel Optus Pty Ltd v Weston* [2012] NSWSC 674; (2012) 90 ACSR 225, *Re Joe & Joe Developments Pty Ltd (subject to a Deed of Co Arrangement)* [2014] NSWSC 1444, *Re ACN 151 726 224 Pty Ltd (in liq)*

[23] In an application [for the removal of a liquidator from office], the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.

[24] Support for this approach is not only to be found in *Keypack* [*Re Keypack Homecare Ltd* [1987] BCL 409], but also in some cases where the court has compulsorily wound up the company and appointed a new liquidator in circumstances where there is already a voluntary liquidator in place – see for instance, *Re Zirceram Ltd* [2000] 1 BCLC 751, especially at para 25(5). Also where the liquidator could not be seen as independent – see, for instance, *Re Lowestoft Traffic Services Ltd* [1986] BCLC 81 (where the liquidator concerned seems to have been the same liquidator as in *Keypack*).

[25] It may also be right to remove a liquidator where the circumstances are such that, through no fault of his own, he is perceived to be – even though he may not be – biased in favour of, say, one or more of the creditors – see per Robert Walker J in *Re Gordon & Breach Science Publishers Ltd* [1995] 2 BCLC 189, another case concerned with a compulsory winding-up order in circumstances where there was already a voluntary liquidator in place.

[26] While the removal of the liquidator is not necessarily based on any fault on his part, most such cases will involve a degree of criticism. Although in *Keypack* Millett J emphasised there was no criticism of the general ability, experience and professionalism of the liquidator, and that, even in relation to the particular case, there was no evidence of his being biased or dishonest, it is nonetheless clear that he was removed because the judge took a dim view of the way in which he had conducted the particular liquidation. As the judge said, the fact that this may to some extent resound to the discredit of the liquidator, does not mean that the court should shy away from making the order. On the contrary, in an appropriate case it is the duty of the court to make such an order, not merely on the merits of the particular case, but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner.

[27] On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. Otherwise, it would encourage applications under s 108(2) [of the English Insolvency Act, 1986 (c 45)] [17] by creditors who have not had

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previously Ridley Capital Holdings Pty Ltd [2016] NSWSC 1801 and *Hebbel Constructions Pty Ltd v Bitar Pty Ltd* [2018] NSWSC 758 at para. 4.

[16] *Bermack Trust* supra and Blackman et al. *Commentary on the Companies Act* (Juta) at 14-315 (Revision service 7, 2010)

[17] Section 108(2) of the Insolvency Act, 1986 c 45 provides: '*The court may, on cause shown, remove a liquidator and appoint another*'.

> their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who was appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over his shoulder, and there would be a risk of the court being flooded with applications of this sort. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay.

(For present purposes I would highlight the remarks in paragraph 27 in particular, but the entire passage is an eloquent exposition of the principle that the critically determinative consideration in such matters is the best interests of the affected liquidation.)

[20] On any approach, however, and irrespective whether it acted in terms of s 151 of the Insolvency Act or s 6 of PAJA, the court would be justified in interfering with the Master's decision on review if she had proceeded on a demonstrably incorrect appreciation of the import of the statutory provision under which she purported to act; in this case by proceeding without due regard to the constraints imposed on the exercise of her power in terms of s 379(1).

[21] The decision in *Laingville Fisheries* also gives no assistance to Mr *Jamie*'s argument. That case involved a review of a ministerial determination in terms of s 81 of the Marine Living Resources Act 18 of 1998. Section 81(1) of that Act provides '*If in the opinion of the Minister there are sound reasons for doing so, he or she may, subject to the conditions that he or she may determine, in writing exempt any person or group of persons or organ of state from a provision of this Act*' and s 81(2) provides the Minister with the power at any time to cancel or amend such exemption. It is entirely up to the Minister to decide what might constitute '*sound reasons*' in a given case, and also to determine the nature of any conditions that might attach to any exemption from the Act that she might decide to grant. A matter of pure judgment is involved. The only constraint on the Minister in forming her judgment is that she must act rationally. As I have sought to demonstrate, the position under s 379(1) of the 1973 Companies Act is quite distinguishable from the subjective discretion

afforded to the Minister in terms of s 81 of the Marine Living Resources Act. And the review in *Laingville Fisheries* was in any event a purely PAJA review, not one of the wide variety provided for by s 151 of the Insolvency Act. The appellant's reliance on the judgment in that case in the very different circumstances of this matter was misplaced.

[22] For all the aforementioned reasons I agree with the submission by Van Zyl's counsel that the court a quo could review and set aside the Master's decision on any of the conventional review grounds now codified in PAJA as well as on the wider review basis applicable in the circumstances in terms of s 151 of the Insolvency Act, which in this case entitled it to set aside the decision simply because it considered it to be 'wrong', as distinct from 'clearly wrong'.

[23] Having established the character of the scrutiny to which the Master's decision was subject on review in terms of s 151 of the Insolvency Act, the numerous grounds upon which it was also impugned on in terms of s 6 of PAJA also bear mention by way of introduction. Obviously, if an entitlement by Van Zyl to relief on any of these grounds were established, the court would not have to consider whether the decision should also be set aside in terms of s 151 for being 'wrong' on its merits. Van Zyl contended that the Master's decision was not supported by, and therefore not rationally connected to, either the information before her or the purpose of the empowering provision (s 6(2)(f)(ii)(bb) and (cc)), and so unreasonable that no reasonable person could have made it (s 6(2)(h)); that the Master's action was procedurally unfair (s 6(2)(c)); that the decision was materially influenced by errors of law (s 6(2)(d)); that she had taken irrelevant considerations into account and not considered relevant considerations (s 6(2)(e)(iii)); had acted arbitrarily or capriciously (s 6(2)(e)(vi)); and she was biased or reasonably suspected of bias (s 6(2)(a)(iii)).

[24] A reasonably detailed description of the factual background is necessary in order to give context to the assessment we have had to undertake of the Master's decision and the treatment by the court a quo of the challenge mounted against it.

The lead up into the Master's investigation into Van Zyl's conduct

[25] Van Zyl's career as a liquidator in Cape Town reaches back nearly forty years. I think we may take judicial notice that he enjoys some prominence as an insolvency practitioner in this jurisdiction. That is indeed borne out by the high number of

appointments held by him in this Division at the time the Master made her decision to remove him. He testified, without contradiction, that the confidence reposed in his abilities by many of the large financial institution creditors has secured his appointment as liquidator in a number of large and complex winding-up operations. Indeed, the record shows that some such creditors made representations to the Master about the prejudicial consequences they apprehended his removal from office would have in some of the liquidations affected by her decision in this case. I record this not to imply that his conduct as an insolvency practitioner has always been, or should be approached as, beyond criticism, but to show that the prospect of his removal from all of his appointments was, and should have been appreciated by the Master as, a measure with very impactful reputational effect, and one that would effectively end his life-long career.

[26] Van Zyl's account in the papers of his relationship with the current Master of the High Court, Cape Town, commences in September 2012, when he wrote to her requesting the removal of his name from her panel of insolvency practitioners. He had been in poor health at the time, and did not feel up to taking on any new appointments. After his health had recovered, he wrote to the Master again, on 29 August 2013, requesting to be reinstated on the panel of insolvency practitioners. When she failed to reinstate him, he instituted proceedings for the judicial review, as a matter of urgency, of her refusal to put him back on the panel. The Master explained her position in the answering papers in that review application. She indicated that as a result of a complaint that she had received about Van Zyl's conduct in the liquidation of Asch Professional Services (Pty) Ltd, she was on the point of instituting an enquiry into his conduct in terms of s 381 of the 1973 Companies Act. (Asch was being wound up because it was just and equitable for the company to be liquidated because of a deadlock between its members. The members had complained to the Master about certain of the fees claimed by Van Zyl in terms of the liquidation and distribution account. Their particular complaint did not give rise to any of the grounds advanced for the Master's impugned decision to subsequently remove Van Zyl from all of his appointments.)

[27] On 11 December 2013, an order was taken by agreement in the aforementioned review application, in terms of which the Master's decision not to reinstate Van Zyl on the panel of insolvency practitioners was set aside. The order

recorded that an enquiry in terms of s 381 into Van Zyl's conduct had commenced, and noted an undertaking by the Master to proceed with it with reasonable expedition in the hope that it would be completed by 28 February 2014. It also recorded an apparently quid pro quo undertaking by Van Zyl not to make himself available for any new appointments until after 14 March 2014.

Enquiry in terms of s 381 of the 1973 Companies Act into Van Zyl's conduct

[28] On 3 February 2014, Van Zyl's attorneys were advised that the Master intended using the services of Mr Stelzner SC of the Cape Bar to preside on her behalf to hear evidence in the s 381 enquiry, and, on 26 February 2014, Van Zyl was in receipt of a letter from the Master listing various alleged irregularities in 13 estates that were apparently to be the subject of the enquiry. The Master stated in her letter of 26 February that she was of the view that Van Zyl had been guilty of a 'widespread practise' (*sic*) whereby he fraudulently misrepresented the financial position of liquidated companies and defrauded creditors, members and insolvents for his own unjust enrichment. Suffice it to say that none the alleged irregularities identified in the Master's letter were later advanced as reasons for her subsequent decision to remove him from all of his appointments.

[29] After an enquiry-management meeting attended by the protagonists' legal representatives in Mr Stelzner's chambers in mid-March, Van Zyl's attorneys were informed by the State Attorney on 14 March 2014 that Mr Stelzner's services had been disposed of. It seems that the decision to withdraw Mr Stelzner's brief was inspired by an apprehension formed during the meeting in chambers that the enquiry might entail a lengthy hearing and run up significant expenses. It was decided instead to use the services of a Deputy Master from Johannesburg to preside over the hearing. A certain Mr Maphaha was seconded to the office of the Master in Cape Town for this purpose.

[30] On 20 March 2014 the Master addressed a letter to Van Zyl raising alleged misconduct by him in a further three estates, thereby bringing the total to 16. Some of these appear to have involved matters in which the liquidations had been finalised and Van Zyl had been discharged from office, and in respect of which the Master consequently no longer had jurisdiction under s 381 of the 1973 Companies Act.

[31] Van Zyl's attorneys submitted a very full response in respect of the issues raised by the Master in respect of his alleged misconduct in the 16 estates that she had identified. The response, dated 12 May 2014, ran to more than 90 pages. Amongst other matters, the response mentioned the conduct by Van Zyl of a number investment accounts in matters under his administration using the Nedbank Corporate Saver facility, about which much will be said later in this judgment. It gave an explanation of how investments using that facility worked. The explanation was apparently independently substantiated in aspects of detail by an attached letter from Werksmans Attorneys, which appears not to have been included in the papers before the court a quo. (The explanation was to be repeated on at least three further occasions between then and the date of the Master's decision to remove him from office more than three years later.) Two days later, on 14 May 2014, Van Zyl began once again to seek new appointments.

[32] It would serve little purpose to go into the allegations that Van Zyl was confronted with in the correspondence from the Master in early 2014 because they bore no material relationship to the reasons ultimately given by the Master, more than three years later, for his removal from office. It is enough to note that they concerned allegations of much more serious misconduct than that ultimately relied upon by the Master for her decision to remove him from office.

[33] On 7 July 2014, Van Zyl's attorneys addressed the Master concerning their client's disquiet at the Master's delay in proceeding with the s 381 enquiry, and highlighting the attendant prejudice to their client.

[34] More than a month after that, on 15 August 2014, the Master announced her intention to proceed at the enquiry with 'charges' in respect of Van Zyl's administration of ten identified corporations in liquidation.[18] Approximately two months later, on 8 October 2014, the State Attorney addressed a letter to Van Zyl's attorneys introducing numerous new 'charges' against Van Zyl. The 8 October letter set out, for the first time, several 'charges' related to the alleged contravention by Van Zyl of ss 394 and 403 of the 1973 Companies Act. Van Zyl provided a response to

[18] Asch Professional Services (Pty) Ltd, Kingsfield Aviation Leasing Five (Pty) Ltd, Elprom Electronic Product Manufacturers (Pty) Ltd, Aquila Insurance and Healthcare Consultants (Pty) Ltd, Erf 1252 Marine Drive (Pty) Ltd, Shoe HQ (Pty) Ltd, New World Fruit Venturers (Pty) Ltd, Zib Devco Building (Pty) Ltd, Huysamen Motors CC and Treehouse Children's Décor Co – SA (Pty) Ltd.

the new matter through his attorneys on 19 December 2014. The response contained, amongst other matter, a comprehensive reiteration of the explanation concerning the workings of the Nedbank Corporate Saver investment facility and of his use in that connection of the intermediary services of a financial service provider known as BLM Administrative Services that had been furnished in his response earlier in the year to the different allegations made against him in the Master's above-mentioned letter of 26 February of that year.

[35] The hearing of oral evidence, including the production of documentary exhibits, proceeded in fits and starts before Mr Maphaha over six days during the period February to December 2015. The Master engaged senior counsel, assisted by a junior, to lead the evidence at the hearing in support of the allegations against Van Zyl, and Van Zyl was himself also represented by senior counsel. Mr Maphaha heard concluding arguments from counsel in March 2016 and delivered his findings on 18 May 2016.

The Master's enquiry in terms of s 381, especially in respect of Van Zyl's alleged non-compliance with s 394 of the 1973 Companies Act

[36] Mr Maphaha's findings, which were included in the record before the court a quo, are not particularly informative. He appears to have proceeded from the premise that the enquiry over which he had presided had been instituted by the Master pursuant to a direction by the court that she should institute it. That was plainly incorrect. Various findings of misconduct were made against Van Zyl. But these were stated in broad-brush terms, and not reasoned with any meaningful reference to the evidence that had been adduced at the enquiry. Mr Maphaha's findings, which in material part focussed on alleged contraventions by Van Zyl of s 394 of 1973 Companies Act, were manifestly wrong in a number of respects, both legal and factual. But it is not necessary to go into the detail for present purposes.

[37] Van Zyl's complaint that the findings are not only unsubstantiated, but also incoherent in parts is not without justification.[19] It is difficult to imagine what use the

[19] By way of example paragraph 10 of the findings goes as follows:
'*It is worth noting that all processes that precede the confirmation of the liquidation and distribution are not met in some of the matters. Therefore the issue of confirmation of the accounts will be limited those matters where there was confirmation of the accounts. In matter where there was no confirmation the Master is not barred from directing the liquidator to amend the account, however*

findings could have been to the Master in determining what precisely Van Zyl had done wrong, or what action it would be appropriate for her to take. The Master would, of course, have been able to peruse the transcript of the proceedings; as, indeed, she said that she did do. To what end we are unable to say, however, as the transcript was not included in the papers before the court a quo. All that it had to go by were the Master's reasons for her decision to remove Van Zyl, to which I shall come presently, and some description in the parties' affidavits of the proceedings at the s 381 enquiry. It is clear that the Master's view of Van Zyl's conduct in terms of s 394 of the Act was foundational to the reasons given by her for the decision to remove him from office. That had to do with Van Zyl's use of the abovementioned Nedbank Corporate Saver facility.

[38] Van Zyl had used the Corporate Saver facility to invest funds on hand in some of the companies in liquidation under his administration that were not immediately required for expenditure. Those funds had been invested in the respective names of the various companies concerned in interest bearing accounts operated under the auspices of the aforementioned facility. The funds were held in such accounts either on call, or 7-day fixed deposit.

[39] Investment by liquidators in savings and fixed deposit accounts is permitted, and regulated, by s 394 of the 1973 Companies Act. Section 394 provides as follows:

> **Banking accounts and investments.**
>
> (1) The liquidator of a company—
>
> (*a*) shall open a current account from which amounts are withdrawable by cheque in the name of the company in liquidation with a banking institution registered under the Banks Act, 1965 (Act 23 of 1965), within the Republic, and shall from time to time deposit therein to the credit of the company all moneys received by him on its behalf;
>
> (b) may open a savings account in the name of such company with such a banking institution, a mutual building society registered under the Mutual Building Societies Act, 1965 (Act 24 of 1965), or a building society registered under the Building Societies Act, 1986 (Act 82 of 1986), within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company;

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when this enquiry was instituted it was as per trend and pattern in which fees were charged in all matters that form part of this enquiry.' The paragraph is quoted in isolation, but regard to the context does not assist in making head or tail of its meaning.

(c) may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against such company, on interest-bearing deposit with such banking institution, mutual building society or building society within the Republic;

(d) shall not withdraw any money from any account referred to in paragraph (b) or (c) otherwise than by way of a transfer to the said current account.

(2) Whenever required by the Master to do so, the liquidator shall in writing notify the Master of the banking institution or building society and the office, branch office or agency thereof with which he has opened an account referred to in subsection (1), and furnish the Master with a bank statement or other sufficient evidence of the state of the account.

(3) A liquidator shall not transfer any such account from any such office, branch office or agency to any other such office, branch office or agency except after written notice to the Master.

(4) All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by the liquidator or his duly authorized agent.

(5) The Master and any surety for the liquidator or any person authorized by such surety shall have the same right to information in regard to that account as the liquidator himself possesses, and may examine all vouchers in relation thereto, whether in the possession of the banking institution or building society or of the liquidator.

(6) The Master may, after notice to the liquidator, in writing direct the manager of any office, branch office or agency with which an account referred to in subsection (1) has been opened, to pay over into the Guardians' Fund all moneys standing to the credit of that account at the time of the receipt, by the said manager, of that direction, and all moneys which may thereafter be paid into that account, and the said manager shall carry out that direction.

(7) (a) Any liquidator who without lawful excuse, retains or knowingly permits his co-liquidator to retain any sum of money exceeding forty rand belonging to the company concerned longer than the earliest day after its receipt on which it was possible for him or his co-liquidator to pay the money into the bank, or uses or knowingly permits his co-liquidator to use any assets of the company except for its benefit, shall, in addition to any other penalty to which he may be liable, be liable to pay to the company an amount not exceeding double the sum so retained or double the value of the assets so used.

(b) The amount which the liquidator is so liable to pay, may be recovered by action in any competent court at the instance of the co-liquidator, the Master or any creditor or contributory.

[40] It was apparent that Van Zyl, and indeed a number of other insolvency practitioners,[20] had for a number of years been availing of the Nedbank Corporate Saver facility for the purpose of making the sort of interest bearing deposits contemplated and permitted by s 394 of the Act. The facility apparently offered particularly attractive interest rates. The higher interest rates applied because the investments were treated by the bank as part and parcel of what might be labelled bulk investments by the intermediary licenced financial service providers through whom the investments were placed, rather than as investments in smaller amounts by individual investors. The higher rates of interest were paid by reason of the large aggregated investment amounts, and were greater than would have been earned on the constituent investments treated individually. Van Zyl testified, without contradiction, that he was obliged to use the services of a licenced financial service provider in order to make the investments in the Corporate Saver facility, and that the associated cost of investing in that manner had been justified by the enhanced returns that were obtained.

[41] The financial service provider used by Van Zyl to invest in the Nedbank Corporate Saver was BLM Administration Services. The funds that he deposited enjoyed the relatively higher returns paid by Nedbank on BLM's aggregated investments. The deposits were made via what I choose to label as BLM's bulk account, but they were allocated in Nedbank's books in separately numbered accounts, each in the name of the company in liquidation concerned. Nedbank accounted to the liquidators directly in respect of each such separately numbered account. Furthermore, the funds in those separate accounts could be disposed of only on the written instructions of the liquidators. They therefore remained under the liquidators' control in the relevant sense.

[42] BLM Administration Services charged a fee for the use of their offices for the purposes of the investments made into the Nedbank Corporate Saver accounts. The standing so-called 'take-up fee' was levied at one per cent per annum on the daily balance of funds invested. The take-up fee was sometimes subsequently adjusted by negotiation between BLM and Van Zyl. In many cases the negotiated on-going fee

[20] See *The Standard Bank of South Africa Limited v The Master of the High Court, Eastern Cape, Port Elizabeth and Others* [2018] ZAECPEHC 55, [2018] 4 All SA 871 (ECP), which is another case in which a liquidator's investment in the Nedbank Corporate Saver facility featured large.

was two per cent per annum. Van Zyl testified that he agreed to a higher fee in matters in which BLM was called upon to render additional services. As the court a quo observed in its judgment, the precise nature of these additional services was not altogether clear. It seems that in some cases it had to do with the use of funds held on call for the making of payments by EFT to third parties in respect of various expenses in the liquidation concerned. Such payments, which in the ordinary course should have been made from the company in liquidation's current account opened in terms of s 394(1)(a), would have entailed a higher level of administrative attendances by BLM in order to keep abreast of constantly changing balances in the accounts for the purpose of computing its fees which were based on the daily balances in the accounts.

[43] Van Zyl's claim that the Nedbank Corporate Saver rates rendered net returns greater than those of directly accessible savings deposits does not appear to have been refuted at the enquiry. Issue was, however, taken with the reasonableness of the fees that he had agreed to pay to BLM in respect of the investments.

[44] At some stage Van Zyl was advised by Nedbank that he could achieve even higher rates of return by placing the funds held by the companies in liquidation in the Corporate Saver call accounts on 7-day fixed deposit. He would then give instructions for amounts in the call accounts that were not required to be expended within the next seven days to be placed on such fixed deposit, also under the umbrella of the Corporate Saver facility. The funds would reflect in the statements that he received in respect of the call accounts as being transferred to fixed deposit. The call account statements would also reflect the return to call status of the amounts so invested after the expiry of the fixed deposit period, together with the interest that had accrued thereon while they were on fixed deposit.

[45] The transfer of funds from call account to fixed deposit occurred by way of book entries in Nedbank's records. There was no transfer of the funds from the companies' Nedbank Corporate Saver call accounts to the companies' current accounts and thence to Nedbank Corporate Saver fixed deposit accounts. Indeed, the funds invested in the Corporate Saver accounts remained allocated in Nedbank's records under the same account numbers throughout, irrespective of whether they were held at any particular time on call or 7-day fixed deposit. That gave rise to a debate, which the Master seems to regard to be of critical importance, as to whether

the respective companies' funds on call and on fixed term deposit in the Corporate Saver facility were held in one account or two accounts.

[46] The statements rendered by Nedbank in respect of the funds held on call in the Corporate Saver accounts also reflected the periodic debiting of BLM's fees on a pro rata basis. 'Pro rata' because the fees so reflected pertained only to that part of the funds held on call at the given time, and did not include the fees payable to BLM in respect the part of the investment contemporaneously held on fixed deposit. The fees were annotated as '*agent fee*' on the statements. Van Zyl did not receive separate statements in respect of the funds while they were placed on fixed deposit, and it transpired that he had not been aware, until focus was brought to bear on the question during the s 381 enquiry hearing, that it had been possible to obtain such statements.

[47] It emerged in the evidence at the enquiry that Van Zyl had not appreciated that BLM's fees were debited discretely in respect of the funds on call and those on fixed deposit, and that the agent fee reflected on the call account statements pertained only to *part* of the funds invested, and did not include those levied in respect of that part of the total amount invested which was on fixed deposit from time to time. The fees on the funds held on fixed deposit were debited before those funds were returned to the call account.

[48] In the result, what Van Zyl had thought was the gross interest earned on the funds while they were on fixed deposit was, in point of fact, the interest net of BLM's fee. Van Zyl testified that he had understood (mistakenly) that the agent fee reflected on the statements that he received in respect of the funds on call represented the gross sum of BLM's fee. Necessarily implicit in this testimony was an admission by Van Zyl that he had not checked the amounts reflected as agent fees on the call accounts statements to verify that the sums reflected thereon as having been debited in favour of BLM in fact correlated to the fees that he had agreed BLM might charge. The discrepancy between what Van Zyl thought was the sum of BLM's fees and what they actually were was substantial. The total fees paid to BLM were nevertheless consistent with what Van Zyl had agreed with BLM based on a percentage of the aggregate amount invested by each company concerned in the Corporate Saver facility. Van Zyl's remissness therefore had no effect on the correctness of the amounts reflected in the accounts that he lodged as being available for distribution.

[49] Van Zyl's misapprehension as to the true state of affairs resulted in him in some instances submitting liquidation and distribution accounts that inaccurately reflected the extent of the fees paid to BLM, materially understating their actual extent. The inaccurate liquidation and distribution accounts that were submitted were accompanied in every case, as required in terms of s 403(2) of the 1973 Companies Act,[21] by copies of the bank statements that he had received in respect of the funds held on call in the Corporate Saver accounts.

[50] The evident purpose of the requirements of s 403(2) is to equip the Master and other interested parties with the means to interrogate the accuracy of the accounts lodged by liquidators in terms of s 403(1). Indeed, the evidence demonstrated that the Master's office does vet the accounts that are lodged, and raises any queries it might have with the liquidator before the accounts are laid open for inspection. The Master is empowered *mero motu* to direct that an account be amended if she considers it to be incorrect in any respect; see s 407(3) of the Act and cf. *Taylor and Thorne, NNO, and Others v The Master* 1965 (1) SA 658 (N), [1965] 2 All SA 106 (N) at 660 (SALR). It is clear from the content of the Master's abovementioned letter of 8 October 2014 in relation to the 'charges' brought against Van Zyl in the enquiry in terms of s 381 that her office must have, by that stage, examined the bank statements in respect of the funds held on call in the Nedbank Corporate Saver accounts of the corporations whose management was under scrutiny at the enquiry.

[51] The information in the bank statements that were lodged by Van Zyl disclosed, amongst other matters, the existence of debits in respect of an agent's fee

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[21] Section 403 provides:

Liquidator's duty to file liquidation and distribution account.

(1) (a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their liability.

(b) If the account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified.

(2) Any account shall be lodged in duplicate in the prescribed form, shall be fully supported by vouchers, including the liquidator's bank statements or certified extracts from his bank and building society accounts showing all deposits and withdrawals, and shall be verified by an affidavit in the prescribed form.

and the percentage rate applicable for the computation thereof, as well as the apparent movement of funds from call to fixed deposit. It was also possible to ascertain from those statements what rates of return were being achieved on the invested funds. The Master was therefore sufficiently informed by the detail in the statements that were provided by Van Zyl to be able to call for further particulars of the fixed deposit accounts and the related bank statements if she had wished to (see s 394(5) of the Act).

The interval between the delivery of the findings in the s 381 enquiry and the giving of notice by the Master of her proposal to remove Van Zyl from office as liquidator

[52] On 20 September 2016, Van Zyl instituted proceedings to take the findings made by Mr Maphaha under judicial review. The Master has given notice of her intention to oppose that application. There has been a long delay in moving that review application along because of a dispute between the parties concerning the delivery by the Master of an administrative record in terms of Uniform Rule 53. The Master had not delivered an answering affidavit in those proceedings by the time the review application that is before us on appeal came up for hearing at first instance. It is apparent, however, from the record before us that the Master intends to take the point that the review was premature because she had at that stage not yet adopted or acted on the findings; in essence her position in that matter is going to be that no administrative action had yet been taken in relation to the enquiry. It is not for us to determine the question, but it seems to me that the proceedings to review Mr Maphaha's findings were overtaken for all substantive purposes by the review application subsequently brought before the court a quo in the present matter.

[53] What the Master did do after Mr Maphaha had delivered his findings was to request copies from Van Zyl of all Nedbank Corporate Saver bank statements in respect of both money on call and on fixed deposit in such accounts. The requested statements were delivered to the Master by Van Zyl's attorneys on 29 July 2016. By that time Van Zyl had in fact already lodged amended accounts in each of the as then not yet finalised liquidations correcting the inaccuracies occasioned by his errors in respect of the reporting of BLM's fees and the gross rate of interest achieved on the fixed deposit investments. In other words, he had by then already remedied his and his co-liquidators' defective compliance with s 403 of the 1973 Companies Act.

The Master's notice of intention to remove Van Zyl from office as liquidator

[54] Nine months later, on 2 May 2017, the Master wrote to Van Zyl to inform him that she intended to remove him from his appointments as liquidator in terms of s 379(1) of the 1973 Companies Act. She invited him to make representations as to why she should not proceed as advised.

[55] The grounds given by the Master for her intended decision centred on her opinion that he had contravened s 394 of the 1973 Companies Act in numerous respects and that he had submitted liquidation and distribution accounts that had failed to disclose the full extent of the fees paid to BLM and the gross interest earned on funds invested on 7-day fixed deposit. It was clear that the Master took particular exception to the filing of inaccurate accounts because they had been lodged under affidavits, in terms of s 403, in which he (and his co-liquidators) had purported to declare that the accounts reflected a full and true account of their administration of the corporations concerned.

Van Zyl's representations to the Master as to why she should not remove him from office as liquidator

[56] Van Zyl submitted his representations on 8 June 2017. They were set out in a lengthy letter from his attorneys. For present purposes it is necessary to summarise only those parts of it that became related to the grounds for removal set out in the Master's subsequent letter, dated 31 August 2017, confirming her decision to remove him from all of his appointments, to which I shall come presently.

[57] Van Zyl commenced by pointing out that all of the information on which the Master relied for the accusation that he had acted in breach of s 394 had been in her possession since at least 2015. He queried why she had not acted on it at the time if it had been considered of sufficient gravity to warrant his wholesale removal from office. He suggested that the delay between her having come by the information and acting on it was ascribable to a lack of bona fides, and symptomatic of an endeavour by her to avoid the embarrassment of his pending review of the findings of Mr Maphaha, which he described as '*superficial, vague, in many respects incoherent … contradictory* [and] *… furthermore manifestly incorrect in many respects'. He alleged in this regard that 'Mr Maphaha simply adopted the submission made on your behalf, in the process exposing the extent to which the outcome was preordained.*

Your latest effort to remove [me] *is clearly an extension of this process brought about by your failure to achieve the results you desired via the enquiry. It is an attempt to circumvent that process and the agreements as to how it would be concluded. It is an abuse of power and mala fide*'.

[58] He described yet again the manner in which the investments into the Nedbank Corporate facility worked and why the use of an intermediary financial service provider such as BLM had been necessary. In that connection he explained, amongst other matters, that '[i]*n terms of the agreement between BLM and Nedbank, BLM is referred to as "the agent" and the liquidators are "the client". The relationship established, however, is one directly between the liquidators of the company in liquidation and Nedbank. Funds can only be moved out of the Nedbank Corporate Saver account with the written authority of the client.*'

[59] He stated further that:

> 25.7 Funds in a Nedbank Corporate Saver account are generally held on "call" and can be accessed at any time. However, the client could elect to place funds on 1-week fixed deposit, and by so doing increase the interest earned. When funds are placed on fixed deposit they are however not moved into a separate account, but merely transferred to a different type of investment within the same account. Nedbank recommended the use of such fixed deposits to earn a higher rate of interest.
>
> 25.8 BLM had nothing to do with these internal transfers within the Nedbank Corporate Saver account, or with the decision to make the transfers.
>
> 25.9 Whether the funds were on call or on 1-week fixed deposit within the Nedbank Corporate Saver account, they attracted the same fee payable to BLM. The Nedbank Corporate saver bank statements, with which you were regularly supplied, clearly reflect that an "agent fee" was being debited to the Nedbank Corporate Saver account, the rate of that fee, and the interest rate being achieved on the funds.
>
> 25.10 The fee paid to BLM was paid for the benefit of using the Nedbank Corporate Saver facility and obtaining the higher interest rates which came with it. BLM is also registered with the FSB. It is required to have, and has, a compliance officer and key individuals who are duly qualified to operate these systems and auditors to audit them. They are also required to have specific indemnity insurance (all of which cause BLM to incur costs and necessitate the charging of a fee for rendering services). BLM rendered services to a number of insolvency practitioners, to various attorneys, and to auctioneers and financial institutions.
>
> 25.11 It was clear from all L&D accounts lodged by [me] with you in matters where a Nedbank Corporate Saver account has been opened that there was such an account. Indeed, it is generally the first line item on the bank reconciliation at the very

> beginning of the L&D account. As stated, the Nedbank Corporate Saver bank statements were routinely provided to you either automatically or on request. Until raised in [my] oral interrogation you had previously never queried the use of the Nedbank Corporate Saver account, or the payment of an agent fee in respect thereof.
>
> 26. All of the above was canvassed and made clear at the enquiry during 2015.

[60] Van Zyl pointed out that he had stopped using the 7-day fixed deposit investment in the Nedbank Corporate Saver facility in May 2013 because it had ceased to offer any advantage on returns. He emphasised that the liquidators had earned considerable returns on the invested funds for the benefit of creditors, and observed that they had not been obliged, on a literalistic reading of s 394, to make any investment at all in interest bearing accounts. (The judgment of the court a quo notes that it appeared that Van Zyl had not opened any new Corporate Saver accounts since 2015.)

[61] He also pointed out that once he had become aware that he could obtain separate statements in respect of the fixed deposit investments and had consequently become astute to the fact that the liquidation and distribution accounts lodged by him and his co-liquidators had failed to reflect the whole amount of the fees debited in favour BLM, he had withdrawn the defective accounts and replaced them with accounts redrafted to reflect a breakdown separately showing gross interest, bank charges, BLM fees and net interest in respect of funds invested in the Nedbank Corporate Saver facility in both call and fixed deposit investments, in the manner directed by the Master. The amended or supplementary accounts had been lodged between 8 April 2016 and 29 July 2016, and duly advertised. No objections to them had been received from creditors or other interested parties.

[62] Van Zyl took issue with the Master's contention that he had impermissibly reflected BLM fees as a cost of administration within the meaning of s 342 of the 1973 Companies Act read with s 97 of the Insolvency Act. He stressed that BLM's fee had no connection with the fee to which the liquidators were entitled in respect of interest earned on funds invested, which, according to the tariff, was ten per cent on the gross return. He equated the fees paid to BLM in connection with the Nedbank Corporate Saver facility to those paid to other kinds of agent engaged by a liquidator for the purpose of a winding-up, such as attorneys and auctioneers. He also took issue, correctly, it seems to me, with the Master's allegation that he had needed permission from her office to engage BLM. He also denied the Master's accusation

that the fees paid to BLM were excessive and challenged her to demonstrate that '*there was any other investment available that would have secured the same returns*' as those obtained by investing in the Nedbank Corporate Saver facility through the offices of BLM. (It does not appear from the record that the Master rose to the challenge.)

[63] Insofar as the Master had indicated that she was considering acting against him in terms of s 379(1)(b) of the 1973 Companies Act, Van Zyl recorded that she had not identified any instance of his having failed to comply with a lawful demand by her office or by a commissioner appointed by the court under the Companies Act, and that she therefore appeared to be relying wholly on her opinions about his alleged non-compliance with various provisions of the Act. He submitted that removing him from office would be a disproportionate response to the instances in which shortcomings in his administration had been identified or alleged in her letter of 2 May 2017.

[64] With regard to the Master's stated intention to invoke her powers in terms of s 379(1)(e), Van Zyl submitted that it would be irrational and disproportionate to use the provision to remove him as liquidator in all matters. He pointed out that there were numerous other lesser sanctions that the Master could apply if she were minded to discipline him. He also illustrated, using three other identified matters in which he was a liquidator as examples, how his removal of office would be materially prejudicial to the best interests of the liquidations concerned. He put up letters from the major creditors (or their attorneys) in those liquidations, in which motivated concern was expressed about the prejudicial consequences of any decision to remove him as liquidator. It was clear from the detail he provided that the liquidations that he referred to by way of example – he called them 'a small sample' – were large and apparently complex undertakings that were already at an advanced stage of administration.

The Master's decision and her reasons for it

[65] On 31 August 2017 the Master communicated her decision to remove Van Zyl from all his appointments and set out her reasons for doing so in a 19-page letter made up of 77 numbered paragraphs. It is clear that the Master had been taking legal advice on the issue from counsel some weeks before her decision was communicated. This

became apparent when the State Attorney sent a letter on 26 July 2017 to Van Zyl's attorneys in which a reasoned decision to remove Van Zyl from office was set out. The State Attorney shortly thereafter, on the same day, advised that the letter had been sent in error and was a draft produced in the course of taking advice from counsel. The Master objected on the grounds of privilege to any reference being made to the letter in the proceedings before Engers AJ. The learned judge at first instance made no reference to the issue in his judgment, but it seems to me that privilege is lost when the privileged material is published. Whether the letter should nevertheless be excluded from being used in evidence on grounds of fairness or policy is another question. There is no need to answer it, because, like the court a quo, I have not found it necessary to go into the content of the letter, which was in any event included in the papers in almost completely redacted form pending a determination (which did not happen) whether regard could or should be had to the detail of its content.

[66] Central to the reasons given by the Master for her decision to remove Van Zyl from all his appointments as liquidator was his use of the Nedbank Corporate Saver facility, and what the Master considered to be his associated breach of statutory duties under ss 394 and 403 of the 1973 Companies Act.

[67] The Master recorded (in paras. 5-12 of her reasons letter) that she considered that the periodic movement by the liquidators of funds invested on call in the Corporate Saver accounts to fixed deposit and then back to call had been in contravention of s 394(1)(d), which requires that any withdrawal from a savings account or fixed deposit be made only by way a transfer to the current account opened by the liquidator in terms of s 394(1)(a). The Master was of the opinion that the aforementioned mode of operating the Corporate Saver accounts had made it possible for funds belonging to the companies in liquidation to be paid to BLM without her knowledge or consent, and also without the knowledge of Van Zyl. She stated that this had evinced a situation in which Van Zyl had not been in control of the funds placed on 7-day fixed deposit and that he had been '*unaware of what was happening to those funds, more particularly in respect of the earning by BLM of an agent's fee in that regard*'. The Master rejected Van Zyl's contention that the funds invested in the Corporate Saver were in each case single accounts and not separate savings and fixed deposit accounts.

[68] The Master also regarded the debits in respect of BLM fees on the funds held on 7-day fixed deposit as evidencing contraventions by Van Zyl of s 394(4) of the Act, which requires that all cheques and orders drawn on any account opened in terms of subsection (1) shall contain the name of the payee and the cause of payment. (She dealt with this at paras. 13-16 of her letter.) The Master acknowledged that the wording of s 394(4) '*no longer coincides with the reality of developments such as electronic banking'* and stated that she accordingly placed '*no store on the references to "cheques or orders" and to "payee"*'. She maintained that the '*spirit of the provision*' nevertheless required adherence '*viz. that the identity of the payee and the cause of all payments must be ascertainable by the Master*'. At para. 16 of her reasons, the Master stated that she considered the payment of part of BLM's fees from the funds held on fixed deposit evidenced '*a serious contravention*' of s 394(4) '*as it concealed the fact that monies were being dispensed from the accounts of the companies in liquidation without any disclosure thereof*'.

[69] The reasons given by the Master for Van Zyl's removal also included a finding (at paras. 17-19) that he had contravened s 394(7) of the Act. Section 394(7) provides for the monetary penalisation of a liquidator who unlawfully uses the assets of a company in liquidation other than for the benefit of the company. The basis of the alleged 'contravention' relied on by the Master in this regard was that Van Zyl had, according to her, '*permitted a third party, BLM, to obtain significant, in fact exorbitant, benefit from providing little, if any, service to the companies in liquidation*' and thereby *'... have permitted the assets of the companies in liquidation to be used otherwise than for their benefit, and more particularly for the benefit of BLM*'.

[70] At paras. 20-36 of her reasons letter, the Master found that Van Zyl had contravened s 403(1) of the 1973 Companies Act and s 92(1) and (2) of the Insolvency Act. The provisions in the respective statutes are essentially mirror images of each other. They both provide for the framing by the liquidator, or trustee, as the case might be, of vouched liquidation and distribution accounts.[22] The Master's finding was founded on the omission in some of the liquidation and distribution accounts that had been lodged of any disclosure of the fees debited in

[22] Section 403 has been quoted in full in note 21 above.

favour of BLM in respect of the funds held in the 7-day fixed deposit accounts. The circumstances in which this occurred have been described at length above. And it will be recalled that all of these omissions had been rectified more than a year before the Master removed Van Zyl from his appointments.

[71] The Master stated that the accounts lodged by Van Zyl had been confirmed on affidavit (as prescribed by the provision) had weighed significantly in the making of her decision that he was '*no longer suitable to hold the office of liquidator in any of the matters in which* [he had] *been so appointed*'. She reasoned '*If the Master cannot rely upon the word of a liquidator given under oath, the entire integrity and efficacy of the system breaks down*'. The Master stated that she considered that Van Zyl's admission that he had been ignorant of the substantial amounts debited in respect of BLM's fees demonstrated '*gross incompetence*' and a '*total dereliction*' of his duties as liquidator.

[72] In paragraphs 37 – 72 of her reasons letter, the Master treated of six issues that she characterised as evincing a breach by Van Zyl of his fiduciary duties. Four of these related to BLM's fees. The Master considered that the absence of a written mandate in respect of BLM's fees, the absence of a justifiable basis for the fees, the apparently arbitrary nature of the fees and the 'grossly excessive' scale of the fees demonstrated that Van Zyl had not '*properly performed his fiduciary duties*'. The other two issues treated as breaches of fiduciary duty were (i) that Van Zyl had in certain instances allowed funds invested in the Nedbank Corporate Saver facility to remain on 7-day fixed deposit even though the returns offered on such deposits had fallen marginally below those obtainable in respect of funds invested on call and (ii) that Van Zyl had failed to claim a tax credit on the value added tax that had been paid on BLM's fees in respect the funds held on fixed deposit. (The alleged failure to claim VAT credits was not a matter upon which Van Zyl had been invited by the Master in her aforementioned letter of 2 May 2017 to make representations.)

[73] The Master brushed aside creditors' concerns that the removal of Van Zyl as liquidator in certain of the matters might prejudice the efficient conduct of the winding-up of the companies concerned by noting that there would be nothing to prevent the remaining or replacement liquidators from engaging Van Zyl's services to assist them where required.

[74] Van Zyl launched the application to review the Master's decision on 5 September 2017. The matter was heard by the court a quo on 4 December 2017, and judgment was delivered four and a half months later, on 16 March 2018.

The judgment of the court a quo

[75] The court a quo approached the review on the basis that the impugned decision had entailed the exercise by the Master of a discretionary power. The court, however, omitted to consider and determine whether the discretion concerned was a true discretion or a broad one. It appears to have proceeded on an assumption that a true discretion was involved. Such an assumption seems to underlie the judge's statement that the court could interfere with the Master's decision only if it was 'unreasonable'.

[76] For the reasons given in the first section of this judgment, I consider, with respect, that the court a quo was misdirected in its approach, and consequently failed to appreciate the breadth of the review insofar as it was brought under s 151 of the Insolvency Act. I think that this determined the court's approach that it would not interfere with the Master's decision unless the decision had been shown to be 'unreasonable', in the sense of being shown to have been 'clearly wrong'.

[77] In the context of what eventually became the Master's principal complaint, the learned judge a quo held that the alleged non-compliance by Van Zyl with s 394 of the 1973 Companies Act lay 'at the heart of the matter'. Engers AJ was inclined to the view that the funds placed by Van Zyl in Nedbank Corporate Saver accounts had been placed in single accounts administered according to a mandate that provided that those parts of the funds in the accounts held on 7-day fixed deposit attracted a different rate of interest to the funds in the accounts that were held on call. He held that even if the funds invested on call in the Nedbank Corporate Saver accounts were in separate accounts from the funds held on fixed deposit, the non-compliance with s 394 occasioned by the failure to effect the transfers from the call accounts to the fixed deposit accounts through the current accounts that had been opened in terms of s 394(1)(a) was of a technical nature. Strict compliance would, in the judge's opinion, have entailed '*an unnecessarily cumbersome way of going about things*'. He did not say so expressly, but I think that by the expression '*unnecessarily cumbersome*', the learned judge must have been implying that the manner in which

the transfers occurred did not materially thwart the achievement of the objects of the provision.

[78] The learned judge a quo, nevertheless considered that there was no basis for interference with the Master's decision to remove Van Zyl from as liquidator of the ten companies in respect of which she had investigated his conduct. His reasoning was to a material extent premised on his acceptance of the Master's findings that Van Zyl had acted in breach of his '*fiduciary duties*' in regard to the winding-up of those companies '*in at least three respects*'.

[79] The judge treated of these breaches, and the resultant failure by Van Zyl to faithfully fulfil his duties in terms of s 403 of the 1973 Companies Act, as follows at paras. 28-35 and 38 of his judgment:

> 28. The Master alleges that [Van Zyl] breached his fiduciary duties towards each of the companies. There are at least three aspects to this.
> 29. The first (although not chronologically) is [Van Zyl's] failure to notice that the fixed deposits were at a lower rate than the Corporate Saver in 2012/2013 [August 2012 – May 2013]. This failure spanned a total of some 8 to 8½ months or about 34 weeks. In my view, this clearly amounted to negligence, possibly even gross negligence on the part of [Van Zyl].
> 30. The second aspect is [Van Zyl's] failure to realise that the funds in the fixed deposit were not accounted for in the statements which he received. Coupled with that is the fact that [Van Zyl] did not have control over those funds when they were in the fixed deposit.
> 31. It is common cause that [Van Zyl] did not have any idea of what actually happened to the funds when in the fixed deposit. By his own admission, he thought that the fees shown in the Corporate Saver statements represented the total fee charged by BLM. In the Asch estate, which is one of ten, BLM took fees of R878 598,50 on the fixed deposit, and fees of RR834 980,85 on the Corporate Saver [i.e. the funds invested on call]. Until he became aware that he could get statements or registers for the fixed deposit, and started doing so, any amounts could have been deducted from the fixed deposit without his ever knowing about it. The applicant simply had no control over those funds.
> 32. To allow a situation like this to continue for several years is in my view also grossly negligent. It should have become apparent to [Van Zyl] when he first began to put funds into the fixed deposit, that the changes [?charges] in these funds were not being shown on the statements. Had he done this he would presumably have found out that he could get statements for the fixed deposit, and would have done so. That would have had two consequences: (i) he would have been aware of the true fees being taken by BLM and (ii) he would not have compiled and given the Master accounts which were inaccurate and misleading.

> 33. The third aspect is the applicant's failure to obtain the best possible rates for BLM's fees. According to [Van Zyl], the take-on fee was 1% of the capital. This was subsequently varied (upwards). Yet, when in 2013 there was a complaint that the fees were excessive, [Van Zyl] apparently had no difficulty in negotiating a lower fee. This implies that the fees were indeed excessive. [Van Zyl] has not really dealt with this point satisfactorily, to explain how and why the fees were agreed and varied.
> 34. Because of all this, [Van Zyl] confirmed under oath, the correctness of accounts which did not show the true position. That constituted a breach of his duties in terms of s 403 [of the 1973 Companies Act].
> 35. In the light of all the above, I consider that [Van Zyl's] challenge to the decision on the basis that the Master's decision was unreasonable, at least in regard to the ten companies, must fail.
> 36. …
> 37. …
> 38. As I have stated above, [Van Zyl's] conduct in respect of the Corporate Saver accounts, and his reporting to the Master thereon, constituted negligence, and in some instances gross negligence. That would certainly affect his suitability to administer those estates, and would justify the respondent in removing [Van Zyl] as no longer being suitable in the companies concerned.

[80] The quoted passage demonstrates that court a quo uncritically accepted, and even endorsed, the Master's contention that Van Zyl had acted in breach of his fiduciary duty in certain respects. For the reasons that I shall give presently when dealing with the cross-appeal, I consider that the court a quo, in common with the Master, proceeded on the basis of a fundamental misconception of the import of a liquidator's fiduciary duty. I shall also explain why I consider that the court a quo was wrong to have characterised the degree in which Van Zyl's conduct fell short of perfection as evincing gross negligence and failed, in any event, to weigh the minimal consequences of the demonstrated negligence in the balance against the extremity of the Master's response.

[81] The court a quo did not make any findings as to the extent, if any, the Master's decision-making had engaged in the careful weighing exercise that had been required were she to act in accordance with the principles enunciated in the jurisprudence referred to earlier in this judgment. Despite having noted the facts, the judge also did not attach any significance in his reasoning to the consideration that all of the identified deficiencies in Van Zyl's administration of the 10 estates that had been investigated had been remedied more than a year before the Master made her

decision, and that there was no evidence that they were likely to recur. The availability of less extreme corrective measures and the question whether the Master's resort to an 'extreme step' in the circumstances was a proportionate response to the identified shortcomings also did not receive consideration.

[82] The learned judge upheld the review challenge to the Master's decision to remove Van Zyl from office in respect of those companies in liquidation in which his conduct had not been individually investigated on the basis that she could not have taken into account the interests of the liquidations in those matters, and that her decision therefore fell to be set aside in terms of s 6(2)(e)(iii) of PAJA.[23]

[83] The court a quo found that Van Zyl had failed to substantiate his allegation that that the Master had been biased or had acted with an improper motive in conducting 'a campaign to have him removed as liquidator'. The learned judge did not, however, set out an analysis of the facts and arguments put up by Van Zyl in support of that ground of his review application or reason his evident rejection of them.

[84] The aforementioned misdirections in the judgment of the court a quo concerning the approach to the review and the character and effect of Van Zyl's identified misdemeanours were sufficiently material, in my view, to justify this court assessing the review completely afresh on appeal, untrammelled by the effect of the findings at first instance.

Determination of the appeal by the Master against the decision of the court a quo

[85] As already noted, the Master appears to have overlooked the confining effect of the expressions '*no longer suitable*' and '*the company concerned*' in paragraph (e) of s 379(1) of the 1973 Companies Act in making a blanket decision to remove Van Zyl from all of his appointments without any specific investigation in the vast majority of cases into the particularity of his conduct of the winding-up of the companies concerned. Insofar as her decision to remove Van Zyl as liquidator in those cases purported to have been predicated on s 379(1)(e) of the 1973 Companies

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[23] Section 6(2)(e)(iii) of PAJA provides:
A court or tribunal has the power to judicially review an administrative action if—
(e) the action was taken—
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered; ...

Act, it is clear that the Master acted on the basis of a material misapprehension of the import of that provision; and the decision was liable, on that account, to be set aside on conventional review grounds in terms of s 6(2)(d) of PAJA because it was materially influenced by an error of law.

[86] In addition, apart from in respect of the ten companies that are the subject of Van Zyl's cross-appeal, there was no evidence that Van Zyl had failed to perform satisfactorily any duty imposed upon him by the Act or to comply with a lawful demand of the Master. In the circumstances it had not been open to the Master to found her decision to remove Van Zyl as liquidator of the companies whose management under liquidation had not been specifically investigated by her on s 379(1)(b) of the 1973 Companies Act, and any reliance by her on that provision in support of her decision in respect of what might be called the unspecified cases cannot withstand scrutiny.

[87] Furthermore, as the court a quo correctly held, the Master gave no consideration to the effect of Van Zyl's removal on the best interests of the winding-up processes that were in progress in the 90+ cases that she had not specifically investigated. Her decision also fell to be impugned in terms of s 6(2)(e)(iii) on that account, as found by the court a quo.

[88] Any one of the aforementioned flaws in the decision-making would, on its own, justify the review and setting aside of the Master's decision in respect of the 90+ unspecified cases.

[89] Furthermore, as will appear from my discussion of the merits of Van Zyl's cross-appeal later in this judgment, I consider that the Master's contention that she was justified in removing Van Zyl from all of his appointments because her assessment of his conduct in the ten corporations in liquidation that she had investigated resulted in her no longer being able to trust him as a liquidator was fundamentally misdirected in a number of material respects. At this stage it suffices to note in that regard that the Master has no general power to remove a liquidator because she has lost trust in him. Her power is limited to the specific instances set forth in s 379(1), and she is bound to exercise it in accordance with the confining precepts of the provision. If, as I have identified, she acted outside the limits of that power, she did so unlawfully.

[90] It is a basic tenet of our constitutional scheme and the rule of law that those who have been invested with public powers '*are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*'.[24] The Master's remedy, if she were of the opinion that her findings in respect of Van Zyl's conduct in the ten matters that she investigated afforded good cause for his removal from all the other appointments he held, would have been to apply to court for his removal in terms of s 379(2).[25] It will be apparent from this judgment that on the available facts I do not think that any such application would have succeeded.

[91] There is accordingly no reason to fault the decision of the court a quo to review and set aside the Master's decision to remove Van Zyl from his appointments as liquidator of the companies that had not been the subject of her investigation into his conduct in terms of s 381 of the 1973 Companies Act. The court's decision in that respect was well-founded, irrespective of whether the review was decided in terms of s 151 of the Insolvency Act or s 6 of PAJA. The Master's appeal must therefore fail.

Determination of the cross-appeal by Van Zyl against the decision of the court a quo

[92] I turn now to Van Zyl's cross-appeal against the dismissal by the court a quo of his application to review and set aside the Master's decision to remove him from his appointments as liquidator of the ten corporations identified in paragraph (a)(i)-(x) of the court's order.[26] It is convenient to begin with what Engers AJ considered lay at the heart of the matter: Van Zyl's alleged non-compliance in various respects with s 394 of the 1973 Companies Act.

[93] I am inclined to agree with the learned judge's finding that the funds invested on call or deposit in the Corporate Saver facility were placed in a single account in respect of each corporate entity under liquidation to be administered differently according to account holder's instructions. The fact that they were identified in the

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[24] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458, at para. 58.

[25] For the reasons that will become apparent when I deal with the cross-appeal later in this judgment, I do not think she would have enjoyed good prospects of success with any such application.

[26] The corporations concerned are those named in note 18 above.

banker's books under a single account number in each case irrespective of whether the invested funds were held subject to withdrawal on call or on fixed term deposit supports such an inference. Furthermore, the evidence concerning the conduct of the accounts in the Corporate Saver facility does not suggest that the funds initially held there on call that were periodically held on fixed term deposit were *withdrawn* by the liquidator in the sense evidently contemplated by the word '*withdraw*' in s 394(1)(d). The funds were not taken out of the Corporate Saver accounts; on the contrary they remained invested there, but on altered terms.

[94] If the characterisation of the accounts were really as important in the circumstances as the Master would appear to have considered, it is puzzling that there was apparently no evidence adduced by her representatives from Nedbank and BLM at the s 381 enquiry as to precisely how the facility operated, and the contractual mechanics of how the interest came to be calculated on the basis of BLM's aggregate or bulk investment rather than that of the individual investors introduced by BLM. Such evidence could also have shone light on the detail of the contractual arrangement in terms of which BLM's fees were debited directly from the account, as it would appear was also done in the matter of *The Standard Bank of South Africa Limited v The Master of the High Court, Eastern Cape, Port Elizabeth and Others* [2018] ZAECPEHC 55; [2018] 4 All SA 871 (ECP).[27] The absence of such evidence in this case left the answers to what were supposedly important questions, such as the basis for the direct debiting, open to speculation – an unwholesome situation for a decision-maker contemplating taking an 'extreme step'.

[95] But even assuming that two accounts had been involved, that would not have been material in my view. In assessing the materiality of the alleged transgressions

[27] I appreciate that the position was not necessarily the same in the Corporate Saver investments in which Van Zyl was involved, but it would appear from the judgment in *Standard Bank v The Master, Port Elizabeth* that the intermediary through whom the liquidator in that case had invested in the Corporate Saver facility was paid its commission, which was a percentage of the interest earned by the company in liquidation, by virtue of an agreement with Nedbank, rather than the liquidator. The company in liquidation in that case was entitled in terms of the applicable contractual arrangements only to the net interest on the Corporate Saver investments, that is net of the commission payable by Nedbank to the intermediary; see in this regard paras. 69 and 70 of the judgment in particular. That there would have been some privity of contract between BLM and Nedbank in respect of the Corporate Saver investments is obvious, for how otherwise would the interest rates be determined with reference to the BLM's aggregate investment, rather than the individual investment of the company in liquidation? Indeed, Van Zyl's attorney's abovementioned letter of 12 May2014 – the response to the Master's initially advanced 'charges' against Van Zyl – records that a copy of the agreement between BLM and Nedbank was provided to the Master.

by Van Zyl of s 394 of the 1973 Companies Act, one has to ask what the objects of the provision are, and to what extent, if any, Van Zyl's conduct of the accounts conducted in the Nedbank Corporate Saver facility undermined or thwarted them.

[96] The evidence showed, and indeed the Master acknowledged, that some of the prescripts of s 394 have become outmoded because they hark back to the age before electronic banking. Literally applied, liquidators would be obliged, in terms of s 394, to make all payments by the company in liquidation by cheque; EFT's would be irregular because s 394 requires that all payments from the funds of a company in liquidation must be made by cheque or order drawn on the current account. A hardcopy document, physically endorsed with the prescribed information, is what is required by the provision, construed strictly according to its tenor. That is not how things work in the electronic age. It is much safer, more efficient, and (according to Van Zyl's uncontroverted evidence) cheaper to make payments by EFT. EFT's do not, by themselves, create a documentary record of the transaction involved in the way that a cheque or money order did. The documentary record of an EFT transaction, which proceeds from a digitally given instruction, is most commonly to be found as an entry on a bank statement or a computer generated payment confirmation printout. It emerged in the evidence that the Chief Master had issued a circular encouraging liquidators to use EFT's instead of cheques; quite understandably, if the real concern is the optimally efficient and beneficial conduct of liquidations. No purpose is served in the digital age by insistence on a strictly formalistic application of s 394 according to the letter of its 1973 text.[28]

[97] The primary object of s 394(1)-(6) is to regulate the manner in which the company in liquidation's funds are held and expended in a manner that facilitates the keeping of a vouched record that can be easily checked by the Master and any other interested person. Nothing about the way in which the companies' banking accounts were operated by Van Zyl thwarted the objects of s 394. It is true that Van Zyl initially failed to properly vouch for the gross interest earned on the funds on fixed deposit and for the fees levied by BLM in respect of the funds held on fixed deposit,

[28] Indeed, as long as a century ago, it was held, in respect of a predecessor of s 394 (s 100 of the Insolvency Ordinance 6 of 1843), that '*A further objection relates to section 100 of the Ordinance not having been complied with, in that the cheques drawn by the trustee did not express the cause of indebtedness; it is admitted that this was so, but the law on this head appears to have been, in practice, never regarded as strictly to be carried out.*'; see *Louw and Dummer v Fagan* 1914 CPD 630 at 644.

but that was because he did not obtain the relevant statements from the bank, not because the operation of the accounts inherently inhibited his ability to have done so, or indeed that of the Master herself to have obtained them directly from Nedbank in terms of s 394(5).

[98] As it was, the vouchers that Van Zyl submitted with the liquidation and distribution accounts that he lodged did disclose the use of the fixed deposit aspect of the Corporate Saver accounts, the payment of 'agent's fees', and the net interest paid on funds invested on fixed deposit. In the result, sufficient information had been disclosed to enable the Master or any other interested party to obtain further particularity, should they have wished to do so. The Master's retort (in para. 30 of her reasons letter) that her office '*cannot be expected to peruse each and every bank statement and it is for this reason that my office relies upon liquidators to make a full disclosure in the liquidation and distribution accounts*' does not bear scrutiny. As discussed below, the very purpose of the bank statements and vouchers that liquidators are required in terms of s 403(3) of the Act to submit together with any liquidation and distribution account that they lodge is to equip the Master to audit and verify the information in the lodged accounts.

[99] The conduct of the accounts in the Corporate Saver facility, moreover, did not entail that there was a loss of control by the liquidator over the invested funds, as found by the Master; and apparently accepted by Engers AJ. I do not agree with the statement in paragraph 25 of the court a quo's judgment that the liquidator would not know from the statements he received in respect of the funds invested on call what was happening to funds being administered under 7-day deposit instructions. That inference is inconsistent with the effect of the uncontroverted evidence. Van Zyl did know how much was being administered in terms of the fixed deposit arrangement because the placement of money on fixed deposit followed in each case on his instructions, and was reflected on the call account statements. He also knew what the net return on the fixed deposit was because that also reflected on the statements rendered in respect of the amounts invested on call. The funds, whether they were on call or on fixed deposit, could not be dealt with other than on the liquidators' instructions. Where was the loss of control? The debiting of BLM's fees to the accounts can, as a matter of probability, only have occurred pursuant to a pertinent provision in the contractual arrangements between the liquidator, the intermediary and

the bank. As noted, as far as we can tell, the detail of these arrangements does not appear to have been established at the s 381 enquiry.

[100] The only thing that Van Zyl was confessedly ignorant about was that the agency fee in respect of the funds held on fixed deposit was not included in that reflected on the call account statements. However, there is nothing to indicate that the fees debited in favour of BLM, whether in respect of the funds held on call or those invested on fixed deposit, in point of fact differed from what Van Zyl had agreed to. They were calculated on an agreed percentage basis with reference to the total amount of money invested at any time in Nedbank's Corporate Saver. Van Zyl's failure to notice that the BLM fees reflected on the bank statements that he received in respect of the funds invested on call were significantly less than what he should have expected to be debited on the total sum of the funds he had invested was remiss, but it in no way adversely affected the actual administration of the winding-up of the companies concerned in any way that was shown in the evidence. It had no bearing or effect on the amount of the proceeds of the realisation of the companies' assets that was available for distribution to creditors. Ironically, the only practical consequence of Van Zyl's shortcoming in this connection, apart from his defective reporting in the liquidation accounts, was that he under-calculated the liquidators' fee entitlement in respect of interest earned because he calculated the amount on the net interest instead of on the gross interest as permitted in terms of the tariff.

[101] For all these reasons I consider that the Master's finding that Van Zyl's conduct evinced 'serious contraventions' of s 394 of the 1973 Companies Act was wrong. Were she minded to take punitive steps against the liquidators for their negligent omission to check the correctness of the fees paid to BLM and to report the full fees paid in respect of the funds invested on fixed deposit in the liquidation and distribution accounts, an appropriate and suitably proportionate means of doing so would have been to disallow all or part of the liquidators' fees based on the returns earned on the investments that were inadequately vouched and reported.

[102] The Master's finding that Van Zyl had 'contravened' s 394(7) of the 1973 Companies Act was fundamentally misdirected. It is not a provision that is capable of being contravened. It is a provision that empowers the Master to penalise a liquidator for using the assets of a company in liquidation for purposes other than the benefit of the company, or for failing to timeously deposit moneys received by the liquidator for

the company's account into its bank account. The Master did not see fit to impose any such penalty in the ten matters under consideration in the cross-appeal, and her invocation of s 394(7) was therefore an irrelevant distraction premised on a material misdirection in respect of the applicable law. All that is germane in this connection is the Master's factual finding that the payment of fees to BLM was an application of the companies' funds other than for the companies' benefit. That finding was inconsistent with the evidence, and entirely devoid of merit.

[103] The fees paid to BLM were in respect of the facilitation of the investment of the funds of the companies in liquidation through the Corporate Saver facility. The evidence that that could be done only by using the offices of a licenced financial service provider like BLM was uncontroverted, as was the evidence that the incurrence of the expenses in respect of BLM's fee was justified by the higher rates of return obtainable by investment in the Corporate Saver. The fees were therefore undisputedly paid for the benefit of the companies concerned. Even if the benefits to the companies could notionally have been enhanced by Van Zyl negotiating a lower fee, that would not detract from the fact that the fees that were actually paid were expended for the companies' benefit. Of course BLM also benefitted from the payment of the fee, but so would any recipient of a payment by the liquidator in consideration for a service rendered to the company or in furtherance of its winding-up.

[104] The fact that certain of the liquidation and distribution accounts lodged by Van Zyl and his co-liquidators were defective, which resulted in the liquidators falling short in the discharge of their duties in terms of s 403 of the 1973 Companies Act, was inextricably bound up in their conduct of the Corporate Saver investment accounts, and properly fell to be addressed by the Master as an incidence of that conduct, and not something discrete from what she chose to deal with as contraventions of s 394 of the Act. It was not suggested that Van Zyl and his co-liquidators had been guilty of any deliberate misrepresentation in the accounts that were lodged, or that Van Zyl's accompanying verifying affidavits in terms of s 403(2) had been made perjuriously. The Master's statement that if she could not rely upon the word of a liquidator given under oath the entire integrity and efficacy of the system would break down was inappropriately hyperbolical in the circumstances.

[105] The whole purpose of the lodgement and advertisement of liquidation and distribution accounts in terms of s 403 is so that their content can be interrogated, and if needs be questioned. The system provides for the reality that such accounts will not always be correct or indisputable, and affords mechanisms for their correction. It just does not follow that because a liquidator lodges an account that is defective because of some or other oversight, even a negligent one, he or she is thereafter not to be trusted in that or any other liquidation in which he or she might be engaged. The reasons for the mistake, its practical effects, whether it is remediable, and the likelihood of its recurrence are just some of the factors that the Master would have to take into account before she could rationally come to the far reaching conclusion that the liquidator was unfit to retain office on account of the mistake. There is nothing in the evidence to indicate convincingly that the Master undertook such an exercise, and, if she did, the conclusion that she reached was entirely disproportionate in the factual context. This points strongly to the irrationality of her decision.

[106] Turning now to consider the Master's finding that Van Zyl had breached his fiduciary duty in the various respects described in paragraph [72] above. It is clear that the Master misdirected herself as to what the concept of fiduciary duty involves (as to which see *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2003] ZASCA 137; [2004] 1 All SA 150 (SCA); 2004 (3) SA 465 at paras. 27-32 and *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-180).

[107] That liquidators stand in a fiduciary relationship to the companies under their administration is trite. Breach of fiduciary duty is a very serious infraction by any person placed in a position with fiduciary responsibilities; it generally involves dishonesty or lack of probity. (The case of *Standard Bank of South Africa v The Master of The High Court and Others* 2010 (4) SA 405 (SCA) gives an example of a matter in which the liquidators were in breach of their fiduciary duties, when they used the company's money to fund litigation in which their personal interests rather than those of the company were in issue and concluded contracts in which their interests were conflicted with those of the company whose interests they were required to foster.)

[108] Breach of fiduciary duty entails something materially different from the negligent discharge of his or her functions by a person in a fiduciary position. Millett LJ (as he then was) stressed this axiom in *Bristol and West Building Society v*

Mothew (t/a Stapley & Co) [1998] 1 Ch 1, [1996] 4 All ER 698 (CA) at p.712 (All ER), noting that '*The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty'*. The matters that the Master characterised (and the court a quo accepted) as breaches by Van Zyl of his fiduciary duties were all instances in which she considered that he had acted negligently or incompetently; not with dishonesty, disloyalty or infidelity. They did *not* constitute breaches of his fiduciary duty.

[109] But quite apart from the legal mischaracterisation of Van Zyl's conduct as breaches of his fiduciary duty, the instances identified by the Master in that connection were also misconceived, either factually or as to their significance.

[110] The absence of a written mandate agreement with BLM or an insufficiently detailed recordal of the terms of the mandate in the instances where there were written mandates might very well have been legitimate reason for the Master to be dissatisfied. But it was within her statutory powers to direct that the position be remedied. There was no indication in the evidence, that when the Master did require remedial steps to be taken, Van Zyl did not punctiliously and expeditiously comply with her instructions; indeed, the evidence is to the contrary. The only material matter in respect of which the deficiencies in the recordal of the mandates appear to have been pertinent was the fixing of the percentage of the total sum of funds invested with reference to which BLM's fee fell in each case to be determined. That it must have been recorded in some or other manner, however, seems to follow from Nedbank's recorded practice of debiting the fees at source. The fees that were debited were recorded in the relevant bank statements, and the manner in which they were computed could be ascertained from the statements.

[111] The evidence did not support the Master's conclusion that the there was no justifiable basis for the fees paid to BLM. The justification was that it enabled the companies in liquidation to obtain a higher return on the investment of available funds than would otherwise be generally obtainable.

[112] The Master's finding that the fees paid to BLM were arbitrary or excessive seems to me to rest on shaky foundations. It is certainly not borne out by the content of the testimony of an expert witness who gave oral evidence at the instance of the Master at the s 381, enquiry, Mr Habib. Judged by the comparative fee computations referred to in that evidence in the transcript included in the papers before the court a quo, BLM's fee seems to have fallen within the range commonly charged in the market. But even if the Master were justifiably of the opinion that Van Zyl had incurred an excessive liability in respect of the fees paid to BLM, she could require him to adjust the accounts, as provided for in terms of s 407(3) of the 1973 Companies Act, to allow only what she considered would have been reasonable expenditure. The result of any such direction would be that Van Zyl and his co-liquidators would have to bear the difference between the amount of the excessive fee and that of the amount that they reasonably should have incurred out of their own pockets.

[113] The Master's counsel did not seek to support in argument before us her finding that Van Zyl had been in breach of his fiduciary duties by failing to have claimed certain VAT credits, which means that all that still remains to be considered under this heading is her finding that he had been in breach of his duties by allowing funds to remain invested on 7-day deposit at times when the rate of return on such investment had fallen marginally below that which could have been obtained on funds invested on call. The Master considered, and the court a quo appears to have concurred, that Van Zyl had been 'grossly negligent' in that regard.

[114] It was noted in *MV Stella Tingas ;Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another* [2003] 1 All SA 286 (SCA),2003 (2) SA 473, at para. 7, that '[g]ross negligence is not an exact concept capable of precise definition.' On any approach, however, it entails a *radical* departure from the standard of the reasonable person. After referring to several examples of attempts at defining the concept in a number of judgments and textbooks, Scott JA concluded in *Stella Tingas* loc. cit.: '*It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-*

taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity'. In *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA), at para 144, it was noted, in regard to conduct of directors of companies, that '*There is a long history of courts treating gross negligence as the equivalent of recklessness, when dealing with the conduct of those responsible for the administration of companies, and recklessness is plainly serious misconduct*'. That observation also would apply by parity of reasoning to liquidators of companies.

[115] I do not agree with the characterisation of the liquidator's failure to notice a marginal interest rate differential for 8 months as 'grossly negligent'. 'A total failure to take care' or reckless indifference might have been demonstrated had it been shown that there had been a very material discrepancy between the net returns realised on the Corporate Saver investments and other available savings investments, which could not have escaped notice by any liquidator paying even a modicum of attention to his responsibilities. There was no such evidence. The bank statements put in evidence, moreover, show that the liquidators did give attention to the funds in the accounts on a regular basis. The transfers and payments reflected in the statements confirm that. The evidence does not support the conclusion that Van Zyl was reckless, or that he could not care less. Logic suggests, and common experience tells, that it is most unusual, at least at the time of investment, for the return offered on a fixed term deposit investment to be less than that obtainable on a call deposit. In the current matter, the unusual happened, but the difference in the respective rates was so marginal – at its greatest 0,09% per annum – that it could easily go unnoticed, and its effect in rands and cents was small.

[116] The extent to which Van Zyl and his co-liquidators' conduct in failing to notice and act on the rate of return aberration might be adjudged to have departed from the standard reasonably expected of a liquidator had to be weighed mindful that there is no statutory duty on a liquidator to invest funds that are not immediately required at the highest available interest rate. He is in fact notionally entitled to hold all of the company's money in a current account, rather than an interest-bearing

savings or fixed term deposit account.[29] Indeed, until, the substitution of s 394(1) of the 1973 Companies Act, in terms of s 6 of the Companies Amendment Act 63 of 1988, a liquidator needed to obtain permission from the Master to invest funds that were surplus to immediate requirement in an interest bearing account.

[117] Furthermore, when it comes to interest rates, the highest attainable rates available can potentially come with increased risk. The express limitation of investment options available in terms of s 394 of the old Companies Act implies an understandable intention by the legislature that funds not required immediately should be conservatively invested by liquidators. Huisamen AJ made that point in *The Standard Bank of South Africa Limited v The Master of the High Court, Eastern Cape, Port Elizabeth and Others* [2018] ZAECPEHC 55; [2018] 4 All SA 871 (ECP) at paras. 86-87.

[118] It is of interest to note that a master who is concerned about the conduct of a company in liquidation's bank accounts is able to gain insight into the conduct of the accounts at any time, even before a liquidation and distribution account is lodged (s 394(2),(3) and (5)). A master who considers that a liquidator is not managing available funds to best advantage is able to take over control of the invested funds by directing that they be transferred to the Guardians Fund (s 394(6)). The rates of return given on funds invested in the Guardians Fund have historically been conservative; and they are determined annually by the Minister, and not monitored weekly or monthly to determine whether they should be increased or lowered. Nothing about Van Zyl's management of the invested funds appears to have been of sufficient concern to have moved the Master to use her power to intervene in Van Zyl's conduct of the various banking accounts in issue. On the contrary, she was instead content to leave him in charge of the investments for an extended period of time after she was apprised of the relevant facts before she announced a decision to remove him from

[29] The learned judge a quo suggested in a footnote that the omission in the provisions of the imposition of any positive duty on liquidators to place idle funds in interest bearing investments might have been because 'the 1973 Act dates back to an era when inflation was still relatively low, and it was not as crucial as it is today to ensure that one's money grows to keep pace with inflation.' According to data published online by Statistics South Africa, the reported CPI headline year on year inflation rate in 1973 was in fact more than double that in 2018; viz. 9,45% as against 4,7%. http://www.statssa.gov.za/publications/P0141/CPIHistory.pdf? (accessed 24 February 2019)
Inflation had indeed become an especially pressing issue at the time that s 394(1) was substituted in 1988, doing away with the requirement that liquidators first obtain permission from the Master before making investments in interest bearing savings or fixed deposit accounts. The CPI year on year inflation rate in 1986 was 18,7% and in 1987, 16,1%.

office. Her conduct was inconsistent with what might reasonably have been expected of a conscientious functionary in her position who was genuinely concerned that a liquidator had been grossly negligent in the management of a company's funds.

[119] If it were considered appropriate by the Master to penalise the Van Zyl and his co-liquidators for not being astute to the fact that they could, for a few months, have done slightly better for the companies concerned by keeping the funds invested on call, the appropriate and proportionate manner of doing that would have been to disallow part of their fees so as to compensate for any loss that creditors or members might have suffered in consequence of their carelessness. If the liquidators were aggrieved by any such action it would, of course, be open to them to take the decision on review.

[120] There is no indication that Master took the interests of the affected liquidations sufficiently into account in making her decision. In the great majority of cases she had not individually investigated the matters and sought to justify her action merely on the basis of her asserted loss of trust in Van Zyl. Her response to the concerns expressed by some creditors that Van Zyl's could be hired by his replacement begged the (unanswered) question, how it could be to the benefit of creditors for the liquidators to incur additional costs over and above the liquidators' fees for Van Zyl to provide important services that would have been included in the liquidators' fee had he been retained in office.

[121] It is significant that the Master has given no indication of why resort to the less extreme punitive or corrective measures that were available to her would not have been adequate in the circumstances. At the very best for her, this is but one of a number of indications that she failed to undertake the required careful balancing exercise described in the judgments cited in the introductory section of this judgment. On the contrary, the evidence leaves one with a very strong impression that the Master pressed on throughout in accordance with the strongly expressed views in her letter of 26 February 2014 that Van Zyl was guilty of widespread fraudulent practices and made her decision on that basis notwithstanding that the findings on which she acted had not sustained those allegations. Even the removal of Van Zyl from office in the ten corporations in respect of which his administration was investigated was a starkly disproportionate response to the identified shortcomings in his conduct, and accordingly irrational. It would appear that it was the product of her having given

effect to her unfounded and wildly exaggerated characterisations of Van Zyl's conduct as '*grossly* incompetent', '*grossly* negligent' and 'a *total* dereliction of duty', and insufficient attention to the uncontroverted information in Van Zyl's representations that showed that even when his conduct had fallen short of what might have been expected of him the adverse consequences had been limited and to a material degree already remediated.

[122] In my judgment the Master's decision to remove Van Zyl from office as liquidator in the ten identified corporations was wrong. It is liable to be set aside on various grounds in terms of s 6(2) of PAJA; viz. that it was not supported by, and therefore not rationally connected either to the information before her, or the purpose of the empowering provision; it so was so unreasonable that no reasonable functionary in her position would have made it; she had not properly taken relevant considerations into account and she had acted arbitrarily. I am respectfully of the view that the court a quo was in error for not having recognised as much. Van Zyl's cross-appeal must consequently be upheld.

Allegation that the Master acted mala fide and with bias

[123] It has not been necessary to reach the allegations by Van Zyl that the Master acted mala fide and with bias. Her conduct in certain respects was such that it should have come as no surprise that Van Zyl should have taken that stand against her. The Master's strongly worded statements, even before the formal commencement of the s 381 enquiry, that Van Zyl was guilty of widespread fraudulent practice were inappropriate and reflected an attitude of prejudgement. The wide extent of the Master's investigation into matters apparently quite unrelated to the original complaint by the members of Asch Professional Services (Pty) Ltd about an aspect of the fees raised by Van Zyl could understandably cause suspicion about the existence of an ulterior motive. Perceptions of mala fides and bias would also find support in the obviously disproportionate action taken by the Master against Van Zyl, especially when judged against her failure to have taken any action against his co-liquidators who also made affidavits in terms of s 403(2) verifying the defective accounts to which she took such strong exception. Co-liquidators are required to act jointly, and are responsible for each other's acts and omissions; see s 382 of the 1973 Companies Act and cf. *Gross and Others v Pentz* 1996 (4) SA 617 (SCA) and *Durandt v Fedsure General Insurance Ltd* [2004] ZASCA 119; 2005 (3) SA 350 (SCA) at para. 12. If

the Master considered it justifiable to remove Van Zyl from all his appointments because she could not trust him because he had filed defective liquidation and distribution accounts under affidavit, how could she keep on his co-liquidators who had done just the same?

[124] There was also the matter of the reported conversation between Mr Maphaha and Van Zyl in the cloakroom during an interval in proceedings during the hearing at the s 381 enquiry. Van Zyl reported to his attorneys at the time that Maphaha had conveyed to him that the outcome of the enquiry had been preconceived and that he was merely going through the motions. When the incident was taken up with the State Attorney by Van Zyl's attorneys, Maphaha admitted that he had had a conversation with Van Zyl in the cloakroom, but denied the veracity of Van Zyl's report as to its content. The resulting conflict in the evidence could not be determined on paper. Were it necessary to have done so for the purpose of deciding the appeal and cross-appeal, it would have to have been resolved against Van Zyl by application of the rule in *Plascon-Evans*.

[125] I have treated of this issue at some length because it is an important one in the greater context of this matter, and I would not like it to be thought that, by not mentioning it, we had overlooked it. If it had been necessary to make determinative findings on it I would have been reluctant to do so on paper. The allegations have such far reaching implications – beyond the parameters of the review itself – that it would be undesirable for them to be adjudicated other than on the basis of oral evidence.

Order

[126] The court a quo did not incorporate in its order reviewing and partly setting aside the Master's decision a direction remitting any aspect of the matter for reconsideration by the Master (see s 8(c)(i) of PAJA). I do not think that there was anything amiss in that omission. It is not obvious that there is any aspect of the matter that specifically requires reconsideration. Certainly, there was nothing in the judgment of the court a quo, nor is there anything in this judgment, that prohibits the Master from continuing to exercise her powers of supervision in respect of any of the estates that are under Van Zyl's administration. The only effect of our judgment is to reinstate Van Zyl to his position as liquidator of the corporations in liquidation

affected by the Master's impugned decision. It is not open to the Master to revisit her decision to remove him from any of those appointments on any of the grounds set out in her letter of 31 August 2017.

[127] The following order is made:

i. The appeal is dismissed with costs, including the costs of two counsel.

ii. The cross-appeal is upheld with costs, including the costs of two counsel.

iii. The order made by the court a quo is set aside and substituted with an order in the following terms:

a) The decision by the Master of the High Court, Cape Town, dated 31 August 2017, purportedly in terms of s 379(1) of the Companies Act 61 of 1973, to remove Christopher Peter van Zyl from office as liquidator of –

i. Asch Professional Services (Pty) Ltd,
ii. Kingsfield Aviation Leasing Five (Pty) Ltd,
iii. Elprom Electronic Product Manufacturers (Pty) Ltd,
iv. Aquila Insurance and Healthcare Consultants (Pty) Ltd,
v. Erf 1252 Marine Drive (Pty) Ltd,
vi. Shoe HQ (Pty) Ltd,
vii. New World Fruit Venturers (Pty) Ltd,
viii. Zib Devco Building (Pty) Ltd,
ix. Huysamen Motors CC and
x. Treehouse Children's Décor Co – SA (Pty) Ltd.

and any other matter under her jurisdiction in which he held an appointment as liquidator is reviewed and set aside.

b) The respondent shall be liable to pay the applicant's costs of suit, including the costs of two counsel.

A.G. BINNS-WARD

Judge of the High Court

T.C. NDITA
Judge of the High Court

M.I. SAMELA
Judge of the High Court

APPEARANCES

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