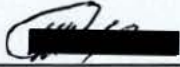


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
14/3/25	
DATE	SIGNATURE

Case Number: 2023/097464

In the matter between:

JOHANNES ZACHARIAS MULLER

FIRST APPLICANT

JOHANNES ZACHARIAS MULLER N.O

SECOND RESPONDENT

and

THE MASTER OF THE HIGH COURT

FIRST RESPONDENT

MS PENELOPE ROBERTS .NO

SECOND RESPONDENT

ACTING CHIEF MASTER OF THE REPUBLIC OF
SOUTH AFRICA

ADV ANDRIES RAMOLURANA

THIRD RESPONDENT

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

FOURTH RESPONDENT

THE DIRECTOR GENERAL OF THE DEPARTMENT
OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

FIFTH RESPONDENT

ENVER MOHAMMED MOTALA

SIXTH RESPONDENT

JUDGMENT

Ramaweke AJ

Introduction

- [1] This is an application for a judicial review, under section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) alternatively on the principles of legality.
- [2] The First Applicant seeks an order in the following terms¹:
- (a) That the decision by the First Respondent, executed by the Third Respondent on 15 September 2023 to remove the First Applicant as joint liquidator in the insolvent estate be and is hereby set aside in terms of section 6 of PAJA;
 - (b) Alternatively, to Prayer (a), that the decision of the First Respondent, executed by the Third Respondent on 15 September 2023 to remove the First

¹ The first prayer relating to urgency has been omitted

Applicant as joint liquidator in the insolvent estate be set aside on the principle of legality;

- (c) That the decision of the First Respondent executed by the Third Respondent on 15 September 2023 to appoint the Sixth Respondent as joint liquidator in the insolvent estate be and is hereby set aside in terms of section 6 of PAJA;
- (d) Alternatively, to Prayer (c), that the decision of the First Respondent, executed by the Third Respondent on 15 September 2023 to appoint the Sixth Respondent as joint liquidator in the insolvent estate be set aside on the principle of legality; and
- (e) That the First Respondent and the Third Respondent, the latter qualified to make payment of the costs *de bonis propriis*, be ordered to make payment of the costs of the application jointly and severally, the one paying the other to be absolved and, on the scale, as between attorney and client.

Background facts.

- [3] The First Applicant has launched this application in his personal capacity as well as in his capacity as the joint liquidator in the insolvent estate of SA MACHADO CONSTRUCTION (PTY) LTD (In liquidation) (MACHADO). This application was launched on 27 September 2023 on urgent basis but removed from the urgent roll because the First Applicant was subsequently reinstated by the First Respondent as joint liquidator on 28 September 2023. The urgency of the application had thus fallen away.
- [4] The First Applicant together with the Seventh and Eighth Respondents were appointed as the joint liquidators of MACHADO in 2018. There is a dispute between the parties about what transpired on 15 September 2023. The First Applicant alleges that he was removed as a joint liquidator whereas the Sixth Respondent alleges that the First Respondent had committed an error by removing the First Applicant as a joint liquidator.

- [5] The version of what exactly transpired has not been fully set out in the papers because the First and the Second Respondents are not opposing the application and have therefore not filed any papers.
- [6] On 20 September 2023 the Third Respondent addressed an email to the Sixth Respondent inviting him to provide an endorsement in terms of section 374 of the Companies Act read with section 381(3) of the Act to investigate the records and all serious allegations levelled against the appointed liquidators of several companies, including MACHADO. The Sixth Respondent was requested to provide a report within six months after his appointment as an investigator.
- [7] On 21 September 2023 the First Applicant received a report from the Third Respondent informing him that his removal was a typing error and that the error will be rectified the following week.
- [8] The Sixth Respondent was previously on the list of approved insolvency practitioners but was removed by the First Respondent during 2011. The Sixth Respondent challenged this decision to remove him from the list of approved insolvency practitioners and the matter eventually reached the Supreme Court of Appeal and is reported as *Motala v Master of the High Court*². Although the First Applicant referred to this decision in his submissions while dealing with the suitability of the Sixth Respondent as a liquidator, I find it unnecessary to consider this case in this application in the view that I take.
- [9] On 20 September 2023 the First Applicant's attorney addressed a letter to the Third Respondent seeking written reasons for the removal of the First Applicant as a joint liquidator.
- [10] On 21 September 2023 the Sixth Respondent wrote an email to the Third Respondent informing him that it has been brought to his attention that the certificate appointing him as joint liquidator issued on 15 September 2023 had omitted the First Applicant as a joint liquidator. The Sixth Respondent further attached a certificate of appointment as Liquidators dated 20th September 2018 issued by the First Respondent wherein the First Applicant together with Mss

² [2019] 3 ALL SA 17 (SCA)

Puleng Felicity Bodibe and Pontsho Lerato Seriti were appointed as joint liquidators of MACHADO. The Sixth Respondent further confirmed that as soon as the Third Respondent returns from leave, the error that had led to the omission of the First Applicant as a joint liquidator would be rectified.

- [11] After this application was launched on urgent basis on 27 September 2023, the First Respondent reinstated the First Applicant as joint liquidator on 28 September 2023. The First Applicant is still the joint liquidator of MACHADO.
- [12] There is also a counter application made by the Sixth Respondent in the South Gauteng Local Division seeking a stay of these proceedings pending the outcome of an application, launched by the Sixth Respondent against the First Respondent. The Sixth Respondent seeks an order that the First Respondent be directed to place him on the Master's national panel of accepted liquidators. As a result of the conclusion that I have arrived at, it is unnecessary to consider this counter application. The parties have also not made submissions on this counterclaim or called upon me to make a decision on it.

Submissions by the First Applicant

- [13] The First Applicant seeks to review and set aside three decisions allegedly made by the First Respondent, namely, the decision made on 15 September 2023 to remove him as joint liquidator, the second decision of the First Respondent to appoint the Six Respondent as a joint liquidator in terms of section 374 read with section 381 of the Companies Act of 1973 and the third decision by the Master of appointing the Six Respondent as joint liquidator of the insolvent estate in terms of section 377 read with section 381 of the Act to fill a vacancy on 28 September 2023.
- [14] Although the first "decision" has since become moot because the First Applicant was reinstated as joint liquidator on 28 September 2023, the First Applicant submitted during the hearing that this issue was still alive and should be considered. The First Applicant submitted in the main that the first decision was reviewable and falls to be set aside because the decision was taken capriciously without the First Applicant being afforded an opportunity to address the concerns of the First Respondent.

- [15] The First Applicant submits that the second decision to appoint the Six Respondent as a joint liquidator in terms of section 381 of the Act is ultra vires. The First Applicant further submits that the decision to appoint the Sixth Respondent as joint liquidator is based on an error of law and that the Third Respondent was not empowered by the provision of the Act to do so. Further, so submits the First Applicant, even if a joint liquidator could lawfully be appointed in terms of section 381 of the Act, the Third Respondent had further misconstrued his powers by relying upon the provision of section 377 to fill the vacancy of Mr Cloete Murray who was never a joint liquidator.
- [16] The First Applicant further contends that the Sixth Respondent was not and is not listed on the panel of vetted liquidators maintained by the First Respondent, has not provided security to the satisfaction of the First Respondent and has no tertiary qualification as required by the Master in terms of its vetting process.
- [17] The First Applicant submits that the third decision was capriciously made because the certificate reinstating the First Applicant as joint liquidator records that the Sixth Respondent is appointed in terms of section 377 of the Act to fill the vacancy arising from the death of Mr Murray who was never a joint liquidator of MACHADO.

Sixth Respondent's submission

- [18] The Sixth Respondent submits that the application by the Second Applicant was not authorised because it was not made by all the liquidators acting jointly as required by section 382 of the Act. The Sixth Respondent contends also that the First Applicant does not have locus standi because he is neither a creditor of MACHADO nor does he have any direct or material interest in the administration of the company in liquidation.
- [19] The Six Respondent submits further that the First Respondent did not take three decisions but only one decision of appointing the Sixth Respondent as a joint liquidator and investigator in terms of section 381(3) of the Act. The Six Respondent submits further that after making the decision to appoint him as joint liquidator, the First Respondent then issued the Master's certificate of appointment provided for in section 375 of the Act.

[20] The Six Respondent further contends that no ground of review has been established that would interfere with the Master's discretion to appoint liquidators as contemplated in section 381(3) of the Act.

Issues to be determined

[21] The following issues fall to be determined:

- (a) Whether the "removal" of the First Applicant as joint liquidator is moot;
- (b) Whether the First and Second Applicants have the necessary locus standi to institute these provisions; and if so,
- (c) Whether the appointment of the Sixth Respondent as joint liquidator is reviewable in terms of PAJA.

Mootness of the application

[22] On the 15 September 2023 the First Applicant's name as co-liquidator of MACHADO was no longer reflected as a joint liquidator. As I have already said above, the Sixth Respondent states that it was a typographical error, but the First Applicant contends that his removal as joint liquidator was capriciously taken.

[23] On 27 September 2023 the First Applicant launched an urgent review application challenging his removal as co-liquidator of MACHADO. On 28 September 2023 the First Applicant was reinstated as a joint-liquidator and is currently performing his duties as a joint liquidator of MACHADO.

[24] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs*³ the Constitutional court held that "*a case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law*"⁴.

³ 2000 (1) BCLR 39 CC

⁴ Id para 21

- [25] In *Centre for Child Law v Hoerskool Fochville and Another*⁵ the Constitutional Court held as follows “*This court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of the appeal*”⁶.
- [26] Acting on behalf of the Applicant, Mr van der Merwe submitted that notwithstanding the reinstatement of the Applicant as joint liquidator, the decision to remove him should still be reviewed and set aside. Mr Bhana contends that there was no decision taken by the First Respondent and that the omission of the Applicant as a co-liquidator was a typographical error which was rectified on the 28 September 2023. Mr van Merwe submits further, relying on the decision of *Gert Lourens Steyn De Wet and Another v Samaiya Abdool Gafaar Khammissa and Others*⁷ that the decision should be reviewed to ensure certainty regarding the status of the Applicant as a joint liquidator.
- [27] In *Gert Lourens Steyn De Wet and Another v Samaiya Abdool Gafaar Khammissa and Others* the issue on appeal concerned two mutually exclusive decisions made by the Master. On 31 August 2017 the Master made two decisions to appoint the Appellants as additional joint trustees of Duro Pressing (Pty) Ltd (In Liquidation) (Duro). On 20 December 2017 the Respondents launched an application in the court a quo seeking to review and set aside the *second decision*, and declaring the *first decision* to be valid one, together with ancillary relief.
- [28] The facts in the *Gert Lourens De Wet and Another* case are undoubtedly different from the facts in this application. The reinstatement of the First Applicant by the First Respondent is not challenged by any other person. The First Applicant has been acting unchallenged as a joint liquidator of MACHADO since 28 September 2023.
- [29] It makes no difference whether the Third Respondent had taken a decision to remove the First Applicant as joint liquidator on 15 September 2023 or whether the First Applicant's name was erroneously omitted when the Six Respondent

⁵ 2016 (2) SA 121 (SCA)

⁶ Id para 11

⁷ (358/2020) [2021] ZASCA 70 (4 June 2021)

was appointed as an additional joint liquidator. The removal or omission of the First Applicant's name no longer presents an existing or live controversy worthy of determination. Whatever the court determines would not change or alter the status of the First Applicant as a joint liquidator of MACHADO.

[30] The determination of the removal or omission of the First Applicant's name as a joint liquidator of MACHADO will thus have no practical effect or result because the First Applicant is a joint liquidator of MACHADO and has been acting as such since 28 September 2023. The removal or omission lasted less than two weeks before the First Applicant was reinstated as a joint liquidator. The liquidation and distribution account has already been lodged with the First Respondent and the liquidation process is almost complete.

[31] It is ironic that the First Applicant seeks to review and set aside the "*decision*" that was taken by the First Respondent without seeking any reinstatement as a joint liquidator. The First Applicant can obviously not do so because he is currently a duly appointed joint liquidator of MACHADO and has no desire or interest in desisting to act further as a joint liquidator. It appears to me that the First Applicant requires the review and setting aside of his removal or omission to pursue other unknown interests which are irrelevant to this application. To undertake such an exercise in these proceedings would be futile.

[32] In the premises I am of the view that the challenge to the "*first decision*" in terms whereof the First Applicant was alleged to have been removed or omitted as joint liquidator, is moot.

First Applicant's locus standi

[33] The First Applicant has made it clear that he is not bringing this application as an aggrieved person as contemplated in the Act but that he is bringing it in his personal capacity to challenge the appointment of the Sixth Respondent by the Master on the various grounds that he has listed.

[34] The First Applicant challenges the appointment of the Six Respondent on the basis of his position as the joint liquidator of MACHADO and submits that the Six Respondent does not have tertiary qualification, is not on the list of approved lists

of the insolvency practitioners. The First Applicant further contends that the Sixth Respondent has not provided satisfactory security to the First Respondent.

Sixth Respondent submissions

- [35] The Sixth Respondent challenges the locus standi of the First Applicant to institute these proceedings both in his personal capacity as well as in his representative capacity as joint liquidator of MACHADO.
- [36] The Sixth Respondent contends that the First Applicant does not have locus standi because he is neither a creditor of MACHADO nor does he have any direct or material interest in the administration of the company in liquidation.
- [37] The Sixth Respondent submits further that the Second Applicant is not authorised to institute the proceedings because no authorisation to institute the proceedings was adopted by all the liquidators acting as joint liquidators as required by section 382 of the Act.

Locus Standi of the First Applicant

- [38] It is important to note that any person aggrieved by the appointment of a liquidator must request written reasons from the Master who would then submit his reasons for the appointment of the Liquidator to the Minister after which the Minister may confirm, uphold or set aside the Master's appointment or refusal⁸. In *Wishart v BHP BILLITON*⁹ the Supreme Court of Appeal held that "*before resorting to review proceedings under section 151 of the Insolvency Act, a liquidator is obliged to follow the procedures set out in s 45 of the Act. The section is peremptory*"¹⁰.
- [39] In terms of section 367 of the Companies Act a liquidator is appointed by the Master for the purpose of conducting the proceedings in a winding up. In terms of section 391 of the Companies Act the Liquidator's duty is to reduce into possession the assets of the company and to apply them, in so far as they extend, in satisfaction of the costs of the winding up and the claims of the

⁸ Section 371

⁹ 2017 (4) SA 152 (SCA)

¹⁰ Id para [24]

company's creditors, and to distribute any surplus among those entitled to share in it.

- [40] In *Minister of Justice v SARIPA*¹¹ the Supreme Court of Appeal held that *"although the master plays an important role in overseeing the process of the winding up an estate, the process is nonetheless creditor driven. it is the majority of creditors in number or value of claims that have the right to elect trustees or nominate liquidators. They have the right to take decisions in respect of the manner in which the assets falling into the estate, or constituting property are dealt with"*¹².
- [41] In *Gainsford NNO v Tanzer Transport*¹³ the Supreme Court of Appeal held that liquidators involved in legal proceedings may sue in their own names or *nomine officio* or in the name of the company concerned if authorised by a resolution of the creditors¹⁴.
- [42] In *Janse van Rensburg v The Master and Others*¹⁵ the Court was seized with a dispute where a joint liquidator of a close corporation acted in his personal capacity as an aggrieved person resulting from the appointment of another person as a joint liquidator. The court held that *"an aggrieved person was one who had nominated a person, and that nomination had not been given effect to by the Master. Such a person would invariably be a member or a creditor who proposed a nomination at the first meeting of creditors. the Applicant was certainly not such a person"*¹⁶.
- [43] In *Geduldt v The Master and Others*¹⁷ the court held that an aggrieved person does include a person who is aggrieved about the appointment of a specific person¹⁸.

¹¹ 2017 (3) SA 95

¹² Id para [55]

¹³ 2014 (3) SA 468 (SCA)

¹⁴ Id para [16] & [17]

¹⁵ 2004 (5) SA 173 TPD

¹⁶ Id para [23]

¹⁷ 2005 (4) SA 460 CPD

¹⁸ Id para 464H-465F

- [44] I agree with Mr Bhana for the Sixth Respondent that the First Applicant, who is not a creditor of the Second Applicant, cannot bring this application to challenge the appointment of the Sixth Respondent. It does not make a difference how the First Applicant clothes its motivation or reasons for the institution of these proceedings, the inescapable inference is that the First Applicant is aggrieved by the action of the First Respondent in appointing the Sixth Respondent as a joint liquidator of MACHADO. As it was held in *Gedult*¹⁹, if the First Applicant does not have a legal grievance, the question arises on what basis has the review been brought.
- [45] Although this was not stated in the papers, it became apparent during the hearing that the thrust of the First Applicant's contention was that the appointment of the Sixth Respondent as a co-liquidator would impact directly on the fees the three liquidators would earn despite the fact that most of the work had already been done. Mr van der Merwe was at pains to painstakingly avoid making this point apparent during in his submissions.
- [46] As it has been indicated above, the winding up process is creditor driven and the First Applicant has no locus standi to institute these proceedings on behalf of the Second Applicant.

Locus Standi of the Second Applicant

- [47] The Second Applicant as a corporate entity cannot act on its own but must be represented by a natural person. There are two more joint liquidators excluding the First Applicant and the Sixth Respondent. They have not expressed any view in regard to the issues raised by the First Applicant. The creditors of the Second Applicant have also not given any authority to the First Applicant to act on behalf of the Second Applicant.
- [48] In dismissing an application where the provisional liquidators brought an application without authorisation, the court in *Ex parte van der Berg & Others NNO: In Re Riviera International*²⁰ remarked as follows, "Thus where the Master has restricted the powers of the provisional liquidators to those which can only

¹⁹ Supra at page 465 para E

²⁰ 2003 (6) SA 727 WLD

*be exercised subject to the directions of the creditors, it would be require an express extension by the Master of their powers to approach this court for relief in the absence of creditors' meeting authorising the applicants to do so"*²¹.

[49] Litigation is regrettably an expensive exercise which must be resorted to after careful consideration of the issues at play. In a company in liquidation, it is risky for a sole liquidator to embark in litigation on behalf of the company without any participation by the other joint-liquidators or authorisation by the creditors. A company which is already in financial distress should not be placed further at the risk of incurring unnecessary legal costs.

[50] In *Minister of Justice v Saripa*²² the court held "*that the creditors are the best judges of their own interests, and they are the people best suited to instruct the trustee or liquidator how to go about the process of liquidation or winding up. They are the people who can judge whether it is desirable to borrow money in order to complete a project in the hope of a substantial payment, or to commence litigation with a view to recovering amounts owing to the estate, to give but two examples. It is after all their money that is being spent on this and their money that is at risk*".

[51] There is no evidence that the views of the creditors have been solicited prior to the institution of these proceedings. Neither were the joint liquidators consulted. A pilot cannot commandeer a plane without her or his co-pilot or commandeer a commercial flight to destinations of his own choice without the knowledge or authority of the chief executive officer of the airline.

[52] For the above reasons, it is my view that the First Applicant has neither the authority to act in his personal capacity nor in his capacity as a joint liquidator of MACHADO to challenge the appointment of the Sixth Respondent as a joint liquidator in these proceedings.

[53] Having found as aforesaid, it is unnecessary to deal with the remaining issues, the former is dispositive of the matter.

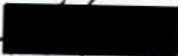
²¹ Id page 734 para A

²² Supra at paragraph [55]

Order

In the result the following order is made:

- [1] The application is dismissed with costs, such costs to include the costs of two counsel wherever so employed.
- [2] Costs to be paid by the First Applicant only.

RATHAGA RAMAWELE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Date of hearing: 29 November 2024

Date of judgement: 14 March 2025

Appearances:

For the Applicant: MP van der Merwe SC with PJ Greyling instructed by John Walker
Attorneys

For the Respondent: R Bhana SC with I Currie instructed by Knowles Husain
Lindsay Inc