



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

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

Case A5072/2022

Date: 19 September 2024

WJ du Plessis

In the matter between:

EDUCATED RISK INVESTMENTS 54 (PTY) LTD

Appellant

and

**THE MASTER OF THE HIGH COURT, JOHANNESBURG
POLLOCK, RICHARD KEAY N.O.
SYMES, MARYNA ESTELLE N.O.
KOTZE, OLGA N.O.
NEDBANK LIMITED
IMPERIAL HOLDINGS LIMITED**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

Coram: Du Plessis AJ (Wepener J and Vally J concurring)
Heard on: 31 July 2024
Decided on: 19 September 2024

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by e-mail to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 19 September 2024.

JUDGMENT

DU PLESSIS AJ (with whom WEPENER J and VALLY J agree)

[1] The appellant (“Educated Risk”) is appealing against the judgment of Adams J,¹ who dismissed its main application, as well as two interlocutory applications for the stay of the main application and for leave to deliver a supplementary replying affidavit. Educated Risk only persisted with its appeal against the dismissal of the main application and the cost order granted in the Court *a quo*.

[2] The main application was dismissed for the following reasons:

- a. S 408 of the Companies Act² (“the old Companies Act”) does not give the court the power to re-open the second liquidation and distribution account (“the second L&D account”) in respect of Farm Bothasfontein (Kyalami) (Pty) Ltd (in Liquidation) (“the Company”) once the second to fourth respondents (“the liquidators”) had commenced with the distribution.
- b. Re-opening the second L&D account serves no purpose. The claim by Educated Risk was compromised, and no substantial injustice has been done by the confirmation of the second L&D account (based on s 157 of the Insolvency Act³).
- c. Educated Risk’s case, on its founding papers, is incomplete on its version and should not be allowed to make out a case in reply.

[3] The Court *a quo* found that the proceedings brought by Educated Risk are clearly frivolous and vexatious and that the application is an abuse of process. The Court awarded costs on a punitive scale.

¹ *Educated Risk Investments 54 (Pty) Ltd v The Master of the High Court, Johannesburg* [2021] ZAGPJHC 461, handed down 29 September 2021.

² 61 of 1973.

³ 24 of 1936.

[4] This stemmed from the following facts: In 2004, an agreement was concluded between the shareholders of Farm Bothasfontein (Kyalami) (Pty) Ltd (“Farm Bothasfontein”) and the fifth respondent (“Nedbank”) and the sixth respondent (“Imperial”) (together referred to as “the respondents”), where these two companies acquired 60% shareholding in Farm Bothasfontein. The company has since been liquidated.

[5] During the Covid-19 pandemic, the Minister of Justice and Correctional Services issued regulations in terms of the Disaster Management Act⁴ to deal with the department's operations during the pandemic. The Chief Master issued a protocol for L&D account inspections during Covid when the Master's offices and the Magistrate's Courts were not open to the public for inspection during the lockdowns. This was to ensure compliance with s 406 of the old Companies Act (“the Act”).

[6] The protocol provided that the examination of L&D accounts in insolvency matters could be lodged by email. Following this protocol, the second L&D account did not lie for *physical* inspection but was available electronically. Thus, under this protocol, on 1 June 2020, the second L&D account was confirmed by the first respondent (“the Master”) in terms of s 408 of the Act. After that, the liquidators commenced with the distribution of dividends to the shareholders of the Company in terms of the L&D account. They paid Nedbank and Imperial and tendered payment to Educated Risk.

Educated Risk's case

[7] Educated Risk's case is that the Master did not have the power to confirm the second L&D account, which renders the purported confirmation of the second L&D account invalid and ultra vires the Act. This is tied to the issue that the Master could not arrogate to himself a power that he did not have. This is because the protocol he sought

⁴ 57 of 2002.

to administer for the inspection of liquidation and distribution accounts during the Covid-19 lockdown does not comply with s 406 of the Act.

[8] S 406 of the Act has three peremptory requirements, namely;

- a. The lying open for inspection of the second L&D account at the offices of the Master and, in applicable cases such as this, at the Magistrate's Court where the company carried on business;
- b. The publication of a notice in the Government Gazette of the places at which such account will lie open for inspection, specifying in the notice, the period during which the account will lie open for inspection; and
- c. The transmission by post or delivery of a similar notice to every creditor who has proved a claim against the estate.

[9] The account is laid open for inspection so that “any person having an interest in the company being wound up” can object to the account before it is confirmed. Educated Risk says it is such an interested person as it holds 40% of the shares in the Farm Bothasfontein and, by virtue of such a shareholding, stands to receive a dividend in terms of the second L&D account after all creditors have been paid. It thus holds the interest of “having a right or title to, or claim upon, or a share in the company”.⁵

[10] Educated Risk argues that compliance with s 406 of the Act was impossible as parties were not permitted to inspect accounts as provided for in s 406 (in other words, physically). Educated Risk states that the Master did not have the power to make regulations and that the protocol regarding electronic inspection exceeded the parameters set by the empowering legislation. Since the protocol is ultra vires, the confirmation was invalid even if the liquidators complied with the protocol, the account did not “lay open” as s 406 requires.

⁵ *Nieuwoudt v The Master* 1988 (4) SA 513 (A) at 531F.

[11] Moreover, they state they have not received notice as the Act requires. It was sent by email, but the subject line did not indicate that it is a notice in terms of s 406, and it was addressed to Mr Theodosiou, so the attorney did not open the email as he receives countless emails daily and did not regard it as relevant. Also, Mr Theodosiou of Educated Risk was cc'd on the email, but upon closer inspection, it became evident that the email address was wrong. He, therefore, never received it.

[12] Educated Risks additionally argues that the notice published by the liquidators in the Government Gazette was misleading and ineffective in informing the public that the second L&D account was lying open for inspection when it was not. It also did not state when the account will lie open for inspection. This means that Educated Risk or others with an interest in the company could not object to the second L&D account.

[13] Because of all these defects, Educated Risk argues that the confirmation by the Master was ineffectual, and no rights and obligations were created. Since the Master did not follow the prescripts of s 406, he did not have the power to confirm the account, which leaves his purported confirmation ultra vires the old Companies Act. They therefore ask the court to declare that the Master's confirmation of the second L&D account in respect of the Farm Bothasfontein on 1 June 2020 is set aside as invalid and that it has not been confirmed. They also ask for it to be re-opened for inspection.

Nedbank and Imperial's case

[14] The respondents oppose this application on various grounds. Firstly, s 408 of the old Companies Act states that the Master's confirmation has the effect of a final judgment, although persons permitted by the Court may re-open the account, but only before the liquidator starts with the distribution.⁶ Since distribution started, Educated

⁶ S 112 of the Insolvency Act.

Risk's request that the court reopens the account is not competent relief. The court does not have jurisdiction to reopen the account in such instances.⁷

[15] As for compliance with s 406 of the old Companies Act, the respondents state

- a. Educated Risk was not entitled to a written notice posted or delivered to it, as it is not a creditor with a proven claim against the Company as per s 406(3) of the old Companies Act.
- b. Even so, due notice was timeously sent to and received by the attorneys of Educated Risk via email. Educated Risk has designated the attorneys as its addressee for all correspondence involving the Company, including the L&D accounts. The attorneys cannot rely on their decision not to read the email, as they elected not to do it; and
- c. As for the Gazette, the introductory part and the specific part referring to the Company means that the statutory requirements have been satisfied. The publication in the Government Gazette was compliant. The Gazette indicates that it will lie open for 14 days unless another period is stated, and no other period is stated.

[16] Thus, the account laid open in compliance with s 406 – albeit virtually.

[17] Even if there was merit in the technical objections, they still had to overcome the hurdle of s 157 of the Insolvency Act by showing the Court that there was merit in reopening the account. They have not done either. Instead, it seems like they are seeking to reopen a historical contention that Nedbank and Imperial are not entitled to be shareholders of the Company due to non-compliance with s 38 of the old Companies Act, despite various judgments and orders stating that this is *not* the case. This dispute was settled and compromised between all the interested parties, including Educated Risk, on 14 November 2018, and Van der Linde J made a settlement agreement and order of this court. The matter is thus *res iudicata*.

⁷ PA Delport: *Henochsberg on the Companies Act 71 of 2008*, loose leaf edition, Vol 2, APPI – 234

[18] As for the contentions regarding the Minister's regulations and protocol, these have not been challenged. They remain valid until set aside. This links with the respondents' contention that the grounds for seeking relief are meritless, as no case is made in the founding affidavit.

[19] There are two ways in which the Master's decision could be challenged: in terms of s 151 of the Insolvency Act (if s 339 of the old Companies Act is applicable) or in terms of the Promotion of Administrative Justice Act ("PAJA").⁸ In its founding affidavit, it does not rely on any of these routes. Its heads of argument concede that s 151 does not apply. While it admits in its heads of argument that it is, in essence, a review of administrative action, it does not mention PAJA or make an argument in terms of PAJA.

[20] The only relief sought by the Educated Risk is a declaratory order to the effect that the Master's confirmation of the second L&D account is invalid and that it is not confirmed. The Educated Risks did not apply to set aside the Master's confirmation, the Minister's regulations or the Master's protocol.

Discussion

[21] Under the common law, the courts had inherent justification for interfering with administrative decisions based on the doctrine of ultra vires.⁹ While the common law ground for review remains available, it is only one of five ways to review administrative actions.¹⁰ In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa*¹¹ the Constitutional Court confirmed that judicial review of administrative action is founded on fundamental rights protected by the Constitution, rather than on the inherent common law jurisdiction of

⁸ 3 of 2000.

⁹ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* [1903] 2 TS 111.

¹⁰ Hoexter (2012) *Administrative Law in South Africa* 116.

¹¹ [2000] ZACC 1 para 33.

the courts.¹² Thus, judicial review of administrative action is the enforcement of s 33 of the Constitution through PAJA or special statutory review mechanisms, such as provided for in the Insolvency Act. The doctrine of ultra vires is now contained in the concept of legality, which is part of the abstract principle of the rule of law found in s 1(c) of the Constitution.

[22] Educated Risk's cause of action lies in PAJA.¹³ Only in instances where PAJA does not apply can the common law doctrine be applied through the principle of legality. In this regard, it is imperative that Educated Risk had to, in its founding affidavit, set out both the facts and the grounds of review relied on.¹⁴ Educated Risk cannot do so in its replying affidavit.¹⁵

[23] Instead, Educated Risk tried to bring a review application disguised as an application for a declarator. During the argument, Mr Hellens SC tried to circumvent the need to bring a review based on PAJA, by arguing that when the Master made the decision, it was not an administrative action because he did not make it as the Master since he acted outside of his powers (even though the Master is cited in his official capacity). This, however, cannot be for two main reasons. It is both illogical and legally incorrect:

- a. It is illogical in that it asserts that the Master sitting (and deciding a matter) in his capacity as an administrative official remains an administrator while considering the matter but ceases to be one as soon as his decision falls outside of his powers: it is simply outside the realm of common sense to say that he is an administrator one minute and not an administrator the very next minute even though he is performing the same function in both minutes.

¹² Hoexter (2012) *Administrative Law in South Africa* 116.

¹³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15 para 21.

¹⁴ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 32.

¹⁵ *Tao Ying Metal Industry (Pty) Ltd v Poole NO* 2007 (5) SA 146 (SCA) para 98.

- b. An administrator acting outside of his or her powers, in terms of the common law of over a century, is said to be acting ultra vires. However, it is now settled that in our law that the common law principle of ultra vires is now encapsulated in the principle of legality: ‘Ultra vires was the negative side and legality the positive.’¹⁶ In *Fedsure Life Assurance v Greater Johannesburg*¹⁷ the Constitutional Court opined as follows:

“There is of course no doubt that the common law principle of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by the constitutional principle of legality.”¹⁸

[24] Hence, a decision taken by an administrative authority that falls outside of its powers remains administrative action as defined in s 1 of PAJA and has to be dealt with in terms of PAJA. In other words, any person aggrieved by that decision – even if that decision falls outside the scope of the administrative official’s powers - has to approach an appropriate court in terms of s 6 of PAJA to have that decision set aside.¹⁹ Failing which, the decision stands. In *Oudekraal Estates (Pty) Ltd v City of Cape Town*²⁰ the Supreme Court of Appeal clarified that

“[u]ntil the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

¹⁶ Hoexter, C., *Administrative Law in South Africa* (2007), Juta, at 116.

¹⁷ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).

¹⁸ Id at [59]

¹⁹ *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at [433] – [437]

²⁰ [2004] ZASCA 48.

[25] The Master's administrative action will, therefore, be regarded as valid until set aside. A review to set aside a decision by the Master because he acted *ultra vires* is no longer made in terms of the common law but in terms of PAJA (s 6(2)(f)(i) specifically). The founding affidavit does not set out facts or grounds for review. The court *a quo* did not err on this aspect, and the appeal on this finding must fail.

[26] There is another reason why the appeal should fail. Even if the court were to review the Master's action and found it wanting, it could not reopen the account as the relief was not competent - distribution had already happened, and s 408 precludes a court from doing so.

[27] I agree with the respondents that Educated Risk's reliance on *Investec Bank v Strydom*²¹ is misguided. That case dealt with the position of a creditor, which the Educated Risk is not. Furthermore, in that case, the creditor did, in fact, not receive notice of the account. That account also lay open at the incorrect Magistrate's office. The applicant there applied for a review in terms of s 151 of the Insolvency Act, and the applicant could indicate that a substantial injustice occurred. Insofar as the court ordered that the account be re-opened, it has been criticised for doing so, as it did not have the authority to do so as distribution had already happened.

[28] The court *a quo* did not err in this regard either. The appeal ought to be dismissed on this point, too.

[29] Even if the court were to entertain the defective application and ignored s 408 of the Act, the appeal must still fail, as the Master complied with s 406.²²

²¹ [2013] ZAGPJHC 59.

²² 406. Places for and periods of inspection of account.—

(1) Every liquidator's account shall lie open for inspection for such period, not being less than fourteen days, as the Master may determine—

(a) at the office of the Master; and
 (b) if the office of the Master and the registered office of the company are not situated in the same district—

[30] Educated Risk correctly states that compliance with the provision is peremptory.²³ The purpose of the accounts laying open for inspection is to enable objections to the account.²⁴ During Covid-19, when no physical inspection of the L&D accounts was possible, the Master issued a protocol to still comply with s 406 of the Act, albeit adjusted. The Master's solution was for the accounts to lay open virtually. A narrow interpretation of s 406 of the Act might require that this be done physically. However, in light of the purpose of the section – to allow interested parties to object to the account – a broader interpretation is warranted: as long as interested parties could get access to the account, there is compliance with s 406 of the Act.

[31] Notice was to be given to every creditor. Despite the Educated Risk not being a creditor, a notice was sent to Educated Risk's attorneys. The attorney purportedly elected not to read the email. That omission cannot amount to non-compliance with s 406. There was substantial compliance with s 406. The court *a quo* did not err on this point. The appeal must also fail on this point.

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- (i) at the office of the magistrate of the district in which such registered office is situated; or
 - (ii) if such registered office is situated in a portion of such district in respect of which an additional or assistant magistrate permanently performs the functions of the magistrate of the district at a place other than the seat of magistracy of that district, at the office of such additional or assistant magistrate; and
 - (c) if the company also carried on business at any other place, then also at the office of the magistrate (including any additional or assistant magistrate) of the district or the portion thereof in which any such other place is situate, as may be determined by the liquidator with the approval of the Master.
- (2) The liquidator shall lodge a copy of the account with every magistrate, additional magistrate or assistant magistrate in whose offices the account is to lie open for inspection.
 - (3) The liquidator shall give due notice in the Gazette of the places at which any such account will lie open for inspection and shall in that notice state the period during which the account will lie open for inspection and shall transmit by post or deliver a similar notice to every creditor who has proved a claim against the company.
 - (4) The magistrate shall cause to be affixed in some public place in or about his office a list of all such accounts as have been lodged in his office, showing the respective periods during which they will lie open for inspection, and shall upon the expiry of any such period endorse on the account in question his certificate that the account has lain open at his office for inspection in terms of this section and transmit the account to the Master.

²³ *TLE (Pty) Ltd v The Master of the High Court* 2012 (2) SA 502 GJ.

²⁴ S 407 of the old Companies Act.

Costs

[32] The respondents seek an order that the appeal be dismissed, with costs on the attorney client scale, including the costs of two counsel, which costs should include the costs of the applications for leave to appeal.

[33] Adams J granted a punitive costs order, as he regarded the proceedings as frivolous and vexatious and as an abuse of the processes of the Court. The issue of costs involves an exercise of discretion by the Court *a quo*. I hold that the finding is unimpeachable. Educated Risk is litigating on regret, trying to circumvent orders of this court by, in this instance, bringing a review application disguised as a declarator, forcing the respondents to once again engage with issues that have already been decided on in this Court. A punitive costs order is warranted.

Order

[34] The following order is made:

1. The appeal is dismissed, with costs on an attorney and client scale, including the costs of two counsel.


WJ du Plessis
Acting Judge of the High Court

For the Educated Risks:

M Hellens SC with him JW Steyn
instructed by J Smit attorneys

For the Respondents:

A Botha SC with him E Kromhout
instructed by Tugendhaft Wapnick
Banchetti & Partners and Lowndes
Dlamini Attorneys