




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 2023/016586**

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED:	
9 June 2023	
_____ DATE	_____ SIGNATURE

In the matter between:

<b>CLOETE MURRAY N O</b>	First Applicant
<b>NORMAN KLEIN</b>	Second Applicant
<b>MARTHINUS JACOBUS BEKKER</b>	Third Applicant
<b>TISETSO OTHELIA MANZINI</b>	Fourth Applicant

and

<b>MASTER OF THE HIGH COURT, PRETORIA</b>	First Respondent
<b>AR RAMORULANA N O</b>	Second Respondent
<b>BARNARD INVESTMENT (PTY) LTD</b>	Third Respondent

<b>JOHACOR EIENDOMME (PTY) LTD</b>	Fourth Respondent
<b>CORNE BARNARD</b>	Fifth Respondent
<b>JOHANNA WILHELMINA BARNARD</b>	Sixth Respondent
<b>ADAM JOHANNES BARNARD</b>	Seventh Respondent
<b>SENSATIONAL DRIED FRUIT &amp; NUTS (PTY) LTD</b>	Eight Respondent
<b>STANDARD BANK OF SOUTH AFRICE</b>	Ninth Respondent

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## **JUDGMENT**

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### **HOLLAND-MUTER J:**

[1] This matter came before court as a special urgent allocation by the Deputy Judge President (“DJP”) to be heard on 22 March 2023. Part A of the application was granted by Le Roux AJ on 22 February 2023, interdicting the First and Second Respondents to appoint any liquidator (for *JAB Dried Fruit Products (Pty) Ltd* (in liquidation), (referred to as “JAB”), pending the finalization of Part B of the application. The costs for hearing Part A was reserved to be determined by the court finalizing Part B of the application.

[2] JAB was placed under provisional liquidation on 9 November 2018 and subsequently under final liquidation on 1 February 2019. The applicants were appointed as the liquidators of JAB after final liquidation was granted. The First and Second Respondents did not oppose this application. The third to eight respondents are creditors of JAB and are referred to as the “Barnard Group” throughout the papers. The ninth respondent is Standard Bank of South Africa Ltd. The Barnard Group opposed the urgent application.

[3] The four applicants, the liquidators of JAB appointed by the Master of the Pretoria High Court (the First Respondent) on 21 November 2018, performed their duties as liquidators and obtained leave to convene an enquiry in terms of sections 417 and 418 of the Companies Act, 61 of 1973 (the "Act"). From the facts and evidence they received during the enquiry, the applicants instituted several claims against debtors of JAB for repayment of debts to the credit of all creditors.

[4] Tragedy overcame two of the parties, the First Applicant assassinated shortly before this hearing and the Seventh Respondent passed on earlier in the year. The remaining parties were prepared to continue with the hearing of the application although no executor has been appointed to the deceased estate of the seventh respondent.

[5] The applicants, the appointed liquidators on 14 November 2019, convened a commission of inquiry in terms of sections 417 and 418 of the Companies Act, 61 of 1973. From the facts and evidence received during the inquiry, the applicants proceeded to institute several claims against debtors of JAB for repayment of debts, all to the benefit of the creditors.

[6] At the second meeting of creditors on 9 March 2020, the majority of the creditors (the Barnard Group) adopted various resolutions which were at variance with the resolutions proposed by the applicants for the proper discharge of the statutory obligations by the applicants. See annexure "FA-9". The applicants were not satisfied with particular resolution 3.

[7] The applicants were of the view that the adopted resolutions severely hampered and restricted their powers as liquidators. Resolution 3 provided therefore that the applicants should not proceed with any further litigation on behalf of the insolvent estate of JAB without consent of the creditors. The applicants sought leave from the Master (the First Respondent) in terms of section 53(4) of the Insolvency Act, 24 of

1936 as amended, to institute review proceedings to set aside the alleged impugned resolutions. The Master refused such leave on 23 July 2020.

[8] The ninth respondent launched an application in the Mbombela High Court during 2021 seeking to set aside the impugned resolutions. The applicants deemed it unnecessary to side with the ninth respondent. This judgment was still outstanding when the Master removed the applicants as liquidators. The reserved judgment was handed down on 28 February 2023 by the Mbombela High Court, setting aside the impugned resolutions. The Barnard Group has appealed the judgment resulting in a further slowdown of the liquidation process.

[9] The applicants did nothing to set aside these hindering resolutions for almost nine months and for unknown reason(s) waited for the “unexpected” to happen. There is no indication what the applicants proceeded to do despite the restricting resolutions in winding-up the estate of JAB. More important, the applicants took no action to have the impugned resolutions set aside by court. This was conveniently “left” for the ninth respondent to act some nine months later. No explanation is tendered for this delay on behalf of the applicants.

[10] The Barnard Group requested the applicants on 4 March 2022 to convene a meeting of creditors for purposes on voting on their removal. The applicants refused to convene such meeting arguing that section 379(1)(d) of the Companies Act (the ‘Act’) does not provide for such a procedure. Their attorney responded in writing to the Barnard Group on 15 March 2022 informing them to lodge their request with the Master but to copy the liquidators therein.

[11] The Barnard Group was of the view that the Master should inform the applicants of the request for their removal. The letter of 28 March 2022 is clear that “***The writer is of the opinion that it is your prerogative (The Master) to call upon the Liquidators and to give them an opportunity to be heard***”. This implies that the

Master should apply the *audi alteram partem* rule and grant the applicants the opportunity to state their case. This did not happen and no creditors' meeting was convened in this regard.

[12] The Master removed the applicants from office as liquidators in terms of section 379(1)(d) of the Act but there is no indication why the Master did not inform the applicants of the request before making his decision. There is also no indication why it took the Master from 28 March 2022 until 15 March 2023 to take the decision. There is further no indication what transpired between the lodging of the removal application and the actual removal decision was taken.

[13] The Master informed the applicants in writing on 14 February 2023 of his decision to remove them from office as liquidators. The applicants aver that they were unaware that the respondents applied to the Master for their removal from office. The applicants informed the Master that he is to convene a meeting of creditors to have the issue ventilated, the Master failing to do it.

[14] The applicants brought this review application on an urgent basis after the Master informed them of his decision to remove them from office. The gist of the application is non-compliance with section 3 of The Act Promotion of Administrative Justice Act, 3 of 2000 ('PAJA'); in essence that there was no procedurally fair administrative action followed by the Master when taking the decision to remove them from office. It is common cause that the decision by the Master amounts to administrative action reviewable by the court. It may be accepted that this is an instance where the *audi alteram partem* rule should apply.

[15] The applicants argued that, (a) JAB was now a "rudderless ship" or ship without a captain (**Maroos and Others v GCC Engineering (Pty) Ltd and Other [2017] JOL 38084 (GP)** par [12]; (b) that there was nobody present to manage JAB's business, and (c) that several claims were to be instituted on behalf of JAB in the

near future to prevent prescription thereof. The applicants aver this may result in a possible loss for JAB exceeding R 45 million. They moved for the review to succeed to remit the matter to the Master for re-consideration.

[16] The crux of the argument on behalf of the applicants is the possible prescription of such claims and that there will no substantial redress should the matter not be heard urgently but in the normal course. **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 [6]** (23 September 2011):

*“The important thereof is that the procedure set out in rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course”.*

[17] It was argued that the current situation was untenable and that it was desirable of having a liquidator appointed. Reliance was also on what was held in **Ex Parte Nell 2014(6) SA 545 (GP) at [54-55]** where the following was held:

*“Furthermore, to vest control in a liquidator would be consistent with a practice that has, as I have it, operated over many years and been developed and refined by the courts.*

*Another factor supporting the view I have taken is the inherent urgency of insolvency proceedings. In Absa Bank Ltd v De Klerk and Related cases 1999 (4) SA 835 E at 838J-839A, the court said:*

*‘There is frequently a large body of creditors whose rights are affected by sequestration, who may wish to be heard on the return day, and who may be prejudiced by delay. This inherent urgency leads to Meskin to make the following recommendation in Insolvency Law at 2.1.7 at 2-34, a*

*recommendation which I endorse and which the courts in this division have in fact applied: 'It is respectfully submitted that any application for sequestration merely as such contains an element of urgency; if a case for sequestration can be made, ex hypothesis, a removal of his property from the control of the debtor and a suspension of enforcement of creditors' rights of action and execution in the ordinary course as soon as possible.'*"

[18] The applicant argued that several claims need to be instituted on behalf of the insolvent estate of JAB, totalling more than R45 million and would be collected for the entire *concursum creditorum*. It was argued that these claims may prescribe in the coming months, but no particulars were supplied with regard to any number of entities, the relevant dates that may set prescription in motion etc.

[19] The respondents opposed the application, firstly that the application was not urgent and secondly that the application should be dismissed on the merits.

[20] The Master may remove a liquidator for office at the request of the majority of creditors if such request is justifiable. **Meskin, Insolvency Law and its operation in Winding-Up, issue 59 para 4.6 & 4.15**. The court may review the decision of the Master in terms of section 151 of the Insolvency Act. **Nel and Another v The Master (Absa Bank Ltd and Others) 2005 (1) SA 276 (SCA) at par [22]**.

[21] Section 379 (1)(d) provides as follows:

**"379 Removal of liquidator by Master and the Court**

(1) The Master **may** remove a liquidator from his office on the ground-

(a) ...

(b) ...

(c) ...

*(d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributions, has requested him in writing to do so; or...*

(e) ...

[22] The parties differ in their respective interpretation of section 379(1)(d). The applicants argue that the Barnard Group believed that the Master is 'duty bound' to adhere to the request of the majority of creditors, implicating that the Master had no discretion acting as a 'rubber stamp' in accepting the request. This is not correct. The Master has a discretion to exercise.

[23] The respondents argued that there is no requirement in section 379(1)(d) compelling the Master to afford the liquidators any opportunity to be heard when the majority of creditors requested the removal of the liquidators. This with respect is contrary the well accepted principle of **audi alteram partem** to listen to the other side. The Master has to consider the request by the majority of creditors to call for the removal from office of the liquidator. Does this imply that the Master is bound to the request of the majority of creditors? The wording in section 379(1)(d) is clear and unambiguous. The Master ***may remove*** a liquidator from office at the request of the majority of creditors and not ***shall*** remove the liquidator from office. As is, the section confers a discretion on the Master and he is not a rubber stamp in the hands of the majority of creditors. In exercising his discretion, the Master should consider ***all*** considerations, which will include the applicants right to be heard as provided for in section 3 of Promotion of Administrative Justice Act, 3 of 2000 ('PAJA').



[24] It is clear from the report by the Assistant Master that he avers exercising his discretion before removing the applicants from office. The Assistant Master, Advocate A S Ramorulana, denies that he failed to exercise any discretion. It is clear from his report and supporting affidavit that he considered all the relevant issues placed before him and that he took an informed decision. He confirmed that the applicants were requested to convene a second meeting of creditors to discuss the proposed request by the Barnard Group to have the liquidators removed from office but that the applicants declined the request. He however, despite alerted thereto by the respondents, failed to notify the applicants thereof before removing them from office.

[25] The parties could not find any direct case law on the point whether the applicants should have been at the meeting when their removal was requested. In my view the answer is to be found in the language of section 379 authorising the Master to remove a liquidator read with the provisions of section 3 of PAJA. The word '*may*' can only mean the Master must consider the request of the majority of creditors in view of all the relevant facts. The appointment of the nominated liquidator by the Master is at the request of the majority of creditors in value and number and the converse can only be that the removal of the liquidator from office by the Master ought to be at the request of the majority of creditors as well. Section 60 of the Insolvency Act has a similar provision authorising the Master to remove a trustee from office '*at the request of the majority creditors in writing*'. Both provisions are silent as to whether the to be affected liquidators had to be informed prior the removal discussion is taken.

[26] There is no indication at all whether the applicants performed any of their duties as liquidators in this 'unexplained' year. The main grounds raised by the applicants are that they are the majority creditors.

[27] The court is in the dark as to any steps were taken by the liquidators to proceed with the alleged intended outstanding urgent litigation hovering close to prescription? There is no indication whatsoever of the intended litigation as to the kind of actions, the quantum of the actions and when prescription occurs.

[28] There is a vague speculation of intended actions amounting to some R 45 million nearing prescription. One would have expected more detail of the alleged debtors of JAB against whom the future intended actions are to be instituted. In view of the long winding-up process since 2020, more detail should have been given with regard to already instituted actions and other steps taken by the liquidators. These unsubstantiated vague allegations do not advance any notion of urgency.

[29] If cognizance is taken that the final liquidation order was granted on 1 February 2019, more than three years have lapsed and most concurrent debts could have already prescribed. These may be a mere “*spes*” with regard to other debts subject longer prescription periods but lacking any detail, it does not advance the applicants’ cause. In my view this delay may well have attributed to the looming fear of prescription.

[29] It seems that the ‘looming prescription’ may be the compelling reason for the launching of the application. The aspect of prescription is not to be adjudicated in this application but may be a huge obstacle for the applicants in future should they decide to institute further actions as averred supra.

[30] The question whether substantial redress would be not achieved should the matter be heard in the normal course of application warranting the urgent application was considered in **Mogalakwena Municipality v Provincial Executive Council and Others 2016(4) SA 99 (GP) at par 46**. It is for the applicants to establish urgency and if not, the application must fail. The unexplained time lapses supra and the complacent attitude of the applicants create some difficulties for the applicants.

This does not take away the expectation created in section 3 of PAJA to be heard when affected by administrative action.

[31] The applicants failed to explain why they did not institute any litigation despite impugned Resolution 3. There is no authority that such regulation will interrupt prescription and no reasons are given why no litigation continued after 2020. But again it is not for this court to decide.

[32] I am therefore of the view that the application is urgent despite several questions raised supra, but the Master acted contrary to the provisions of PAJA by not informing the applicants of the application by the majority of creditors. This is the main contributor to the aspect of urgency. The fact that JAB could be without someone to manage its affairs in liquidation for a further indefinite period is a further aspect to consider whether the application is urgent. To prolong the proceedings further is not in the interest of the creditors. The matter is found to be urgent and it should be referred back to the Master to consider the request with compliance to PAJA.

#### **CONDITIONAL COUNTER APPLICATION:**

[33] The respondents' conditional counterclaim is based on the premises that the court grants the applicants' application resulting in the position of the liquidators' removal set aside. The counterclaim is brought in terms of section 379(2) of the Act; the provision clearly states that where the Master fails to remove a liquidator, the court may remove the liquidator. This clearly can only be where the Master **refuses/fails** to remove the liquidator, this not applicable here.

[34] Where a court reviews the decision of the Master and refers the matter back for reconsideration, it does not amount to a failure by the Master to remove the liquidator. Section 379(2) only applies where the Master refuses or fails to remove liquidators from office.

[35] I am convinced that the provisions of section 379(2) cannot apply to “trump” a possible review outcome, and the conditional counterclaim must fail.

**Wherefore the following order is made:**

1. The matter is considered to be urgent.
2. The decision of the Master to remove the liquidators from office is reviewed and set aside.
3. The matter is referred back to the Master for consideration of the respondents' request for the removal of the liquidators to be removed from office with prior notice to the applicants.
4. The conditional counterclaim is dismissed with costs.
5. The Respondent is to pay the costs of the applicant, inclusive of two counsel subject to the provisions of Rule 69 (2), the costs of the second advocate not to exceed one half of those allowed in respect of the first advocate, the costs on a party and party scale. The costs of Part A of the application be included in the order.



**J HOLLAND-MUTER  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

*This judgment by the Judge whose name is reflected herein, is delivered and submitted electronically to the parties/their legal representatives by e-mail. This judgment is further uploaded to the electronic file on this matter on Caselines by the Judge or his / her secretary. The date of the judgment deemed to be 09 June 2022.*

#### **APPEARANCES**

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WIEKUS DU TOIT ATTORNEYS

Date heard:

22 March 2023

Date delivered:

09 June 2023