

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-002933

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 29 August 2024

WJ du Plessis

In the matter between:

SHIRISHKUMAR JIVAN KALIANJEE

APPLICANT

and

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

FIRST RESPONDENT

MAHOMED MAHIER TAYOB

SECOND RESPONDENT

APHANE ATTORNEYS

THIRD RESPONDENT

NANO ABRAM MATLALA N.O.

FOURTH RESPONDENT

ADRIAAN WILLEM VAN ROOYEN N.O.

FIFTH RESPONDENT

REUNERT NDIVHUHO KHARIVE N.O.

SIXTH RESPONDENT

and in the counter application between

MAHOMED MAHIER TAYOB

COUNTER APPLICANT

and

SHIRISHKUMAR JIVAN KALIANJEE

**FIRST COUNTER
RESPONDENT**

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

**SECOND COUNTER
RESPONDENT**

JUDGMENT

DU PLESSIS AJ

Background

- [1] The Court is tasked to adjudicate two applications. Firstly, an application to review, correct and set aside two decisions made by the Master of the High Court, Johannesburg (“the Review Application”) to remove the Applicant, Kalianjee, as a trustee of two estates, and secondly, a counter application issued by the second respondent, Tayob, seeking an order declaring that Kalianjee be disqualified from holding office as a trustee and as a liquidator (“the Counter Application”). There is also an application to intervene (“the Application to Intervene”) by Naidoo. The parties will be referred to by their surnames to avoid confusion, and the applications will be referred to as they are cited here.

The Parties

- [2] Kalianjee is an attorney of this Court, a liquidator of companies and a trustee of insolvent estates. The Master appointed him as one of the final joint liquidators in the estate of M&M on 3 November 2010 and in the estate of Creative on 11 January 2013. His appointments were terminated pursuant to two decisions the Master took on 13 December 2021.
- [3] The second respondent, Tayob, is a business rescue practitioner. Tayob was the business rescue practitioner in Creative and another estate, Lifestyle Furnishers’,

that lies with the Pretoria Master. Kalianjee has also been appointed as a joint final liquidator of Lifestyle Furnishers CC with three others. It is not one of the appointments from which the Master removed Kalianjee. However, Tayob was the business rescue practitioner of Lifestyle before liquidation, and Tayob's firm, Tayfin Financial Accountants, has proved a claim in the estate of Lifestyle, which is currently disputed in terms of s 45(3) of the Insolvency Act. Neither the Pretoria Master nor the other three joint liquidators in Lifestyle are parties to the Review Application or the Counter Application. Tayob lodged several complaints with the Master regarding Kalianjee.

- [4] The third respondent, Aphane, is a firm of attorneys representing Tayob. The fourth respondent is Kalianjee's joint liquidator in M&M, and the Fifth and Sixth respondents are Kalianjee's joint liquidators in Creative. Kalianjee does not seek any relief against these parties.
- [5] Naidoo is an unrehabilitated insolvent. His estate has been sequestrated because of an enquiry held at the behest of two major creditors in M&M. He is a former member of M&M Hiring Marquee CC. M&M Marquee issued summons against Kalianjee in July 2013, alleging that Kalianjee made certain fraudulent misrepresentations to Naidoo (as representative of M&M Marquee), resulting in Kalianjee receiving a series of payments amounting to R300 000 over the period October to December 2010. Kalianjee pleaded to the summons, denying the allegation. M&M Marquee delivered a discovery affidavit but has taken no further steps to bring the matter to trial. Tayob is reported to be Naidoo's advisor.

The review application

- [6] The Review Application is brought under s 151 of the Insolvency Act¹ ("Insolvency Act") read with s 339 of the Companies Act² ("old Companies Act") and the

¹ 24 of 1936.

² 61 of 1973.

Promotion of Administrative Justice Act³ (“PAJA”) and the principle of legality. In the Counter Application, Tayob seeks an order declaring that Kalianjee be disqualified from holding office as trustee and as a liquidator for life or a period the Court deems fit, based on s 59 of the Insolvency Act and s 373 of the old Companies Act. Alternatively, should the Court grant the relief sought in the Review Application, the Court must grant “appropriate relief” in terms of s 8 of PAJA and direct the Master to conduct a full enquiry as contemplated in s 381 of the old Companies Act.

- [7] To assess the Review Application, it is important to set out the complaint at the Master in some detail.
- [8] On 14 December 2021, the Master emailed Kalianjee a letter dated 13 December 2021. In this letter, the Master removed him as a liquidator from M&M and Creative in terms of s 379(b) (sic) of the Old Companies Act. The letter stated:

We refer you to section 384 of the Companies Act 61 of 1973 (as amended). Considering that you have failed to respond satisfactorily to our letter (sic) dated 19th October 2021 and 9th November 2021.

Take note that you are hereby removed as liquidator of M&M Hiring SA CC and Creative Aluminium Products CC in terms of section 379(b) of the Companies Act 61 of 1973 (as amended). Should you wish to submit accounts for work done, your remuneration will be taxed by the Master. You have the right to request written reasons for our decision in terms of section 5 of the Promotion of Administrative Justice Act 3 of 2000 provided that they are requested within 90 days of you becoming aware of this decision. You also have the right in terms of section 151 of the Insolvency Act 24 of 1936 read with section (sic) 6 and 7 of the Promotion of Administrative Justice Act 3 of 2000, provided the proceedings for judicial review are instituted within 180 days of this decision.

Notice of your removal will be forwarded to the office of the Chief Master.

- [9] This letter, Kalianjee argues, is problematic for the following reasons:
- i. S 384 of the Old Companies Act deals with the remuneration of a liquidator;
 - ii. Kalianjee received letters from the Master dated 25 October 2021 and 9 November 2021, to which he responded he did not receive a letter from the Master dated 19 October 2021;

³ 3 of 2000.

- iii. There is no s 379(b) of the Old Companies Act. There is a s 379(1)(b) that authorises the Master to remove a liquidator from his office if he has failed to perform satisfactorily in terms of a 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 the Act. This is a problem because the Master did not;
 - a. Identify whether he was removing Kalianjee for failure to perform satisfactory or failed to comply with a lawful demand;
 - b. Identify the duties imposed on Kalianjee by the Old Companies Act that he failed to perform satisfactory or at all;
 - c. Identify what it is about any performance by Kalianjee that was not satisfactory;
 - d. Identify any lawful demand either by the Master or a commissioner or
 - e. Identify the nature of any failure to comply with any lawful demand.

[10] To understand the issue under review, it is essential to understand how the Master got to that letter. On 25 October 2021, the Master sent a letter to Kalianjee informing him of a complaint against him. The letter states:

I refer to the abovementioned matter.

Find herewith application in terms of section 379(1)(b) of the Companies Act 61 of 1973, as amended from Messrs Aphane Attorneys for your attention and reply within 14 days from date hereof.

[11] It was unclear from this correspondence what closed corporation this relates to, nor were there specific complaints that needed to be addressed. To give context, the Master included an annexure of 110 pages consisting of:

- i. a letter addressed by Aphane to the Master dated 14 October 2021, in which Aphane refers to their initial complaint, presumably the letter in (ii), although that letter is a complaint by Tayob.

- ii. a letter addressed by Aphane to the Master, dated 20 June 2018;
- iii. the summons by M&M Marquee and Kalianjee's plea where Kalianjee denies the allegations made by Naidoo from 2013;
- iv. A letter from the Master to Aphane dated 13 December 2018, in which he refers to his letter dated 29 November 2018 and attaches Kalianjee's response to the complaint made on 4 July 2018. The letter is dated 11 September 2018.
- v. an email dated 17 January 2019 from Aphane to the Master in which Aphane refers to the complaint lodged on 22 June 2018 and enquiries regarding the status of the matter, which formed part of an email trail of correspondence between Aphane and the Master. This was forwarded to Kalianjee ten weeks later, and he responded on 2 April 2019. Kalianjee indicated that he responded to the Master, Pretoria. He thus responded to the complaints in M&M and Creative and the Lifestyle one in Pretoria.
- vi. A letter from Aphane dated 26 February 2019 responding to Kalianjee's letter of 11 September 2018.
- vii. A letter from Tayob addressed to the Master dated 20 November 2019., referring to an "aforementioned estate" without indicating what estate; however, from the context, it is clear that the complaint relates to Lifestyle.
- viii. A letter from Tayob to the Master dealing with Lifestyle dated 26 November 2019.
- ix. An email from Alphane to the Master dated 8 July 2000. It relates to allegations that have nothing to do with M&M or Creative and refers to annexures that were not attached. There is a reference to an affidavit by Naidoo that might have a bearing, but Kalianjee did not know of such an affidavit, and none was sent to him to respond to.

- x. An affidavit by Tayob, referring to various annexures, none of which were sent to Kalianjee in the bundle he received from the Master. This seems to be a complaint about the Master's failure to act on the complaints made by Tayob against Kalianjee. This, however, again refers to the complaints made against Kalianjee in the Lifestyle matter.

[12] Kalianjee requested clarity about the complaint from the Master on 4 November 2021 to enable him to respond. He specifically queried what company his removal was sought from, Aphane's *locus standi* to ask for such a removal, what duty he failed to perform and what lawful demand from the Master he had failed to comply with.

[13] On 9 November 2021, the Master responded

You are aware that Aphane Attorneys are on record for Mr Tayob. You have replied insufficiently to their initial letter dated 20 June 2021. Aphane Attorneys and Mothilal Attorneys addressed correspondence to the Master's office with additional complaints.

You have not addressed any of the complaints. Each of the complaints are properly recorded in the letters of both firms.

You are afforded 14 days to render reasons as to why you should not be removed as a liquidator or alternatively why the Master should not invoke Sections 379(b) or (e) or 381(2) on the estates where the complaints were lodged.

The complaints were lodged in M and M Hiring CC and Creative Aluminium CC which falls under the jurisdiction of Master's office, Johannesburg.

[14] The Master thus identified the two close corporations from which Kalianjee's removal was sought but did not identify the complaints he needed to answer.

[15] On 2 December 2021, Kalianjee responded to the Master. He refers to the letter of 11 September 2018, wherein he already responded to the complaints of Aphane's 20 June 2018 letter, and where he also requested further information.

[16] On top of denying the allegations, Kalianjee also inquired what he had done in violation of s 55 of the Insolvency Act. He drew the Master's attention to the fact that in both M&M and Creative, he was one of several liquidators. The Master did not respond to the 11 September 2018 letter in which Kalianjee addressed the complaints.

- [17] Kallianjee then again addressed the complaints concerning M&M and Creative. These two complaints were, in short, firstly, that he extracted R300 000 from Naidoo by bribe or misrepresentation without particulars about how he allegedly went about it. Nevertheless, he denies it. Secondly, the M&M complaint related to two entities that had been sold contrary to an undertaking by Kallianjee. He answered this by indicating that another party, Park Village Auctioneers, obtained a judgment against the owners of the assets, which caused the assets to be sold.
- [18] As for Creative, Kallianjee did not understand the complaint. The Master did not reply to his query.
- [19] The 13 December 2021 letter of removal followed. Kallianjee immediately responded that in the absence of a reply to his 2 December 2021 letter inquiring what he had done in violation of s 55 of the Insolvency Act, amongst other queries. The Master responded the next day, informing him that the Master did receive the letter but that he failed to respond to the allegations and merely addressed fragments of the allegations. This, Kallianjee states, shows that he did not read the complaints and his responses and did not apply his mind.
- [20] Kallianjee thus instructed his attorneys to write to the Master to request reasons for Mr Kallianjee's removal from both entities. After missing some deadlines, the Master eventually sent a letter informing him that s 379b (sic) of the Companies Act⁴ affords the Master the authority to remove the liquidator if the liquidator does not comply with the lawful demand of the Master. This, then, is the fact that Kallianjee did not answer the allegations of the complaint in sufficient detail. Kallianjee does not regard these as "reasons" for purposes of PAJA. Thus, there is no basis for his removal as liquidator of M&M and Creative. They thus issued the review application on 30 May 2022.
- [21] Kallianjee states that in terms of the notice of motion, as well as Rule 53 of the Uniform Rules of Court, the Master was required to provide the record of the

⁴ 61 of 1973.

proceedings, together with reasons as he is by law required to give or make, within 15 days of receiving the notice of motion. On 25 August 2022, while still waiting for the record, the State Attorney representing the Master wrote to Kilianjee's attorney, contending that the Master had not decided to remove Kalianjee as liquidator of the two estates. This contradicted the Master's actual words in his letter of 13 December 2021. There was no reply from the State Attorney when this was pointed out, and the record was only produced after the threat of an application to compel the Master to do so.

[22] The Record includes the correspondence to Kilianjee's attorneys of 4 April 2022, the 13 December 2021 letter removing Kalianjee as liquidator of the two estates, Kilianjee's correspondence of 2 December 2021, and the correspondence between the Master and Kalianjee in November 2021, with the annexure attached to the Master's letter of 25 October 2021. In this "record" were also documents that were not related to the two estates or were incomplete, namely

- i. Documents related to Lifestyle, although Lifestyle falls within the Pretoria Master's jurisdiction and is irrelevant to M&M and Creative. The Master does not have jurisdiction on that matter. If he took that into account, he took irrelevant considerations into account, Kalianjee argues.
- ii. The first page of a letter that Aphane addressed to the Master on 8 December 2021 that seems to be a response to the Master regarding Kilianjee's 2 December 2021 letter, but only the first page is included.
- iii. A cover page of a complaint against Kalianjee lodged by Laros. It is unclear what the complaint or part thereof the Master relied on to reach his decision. This complaint was never presented to Kalianjee.

[23] The records did not include the letters exchanged between the State Attorney and Kilianjee's attorneys.

[24] Kalianjee seeks to challenge the Master's decision to remove him by review in terms of s 151 of the Insolvency Act 61 of 1973, read with s 339 of the Companies Act 61

of 1973 and s 6 of the Promotion of Administration of Justice Act 3 of 2000, as well as the principle of legality.

- [25] Kajianjee argues that the two decisions that the Master made on 13 December 2021 were made without considering the nature of either the complaints lodged against Kajianjee or his answers thereto, with no legal basis, and in breach of the principle of legality. These decisions are administrative actions and, as such, reviewable under PAJA. The decisions also adversely affected Kajianjee's rights and had a direct external effect.
- [26] Kajianjee states that s 151 of the Insolvency Act provides for a review in the widest sense. This means that the Court can decide the matter *de novo*, thus not only exercising powers of review but also functioning as a court of appeal. It can set aside the decision arrived at by the tribunal or functionary and deal with the whole matter upon fresh evidence as if it were the decision-maker of the first instance. Thus, it allows the Court to consider the merits of the decision.
- [27] Based on this, Kajianjee argues that the Court must consider the complaints, Kajianjee's responses, and the Master's reason. It then becomes clear that the Master never considered the nature of the complaints or Kajianjee's answers to determine whether the complaint warrants an answer or if the answer meets the complaint. It seems as if the Master merely acted as a conduit for the complaints to Kajianjee and Kajianjee's response to the complaints. Whatever was received by Aphane and Tayob was sent to Kajianjee, whether it applied to M&M and Creative or not.
- [28] Kajianjee states that the Master did not act reasonably in considering the issues to which Kajianjee drew his attention in his answer to the complaint. If he did, he would have noted that Kajianjee did not have to respond. Removal from the estates would have been unnecessary. The Master did not apply his mind and omitted to consider other relevant facts.
- [29] Kajianjee asserts further that the Master uncritically accepted Aphane's and Tayob's allegations and treated Kajianjee's denial of the allegations as if the denial did not

address the allegations. He did not ask for more explanation or information from Kallianjee. This is a misdirection and evidence of his failure to consider the terms of Kallianjee's denial and his erroneous taking into account the unsubstantiated and hearsay allegations against Kallianjee.

- [30] In the "Review Record" and his answer to the Review Application, the Master refers to and includes several complaints on which he purportedly relied when he removed Kallianjee, even if none were put to Kallianjee. The Master refers to various documents generated during 2022 after Kallianjee's removal. These are not documents that could have influenced the Masters December 2021 decision. With reference to these documents, the Master then forms an opinion on whether Kallianjee is suitable. He concludes that based on these documents, on a *prima facie* basis and having considered and addressed the complaints, he was convinced that Kallianjee's conduct was improper and irregular and, therefore, he had to be removed. However, Kallianjee states that the failure on the part of the Master to afford Kallianjee an opportunity to be heard before removing him is in itself a reason for the Master's decision to be reviewed and set aside.
- [31] Kallianjee insists that someone who applied their mind based on the information that was before the Master in December 2021 could not have concluded that he had to be removed as a liquidator of either M&M or Creative and in particular not in terms of s 379(1)(b) of the old Companies Act. This is with specific reference to *Master of the High Court, Western Cape Division, Cape Town v Van Zyl*⁵ where it was stated that the powers in this section are not truly discretionary, as expressly identified objective criteria govern it. Moreover, the case said that if a Master proceeded with an incorrect understanding of the import of the statutory provision under which they act, the Court would be justified to interfere with the decision.⁶

⁵ [2019] 2 All SA 442 (WCC) at paras 10 to 14.

⁶ Para 20.

- [32] Kalianjee states that this is what happened, as the Master submits in his answering affidavit that the old Companies Act does not make provision for the procedure to be followed in removing a liquidator in terms of s 379. Therefore, he followed the procedure that a reasonable decision-maker would follow. But Kalianjee argues this is a misconstruction of his powers: he had to identify a (lawful) demand made to Kalianjee that he failed to follow or identify the duty imposed on him by the old Companies Act that he failed to perform satisfactorily or at all. He forms an opinion on unsubstantiated and unrelated complaints and Kalianjee's "shortcomings", concluding that Kalianjee acted improperly and irregularly. He also does not indicate why he does not resort to less extreme punitive or corrective measures.
- [33] Thus, there was no reason to remove him as a liquidator of either estate and, at least, as a joint liquidator because joint liquidators act jointly, Kalianjee states. The Master can also not explain how he can identify Kalianjee for removal without also removing the other liquidator. The decision must thus be set aside on various grounds in terms of s 151 of the Insolvency Act and s 6(2) of PAJA, in that:
- i. The Master erred or misdirected himself considering the factual material placed before him, together with his decision and report;
 - ii. There is not a rational connection between the information before the Master and the decision, nor with the purpose of the empowering provision and the decision;
 - iii. It was unreasonable, and no reasonable functionary in the Master's position would have made such a decision;
 - iv. The Master had not taken relevant considerations into account, and he has acted arbitrarily;
 - v. Kalianjee was not given a proper opportunity to comment and make representations to the Master.

- [34] The Master, in his reply, characterises the review application as two types of review. One is a statutory review in terms of s 151 of the Insolvency Act, and one is a judicial review in terms of PAJA. Both, he says, are without merits.
- [35] Firstly, in engaging s 151, Kallanjee requests the Court to sit as both an appeal and review Court. This is not correct, the Master states. While it may be that statutory review may be wider than judicial review of administrative action, in some instances, it should be narrower, confining the Court to particular grounds of review and remedies.⁷ This, the Master argues, means that the Court cannot simply ignore the Master's justification or factual evidence that was presented to him. The Court may only decide the case afresh on review and/or appeal in circumstances where the Master made a mistake or erred when considering the information presented to him. To do so, Kallanjee must make out a case that the Master has erred in his decision.
- [36] Secondly, judicial review is not concerned with the merits of the decision but rather with whether the decision was arrived at in an acceptable fashion.
- [37] Turning to the decision of the Master – he made his decision in terms of s 379 of the old Companies Act. He removed Kallanjee as he failed to observe what was required of him in terms of the Insolvency Act and the old Companies Act, and he was not fit and proper to continue with the administration of the liquidators.
- [38] Kallanjee failed to perform his duties satisfactorily or failed to comply with a lawful demand of the Master as required by s 379(1)(b). This is so because a liquidator should be independent and occupy a position of trust, not only towards creditors but also to the companies in liquidation whose assets vest in them. The Master reviewed Kallanjee's shortcomings; Kallanjee did not carry out his duties independently, and his conduct did not align with the mentioned obligations. This is for the following reasons:

⁷ *Nel v The Master* 2005 (1) SA 276 (SCA) para23.

- i. The Master received a complaint that Kalianjee solicited an amount of R300 000 from a member of M&M, an allegation made under oath by the member, backed up with confirmatory affidavits on oath from the employees who delivered these payments to Kalianjee. Receiving the payments from a member of a company under liquidation without the knowledge of the Master demonstrates that Kalianjee lacks impartiality and that he put himself in a situation of conflict of interest. This, the Master says, in itself warrants its removal.
- ii. Another complaint was that Kalianjee attached assets valued at R30 million that did not belong to M&M, giving an undertaking that the assets would not be removed pending the outcome of the appeal. Despite that, Park Village Auctions sold the assets. Allowing assets worth R30 million to be sold for storage costs without mitigating the risk is also dilatory in exercising his duties, failing to regard all creditors' interests. Therefore, the Master was warranted to remove Kalianjee.

[39] As for Creative, a creditor raised concern about the value of realised assets in liquidation *vis a vis* assets recorded in terms of s 79 of the Close Corporation Act.⁸ There was a discrepancy in the value of about R41 million, which Kalianjee explain was due to some confusion and that it was no train smash. When Kalianjee was asked for certain documents from the Business Rescue Practitioner, he could not provide them, saying that years had elapsed since the liquidation. These documents would have provided clarity on the value of the assets. The Master thus formed a view that Kalianjee failed to exercise his duties satisfactorily. This demonstrates Kalianjee's gross negligence and that the Master was not irrational in concluding that he failed to perform his duty satisfactorily. The facts were there for the Master to decide to remove Kalianjee.

⁸ 69 of 1984.

[40] Kalianjee is further unsuitable to be a liquidator in terms of s 379(1)(e). The phrase “no longer” indicates that a state that has existed has ceased to exist. In other words, he may have been suitable but no longer suitable. *Master of the High Court, Western Cape Division, Cape Town v Van Zyl*⁹ clarified that what is required is that he be no longer suitable to be a liquidator in the company concerned. This requires that the Master, on the one hand, must identify the characteristics that would make a person suitable, and on the other, with reference to the particular needs and demands of the liquidation of the company involved, if the liquidator is measured against those characteristics, suitable.

[41] The Master states that it is evident from his papers that he takes the Court into confidence and refers to the needs and demands of the liquidation companies involved. Firstly, he sets out the duties of a liquidator, namely to:

- i. Proceed without delay to recover and take possession of all assets of the company;
- ii. Apply such assets and property in satisfaction of the costs of the winding up and claims of creditors;
- iii. Distribute the balance among those who are entitled thereto;
- iv. To give information to the Master of the High Court;
- v. To facilitate the Master’s inspection of books and documents of the company;
- vi. To aid the Master in performing his duties under the act.

[42] The Master then continues to say that he gives the characteristics which render Kalianjee no longer well-fitted to manage the two estates by referring to the reasons that informed them. Here, he considers the complaint by Toyab, supported by Naidoo, noting that Naidoo was a member of M&M, the entity for which Kalianjee

⁹ [2019] JOL 4 1274 (WCC) at para 13.

acted as a liquidator. The summary of the allegations relating to Kalianjee's conduct as a liquidator to M&M are those summarised in paragraph [38]. This is proof of *prima facie* dishonesty and gross negligence.

- [43] As for Kalianjee disputing that he received money and that the monies are being recovered through legal proceedings, the matter is thus sub judice. However, there is no legitimate reason for a liquidator to receive any money from a member of a company he administrates. This raises concerns on the part of the Master, who would not appoint liquidators if they are suspected of being involved in criminal activities.
- [44] Kalianjee also does not dispute that the assets were sold but states that they were sold in lieu of storage costs. This does not help him. Thus, the Master states that he was reasonable and rational in concluding that Kalianjee was not well suited to administer the affairs of M&M. Thus, an application for review is without merit and must fail.
- [45] Regarding Creative, the Master refers to correspondence between a creditor addressed to Kalianjee a year before the decision to remove him was taken. In short, the creditor stated that the First and Final Liquidation Account was published under an incorrect reference number, resulting in the creditor not knowing that the account laid open for inspection. He also requested documents, including an inventory list received by Kalianjee from the Business Rescue Practitioners and other documents, but did not receive them. He raised concerns about the value of the assets realised, which amounted to R6,3 million instead of R48,2 million as per the s 79 report. This discrepancy was explained to be not a train smash. Kalianjee did not dispute the letter's contents but stated that it was not raised for him to respond. Still, this does not mean that the Master was unreasonable and irrational in concluding that Kalianjee was no longer suitable to be a liquidator for Creative.
- [46] For these reasons, the Master states, the review is without merit. However, should the Master be wrong in both decisions, it does not follow that the review must succeed. The review was launched in the prism of s 151 of the Insolvency Act. Where the decision of the Master is wrong, the jurisdictional factors requiring to sit

as a court or review and appeal become engaged. The Court is empowered to proceed to determine afresh on the issues raised before it whether the Master's decision should be reviewed, corrected and set aside.

- [47] Thus, the Court must consider the totality of the complaints in the Record in terms of how they relate to M&M and Creative. The Master submits that it acted fairly and responsibly in affording him an opportunity to be heard before making the final decision. Kalianjee did not respond. There is no reason to impugn the decision to remove him as liquidator.
- [48] As for the PAJA review, Kalianjee does not plead a specific ground of review in his papers; he merely lists them in his heads of argument without linking each ground to a specific conduct of the Master. He lists the decision as being reviewable in terms of s 6(2) of PAJA, but lays no factual basis for these grounds of review. Thus, the PAJA application is bad in law.
- [49] Tayob states that Kalianjee plays "catch me if you can", and instead of establishing his honesty, he attempts to keep proof of his wrongdoing from the Court. However, Tayob states Kalianjee did not succeed in this. He should not only be removed from the two estates but also from all estates where he has been appointed and should not be appointed as a liquidator and trustee at all. Hence the counter-application.
- [50] Kalianjee replies to all this, stating that correspondence from the Master removing him from the estates and providing "reasons" confirms that he was removed in terms of s 379(1)(b) of the old Companies Act for failure to respond. S 379(1)(e) was not mentioned. Be that as it may, the Master still fails to identify what parts of the allegations Kalianjee failed to address and does not identify the duty imposed on Kalianjee that he failed to perform satisfactorily.
- [51] The Master taking into account the *prima facie* allegations of Naidoo and the correspondence between Kalianjee and a creditor of Creative deciding to remove Kalianjee indicates that the Master uncritically accepted Aphone's, Tayob's and Naidoo's allegations as fact and does not require more information or explanation from Kalianjee after he denied the claims.

- [52] In the review record, the Master includes several other complaints and correspondence with a creditor of Creative. In contrast, none of these complaints were ever put to Kalianjee to reply to. Kalianjee thus did not have an opportunity to be heard.
- [53] As for the Master's argument that should the Court find that the Master was wrong in both decisions, the Court is empowered to determine afresh on the issues raised before it, Kalianjee states that the Court hearing an application in terms of s 151 of the Insolvency Act sits as both a court of appeal and review, reconsidering the decision of the Master. That does not mean the Court may disregard the factual material before the Master or the Master's reasoning. In other words, if the Court finds that the Master erred or misdirected himself based on the material placed before him, the Court can decide the matter *de novo*. But this is only with reference to the material before the Master and the correctness or otherwise of his decision. New material cannot be considered.

The Counter Application

- [54] Tayob, in the counter-application, seeks an order declaring Kalianjee disqualified from holding office as a trustee and a liquidator for life. He also wants him removed from all the offices he currently holds as a liquidator and trustee. This is based on the provisions of s 59 of the Insolvency Act and s 373 of the old Companies Act.
- [55] In the alternative, should the main application be successful and the Master's decisions set aside, they seek an order to direct the Master to examine the complaints against Kalianjee by subjecting him to interrogation on oath in terms of s 381 of the old Companies Act.
- [56] Tayob divides the groups of wrongdoing into two groups:
- i. Kalianjee's non-fraudulent performance of his functions as a liquidator in the three estates, such as abusing his powers by engaging in unwarranted and unnecessary judicial and quasi-judicial proceedings in the Creative and Lifestyle estates. How he functions led Tayob to lodge complaints against Mr

Kalianjee with the Master, which led to his removal from the Johannesburg estates.

- ii. The other issues do not concern Kalianjee's performance of his functions in any specific case. It concerns his character, with evidence that he is corrupt. This is what the counter-application seeks to do. The payment of R300 000 that Kalianjee extracted from Naidoo Tayob is deemed corrupt.

[57] Should the relief in the main application be granted, Tayob suggests that it would be just and equitable for the Court to grant "appropriate relief" in terms of s 8 of PAJA and direct the Master to conduct a full inquiry as contemplated in s 381 of the Old Companies Act.

[58] Kalianjee opposes this counter application. He states it discloses no cause of action. Tayob furthermore fails to establish his *locus standi* as an interested person in M&M, Creative and/or Lifestyle and seeks relief that the Court cannot grant. Instead, the allegations are incorrect and exaggerated, frivolous and vexatious, and have been brought up with the ulterior motive of delaying judgment on the Review Application.

[59] Addressing the issue of *locus standi*, Kalianjee makes the following arguments:

- i. S 59 of the Insolvency Act refers to "any person interested", as does s 373 of the Old Companies Act. *Henocheberg* on the Companies Act¹⁰ states that an interested person is one who has a pecuniary or proprietary interest in the company of which the person is sought to be disqualified or removed. No case was made to establish Tayob's interest and/or *locus standi*. This is grounds for dismissing the application.
- ii. There is also material non-joinder as the relief sought has an impact on persons concerned in the winding up of *all* the estates in which Kalianjee is

¹⁰ Volume 2 at APPI-161 page 799.

appointed as either trustee or liquidator.¹¹ This includes the Pretoria Master. The non-joinder of other co-liquidators and the Pretoria Master precludes the Court from considering the counter-application. This was raised in the answering affidavit months before the hearing; despite that, Tayob persists, and the Court should not use its discretion to rather postpone the matter instead of dismissing it.

- iii. As for s 59 of the Insolvency Act, *Gilbert v Bekker*¹² states that “the Court no longer has the power to remove a trustee, be it from maladministration or failure to perform satisfactorily. This function has now fully and effectively been transferred to the Master.” Furthermore, reference in the section is made to the estate in question. Thus, for an applicant to succeed, they need to bring facts relating to the appointed trustee in administering a specific insolvent estate, which Tayob did not do. Because Tayob cannot bring himself within the ambit of s 59, the relief sought is impossible for the Court to grant.
- iv. S 373 of the old Companies Act is similar to s 59 of the Insolvency Act but empowers the Court to disqualify a person from holding the office of liquidator and to remove them from office if they have been appointed. The Court can also temporarily or permanently disqualify such a person. However, the Court’s powers to do so are restricted to certain categories of conduct as set out in the section. Thus, Tayob must show that he is an interested party and establish facts to prove that the liquidator is guilty of the conduct set out in s 373. He does not specify the category of conduct upon which he relies. He states that Kalianjee is dishonest and lacks the character of being a trustee, but this is not a ground listed in s 373.

¹¹ They refer to *Cooper NO v the Master of the High Court, Bloemfontein* 2019 JDR 1416 (FB) at para 41 and *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) at par 92, amongst others.

¹² 1984 (3) SA 774 (W).

- [60] Tayob regards these points as misguided, as his case concerns corruption, a character flaw in Kalianjee. He is not seeking relief of a technical nature regarding a specific estate in which he does not have a direct interest. He is concerned with the question of whether Kalianjee is a fit and proper person to be an insolvency practitioner. This is possible in terms of the Court's common law powers, as accepted in *Fey NO and Whiteford NO v Serfontein*¹³ and confirmed in *Gowar v Gowar*.¹⁴
- [61] Tayob also indicates that Kalianjee only answers the corruption claim with a bald denial and issues about evidence and the hearsay rule. However, Naidoo's application under oath thwarts this by setting out how the payment was made. This is why he seeks intervention – to inform the Court and to place it before the Court as a justiciable issue. This is why it is important first to consider the intervention application – if he is granted leave to intervene and delivers an affidavit setting out Kalianjee's corrupt character, then the review is unnecessary as Kalianjee would be proven to be corrupt and not be allowed to fill the position of liquidator.
- [62] Kalianjee persists that Tayob does not have *locus standi*, and that it needs to join all the estates and co-liquidators in the counter-claim for the relief it seeks.
- [63] As for the argument that the Court has a common law power to remove a trustee or liquidator from the estate and that the power does not reside exclusively with the Master, the Court can remove the trustee or liquidator on the grounds of misconduct, which the Insolvency Act has not replaced. However, this is not the relief sought in Tayob's founding papers. It raised the issues in their heads of argument, seemingly introducing a new cause of action. S 59 refers to "the estate in question",¹⁵ Thus, facts relating to specific conduct concerning a specific estate should be disclosed, which Tayob failed to do. Moreover, the argument that the Court can remove

¹³ 1993 2 SA 605 (A).

¹⁴ 2016 5 SA 225 (SCA).

¹⁵ *Gilbert v Bekker* [1984] 4 All SA 279 (W).

Kalianjee on the grounds of misconduct is not an argument for Tayob to raise but for the creditors of the respective estates.¹⁶ Tayob does not have firsthand knowledge of the allegations. Regardless of this argument of whether the Court has the power or not, Kalianjee states that Tayob still failed to show his interest in the case.

[64] Tayob disagrees – pleadings do not have to specify the legislation or the rule in common law relied upon. It must merely describe the facts, and the evidence relied on must be proved.

[65] As for *locus standi*, in common law, there is no limitation on who the applicant for disqualification must be; it is determined according to the rules of standing. Tayob, as a member of the same profession, has an interest in bringing an application when he becomes aware of Kalianjee's dishonesty. Furthermore, Kalianjee joined Tayob as a respondent, and there is thus a *lis* between the parties.

The Application to Intervene

[66] At the hearing, counsel for Naidoo objected to Kalianjee's counsel being allowed to address the Court on the Intervening Application since there was no answering affidavit filed in response to his claims, and the allegations are thus uncontested. I disagreed, as I must first decide whether Naidoo is entitled to intervene, whether contested or not.

[67] Naidoo seeks leave to intervene under Rule 12 of the Uniform Rules of Court. Thus, the intervention of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of the Court. Based on case law,¹⁷ Naidoo argues that he has a direct and substantial interest in the right, that is the subject of the litigation. Whether someone has a direct and substantial interest will depend on the matter before the Court and the context.¹⁸

¹⁶ *Jordaan v Richter* 1993 2 SA 605 (A).

¹⁷ *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para 8.

¹⁸ *Polokwane Taxi Association v Limpopo Permissions Board* [2017] ZASCA 44 para 15.

- [68] Naidoo states that he falls under the wide net of s 59 of the Insolvency Act and ss 373 and 379(1) of the old Companies Act as “any person interested”.
- [69] Naidoo sets out his interest as follows: the Master removed Kalianjee, who is the liquidator of M&M, of which Naidoo is a member. In the review application, Kalianjee seeks to be reappointed as liquidator of M&M. Kalianjee then questions Tayob’s authority to make a complaint on behalf of Naidoo, stating that only Naidoo can do that. He thus has an interest in the complaint – both as the complainant to the Master and as a member of the Close Corporation.
- [70] Kalianjee, in their supplementary heads of argument, states that it is not sufficient for Naidoo to merely state that he has an interest in the application, he must also make such allegations as would show that he has a *prima facie* case and that his application is seriously made, and not frivolous.
- [71] Other than that, Kalianjee states that he lacks *locus standi* in that his personal estate has been sequestered. He claims that he has a direct interest in M&M, of which he is a former member, issued summons against Kalianjee (in 2013) to recover the R300 000 allegedly improperly solicited, as well as a further summons to seek delivery of the property belonging to them or R33 million damages. This all relates to M&M, from which Kalianjee is removed. Kalianjee points out that later in his affidavit, he states that damages were caused to his personal estate. Naidoo also states that despite being an unrehabilitated insolvent, the relief does not relate to his personal estate so he does not need permission from the trustees appointed to his insolvent estate.

The law

(i) Joinder:

- [72] Rule 12 of Uniform Rules of Court:

Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The Court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet.

[73] A party who wants to join must apply to the Court, and such a joinder is subject to the Court's discretion. *Gordon v Department of Health, Kwazulu-Natal*¹⁹ formulated the test for joinder as follows:

The Court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the Court might make would not be res judicata against him, entitling him to approach the Courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.⁶ This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.

[74] In other words, a party who wants to join must show three things: that they are concerned about the issue, the matter is of common interest to them and the party they desire to join, and that the issues are the same. Of importance is whether the party has a direct and substantial interest in the subject matter. The Constitutional Court clarified in *Snyders v De Jager*²⁰ what that entails, namely

[9] A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no Court may make an order against anyone without giving that person the opportunity to be heard.

[75] Naidoo's argument that since Kallianjee questions Tayob's authority to make a complaint on behalf of Naidoo with the Master, he has a right to intervene in this application seems misplaced. One scenario deals with a complaint to the Master, and the other with an application for the disqualification of a liquidator. The processes and requirements are different.

¹⁹ 2008 (6) SA 522 (SCA) para 9.

²⁰ [2016] ZACC 54. This was confirmed in *South African Riding for the Disabled Association v Regional Land Claims Commissioner* [2017] ZACC 4.

[76] Naidoo is not clear on what interest he relies on – whether it is his interest in M&M or his personal estate. Be that as it may, as an unrehabilitated insolvent, his estate vests in the trustee. He has no interest in M&M.²¹ If there is such an interest, it will vest in the trustees of his insolvent estate.

[77] Naidoo, accordingly, has not made out a proper case for intervening in these proceedings.

(ii) Counter application law discussion

[78] I do not wish to dwell too much on Tayob's standing to bring the counter application. It was Kalianjee who joined him, and thus created a *lis* between the parties, so I accept that he does have standing. Still, the counter application must be dismissed for the reasons set out below.

[79] Tayob relies on s 59 of the Insolvency Act and s 373 of the old Companies Act for their counter-application. S 59 Insolvency Act states that the Court may declare a person disqualified from being a trustee or remove a trustee:

On the application of any person interested the Court may either before or after the appointment of a trustee, declare that the person appointed or proposed is disqualified from holding the office of trustee, and, if he has been appointed, may remove him from office and may in either case declare him incapable of being elected or appointed trustee under this Act during the period of his life or such other period as it may determine, if—

(a) he has accepted or expressed his willingness to accept from any person engaged to perform any work on behalf of the estate in question, any benefit whatever in connection with any matter relating to that estate; or

(b) in order to induce a creditor to vote for him at the election of a trustee or in return for his vote at such election, or in order to exercise any influence upon his election as trustee, he has—

(i) wrongfully omitted or included or been privy to the wrongful omission or inclusion of the name of a creditor from any record by this Act required; or

(ii) directly or indirectly given or offered or agreed to give to any person any consideration; or

²¹ Meskin's *Insolvency Law and its operation in winding-up* Eds Justice P A M Magid, Professor André Boraine, Jennifer A Kunst and Professor David Burdette (loose-leaf) para 5.2.

- (iii) offered to or agreed with any person to abstain from investigating any previous transactions of the insolvent concerned; or
- (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

[80] In *Gilbert v Bekker*²² the Court clarified that a court may only disqualify or remove such a person if subsections (a) and (b) are complied with. In other words, if there were improper practices. It further ruled that only the Masters, and not the High Court, has the power to appoint liquidators. It also stated that the Insolvency Act replaced the common law of insolvency – mostly followed by reference to the appointment of trustees and not the removal of trustees. The Court states

This brings one to the important point of being able to say that, but for improper practices, the Court no longer has the power to remove a trustee, be it for maladministration or failure to perform satisfactorily. This function has now fully and effectively been transferred to the Master. The new section even expands the grounds for action by him by inclusion of the new ss (d) and (e). Again the direction of the thrust is clear. To speak of the Court's "jurisdiction not being ousted" as the editors of the seventh edition of *Mars* do, ignores the fact that our insolvency administration is wholly a creature of statute. Only when one comes to impeachable transactions is there some room for the common law. The Court's "jurisdiction" in this sense, if not expressly contained in the statute, can therefore only exist if it arises by necessary implication. There is nothing to which one can point as possibly implying this "jurisdiction".

[81] In *Ex Parte the Master of the High Court of South African North Gauteng*²³ reference was made to *Gilbert* case, but with regard to the power of the Court to appoint and not to remove the trustee, where the Court in the end found that the power to *appoint* trustees rests exclusively in the Master.

[82] In this case Tayob did not bring the actions of Kalianjee within the prescripts of s 59. S 59 is thus not applicable.

[83] However, what Tayob argues is that the common law powers of the Court to *remove* a trustee on the grounds of misconduct have not been displaced by the Insolvency Act. Tayob states that such a power does not reside exclusively with the Master. For this reliance is placed on *Fey NO and Whiteford NO v Serfontein*²⁴ that held that if

²² 1984 (3) SA 774 (W).

²³ 2011 5 SA 511 (GNP).

²⁴ 1993 (2) SA 605 (A).

there are charges of abuse of trust, dishonesty and recklessness, the Court has the common law power to remove the liquidator. The Court in *Fey NO and Whiteford NO v Serfontein*²⁵ clarified that the statutory power to remove a trustee was assigned to the Master and no longer the Court. However, the common law ground of “misconduct as trustee” was omitted. In those instances, the Court’s power remains. *Gowar v Gowar*²⁶ confirmed this. In other words, Tayob concludes that the Court has the common law power to remove a trustee from an estate for abuse of trust, dishonesty and recklessness. That power does not exclusively reside with the Master, and this is what they tried to argue.

- [84] These two Supreme Court of Appeal decisions seem to be in contrast with *Gilbert v Bekker*.²⁷ However, in my view, these two views can be reconciled by considering the legislative scheme and interpreting s 59 of the Insolvency Act in light of the similar provisions, ss 373 and 379, in the old Companies Act. In light of the legislative scheme, namely the Insolvency Act, read with the old Companies Act, the question then turns to *when* a litigant can rely on the common law power of the Court *instead* of the power of the Master.
- [85] In this context, *Ex Parte the Master of the High Court of South African North Gauteng*²⁸ is instructive. While the case dealt with the issue of the appointment of trustees, the Court makes valuable comments about the roles of the Court *vis a vis* the Master that is equally applicable here. The Court clarified that in terms of the Insolvency Act, the “Master is in control of the entire process of administration and liquidation of insolvent estates”,²⁹ which then extends to companies and closed corporations too. The Court stated that “[e]very stage [...] is controlled by the

²⁵ 1993 (2) SA 605 (A) at 614

²⁶ 2016 (5) SA 225 (SCA).

²⁷ 1984 (3) SA 774 (W).

²⁸ 2011 5 SA 511 (GNP).

²⁹ Para 19.

Master's office".³⁰ It is the Master who has knowledge about the ability, integrity, honesty and dedication of people who want to be appointed as trustees.³¹ Similar considerations are also true for the Court's powers to disqualify or remove a liquidator.

[86] It is with this in mind that the following provisions should be considered. Both s 373(2) and s 379(2) state that the Court may, on application by the Master or any interested person, remove a liquidator from office *if the Master fails to do so* in any of the circumstances mentioned in subsection (1) or for any other good cause. In other words, the Court may only step in *if the Master fails to do so*. "or for any other good cause" should be read with "in any of the circumstances mentioned in subsection (1)" and not with "if the Mater fails to do so". This is because the primary task of the Master is to appoint, disqualify, or remove liquidators. Only if the Master *fails* to disqualify or remove a person, the Court may step in.

[87] This is in line with the reasoning in *Murray NO v Master of the High Court, Pretoria*³² that dealt with the Court's powers in terms of s 379(2) of the old Companies Act. In this case, the Master removed the applicants from the office of liquidators in terms of s379(1)(d) of the old Companies Act. This decision was taken on review. There was a conditional counterclaim that should the Court grant the application and the removal of the liquidators be set aside, then in terms of s 379(2), the Court should remove the liquidator. The Court found³³ that s 379(2) only applies where the Master refuses or fails to remove a liquidator from office. The Court stated that S 379(2) cannot "trump" a possible review outcome.

[88] While in this case the counter application is not conditional on the review application succeeding, it is doubtful whether the Court has the common law residual powers to disqualify a liquidator in instances where the Master *is* busy with a process of

³⁰ Para 26.

³¹ Para 27.

³² [2023] ZAGPPHC 457.

³³ Para 34.

assessing the suitability of a liquidator. It seems that in such a case, the Court will be usurping the functions of the Master, and this is not in line with the legislative scheme that seeks to place the administration of estates in the hands of the Master. From the two cases mentioned above, it would seem that the residual power that the Court may have in terms of *Fey* only kicks in when the Master fails to perform his duties.

- [89] Like s 59, the Court's power in s 373 of the old Companies Act³⁴ to disqualify a person from holding the office of liquidator is limited to the categories mentioned in the section. In other words, for an application to succeed, it must fall within s 373(1).
- [90] Mr Louw argued that s 373 of the old Companies Act "provides mere examples of conduct for which person may be declared unfit to be a liquidator". I disagree. As discussed above, the powers of the Court in the liquidation process have been limited by the Insolvency Act, which seeks to delineate the powers of the Court *vis a vis* that of the Master. Nothing in s 373 suggests that the Court has powers to

³⁴ (1) The Court may, on the application of any interested person, declare any person proposed to be appointed or appointed as liquidator, to be disqualified from holding office, and, if he has been appointed, may remove him from office, and may, if it thinks fit, declare him incapable for life or for such period as it may determine of being appointed as a liquidator under this Act—

(a) if he has accepted or offered or agreed to accept or solicited from any auctioneer, agent or other person employed on behalf of a company in liquidation, any share of the commission or remuneration of such auctioneer, agent or person or any other benefit; or

(b) if he has, in order to obtain or in return for the vote of any creditor, member or contributory, or in order to exercise any influence upon his nomination or appointment as liquidator—

(i) procured or been privy to the wrongful insertion or omission of the name of any person in or from any list or schedule required by this Act; or

(ii) directly or indirectly given or agreed to give any consideration to any person; or

(iii) offered or agreed with any person to abstain from investigating any transactions of or relating to the company or of any of its directors or officers; or

(iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

disqualify a liquidator outside the parameters of the provision. The phrase “if it thinks fit” does not indicate a widening of the instances where removal is warranted but rather of the Court’s discretion in disqualifying a liquidator.

[91] The Court’s powers to remove a liquidator is widened in s 373(2), where the Court may remove a liquidator “for any other good cause”. However, that residual power, be it a common law power or a statutory power, is only applicable if the Master refuses to remove a liquidator for reasons set out above. This is not the case.

[92] Accordingly, since the Master has taken action in terms of legislation to remove Kalianjee from the two estates in the Main Application, that process must first run its course before Tayob can call on the Court’s power to disqualify or remove. The counter application is premature and therefore dismissed.

[93] This then brings me to the review application.

(iii) Review application

[94] Kalianjee asks that the decisions to remove him from M&M and Creative be reviewed, corrected and set aside. Reliance is placed on S 151 of the Insolvency Act, PAJA and legality. S 151 states that “[...] any person aggrieved by any decision, ruling, order or taxation of the Master [...] may bring it under review by the Court [...]” S 151 is indeed a “third type of review” as set out in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*.³⁵ In other words, it is one where the Courts have statutory powers of review. This entitles the Court to enter upon and decide the matter *de novo*. Thus, if the decision is set aside, it can deal with the matter on fresh evidence. However, it may also be narrower with the Court being confined to particular grounds of review, or particular remedies.³⁶

³⁵ 1903 TS 111.

³⁶ *Nel N.O v Master of the High Court Eastern Cape* [2004] ZASCA 26 para 23.

[95] The Master purported to remove Kalianjee in terms of s 379 of the old Companies Act, which states that

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

[...]

(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

[...]

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

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

[96] From the wording of the section, it is evident that the Master does not have a wide discretion,³⁷ the power is limited to paragraphs (a) – (e). There are express identified objective criteria – these criteria must be satisfied before the Master can exercise their power of removal. In the letter sent to Kalianjee to remove him, reliance was placed on s 384 and s 379(1)(b).

[97] S 384 was a wrong choice as it deals with remuneration, so the focus of the discussion will only be on s 379(1)(b). This requires the Master to find that:³⁸

- i. The liquidator has failed to perform satisfactorily any duty imposed upon him; or
- ii. The liquidator has failed to comply with a lawful demand of the Master;
- iii. If (i) or (ii), then whether removal is the appropriate and proportionate consequence in the circumstances, given that removal is “and extreme step”.

³⁷ *Van Zyl v Master of the High Court, Western Cape Division, Cape Town* [2019] ZAWCHC 23 para 7.

³⁸ Based on the dicta of *Van Zyl v Master of the High Court, Western Cape Division, Cape Town* [2019] ZAWCHC 23 para 12.

- [98] In previous correspondence, the Master also relied on subsection (e). This section empowers the Master to remove a person when circumstances change and the person is no longer suitable. It is not a suitability to hold office in general, it is suitability regarding the specific estate, thereby narrowing the ambit of the provision. What this requires of the Master is first to identify the characteristics of the liquidator that is needed for the office, and then consider the needs of the liquidation of the specific company involved, and if the liquidator is in relation to those specific characteristics no longer fit to manage that specific company's winding up. This usually refers to conflicts of interest, disruptive discord with creditors, members or co-liquidators, etc.³⁹
- [99] In *Van Zyl v Master of the High Court, Western Cape Division, Cape Town*⁴⁰ the Court clarified that “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).”
- [100] Parallel to that are the prescripts of PAJA that provide for review on the grounds that
- i. The Master’s decision was not supported by, and therefore not rationally connected to, either the information before him or the purpose of the empowering provisions - 6(2)(f)(ii)(bb) and (cc),
 - ii. The decision is so unreasonable that no reasonable person could have made it - s 6(2)(h);
 - iii. The Master’s action was procedurally unfair - s 6(2)(c);

³⁹ *Van Zyl v Master of the High Court, Western Cape Division, Cape Town* [2019] ZAWCHC 23 paras 13 & 14.

⁴⁰ [2019] ZAWCHC 23 para 20.

- iv. Errors of law materially influenced the decision - s 6(2)(d);
- v. The Master had taken irrelevant considerations into account and not considered relevant considerations - 6(2)(e)(iii).

[101] In *Van Zyl v Master of the High Court, Western Cape Division, Cape Town*⁴¹ the Court stated that if an entitlement to relief is established on grounds of s 6 PAJA, it would not have to consider whether it should also be set aside in terms of s 151 for being “wrong” on the merits. I will, therefore, first consider the PAJA grounds.

[102] Some difficulties in reviewing the Master’s decision relate to the inadequacy of the reasons. Reasons are important for the person affected to understand why and how the decision was made, for them to consider whether they accept or challenge the decision, and if they challenge it, on what ground.

[103] A fuller picture emerged in this review application when the Master set out his position in the affidavit, but that is not the moment in time when the adequacy or not of the reasons is assessed. *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*⁴² set the starting requirements for the adequacy of reasons. It stated that “[t]his requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.” Reasons must inform the person affected properly. It must set out the Master’s understanding of the relevant law, its finding on the facts, and his reasoning process.⁴³ The reasons also require the appropriate level of detail.

⁴¹ [2019] ZAWCHC 23 para 12.

⁴² [2003] ZASCA 46..

⁴³ *Kiva v Minister of Correctional Services* [2006] ZAECHC 34

- [104] Measured against these requirements, the Master did not provide adequate reasons. The Master merely stated that s 379(b) (sic) of the old Companies Act empowers him to make this decision for failure to comply with a lawful demand, that the allegations were not answered in sufficient detail and that the estates have not been finalised. The Master then informs Kalianjee that an investigation into s 381 is underway. Suffice it to say, these reasons do not set out the Master's understanding of the relevant law, it does not provide the facts on which his finding is made, and it does not indicate the Master's reasoning process. There is no detail. This, despite the repeated requests from Kalianjee to clarify the specific demands that he needs to comply with, the particular estates that this refers to. The reasons the Master gave, for instance, do not indicate why Kalianjee's responses were inadequate other than to say that he denied the allegations, which is not true for all complaints.
- [105] Without adequate reasons, the presumption is that the decision was taken without good reason.⁴⁴ This impacts s 6(2)(f)(ii)(dd), which empowers a court to review an administrative action if the action itself is not rationally connected to the reasons given for it by the administrator. If the s 5(3) assumption is that the decision was taken without good reason, it must follow that the action itself was not rationally connected to the reasons given for it. The Master's decision is unreasonable and must be set aside for this reason.
- [106] S 6(2)(e)(iii) of PAJA requires a decision-maker to take all relevant considerations into account and to ignore irrelevant considerations.⁴⁵ This is closely linked to s 6(2)(i), a mistake of fact. The Master relied on complaints lodged against Kalianjee in the Lifestyle estate, an estate lodged at the Master in Pretoria. While these complaints are serious and concerning and need to be investigated, they are not relevant considerations that the Johannesburg Master could have relied on to

⁴⁴ S 5(3).

⁴⁵ *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd* 2012 (2) SA 16 (SCA) para 34.

remove Kajianjee from the M&M and Creative estates as they relate to a different estate. The Master's decision is thus unlawful and must be set aside.

- [107] The common law rule of *audi alteram partem* was not replaced by PAJA, but instead is now a mandatory requirement in terms of s 3(2)(b) of PAJA. A decision-maker must give the person whose rights will be affected a reasonable opportunity to make representations. Of course, the right to make representations does not include the right to have them accepted. Instead, it is to ensure that the decision-maker hears all points of view to enable them to arrive at an objectively justifiable conclusion.
- [108] The review record includes complaints that have not been put to Kajianjee to address. These are serious and concerning allegations, and if true, would empower the Master to remove Kajianjee. However, to get to that point, lawful procedures must be followed, where the legal principles relied on must be set out, with a clear explanation of how all the facts before the Master justify such a conclusion. If Kajianjee was not afforded an opportunity to answer the complaints, not only is the *audi* principle not adhered to, but all the facts would not have been before the Master. The Master's decision was procedurally unfair and must be set aside for this reason.
- [109] This leaves me to consider the appropriate remedy. The decision is invalid and must be set aside in terms of s 8(1) PAJA. The question is whether this Court has good reasons to depart from the default position to remit the decision to the Master. I accept that the Court has wider powers in terms of s 151 of the Insolvency Act, and curious questions arise about the interaction between the Insolvency Act and PAJA that I do not need to answer here. In my view, the Court should be hesitant to encroach on the Master's territory, namely, the administration of estates. The deference to the Master in this instance thus rests on the reasoning that the Master should first complete the process in line with the prescripts of a just administrative process, which hopefully leads to a valid decision. Only once a valid decision is made, and parties then approach the court, can the Court step in, if necessary.
- [110] As for Tayob's request to direct the Master to do a s 381 enquiry, It is evident from the "reasons" letter sent by the Master that the Master has already embarked on a s

381 enquiry. This is the Master's prerogative, and given the complaints raised in this case, in my opinion, it is the right thing to do.

[111] With the decision set aside, it allows the Master to consider the totality of the complaints and address them in a lawful, rational and procedurally fair way. This may or may not lead to the removal of Kalianjee from these two, or perhaps all, estates. That is not a decision for his Court to make at this moment. That would be premature. I will, accordingly, remit the decision back to the Master.

Costs

[112] Kalianjee sought an attorney-client scale costs order, including the costs of two counsel, against the Master, should the review succeed. I can see no reason why a punitive order is warranted in this case. However, I agree that the Master should pay Kalianjee's cost since he is successful with the review.

[113] Since the counter application did not succeed, costs will follow the results. Kalianjee requested a punitive cost order (including three counsels), which I do not think is warranted in the case. Tayob raised serious concerns that deserve investigation, and his legal points warranted consideration. I do not regard the fact that it is premature as supporting a punitive cost order.

[114] The same goes for the intervening party, where Kalianjee sought costs on scale C. Given the history and the complexity of the case, I agree.

Order

[115] I, therefore, make the following order:

1. The Master's decision of 13 December 2021 to remove the applicant as final liquidator of:
 - a. M&M Hiring SA CC (in liquidation); and
 - b. Creative Aluminium Products CC (in liquidation)

are reviewed and set aside;

2. The matter is remitted to the Master for reconsideration.
3. The cost of the application is to be paid by the first respondent, including the costs of two counsel, on scale C.
4. The counter application is dismissed, with costs, including the costs of two counsel, on scale C.
5. The intervening application is dismissed, with costs, including the costs of two counsel, on scale C.

[REDACTED]

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email. The date of the judgment is deemed to be 29 August 2024.

Counsel for the applicant:	HC Bothma SC with him N Diederichs
Instructed by:	Vezi & De Beer Incorporated
Counsel for the first respondent:	P Mahlati
Instructed by:	The State Attorney
Counsel for the second respondent:	PF Louw SC
Instructed by:	A Mothilal Attorneys Incorporated
Counsel for the intervening party:	L van Gass
Instructed by:	Lacante Attorneys Incorporated
Date of the hearing:	24 May 2024, with further heads filed on 27 and 29 May 2024
Date of judgment:	29 August 2024