IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 534/2002

In the matter between :

THE MINISTER OF JUSTICE **Appellant**

and

FIRSTRAND BANK LIMITED
First Respondent
BOE BANK LIMITED **Second Respondent**
ABSA BANK LIMITED **Third Respondent**
CREDIT GUARANTEE INSURANCE CORPORATION LIMITED **Fourth Respondent**
RETAIL APPAREL GROUP LIMITED **Fifth Respondent**
LESLIE MATUSON **Sixth Respondent**
MARK WILLIAM LYNN **Seventh Respondent**
YVONNE THOKOZILE MBATHA **Eighth**

Respondent
THAMSANQA EUGENE MSHENGU **Ninth Respondent**

Coram: **HOWIE P, SCOTT, ZULMAN, BRAND *et* CLOETE JJA**

Heard: **1 September 2003**

Delivered: **25 September 2003**

Summary: **Section 371 of the Companies Act does not apply to provisional liquidators.**

J U D G M E N T

HOWIE P/
HOWIE P:

[1] First respondent, a creditor of Retail Apparel Group Limited, obtained an order in the High Court at Durban for the provisional liquidation of that company. In due course the Master of the High Court for Kwazulu-Natal appointed four provisional liquidators. Subsequently, appellant, the Minister of Justice and Constitutional Development, directed the Master to appoint a fifth provisional liquidator, Mr E M Motala. In issuing the directive the Minister relied on the provisions of s 371 (3) of the Companies Act 61 of 1973, and on professional advice that the sub-section empowered such a directive in the case of a provisional liquidator. The Master complied with the directive and appointed Mr Motala.

[2] First respondent and others, including the four originally appointed provisional liquidators, then applied to the High Court in Durban for an order

reviewing and setting aside the appointment of Mr Motala and the underlying directive. Cited as respondents were the Minister, the Master and Mr Motala. Booysen J granted the application and later gave leave to appeal. Only the Minister appeals.

[3] We were informed prior to the hearing of the appeal that Mr Motala had been appointed a provisional liquidator by way of a second appointment entirely separate from that presently in issue. This does not render the appeal moot, however, for we were informed at the hearing that the Minister has relied on s 371 in other provisional liquidations as well. The Court's decision is therefore of application not just to possible future cases but actual pending matters.

[4] Formally, the question for decision is whether the provisions of s 371(3) pertain only to liquidators or also apply to provisional liquidators. However, the definition section in the Act defines 'liquidator' as including 'provisional liquidator' unless the context indicates otherwise and so the real issue is whether the relevant context does indicate otherwise.

[5] The context which requires analysis is provided by a number of sections of the Act. It is convenient to recount them not in numerical sequence but in the sequence in which events pertaining to liquidation orders would ordinarily occur.

[6] This case concerns a liquidation ordered by the court at the instance of a creditor by reason of the debtor company's inability to pay its debts but it is necessary to consider, as part of the relevant context, provisions of the Act which concern other types of winding-up as well.

[7] Apart from winding-up by the court, the Act provides for two forms of voluntary winding-up, one by creditors and the other by members (s 343). Either form of voluntary winding-up requires a special resolution of the company (s 349). In terms of s 356 (2) a certified copy of that resolution must be lodged with the Master together with any further resolution (in the case of a members' voluntary winding-up) containing nominations for appointment as liquidator of the company. I pause to observe that nomination is provided for also in other situations dealt with in the Act, as will be seen, and is a concept of

crucial importance in resolving the question in issue.

[8]In a winding-up by the court (and unless indicated otherwise I mean to focus on such form of winding-up) all the property of the company is deemed to be in the custody and control of the Master until a provisional liquidator has been appointed and has assumed office (s 361).
[9]The appointment by the Master of liquidators generally is empowered by s 367. The appointment of a provisional liquidator in particular is dealt with in s 368 which, omitting irrelevant wording, reads:
'As soon as a winding-up order has been made in relation to a company … the Master may appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his duties as provisional liquidator and who shall hold office until the appointment of a liquidator'.
[10]In terms of s 364(1), as soon as possible after a final winding-up order, the Master must summon separate meetings of creditors and members. Both kinds of meeting are held for the purpose, *inter alia*, of
'nominating a person or persons for appointment as liquidator or liquidators'.
In the case of a members' voluntary winding-up, so the subsection provides, the nomination process will be unnecessary if nomination has already been effected in a s 349 resolution.
[11]That the nomination procedure in a winding-up by the Court does not apply also to provisional liquidators, is indicated by the terms of s 364(2) according to which, for the purposes of summoning a creditors' meeting (at which nominations will be made) the Master may direct the company <u>or the provisional liquidator</u> to send notice of the meeting to creditors. In other words, a provisional liquidator enters upon the scene before nominations for the office of liquidator can be made.
[12]Section 369 is headed 'Determination of person to be appointed liquidator' and lays down that, subject to s 370, the Master must appoint as liquidator or liquidators the person or persons 'nominated' under the sections (to which I already have referred) dealing respectively with a members' winding-up and a winding-up by the court.
[13]Section 370(1) details circumstances in which the Master may decline to accept a nomination or to appoint the nominee. Where that occurs a remedy is provided in s 371. It is appropriate to quote s 371 in full. It reads:
'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.'

(Emphasis supplied.)

[14]Reverting to s 370, subsection (2) provides that when the Master has declined to accept a nomination or to appoint the nominee, or the Minister has, under s 371(3), set aside the appointment of a liquidator, the Master must once again convene meetings of creditors and members for the purpose of a fresh nomination and appointment process.

[15]Similarly, s 377 provides that when a vacancy in the office of liquidator occurs, and the Master does not leave completion of the winding-up to any remaining liquidators, he must convene members' and creditors' meetings to obtain the nomination and appointment of a new liquidator (subsec (1)). Subsections (2) and (3) are also of significance. The former emphasizes that the provisions of the Act applicable to the convening and conduct of meetings and the nomination and appointment of liquidators must apply to the filling of a vacancy. Subsection (3) states that where a vacancy is for any reason not filled by implementation of such procedure or the Master does not leave it to any remaining liquidators to complete the winding-up, he may appoint a person as provisional liquidator or as liquidator to fill the vacancy. The latter subsection, therefore, contrasts an appointment pursuant to the statutorily provided nomination and appointment process, and an appointment by the Master where that process fails, acting in his own discretion and on his own initiative in making an appointment of either a provisional liquidator (or a liquidator). The important point is that even where he acts in his own discretion that must necessarily be only after the prescribed nomination process has failed to effect the filling of the vacancy.

[16]Section 375 then states the essentials for appointment as liquidator. The

first is that the person to be appointed has been 'determined' and the second is that such person has given security to the Master's satisfaction. As the earlier sections show, the person determined cannot be anyone other than somebody nominated at a convened meeting of members or creditors. And the requirement of nomination remains even if the Minister uses his s 371 powers of intervention. I shall revert to this last point.

[17]Finally as to the legislative context, there is a blanket provision in s 374 which empowers the Master, whenever he considers it desirable, to appoint any person not disqualified from holding the office of liquidator, and who gives the necessary security, as a co-liquidator with the liquidators. Of note here is that any appointment under this section, unlike the position in s 371(3), is not made subject to any possible directive by the Minister.

[18]Turning to the argument in support of the appeal, counsel for the Minister said that the cornerstone of his submissions consisted in the provisions of s 39(2) and 33(1) of the Constitution. (The former requires promotion of the values of the Constitution in statutory interpretation and the latter bestows the right on everyone to fair and reasonable administrative action.) The need for that quality of administrative action, said counsel, was especially required at the time in a winding-up before a final liquidator was appointed because it was at those early stages when a company's assets were peculiarly vulnerable to illicit concealment or disposal. It was at this juncture and with the risk of this mischief, therefore, that effective action was necessary to ensure that adequate and appropriate provisional liquidators were in charge. It there was a shortcoming in their numbers, competence or approach to any aspect of the winding-up, there was a need for a quick remedial process whereby informal nominations could be made and, if not accepted by the Master, then enforced by a Ministerial directive under s 371(3).

[19]From the papers it emerges that the provisional liquidators originally appointed were considered by the Minister, or rather, perhaps, by those advising him, to be unduly sceptical or dismissive in regard to an alleged claim against the company by the South African Revenue Services and it was consequently the Minister's wish to obtain the appointment of Mr Motala so that the Revenue's claim could be accorded the attention to which it was, in the Minister's view, entitled in the proper execution of the winding-up.

[20]Counsel for the Minister accepted that the Master's actions could be subject to review if a creditor's interests were irregularly disregarded but he contended that by the time review proceedings were finalised a successful outcome would be cold comfort if the consequences of wrong or ineffective action in the preservation of the assets or in the treatment of a valid claim had long since been

felt.

[21]Counsel went on to outline existing practice consequent upon the grant of a provisional winding-up order as being one whereby creditors put forward names of suggested provisional liquidators, the latter lodged requisitions with the Master and he usually accepted those suggestions and made appointments of provisional liquidators accordingly. It was submitted that this practice really involved an informal nomination procedure and that when the Act referred to nomination the interpretation accorded that word should embrace this informal intimation as well as the formal process provided for in the statute.

[22]In evaluating the argument advanced in support of the appeal it is realistic to bear in mind that some company insolvencies do, unfortunately, involve irregular dealing with assets by former directors, members or employees. However, I find nothing in the sections of the Act to which I have referred, or in the practice described by counsel whereby provisional liquidators are usually appointed (assuming that description to be correct) which tends to jeopardize a creditor's, or any other interested party's, constitutional right to fair administrative action. If irregularities are perceived on the part of the Master, a provisional liquidator or anyone else involved in the provisional winding-up of a company, review or interdictory remedies are available. Should the circumstances warrant speedy relief, they can be brought as matters of urgency and disposed of with expedition. Essentially, therefore, the case turns on the proper construction of s 371 viewed in the context set out above.

[23] What the contention for the Minister really seeks to achieve is the interpretation of the opening words of s 371(1) ('Any person aggrieved by the appointment of a liquidator') as including any person aggrieved by the non-appointment of a provisional liquidator; and the interpretation of 'nomination' or nominated' as also referring to nomination made otherwise than in the manner provided for in the Act.

[24]In my view 'appointment' in the opening quoted phrase of s 371(1) cannot include 'non-appointment'. Non-appointment is specifically dealt with in the immediately following words which cover refusal of the Master to accept a nomination and refusal of the Master to appoint a nominee. Moreover the section deals not with appointment *per se* but only appointment pursuant to nomination. As for 'nomination' or 'nominated', these words can, in the relevant context, refer to nothing other than the s 364 nomination process, the result of which is that the Master is required, by s 369, to appoint as liquidator (meaning final liquidator) the person or persons nominated. Nothing in the Act leaves room for understanding those words in any other sense. Therefore the grievances for which s 371 provides a remedy are grievances consequent upon

the appointment of a person duly nominated (or the non-appointment of a person duly nominated) within the meaning of the Act, and particularly s 364.

[25]The fundamental flaw in the statutory construction on the strength of which the Minister issued the directive in question is that it was thought sufficient to direct the Master to appoint Mr Motala. The vital point, however, is that where the Minister acts under s 371(3) and sets aside a Master's s 370 refusal, he must not just direct the person concerned's appointment. He must, in addition, by reason of the closing words of s 371(3)

'direct the Master to accept the nomination of the liquidator concerned and to appoint him as liquidator …'

In the present case there was no such nomination of Mr Motala within the meaning of the Act. It remains to add that s 371, properly construed, cannot apply to the Master's appointment, or non-appointment, of a provisional liquidator. In the result the Minister's directive, and the appointment based on it, were not in conformity with the provisions of the Act. They were therefore invalid.

[26]The appeal is dismissed with costs, including the costs of two counsel.

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CT HOWIE
PRESIDENT

SUPREME COURT OF APPEAL

CONCURRED:
SCOTT JA
ZULMAN JA
BRAND JA
CLOETE JA