

IN THE NORTH GAUTENG HIGH COURT
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 54849/10

In the matter between:

5/11/2010

MBONENI BALDWIN MUSENWA

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHER JUDGES: YES /NO	
(3) REVISED	
04/11/10 DATE	<i>h. S. M.</i> SIGNATURE

MASTER OF THE NORTH GAUTENG HIGH COURT

Respondent

and

CERTAIN INTERVENING PARTIES

REASONS FOR JUDGMENT

Tuchten J:

- 1 I heard this matter in the urgent court on 18 October 2010. The main application was for interim interdicts pending a review of a decision of the Master, which the applicant intended to argue at a later date. At the hearing two separate sets of intervening parties made application to be joined. Part of the relief sought by the applicant directly affected

the intervening parties, who thus had a substantial legal interest in the outcome of the application and the applications for joinder were granted. I dismissed the applicant's application. By notice dated 26 October 2010, the applicant requested reasons for my judgment.¹ My reasons follow.

- 2 The applicant sought orders directed at, in the first instance, restoring his name to a list of eligible previously disadvantaged persons kept by the Master. This list was compiled pursuant to a determination of the Minister under s 15(1A)(a) of the Companies Act, 1973 and s 158(2) of the Insolvency Act, 1936 that the Master keep a list of previously disadvantaged persons who the Master regarded as suitable for co-appointments to the offices of trustee, liquidator and the like together with more experienced insolvency practitioners.
- 3 This policy trenches upon the previously unfettered discretion of the Master to appoint any suitable person to these offices but obviously does not enjoin the Master to appoint unsuitable persons to these offices. Pursuant to the policy direction, the Master maintains a list of

¹ I am unable to establish from the contents of the court file placed before me the identities of the first and second intervening parties, who jointly brought the first intervention application. The second application for leave to intervene was brought by Leonard Johannes Strydom and Dimakatso Arnold Michael Mohasoa in their capacities as joint liquidators of Coal Experts (Pty) Ltd (in liquidation).

suitable previously disadvantaged persons, whom he appoints in rotation.

- 4 During 2009 the applicant and Mr Strydom, the third intervening party, were appointed joint provisional liquidators in the winding-up of Coal Experts (Pty) Ltd. Strydom and the applicant sold assets in the provisional winding-up and got in an amount of some R10 million. They decided to apply for an interim fee. The applicant was entrusted with the task of submitting the application for an interim fee to the Master. The applicant returned to Strydom, claiming that he had indeed submitted the application and that it had been granted in the sum of R500 000. On the strength of a document bearing the stamp of the Master to this effect, Strydom, who was in charge of the administration of Coal Experts, paid out R200 000 of Coal Experts' money to the applicant.
- 5 It has emerged that the document produced to Strydom was probably a forgery. In fact the Master refused the application for an interim fee. The applicant protests that he was an innocent party and that the probably forged document was merely produced by an official in the Master's office who thought he had, but did not in fact have, authority to grant the application for an interim fee. Despite this protestation by the applicant, there is in my view a strong probability, established on

the papers, there was a misappropriation and that the applicant was a party to the misappropriation. For one thing, the applicant alone benefited from the misappropriation. Although the applicant says that he was innocent of any intention to defraud Coal Experts or Strydom, from an early date after the misappropriation was discovered, December 2009 or January 2010, he promised to pay the money back. Contrary to his undertaking, he has not paid any of the R200 000 back.

- 6 The Master held a formal enquiry into the misappropriation at which he heard the applicant on whether, and if so to what extent, the applicant was a party to the misappropriation. The Master came to the conclusion that the applicant was implicated in the fraudulent scheme and was thus not a fit and proper person to be appointed to the offices in question and should be removed in those cases where he had been appointed. He accordingly removed the name of the applicant from the list. As estates came up for consideration before him in which the applicant was involved, he systematically removed the applicant and replaced him with a candidate from his list.
- 7 In addition to the relief directed at restoring him to the list, the applicant seeks interim orders, pending the adjudication of his review application, restoring him to his erstwhile offices, interdicting the

Master from removing the applicant in any further insolvent estates and setting aside all decisions of the Master which had the effect of removing the name of the applicant from a panel of liquidators or trustees where a liquidation and distribution account was confirmed to the exclusion of the applicant.

- 8 Despite the far reaching relief sought, no liquidators and trustees in affected estates were cited by the applicant as respondents in his application. The two sets of interveners came to court to protect their positions but for the rest there was no adequate information before the court as to which estates were involved and what prejudice would be suffered by liquidators and trustees, acting in good faith pursuant to decisions made by the Master, and the creditors whose interests they represent. Nor was any basis laid for the grant of an order, even an interim order, in the absence of notice to such persons.
- 9 Counsel for the applicant appreciated this difficulty and confined himself to the claim, *pendente lite*, for reinstatement on the list as a potential co-liquidator and trustee in good standing.
- 10 The sole ground on which the interim relief was sought was that in removing names from the list, the Master performs an administrative act, thus engaging the Promotion of Administrative Justice Act, 3 of

2000, ("PAJA") and that the Master had not heard him before taking the decision to remove him from the list. The applicant concedes that there was a full enquiry by the Master into the circumstances in which the money was misappropriated and that the applicant gave evidence at the enquiry. But, says the applicant, he was entitled to more than that. He should, he says, have been given a charge sheet and procedures should have been followed akin to those in a disciplinary enquiry.

11 I do not agree that the compilation of the list constitutes administrative action. The list is not compiled in the process of implementing legislation but in the process of implementing the socio-political policy of the Minister. In these circumstances, it seems to me that the principle articulated by Chaskelson P in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 CC para 142 (footnotes omitted) is applicable:

As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to

initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33.

- 12 If the action taken by the Master in removing the applicant's name from the list was not administrative action, then the applicant was not entitled to a hearing before his name was removed from the list.² Furthermore, if I am wrong and the applicant was entitled to a hearing, I can see no reason why the applicant should have required a charge sheet or a formal hearing to defend himself against the allegations that there was a misappropriation and that he was party to the misappropriation. At best he was entitled to a fair hearing. He must have known that his part in the misappropriation was being scrutinised. He must have known that the Companies and Insolvency Acts require the Master to appoint suitable persons to the offices in question and to remove any such person when it appeared that the person in question was not, or was no longer, a suitable person in this context. He must have known that if the Master concluded that he was implicated in the misappropriation, the Master would cease to regard him as a suitable person for appointment and that his removal, both from the list and as a trustee or liquidator, would inevitably follow. I think he did get a fair hearing.

²

Compare *Langa CJ and Others v Hlophe* 2009 4 SA 382 SCA para 34

- 13 The true nature of the Master's discretion in relation to the appointment of trustees and liquidators is to be found in the statutory provisions empowering the Master to make such appointments.³ This discretion has been described as being entirely discretionary. Only rarely has the court interfered with the exercise of the discretion, ie where he failed to exercise it at all or acted *mala fide* or was motivated by improper considerations.⁴
- 14 This being a an application for an interim interdict, I must apply the dictum in *Simon NO v Air Operations of Europe AB*⁵:

Insofar as the appellant also sought an interim interdict pendente lite it was incumbent upon him to establish, as one of the requirements for the relief sought, a prima facie right, even though open to some doubt (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.

³ Section 18(1) of the Insolvency Act; ss 367 and 368 of the Companies Act.

⁴ *Henochsberg on the Companies Act*, (looseleaf ed) vol 1, note to s 368 sv "May appoint".

⁵ 1999 1 SA 217 SCA 228F-H

- 15 The applicant cannot dispute that the Master believes, on reasonable grounds, that the applicant is not a suitable person for appointment to the offices of trustee and liquidator. In those circumstances the Master would be failing in his duty if he appointed the applicant to any of the offices in question. Having come to the conclusion that the applicant was not suitable for appointment, the Master would have failed in his duty, had he not removed the applicant's name from the list. Applying the *dictum in Simon's* case which I have quoted, there is no doubt that the applicant should not, on the facts presented, obtain final relief.
- 16 Finally, the balance of convenience is overwhelmingly against the applicant and the remedy of reinstatement, pending the final determination of the applicant's review would not be just and equitable as that expression is used in s 8(1) of PAJA.
- 17 The applicant pointed out that although he is an attorney, the entire livelihoods of the applicant and his staff are dependent on his income as a previously disadvantaged liquidator and trustee. But against that the evidence of misappropriation against the respondent is very strong and although he has promised to repay the money taken, he has not done so. The effect of an order of reinstatement on the list would be to foist upon the Master, and the public, a person whose integrity is at this stage, to put it at its lowest, open to considerable doubt.

Furthermore, even if the applicant were to succeed in due course in establishing that PAJA applies and that he was not given a fair hearing, I strongly doubt that any court would, in the exercise of its equitable discretion under s 8(1) of PAJA, order that the applicant's name be restored to the list pending such a hearing. Certainly I do not consider that it would be just and equitable at this stage to order the applicant's reinstatement.

10 For these reasons I ordered that the applications for joinder be granted and the applicant's application for interim relief be dismissed with costs, such costs to include the applications for joinder and the costs of opposing the applicant's application by each of the intervening parties.


NB Tuchten
Judge of the High Court
4 November 2010