IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN DIVISION, GQEBERHA)

CASE NO: 1358/2022

In the matter between:-

ANDRE CHARL VAN HEERDEN	First Applicant
ANDRE CHARL VAN HEERDEN N.O. [In his capacity as joint liquidator of Retro Reflective (Pty) Ltd (in liquidation)]	Second Applicant

and

THE MASTER OF THE EASTERN CAPE HIGH COURT, PORT ELIZABETH	First respondent
BRIAN VAN ZYL	Second respondent
HANTLE INFRA PLANNING (PTY) LTD	Third respondent
SUNE SMIT N.O. [in her capacity as joint liquidator of Retro Reflective (Pty) Ltd (in liquidation)]	Fourth respondent

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JUDGMENT

MATEBESE AJ

[1] On 18 December 2018 Retro Reflective (Pty) Ltd, hereinafter referred to as Retro, was placed under voluntary winding up in the hands of the first respondent. The first applicant and the fourth respondent were appointed as provisional liquidators on 14 January 2019 and as final liquidators on 6 February 2019. Their appointments were made by the first respondent under reference S1/2019.

[2] On 18 August 2020 the first respondent, pursuant to complaints and an application by the third respondent, approved an enquiry in terms of section 381 of the Companies Act 61 of 1973 ("the Companies Act") to investigate the conduct of the liquidators of Retro in the performance of their duties ("the decision"). The third respondent is a proven creditor of Retro.

[3] In his letter dated 18 August 2020 containing the decision the first respondent identified six (6) issues to be investigated by the enquiry. He also indicated his intention to *"utilise the services of an evidence leader (counsel) to cross examine the evidence placed before the enquiry by the liquidators and others witness (sic)"*.

[4] In the letter the first respondent further stated that *"the evidence leader will only question the liquidators and other witness and the Master will make*

final findings with regard to whether the case of Infra is substantiated or not".

[5] In a letter dated 18 August 2020 addressed to Honey Attorneys and Bedford Trust, on behalf of the fourth respondents and applicants, respectively, the first respondent informed the applicants and the fourth respondent of his decision aforesaid. He also advised that he *"will in due course issue notices to liquidators and other witnesses to attend the enquiry".*

[6] On 12 October 2020 the first respondent issued the applicants with the notice referred to in the letter dated 18 August 2020. In the notice the first respondent stated, inter alia, the following:

1. "*You are informed that:*

1.1 The Master of the High Court will conduct an enquiry in terms of section 381 of the Companies Act. The purpose of the enquiry is to investigate the complaints made against Andre Charl Van Heerden by Hantle Infra Planning (Pty) Ltd (creditor) with regard to execution of his fiduciary duties.

1.2 The enquiry will be convened on the 17 November 2020 at….

1.3 You are requested to appear in person at the enquiry on the 17 November 2020 at 9h00 a.m. and to remain in attendance until excused by the Master.

2. Take notice further that

2.1 You have a right to legal representation at the enquiry…."

[7] The enquiry was postponed on 17 November 2020 to 29 April 2021. On 29 April 2021 the enquiry was postponed to 6 September 2021 so as to allow the section 417/418 enquiry to be finalised since according to the first respondent *"the section 417/418 enquiry evidence has a directing (sic) bearing in the outcome of the section 381 enquiry"*. It was again postponed on 6 September 2021 to 13 December 2021.

[8] I pause to mention that on 31 March 2021 the third respondent's attorneys addressed an email to the office of the first respondent. The email reads:

"Dear Mr Komle

Further to your below email, we have been instructed to request that you enquire from the office of the chief master if adv Brian van Zyl can be appointed as the evidence leader for the section 381 enquiry in this insolvency to commence on 1 June 2021 for reasons set out in our below email of 6 March 2021. Our instructions are further that our client, the proven creditor, Hantle Infra Planning (Pty) Ltd tenders to pay the costs to be incurred for appointment of ad van Zyl."

[9] It appears that the first respondent had, by letter dated 5 February 2021 addressed to the Bedford Trust, through which the applicants communicated with first respondent, agreed to postpone the enquiry which was scheduled to sit on 1 March 2021 to 1 June 2021. It is apparently for this reason that reference is made to 1 June 2021 in the above email.

[10] The email of 6 March 2021 referred to in the above quoted email is not included in the papers. The reasons set out therein are also not disclosed in any of the affidavits. To make matters worse the first respondent has not filed any affidavit explaining whether he acted on the said reasons or not and what those reasons were. I say more on this later in this judgement.

[11] On 8 November 2021 the first respondent approved the appointment of advocate Brian van Zyl, the second respondent herein. In his letter, addressed to the third respondent's attorneys, the first respondent stated:

"…

Your letter dated 19 October 2021 refers.

I approve that appointment of advocate Brian van Zyl as evidence leader in the section 381 enquiry approved by the Master in the abovenamed estate. I further consent to the costs of the evidence being paid by the creditor (Hantle Infra Planning (Pty) Ltd).

Hantle Infra Planning (Pty) Ltd is the creditor who approached the Master to hold the section 381 enquiry to investigate the conduct of the liquidator in the administration of the above estate…."

[12] On 17 May 2022 the applicants instituted proceedings seeking an order in the following terms:

1. *"That the decision of the First Respondent to allow the enquiry in terms of section 381 of the Companies Act 61 of 1973 to be conducted by anyone else than the Master, the matter of retro Reflective (Pty) Ltd, be reviewed and set aside;*
2. *In the alternative, that the decision of the First respondent to appoint the Second Respondent as "evidence leader" to conduct the Section 381 enquiry in the matter of Retro Reflective (Pty) Ltd (in liquidation), be reviewed and set aside;*
3. *That the proceedings and record of such enquiry to date be declared null and void;*
4. *That the First Respondent pay the costs of this application together with any party who chooses to oppose this application jointly and severally the one paying the others to be absolved."*

[13] On 1 June 2022 the first respondent filed a Notice to Oppose the application. The opposition was later withdrawn and a Notice to abide was filed on 23 August 2022. The reason for the withdrawal of opposition appears to be that the applicant agreed to abandon the prayer for costs against the first respondent. This means the first respondent had no intention of opposing the application on its merits but only filed opposition to the prayer for costs. As stated above, nothing has been filed by the first respondent, not even reasons for his decisions.

[14] The second and third respondents ("the respondents") are opposing the application. They have raised the following points:

1. That the applicants lack the *locus standi* to bring this application;
2. That the applicants failed to bring the application within reasonable time;
3. That the decisions under attack do not amount to administrative action as envisaged in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
4. That the application is without merit.

[15] In response to the unreasonable delay point raised by the respondents the applicants filed an application for condonation. I deal with this application hereunder. But, first I must dispose of the *locus standi* point in limine. This

is so because if I find against the applicants on this point, that will be the end of the matter.

Locus standi

[16] I must mention that this point was not pursued during argument. Neither was it abandoned. Accordingly, it is for this reason that I have decided to deal with it for completeness.

[17] The second respondent contends that the first applicant lacks the locus standi to bring these proceedings principally because he is an appointee of the first respondent and acts, in his capacity as liquidator, as the latter's representative. He, accordingly, so the argument goes, in his personal capacity, does not have the requisite *locus standi* in terms of section 151 of the Insolvency Act and section 6(1) of PAJA.

[18] As regards the second applicant the second respondent contends that the decision to appoint the evidence leader is done for the benefit of the first respondent and it cannot affect the rights of any person participating in the section 381 enquiry; that the decision does not amount to administrative action as it is not a decision taken in the exercise of a power in terms of the constitution, provincial constitution or exercise of a public power in

terms of legislation and that there are no rights of the second applicant that are affected by the decision.

[19] The third respondent contends that the applicants do not have *locus standi* on the facts of the case to approach court because they are not persons aggrieved by the decisions/actions-they, so the argument proceeds, have not suffered a legal grievance wrongfully depriving them of anything or wrongfully refusing them anything. It is argued, by the third respondent, that the applicants' rights have not been infringed.

[20] *Locus standi* in the legal sense has two connotations. In one sense it connotes a person's right to bring legal proceedings to court. In the second sense it means a party bringing proceedings must have a direct and substantial interest in the matter.[1]

[21] It is not contended by the respondents that the Mr van Heerden, both in his personal and representative capacity as liquidator, lacks the right to bring legal proceedings to court. Properly understood their contention is simply that they do not have a direct and substantial interest in the decision that is the subject of review, because the decisions do not affect any of their rights and the decisions do not constitute administrative action reviewable at their instance.

[1] Desai-Chilwan NO v Ross and Another 2003 (2) SA 644 (C) para. 30

[22] I disagree. The decisions of the first respondent are purportedly taken in terms of section 381 of the Companies Act. Therefore, the first respondent was exercising a public power when taking the decisions. The enquiry that is authorised by the decision of 18 August 2020 is directed at investigating the conduct of, *inter alia*, the first applicant in his capacity as the liquidator. If findings are made against him as such, such findings are likely to affect him as a person and as liquidator.

[23] In my view the applicants have a right to challenge these decisions and have a direct and substantial interest in these proceedings which are mainly to challenge decisions that have a potential to adversely affect them.

[23] The question whether the decision constitutes administrative action as defined in the PAJA is, in my view, irrelevant, to whether a party has *locus standi* or not. It is only relevant if a court must decide whether a decision is reviewable under the PAJA or not, which is not the challenge at this stage.

[24] For the above reasons I find no merit to the respondents' *locus standi* point.

Decisions not amounting to administrative action under PAJA

[25] The third respondent contends that the decisions under attack do not amount to administrative action as envisaged in PAJA in that they do not adversely affect the rights of the applicants and also do not have external legal effect.

[26] PAJA defines administrative action to mean *"any decision of an administrative nature made… under an empowering provision and taken by an organ of State, when exercising a power in terms of the…, or exercising a public power or performing a public function in terms of any legislation, or taken by a natural person, other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect…."*

[27] The first respondent is an organ of state. He was exercising a public function in terms of the Companies Act, a legislation, when he took the decision to initiate an enquiry and to appoint the evidence leader. Whether he acted *ultra vires* in doing so is irrelevant for purposes of determining whether his decision amounts to administrative action or not.

[28] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* *2005 (6) SA 313* the SCA per Nugent JA, as he then was, stated:

"[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the

exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State.

Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."

[29] The decision by the first respondent is a decision taken by a bureaucratic functionary, carrying out the functions of a State, and exercising a power in terms of legislation. Accordingly, I find no merit to the first respondent's contention. The first respondent's decision has all the attributes of administrative action as envisaged in section 1 of PAJA.[2]

Unreasonable delay

[30] The respondents contend that the applicants have unreasonably delayed in bringing this application and therefore stand to be non-suited. They

[2] See Trustees for the Time Being of the Legacy Body Corporate v BAE Estates 2022 (1) SA 424 para. 16 - 19

argue that the applicants became aware of the decisions that are the subject of review on 18 August 2020 and on 8 November 2021.

[31] It is their argument that in so far as the decision of 18 August 2020 is concerned, the application was brought 18 months after the applicants became aware thereof and in respect of the decision appointing the second respondent (the decision of 8 November 2021) the application was brought six months from the date of the decision.

[32] The respondents contend that, irrespective of whether the application is brought in terms of section 151 of the Insolvency Act 24 of 1936 ("the Insolvency Act") or in terms of the PAJA, the applicants have unduly delayed in bringing the application.

[33] Faced with this point *in limine*, the applicants brought an application for condonation or for the extension of time in terms of section 9 of the PAJA. The application is opposed by the respondents. It is to the merits of this application that I turn hereunder.

[34] The applicants first contend that the main application is brought in terms of section 151 of the Insolvency Act and is a common law review. They argue that this court has an inherent power to condone the late filing of

such review. They also argue that no substantive application for condonation is required.

[35] Whilst I agree with the applicants on the inherent power of the court to condone the late filing of the review and that under legality or common law reviews no formal application for condonation is required, I dare say that the legal position remains that the applicants have a duty to explain the delay.

[36] It is trite that condonation is not granted for the mere asking. A party seeking condonation must furnish an explanation which accounts for the entire period of the delay and that above all the explanation must be reasonable.

[37] It is also trite that a court granting condonation, or overlooking a delay, exercises a discretion and the discretion must be execised judiciously in the interests of justice.

[38] The applicants do not dispute that they became aware of the first respondent's decision to initiate an enquiry on 18 August 2020. They however, state that in the letter containing the decision the first respondent simply stated that he is in the process of acquiring the services of counsel to lead evidence in the enquiry. They also admit becoming aware of the

decision to appoint the second respondent, at the latest on 13 December 2021.

[39] The first applicant states that, since he was not legally represented he was not aware that the Master's decision was unlawful and also states that his understanding was always that he must raise the issue of his dissatisfaction with the Master's decision on the first date of the enquiry, which he did on 1 March 2022.

[40] The applicants accordingly argue that there was no delay in bringing the review application and that, if there was any, the delay is not unreasonable.

[41] The respondents contend that the applicants became aware of the decisions on 18 August 2020 and 8 November 2021 respectively, and therefore they ought to have brought their review application within 180 days of the decisions respectively. They argue that in respect of the first decision the applicants are woefully out of time and they have not furnished any explanation, let alone a reasonable one. In respect of the second decision they argue that the application ought to have been brought, at the latest, on 5 May 2022 but was only brought on 17 May 2022.

[42] What the respondents do not dispute, though, is that at the commencement of the hearing on 1 March 2022, the first applicant advised the Master that he was advised that the appointment of the second respondent was unlawful and that he stated that *"I am going to delve into it further into it further (sic) and if I believe it is a valid point, then I am going to address you before the proceedings begin."*

[43] What the above suggests is that at the time the first applicant raised the issue of the appointment of the second respondent with the Master on 1 March 2022 he had just been advised of the alleged unlawfulness thereof. He needed to be certain of same before making it an issue for consideration by the Master. But his intention was to raise it before the proceedings begin.

[44] It is also not in dispute that the Master in response stated that *"if anyone is unhappy with his appointment must instruct an attorney and institute legal proceedings to set that aside."*

[45] From the above it is clear that the applicants sought to resolve the matter, once they became aware of any possible illegality in the appointment of the second respondent, by way of engagement with the Master. It is this engagement that the Master dismissed outrightly on 1 March 2022.

[46] The question is whether the applicants must be faulted for having sought to resolve the matter amicably with the Master before they approached the court.

[47] I believe not. Parties should be encouraged to resolve their disputes before resorting to litigation.

[48] Accordingly, I am of the view that there was no delay in the bringing of this application. Even if I am wrong in this regard and there was a delay, such delay was in my view not unreasonable and is hereby condoned.

The merits

[49] As already stated above the applicants seek an order that the decision of the first respondent to allow the enquiry in terms of section 381 of the Companies Act 61 of 1973 to be conducted by anyone else than the Master, in the matter of Retro Reflective (Pty) Ltd, be reviewed and set aside; alternatively that the decision of the first respondent to appoint the Second Respondent as "*evidence leader*" to conduct the Section 381 enquiry in the matter of Retro Reflective (Pty) Ltd (in liquidation), be reviewed and set aside and that the proceedings and record of such enquiry to date be declared null and void;

[50] The questions raised in these proceedings, therefore, are:

(a) Whether section 381(1) of the Companies Act permits the appointment of any person other than the Master to conduct an enquiry into the liquidator's conduct; and

(b) Whether the appointment of second respondent by the first respondent is susceptible to review on the grounds relied upon by the applicants

Does section 381 permit the appointment of any person other than the Master?

[51] This question is a *vires* (power) question. Put differently, the question is whether, on a proper interpretation of the section, the Master has the power to appoint someone else to conduct an enquiry regarding or relating to the conduct of a liquidator.

[52] I must indicate from the onset that if regard is had to the letter of the first respondent dated 18 August 2020 it is clear that the first respondent appointed the second respondent as *"evidence leader"* in an enquiry to be presided over by the first respondent ("the Master"). It follows therefore that on the facts of this case the question whether any person other than the Master can conduct an enquiry in terms of section 381 of the Companies Act does not even arise.

[53] However, to the extent that the question to be answered is whether the Master, in appointing an evidence leader and a person who is an outsider from the Master's office, to assist him in conducting the enquiry acted *ultra vires* the provisions of the legislation, I deal with the question hereunder. I do so because it seemed to be the question to which the argument of the applicants was directed.

[54] The answer to this question lies in the proper interpretation of section 381(1) of the Companies Act.

[55] In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question. In addition, principles of interpretation also require that the statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualised; and the statutory provision must be construed consistently with the Constitution.[3] The exercise is an objective one and the subjective views of the parties, their state of mind, or the facts of the case have no bearing on this analysis.[4]

[56] Section 381 of the Companies Act provides:

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[3] South African Reserve Bank and Another v Maddock NO and Another 2023 (4) SA 85 (SCA) para.27

[4] CA Focus CC v Village Freezer t/a Ashmel Spar 2013 (6) SA 549 (SCA) para.18

381 "Control of Master over liquidators

(1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning such winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator;

(4) The Court may, upon the application of the Master, order that any costs reasonably incurred by him in performing his duties under the section be paid out of the assets of the company or by the liquidator de bonis propriis.

(5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the Court otherwise orders, be regarded as part of the costs of the winding-up of the company."

[57] The purpose of the section is for the Master to exercise control over liquidators, to deal with the conduct of liquidators and with complaints regarding the conduct of liquidators. It empowers the Master, where he has reason to believe that a liquidator has acted, or failed to act, in the manner evisaged in the section, to open an enquiry into such liquidators conduct and act thereon.

[58] It does not prescribe how the Master must enquire into the conduct of the liquidator. Neither does it preclude the Master from utilising the services of an evidence leader in the enquiry, where such is necessary. In my view, to interprete the section to preclude the Master from appointing an evidence leader in an enquiry under section 381 of the Companies Act would frustrate the objects and purpose of the section and may lead to an absurdity.

[59] There are varied enquiries that may be conducted by the Master under section 381 of the Companies Act. Each depending on the nature of the conduct enquired upon or the nature of the complaint or complaints levelled against the liquidator or liquidators and the complexity of the issues involved. Some may require the appointment of evidence leaders and some may not. In my view, it is unnecessary to restrictively interprete the powers of the Master in this regard.

[60] Accordingly, I find that the Master may appoint an evidence leader to assist him in the enquiry.

[61] In any event, I am of the view that the power to appoint an evidence leader in an enquiry under section 381 of the Companies Act is logically necessary for the exercise of the Master's powers in terms of the section, it does not extend beyond the powers conferred upon the Master and does not interfere with the rights of third parties more than section 381 of the Companies Act allows.

[61] The applicants argued in the alternative that, in the event I find that the Master is empowered to appoint an evidence leader, such appointment is limited to officials within the various Master's offices and exclude any other person. I disagree with the applicants in this regard. The exigencies of the enquiry may sometimes demand that the Master look outside the Master's offices for the evidence leader. There is no logic to prefer such a restrictive interpretation to the appointment of a person to assist the Master. It may be sound when it comes to the person to preside over the enquiry and take decisions but not for the evidence leader who takes no decisions.

[62] Accordingly, I find that the decision of the first respondent to appoint an evidence leader to assist him in the enquiry in terms of section 381,

contained, in the letter dated 18 August 2020, is not ultra vires the provisions of section 381 of the Companies Act. The applicant's case in the regard must fail.

The challenge on the appointment of Adv van Zyl, the second respondent

[63] It is not disputed that the second respondent was appointed as the evidence leader by the first respondent at the instance of the third respondent. It is also not in dispute that the second respondent has represented and still represents the third respondent in the section 417 or 418 enquiry involving the affairs of Retro and that he has represented the third respondent in legal proceedings before this court against Retro and its liquidators, including the applicants.

[64] The applicants argue that the second respondent should not have been appointed by the first respondent because the applicants have a reasonable apprehension that he is biased against them. They argue that he has not denied this in his papers. His conduct also, so the argument goes, confirms the extent of his bias. The applicants cite in this regard, *inter alia*, the fact that he has opposed this application, his opposition of postponement of the enquiry when the Master excused Smit, his relationship with one Mr Erasmus who is a deponent to the third respondent's answering affidavit.

[65] The respondents argue that the evidence leader, just like a prosecutor in an adversarial system is inevitably partisan and he would, so the argument goes, be only disqualified where his bias affected the applicant's right to a fair hearing. They argue that the applicant has failed to establish, by way of evidence, that their right to a fair hearing will be affected in any way should the respondent proceed as evidence leader. They base their case on *S v Zuma and Another 2022 (1) SACR 575 (KZP)*.

[66] Whilst I agree with the standard laid down in the Zuma case, above, I am, however, not sure if it finds application in enquiries conducted by the Master, which, in my view, are not supposed to be adversarial in nature.

[67] For the reasons that appear below I need not decide this issue. I also do not find it necessary to decide whether the applicants have made out any case for a reasonable apprehension of bias as a ground for the review and setting aside of the Master's appointment of the second respondent.

[68] I have stated herein above that it is the third respondent that requested the appointment of the second respondent. The request was made on 31 March 2021 and was directed to the first respondent. It was, according to the email dated 31 March 2021, based on the reasons contained in the email of 6 March 2021.

[69] I have also stated herein above that the first respondent has not filed any reasons for his decision to appoint the second respondent. He has also not filed any affidavit explaining his decision to appoint the second respondent. I am left in the dark as to what are the first respondent's reasons for the appointment and whether they are the same reasons contained in the letter dated 6 March 2021, which I also do not have. I must therefore assume that such decision was taken without good reasons[5] or that it was influenced by the unwarranted dictates of the third respondent.

[70] In *Kalil NO and Others v Mangaung Metropolitan Municipality and Others*[6] the SCA stated:

"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interest of the public and good governance."

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5 Section 5(3) of the PAJA, Zweni v Road Accident Fund 2022 (6) SA 639 (WCC)

6 2014 (5) SA 123 (SCA) para.30

[71] The first respondent has failed in this duty. No reasons are advanced for the decision to appoint the second respondent. No facts have been furnished to explain how he arrived at the decision to appoint the second respondent. His decision is, in my view, irrational, on this basis and deserves to be reviewed and set aside.

[72] Accordingly, the first respondent's decision to appoint the second respondent as evidence leader in the section 381 enquiry is reviewed and is set aside.

Costs

[73] The general principle on costs is that costs follow the result. Both the applicants and the respondents have obtained substantial success in these proceedings.

[74] I was also advised during argument that the applicants are not insisting on costs against the first respondent. In fact, it was indicated that this was the reason the first respondent withdrew his opposition of the application.

[75] In the circumstances it appears just that each party should pay its own costs.

[76] In the result the following order is made.

1. **The applicants' application to review and set aside the decision of the first respondent dated 18 August 2020 to appoint an evidence leader in the enquiry in terms of section 381 of the Companies Act is dismissed.**
2. **The first respondent's decision to appoint the second respondent (Adv van Zyl) as the evidence leader in the section 381 enquiry is reviewed and set aside.**
3. **Each party shall pay his or its own costs.**

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Z.Z. Matebese

Acting Judge of the High Court

Appearances:

For the applicant: Adv MM van Staden

Instructed by: Smith Tabata Buchanan Boyes Attorneys

For the respondents: Adv P. Du Toit

Instructed by: Van Zyl Rudd Incorporated

Date Heard: 24 August 2023

Date delivered: 03 October 2023