THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 959/2024

In the matter between:

JP FOURIE N O **FIRST APPELLANT**

SM RAMPOPORO N O **SECOND APPELLANT**

and

THE MASTER OF THE HIGH COURT MAHIKENG **FIRST RESPONDENT**

SOUTH AFRICAN RESTRUCTURING AND
INSOLVENCY PRACTITIONERS ASSOCIATION NPC
('SARIPA') **SECOND RESPONDENT**

Neutral citation: *JP Fourie NO and Another v The Master of the High Court, Mahikeng and Another* (595/2024) [2026] ZASCA 104 (29 July 2026)

Coram: MATOJANE, KGOELE AND KEIGHTLEY JJA AND BASSON AND KUBUSHI AJJA

Heard: 19 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the hand-down of the judgment is deemed to be 29 July 2026 at 11h00.

Summary: Winding-up – interpretation – s 18(4) of the Insolvency Act 24 of 1936 read with the Companies Act 61 of 1973 – application of Insolvency Act provisions by virtue of s 339 of the Companies Act – provisional liquidator appointed by the Master – creditors failing to attend the first meeting of creditors convened under s 364 – whether s 18(4) is peremptory – Master obliged to appoint the provisional liquidator as final liquidator.

ORDER

On appeal from: North-West Division of the High Court, Mahikeng (Reid J sitting as court of first instance):

1 The appeal is upheld.

2 The first respondent to pay the costs of the appeal, including the costs of two counsel, where so employed.

3 The order of the high court under case no M357/2022 is set aside and replaced with the following order:

‘(i) It is declared that the first respondent is obliged to appoint the first and second applicants as joint liquidators of the insolvent estate of Boxberry Express (Pty) Ltd (with Master’s reference M61/22), subject to the first and second applicants providing such additional security as the first respondent may require.

(ii) The first respondent is ordered to pay the costs of the application.’

JUDGMENT

Basson AJA (Matojane, Kgoele and Keightley JJA and Kubushi AJA concurring):

Introduction

[1] The first and second appellants, JP Fourie N O (Mr Fourie) and SM Rampoporo N O (Mr Rampoporo) were appointed by the Master of the High Court, Mahikeng (the Master) as the provisional liquidators of the insolvent estate of Boxberry Express (Pty) Ltd (in liquidation) (Boxberry). They applied to the North-West Division of the High Court, Mahikeng, (the high court) for an order declaring that the Master of the High Court, Mahikeng, (the Master) was obliged to appoint them as the joint final liquidators of the insolvent estate of Boxberry. The application arose in circumstances where no creditor had attended the first meeting of creditors convened by the Master. As a result, no claims were proved, and there were no nominations for the appointment of final liquidators. The Master decided to only appoint Mr Rampoporo as the final liquidator.

The appellants contended that, by operation of s 18(4) of the Insolvency Act 24 of 1936 (the Insolvency Act), the Master was obliged to confirm them both as final liquidators notwithstanding the absence of creditor participation.

[2] The high court dismissed the application and upheld the Master's decision refusing to appoint Mr Fourie as final liquidator. The court concluded that the appellants had failed to establish a basis for the declaratory relief sought and that the Master's discretion in appointing final liquidators could not be ousted. The court found that s 18(4) of the Insolvency Act does not oblige the Master to confirm provisional liquidators as final liquidators where no creditor claims had been proved or votes cast. In its view, this would reduce the Master to 'rubber-stamping the creditors' choice of a liquidator. The court accepted that, while s 18(4) of the Insolvency Act limits the Master's discretion, it does not extinguish it. The Master may depart from the default position where exceptional circumstances exist, such as where creditors fail to honour their undertakings to prove claims or to vote. This appeal comes before us with the leave of the high court.

This appeal

[3] The appeal concerns the interpretation and application of s 18(4) of the Insolvency Act, read with s 339 of the Companies Act 61 of 1973. Any reference to the Companies Act in this judgment is to the 1973 Companies Act. The central issue is whether, in the absence of any voting at the creditors' meeting convened under s 364(1) of the Companies Act, the Master is obliged, having regard to the peremptory wording of s 18(4), to appoint the existing provisional liquidators as final liquidators, or whether the Master nonetheless retains the discretion to appoint a person of his choosing.

[4] The statutory scheme is well settled and requires only brief mention. Under s 339 of the Companies Act, the law relating to insolvency applies in respect of any matter not specially provided for by the Companies Act.[1]

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[1] Although the 1973 Act has been repealed by the Companies Act, 71 of 2008 (2008 Companies Act), Item 9 of Schedule 5 of the 2008 Act determines that Chapter 14 of the 1973 Act continues to apply as if that Act had not been repealed until a date to be determined by the Minister. Section 339 of the 1973

Factual context

[5] The background facts relevant to the dispute between the parties are largely common cause. On 9 March 2022, Boxberry adopted a special resolution placing itself in voluntary liquidation. The only three creditors of Boxberry submitted a 'Creditors Requisition Form' (the requisition form) to the Master, declaring themselves to be the creditors in the estate of Boxberry. This form allows creditors to indicate their preferred nominee for appointment as a provisional liquidator. Mr Fourie was nominated as the preferred provisional liquidator. The form also records that the creditors intended to prove their claims and vote for the appointment of Mr Fourie as the final liquidator.

[6] On 9 June 2022, as noted earlier, the Master appointed both appellants as provisional liquidators in terms of s 368 of the Companies Act and a 'Certificate of appointment of Provisional Liquidator' confirming such appointment was issued. Mr Fourie was appointed pursuant to his nomination by the creditors. The Master appointed Mr Rampoporo in the exercise of his discretion. Mr Rampoporo's appointment as final liquidator is not in dispute: only Mr Fourie's appointment as final liquidator is in contention.

First creditor's meeting

[7] The Master convened the first creditors' meeting on 17 June 2022 in terms of s 364 of the Companies Act. The three creditors, despite their right to do so, elected not to attend the meeting to prove their claims and to nominate the final liquidator for appointment. The appellants contend that the creditors have refrained from proving their claims for fear of being held liable under s 106 of the Insolvency Act to contribute to the insolvent estate. The Master postponed the meeting to 1 July 2022 and requested that Mr Fourie provide reasons why he ought to be appointed as the final liquidator.

[8] The appellants' attorneys responded by stating that, where no creditors attended the meeting and the estate had already vested in the provisional liquidators, the Master is obliged, in terms of s 18(4) of the Insolvency Act, to appoint the

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Companies Act provides that the law of insolvency applies *mutatis mutandis* to the winding-up of companies.

provisional liquidators as the final liquidators. Such appointment being subject only to the furnishing of such security as the Master may determine.

[9] This argument proceeds on the basis that the Companies Act, and in particular s 369, does not provide for a situation in which a meeting convened to elect a final liquidator result in no nomination being made. In those circumstances, s 18(4) applies *mutatis mutandis*. While it is common cause that s 18(4) finds application because the Companies Act does not regulate this situation, the parties are divided on its effect. The appellants argue that the provision is peremptory, subject only to the furnishing of security, and leaves no room for discretion.

[10] Section 18(4) reads as follows:

'When a meeting of creditors for the election of a trustee has been held in terms of section *forty* and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the Master may have required.'

[11] The Master disputes this construction and contends that, notwithstanding the ostensibly mandatory wording of s 18(4), a residual discretion remains. In correspondence with the attorneys for the provisional liquidators, the Master contended that this residual discretion applies even where no creditors attend the first meeting. The Master's view is that such discretion may be exercised in accordance with the Ministerial Policy governing the appointment of liquidators. It was further contended that s 370 of the Companies Act may serve to 'cure the defects' arising from the failure of creditors to vote, and that, in the absence of creditor participation, the Master could proceed to confirm the discretionary appointee. Equally, the Master could decline to appoint Mr Fourie as the final liquidator.

[12] Whether s 18(4) affords such a discretion, and whether s 370 cures the alleged defect, will be addressed later. Three of the Master's contentions can, however, be disposed of at the outset. First, apart from the fact that the Ministerial Policy has been declared unconstitutional, it is in any event directed only at the appointment of provisional liquidators under s 368 and does not regulate the appointment of final liquidators. Second, creditors are not obliged to attend the first meeting convened by

the Master. Section 364 requires the Master to summon such a meeting to enable creditors to prove claims and nominate liquidators. It confers an entitlement to participate, not an obligation to do so. Attendance is permissive, not mandatory. The mere absence of creditors and their consequent failure to prove claims cannot, therefore, justify the refusal to appoint a final liquidator who was previously recommended by creditors in the requisition form. This accords with the position under the Insolvency Act, where s 44(3) provides that a creditor can prove his claim at a later meeting.[2]

[13] Third, in a somewhat convoluted line of reasoning, the Master contended that it was not only entitled but obliged to refuse to appoint Mr Fourie. This was because the appointment had been made based on the creditors' undertaking, contained in the requisition, that 'the creditor intends proving a claim and voting for the final appointment of the aforementioned person at the first meeting of creditors in this estate'. The creditors had failed to honour this undertaking. The Master's view was that the effect was that Mr Fourie ought never to have been appointed as provisional liquidator. It was for this reason, according to the Master, that he could not appoint him as a final liquidator.

[14] There is no merit in these submissions. First, as will be pointed out, s 18(4) of the Insolvency Act affords the Master no discretion to refuse to appoint the provisional liquidator as final liquidator where no nomination was made at the first meeting of creditors. Second, both Mr Fourie and Mr Rampoporo were duly appointed by the Master as provisional liquidators in terms of s 368 of the Companies Act and were issued with certificates confirming their appointment and the powers afforded to them under s 386(1) of the Companies Act.

[15] The Master's argument overlooks that the appointment and removal of a liquidator constitute administrative action subject to judicial review.[3] Mr Fourie's

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[2] In *Barlows Tractor Company (Pty) Ltd v Townsend* 1996 (2) 869 (A) at 871A the Court recognised in the context of s 44(3) of the Insolvency Act that a creditor may attempt to prove a claim at a subsequent meeting of creditors.
[3] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA)(*Motala*) and *Minister of Justice and Another v Restructuring and*

appointment as provisional liquidator therefore remains in force unless and until the Master exercises the statutory powers conferred by s 379(1) of the Companies Act to remove him from office. That section circumscribes the circumstances in which the Master may exercise that power. These include, inter alia, where the appointment was unlawful, where the liquidator has become disqualified, where the liquidator has failed to perform a statutory duty satisfactorily, where the liquidator has failed to comply with a lawful demand of the Master, or where the Master considers the liquidator no longer suitable to act as liquidator of the company.

[16] A provisional liquidator cannot, therefore, be removed at the Master's whim or without a justiciable reason. In appointing or removing a liquidator, the Master exercises public power and must comply with the principles of lawfulness, reasonableness and procedural fairness required by the Promotion of Administrative Justice Act 3 of 2000. It is common cause that Mr Fourie was never removed as a provisional liquidator. His legal status remains that of a provisional liquidator for purposes of the issues in dispute in this appeal. The Master's approach is fundamentally flawed as it is based on the incorrect premise that it is open to the Master to ignore Mr Fourie's status as a provisional liquidator in making the appointment of final liquidators.

Statutory interpretation

[17] The narrow issue for determination in this appeal is whether s 18(4) excludes the Master's discretion entirely, or whether such discretion persists despite the peremptory language of the section, which requires that 'the Master shall appoint [the provisional liquidator] as [the final liquidator]' in the circumstances described. This section must be construed in accordance with the established principles of statutory interpretation in our law. The 'inevitable point of departure' of this exercise is the words used in the section, which must be given their ordinary grammatical meaning, unless doing so would result in an absurdity.[4] Statutory interpretation is a unitary exercise in

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Insolvency Practitioners Association and Others [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC).

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18 (*Endumeni*). *Endumeni* has consistently been endorsed by the Constitutional Court. See also *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 29; *Road Traffic*

which the language used, understood in accordance with the ordinary rules of grammar, the context in which the provision appears, and the purpose for which it is directed are considered together as interrelated elements to give coherent effect to the legislative scheme.[5]

[18] Against this interpretive framework, the peremptory language used in s 18(4) of the Insolvency Act must be considered within the broader statutory framework of the Companies Act, which regulates winding-up proceedings. Since grammar and dictionary meanings are merely principal (initial) tools rather than 'determinative tyrants',[6] the context within which the word 'may' is used in s 18(4) must be considered. The Constitutional Court in *South African Police Service v Public Servants Association*,[7] cautioned that the legitimate field of interpretation should not be restricted by excessive peering at the language to be interpreted without sufficient regard to the broader contextual scene.

The discretion of the Master in appointing liquidators

[19] A convenient starting point in considering the proper interpretation of s 18(4) of the Insolvency Act is the extent of the discretion conferred on the Master in the appointment of provisional and final liquidators. This enquiry must be approached bearing in mind that, as this Court observed in *Motala*,[8] 'our insolvency administration is wholly a creature of statute'. The Master is the only person who is authorised to appoint provisional and final liquidators, subject to the governing statutory framework.[9]

Management Corporation v Waymark Infotech (Pty) Ltd [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC) paras 29-30.

[5] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28. *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 52. See also *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* ZASCA 144; [2023] 1 All SA 1 (SCA); 2022 (1) SA 100 (SCA) para 15.

[6] *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC); (2006) 27 ILJ 2241 (CC) para 17.

[7] Ibid where the court reiterated the importance of context in statutory interpretation.

[8] *Motala* para 5.

[9] *Ex Parte The Master of the High Court South Africa (North Gauteng)* [2011] ZAGPPHC 105; 2011 (5) SA 311 (GN) para 33.

[20] The Master assumes control of all the property of the company upon the commencement of the winding-up until a provisional liquidator is appointed.[10] Once appointed, the provisional liquidator assumes control of the assets and affairs of the estate and administers it under the supervision of the Master pending the appointment of a final liquidator at the first meeting of creditors. Whilst it is not the function of the provisional liquidator to wind up the estate, she plays a central role in safeguarding and administering the company's affairs for the benefit of the body of creditors, pending their participation in the statutory process of nominating a liquidator.[11]

[21] Before 2004, the Master's discretion to appoint a provisional liquidator was generally regarded as largely unfettered.[12] That position was eroded considerably by amendments to s 336 of the Companies Act, which required the discretion to be exercised in accordance with Ministerial Policy. Following the declaration of that policy as unconstitutional,[13] the position has, in effect, reverted to its pre-amendment state, but not to an unfettered discretion. The Master's power under s 368 remains discretionary, to be exercised within the statutory framework, including the requirement to appoint a suitable and independent person who is not disqualified under ss 372 or 373 and who has furnished the requisite security. In appointing a provisional liquidator, the Master must act rationally and ensure that the appointment promotes the proper administration of the estate in the interests of creditors as a collective body.

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[10] Section 361(1) of the Companies Act 61 of 1973.

[11] *Walker v Syfret N O* 1911 AD 141 at 166 See also *Commissioner, South African Revenue Service v Pieters and Others* [2018] ZASCA 128; 2020 (1) SA 22 (SCA); 82 SATC 12 para 10. *Meskin NO v Friedman* 1948 (2) SA 555 (W) at 559-560. See also *Liberty Group Ltd v Moosa* [2023] ZASCA 52; 2023 (5) SA 126 (SCA) para 27.

[12] *Lipschitz v Wattrus N O* 1980 (1) SA 662 (T) at 671G: 'As to any such provisional appointments the Master clearly has an unfettered and sole administrative discretion, and it is within his enacted powers to give directions to his staff about such appointments'.

[13] The Constitutional Court dismissed an appeal by the Minister of Justice and Constitutional Development in *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) para 74. In that case, the Minister challenged a decision of this Court in *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA) paras 38 and 44 (*Minister of Justice SCA*), which declared the Ministerial Policy which sought to regulate the appointment of insolvency practitioners as part of efforts to transform the insolvency profession, unconstitutional and invalid.

[22] A practice has developed within the Master's office whereby creditors are invited to indicate their preferred nominee for appointment. The 'requisition system', while commonly utilised in practice, does not derive from any provision of the Companies Act and has not been judicially endorsed. It serves, in practical terms, to convey creditors' preferences in a creditor-driven insolvency regime, in which creditors play a central role in the nomination and appointment of liquidators. The Master will generally have regard to such indications of creditor preference when exercising the power of appointment, provided that the ultimate discretion remains vested in the Master and is exercised in accordance with the statutory framework.

[23] In this matter, the Master was critical of the requisition practice in terms of which Mr Fourie was nominated. It contended that the practice gives rise to what was described as 'back-door appointments', constitutes an 'unlawful practice', and has developed in a manner that interferes with the statutorily conferred discretion of the Master by permitting the confirmation of liquidators who ought not to have been appointed. Somewhat inconsistently, the Master also stated that he 'does not necessarily have a problem with either the requisition or confirming the appointment of the First Applicant (sic)'.

[24] Insofar as it is suggested that the requisition practice interferes with the Master's statutory discretion by reducing his role to that of merely rubber-stamping creditor nominations, that contention cannot be sustained. Such an approach would entail an abdication of the responsibility entrusted to the Master to apply an independent mind to the suitability of a proposed appointee. It would be inconsistent with the authority vested in the Master by the Companies Act.

[25] Whilst the Companies Act confers the exclusive power on the Master to appoint liquidators, this does not, however, displace the centrality of creditors in the insolvency regime. The purpose of insolvency legislation necessarily informs the basis on which provisional liquidators are appointed, the guiding consideration being the interests of creditors and the proper advancement of those interests. While s 364 requires the Master to summon the first meeting of creditors as soon as a special resolution for the voluntary winding-up of a company has been registered, or a final winding-up order

has been granted, delays in convening such meetings have led to provisional appointments becoming more prevalent. The requisition system was developed as a practical response to these delays by affording creditors a meaningful role in selecting provisional liquidators. It was precisely because the voice of creditors was effectively removed by the Ministerial Policy, reducing the Master's function to that of a 'rubber-stamp', that the policy was declared unconstitutional.

[26] Nothing in the Companies Act compels the Master to rubber-stamp a nomination. She still must exercise discretion in appointing a person nominated in a requisition as a provisional liquidator. Equally, however, nothing in the Act permits the Master to disregard the interests of creditors. This Court in *Minister of Justice SCA* explains:[14]

'This passage highlights the fundamental purpose of insolvency legislation, which is to secure the realisation of the remaining assets of the insolvent and the distribution of the resulting amounts among creditors in accordance with the order of preference laid down by law. Although the Master plays a vital role in overseeing the process of 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 of the corporate body, in winding-up are to be dealt with. The logic of this is obvious. It is the creditors who stand to lose as a result of the insolvency. They are the best judges of their own interests and are best situated to instruct the trustee or liquidator how to go about the process of liquidation or winding-up. They can judge whether it is desirable to borrow more money in order to complete a building 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 and their money that is at risk.'

[27] The first occasion on which creditors may formally nominate a liquidator arises at the first meeting of creditors summoned by the Master in terms of s 364, inter alia, for the purpose of nominating a person or persons for appointment as liquidator or liquidators.

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[14] *Minister of Justice SCA* above para 55.

[28] Section 364 provides that the Master shall summon, as soon as may be, after a final winding-up order or a special resolution for a creditor's voluntary winding-up of a company has been registered in terms of s 364(1) of the Companies Act –

'(a) a meeting of the creditors of the company for the purpose of –

(i) considering the statement as to the affairs of the company lodged with the Master under section 363;

(ii) the proof of claims against the company; and

(iii) nominating a person or persons for appointment as liquidator or liquidators.'

[29] Relevant to this matter is the stated purpose of the first meeting of creditors, namely, to *nominate* a person or persons for appointment as liquidator. Where a person or persons are so nominated, s 369 provides that the Master shall, *subject* to the provisions of s 370, appoint the nominee or nominees.[15] Section 370, in turn, permits the Master to decline to appoint a person who has been *nominated* as liquidator by meetings of the creditors on the grounds set out therein.[16] The Master submits that he was permitted to decline to appoint Mr Fourie on the ground that he was 'was not properly nominated' by the creditors. This is because, submits the Master, the creditors undertook in the requisition to prove their claims but failed to do

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[15] '**Section 369 Determination of person to be appointed as liquidator**
(1) In the case of a members' voluntary winding-up of a company, the Master shall, subject to the provisions of section 370, appoint the person or persons nominated by the company in the resolution referred to in section 356 (2)*(a)*(i) as liquidator or liquidators of the company concerned.
(2) *(a)* In the case of a creditors' voluntary winding-up and a winding-up by the Court of a company, the Master shall, subject to the provisions of section 370, appoint the person or persons nominated by any meetings referred to in section 364 as liquidator or liquidators of the company concerned, if the same person or persons have been nominated by the said meetings.
(b) If the said meetings have nominated different persons, the Master shall, subject to the provisions of section 370, decide the difference and appoint all or any of the persons so nominated, as he thinks fit, as liquidator or liquidators of the company concerned.'

[16] '**370 Master may decline to appoint nominated person as liquidator**
(1) If a person who has been nominated as liquidator by meetings of creditors and members or contributories of a company was not properly nominated or is disqualified from being nominated or appointed as liquidator under section 372 or 373 or has failed to give within a period of seven days as from the date upon which he was notified that the Master had accepted his nomination or within such further period as the Master may allow, the security mentioned in section 375(1) or, if in the opinion of the Master the person nominated as liquidator should not be appointed as liquidator of the company concerned, the Master shall give notice in writing to the person so nominated that he declines to accept his nomination or to appoint him as liquidator and shall in that notice state his reason for declining to accept his nomination or to appoint him: Provided that if the Master declines to accept the nomination for appointment as liquidator because he is of the opinion that the person nominated should not be appointed as liquidator, it shall be sufficient if the Master states, in that notice, as such reason, that he is of the opinion that the person nominated should not be appointed as liquidator of the company concerned.'

so at the first meeting of creditors. For this reason, his view is that s 370 permits him to confirm the appointment of Mr Fourie as a final liquidator.

[30] There are two reasons why there is no merit in this submission. First, as I have already discussed, unless and until Mr Fourie's appointment as provisional liquidator is formally set aside, he remains properly appointed. Thus, there was nothing improper about Mr Fourie's appointment. The ground relied upon under s 370 simply does not avail the Master. The second reason why the Master's reliance on s 370 lacks merit, is that the section is predicated on the existence of a *nomination* by the creditors at the first meeting summoned by the Master. In the absence of a nomination as contemplated by s 364 read with s 369, the Master's discretion under s 370 to decline to appoint a nominated person does not arise. The Master's reliance on that provision in the present matter, where no nomination was made, is accordingly misplaced for this reason too.

[31] In the circumstances prevailing in this case, it is s 18(4) of the Insolvency Act that applies. Consequently, the Master must appoint Mr Fourie as a final liquidator unless the Master can persuade this Court that, despite the peremptory language of s 18(4), he retains a discretion to refuse that appointment. Section 18(4) provides that where a meeting of creditors has been convened, and no liquidator has been elected, the Master 'shall' appoint the provisional trustee as the trustee, subject only to the furnishing of security. On a plain grammatical reading of the subsection, its language is peremptory, leaving no room for residual discretion.

[32] Our courts have long grappled with the question whether the word 'shall' should be read as 'may', and thus whether statutory language is to be construed as peremptory or merely directory.[17] In keeping with the approach articulated in *Endumeni*, that the 'inevitable point of departure' is the language of the provision unless doing so would result in an absurdity, the courts have generally accepted that the use of the word 'shall' is indicative of a mandatory obligation rather than a

[17] *Sutter v Scheepers* 1932 AD 165 at 173-174. See also *Motloung and Another v Sheriff, Pretoria East and Others* [2020] ZASCA 25; 2020 (5) SA 123 (SCA) para 11.

permissive discretion. In *Amalgamated Packaging Industries Ltd v Hutt*,[18] the court confirmed that 'the ordinary, decisive distinction between "may" and "shall" was present to the lawgiver's mind. Consequently, it is not easy to infer that "may" was inappropriately used . . . when "shall" was really intended'. Similarly, in *Nkisimane and Others v Santam Insurance Co Ltd*,[19] the Appellate Division held that the ultimate enquiry is one of statutory construction in which the intention of the Legislature must be ascertained from the language, scope, and purpose of the provision in question. In the same vein, in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd*,[20] the court held that the use of the word 'shall' in a statutory provision affords a strong indication that the Legislature intended to impose an obligatory duty rather than confer a discretionary power.

[33] On the Master's argument, the interpretation contended for by the appellants would yield an undesirable result, namely, that the appointment of a final liquidator would follow automatically from the absence of creditor participation at the meeting, with the result that the Master's discretion to decline an appointment would be unduly constrained.

[34] Section 18(4) of the Insolvency Act must also be interpreted against the broader context of insolvency legislation as well as within its immediate statutory context. The Constitutional Court in *Afriforum and Another v University of the Free State*,[21] explained that contextual interpretation requires consideration not only of the language used, but also of the setting in which the provision appears, including the surrounding subsections.

[35] Section 18(1) of the Insolvency Act, which mirrors in material respects s 368 of the Companies Act, provides for the appointment of provisional trustees pending final

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[18] *Amalgamated Packaging Industries Ltd v Hutt* 1975 (4) SA 943 (A) at 950F.
[19] *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A.
[20] *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) at 679C.
[21] *AfriForum and Another v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) para 43. See also *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

appointment. In both provisions, the use of the word ‘may’ indicates that the Master is vested with a discretion to appoint a provisional trustee or liquidator, albeit one that was, at least for a time, informed by the Ministerial Policy (which has since been declared unconstitutional). Section 368 provides for an additional consideration in the exercise of that discretion, namely, that the person appointed be ‘suitable’.

[36] A comparison between ss 18(1) and 18(4), read in their immediate statutory context, is instructive. Whereas ss 18(1) and s 18(2) are framed in directory terms. s 18(4) is framed in peremptory terms. This shift in language from a discretionary formulation in s 18(1) to a mandatory one in s 18(4) is significant and cannot be regarded as accidental. There is no persuasive reason to depart from the ordinary grammatical meaning of ‘shall’ in s 18(4) as limiting the Master’s discretionary power. The juxtaposition of ‘shall’ and ‘may’ in the same provision underscores this reading, indicating that the one denotes an obligation and the other a discretion. It follows that, where no nomination has been made, the Master’s discretion to appoint a final trustee or liquidator is curtailed.

[37] The Master’s concerns also fall away when s 18(4) is read in its broader statutory context. In the winding-up of companies, the appointment of a provisional liquidator is itself preceded by the exercise of the Master’s discretion under the Companies Act. The Master is required to determine the suitability of the proposed appointee and to appoint only a person who meets the statutory requirements. In doing so, the Master has already considered the appointee’s suitability and independence. The contention that the subsequent appointment of that person as final liquidator unduly constrains the Master’s discretion is therefore overstated. On the contrary, such an outcome underscores the creditor-driven nature of the insolvency regime, in which creditors are recognised as the best judges of their own interests. The application of s 18(4) avoids the situation where, in the absence of a nomination, which is a prerequisite for the exercise of the Master’s powers under s 369 (or to decline an appointment under s 370), the winding-up process is left without direction. In those circumstances, s 18(4) directs that the provisional liquidator continues as the final liquidator.

[38] The provision also does not lead to an absurdity. Rather, it reflects a legislative choice that the administration of the estate should not be stalled by a creditor's inaction where the Master has already exercised his discretion in appointing a provisional liquidator whose suitability has already been considered. By the time the first meeting of creditors is convened, the estate is already under the administration of the provisional liquidator. To interrupt that administration in circumstances where no nomination has been made would undermine the continuity of the winding-up process and would be inimical to the interests of creditors, who ultimately bear the financial consequences of any delay or disruption. Allowing the provisional liquidator to continue as final liquidator accordingly promotes the orderly, continuous, and efficient winding-up of the estate for the benefit of creditors as a whole.

[39] Ultimately, the integrity of the winding-up process must be safeguarded. That integrity would be compromised if the absence of a nomination at the first meeting of creditors were permitted to disrupt an administration already vested in a duly appointed provisional liquidator. In such circumstances, the provisional liquidator, upon appointment as final liquidator, continues to exercise the functions of that office in administering the estate. This occurs under the overarching supervision and control of the Master, who remains responsible for ensuring that the winding-up is conducted in accordance with the statutory framework, that the liquidator performs his or her duties properly, and that the administration of the estate proceeds in an orderly and lawful manner until completion. This interpretation of s 18(4) thus accords with the purpose of insolvency legislation, which is to secure the orderly, efficient, and lawful winding-up of the company for the benefit of creditors until its eventual dissolution.

[40] In the circumstances, the high court erred in reading into s 18(4) of the Insolvency Act a residual discretion permitting the Master, in 'exceptional circumstances', to depart from its express terms. That approach is inconsistent with the principle of legality: the Master is a statutory functionary exercising public power under the Insolvency Act and may exercise only those powers conferred by that Act.[22]

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[22] *Endumeni* para 18; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 56 and 58.

Section 18(4), on its plain wording, confers no such discretion; indeed, it is framed in terms that exclude one. The high court therefore impermissibly imported into s 18(4) a power that the Legislature did not confer. The creditors' failure to honour their undertaking to attend the first creditors' meeting and vote for a final liquidator cannot constitute an 'exceptional circumstance' justifying a departure from s 18(4), where the section itself makes no provision for such an exception.

[41] For these reasons, the appeal is therefore upheld. As to the costs of this appeal, they must follow the appellants' success in overturning the order of the high court.

Order

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

1 The appeal is upheld.

2 The first respondent to pay the costs of the appeal, including the costs of two counsel, where so employed.

3 The order of the high court under case no M357/2022 is set aside and replaced with the following order:

'(i) It is declared that the first respondent is obliged to appoint the first and second applicants as joint liquidators of the insolvent estate of Boxberry Express (Pty) Ltd (with Master's reference M61/22), subject to the first and second applicants providing such additional security as the first respondent may require.

(ii) The first respondent is ordered to pay the costs of the application.'

A C BASSON

ACTING JUDGE OF APPEAL

Appearances:

For appellants:	J Vorster SC (with him R Kooverjie)
Instructed by:	Tintingers Incorporated, Pretoria
	Cooper and Associates, Bloemfontein
For respondents:	L Montsho-Moloisane SC (with him V Mabasa)
Instructed by:	State Attorney, Mahikeng
	State Attorney, Bloemfontein.