IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Reportable / Not Reportable

Case Number: **4006/2024**

In the matter between:

ALTERNATIVE FINANCE SOLUTIONS (PTY) LTD	Applicant
and	
MASTER OF THE FREE STATE HIGH COURT, BLOEMFONTEIN	First Respondent
ELRICH RUWAYNE SMITH NO	Second Respondent
ADEL DOREEN McQUARRIE NO	Third Respondent
STANDARD BANK OF SOUTH AFRICA	Fourth Respondent

Neutral citation: *Alternative Finance Solutions (Pty) Ltd v Master of the Free State High Court, Bloemfontein, 4006/2024*

Coram: **Daffue, J et Grobler, AJ**

Heard on: **20 January 2025**

Delivered on: **13 February 2025**

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16H00 on 13 February 2025.

Summary: *Review in terms of section 407(4) (a) of the Companies Act, 61 of 1973. The court is to look to all material placed before it, irrespective of if the evidentiary material served before the Master. The procedure is sui generis. But the objector may not venture beyond what the objection entailed before the Master. Even disputes of fact must be put before the Master, so that the dispute is properly framed by the time a court is asked to decide upon it.*

ORDER

1. The late filing of the application is condoned.
2. The application is dismissed, and the Applicant is ordered to pay the Fourth Respondent's costs, taxed or agreed to otherwise, on a party and party scale and the costs of counsel is to be on Scale C.
3. Second and Third Respondents shall bear their own costs.

JUDGMENT

GROBLER AJ (DAFFUE J concurring)

INTRODUCTION:

[1] This review application is instituted on strength of s 407(4)(a) of the Companies Act, 61 of 1973 (*'the old Act'*), in terms of which the Applicant (*'Alternative Finance'*) seeks the review and setting aside of several decisions the First Respondent (*'the Master'*) took on 14 June 2024. The application also joins the Second and Third Respondent, who are cited in their capacity as joint liquidators of Country Meat Market (Pty) Ltd (in liquidation) (*'the liquidators'*) and the Standard Bank of South Africa, the Fourth Respondent (*'the Bank'*).

[2] The impugned decisions concern matters of administration in the liquidation process, which Alternative Finance contends affect both its position as a secured creditor and the administration of the insolvent estate otherwise.

[3] The application was filed late, and although not much was made of this in argument before us, *in sum* I believe condonation should be granted. Alternative Finance had an arguable case which, in my view, means that we should entertain the merits. Justice dictates nothing less.

[4] It bears mentioning at this stage already that the liquidators were joined to the proceeding because Alternative Finance sought a cost order against them on a scale as between attorney and client *de bonis propriis.* Mr Tsangarakis for the liquidators submitted during argument that had it not been for that request, the liquidators would probably – as is the custom in this- and other divisions – have filed a report with the Master only. Their version of events would have found its way to the court under the heralding of the Master, reporting its position. I understood this to mean that the opposition is proffered because costs are sought against the liquidators, the requested scale only increased the determination of the opposition. Mr Hitchings, for Alternative Finance, stated that they persist in seeking costs against the liquidators because of certain egregious missteps – so the argument goes – the liquidators had taken.

[5] The primary battle is between Alternative Finance, the Master and the Bank. The Bank opposes the application – represented by Mr Zietsman – because of the effect success of the application will have on its position as a secured creditor (ranking above that of Alternative Finance).

[6] Both in the heads of argument Mr Hitchings filed as well as during argument, the nub of the dispute was punted as concerning the Master's decision on an objection Alternative Finance made against the inclusion of what is described in the Liquidation and Distribution account as '*claim 17*'. This demands mentioning, because the Notice of Motion attacked several decisions the Master had taken. Once again during argument, Mr Hitchings said his client intends to be practical about those grounds and contended errors, and I understood this to the extent that Mr Hitchings all but outright conceded that those errors as exposed may be dealt with in subsequent liquidation and distribution accounts submitted for approval to the Master, or have been practically sorted out in the interim, or are just simply bad. Indeed, had it not been for Mr Zietsman arguing these points, I do not believe that we would have heard any argument on these at all. Mr Hitchings nevertheless insisted – and on instruction of his client – that we deal with those in this judgment.

[7] I deal with the salient facts first. Those are the facts relevant to the adjudication of the claim 17 attack. I then turn to the additional grounds of review and incorporate necessary facts omitted, and then deal with claim 17.

THE FACTS:

[8] I provide some elucidation as well on what was revealed in the affidavits before court, and when. This is required because we must deal with a question that has arisen as well, concerning the Alternative Finance case made.

[9] The Founding Affidavit reveals that a special meeting of creditors was held on 16 November 2022. At that meeting Alternative Finance proved a claim in its favour in the amount of R1,256,512.98. Alternative Finance contends prior to this meeting one of the liquidators – Mr Smith – lodged claim 17 for proof on the Bank's behalf.

[10] Claim 17 was supported by an affidavit of Ms Gugulethu Cynthia Modikwane, who described herself as a manager in the Bank's Business Support Recoveries, Business and Commercial Clients Credit Department. Her affidavit reveals that this claim arose because of the conclusion of a credit agreement, in terms of which the Bank agreed to advance a credit facility to a company called Elskasys (Pty) Ltd (*'Elskasys'*) in the amount of R1,964,396.25. The affidavit further says that the liquidated company agreed to bind itself as guarantor in respect of debts due by Elskasys, that Elskasys remains indebted to the Bank in this amount and accordingly the Bank's claim should be satisfied out of the insolvent estate.

[11] It is common cause between the parties that this could only have been done in the face of compliance with s 45 of the Companies Act, 71 of 2008 *('the new Act')*. More about this later.

[12] The claim was initially rejected for non-appearance on behalf of Standard Bank, but the liquidators subsequently admitted claim 17 in terms of s 78(3) of the Insolvency Act, 24 of 1936 ("the Insolvency Act"). The claim was then included in the second amended first liquidation and distribution account.

[13] I say more about this later as well.

[14] Alternative Finance objected to the admission of claim 17 and it was based upon the claim being bad in law. *Ex facie* the documents that were submitted as part of this claim, it was evidently clear that s 45 of the New Act had not been complied with. That much is common cause.

[15] The Master dismissed the objection, because it opined the liquidators had exercised a discretion [conferred upon them in terms of s 78(3) of the Insolvency Act], to accept the claim. Alternative Finance was directed to approach court should they feel aggrieved further.

[16] The liquidators explained their actions for the first time in the opposing affidavit they filed. They accepted that the tendered claim 17 had the wrong resolution attached to it. Mr Smith says that after receipt and perusal of claim 17, he telephoned Ms Modikwane and inquired if the resolution that was appended to the claim form was mistakenly attached. His testimony is that Ms Modikwane confirmed that Elskasys had also provided a guarantee in favour of Standard Bank for the indebtedness of the liquidated estate. She further confirmed that she had had sight of the correct resolution of the directors of the liquidated estate, as well as the requisite resolution of the shareholders thereof, and the requirements of s 45 of the New Act had been complied with.

[17] Based upon this revelation the claim was accepted.

[18] It warrants mention again that as far as Alternative Finance's position is concerned, it saw the correct resolution – appended to the liquidators' opposing affidavit – for the first time when the opposing affidavit was filed.

[19] In the reply Alternative Finance took issue with the correct documents on several grounds, apart from the obvious fact that it (the resolution - the document itself) had not been tendered at the special meeting of creditors. These include:

19.1 *Ex facie*, the document does not appear to be a resolution of the Board of Directors, but is termed to be a *certificate* by the Board of Directors.

19.2 The certificate is a positive declaration by one director of the liquidated company, where elsewhere in the document the plural is used, - referring to directors. It goes to say the certificate itself is headed as being a statement by the Board of Directors, which indicates that there is more than one director. The document is a statement only, and it glibly states that s 45 had been complied with. Nothing in the document indicates anything beyond that.

<u>ADDITIONAL GROUNDS FOR REVIEW:</u>

<u>The claim 5 interest objection:</u>

[20] The Bank submitted a claim (*'claim 5')* against the insolvent estate for an amount in excess of R4 Million. The contractual interest payable in terms of the credit thus extended was meticulously stated on page 1 of the credit agreement between the Bank and the liquidated company. The clause is not worth repeating verbatim. Alternative Finance contends that the Bank attached a certificate of balance in the submission of its claim (which was ultimately allowed) that incorrectly records the variable interest rate. This is on the back of a contention – by Alternative Finance – that the correct rate of interest is the Bank's prime rate of interest from time to time plus 2.29% per annum. Further, that should the amount of R4 Million be exceeded, an additional 2,5% may be charged by the Bank.

[21] In my view, Mr Zietsman conclusively answered this when he referred us to the fact that the Bank had actually charged less interest than that to which it was entitled. The second amended first liquidation- and distribution account shows that regarding claim 5, 10,95% was charged. This seems to have been to the advantage of all concerned, including Alternative Finance.

[22] Courts generally seek to remedy injustice and/or detriment - the correction of a wrong - whether personal to the litigating parties or to the public at large Neither has here been shown on this point.

Interest on Claim 10:

[23] Claim 10 is the Alternative Finance claim against the liquidated estate. Alternative Finance contends that the liquidators had disregarded the portion of its agreement which stipulated that interest would be increased in the event of default on the part of the insolvent company at a rate being '….3% per month compounded daily and payable monthly from date of default to date of payment in full.' The Master dismissed this complaint, and once again the Bank – I believe – conclusively answered this with reference to what appears to have been Alternative Finance's own claim submitted. A certificate of balance dated 21 June 2022, signed by Cuan Carden Hopley, indicates that the liquidated company was at the date of liquidation indebted to Alternative Finance in the amount of R1,256,512.98. No further claim for interest was made. To this, we heard no answer in argument.

[24] Any misfortune for Alternative Finance on this is self-inflicted. It cannot be both perpetrator and victim. Similarly, thus I view there is no merit in this complaint.

[25] *En passant* it merits mentioning that prayer 4 of the Notice of Motion specifically asks we should order the liquidators to calculate interest on claims 5 and 10 in accordance with the interest rate stipulated in the agreements filed in support of these claims. As I have already dealt with the gist of these complaints, prayer 4 axiomatically falls by the way side.

Trigger 1000 Investments:

[26] Prayer 5 of the Notice of Motion seeks the review and setting aside of a punted decision on the part of the Master to 'allow the inclusion of the legal costs incurred in the insolvent estate of Trigger 1000 Investments CC in the second amended liquidation- and distribution account.'

[27] The substance of this objection found its way into an earlier objection Alternative Finance directed at an account. On 14 December 2022, the Master issued a ruling upholding the Alternative Finance objection and directed that the liquidators furnish the Master by 16 January 2023 with an amended first liquidation- and

distribution account. It appears to be common cause that this was not done, but the liquidators – in the second amended first liquidation- and distribution account – indicated that the costs for the enquiry had to be refunded by Trigger Investments. This is to the sum of just over R500,000.00.

[28] By this I understood that the liquidators accepted that the monies paid out for the holding of an insolvency enquiry where the affairs of a company called Tigger Investments were at issue, must be repaid. That liability is accepted and although no amended account has been provided as the Master has directed, it seems that the substance of the complaint will be addressed in a subsequent account. Nothing serves before us to indicate moreover that the liquidators do not accept responsibility for the substantive portion of the Master's directive and ruling.

[29] Once again, I do not think that this point should delay us any further.

Interest accrued on advanced dividends declared:

[30] It is common cause that the liquidators made an advance payment of a dividend declared to the Bank. This was the subject of complaint as well. On 14 December 2022 the Master ruled that because the liquidators did not provide any authority[1] that enabled them to so pay an advance dividend, this amount paid had to be repaid to the Estate. The repayment was then made, but Alternative Finance suggests that Standard Bank should account for - and repay to the estate - the interest it had earned on this amount in the interim (i.e. between the date of receipt of these funds and the date of paying back). This argument denotes that the interest belongs to the estate.

[31] In my view Mr Zietsman once again dispositively dealt with this argument. The Bank's interest claim is also secured, which means that it [i.e., the interest claim] will not form part of any free residue account. This is relevant, because it does not seem (as the Bank also contends) that there will be any free residue available for distribution. The upshot of course is that the paying out of the dividend had indeed – in the words of the Bank – saved the estate a lot of money in the sense that the proven Standard Bank

[1] Presumably this referred to Master's permission.

claim would only accrue further interest until date of final payment.

[32] Mr Tsangarakis also refers to the cases of *Rulten NO*[2] and *Bosman's Trustee*. In terms of these decisions a liquidator may pay a creditor before the confirmation of a liquidation and distribution account, albeit that he or she does so at own risk. The power seems to extend beyond that even and the liquidator may even pay a creditor before his claim has been formally proved.

[33] There seems to have been procedural issues that compelled the Master to order the repayment, but the fact that the payment could have been made seems beyond doubt. And of course, we are not to decide if the payment could be made. We are to consider if interest has to be paid on the amount that was repaid.

[34] *Obiter* it seems to me thus objectively that there was nothing wrong with the paying of the amount, and consequently it does not axiomatically follow that because the Master had ordered repayment, interest should follow the repayment obligation as well. A problem would notionally come in should it ultimately be found that the payment was never due in the sense that the claim was unjustified. And once again, the practical effect of what had been done here and ordered does not seem to impact upon the true dispute between the parties at all. What the estate lost on the swings it gained (or will gain) on the roundabouts.

<u>CLAIM 17:</u>

[35] The attack here is multipronged. Mr Hitchings raised these points:

35.1 Firstly, it cannot be said that Claim 17 was validly submitted at a meeting of creditors, because the claim was rejected by the presiding officer. This is with reference to s 45 of the Insolvency Act. The argument then is that the liquidators could not have exercised any discretion under s 78(3) of the Insolvency Act.

[2] *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D) at 610 G – H and *Land Bank of SA v Bosman's Trustee* 1915 CPD 665 at 670.

35.2 Secondly and even if the liquidators could lawfully have done as they did, they should not have. That is because they should not have accepted the Bank's mere say so, and especially since even the correct resolution appended to the opposing affidavit suffers from serious deficiencies. Thus, the Master should consequently not have deferred to the liquidators' opinion.

[36] I turn to the first attack.

Section 45 of the Insolvency Act:

[37] Mr Hitchings placed considerable reliance upon the provisions of s 45(2) of the Insolvency Act. It states that trustees shall examine all available books and documents relating to the insolvent estate for the purpose to ascertaining whether the estate in fact owes the claimant the amount claimed. This follows after – in accordance with s 45(1) – a meeting of creditors and where the officer who presided over that, delivers to the trustees every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.

[38] The way I understood Mr Hitchings on this point, the argument is that because the claim was initially rejected it was not tendered at a meeting of creditors in strict compliance with s 45. Mr Hitchings argues that this should be the end of the matter.

[39] It seems to me though that both s 78(3) and s 386(4) allow the liquidators to accept a claim against the estate other than under circumstances provided for in s 45, and thus at a meeting of creditors.

[40] Primarily claims are to be admitted in terms of s 44 of the Insolvency Act. *Mars*[3] writes that a *tendered* claim wholly or partially rejected by the presiding officer at a meeting of creditors, but subsequently compromised or admitted by the trustee, or settled by a judgment of a court, is deemed to have been proved and admitted against the estate, unless the creditor within seven days informs the trustee in writing that he

[3] Bertelsman *et al*: *Mars, The Law of Insolvency in South Africa* 9th ed at p 391.

abandons his claim.[4]

[41] In *Cachalia,*[5] relied upon by *Mars*, the court held:

'When it provides that a claim compromised or admitted or settled by judgment shall be deemed to have been proved and admitted in the manner set forth in sec. 44 it clearly refers to admission by the officer presiding at a meeting of creditors in terms of sub-sec. (3) of that section, because that sub-sec is the only portion of sec. 44 which deals with the admission of a claim. The intention of sec. 78(3), so far as it relates to claims compromised or admitted by the trustee, therefore appears to be that where proof of a claim is tendered 'duly', that is twenty-four hours or more before a meeting, and is not admitted at that meeting by the presiding officer, but is thereafter compromised or admitted by the trustee with the authorisation of the creditors, it is to be deemed to have been proved and admitted at the meeting at which it was tendered; the admission is retrospective to the meeting.'[6]

[42] In the present case it is common cause that claim 17 was tendered. And it is common cause that it was initially rejected by the presiding officer. Thus, and jurisdictionally, nothing seems to have stopped the liquidators from admitting claim 17 which means, to my mind, that this first ground of attack should fail.[7]

[43] Section 78(3) reads:

'(3) If authorized thereto by the creditors or if no creditor has proved a claim against the estate, by the Master, the trustee may compromise or admit any claim against the estate, whether liquidated or unliquidated if proof thereof has been duly tendered at a meeting of creditors. When a claim has been so compromised or admitted, or when it has been settled by a judgment of a court, it shall be deemed to have been proved and admitted against the estate in the manner set forth in section *forty-four* ... (*ad finem*).'

[44] It seems to me that claims are tendered validly or invalidly *before* the scheduled meeting. There is a distinct difference between the tendering of a claim and it's rejection or acceptance, because tendering is the necessary precursor to either the

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[4] This is also in keeping with s 78(3).

[5] *Cachalia v De Klerk NO and Benjamin NO* 1952 (4) SA 672 (TPD).

[6] *Ibid* pp 673 H – 674 A.

[7] Just as an aside further, it was not argued that the liquidators had acted outside authority bestowed upon them by either the creditors or the Master. It is for that reason that I do not deal with this contingency and potential hurdle in the way of what the liquidators had done any further.

acceptance or the rejection of it. It can't be rejected if it hadn't been tendered. Indeed, it couldn't have been admitted either.

The second attack:

The proper approach:

45. It is necessary that I state the approach the court is to adopt in applications of this nature. This somewhat casts the enquiry into its proper perspective and answers the legal question that was argued before us as to the duties of the liquidators. It also says why, even if we are to allow Alternative Finance to make a case in reply, the application must fail. Mr Zietsman referred us to the case of *Van Zyl NO*[8] *Griesel* J in that judgment held:

'As such the Master's rulings ordinarily deserve some deference. For this reason, I would venture to suggest that, where no new facts have been placed before the court, the court should hesitate to substitute its own opinion for that of the Master in exercising its wide powers under s 407(4)(a) of the Act unless it is clear that any particular ruling by the Master is tainted by irregularity or error.'[9]

46. This seems to suggest that the court is to approach reviews under s 407(4)(a) of the old Act as if it were a review application proper. It warrants no argument that in such cases, the court should be loath to interfere because of its deference obligations and traditionally because such reviews are process focused.

47. This approach seems to clash with what the SCA held in *Constantia.*[10] In *Nel,*[11] *Van Zyl* was mentioned, but the ratio of the decision appears to differ as to the manner of approach. There the SCA held that a proper enquiry in terms of s 407(4)(a) amounts to an appeal or review type *sui generis* process. I quote:[12]

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[8] *Van Zyl NO v The Master* 2000 (3) SA 602 (C).

[9] At para 20.

[10] *Constantia Insurance Company Ltd v Master Johannesburg High Court and others* 2023 (5) SA 88 (SCA).

[11] *Nel and Another NNO v The Master (ABSA Bank Limited and Others Intervening)* 2005 (1) SA 276 (SCA).

[12] See also: *Fourie's Poultry Farm v Kwanatal Food Distributors (Pty) Ltd* 1991 (4) SA 514 (N) at p 524, referring to *South African Bank of Athens Ltd v Sfier (also known as Joseph) and Others* 1991 (3) SA 534 (T) where De Klerk J held at 536F:

'I agree with this reasoning. S 407 was enacted to lay down the procedure to be followed where a creditor wishes to object to an account, and also to lay down the manner in which the objection may be prosecuted until finality is reached. The authority created in s 407(4)(a) to apply to Court to have the Master's decision set aside is not

'[22] In terms of s 151 of the Insolvency Act, read together with s 339 of the Companies Act

". . . any person aggrieved by any decision, ruling, order or taxation of the Master. . . may bring it under review by the Court . . .".

South African Courts have long accepted that the review envisaged by s 151 of the Insolvency Act is the 'third type of review' identified more than a hundred years ago in *Johannesburg Consolidated Investment Co v Johannesburg Town Council,* ie where Parliament confers a statutory power of review upon the Court. In the *Johannesburg Consolidated Investment Co* case, Innes CJ stated, with reference to this kind of review, that a Court could

". . .enter upon and decide the matter *de novo*. It possesses not only the powers of a Court of review in the legal sense, but it has the functions of a Court of appeal with the additional privileges of being able, after setting aside the decision arrived at. . ., to deal with the matter upon fresh evidence. . . ."

[23] Thus, when engaged in this third kind of review, the Court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the Court's powers under this kind of review are 'unlimited' or 'unrestricted', this is not entirely correct. The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the 'ordinary' judicial review of administrative action (the 'second type of review' identified by Innes CJ in the *Johannesburg Consolidated Investment Co* case), so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular grounds of review or particular remedies'.' (authorities omitted)

48. Mr Zietsman argued that Griesel J's use of the words '*unless new facts are shown*' means that two different approaches may be married. Respectfully I don't agree. To my mind, what the s 407(4)(a) review entails is a fresh consideration by a court of all facts not only advanced before the Master, but all subsequent facts put before it for consideration. The Master's rulings constitute *quasi*-judicial actions, meaning that ordinary rules of deference as if the action were (for instance) administrative in nature, do not apply. It is for that reason also that I believe the judicial deference canon does not apply, even if it is said the Master had exercised a discretion.

intended to provide relief only where the Master erred on the facts before him or where his conduct is such that it is open to criticism.'

49. The upshot on this point is that I believe a court is obligated to consider all such rulings afresh. Indeed, it is as if the court should decide the issue first hand. But not – I stress – without compliance of what the legislator as apex law maker determined on whom should first and foremost deal with such objections.

50. And of course, there is a very important proviso. The grounds contended before the Master remain – however – solid. No new additional grounds may be raised before a court that did not serve before the Master.[13] I believe that is the truism because the legislator had intended that the primary repository of correcting power should be the Master, and reference to a court should only be permissible when the Master refuses the relief the objector seeks, cannot decide disputes of fact or fundamentally errs otherwise.[14]

51. Moreover, and although the rudimentary correcting power is with the Master, the power is inflexible and rigid. *Mars*[15] writes that when dealing with an objection the Master would not be doing right in using his power in such a way as to relieve those concerned from the proper expense of protecting their own interests, or so as to decide questions of fact upon which the rights of creditors *inter se* may depend.[16]

52. I highlight: the Master is not to deal with questions of fact, and there is no doubt that cases such as *CP Smaller* say as much, because the Insolvency Act does not provide for the Master to hear any evidence upon such questions. *Fourie's Poultry*[17] is authority for the proposition that in matters of complex factual disputes not capable of being resolved by the Master, the correct procedure is for the objector to apply to the court for a decision directly and by avoiding the Master altogether.[18] Luckily we need not decide this point, as I do not believe that would be correct.

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[13] *Mars supra* at p 528.

[14] *Sfier's* case at fn 12; the procedure it advocates does not allow for the raising of new grounds for the first time in the review. See also *Mars loc cit* at p 529, and *Fourie's Poultry supra* at p 525.

[15] *Loc cit* at p 526.

[16] See also: *CP Smaller (Pty) Ltd v The Master* 1977 (3) SA 159 (T) at p 163.

[17] Supra at pp 522 – 528.

[18] The authors of *Mars* seem to support this at p 527, fn 118 with reference to *CP Smaller, supra* at p 163.

53. It is accepted law that a case needs to be made in the founding affidavit. And it is equally accepted that there are exceptions. A complete exposition on the law concerning this will only burden this judgment. The application of these exceptions do not apply here, not because I think the ultimate case made against the correct resolution should as a matter of principle have found its way into the founding affidavit, but because the case advanced is different to the objection put before the Master.

54. As to compliance with s 45 of the New Act, the relevant parts of the section read:

"(1) ...

(2) ....

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless-

(a) the particular provision of financial assistance is-

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that-

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) ....

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with-

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(7) ....'

55. I have no doubt that Mr Hitchings is correct when he relies on *Constantia*, and when he submits that strict compliance is required with s 45 of the New Act *re* the giving of such financial support. The problem is that was not the objection brought to the Master. The actual objection – echoed in the founding affidavit - was that ex facie the documents underscoring claim 17 there was no compliance with s 45 of the New Act at all. That is a far cry from alleging that the resolution creates uncertainty because of its wording.

56. Alternative Finance might immediately argue that the court was always to decide on questions of fact fitting such objections, and for that reason it does not matter – especially now - how it framed its objection to the Master initially. The problem with this is that still, the framing of the objections in a proper way to the Master would have enabled the dispute to crystalize there. And then when we were called upon to decide the dispute of fact, the issue would have been properly ventilated. What we are left with now is Alternative Finance arguing for inferences, speculations and nuanced, rather strained legal conclusions on the back of complaints made in a replying affidavit. To my mind, there is no way in which we may deal with the matter in such a way.

COSTS:

57. I do need to say something about the costs of this application. The application was filed late because Alternative Finance had asked the liquidators whether there were any further documents that were in play, submitted or considered for the purposes of what they had done and what they had submitted to the Master, before launching the present application. It is common cause that the liquidators did not answer that request.

58. This is essentially why the main application – in the founding affidavit – was prosecuted upon an initial basis that there was no s 45 resolution passed, rendering the guarantee void and hence the argument that claim 17 should have been discarded. It was only revealed in the opposing affidavit that the Bank had inadvertently appended the wrong resolution, and it seems as if Alternative Finance was also alerted to the telephone conversation between Mr Smith and the Bank official in the opposing affidavit itself.

59. Now it is so that the applicant could have realised at that stage that it has been somewhat led [by omission] up the garden path and could have reconsidered its position. It could have abandoned the application, and at that stage issued a fresh application based upon the case that was ultimately made before us in reply (forgetting for the moment that that was not the objection that served before the Master). It did not do so. What it did attempt to do was to change tack, to the extent that it apparently accepted that the wrong document was appended by the Bank and impugn it for the various reasons that have been stated.

60. Having found that there is no merit in the application, the cost order sought against the liquidators falls by the wayside. To a very large extent that ends their involvement in the matter, and I believe that their costs should be borne by the insolvent estate. Frank and open cards – from the outset – would have gone a long way in the present case. As they are somewhat to blame for the way in which the case unfolded, I do not believe that Alternative Finance should pay their costs.

61. The Bank has been successful in its opposition and I see no reason why the ordinary rule applicable here should not prevail.

The following order must then follow:

1. The late filing of the application is condoned.
2. The application is dismissed, and the Applicant is ordered to pay the Fourth Respondent's costs, taxed or agreed to otherwise, on a party and party scale and costs of counsel to be on Scale C.
3. The Second and Third Respondents shall bear their own costs.

[redacted]

GROBLER, AJ

I concur

DAFFUE, J

[redacted]

On behalf of the applicant:	Adv BD Hitchings On instruction of HJ Booysen Attorneys BLOEMFONTEIN
On behalf of the 2nd and 3rd Respondents:	Adv. S Tsangarakis On instruction of: Hendre Conradie Inc BLOEMFONTEIN
On behalf of the 4th Respondent:	Adv P Zietsman SC On instruction of: Phatshoane Henney Inc Bloemfontein