Republic of South Africa

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

Case No. 16839/2018

Before: The Hon. Mr Justice Binns-Ward

Hearing: 10 February 2020
Judgment: 30 April 2020

In the matter between:

CHRISTOPHER PETER VAN ZYL Applicant

and

THE MASTER OF THE HIGH COURT, WESTERN CAPE DIVISION, CAPE TOWN First Respondent

REUBEN MAPHAHA Second Respondent

JUDGMENT
(Transmitted by email to the parties' legal representatives and posted on SAFLII. This judgment shall be deemed to have been handed down at 10h00 on Thursday, 30 April 2020.)

BINNS-WARD J

Introduction

[1] Section 381(1) of the Companies Act 61 of 1973 ('the Companies Act') provides that the Master 'shall take cognizance of the conduct of liquidators and shall, if [s]he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his

duties, or if any complaint is made to him [/her] by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as [s]he may think expedient'. The members of Asch Professional Services (Pty) Ltd, a company in the course of being voluntarily wound up, submitted a complaint to the Master of the High Court, Cape Town ('the Master'), about an aspect of the fees levied by the liquidators. The complaint prompted the Master to initiate an enquiry into the conduct of Christopher Peter van Zyl, a prominent Cape Town-based insolvency practitioner. The decision to enquire into Van Zyl's conduct was announced in the context of the institution of litigious proceedings by Van Zyl at the time for the setting aside of the Master's refusal to reinstate him on her panel of insolvency practitioners available to take appointments, from which he had earlier been removed at his own request at a time when he was in poor health. The intended enquiry was not limited to Van Zyl's conduct as liquidator of Asch Professional Services (Pty) Ltd. It extended initially to 12 other estates and was subsequently extended to 16 estates. (Two of these concerned trusteeships of the insolvent estates of natural persons and were actually not susceptible to s 381 of the Companies Act.)

[2] In announcing her intention that a wide enquiry should be undertaken the Master expressed the opinion 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. She indicated that an enquiry hearing would be convened under the chairmanship of a senior counsel at the Cape Bar. However, after a procedural management meeting in that counsel's chambers during March 2014, it was announced that an official in the Master's office would preside over the hearing instead. There was some suggestion that the change in plan was inspired by cost considerations and also a concern that it might be inappropriate for the Master's statutory functions to be discharged by a person outside the Master's office. In the event, one Reuben Maphaha, a deputy master in the office of the Master of the High Court, Johannesburg, was nominated to undertake the enquiry. Maphaha was appointed as an ad hoc Deputy Master in the Master's office in Cape Town to clothe him with the required authority to fulfil the function.

[3] The Master's concerns about Van Zyl's conduct were set forth in a letter dated 26 February 2014. Van Zyl furnished a very full response to them through his attorneys in a 90+- page letter, dated 12 May 2014. Amongst other matters, the response pointed out that some of the estates in respect of which the Master had indicated that she wished to

investigate Van Zyl's conduct had been finally wound up and that he had consequently been discharged from office in the ordinary course, with the result that she no longer enjoyed jurisdiction or control over him in those liquidations. A lengthy pause then intervened, whereafter, on 15 August 2014, the Master announced that the enquiry would investigate Van Zyl's conduct as liquidator of 10 identified companies in liquidation. The Master furnished particulars of the respects in which it was alleged that Van Zyl's conduct had been lacking or unlawful in those matters. These were framed as so-called 'charges' for him to meet at a forthcoming hearing to be presided over by Maphaha.

[4] The originally provided list of charges was later substantially supplemented in terms of a further letter from the Master, dated 8 October 2014. The supplemented charges introduced new matter with which Van Zyl had not had the opportunity to deal in his previous representations. He responded to the new matter through his attorneys in a letter, dated 19 December 2014.

[5] It bears mention that Van Zyl dealt extensively in his representations to the Master with the nature and mechanics of certain investments that he had made on behalf of the companies under his administration in a number of Nedbank Corporate Saver call and fixed deposit accounts. He explained that the investments, which were directed at realising greater returns than could be obtained using deposit accounts freely available to the public, were effected using the facilities of BLM Administration Services (BLM), which was a registered financial services provider.

[6] The enquiry hearing before Maphaha commenced in February 2015 and proceeded at intervals until December of that year. The Master engaged senior and junior counsel to lead evidence against Van Zyl, who was himself represented at the hearing by senior counsel. Maphaha heard oral argument from counsel at a sitting of the enquiry in March 2016 and delivered his findings, in writing, two months later, in May 2016. He found that Van Zyl had misconducted himself in various respects that I shall particularise presently. In accordance with the scheme to which the parties had agreed at the outset of the enquiry hearing, Maphaha postponed the proceedings to a date to be arranged for the purpose of 'sanction'; in other words, for the determination of what action should be taken against Van Zyl in consequence of the findings of misconduct.

[7] Van Zyl testified that during the enquiry he had a conversation with Maphaha in the cloakroom during an adjournment at one of the sessions, in the course of which the latter had

informed him that he was puzzled by his role in the proceedings as a decision had already been made on its outcome. Van Zyl's legal representatives verbally confirmed the reported occurrence of the incident to the Master's legal representatives on the same day, and shortly thereafter in writing. It was only several months later that the State Attorney wrote to Van Zyl's attorneys stating that their instructions were that Maphaha denied having said anything of the sort. Maphaha has not made an affidavit in these proceedings denying the allegation.

[8] On 20 September 2016, and before the resumption of the hearing for the second stage of the proceedings, Van Zyl instituted the current application to review and set aside the findings of misconduct made by Maphaha. The Master was cited as the first respondent and Maphaha as the second respondent. Van Zyl averred that the matter was ripe for review at that stage and that he was not required in principle to await the decision of the action to be taken against him before instituting a litigious challenge, whether in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or (in respect of the findings made concerning his conduct of the liquidation of companies that were being wound up by reason of their inability to pay their debts) s 151 of the Insolvency Act 24 of 1936. Insofar as the application was brought in terms of s 151, the founding papers failed to identify which of the companies in liquidation concerned in the investigation had been wound up because of their inability to pay their debts. The Master gave notice of her intention to oppose the application. The further conduct of the application was thereafter delayed because of a dispute between the protagonists about the adequacy of the administrative record that the respondents were required to make available in terms of Uniform Rule 53(1)(b).

[9] The dispute about the administrative record was still unresolved when, on 2 May 2017, the Master informed Van Zyl by letter that she intended to remove him from his appointments as liquidator in terms of s 379(1) of the 1973 Companies Act and invited him to make representations why she should not do so. Van Zyl's subsequently submitted representations were unsuccessful and he was informed by letter, dated 31 August 2017, that the Master had withdrawn all of the appointments that he held as liquidator under the aegis of her office. The Master's decision to remove Van Zyl from office was purportedly made in terms of s 379(1)(b) or (e) of the Act. A total of more than 100 companies was involved.

[10] On 5 September 2017, Van Zyl instituted a second application for the review and setting aside of the Master's decision to remove him from office. That application was also

brought in terms of PAJA, alternatively, s 151 of the Insolvency Act. The current application was left in abeyance while the second review application took up the momentum.

[11] Mr van Zyl was successful at first instance in the second review application in having the Master's decision to remove him from office set aside in respect of all but the 10 companies identified in the Master's letter of 15 August 2014 mentioned in paragraph [3] above. The Master appealed to the Full Court (before myself, sitting with Ndita J (presiding) and Samela J) against the part of the judgment that had gone in favour of Van Zyl, and he cross-appealed against the dismissal of his application to have his removal from office in the 10 identified companies set aside. Van Zyl prevailed. The appeal was dismissed and the cross-appeal was upheld.

[12] The Full Court's judgment has been reported sub nom. *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* [2019] ZAWCHC 23 (6 March 2019); [2019] 2 All SA 442 (WCC). Much of the material that is germane to the first review application currently under consideration was dealt with in some detail in the judgment that I wrote for the Full Court and I shall therefore seek, by cross-reference to that judgment, to avoid repetition as much as practicable.

[13] As the judgment of the Full Court sets out (at paras. 65-73), the grounds upon which the Master purported to remove Van Zyl from office were the following: (i) that he had been in breach of s 394 of the Companies Act in various respects in regard to his investments in the Nedbank Corporate Saver Accounts using the services of BLM, (ii) that the accounts submitted by him in terms of s 403 of the Act had been erroneous and misleading in material respects; she took especial umbrage at the erroneous accounts having been submitted under affidavit (as required by the Act) notwithstanding that it could not be suggested that Van Zyl (or his co-liquidators, against whom no action was taken) had acted perjuriously in making the affidavits; (iii) that his failure to notice the substantial fees debited by BLM in respect of funds invested on fixed deposit in the Nedbank Corporate Saver accounts constituted 'gross incompetence' and evidenced 'a total dereliction' of his duties as liquidator and (iv) that he had acted in breach of his fiduciary duties in six instances, four of which related to his engagement of BLM, namely in not concluding a written mandate in respect of BLM's fees, in transacting with BLM in the context of an alleged absence of a justifiable basis for the fees, the apparently arbitrary nature of the fees and the allegedly 'grossly excessive' scale of the fees. The other two issues treated as breaches of fiduciary duty were (a) 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 (b) that he 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 and it was not a ground that the Master's counsel sought to defend in argument before the Full Court.)

[14] After the ultimate conclusion of the proceedings in the second review application, the Master withdrew her opposition to the current application without having delivered answering papers. Despite his achievement of substantive redress in the second review application, with the attendant substantial vindication, notwithstanding some incidences of carelessness and negligence, of his conduct as a liquidator, Van Zyl has now enlisted the first application for determination.

The impugned findings

[15] As observed in the judgment of the Full Court, the findings made by Maphaha, which were set out in a document signed at Johannesburg, dated 17 May 2016, and communicated under cover of a letter under the letterhead of the Master of the High Court, *Johannesburg*, were not particularly informative. He 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. The findings that he made were expressed in broad-brush terms without meaningful reference to the evidence adduced over six days at the hearing.

[16] Mr Maphaha found that Van Zyl had contravened s 384(1) of the Companies Act in that in the liquidation of Aquila Insurance and Healthcare Consultants (Pty) Ltd he had levied a fee in respect of a loan raised from Absa Bank. He held that Van Zyl had contravened s 384(3) of the Act by framing the amount due in terms of the loan as rental income. He observed that the 'payment made to himself [by Van Zyl] affected the dividends that were to be paid to creditors'. He noted that 'the amount of the fee was later refunded' and regarded the refund as having clearly shown 'that Van Zyl was very aware that his conduct was in contravention of Section 384(3) of the Act'.

[17] Mr Maphaha proceeded directly from the aforementioned findings, and without furnishing any factual particularity or substantiating reasoning, to conclude in the following paragraph of the findings that, '[t]he pattern in all the 10 matters reflects the mind-set that Mr Van Zyl was dishonest and reckless, and this clearly constitutes misconduct'. In support of this conclusion Maphaha made a footnote reference to *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) at 613A.

[18] That case involved an appeal from the dismissal by Thirion J of an exception to particulars of claim in which the plaintiffs had sought the removal of the trustees of an insolvent estate on the grounds that they were unfit for the office. The questions were firstly, whether the courts enjoyed an inherent power at common law to remove trustees whose continuance in office would be prejudicial to the estates under their administration and secondly, if they did, whether the existence of the power had survived the institution of the statutory regime in terms of the Insolvency Act. The Appellate Division answered both questions affirmatively.

[19] The passage in the judgment to which Maphaha referred pertained to the first question, and read as follows: '*In the declaration in the instant case there are averments (which, if the matter proceeds to trial, may or may not be susceptible of proof) which are tantamount to charges of abuse of trust, dishonesty and recklessness which may justifiably be termed 'misconduct' on the part of the trustees. In my view Thirion J correctly decided the first issue against the defendants.*' The point of Maphaha's reference to the passage is not readily apparent, unless it was to find support for the trite proposition that dishonesty and recklessness by a person holding a position with fiduciary responsibility would constitute good grounds for that person's removal from office. Even that was not relevant at that stage of the enquiry, as 'sanction' had been deferred for later consideration in a contemplated second stage of sittings.

[20] Mr Maphaha then proceeded to make a number of findings to the effect that by investing the surplus funds of the 10 companies in question in Nedbank Corporate Saver Accounts, to which facility Van Zyl had obtained access through the intermediary services of BLM, Van Zyl had contravened s 394(1)(b), (c) and (d) and s 394(3) of the Companies Act. Maphaha made the following factual findings in this connection: (i) that Van Zyl had failed to obtain authorisation from the Master for the said investments; (ii) that he had used a 'conduit account' that was not in the name of the companies concerned as required in terms

of s 394; (iii) that he had deposited the companies' funds into BLM's Nedbank account thereby losing control over, and the ability to 'monitor', the money deposited into BLM's account; (iv) that he had outsourced the duties of the co-liquidators to BLM; (v) that he had erroneously reflected BLM's fees as a charge in the winding up of the companies concerned, when, according to Maphaha, the fees should have been included in the liquidator's fees having regard to the role of BLM as nothing more than the liquidators' agent.

[21] Owing to the Master's heavy reliance in her decision to remove him from office on the basis of what she also considered to have been Van Zyl's serious misconduct in relation to the conduct of the Nedbank Corporate Saver account investments and the alleged contraventions of s 394 of the Companies Act related thereto, the question was dealt with at length in the Full Court judgment; see in particular paras. 37-51; 58-62; 66-69; 77-80; 92-103 and 110-112 of that judgment. In short, it was found by the Full Court that Van Zyl's conduct of the accounts had been legitimate, and that the allegations that he had contravened s 394 or had lost control of the funds were baseless. The accounts were all held in the names of the companies concerned and the funds in them could be dealt with only on the written instructions of the liquidators. It was also found that Van Zyl had been justified in engaging the services of BLM as independent service providers and that his expenditure in payment of BLM's fees was unexceptionable. The Full Court judgment moreover rejected the idea that Van Zyl had required authorisation from the Master to make the investments. It was found that Van Zyl had been negligent, however, in failing to notice that BLM's fees were being debited from the interest earned on the monies held on fixed deposit and also in not noticing that, unusually, for a relatively short period, the interest earned on fixed deposit in the Nedbank accounts was marginally less than that that could be earned on call. The first of the aforementioned shortcomings in his conduct had resulted in the liquidation accounts submitted by him in terms of s 403 of the Companies Act being materially inaccurate, but had not affected the dividends payable to creditors in any way, and the second had had a very small, almost trifling, financial impact.

[22] Mr Maphaha's findings included what he described as a quotation from the judgment of the Supreme Court of Appeal in *Standard Bank of South Africa v The Master of The High Court and Others* 2010 (4) SA 405 (SCA), but which was in fact an excerpt taken from the headnote to the report in the South African Law Reports, concerning the trite proposition that liquidators occupy a position of trust in respect of the companies under their administration and towards the companies' creditors. The *Standard Bank* case concerned a breach by the

liquidators in that matter of their fiduciary duties by, amongst other matters, applying the funds of the company in litigation in furtherance of the liquidators' personal interests. The factual context of the matters in issue in that case bore no relationship to that in respect of the allegations against Van Zyl. The reason for Maphaha's reference to the case is not altogether clear, but it may be inferred that it was invoked in support of an implication that Van Zyl had been in breach of his fiduciary duties in some or other (unspecified) way. The only bases for the implication discernible in the written findings are the abovementioned determinations that Van Zyl had incorrectly computed his fee entitlement in respect of the winding up of Aquila Insurance and his supposed contravention of s 394 of the Companies Act. The Full Court judgment concluded that the Master's apprehension that Van Zyl had been in breach of his fiduciary duties by reason of his negligence in certain respects was misdirected; see the Full Court judgment at paras. 72 and 106-109.

Grounds of review

[23] Van Zyl advanced the following grounds for review in terms of PAJA:

1. bias and ulterior purpose or motive;
2. procedural unfairness;
3. the findings were materially influenced by an error of law;
4. the findings were made because irrelevant considerations were taken into account or relevant considerations were not considered;
5. the findings were not rationally connected to the information before the decision-maker; and
6. the findings were so unreasonable that no reasonable decision-maker could have made them.

Should judicial review occur in the circumstances?

[24] Virtually all of the applicant's complaints were subsequently subsumed in the review proceedings that were ultimately determined on appeal by the Full Court in the second application, and I therefore do not consider that it would profitable to engage with them again in this judgment. It is clear from what was held in the Full Court's judgment that the findings made by Maphaha are amenable to review and being set aside. His findings predicated on s 394 were materially influenced by an apprehension of the import of the provision that was

erroneous in law for essentially the same reasons that the Master had been in making her decision to remove Van Zyl from his position as liquidator.[1] To the extent (which is not altogether clear) that he found that Van Zyl had acted in breach of his fiduciary duties, he was similarly materially influenced by an error of law for the same reason as the Master was.[2] His findings that Van Zyl had acted dishonestly were indicative that he had not properly applied his mind to the evidence, in other words because relevant considerations were not considered. This may be deduced from his failure to advance any reasons for rejecting Van Zyl's evidence concerning how certain fees came to be incorrectly debited. It may be that Maphaha did not make an affidavit in these proceedings because of an apprehension that the first application had been overtaken by proceedings in the second application. The absence of any answer from Maphaha would justify a finding that Maphaha's decision had been made for an ulterior reason or because of the unauthorised or unwarranted dictates of another person. In the context of the other grounds upon which the decision falls to be impugned, I shall, however, refrain from making a determinative finding in that regard beause of my uncertainty whether the omission to make a rebutting affidavit might perhaps have been due to a perception that the current proceedings had become moot.

[25] Maphaha's findings were in a sense a preliminary step. Section 381(1) of the Companies contemplates an enquiry by the Master into apparent misconduct and the taking of action thereanent as might be thought to be expedient. When the enquiry confirms misconduct by the liquidator, the administrative action provided for in terms of the subsection includes the consequent taking of action. Maphaha did not reach the stage of taking action against Van Zyl because of the institution of the current application for judicial review and also, it would appear, because the Master intervened with a parallel process of her own.

[26] In *Democratic Alliance and Others v Oudtshoorn Municipality and Others; In Re: Democratic Alliance and Another v Oudtshoorn Municipality and Others* [2014] ZAWCHC 132 (27 August 2014), [3] Rogers J observed that '[t]he circumstances in which review in terms of [PAJA] and in terms of the legality principle is available to impeach preliminary investigations and recommendations is not altogether clear'. That is true. However, an

[1] Full Court judgment, paras. 95 – 101.

[2] Full Court judgment, paras. 107 – 108.

[3] In para. 120.

important distinguishing feature between the current case and that with which the learned judge was dealing in *Oudtshoorn Municipality* was that in this matter the enquiry was not directed, as it was in that case, at making a recommendation to another decision-maker to act on. Maphaha's findings were the first of a two-step process of decision-making, both of which entailed himself being the decision-maker. Accordingly, if his first step decision was bad, no point would be served by not entertaining a review until he had made the second decision. The reason being that if the first decision were invalid, the second decision could not validly follow. In addition, the second decision that he had to make ('sanction') would not afford him the opportunity to undo the first decision (finding of misconduct).

[27] In the circumstances, I accept the argument by Ms *Reynolds*, who appeared for Van Zyl, relying inter alia on the reasoning of Fabricius AJ in *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters Mpumalanga and Others* 2008 (2) SA 570 (T)[4] and that of Mogoeng J in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21 (23 November 2010); 2011 (1) SA 327 (CC) ; 2011 (2) BCLR 207 (CC) at paras. 36-39, that the findings made by Maphaha constituted administrative action that was impugnable on review even before any sanction was imposed. The question that arises, however, is whether it would be appropriate to make a separate order in the current matter, in the context of the first application arguably having been overtaken by the events that led to the second application. More particularly so, when judgment in the second review did not involve the remission of any question bearing on an investigation into Van Zyl's conduct or the decision to remove him from office for reconsideration by the Master. As the Full Court judgment noted: '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'.[5] The question really distils into one of mootness. Has the determination of the second application rendered an adjudication of the first one of no practical relevance, other than as to costs?

[28] Ms *Reynolds* pointed out that it was apparent from the transcript of the enquiry proceedings that the intention had been that Maphaha would act in lieu of the Master and that

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[4] Compare also *Minister of Defence and Military Veterans and Another v Mamasedi* [2017] ZASCA 157 (24 November 2017); 2018 (2) SA 305 (SCA), at para. 14 and the other authority cited there in note 3.

[5] Full Court judgment, para. 126.

he, and not she, would be charged with determining the consequences for Van Zyl should any findings of misconduct be made. This course may have been followed because of the allegations of bias and personal antipathy that Van Zyl had raised against the Master at quite an early stage after it became apparent that his conduct was to be placed under scrutiny. Ms *Reynolds* submitted that it was clear that the Master had only stepped in, purportedly in terms of s 379(1) of the Companies Act, when the difficulties with Maphaha's findings had been highlighted by the bringing of the review application that is currently under consideration.

[29] As noted in the Full Bench judgment, in making her decision to remove Van Zyl from his appointments, the Master indicated that she had acted on the opinion she had formed on her own reading of the full transcript of the enquiry proceedings and, by implication, not on the basis of the findings made by Maphaha. She had also carried out her own enquiries after the completion of the first. That was somewhat contradicted, however, by the indications referred to in the Full Bench judgment that suggested that the Master intended to oppose the first review application on the grounds that it had been premature.[6] Ms *Reynolds* suggested that in the circumstances of the Master having purported to act independently of the enquiry by Maphaha, it was technically still open to Maphaha to impose a sanction predicated on his findings. Although it seems extremely unlikely that Maphaha would presume to do so in the face of the Full Court's judgment, I suppose it is strictly speaking correct that he is not prohibited by that judgment from doing so.

[30] The Master's decision to remove Van Zyl from office was not based in all respects on the misconduct identified in Maphaha's findings. She did not, for example, give as a reason for her decision the finding that Van Zyl had acted dishonestly when charging an incorrect fee in the Asch liquidation, nor that in Aquila.[7] Maphaha's finding to that effect, which was plainly unfounded in the context of Van Zyl's unimpeached explanation that the charge was as a result of an administrative error, has not been formally impugned. The findings, while they stand formally unimpugned, also have the potential to impact reputationally in an unduly adverse manner on Van Zyl. I have come to the conclusion in the circumstances that Van Zyl is entitled to an order reviewing and setting aside the findings made by Maphaha.

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[6] Full Court judgment, para. 52.

[7] The Master's given reasons for deciding to remove Van Zyl from office are summarized in paragraphs 65-73 of the Full Court judgment.

Order

[31] The following order will issue:

1. The findings made by the second respondent, dated 17 May 2016, in the enquiry instituted by the first respondent in terms of s 381(1) of the Companies Act 63 of 1973 into the conduct of the applicant, qua liquidator, are hereby reviewed and set aside.

2. The first respondent shall be liable for payment of the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court