THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 358/2020

In the matter between:

GERT LOUWRENS STEYN DE WET	**FIRST APPELLANT**
JOHAN FRANCOIS ENGELBRECHT	**SECOND APPELLANT**

and

SUMAIYA ABDOOL GAFAAR KHAMMISSA	**FIRST RESPONDENT**
BETHUEL BILLYBOY MAHLATSI	**SECOND RESPONDENT**
KEHEDITSE DESIREE JUDITH MASEGE	**THIRD REPONDENT**
GURWANTRAL LAXMAN BHIKA	**FOURTH RESPONDENT**
ALBERT IVAN SURMANY	**FIFTH RESPONDENT**

Neutral citation: *De Wet and Another v Khammissa and Others* (358/2020) [2021] ZASCA 70 (4 June 2021)

Coram: SALDULKER, MAKGOKA, MBATHA JJA and GORVEN and GOOSEN AJJA

Heard: 4 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 4th day of June 2021.

Summary: Administrative law – Master refusing to appoint liquidators and later appointing them – Master *functus officio* and second decision a nullity.

ORDER

On appeal from: Gauteng High Court, Pretoria (Siwendu J sitting as court of first instance): judgment reported *sub nom Khammissa and Others v Master of the High Court, Gauteng and Others* 2021 (1) SA 421 (GJ).

The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

Makgoka JA (Saldulker and Mbatha JJA and Gorven and Goosen AJJA concurring):

[1] This appeal concerns two mutually exclusive decisions made by the Master of the High Court, Gauteng Division, Johannesburg (the Master). The Master is appointed under s 2(1)*(a)*(ii) of the Administration of Estates Act 66 of 1965. In s 1 of that Act the term 'Master' is defined as meaning a Deputy Master or Assistant Master appointed under s 2 and is subject to the control, direction and supervision of the Chief Master.

[2] On 31 August 2017 the Master made a decision not to appoint the appellants as additional joint trustees of Duro Pressing (Pty) Ltd (in liquidation) (Duro), (the first decision). On 25 October 2017 the Master made a decision to appoint the appellants as additional joint trustees of Duro (the second decision). The two decisions were made against the following factual backdrop. Duro was voluntarily wound-up by special resolution on 27 February 2014. The winding - up was converted to a compulsory one by the court on 25 July 2014.

[3] The respondents and one CF De Wet were appointed by the Master as Duro's joint final liquidators on 8 April 2014. CF de Wet died on 23 May 2017. Acting in terms of s 377 of the Companies Act 61 of 1973 (the Companies Act), the Master convened

a creditors' meeting on 29 August 2017 for the purpose of nominating a liquidator in the place of CF De Wet. The meeting was chaired by the Assistant Deputy Master, Mr Reuben Maphaha, during which the appellants were nominated for appointment as additional joint liquidators of Duro. The first appellant, Gert Steyn de Wet, is CF de Wet's brother.

[4] Pursuant to the creditors' meeting, on 31 August 2017, the Master, per Ms Pamela Dube, also an Assistant Deputy Master, conveyed the first decision in a letter to the appellants, and accordingly issued a new certificate of appointment reflecting the removal of CF de Wet as a liquidator of Duro, and the respondents as the only joint liquidators. In the same letter, the Master informed the appellants of their right in terms of s 371(1) of the Companies Act, to request the Master in writing to submit his reasons to the Minister of Justice for the first decision.[1] The appellants did not exercise this right. Instead, the Master received a letter from attorneys on behalf of undisclosed creditors seeking reasons for the first decision, and after Ms Dube had done so, they requested the Master to reconsider it. On 25 October 2017, the Master, represented by Mr Maphaha, made the second decision and accordingly issued an amended certificate of appointment, evenly dated, reflecting the appellants' appointment as co-liquidators with the respondents.

[5] On 20 December 2017 the respondents launched an application in the court a quo seeking to review and set aside the second decision, and declaring the first decision to be the valid one, together with ancillary relief. The application was

[1] Section 371(1) of the Companies Act reads as follows:
'**371 Remedy of aggrieved persons**
(1) Any person aggrieved by the appointment of a liquidator or the refusal of the Master to accept the nomination of a liquidator or to appoint a person nominated as a liquidator, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his reasons for such appointment or refusal to the Minister.
(2) The Master shall within seven days of the receipt by him of the request referred to in subsection (1) submit to the Minister, in writing, his reasons for such appointment or refusal together with any relevant documents, information or objections received by him.
(3) The Minister may, after consideration of the reasons referred to in subsection (2) and any representations made in writing by the person who made the request referred to in subsection (1) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, direct the Master to accept the nomination of the liquidator concerned and to appoint him as liquidator of the company concerned.'

brought in terms of s 151 of the Insolvency Act 24 of 1936 (the Insolvency Act), alternatively the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The grounds of review were that the second decision was: (a) ultra vires; (b) procedurally unfair; (c) taken arbitrarily or capriciously; and (d) not rationally connected to the information before the Master. The Master did not oppose the application, and filed a notice to abide the decision of the court a quo. Accordingly, the Master took no part in this appeal. The appellants opposed the application but did not deliver an answering affidavit. Instead, they filed a notice in terms of rule 6(5)(*d*)(iii) of the Uniform Rules of Court, in which they raised the following three questions of law:

'1. That the applicants [the respondents] do not have locus standi to seek the relief to the main application; and

2. That the relevant provisions of section 151 of the Insolvency Act of 1936, and the provisions of the Promotion of Administrative Justice Act of 2000 do not apply to the relief sought in the current application;

3. That the applicants [the respondents] have disregarded the provisions of section 371 of the Companies Act of 1973, which failure is destructive of the relief sought in the current application.'

[6] The thrust of the appellants' case was this: s 151 of the Insolvency Act finds no application in the matter and that s 371 provides the only means of obtaining redress in respect of the Master's appointment of liquidators. Even if s 151 applied, it was not available to the respondents as they were not 'aggrieved persons' for purposes of that section. Furthermore, PAJA was not applicable since the respondents had failed to exhaust internal remedies by not appealing to the Minister in terms of s 371. Even in the event of PAJA being applicable, the respondents had failed to establish the requisite locus standi.

[7] The application came before Siwendu J. The learned Judge recorded that 'whether such a decision is reviewable under PAJA was raised but not pursued'. She proceeded to identify the issues for determination as follows (at para14):

'The contested issues expose two fundamental legal considerations. The first is, who can legitimately challenge *an appointment of a liquidator*? *In this case, can the applicants challenge the appointment of another liquidator*? The second is, what is the correct gateway

to relief when there is a *challenge to an appointment of a liquidator*? There is limited and conflicting authority on these issues.' (Emphasis added.)

As I demonstrate later, the court a quo, with respect, misconstrued the basis on which the review application fell to be determined. As a result, it embarked on an unnecessary survey of ss 371 and 151.

[8] To determine the respondents' locus standi, the court a quo considered s 371 and the related case law. As mentioned earlier, s 371 entitles 'any person aggrieved' by the appointment of a liquidator or the refusal thereof, to request the Master in writing to submit his reasons for such appointment or refusal to the Minister of Justice. The court a quo spent considerable effort seeking to determine whether the respondents qualified as 'aggrieved persons'.

[9] It considered three decisions of provincial divisions: *Janse Van Rensburg v The Master* 2004 (5) SA 173 (T); *Geduldt v The Master and Others* 2005 (4) SA 460 (C) and *Patel v The Master of the High Court* 2014 JDR 0346 (WCC). Those decisions are not unanimous on who qualified as an 'aggrieved person' to clothe them with the necessary locus standi in terms of s 371. The court preferred the reasoning in *Geduldt* and *Patel* and concluded that the appellants qualified as 'aggrieved persons' as envisaged in s 371. The court also concluded that, in addition to s 371, the respondents were entitled to rely on s 151 to challenge the Master's decision.

[10] Having disposed of the issue of locus standi in the respondents' favour, the court concluded that the Master was *functus officio* and 'not empowered to issue a second decision once the decision not to appoint the second and third respondent was made'. Accordingly, the court a quo issued an order in terms of which: the second decision was reviewed and set aside; the Master's certificate of appointment in respect of the second decision was revoked; and the appellants were ordered to pay the costs of the application, including costs of two counsel.

[11] Aggrieved by that order, the appellants appeal to this Court, with the leave of the court a quo. In this Court, the appellants persisted with the gravamen of their case asserted in the court a quo, summarised in para 6 above. As already stated, the court

a quo, with respect, failed to properly identify the issue for determination. The respondents' challenge, properly construed, was not about the merit of the appointment of the appellants as joint liquidators, as the court a quo consistently mentioned in its judgment. It is so that the decision under review has its genesis in that appointment. However, the thrust of the respondents' challenge was that the Master had become *functus officio* once she had made the first decision, and thus had no power to revoke it and replace it with second decision.

[12] Viewed in that light, the application quintessentially concerned administrative law, as opposed to insolvency or company law. The decision of the Master directly affected the respondents and they indubitably had locus standi at common law. They did not need either s 371 of the Companies Act or s 151 of the Insolvency Act to establish their locus standi. If anything, it is the appellants who would have had to rely on s 371 had they sought to challenge the Master's first decision (not to appoint them), a decision they clearly were aggrieved by.

[13] Once the conceptual issue concerning the nature of the appellants' true complaint is appreciated, it follows that the court a quo's excursion on s 371 and the related case law, was irrelevant. This applies with equal force to the court a quo's interpretation of s 151, on which the court a quo also expended much effort. As a result, I do not express any view as to the correctness of the court a quo's interpretation of these sections, nor of any of the decisions referred to in its judgment. To be clear, that should not be considered as an endorsement or rejection of the court a quo's conclusions.

[14] This case demonstrates the importance of a court's central role in the identification of issues. It is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be left solely to the parties or their legal representatives. Unfortunately, this is what happened in this case. The court a quo was apparently led astray by the arguments contained in the appellants' notice in terms of rule 6(5)(*d*)(ii), which it accepted uncritically.

[15] Back to the merits of the appeal. In this Court, counsel for the appellants fairly accepted the correctness of the views expressed in paras 11 and 12 above, and that the case turns on the legality of the second decision. I now turn to that decision. The respondents contend that the Master became *functus officio* after making the first decision, and that she was not empowered to revoke it and replace it with the second decision. Broadly stated, *functus officio* is a doctrine in terms of which decisions of officials are deemed to be final and binding once they are made. Thus, the question as to whether the Master was *functus officio*, calls for a consideration whether the first decision was final. Hoexter,[2] explains that finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it, ie it must have passed into the public domain in some manner.[3]

[16] In the present case, on 31 August 2017 the Master:

(a) communicated to the appellants her first decision;

(b) issued a certificate of appointment reflecting the removal of CF de Wet as a liquidator of Duro, and reflecting the respondents as Duro's only joint liquidators;

(c) advised the appellants of their right to request her to furnish the reasons for her decision, to the Master.

[17] In my view, these constituted overt acts in terms of which the Master's decision passed into the public domain. In the absence of a statutory provision to the contrary, the Master had no power to revoke the first decision. Neither the Companies Act nor the Insolvency Act confers such power on the Master. The requirements for *functus officio* were thus met, and finality reached on 31 August 2017. The first decision became final and irrevocable. It follows ineluctably that the second decision was invalid.

[18] The appeal must fail and it is dismissed with costs, including costs of two counsel.

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[2] C Hoexter *Administrative Law in South Africa* 2 ed (2011) at 277.

[3] Compare *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 44.

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T Makgoka
Judge of Appeal

APPEARANCES:

For Appellants:	F H Terblanche SC
Instructed by:	Senekal Simmonds Inc., Johannesburg
	Symington De Kok Attorneys, Bloemfontein.
For Respondents:	J M Suttner SC (with him P M Cirone)
Instructed by:	Goodes & Seedat Attorneys, Johannesburg
	Honey Attorneys, Bloemfontein.