IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR444/24
DBN HC CASE NO: 12054/2016

In the matter between:

GEARWISE PROPERTIES CC — **FIRST APPELLANT**
(First intervening party in the court a quo)

HARESH OUDERAJH — **SECOND APPELANT**
(Second intervening party in the court a quo)

and

CONSOLIDATE AONE TRADE & INVEST PROPRIETARY LIMITED (IN LIQUIDATION) — **RESPONDENT**

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (ME Nkosi J sitting as court of first instance):

1. The appeal against the order reviewing and setting aside the Master's decision to expunge Claim 4 and Claim 5 is dismissed;

2. The orders of the high court in paragraphs 3 and 4 are set aside and substituted by the following:

(a) The Master is directed to reinstate the respondent's Claim 4 in the amount lodged and approved at the meeting of the creditors;

(b) The determination of Claim 5 is remitted to the Master, and the Master is directed to:

(i) consider all relevant information placed before her by the respondent in respect of Claim No 5;

(ii) rationally determine the respondent's Claim whether based on the reduced amount of R7 261 755.85 or the alternative claim of R3 950 230.37; and

(iii) provide the respondent written reasons for the determination.

3. Each party is to pay its own costs.

JUDGMENT

Siwendu J (Bedderson J and Shoba AJ concurring):

Introduction

[1] This is an appeal against the judgment and order of ME Nkosi J (the *court a quo*), which reviewed and set aside the Master's decision expunging two claims lodged by Consolidated Aone Trading and Invest 6 (Pty) Ltd (in liquidation) (Consolidated) against Imperial Crown Trading 176 (Pty) Ltd (in liquidation) (ICT). The appeal is prosecuted with the leave of the *court a quo*.

[2] A narration of the relevant background facts, including the relationship between Consolidated and ICT, and the circumstances that culminated in the lodgement and subsequent expungement of the disputed claims is necessary.

Background facts

[3] Consolidated is the registered owner of the property upon which the Ballito Bay Mall Shopping Centre (the shopping mall) stands. A mortgage bond over this property was registered as security for a loan in favour of FirstRand Bank Limited, acting through its division, Rand Merchant Bank (RMB). As additional security for the loan advanced in terms of the mortgage bond, Consolidated ceded its rights to current and future rental income from all tenants of the shopping mall to RMB. Its attorneys gave notice of the cession to the tenants on the 26 September 2011.

[4] Shoprite Checkers (Pty) Ltd (Shoprite) was one of Consolidated's tenants, pursuant to two written lease agreements concluded on 4 August 2010, authorising it to operate a Checkers store and a Checkers Liquor Shop. As will be seen later in the judgment, the rental income payable by Checkers became the subject of one of the disputed claims.

[5] ICT had constructed a retail shopping centre, Luthuli Bay, across two of Consolidated' s properties. On or about 1 December 2009, Consolidated and ICT concluded a sale agreement, the material terms of which were that:

(a) Consolidated would, at its own cost, establish a sectional title scheme comprising two sectional title units known collectively as Luthuli Bay.

(b) ICT would pay Consolidated R45 million for the two sectional title units, to secure the transfer and facilitate the release of those properties from RMB's mortgage bond.

(c) From 1 December 2008, ICT would bear all rates, taxes, insurance, levies, and other outgoings 'of whatsoever nature and however incurred', including water and electricity charges, until registration and transfer. [see Vol 2 FA page 185 and 195 - 197]

[6] Consolidated defaulted on its loan obligations and was provisionally wound up at RMB's instance on 19 September 2013. Messrs Van den Heever, Nel, and Nkomo were appointed as joint provisional liquidators on 28 September 2013. A final winding-up order was granted on 20 March 2014.

[7] ICT, in turn, was finally wound up on 17 January 2014, following proceedings instituted by its creditors, Gearwise Properties CC (Gearwise) and Mr Haresh Ouderajh. The joint liquidators appointed were Ms Fatima Cassim NO, Professor Madlala NO, and Mr Niel Button NO.

The disputed claims lodged by Consolidated

[8] On 1 April 2014, Consolidated, acting through its liquidators, lodged Claim 4 and Claim 5 with the liquidators of ICT in terms of s 44(4) of the Insolvency Act 24 of 1936[1] made up as follows:

(a) Claim 4 was for R13 537 693.70, allegedly comprising rental due by Shoprite paid to ICT from February 2010 to January 2013. The schedule evincing the amount collected was obtained from ICT's attorneys, Hemanth Singh and Company. [see Vol 1 page 15]

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[1] Section 44 (4) of the Insolvency Act 24 of 1936 requires that: 'every such claim be proved by affidavit in a form corresponding substantially with Form C or D in the First Schedule to this Act. That affidavit may be made by the creditor or by any person fully cognizant of the claim, who shall set forth in the affidavit the facts upon which his knowledge of the claim is based and the nature and particulars of the claim, whether it was acquired by cession after the institution of the proceedings by which the estate was sequestrated, and if the creditor holds security therefor, the nature and particulars of that security and in the case of security other than movable property which he has realized in terms of section *eighty-three*, the amount at which he values the security.'

(b) Consolidated contended that ICT retained the rent due and had been unjustly enriched. In view of the cession, the rental was not due to ICT but to RMB.

(c) Claim 5 was in the amount of R13 456 776.65. Consolidated alleged that the claim stems from ICT's breach of the obligations under the sale agreement, resulting in Consolidated, as the registered owner, incurring liability to the KwaDukuza Municipality for various charges.

(d) In terms of Claim 5, Consolidated claimed that ICT failed to pay the rates, taxes, electricity, levies, insurance and other outgoings for the sectional title units purchased. The amount was based on a schedule of account received from the KwaDukuza Municipality.

(e) In conjunction, Consolidated lodged an alternative claim of R4 693 113.97 which it alleged arose out of an obligation of ICT to the KwaDukuza Municipality between April and October 2013. Consolidated had discharged the obligation.

[9] Consolidated alleged that on 29 October 2013, its liquidators cancelled the sale agreement with ICT. In its founding affidavit, it disclosed that it received a refund of R742 883.60 from the KwaDukuza Municipality, reducing the alleged indebtedness to R3 950 230.37. Both claims were approved at ICT's first meeting of creditors on 9 April 2014. [see Vol 2 pages 184 -190 see Vol 2 para 15.2 page 188 - 190].

Recommendation to expunge the claims

[10] On 30 June 2015, Consolidated received notice from ICT's liquidators' attorneys requiring it to show cause why its claims should not be expunged under s 45 of the Insolvency Act.

[11] The correspondence attached included a recommendation from R Choonilall & Associates dated 26 June 2015, signed by F Cassim, advising the Master to expunge Claims 4 and 5. In relation to Claim 4, the letter stated that:

'With regards to the aforesaid claim for the sum R13 537 693.70, we note from attachment TVDH8 at paragraph 4.2, it is alleged that Eugene Jackson who held shareholding in ICT demanded payment of the rental of Shoprite Checkers to be made to ICT, which rental was made to attorney Hemanth Singh & Associates on behalf of ICT.

Further, in term[s] of email dated 14 September 2012, from Roy Soodhoo to Hemanth Singh, which was copied to Jackson and Ouderajh, Soodhoo as director of ICT urged Singh to pay towards the electrical bill of ICT. This instruction was confirmed by Ouderajh on the same day.

We had written to the liquidators of AONE ON 15 July 2014 ("A") and to date they have not responded.

In the light of the aforesaid, we submit that Aone's claims 4 be expunged.' [see Vol 2 page 149 to 151 and Vol 3 page 209 to 2010]

[12] Insofar as Claim 5 is concerned, the letter dated 26 June 2015 from R Choonilall & Associates to the Master, signed by F Cassim, stated that:

'With regards to the aforesaid claim, the liquidators of ICT do not dispute its indebtedness to the KwaDukuza Municipality for rates and refuse in terms of the deed of sale concluded.

However, having perused and considered annexure TVDH 5, we are of the view that the final balance is incorrect as the sum of R6 195 020.08 is duplicated/repeated. The final balance ought to be R7 261 755.85

Prior to the lodgement of this claim, KwaDukuza Municipality obtained a court order dated 30 May 2013 that the rental of Checkers be paid to the Municipality. A full accountability is still awaited.

This situation had prevailed since the court order and we submit such indebtedness to the Municipality ought to be fully settled by now.

In any event we had furnished the liquidators of Consolidated Aone a letter dated 15 July 2014 ("A") to which we have not yet had their response. In the light of the aforesaid, we submit that Claim 5 of AONE be expunged.'

Volume 1 page 16 paragraph 12.1 and s12.2; Volume 2 Page 149 -155 Annexures ENS 4 and ENS 5

Master's decision and review proceedings

[13] Consolidated's attorneys requested an extension to respond, followed by comprehensive submissions on 17 August 2015. The Master thereafter issued a notice stating:

'Your letter dated 23 November 2015 refers. The Claims no 4 and 5 against the above estate is hereby expunged as per motivation provided by you.
Kindly refer to section 45(3) of the Insolvency Act 24 of 1936 (as amended) and Regulation 3 under the same Act, as read with regulation 18 of the Companies Act 61 of 1973.'

[see vol 2 page 156 – 163; and page 182.]

[14] It is common cause that the Master furnished no reasons for the impugned decision. Consolidated requested reasons on 7 June 2016, but none were ever provided. Consequently, on 23 November 2016, Consolidated instituted review proceedings in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), read with s 151 of the Insolvency Act[2] and s 339 of the Companies Act 61 of 1973[3], seeking an order to set aside the Master's expungement of Claims 4 and 5.

[15] Apart from the relief to review and set aside the Master's decision of 12 May 2016 to expunge Claims 4 and 5 lodged against ICT, Consolidated sought the following additional relief:

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[2] The **review** of the Master's decision is brought in terms of section 151 of the Insolvency Act 24 of 1936.which states as follows:' Any person aggrieved by any decision, ruling, order, appointment or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the Court and to that end may apply to the Court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected : Provided that if all or most of the creditors are affected, notice to the trustee shall be .deemed to be notice to all such creditors ; and provided further that the Court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve.'

[3] Section 339. of the Companies Act 61 of 1973 states as follows:
Law of insolvency to be applied mutatis mutandis.
'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.'

'3. That the First Respondent be directed to reduce the Applicant's Claim No 5 to the sum of R7 261 755.85 as provided for in section 45(3) of the Insolvency Act No 24 of 1936;
4. That it be hereby declared that the Applicant's Claim 4 and Claim 5 reduced to the sum of R7 261 755.85 be dealt with by the Second, Third and Fourth Respondents as claims proved against Imperial Crown Trading 176 (Pty) Ltd (in liquidation);
5. That the First Respondent be and is hereby directed to pay the costs of this Application, save in the event of any of the other Respondents also opposing the Application, in which event all the Respondents so opposing shall jointly and severally pay the costs of the Application.'

[16] The grounds for review are succinct. In the absence of reasons from the Master which, Consolidated contends, triggers the adverse presumption in terms of s 5(3) of PAJA that the decision was taken without good cause, Consolidated relied on the following additional grounds, namely that the Master:
(a) Considered irrelevant alternatively relevant considerations were improperly weighed or not considered as contemplated in section 6(2)*(e)*(iii) of PAJA,
(b) Took the decision arbitrarily or capriciously as envisaged in 6(2)*(e)*(vi) of PAJA,
(c) The exercise of the power conferred in s 45(3) of the Insolvency Act was so unreasonable that no reasonable person would have exercised such powers in the manner that he did by expunging the claims.

[17] The Master has opted to abide by the decision of the court. ICT's joint liquidators first filed a notice to oppose the application, followed by a notice in terms of Rules 30(1) and 30(2)*(b)*, alleging several irregularities and causes of complaint pertaining to the review application. They subsequently withdrew the Rule 30(1) application and tendered costs. ICT's joint liquidators have henceforth not taken part in the review and the appeal.

Intervention by the appellants

[18] Gearwise and Mr Ouderajh applied for leave to intervene in the review proceedings. Mr Ouderajh alleged that he was one of the four co-members of ICT and is the sole member of Gearwise. They cited their status as creditors of ICT and their claimed interests included:

(a) A builder's lien on the shopping mall, allegedly admitted by ICT's liquidators,

(b) A claim exceeding R215 million for construction costs,

(c) A R30 million loan account claim in ICT, and

(d) Concerns that acceptance of Consolidated's claims would dilute their influence in ICT's winding-up.

Opposition to the review

[19] The appellants raised two preliminary points:

(a) Consolidated lacked *locus standi* to bring Claim 4 due to the cession of its rental to RMB.

(b) There was a delay in that the review was allegedly instituted outside the 180-day period in PAJA.

[20] On the merits, they contended that:

(a) ICT was entitled to the rental under a 'real agreement', despite the written leases naming Consolidated as the landlord,

(b) Payments of the rent the subject of Claim 4 to ICT's attorneys were made under internal arrangements,

(c) ICT bore no obligation under the sale agreement after Consolidated breached it, and

(d) Claim 5 was irregular under s 44(4) of the Insolvency Act because it was unsigned.

Decision of the Court a Quo

[21] The *court a quo* held that condonation of the delay and the extension of the period within which to launch the review application was warranted. It found the review was effectively one day late. It was in the interest of justice to grant same.

[22] In relation to Consolidated's locus standi to lodge Claim 4, the court *a quo* held relying on the authority of *Millman NO v Twiggs and Another*[4] that *dominium* in the ceded rights vested in Consolidated. It therefore concluded that there was no lawful basis for the expungement of Claim 4. To the extent that any portion of the claim may have prescribed, the court held that the Master was empowered to adjust the claim proportionately rather than expunge it in its entirety.

[23] The court *a quo* found that Claim 5 should be reduced (as conceded) to R7 261 755.85 under s 45(3) of the Insolvency Act. The Master's failure to provide reasons rendered the decision arbitrary and irrational. Costs were awarded against the intervening parties. I shall return to the content of the order granted by the court a *quo* in due course.

Issues on appeal

[24] The issues on appeal mirror those ventilated at the hearing. The appellants challenge the court *a quo's* findings on:

(a) Condonation and the extension of the period granted under ss 7 and 9 of PAJA to launch the review;

(b) Locus standi conferred on Consolidated to lodge Claim 4;

(c) The rejection of evidence of a verbal agreement concerning rental collection;

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[4] *Millman NO v Twiggs and Another* 1995 (3) SA 674 (A).

(d) Prescription of a portion of the rent claimed and the treatment of unliquidated claims;

(e) The court's reliance on s 45(3), which they argue empowers only the Master, not the court.

Interests of the appellants

[25] The parties consented to the intervention, and the court *a quo* permitted the intervention without demure or detailed analysis of these issues. At the hearing, the court raised *mero motu* the question whether the intervening parties were "aggrieved persons" in terms of s151 of the Insolvency Act and or how the Master's failure to take a decision adversely affected their interest or rights as defined in s1 of PAJA. The question arose having regard to the two principal statutory provisions on which Consolidated relied in launching the review application, namely s 151 of the Insolvency Act and section 6 of PAJA.

[26] When the intervention application is considered with reference to *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) (Ltd)*[5], the direct and substantial interest in the subject matter of the review, namely the expungement of Consolidated' s claims from ICT's insolvent estate was not clear. As already alluded to, Mr Ouderajh and Gearwise were creditors of ICT. Gearwise instituted an action against ICT under case number 674/2013, which was pending before the court at the time. There were in addition action proceedings pending under case number 5846/2016 against Consolidated for unjust enrichment. Mr Ouderajh and Gearwise alleged that although Consolidated denied liability to Gearwise, it had not paid for the construction of the mall despite benefiting from it.

[5] *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W).

[27] The question must be viewed against the emphasis by the Supreme Court of Appeal (SCA) in *Minister of Justice v SARIPA*[6] 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". Based on this *dictum,* it appeared that any prejudice the appellants would suffer could only arise and stood to be resolved in the winding-up process, if the Master took a decision that is irregular. Moreover, their intervention shed no light on the reasons for the decision by the Master.

[28] Consolidated's review is grounded in s 151 of the Insolvency Act, read together with s 339 of the Companies Act and the relevant provisions of PAJA. PAJA envisages a narrower scope of their interest, as there is no decision taken by the Master which affects their rights and or interests. On the other hand, when the nature of the review powers contemplated in s 151 of the Insolvency Act are considered the SCA in *Nel and Another NNO v The Master (with Absa Bank Ltd and Others Intervening),*[7] held that s 151 confers wide powers of both appeal and review, including the power to receive new evidence and to decide the matter *de novo.*

[29] The granting of leave to intervene to the appellants cannot be criticised. It can be countenanced on the strength of the wide powers conferred by s 151 to determine the claims *de novo*. Although the appellants' interest is not direct having regards to the construction in PAJA, to the extent that the Court could

[6] *Minister of Justice v SARIPA* 2017 (3) SA 95

[7] *Nel and Another NNO v the Master (Absa Bank Ltd and Others Intervening)* 2005 (1) SA 276 (SCA) at paras 22-23.

determine and dispose of the claims, they would have an interest in the outcome of the Court's determination. A wider scope to interest has some merit.

The question of delay

[30] The first preliminary point pertains to the question of delay, and much was made of this at the hearing. The appellants contended that the *court a quo* erred in granting Consolidated condonation under s 7(1)*(b)* of PAJA and in extending the period for instituting review proceedings in terms of s 9(1*)(b)* and (2) of PAJA. The significance of this for the appellants' case is that a determination on delay in their favour would be dispositive, and the Court would not need to enter upon the merits of the appeal. The judgment of the court a quo and the parties proceeded on the premise that there was a delay albeit it found it was minimal. It concluded it had a discretion to exercise and grant both the condonation and the extension of the period.

[31] The provisions ss 7(1) and 9(1) of PAJA have been the subject of extensive judicial interpretation.[8] It is unnecessary to rehearse that jurisprudence in this judgment, save to investigate whether factually there was such a delay, which triggered the provisions in ss7 and 9.

[32] The appellants' complaint, which was premised on the decision in *Aurecon South Africa (Pty) Ltd v Cape Town City*[9] was that Consolidated waited six years after it was alerted it was out of time and thus needed to apply for condonation before launching its application seeking same. It was submitted even then, that

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[8]. *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA); *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA); *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC).

[9] *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA);

Consolidated applied for condonation well after the 180-day period prescribed by PAJA had expired. The appellants contended that:

'The 180-day period could only be extended if such extension was sought prior to the expiry thereof and in so doing erred in holding that the Respondent could apply for such an extension years after the expiry of the prescribed period.'

The gist of the complaint was that Consolidated failed to provide an adequate explanation for the delay in filing the condonation and the appellants took issue with the court *a quo's* conclusion that it would not be in the interests of justice to dismiss the review on the basis that it was filed only one day late.

[33] Although the appellants relied on the dictum in *Aurecon South Africa (Pty) Ltd v Cape Town City and Asla Construction v Buffalo City*[10] the complaint argued before us refashioned the challenge pleaded in their affidavits. In their application for intervention, the issue about the delay was framed as follows:

'I do not accept that the applicant has brought its application for review within 180 days under PAJA.'

[34] However, in the answering affidavit where the appellants raised a point *in limine,* they contended that:

'5.2 The application therefore ought to have been brought within a period of 180 days as provided in terms of Section 7 of PAJA.

5.3 The aforesaid act does not make provision for any condonation.'

[35] The standing principle is that it is to the affidavits the court looks to determine the complaint, and the appellants stand and fall by the averments made therein. The appellants cannot make new grounds on appeal, and the court will

[10] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23; 2017 (6) SA 360 (SCA).

not allow them to do so unless the point has been fully canvassed, in which case the court is expected to fully pronounce on it.[11]

[36] Of significance is whether, on the facts, and the statutory provisions, there existed a valid question of delay, thereby warranting condonation and an exercise of discretion by the court *a quo*. As pointed, Consolidated and the court *a quo* proceeded on the basis that there was such a delay, hence it applied for condonation. It is to that issue that I now turn. Several provisions of PAJA relevant to computing the 180-period merit stating.

[37] To illustrate the consequences on the facts of the present appeal, it is essential to first refer to the provisions of ss 5(1) to (4) of PAJA pertaining to the Master's obligations to furnish reason, the applicable time periods and the effect thereof on the computation. They state that:

'(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days *after receiving* the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) *(a)* An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances and must forthwith inform the person making the request of such departure.

(b) In determining whether a departure as contemplated in paragraph *(a)* is reasonable and justifiable, an administrator must take into account all relevant factors, including-

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[11] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635F/G-636F; *Road Accident Fund v Mothupi* 2000(4) SA 38 (SCA) at para 30.

(i) the objects of the empowering provision;

(ii) the nature, purpose and likely effect of the administrative action concerned;

(iii) the nature and the extent of the departure;

(iv) the relation between the departure and its purpose;

(v) the importance of the purpose of the departure; and

(vi) the need to promote an efficient administration and good governance.'(Emphasis added)

[38] The second relevant provisions are ss 7(1) and 9. Section 7 states that:

'Any *proceedings for judicial review* in terms of section 6(1) must be instituted without *unreasonable delay* and not later than 180 days *after the date-*

(a) subject to subsection (2)*(c)*, on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)*(a)* have been concluded; or

(b) where no such remedies exist, on which the person concerned *was informed of the administrative action, became aware of the action and the reasons for it* or might reasonably have been expected to have become aware of the action and the reasons.' (My emphasis.)

Section 9 states that — (1) The period of—

(*a*) 90 days referred to in section 5 may be reduced; or

(*b*) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

[39] As held by the SCA, in *Opposition to Urban Tolling Alliance v SANRAL*[12] s7(1) requires a determination of when 'the person concerned' was 'informed of, became aware of, or might reasonably have been expected to become aware of, the administrative action'. It will be a matter of the facts.

[12] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) para 27.

[40] The appellants accepted that, although the letter notifying Consolidated of the Master's decision to expunge the claims is dated 12 May 2016, Consolidated acquired knowledge of the decision expunging its claim on 25 May 2016. Although Consolidated had 90 days within which to request reasons for the expungement from the Master in terms of s 5(1) of PAJA, Consolidated requested the reasons on 7 June 2016, less than the 90 days prescribed in PAJA. As already stated, the Master was required give the reasons within 90 days after receiving the letter dated 7 June 2016 but failed to do so. Consolidated launched the review application on 23 November 2016.

[41] Applying the provisions of PAJA to the facts, the analysis demonstrates otherwise. On Consolidated' s view, the proverbial clock began to 'tick' from 25 May 2016, being the date, it received notice of the decision and gained knowledge of the administrative action to expunge its claim, which was not disputed. Consolidated and the court *a quo* erred in this regard. The proverbial clock began to 'tick' on 26 May 2016, and not the 25 May 2016.

[42] On a proper interpretation of s 7(1*)(b),* there is a difference between the date of the trigger event, namely the date of the knowledge of the administrative action and the date from which to compute the period the 'clock began to tick'. The wording of the provision in s 7 of PAJA refers to '*after the date*' the knowledge was acquired. It makes it clear that the 'clock ticks' after the date of the trigger event. That view is not only consistent with s 7 of PAJA but also with s 4 of the Interpretation Act 33 of 1957 which mandates that when reckoning a period, the computation is exclusive of the date the trigger event.[13] Accordingly

[13] Section 4 of the Interpretation Act is titled 'Reckoning of number of days', and reads:
'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a

the computation excludes 25 May 2016, the date when knowledge was acquired. As a result, the review was not a day late, it was launched on 23 November 2016 within the 180-day prescribed period. There was nothing to condone or extend by the court *a quo*.

[43] A third consideration, although raised at the hearing, by the respondent, is that neither party correctly considered the effect of the request for reasons on the computation of the period in their papers or during submissions. Consolidated invoked s 5 PAJA by requesting reasons within the 90-day window on 7 June 2016. The Master should have provided reasons for the decision by 5 September 2016. Since no reasons were provided, and no justification furnished to Consolidated for the refusal, the Master was deemed to have failed to have provided reasons at the expiry of the 90 days, by 5 September 2016.

[44] Once more, on a proper interpretation of s 7(1*)(b)* the Master's failure to provide reasons within 90 days by 5 September 2016 did not only trigger the presumption under s 5(3) PAJA, but it also reset the 180-day clock for computing the period within which to launch the review. The 180-day period commenced ticking on 6 September 2016, the day after reasons were due and expired on 4 March 2017. In both instances, the review was launched either on or before the 180-period prescribed in PAJA. The review application was not out of time.

[45] The above finding merits a restatement of several principles on the role of the court on appeal, starting with erroneous concessions or errors of law, which may have been made by the parties. Although submitted from a different context, it was argued on behalf of the appellants that Consolidated elected to bring the

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Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

condonation and extension application and are bound by the path chosen. A court on appeal is not only entitled to base its judgment and make findings on any matter flowing from the record, the heads or the argument, it is required to give the right decision on the accepted facts.[14] As the court in *Paddock Motor (Pty) Ltd v Igesund*[15] held, it would be an intolerable position if the court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part. Accordingly, the error by Consolidated does not convert an otherwise unauthorised act to a legally correct one.[16]

[46] If anything, the case as pleaded in the affidavits underscores the point made at the hearing of the appeal that, contrary to new submissions advanced on the appellants' behalf, s 7 of PAJA regulates the 'reasonableness' of the delay *in instituting the review* and not the period when condonation for the late review is sought. The court a *quo* erred in this regard and the argument about delay lacks merit. [emphasis added]

Was the Master's decision to expunge the claims appropriately reviewed?

[47] Although the powers conferred by s 151 operate independently of PAJA, when read alongside the decision in *Nel*, the statutory presumption in s 5(3) of PAJA becomes apposite. The absence of reasons from the Master, s 5(3) gives rise to the presumption that the decision to expunge the claims being an administrative action was taken without good reason. The only evidence placed before the court was the letter dated 26 June 2015, which did not contain reasons capable of rebutting that presumption. Since it did not lie in the mouths of the

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[14] *Thompson v South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) para 7.
[15] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A).
[16] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC).

appellants to dislodge the presumption, the court was entitled, under s 151, to re-evaluate the merits of each claim afresh and, where necessary, to receive additional evidence

[48] I turn now to the merits of each of the claims and the orders made in respect thereof.

***Locus Standi* to Lodge Claim 4**

[49] The question of *locus standi* is confined to the decision pertaining to Claim 4. Since the issue affects the legal standing to consider the review and or enforce the claim before the court; authorities make it clear that the question must be decided first independent of the merits of the claim.[17]

[50] The appellants contended that the cession to RMB deprived Consolidated of standing to lodge Claim 4. The court *a quo* nevertheless conferred Consolidated *locus standi* on the strength of the decision in *Millman NO v Twiggs* and thus erred. There is no basis to interfere with the finding of the court *a quo*.

[51] The appellant did not dispute that the cession of the book debts was a cession *in securitatem debiti*, rather than an out-and-out cession. It is well established and was most recently reaffirmed by the SCA in *Batteson NO and Others v Joubert NO and Another*,[18] that once a cession is characterised as a cession *in securitatem debiti*, it bears the attributes of a pledge. Ownership of the

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[17] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 676. See also *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 33-43; *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Another* [2016] ZACC 51; 2017 (6) SA 621 (CC) para 40; *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 7; *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* [2018] ZASCA 72 para 13; *Tupac Business Enterprises CC v KwaZulu-Natal Gaming and Betting Board* [2018] ZAKZPHC 63 paras 15-21; *Goldrush Group (Pty) Ltd v North West Gambling Board and Others* [2022] ZASCA 164; 2023 (3) SA 487 (SCA) paras 14-15; *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc and Another* [2023] ZASCA 107; 2024 (6) SA 52 (SCA) para 6.

[18] *Batteson and Others NNO v Joubert and Another NNO* [2025] ZASCA 129; 2025 (6) SA 386 (SCA)

ceded rights does not pass to the cessionary instead, the cedent retains a reversionary interest.[19]

[52] The submission is inconsistent with the insolvency and liquidation regime. Upon liquidation, a *concursus creditorum* is established and Consolidated's assets vest in the liquidators for the benefit of all its creditors. Consolidated, acting through its liquidators, accordingly, retained the requisite standing to lodge Claim 4. This conclusion accords with the powers conferred on trustees in terms of s 95 of the Insolvency Act, which include taking control of the estate, protecting, managing and realising assets, collecting debts, dealing with property in the possession of others, and acting in the collective interests of creditors.

[53] The SCA recently reaffirmed in *Emontic Investments (Pty) Ltd v Bothomley NO and Others*[20] that the Insolvency Act and the liquidation regime provide a comprehensive framework for the proof of claims, the realisation of securities, and the subsequent distribution of assets to creditors in accordance with their order of preference. There is therefore no merit in the complaint. I proceed to consider the appeal against the determinations made by the court a quo.

Claim 4

[54] In respect of the merits of Claim 4, I have already disposed of the *locus standi* complaint. It was not disputed that the tenants had been notified of RMB's cession as early as 26 September 2011. The first criticism on appeal, however, is that the court *a quo* disregarded that the payment of rental by Shoprite to ICT was made on the instructions of Mr Jackson, a shareholder of ICT and the Chairman

[19] *Bank of Lisbon and South Africa Ltd v the Master and Others* 1987 (1) SA 276 (A) at 294, *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) paras 15-16.

[20] *Emontic Investments (Pty) Ltd v Bothomley NO and Others* 2025 (2) SA 66 (SCA).

of Consolidated. The court *a quo* correctly rejected reliance on Mr Jackson's instructions. I must add that even if Mr Jackson had been validly authorised, RMB's consent would have been required to alter the terms of its security embodied in the mortgage bond. There was no evidence of RMB's consent tendered.

[55] Second, to the extent that the appellants claimed that there was some other 'verbal agreement' or alleged that the written lease agreement between Consolidated and Shoprite was not the 'real agreement' entitling the collection of the rental to off-set expenses ICT would incur, the contention is unsustainable. Although evidence of both text and context is admissible on the principles of *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[21] the assertion by the appellants would be inadmissible evidence and hit by the parole rule. The terms of the verbal agreement could not be used to prove or contradict the written agreements between the parties. As the court held in *KPMG Chartered Accountants v Securefin Ltd*[22] if an agreement was intended to provide a complete memorial of a juristic act, extrinsic evidence may not be led to contradict, add, or modify the meaning of the agreement. The principle has not been jettisoned and remains part of our law.

[56] This brings me to the third issue that part of the amount the subject of Claim 4 was extinguished by prescription. Apart from stating that the Master could have deducted the portion of the claim that would have prescribed, the court *a quo* did not undertake an inquiry or consider the evidence before it, to examine whether there is merit to the argument, or assess whether on the evidence before it, the amount of the claim it ordered was accurate or justified.

[21] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA).
[22] *KPMG Chartered Accountants v Securefin Ltd* 2009 (4) SA 399 (SCA) at para 38 to 39.

[57] I accept as a matter of general principle that because the subject-matter of Claim 4 consists of monthly rentals payable by Shoprite, each monthly rental constituted a separate and self-standing debt due, and prescription must run independently in respect of each rental payment due. This principle is well established at common law: where performance is periodic or divisible, each periodical debt prescribes separately because the nonpayment constitutes a breach of the payment due.[23]

[58] Ordinarily, a cession in *securitatem debiti* does not alter or interrupt the running of prescription in respect of the debt because its nature is not altered: the cessionary merely steps into the shoes of the cedent and acquires the claim with prescription already running.[24] In the present case, as already alluded to, the cession forms part of the terms of the mortgage bond, in terms of clause 3 thereof, and constitutes a pledge of the book debts in favour of RMB.[25] However, the Prescription Act 68 of 1969 (Prescription Act) is directly relevant to the issues arising under Claim 4. In terms of s 12(1) of the Prescription Act, prescription begins to run as soon as the debt becomes due. However, s11*(a)(i)* of the Prescription Act provides that a debt secured by a mortgage bond prescribes after 30 years, whereas in terms of s 11*(d)*, any ordinary, unsecured debt prescribes after three years. That the cession in *securitatem debiti* was integral to the terms of the mortgage bond was not considered at all.

[59] Finally, s 13(1)*(g)* of the Prescription Act provides that the running of prescription may be delayed where the debt is the object of a claim filed against a company in liquidation. This provision postpones the completion of prescription

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[23] *Roestorf and Another v Johannesburg Municipal Pension Fund and Others* 2012 (6) SA 184 (SCA) at para 17; also, in *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* 1998 (1) SA 811 (SCA).
[24] *Fisher v Natal Rubber Compounders (Pty) Ltd* 2021 (3) SA 64 (SCA) at para16 to18.
[25] *First National Bank of SA Ltd v Lynn NO and Others* 1996 (2) SA 339 (A).

in limited circumstances but does not restart prescription or alter the fact that it began to run when each monthly rental became due.[26]

[60] Shoprite discharged its obligation in terms of the schedule prepared by Hemanth Singh and Company, which shows that rental was collected from Shoprite from February 210 to January 2013 albeit that it made payments to the wrong party.

[61] Whether by virtue of being a term of the mortgage bond, the cession forms part of the 30-year prescription period contemplated in s 11*(a)*(i) of the Prescription Act was not decided by the court *a quo* nor argument advanced on this score in these proceedings. As accessory to the mortgage debt, the cession endured and the debt could not have prescribed. However, what is clear is that Consolidated' s cause of action for Claim 4, is not founded on a contractual debt by ICT but on unjustified enrichment. On the evidence before the court *a quo*, there was plainly no legal cause for ICT to receive the rental payments. Reliance on any alleged verbal agreement cannot override or amend the securities contained in the written mortgage bond and cession which not only secure Consolidated's obligations to RMB but its rights to any reversionary interest Consolidated has once the indebtedness in terms of the mortgage bond was discharged.

[62] In these circumstances, the prescription defence is not a defence available to ICT, which is alleged to have been enriched without legal cause by receiving payments that, in law, should have been paid to Consolidated or its cessionary, RMB. On the above facts, prescription could not extinguish an enrichment claim

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[26] *Bester NO v Schmidt Bou Ontwikkelings CC* [2012] ZASCA 125; 2013 (1) SA 125 (SCA); *The Master v I L Back & Co Ltd and Others* 1983 (1) SA 986 (A).

by the true creditor against a third party who received the money without just cause. The unliquidated charges due to Hemanth Singh and Company are claims against ICT and not Consolidated. Hemanth Singh and Company or the appellants may raise that claim at a meeting of creditors.

Claim 5

[63] As already alluded to, Claim 5, is premised on the written agreement with ICT already referred to above. Consolidated was held liable to the KwaDukuza Municipality for outgoings due by ICT. ICT's obligation and liability appeared *ex facie* the agreement, despite ICT's extraneous defences. The amount due, payable and paid to the municipality is ascertainable. There was nothing on the evidence nor any rational basis to expunge the Claim in toto.

The order by the court *a quo*

[64] The above conclusion brings me to the orders granted by the court *a quo*, which merit a restatement. The court *a quo* not only set aside the decision to expunge the two claims, but it also decided the merits of the claims and made orders relative thereto.

[65] Although the powers of the court are wide and include a revisit of the merits *de novo*, the amounts in the order of the court *a quo* and the evidence on the papers do not reconcile for the following reasons:

i. Claim 4 lodged with the Master was for R13 537 693.70.
ii. The initial Claim 5 was for R13 456 776.65.

[66] Consolidated conceded in respect of Claim 5, that there was a duplication of the sum of R6 195 020.80. The actual sum due was reduced to R7 261 755.85. Accordingly, it sought a reduction of Claim 5 to R7 261 755.85.

[67] It is imperative to observe that Consolidated also relied on an alternative cause of action in respect of Claim 5 for an amount of R3 950 230.37. It conceded it received a sum of R742 883.60 as a refund from the KwaDukuza Municipality. It paid outgoings of R4 693 113.97 between April 2013 to October 2013 to the KwaDukuza Municipality. It sought payment of R 3 950 230.37.

[68] The judgment and order by the court *a quo* accepted Consolidated computation without demure. It makes no mention of the alternative claim and the basis on which it determined the amounts in the order directing the reduction. To illustrate, the point, Consolidated's notice of motion sought the following orders in paragraphs 3, 4 and 5, that:

'3. That the first respondent be directed to reduce the applicant's claim No 5 to the sum of R7 261 755.85 as provided in s 45(3) of the Insolvency Act No 24 of 1936

4. That it be hereby declared that the applicant's *Claim No 4 and Claim No 5* be reduced to the sum of R7 261 755.85, be dealt with by the second, third and fourth respondent as claims proved against Imperial Crown Trading 176 (Pty) Ltd (in liquidation)' [Emphasis added]

[69] The computation of the amount in the order in paragraph 3 and 4 conflates the Claims. The only concession of the error made on the papers was in respect of Claim 5. Claim 4 does not feature in the order granted. What is more, in respect of Claim 5, the order is silent on the effect of the alternative claim to the direction to the Master. That part of the order is clearly wrong and cannot stand. At the hearing Counsel for Consolidated conceded that the alternative claim was not placed into consideration before the court a *quo*.

[70] While I agree that the expungement of the claims fell to be set aside, the court a *quo* was not best placed to order the amounts it did in respect of claim 5. Although s 151 of the Insolvency Act permits a court to consider evidence to determine the claims afresh , absent such evidence, the court on review has at its

disposal several remedies in terms of s 8 (1) of PAJA which are not only limited to the substitution or variation of the administrative action but include an order remitting the administrative action with or without directions. An order for the remittal of Claim 5 to the Master for investigation and determination is appropriate.

[71] It now remains to determine the issue of costs, which generally follow the result. Consolidated has succeeded in resisting the appeal to the extent that this court confirms the order reviewing and setting aside the Master's decision expunging its claims and, reinstates Claim 4 as proved at the meeting of creditors. On the other hand, the appeal partially succeeds to the extent that the court a quo's order in respect of Claim 5 is remitted to the Master for consideration. In the result and having regard to the mixed outcome of the appeal, I consider that the interests of fairness are best served by making no order as to costs. Each party has achieved a measure of success on discrete issues, and it would not be just to characterise either as the overall successful party for purposes of costs, given the remittal order below.

[72] In the result, the following order is made:

1. The appeal against the order reviewing and setting aside the Master's decision to expunge Claim 4 and Claim 5 is dismissed;

2. The orders of the high court in paragraphs 3 and 4 are aside and substituted by the following:

(c) The Master is directed to reinstate the Respondent's Claim 4 in the amount, lodged and approved at the meeting of creditors;

(d) The determination of Claim 5 is remitted to the Master, and the Master is directed to:

(i) consider all relevant information placed before her by the Respondent in respect of Claim No 5;

(ii) To rationally determine the Respondent's Claim whether based on the reduced amount of R7 261 755.85 or the alternative claim of R3 950 230.37; and

(iii) provide the Respondents written reasons for the determination.

3. Each party is to pay its own costs.

[redacted]

NTY SIWENDU J

[redacted]

BEDDERSON J

[redacted]

SHOBA AJ

Date of hearing: 24 October 2025

Date of Delivery: This judgment was handed down electronically by circulation to the parties' representatives by email and released on SAFLII. The date and time for hand down of the judgment is deemed to be **10h00** on **15 April 2026**.

Appearances:

For the Appellant:	Mr Kisson Singh SC
Instructed by:	Nirvan Kawulesar & Company C/O Vathers Attorneys
For the Respondent:	Mr GME Lotz SC
Instructed by:	Edward Nathan Sonnenbergs C/O Venns Attorneys