THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 92/2018

In the matter between:

ENVER MOHAMED MOTALA **APPELLANT**

and

THE MASTER OF THE NORTH GAUTENG

HIGH COURT, PRETORIA **RESPONDENT**

Neutral citation: *Motala v The Master of the North Gauteng High Court, Pretoria* (92/2018) [2019] ZASCA 60 (17 May 2019)

Coram: Leach, Wallis, Mathopo and Van der Merwe JJA and Dlodlo AJA
Heard: 18 February 2019
Delivered: 17 May 2019

Summary: Administration of insolvent estates – Master's panel of persons suitable for appointment as liquidator or trustee – compilation of panel constitutes administrative action as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – appellant removed from the panel – factors relevant to such removal including appellant's dishonesty and his disqualification as a liquidator or trustee – appellant's challenge to his removal from the panel dismissed.

Appellant also having applied to the Master to be reinstated to the panel – Master refusing to do so – this decision not challenged by the appellant under PAJA – Master's decision not to reinstate renders nugatory the appellant's claim based on earlier removal.

Costs – appellant contending he ought not to pay costs if unsuccessful as he sought to enforce a constitutional right – factors relevant to discretion in such cases – appellant ordered to pay the costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J sitting as court of first instance):

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

JUDGMENT

Leach JA (Wallis, Mathopo and Van der Merwe JJA and Dlodlo AJA concurring)

Introduction

[1] The respondent in this appeal is the Master appointed under s 2(1)*(a)*(ii) of the Administration of Estates Act 66 of 1965 in respect of the Gauteng Division of the High Court, Pretoria (known at the time these proceedings were

commenced *a quo* as the North Gauteng High Court). In s 1 of that Act the term 'Master' is defined in relation to any matter, property or estate 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. The present proceedings relate in the main to actions taken by a Deputy Master, Ms C Rossouw, which the appellant sought unsuccessfully to challenge by way of review under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[2] The Master's office in Pretoria is burdened with onerous responsibilities. Every year it is placed in control of some 750 company liquidations and since 2009 has dealt with an annual average of about 7 000 sequestrated estates. The funds involved in these administrations total thousands of millions of rand. It is self-evident from this that in order to protect these funds and the interest of creditors and other interested parties, only persons suitable for the purpose should be appointed as the liquidators of companies or the administrators of estates. To facilitate this, the long-standing practice has been for Masters to maintain a list or panel of persons that have been found to be suitable for appointment: see the *SARIPA* case.[1] Whilst not statutorily recognised, it is a practice which holds obvious practical advantages. For convenience, I intend to refer to the list simply as the Master's panel.

[3] The appellant, Mr Enver Motala, describes himself as being a 'liquidator and administrator of estates'. He commenced working in that field in 1999 and built up a successful practice. He is a director of a trust company, referred to in the papers as 'SBT Trust', which has its principal place of business in Johannesburg. The appellant was previously on the Master's panel.

[1] *Minister of Constitutional Development & another v South African Restructuring and Insolvency Practitioners Association & others* [2018] ZACC 20; 2018 (5) SA 349 (CC). See further *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 668E-669A.

[4] In April 2009, the appellant was appointed as a joint liquidator of the seventh respondent (Pamodzi Gold Free State (Pty) Ltd) as well as a joint provisional liquidator of the eighth to thirteenth respondents (respectively Pamodzi Gold East Rand (Pty) Ltd, Nigel Gold Mining (Pty) Ltd, the Grootvlei Mines (Pty) Ltd, Consolidated Modderfontein Mines Ltd, Consolidated Modderfontein Mines 1979 (Pty) Ltd, and Pamodzi Gold Orkney (Pty) Ltd). In October 2009, the appellant was further appointed as a joint final liquidator of the sixth respondent, Pamodzi Gold Limited. For convenience I intend to refer to these companies collectively as 'the Pamodzi Group'. They are all companies which owned and operated mines, the sixth respondent having been the holding company of the group. They had all been placed into liquidation under the jurisdiction of the respondent. Ms Rossouw was the official in the Master's office responsible for the liquidations of the companies in the Pamodzi Group.

[5] In the circumstances more fully set out below, Ms Rossouw terminated the appellant's aforementioned appointments. Aggrieved by this, the appellant instituted review proceedings in the North Gauteng High Court. By way of a notice of motion issued on 22 August 2011 and served on 9 September 2011, he sought an order both setting aside the decision to remove him as liquidator of the Pamodzi Group and reinstating him to that position. On 5 September 2011, a few days before the notice of motion was served, Ms Rossouw had issued a further directive that the appellant's name be removed from the Master's panel. Despite the fact that on 25 August 2011 the appellant had been informed that the Master was considering taking this step (as I shall set out below), no challenge to this decision was immediately forthcoming and the appellant only sought to do so some three and a half years later.[2]

[2] See para 31 below.

[6] The appellant's application for reinstatement as a Pamodzi Group liquidator was opposed, and time dragged on without it being resolved. It was only in January 2015 that the appellant sought to introduce an amended notice of motion containing additional prayers, including an order setting aside the decision of 5 September 2011 to remove him from the panel. The matter eventually came before D S Fourie J in the Gauteng Division, Pretoria who, on 9 October 2017, refused to condone the appellant's late introduction of the review proceedings relating to his removal from the panel. As the latter decision was thus undisturbed, the relief sought at the outset became inconsequential and the application was dismissed. The appeal to this court against that order is with the leave of the court *a quo*.

The Facts

The liquidation of the Pamodzi Group

[7] It is necessary to place the dispute in its factual context and to detail the history of this litigation. The operating companies in the Pamodzi Group were all gold mining companies that, having a collective debt of more than R1 billion, were described by the appellant himself as being 'hopelessly insolvent'. This had led to them being placed into liquidation in the hands of the Master. However, despite their insolvency, they each had intrinsic value not only in their tangible assets but, importantly, in the mining rights they held which would have been lost had they gone into final liquidation. For this reason it was to the advantage of creditors for the companies to be kept in provisional liquidation while attempts were made to sell them. Consequently, the return dates of their provisional liquidation orders were extended from time to time as the liquidators attempted to find suitable purchasers.

[8] It was at this stage that Aurora Empowerment Systems (Pty) Ltd (Aurora) came onto the scene, describing itself as 'a specialised investment vehicle

established to make strategic investments in a diversity of categories in the sub-Sahara African region'. Aurora's directors appear to have been politically well connected. They included a grandson of President Nelson Mandela, a nephew of President Zuma and Mr Michael Hulley, an attorney often employed by President Zuma for his personal matters.

[9] For reasons not relevant to this dispute, Aurora was the liquidators' preferred bidder for certain of the mines. On 27 July 2009, it offered R215 million to purchase the assets of the thirteenth respondent and, subsequently, on 1 October 2009, R379 million for the assets of the ninth to twelfth respondents. Although Aurora lacked the necessary funds to pay these vast sums and needed to raise finance from a strong and reliable financier, the liquidators accepted its bids as they were supposedly supported by a commitment from a Malaysian consortium which provided two letters of undertaking. In the first, an undertaking was given to pay R200 million for the acquisition of the thirteenth respondent upon confirmation that Aurora had been selected as preferred bidder. In the second, there was an undertaking to pay R350 million for the acquisition of the eighth to thirteenth respondents. It was on the strength of these undertakings that the liquidators accepted Aurora's bids.

[10] The Pamodzi Group employed more than 10 000 people and it was vital, not only for the retention of their mining rights, but for social and economic purposes, for the mines to continue operating. Accordingly, pursuant to Aurora having been selected as the preferred bidder and its bids accepted, the liquidators concluded interim agreements (referred to in evidence as the ICTMA's) with Aurora relating to the mines it wished to buy. These were designed to enable it to carry on mining activities while it secured payment and completed the process of purchasing the mines.

[11] Under these agreements, Aurora was given the right to mine at its expense 'under the overall control and supervision of the Joint Provisional Liquidators'. It also assumed the contractual obligations to maintain the mines for the liquidators and bound itself, inter alia, to maintain and keep safe the mines' assets 'in accordance with good and sound mining practices and procedures', to manage and control the security of the mines, to be responsible for 'all hostel arrangements in respect of the employees, including but not limited to feeding, accommodation and water and electricity supply at the hostels' and to ensure that all expenses be 'discharged timeously'. Pertinently it warranted that it would:

'8.3 not at any time during the currency of this Agreement make any alterations, additions, modifications or adjustments to the Mines or any equipment or assets of the Mines, unless it has first obtained the prior written consent of the Joint Provisional Liquidators . . . ;

8.4 not remove any items, equipment or assets from the Mines without the prior written consent of the Joint Provisional Liquidators.'

[12] Unfortunately, Aurora's governance and conduct of the mines and their operations went anything but swimmingly. Ms Rossouw stated that she read numerous articles in the press and other journals commenting adversely on events taking place on the mines. She also received calls from journalists as well as from trade unions whose members were employed on the mines. On 26 October 2010, a journalist asked her to comment on the statement in which the National Union of Mine Workers had appealed to the Master's office to 'nullify the obviously failed liquidation process'.

[13] The complaints levied against Aurora were many and serious. They included that the mines' employees were not receiving their food or wages and were being retrenched or dismissed from their employment; that various deductions from wages – eg those in respect of unemployment insurance and

PAYE tax – were being retained by Aurora and not being paid over to the authorities in question; that assets of the mines were being stolen or otherwise removed and not accounted for; that the mines were being stripped of their assets to the extent that on the Grootvlei Mine, the entire headgear and machinery of number six mineshaft had been removed, rendering the shaft inoperable; that electricity had been disconnected as electrical charges had not been paid, which in turn had not only left employees in the dark and without power, but had resulted in the mines being unable to conduct mining operations as water could not be pumped from the shafts; that the failure to pump water had also resulted in ecological problems impacting seriously upon the environment; that mine security had been breached and was at times almost non-existent; that illegal underground mining was taking place; and that gold had been stolen and not adequately accounted for.

[14] These reports were self-evidently of serious concern to the Master. The assets of the mines were both valuable and crucial to their operation (the headgear that had been removed was alone worth tens of millions of rand.) Moreover, the livelihood of many thousands of employees was under threat and an environmental calamity caused by non-pumping of water and acid mine seepage had become a very real prospect. All these complaints related to duties that Aurora had undertaken in terms of its interim agreements with the liquidators. It is not without significance that in *Engelbrecht*,[3] in relation to substantially the same facts, albeit at a later time and in a claim brought under s 424 of the Companies Act, instituted after the appellant had been removed as a joint liquidator, Bertelsmann J stated:

'[41] Had the (Aurora's directors) approach to concluding the original transaction been reckless – if not fraudulent - their management of the mines and their inaction after March 2010 to attend to the ever-worsening situation of the mines was no better. Their complete

[3] *Engelbrecht NO & others v Zuma & others* [2015] 3 All SA (GP) para 41-42.

disregard for the consequences of their failure to implement the original transaction is inexplicable other than that they could not care at all about the damage they had caused. They should have – as should the liquidators – acted to limit further losses at the latest by terminating the agreements for the acquisition of the mines no later than March 2010 at the very outside and placing the mines on auction, if no other purchaser could be found.

[42] To the above failures must be added the fact that (Aurora's directors) did not honour the ITCMA agreements at all. They failed to manage the mines properly, they failed to account to the liquidators, they failed to maintain the workforce, they failed to ensure the mines safety – in short, they are guilty of numerous breaches of the agreements.'

[15] In an affidavit deposed to on 5 December 2011, Ms Rossouw, stated that although the liquidators had sent various reports to the Master concerning these issues, they were unhelpful as, *inter alia*, the question of asset stripping was not properly addressed. There was also no indication that the liquidators had themselves visited the mines to ascertain what had been happening on the ground. As she pertinently recorded, it would have been a simple matter to ascertain whether the entire headgear of the number six shaft at Grootvlei Mine had been removed as had been contended. Ms Rossouw stated further:

'The reports did not address the other issues that concerned me . . . There was no indication of proper attention being directed, for instance, to the ecological damage occasioned by Aurora or to the devastation that was being suffered by the miners and their families. Indeed, the problems that were identified by the joint liquidators were problems identified as non-compliance by Aurora. There was no indication on the part of the joint liquidators of steps taken by them to control Aurora or to compel Aurora to comply with their responsibilities. The Master never received a single report (if there was one) made by Aurora to the liquidators as contemplated in the ICTMA's.

The Master's office had no idea of the veracity of the stories and rumours and articles that were coming to its attention. The stories were, however, appalling and, if true, warranted action. It was clear, however, that, in the interests of the companies, their creditors and their employees, the Master was obliged to investigate whether what the office was hearing was true. Moreover, the reports by the liquidators did not address two problems concerning Aurora. The first was the repeated extension of provisional orders to enable Aurora to

produce funding which it appeared unable to do. It was not clear to the Master why, at the apparent expense of creditors, employees and the environment, such latitude was being extended to Aurora. Second, there was no indication from the reports of the joint liquidators that they were taking steps to terminate the ITCMA's either on the ground of Aurora not coming up with the funds or on the basis of what appeared to be numerous material and extensive breaches thereof.'

[16] The tipping point appears to have been the attitude adopted by another of the joint liquidators, Mr J Engelbrecht, who on 8 April 2011 wrote to his co-liquidators and various others, expressing the need to formally record his views on issues relating to the administration of the eighth respondent. These included the breaches of the interim agreements already mentioned, as well as the withdrawal of services by the security company employed to protect the mine due to non-payment of their charges, and the content of media releases made by the trade union Solidarity. In the light of all of this, Mr Engelbrecht demanded that the joint provisional liquidators should urgently resolve to anticipate the return day of the final order of liquidation relating to the eighth respondent, and stated that should they refuse to consent to his suggestions, he intended to call upon the Master to authorise and direct the liquidators to anticipate the return day. He concluded by disassociating himself from any further negotiations with Aurora. This letter was in due course made available to the Master.

The enquiry on 16 May 2011 and the appellant's removal as a Pamodzi liquidator

[17] The situation had clearly become intolerable and it would have been grossly remiss for the Master not to have taken urgent remedial action. Ms Rossouw decided at the outset to invoke s 417(1) of the Companies Act 61 of 1973 (the Companies Act).[4] This section provided that in a winding-up of a

[4] It was then in operation prior to its repeal by the Companies Act 71 of 2008.

company unable to pay its debts, the Master may at any time after a winding-up order has been made, summon, inter alia, any director or officer of the company or any person whom the Master deems capable of giving information concerning the trade, dealings, affairs or property of the company. Subsection 417(2) went on to provide that the Master could examine any person so summoned on oath or affirmation concerning any such matter either orally or by way of interrogatories.

[18] Pursuant to this, an enquiry under s 417 was initially held on 10, 17 and 21 May 2011 when several witnesses, including the deputy general secretary of the trade union, Solidarity, gave evidence. With the assistance of a series of slides he demonstrated how assets at the Grootvlei mine had been stripped, the entire mining headgear removed and a shaft of the mine exposed. He also gave evidence as to the devastation suffered by the former employees of the mines and Aurora's various breaches of the interim agreement, including the failure to make payment to the appropriate authorities of the deductions made from wages and salaries. Various other witnesses also testified, painting a bleak picture of Aurora's mining activities and the administration of the mines under their control. Disturbingly, a witness from Standard Bank gave evidence that Aurora's supposed Malaysian backers may have been no more than a paper company using a name similar to a well-known Malaysian banking group.

[19] The liquidators were not persons referred to in s 417, so its provisions could not be relied upon by the Master to obtain information from them. Ms Rossouw therefore decided to invoke the provisions of s 381 of the Companies Act which, *inter alia*, provided:

'(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 the winding-up.'

[20] Ms Rossouw describes this section as being 'an essential tool' for her to maintain control of liquidations, acquire information from liquidators and satisfy queries she might have. She states that in practice the section is invoked daily, both informally and formally, and explains:

'For instance, whenever a Master has a query about a company in liquidation, it is not uncommon for the Master to telephone the liquidator in question and elicit an immediate answer which may satisfy the query. Likewise, if the liquidator happens to visit the Master's office in respect of liquidation X the Master may informally ask that liquidator a question about liquidation Y. Sometimes the Master will write to a liquidator to elicit information . . . In some instances the Master may decide to request a liquidator's attendance and, in some instances, the Master may elect to question the particular liquidator under oath and have the proceedings recorded.'

[21] In the present instance, the Master decided upon a formal enquiry with the liquidator testifying under oath and the proceedings being recorded. Accordingly, on 3 May 2011 an Assistant Master, Mr Cilliers, telefaxed a communication to the appellant and his co-liquidators relating to the sixth, eighth and thirteenth respondents, summoning them to an enquiry under s 381(2) on 16 and 17 May 2011, and to bring all documents and papers in their possession relating to their administration . Further to this, on 11 May 2011 the Master sent an email to the liquidators stating:

'With reference to the section 381 subpoenas issued by this office in the above matters and with specific reference to the documentation to be presented to the Master at the enquiry, you are hereby requested to bring the following documents:

1. All documents regarding the extension of the JPL's (joint provisional liquidators) powers and the source of the powers;
2. All correspondence between JPL's regarding the above matter;
3. All correspondence between JPL's and (Aurora) including all contracts between JPL's and (Aurora);
4. All accounts maintained by the JPL's in the course of liquidation (cash book) and all bank statements;
5. All reports from (Aurora) to the JPL's;
6. Asset register in respect of each of the entities as at date of provisional liquidation;
7. (Interim agreement) between (Aurora) and JPL's.'

[22] An attorney acting on behalf of both the appellant and a co-liquidator of the sixth and eighth respondents, Mr Gainsford, responded in writing to the Master the same day. After having expressed his concern about the contents of the telefax and the paucity of information contained therein, the attorney went on to say:

'3.2 It appears that you have made the decision to summon our clients to an enquiry. Our clients do not dispute your right to receive information from them regarding the continued course of the winding-up of the companies providing such information sought is done properly, fairly and in a correct and appropriate manner. Accordingly, our clients require to know the following:

3.2.1 Pursuant to section 381 of the Companies Act an enquiry is envisaged if you have received a complaint by any creditor, member or contributory alternatively if you have reason to believe that our clients do not faithfully perform their duties as liquidators. If a complaint was made, a copy of such complaint is required to be made available to enable our clients to deal with the allegations made in the complaint. If you have relied on the alternative our clients require to be informed of the basis thereof.

3.2.2 Our clients are also entitled in terms of legislation, including without limitation, the provisions of the Promotion of Administrative Justice Act to be provided with reasons for the decision and accordingly our clients require the reasons to be furnished as provided in legislation.

4. You will appreciate that whilst our clients are of course more than happy to appear before you in the spirit of their continued co-operation with your offices, the complexity of

the matters, the necessity to obtain and to brief counsel and to properly prepare, clearly indicate that the notice given is wholly inadequate. Further, the requirement to bring "all documents" as required by you is simply untenable, in light of the vast volume thereof, and our clients require you to provide a proper list of specific documents, or details as to the specific aspects in respect of which they will be required to comment.

. . .

6. The joint provisional liquidators have been required by the Parliamentary Portfolio Committee on Mineral Resources to appear and report to them on the 25th of May 2011. This of necessity requires full preparation by our clients and in light of that, and the complexity of the matters and the vast volume of documentation relating thereto, and the importance thereof, our clients will simply be not in a position to prepare and appear before the enquiry on the 16th and 17th of May 2011.'

[23] The Master responded with alacrity. The following day, 12 May 2011, Ms Rossouw wrote to the appellant's attorney, stating that the enquiry was in terms of that section 'as a whole'. She further stated that the documentation she required was 'the sort of documentation (one) would expect a provisional liquidator to have at hand', and that each liquidator should therefore 'bring as much documentation as he is able to put together in time for the enquiry'. She also went on to record that she reserved her right to engage legal assistance 'in the running of enquiry' and that she would not object if any of the joint provisional liquidators required legal representation at the enquiry. Seemingly in anticipation of the future litigation which indeed followed, she opined that the decision to hold the enquiry did not constitute administrative action as envisaged by PAJA.

[24] The enquiry that was held on 16 May 2011 appears from its record to have been a tense and combative affair. The appellant and Mr Gainsford, were represented by senior counsel[5] and attorney whilst the Master, too, was assisted

[5] Not the senior counsel who represented him in this appeal.

by senior counsel. The two sides immediately crossed swords. Counsel for the appellant, while recording the willingness of his clients to co-operate and provide information, stated for the record that the liquidators should be informed about any complaint against them or why the Master had decided to hold the enquiry in the first place. As against that, counsel assisting the Master stated that the Master sought the liquidators' co-operation in handing over whatever documents they had been able to put together relevant to the administration of the mines and wanted to ask questions about the running of the insolvent mining companies. Counsel for the appellant insisted on the Ms Rossouw providing details of the issues she wished to raise so that the liquidators could properly prepare in respect of the subject matters to be dealt with, which he said they had been unable to do in the limited time that had been available. While recognising the short time the liquidators had to prepare and conceding that if there were any questions they could not answer, those issues could be postponed, the Master however contended that the liquidators should be able to deal with at least some issues.

[25] Eventually a point of deadlock was reached when the appellant's counsel made it clear that the appellant was not prepared to answer any questions in regard to the administration of the Pamodzi Group's winding-up. This led to an incongruous situation where the appellant (and his co-liquidator Mr Gainsford) refused to answer any question put by the Master concerning the administration of the mines whilst the other Pamodzi liquidators were prepared to testify or make themselves available to do so.

[26] Ms Rossouw found herself in what she felt was an intolerable situation. The appellant was a co-liquidator of companies having assets worth millions of rand, the administration of which was firmly in the public eye; but she could not communicate with him, save through his legal representatives; and he refused to

discuss the administration of those companies. Ms Rossouw understandably felt that this undermined her ability to carry out her duties under s 381 of the Companies Act. One of the major statutory duties of a liquidator is 'to give the Master such information and generally such aid as may be requisite for enabling that officer to perform his or her duties'[6] and she regarded the appellant's refusal to answer her queries both as a failure to perform his duties satisfactorily and to comply with a lawful demand from her. This she felt constituted grounds envisaged by s 379(1)*(b)* of the Companies Act justifying his removal as liquidator. She says she also formed the opinion that the appellant was no longer suitable to be the liquidator of the companies concerned, and this too justified his removal under s 371(1)*(e)* of the Companies Act.[7]

[27] But before Ms Rossouw finally decided to remove the appellant as liquidator of the Pamodzi Group, further relevant information came to her attention. First, for purposes of the s 417 enquiry, she had required Standard Bank to produce Aurora's bank statements. Studying them on the evening of 20 May 2011, she came across a reference to a loan of R3 million Aurora had received from the appellant's company, SBT Trust, on 10 February 2010, at a time when the provisional liquidation orders were being repeatedly extended to enable Aurora to try and raise the finance necessary to purchase the mines. She subsequently ascertained from the various other joint liquidators that none of them had known of this loan. Importantly, the loan had also never been drawn to the attention of the Master. Aurora had also made repayments in respect of

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[6] *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC) para 15.

[7] Section 379 of the Companies Act reads as follows:

Removal of liquidator by Master and by the Court.– (1) The Master may remove a liquidator from his office on the ground–

(a) . . .

(b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master . . .; or

(c) . . .

(d) . . .

(e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.'

this loan without the knowledge of the Pamodzi Group's creditors or the other joint liquidators. This, in the Master's view, led to a conflict of interest between the appellant and Aurora on the one hand and the creditors and other liquidators on the other. Ms Rossouw viewed this in a very serious light. The appellant had helped Aurora to limp along at a time when the Pamodzi Group's assets were disappearing, and when he ought rather to have considered terminating Aurora's stewardship in the interest of creditors. Moreover he had secretly been receiving substantial repayments of his loan which were also adverse to the interest of creditors.

[28] Second, Mr Callie Smit, an attorney employed by Aurora as an in-house legal representative, gave evidence when the s 381 enquiry continued on 21 May 2011. He testified how on 5 February 2010 he had written the following letter to the joint provisional liquidator, SBT Trust (ie the appellant):

'Dear Sir

Re: Aurora Empowerment Systems (Pty) Ltd

We act on behalf of our client Am-Equity Limited.[8]

We refer to the Binding Offer entered into between Aurora Empowerment Systems (Pty) Ltd and The Joint Provisional Liquidators of Pamodzi Gold East Rand (Pty) Ltd – in Provisional Liquidation dated 1st October 2009.

We hereby confirm that we hold an amount of R20 000 000 (TWENTY MILLION RAND), which amount is available for payment on behalf of Aurora Empowerment Systems (Pty) Ltd as required in terms of the Binding Offer.

The amount is made up of R20 000 000 (TWENTY MILLION RAND) for payment of the purchase price as defined in the amended Binding Offer for payment to offer of compromise or the alternative court sanctioning of the Section 311 offer of compromise or the alternative court sanctioning of the sale of assets of Pamodzi Gold East Rand – in Provisional Liquidation including government sanction and transfer of all necessary licences so to continue conducting the business previously known as Pamodzi Gold East Rand.'

[8] This was the company that was to provide the finance to Aurora to purchase the mines.

[29] It is not disputed that Mr Smit wrote this letter on his laptop computer at the appellant's office after having been called there. When Mr Smit testified on 21 May 2011, he confessed that the entire letter was false and that he had not held any money, let alone R20 million, on behalf of Aurora at the time. The Master understood his evidence to be that he had prepared this fraudulent letter in the presence of the appellant who was aware that the contents were not true. Although the appellant denies this to have been the case, Mr Smit testified that the appellant had been present when a certain Mr Bhana, who worked for Aurora, had instructed him to write the letter, and that he knew what the content of the letter was to be. (Possibly due to Smit's vagueness, the Master did not rely on the appellant's knowledge of the falsity of this letter when later removing the appellant from the panel of liquidators, as set out more fully in due course.)

[30] In these circumstances, not only had the appellant refused point blank to answer any questions relating to the administration of the Pamodzi Group's mines, but it appeared to the Master that he had acted improperly by advancing a substantial loan to Aurora without the knowledge of his co-liquidators or the Master, and that he may have been party to the preparation of a letter indicating that Aurora's attorney was in possession of substantial funding for the mines which he knew was false. On 23 May 2011, the Master therefore wrote to the appellant and informed him that she had removed him as one of the joint provisional liquidators of the Pamodzi Group and told him that she had done so as, in her opinion, 'you are no longer suitable to be a joint provisional liquidator of each of the said companies'.

[31] The appellant was not prepared to take his removal lying down. As set out above,[9] he launched an application in the court *a quo* served on 9 September 2011 seeking the review and setting aside of his removal as joint liquidator and joint provisional liquidator of the various companies, and having himself restored to those positions. In support of this relief he claimed that there had been no sound reasons for his removal as he had performed the work involved diligently and faithfully. Accordingly, so he said, the decision to remove him had been arbitrary, irrational and unreasonable and thus unlawful. He also complained that the procedure of holding an enquiry under s 381 had been unfair and that his removal had been unfair on various grounds.

[32] The appellant's application was not only duly opposed but, by way of a counter-application dated 5 December 2011, the Master sought further relief in the light of yet further information in regard to the appellant which had come to her attention. This is dealt with below.

The enquiry of 17 August 2011 and the appellant's removal from the panel

[33] An article had appeared in The Citizen newspaper on 3 June 2011 in which it was alleged that the appellant had been 'mistakenly' issued with an identity document bearing 'an ID number of someone who had previous fraud and theft convictions'. The article continued that the spokesman of the appellant had said that lawyers had been appointed to probe how the appellant's name and identity number showed convictions dating back to 1978. This raised concerns on the part of the Master who, as a matter of principle, would not appoint persons as liquidators should they be suspected of having been involved in criminal activities. On 13 July 2011, Ms Rossouw therefore wrote to the appellant and inquired about the matter.

[9] Paragraph 5 of this judgment.

[34] The appellant's response was immediate. He stated that the newspaper had incorrectly recorded his comments. He placed on record that he had 'no previous convictions that disqualified me from acting as a Trustee or a liquidator'. The qualification was important because, in terms of s 372*(f)* of the Companies Act, a person who had at any time been convicted, whether in South Africa or elsewhere, of theft, fraud, forgery or uttering a forged document, or perjury, and had been sentenced as a result to imprisonment without the option of a fine or to a fine exceeding R20, was disqualified for nomination or appointment as the liquidator of a company. Thus the effect of what the appellant said in response to the Master's enquiry was that he had not been convicted of any such offence and sentenced to imprisonment without the option of a fine. He went on to state that his legal team had investigated the matter with the South African Police Services Crime Administration System and ascertained that 'there are no convictions recorded against my name'.

[35] As is apparent from this, the appellant did not specifically dispute that he had previous convictions. As the appellant would have known if he had previously been convicted, Ms Rossouw could not understand why it had been necessary for him to investigate whether he had convictions recorded against his name. She therefore wrote again to the appellant on 14 July 2011. This time she specifically asked whether he had any previous convictions for dishonesty. In the correspondence which followed, unnecessary to detail for present purposes, the appellant proceeded to tap-dance around the issue. Despite it being pertinently asked whether he had previous convictions for theft or fraud, the appellant fell back on what he had said at the outset, namely that he had no previous convictions which disqualified him from acting as a trustee or liquidator.

[36] Tired of playing ducks and drakes, the Master then called for a further enquiry under s 381 of the Companies Act.[10] She wrote to the appellant on 20 July 2011, requesting him to attend such an enquiry on 25 July 2011, and informing him that she had no objection to him having legal representation should he feel that he required such assistance.

[37] In response to this, the appellant's attorney wrote to the Master on 22 July 2011. On this occasion he specifically stated that the appellant did not have any previous convictions for fraud or theft and that a prominent criminal attorney had been appointed to investigate with the police 'that there is no fraud or theft conviction'. Not surprisingly, Ms Rossouw again found it somewhat strange that an attorney would be employed to investigate whether the appellant had been convicted of fraud or theft when the appellant himself said he had no such convictions.

[38] Be that as it may, by agreement the enquiry was postponed, first to 15 August 2011 and then to 17 August 2011. It was held at the Master's offices in Pretoria. On the latter date the appellant arrived, represented both by attorney and senior counsel. The enquiry that followed was recorded and the appellant testified under oath. During the course of the proceedings he stated that if he had any previous convictions he would have disclosed them but that he had no such convictions.

[39] The appellant also denied ever having encountered a person by the name of Enver Mohamed Dawood. When the Master raised the issue of the conviction of Mr Dawood on 92 counts of fraud in 1978, and stated that this person had the same identity number as the appellant, the appellant's legal team objected,

[10] Quoted in para 19 of this judgment.

wanting to know what information was available to the Master in that regard. They then ended the enquiry. Later that day, the Master wrote to the appellant's attorney enclosing documentation which illustrated that the appellant was formerly known as Enver Mohamed Dawood and had changed his name to his current name on 22 June 1981. That is now common cause, as is the fact that the appellant was indeed the person who was convicted on 92 counts of fraud as had been reported in The Citizen newspaper, that the evidence he gave in that respect was false, and that he had lied to the Master under oath.

[40] Despite having been found out, the appellant did not readily concede that to be the case. Although ill-tempered correspondence passed between his attorney and Ms Rossouw in which the latter was accused of various abuses, the appellant was not prepared to admit that he was indeed the same Mr Dawood who had previously been convicted of 92 counts of fraud. In the absence of a reply to that inquiry, Ms Rossouw informed the appellant on 25 August 2011 that he should advance reasons by Monday 29 August 2011 why he should not be removed from the Master's panel of liquidators and trustees. This was ignored.

[41] The appellant's previous convictions were not the only subject of correspondence between the Master and the appellant. On 25 August 2011, Ms Rossouw wrote to him, raising the issue of the payment of R3 million already mentioned, made to Aurora on 2 February 2010, and that the bank statements of Aurora reflected various substantial payments made either to SBT Trust or himself between 2 February and 3 May 2010. Ms Rossouw went on to say that 'given the status of Aurora as the preferred bidder at the time', she would appreciate an explanation for these payments.

[42] In reply, the appellant stated that he had no record of a payment of R200 000 made by Aurora to SPT Trust on the 2 February 2010, and asked for proof. He also stated that a payment of R6 886 made by Aurora on the 17 February 2010 was the reimbursement of a return airline ticket to Cape Town relating to a meeting scheduled between Mr Hulley, a director of Aurora, and himself representing the joint provisional liquidators. Insofar as the other payments were concerned, the appellant explained that in January 2010 the joint liquidators had been approached by Aurora for financial assistance as it had cash flow constraints and needed assistance to pay some wages and salaries for employees on one of the mines (the eighth respondent's East Rand mine) so as to preserve its on-going operations in the hope that Aurora could secure funding to conclude the mine's purchase. This had led to the loan of R3 million.

[43] The Master states that she was astonished by this as the lack of cash flow would have been a good reason for the joint provisional liquidators to have cancelled their contract with Aurora, which would have been preferable to helping Aurora financially. As she was also concerned about financial assistance having been rendered to Aurora, she investigated the issue and ascertained that all the other joint liquidators either denied knowledge of the loan and Aurora's request for assistance, or said they could not recall the incident.

[44] This seems to have been, so to speak, the straw that broke the camel's back. In the light of all this information, Ms Rossouw wrote to the appellant on 5 September 2011 to inform him that she had decided to remove him from the panel. In doing so she, inter alia, stressed the necessity for the persons appointed as liquidators or trustees to be honest and accountable to the Master and for them to respond to reasonable queries from the Master both promptly and fully. She then chronicled her complaints against the appellant to which I have already

referred, arising both before and after his removal as joint liquidator of the Pamodzi Group (she did not rely on the false letter prepared by Smit), and concluded 'the Master can have no confidence in your candour, integrity or transparency (and) cannot entrust the administration of companies in liquidation and sequestrations to you'.

The appellant's response to his removal from the panel

[45] The appellant neither responded to this letter nor sought to contradict its terms. He also did not take any steps to set aside the decision to remove him from the panel. Instead, in an interview published in the press, he once more denied being a convicted fraudster, stated that he should be awarded a medal for infusing R3 million into Aurora, asserted that the counts of fraud and theft had been 'made up' and called his fellow liquidators 'liars'. No doubt it was in the light of this that, when the Master delivered an answering affidavit in the review proceedings, it was accompanied by a counter application, part of which was conditional on the appellant being granted any relief in his application and part of which was for a declaratory order confirming the appellant's removal from the panel and declaring him to be disqualified from appointment as a liquidator or trustee in terms of certain provisions of the Companies Act and the Insolvency Act.

[46] Be that as it may, the appellant was of the view that the main reason for the Master's decision to remove him from the panel had been his previous convictions for theft and fraud. Instead of seeking to have his removal from the panel set aside, as he had done when removed as a Pamodzi liquidator, he decided on an alternative course. He applied to the Department of Justice for a Presidential pardon under s 84(2)*(j)* of the Constitution which, if granted, he felt would overcome the obstacle he faced. It seems that in this application he claimed for the first time that it was not he, but his uncle, who had committed

the offences of fraud and theft in respect of which he had been convicted in 1978.

[47] In a lengthy response to the pardon application, Ms Rossouw, on behalf of the Master, expressed the view that a pardon would discredit and make a mockery of the pardon process. In justifying her stance, she detailed the appellant's actions which she had found made him unsuitable to act as a liquidator, summarising her complaints as follows:

'87. In the circumstances, I confirm that I removed Mr Motala from the Master's panel of approved liquidators and trustees as

87.1 he has substantial previous convictions;

87.2 he did not disclose those convictions to the Master when he was placed on the panel of approved liquidators;

87.3 he evaded the Master's questions concerning those convictions and then lied to the Master both in correspondence and under oath concerning those convictions. If he is to be believed that the crimes were in fact committed by his uncle then he failed to disclose this fact to me despite being given ample opportunity to do so;

87.4 he refused to assist the Master in the investigation in respect of the Companies;

87.5 he exposed himself to a conflict of interest by lending money to a company that was attempting to purchase assets that he, as liquidator, was selling; and

87.6 he participated in the preparation and dissemination of a fraudulent letter sent by an attorney to him and communicated by him to his joint liquidators indicating that the attorney was holding money on behalf of the financier to the purchaser of the assets in question when, in truth and in fact, the attorney was not holding any such funds.'

Ms Rossouw went on to explain:

'I reiterate that Mr Motala's previous conviction is only one of the reasons why he was removed from the panel. He was well aware of all the other reasons that I have set out . . . Despite this he has created the impression that it is because of this previous conviction that he cannot take appointments as a liquidator or trustee. This is simply not correct.'

[48] On 27 March 2012, the appellant was advised by the Department of Justice that rather than seeking a pardon, it would be more appropriate for him

to apply for an expungement of his convictions under s 271B of the Criminal Procedure Act 51 of 1977. On 12 July 2012, the appellant therefore withdrew his pardon application and applied instead for such an expungement. For some reason it took some 20 months until 28 November 2013 before the State President granted him the expungement he sought. Not only did the certificate of expungement relate to his conviction of theft and 92 counts of fraud on 5 December 1978, but for good measure and for some inexplicable reason the appellant's conviction of driving at an excessive speed for which he had been convicted in December 1997 and sentenced to a fine of R800 or 80 days' imprisonment, was also cleared from his name!

[49] Armed at last with a certificate of expungement, the appellant's attorney wrote to the Master on 11 December 2013 stating that the appellant's previous convictions had now been expunged and requesting his reinstatement to the panel. In doing so, the attorney stated:

'2.1 Our client wishes to mention that the circumstances of his conviction some 35 years ago has been fully explained to the authorities. The conviction had a political background, and arose in the time when he, as a person of colour, suffered discrimination and persecution, together with all others like himself.

2.2 If necessary, our client can provide you with the full details of those distant events.'

[50] On 20 January 2014, the Master refused to accede to the request to reinstate the appellant to the panel. Referring to her letter of 5 September 2011 which set out her various reasons for removing the appellant from the panel in the first place, Ms Rossouw stated that irrespective of the expungement of his convictions, the remaining reasons still stood. This was in accordance with the view she had expressed in regard to the appellant's pardon application quoted above.[11] Disappointed, the appellant then requested the Minister of Justice to

[11] See para 46 above.

instruct the Chief Master to reinstate him on the panel. This, the Minister declined to do. On 3 March 2014, he responded by telling the appellant that the pending litigation should take its normal course and it could be improper for him to assume the powers of review vested in courts.

[51] One would have thought that, logically, once he believed that the obstacle of his previous convictions had been removed, the appellant's obvious course would have been to challenge the January 2014 decision not to reinstate him to the panel. However he did not do so (indeed, to this day he has not done so). Despite both the Master's refusal to reinstate him to the panel and the Minister's refusal to become involved in the dispute, a further year passed without the appellant taking any steps either to challenge the Master's latest decision or to further the litigation that had been left hanging in the air since December 2011.

The amended relief

[52] In February 2015, more than three years after the counter-application had been lodged, and three and a half years after he had been removed from the panel, the appellant filed a supplementary founding affidavit. The purpose of this affidavit was threefold; first, to supplement the appellant's original founding affidavit; second to act as an answering affidavit to the Master's counter-application; third, to support an amended notice of motion which introduced, in the alternative to the relief originally sought (that the appellant's removal as a liquidator in the Pamodzi Group be set aside and that he be reinstated) the following, additional prayers:

'5. Reviewing and setting aside the decision of (the Master) of 20 July 2011 to conduct an enquiry in terms of s 381 of the Companies Act and the entire proceedings conducted in terms of that section.

6. Declaring that the (appellant) is qualified to be nominated or appointed as a liquidator or trustee in terms of the Companies Act 61 of 1973 and the Insolvency Act 24 of 1936.

7. Reviewing and setting aside the decision of (the Master) of 5 September 2011 to remove the (appellant) from the (the Master's) panel of approved liquidators and trustees.
8. Ordering (the Master) to reinstate the (appellant) to the (the Master's) approved panel of liquidators and trustees.'

[53] It was in this supplementary affidavit of 23 January 2015 that the appellant first disclosed to the Master his version as to how it had come about that he had been convicted in the first place. The culmination of a long and involved story set out in the affidavit was that in order to protect his uncle, an anti-apartheid activist, from being arrested and imprisoned, and to facilitate his uncle's flight to Swaziland, the appellant 'took the rap' (to use a colloquial expression) for his uncle and pleaded guilty to the various counts of theft and fraud his uncle had committed with a credit card. He alleged that his uncle, a practising lawyer, had told him both that due to his youth he would probably receive a suspended sentence and that the record of the conviction and sentence could not be raised against him after a period of ten years, provided he was not convicted on any further criminal offences during that time. In these circumstances, so the appellant averred, he was convicted and sentenced to 18 months' imprisonment wholly suspended for five years on various conditions. He was tried, convicted and sentenced under the surname of Dawood as that was the name reflected in his identity book at the time. His actions taken on behalf of his uncle had allowed the latter to safely flee the country. He denied that he had subsequently changed his name to Motala as a ruse to disguise his criminal past.

[54] For present purposes, the truthfulness of this version is neither here nor there. For the reasons set out in due course, of greater relevance is (a) the fact that the appellant had repeatedly lied to the Master, at times under oath, both that he had not been convicted of those charges and he did not know of the

Mr Dawood who had; and (b) the delay that occurred before this version was offered.

[55] It took some eight months before Ms Rossouw, on behalf of the Master, filed an affidavit dated 9 October 2015. Its purpose, too, was expressed to be three-fold: first, to show that that the appellant did not have a case on the merits in regard to the additional relief sought in the amended notice of motion; second, to be construed as an answering affidavit to the appellant's supplementary founding affidavit; and third, to be construed as a replying affidavit to the appellant's answering affidavit. After the lapse of almost a further eight months, the appellant responded to this by way of an affidavit entitled 'replying affidavit' deposed to by him on 25 May 2016. In this way the appellant's application, which had commenced in 2011, proceeded at the pace of a snail to come before the court *a quo*, whose judgment was ultimately delivered on 9 October 2017.

[56] In dismissing the appellant's application, the learned judge reasoned, inter alia, that the relief sought for the first time in the amended notice of motion in regard to the decisions of 20 July 2011 (to conduct an enquiry under s 381 of the Companies Act) and 5 September 2011 (to remove the applicant from the panel) was first introduced on 5 February 2015 when the supplementary founding affidavit was filed. This was more than three years after such decisions were taken, and there was no adequate explanation for such delay. There was also no reasonable prospect of success in regard to reviewing those decisions, and the delay could in all the circumstances not be condoned. The decisions therefore stood and as a result the appellant was not entitled to the relief claimed.

Discussion

[57] With due respect, I find certain of the reasoning of the court *a quo* to be somewhat confusing. For example, it was held that the Master's counter-application was conditional upon the appellant achieving a degree of success in his application. Although certain of the relief the Master sought was subject to that condition, the prayer for confirmation of the decision to remove the appellant was specifically sought unconditionally.

[58] Importantly, the court *a quo* also held the Master's action in removing a person from the panel (as was done in respect of the appellant) not to be administrative action, but went on to find it was necessary for the appellant to obtain an extension of time under s 9 of PAJA[12] in order to review the Master's decision to remove him from the panel. This was incorrect if the decision did not constitute administrative action. In review proceedings falling outside the ambit of PAJA the common law undue delay rule applies and the delay must be explained with reasons provided why the court should overlook it. It does not require a formal application for condonation, unlike the position under s 9 of PAJA, although any facts relied upon to justify the delay must appear from the affidavits.[13]

[59] The judgement also failed to deal with the fundamental issue of whether the appellant was disqualified from appointment as a liquidator, whether provisional or final, and as such was at the time of his removal from those positions in the Pamodzi Group, disqualified from filling them and from being reappointed to them in accordance with the relief he initially sought in his review. It also disregarded the fact that if the appellant was disqualified, then his removal from the panel was justified on that ground alone. The effect would

[12] Referred to below.
[13] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 paras 46-53.

be that both decisions by the Master were unimpeachable and the appellant was not entitled to the relief he was seeking in regard to either of them.

[60] In my view, then, the issues in this case were therefore:

(a) Whether in 2011 the appellant was disqualified from holding an appointment as a provisional or final liquidator under s 372*(f)* of the Companies Act?

(b) If so, whether any of the relief he was seeking could be granted?

(c) Whether the decisions in question constituted administrative action envisaged by PAJA?

(d) Whether the delay in seeking to review the decision to remove him from the panel should have been condoned in terms of s 9 of PAJA or overlooked if the decision did not constitute administrative action?

(e) Whether his removal from the panel, if not set aside, rendered moot the review of the decision to remove him as liquidator, with a final or provisional, for the Pamodzi Group of companies?

(f) Whether in any event either decision to remove was reviewable on the grounds of unreasonableness, irrationality or an incorrect appreciation of the relevant facts or for procedural unfairness?

(g) Whether the Master's decision of 20 January 2014 refusing to reinstate the appellant to the panel rendered nugatory the relief sought by the appellant either at the outset or by way of the proposed amendment to his notice of motion?

(h) Costs.

Disqualification

[61] First, one knows as a matter of fact that in 1978 the appellant was convicted on one count of theft of a credit card and 93 counts of credit card fraud. Those counts were taken together for the purposes of sentence, he was

sentenced to 18 months' imprisonment suspended for five years on various conditions, including that he repay an amount to a bank. As already mentioned, s 372*(f)* of the Companies Act prescribes that 'any person who has at any time been convicted . . . of theft (or) fraud, . . . and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding R20' may not be appointed as a liquidator of a company. In *Bhana v Dönges NO & another* 1950 (4) SA 653 (A) at 657H-658A this Court held that:

'. . . a sentence of imprisonment, the whole of which is suspended on a specified condition, is as much a sentence of imprisonment as a sentence of imprisonment none of which is suspended. It is true that the sentence cannot be enforced unless the condition is breached but it remains in force and can be carried into execution if during the period of its suspension the accused breaches the condition. The test imposed by the Legislature is not whether an accused has served a term of imprisonment . . . but whether he has been sentenced to imprisonment.'

[62] It is apparent from this that a person who has committed an offence envisaged by s 372*(f)* of the Companies Act and sentenced to either a period of imprisonment, either suspended or unsuspended, or to a fine exceeding the trivial sum of R20, is disqualified from being appointed a liquidator. The appellant was convicted of 94 such offences and was sentenced to a fairly lengthy period imprisonment, albeit suspended. The fact that, according to him, it was not he but his uncle who had committed the offences, is irrelevant. The disqualification is founded on a conviction. It would be of no help to candidates seeking appointment to allege that they had been wrongly convicted. The conviction in itself operates as a bar to appointment. Thus even if it was the appellant's uncle who had committed the offences, it was the appellant who had been convicted and sentenced, and who therefore faced the disqualification.

[63] Consequently, when the decision was taken in September 2011 to remove him from the panel, the appellant was a person who was at the time disqualified

from being a liquidator. In fact, he had been so disqualified throughout his career in the insolvency industry. This constituted an obvious answer to his opposition to the application he had brought to have his removal as a liquidator of the Pamodzi Group set aside. Presumably he realised this, and for that reason set about applying to have his convictions expunged.

[64] The fact that the appellant's convictions and sentence were in fact subsequently expunged, although potentially relevant in the event of him thereafter applying to be restored to the panel, is irrelevant in the consideration of the lawfulness of the decision of September 2011 when they still operated to disqualify him. Section 379(1)*(a)*of the Companies Act provided that the Master may remove a liquidator on the ground 'that he was not qualified for . . . appointment . . .'. Although that section conferred a discretion upon the Master, it confers a power with a duty to exercise it in all appropriate cases.[14] I would venture to suggest that it would only rarely be exercised in favour of not removing a person disqualified from holding an appointment eg where it is at a late stage of the winding-up, where additional expenses would be incurred, or where to do so would for some reason be to the clear disadvantage of creditors.[15] No such circumstances readily present themselves in this case, particularly as the appellant was but one of a number of co-liquidators who would presumably be able to continue with the winding-up process to the advantage of creditors.

[65] Whether the expungement of the appellant's convictions would result in him no longer being disqualified is a question that does not arise in this case. It clearly does not provide a basis for questioning the decision to remove him

[14] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473I-474C.
[15] Cf *Standard Bank of South Africa Ltd v The Master of the High Court & others* 2009 (5) SA 13 (E) paras 7-11 and the authorities there cited.

from the panel in September 2011, when he was disqualified. It would have been relevant to a review of the decision not to reinstate him to the panel, but as already noted, he chose not to pursue that route. There is nothing in s 271B of the Criminal Procedure Act 51 0f 1977 dealing with the consequences of expungement. The disqualification provision speaks only of the fact of conviction, which may have occurred in another country, and like those in ss 372*(d)* and *(g)* it is not time-bound, unlike the disqualifying provision in s 372*(c)*. In dealing with the question of amnesty, the Constitutional Court held in *McBride*[16] that it did not preclude an assertion of historical fact (in that case that McBride had committed murder), and expungement may fall into the same category. As the issue may arise in the future, it is best not to express any view on it. For the present, the first two issues must be determined against the appellant. It is, however, desirable to deal with the other issues to show that, in any event, the appellant was not entitled to succeed.[17]

Administrative action

[66] So was the court *a quo* correct in its expressed view that Master's removal of the appellant from the panel was not administrative action as envisaged by PAJA? The definition of 'administrative action' as set out in PAJA, has been criticised in certain quarters for being convoluted, cumbersome and failing to provide certainty.[18] However, in *Grey's Marine*,[19] in an exposition and analysis repeatedly approved by the Constitutional Court,[20] Nugent JA explained:

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[16] *The Citizen 1978 (Pty) Ltd & others v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC).
[17] *Spilhaus Property Holdings (Pty) Ltd & others v MTN & another* [2019] ZACC paras 44 and 45.
[18] See eg *Minister of Education v Beauvallon Secondary School* [2015] 1 All SA 542 (SCA) para 11 and the cases there cited.
[19] *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 21.
[20] See eg *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33.

'What constitutes administrative action - the exercise of the administrative powers of the State - has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications. It is not necessary for present purposes to set out the terms of the definition in full: the following consolidated and abbreviated form of the definition will suffice to convey its principal elements:
"Administrative action means 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 Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic 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."'

[67] There is no simple litmus test to determine when an action or decision is of an 'administrative nature'. It is therefore necessary, in the light of the facts of each particular case, to embark on 'a close analysis of the nature of the power or function and its source or purpose' – per Wallis J in *Sokhela*,[21] cited with approval by this court in *Scalabrini.*[22] In doing so, it should be remembered as was stressed by the Constitutional Court in *SARFU*[23] that the source of the power, albeit not necessarily decisive, is an important factor in this regard. Also important are the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters which are not administrative and, on the other, to the implementation of legislation, which is. Also of crucial importance is the requirement in the definition that the action or decision must be one '. . . which adversely affects the rights of any person and which has a direct, external legal effect'.

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[21] *Sokhela & others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & others* 2010 (5) SA 574 (KZP) para 61.
[22] *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) para 52.
[23] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) paras 142-143.

[68] In arguing that the compilation of the panel by the Master was not administrative action, the appellant relied upon the decision of Tuchten J in *Musenwa*.[24] In that matter the applicant's name had been on a list kept by the Master of previously disadvantaged persons who were suitable for appointment as joint liquidators or trustees. This list had been compiled pursuant to a policy determination made by the Minister under s 15(1A)*(a)* of the Companies Act and s 158(2) of the Insolvency Act, 1936. Being of the view that he had misappropriated funds from a company of which he was co-liquidator, the Master removed the applicant from the list and from any cases in which he had been appointed. Proclaiming his innocence, the applicant applied to be restored to the list, contending that in removing his name the Master had performed an administrative action as envisaged by PAJA without affording him a proper hearing. He conceded that a full enquiry by the Master had been held into the circumstances in which the money had been misappropriated and that he had given evidence at the enquiry, but argued that he was entitled to more; that he ought to have been given a charge sheet; and that procedures similar to those in a disciplinary enquiry should have been followed.

[69] In reaching his decision, Tuchten J expressed the view the Master's list (or panel) was not compiled in the process of implementing legislation but in the process of implementing the socio-political policy of the Minister and, as such, did not constitute administrative action.[25] In dismissing the application he went on, however, to hold that even if he was incorrect on that issue, the appellant had enjoyed a fair hearing and the Master had reasonable grounds for believing the applicant not to be suitable person for appointment to the office of liquidator.

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[24] *Musenwa v Master of the North Gauteng High Court* 2010 JDR 1354 (GNP).
[25] Paragraph 11.

[70] The 'list' discussed by Tuchten J in *Musenwa's* case was compiled in accordance with a policy directive issued by the Minister of Justice under his power under s 158(2) of the Insolvency Act 24 of 1936 and s 15(1A)*(a)* of the Companies Act which essentially provided for the appointment of previously disadvantages persons as liquidators in rotation, in order to correct past injustices. It was not the panel of competent persons kept by the Minister as a matter of long-standing practice. In *The South African Restructuring and Insolvency Practitioners Association*,[26] the compilation of a list compiled under a subsequent policy directive of the Minister, but which also prescribed a formula to be used in the appointment of liquidators compiled under the Minister's formula, was challenged on review in the Western Cape Division of the High Court. It held that the policy directive had been issued in the exercise of the Minister's power to develop and implement national policy in terms of s 85(2)*(b)* of the Constitution and, as such, did not constitute administrative action.[27] However, it went on to hold that the policy directive did not pass constitutional muster and had to be set aside.

[71] That order was confirmed on appeal both by this Court[28] and, subsequently, the Constitutional Court.[29] But in doing so, the question whether the compilation of the panel pursuant to the Minister's policy directive constituted administrative action was not addressed. The decisions were based on a conclusion that the policy, which required the application of an inflexible roster, was arbitrary, capricious, irrational and the product of a power used for a purpose other than that for which it had been bestowed. These judgments are

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[26] *The South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development* [2015] 1 All SA 589 (WCC).
[27] Paragraph 106.
[28] *Minister of Justice and Constitutional Development & another v The South African Restructuring and Insolvency Practitioners Association & others* (693/15) [2016] ZASCA 196 (2 December 2016); 2017 (3) SA 95 (SCA); [2017] 1 All SA 331 (SCA).
[29] The *SARIPA* case fn 1.

therefore no authority for the proposition that the Master's compilation of a panel of the nature of the one here in issue, which was not compiled pursuant to the Minister's policy directive, is an administrative action.

[72] Establishing a panel of approved liquidators and trustees facilitates the exercise of the Master's discretion in making appointments from people in whom the Master has faith. Ms Rossouw explained, that the panel provides a list of persons who have, so to speak, 'passed the test' and shown themselves to have the necessary skills, qualifications, experience and expertise to be appointed as liquidators and trustees. The panel thus constitutes a pool of persons whom the Master is satisfied to appoint, so that whoever is ultimately appointed will be drawn from it. Although the keeping of this panel has no statutory base, it is a tool used for the implementation of a power bestowed by legislation upon the Master; a factor which weighs heavily in favour of the compilation of the panel being of an administrative nature.

[73] Indeed, in *Lipschitz*,[30] albeit well before the days of PAJA, it was held that the discretion vested in the Master to appoint a liquidator or trustee was exclusively an administrative one. In more recent times, in *Ex Parte the Master of the High Court South Africa (North Gauteng)*[31] it was held that the Master is the only official authorised to appoint liquidators and provisional liquidators and that, in doing so, the Master performs an administrative function.[32] That was also held to be so by this Court, albeit without detailed scrutiny, in *City Capital.*[33]

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[30] Footnote 1.
[31] *Ex Parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 306 (GNP).
[32] Paragraph 32.
[33] *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper & others* 2018 (4) SA 71 (SCA) para 43.

[74] As the compilation of the panel involves, in essence, the drawing up of a roll of persons whom the Master is be prepared to appoint, those whose names are not on the panel, will not be appointed. Appointment to the panel is thus akin to the issue of a licence to work as a liquidator or trustee and, as this Court remarked in *Scalabrini*,[34] 'such decisions are quintessentially administrative decisions that have always been subject to judicial review'. By the same token, a removal from the panel is essentially akin to the withdrawal of a licence as it will result in the person concerned no longer being considered by the Master for appointment. Appointment to the panel and removal therefrom are really flip sides of the same coin. The cardinal decision in each is whether the person concerned is a suitable person to be appointed.

[75] An appointment to the Master's panel or a removal therefrom (or indeed a refusal to appoint a person to such panel) certainly adversely affects the rights of persons, including not only the individuals concerned but the creditors as well.[35] These decisions therefore have 'a direct, external legal effect' as required by PAJA's definition of administrative action. Without being on that panel, a person will not be appointed a liquidator or trustee. In the light of these considerations, I am of the view that the formulation of that list – a decision as to who is suitable to hold an appointment – is clearly administrative action. To the extent that the judgments in *Musenwa*, as well as in the court of first instance in *The South African Restructuring and Insolvency Practitioners Association* case and in the court *a quo* in the present matter, may be construed to the contrary (albeit dealing with a ministerial policy directive which is not here the case) they must be regarded as having been wrongly decided.

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[34] Paragraph 95.
[35] *Ex Parte The Master of the High Court South Africa (North Gauteng)* para 30.

Delay

[76] The immediate problem that this conclusion holds for the appellant lies in s 7(1)*(b)* of PAJA which provides that any proceedings for judicial review must be instituted without unreasonable delay 'and not later than 180 days after the date . . . on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it . . . .' Section 9(1)*(b)* of PAJA, as read with s 9(2) goes on to provide that this 180 day period may be extended by a court for a fixed period where the interest of justice so require.

[77] In the present case, no such extension was ever sought, and as at first blush the appellant was obliged to review the decision to remove him from the panel within 180 days of receiving Ms Rossouw's letter of 5 September 2011, the appellant appears not to have complied with this requirement. The Master contends that the first indication that the appellant sought to review his removal was when the amended notice of motion was filed in February 2015, some three and a half years later. The court *a quo* accepted this to have been the case and that despite its view that such a removal was not administrative action, an application for condonation under s 9 of PAJA was therefore required. Although there was no application for an extension under s 9, it went on to accept that the appellant's request for condonation for the late filing of the supplementary affidavit embraced an application to condone the failure to timeously lodge the additional grounds of review – but ultimately decided not to condone such delay ie not to grant an extension under s 9.

[78] Although at the end of the day it does not affect the outcome, in my view the court *a quo* erred in its approach. An application either for the delay to be overlooked or for condonation under s 9 of PAJA, was never mentioned in the appellant's papers. An applicant seeking such relief must do so expressly and fully motivate why it should be granted. This the applicant just did not do. On

the contrary, his attitude, both *a quo* and in this court, was that such an application was not required.

[79] In this regard the appellant relied upon the Master's counter-application having been filed on 5 December 2011, some 90 days after the appellant had been removed from the panel. The Master alleged therein that the appellant was justifiably disqualified from being a liquidator and there was sufficient basis for the court to confirm his removal. In the light of this, so it was argued, the introduction of the counter-application and the amended notice of motion rendered it unnecessary for the applicant to seek to review the decision to remove him by way of a separate application as the appellant was 'entitled to defend himself against the attempt by the Master to enforce that decision by contending that the decision is invalid and . . . should be set aside'. Accordingly, so the argument went, 'the question of the 180-day limit simply does not arise' and the amendment to the notice of motion to include prayers that the Master's decision to remove him from the panel was 'strictly unnecessary'.

[80] This cannot be accepted. The underlying purpose of the Master's request for a declaration confirming the appellant's removal from the panel, whether rightly or wrongly, was to strengthen her hand by having the court recognise his removal and then to use that as a ground for his disqualification. This relief was sought on the same basis that litigants sometimes ask for an order for the cancellation of a contract that they have already cancelled. The refusal of that relief would not have resulted in the appellant being reinstated to the panel, nor would it have implied that his removal had been unlawful. In order to secure his reinstatement to the panel, he was obliged to review the decision to remove him. What made it even more important was that, unless he was reinstated, he would not have been entitled to be reinstated as a liquidator, final or provisional, to the

Pamodzi Group of companies. The end result is that it was essential for him to challenge his removal by judicial review which he had to do so within 180 days or seek condonation of his failure to do so. He did neither. For those reasons the court *a quo* was correct to hold that he was out of time when he first sought to challenge his removal in 2015.

Were the removals unlawful?

[81] As already detailed, the appellant was removed from the panel and as a joint liquidator of the Pamodzi Group at a time he was disqualified from holding those positions due to his previous convictions. For that reason alone, his removal was not only not unlawful but obligatory and the Master would have failed to properly discharge her duty and obligations had the appellant not been removed. Apart from that, there is the fact that the appellant had deliberately and persistently lied to Ms Rossouw about his convictions. Alerted by the article in The Citizen newspaper, she was obviously concerned about whether the appellant was the person who had been convicted in 1978. The cause of such concern was obvious; if he was indeed the person who had been convicted, he was potentially disqualified to be a liquidator. However, as I have already detailed, instead of coming clean and telling the truth, the appellant was initially evasive and, subsequently, absolutely dishonest in regard to the issue. This farce culminated in him falsely denying under oath that he knew a person by the name of Dawood or that he had been convicted of the offences in question under that name. The appellant's later explanation that he had lied in the situation he found himself in when 'ambushed' by the Master at the enquiry on 17 August 2011, is untenable. It is quite clear from the correspondence which had preceded his giving evidence under oath at the enquiry that the possibility of him being the person who had been convicted as alleged in the newspaper article, was of paramount concern to the Master and, indeed, the reason behind the enquiry being held. It would have been a simple matter for

the appellant to have then explained that it was he who had been convicted and the circumstances under which that conviction had taken place. All he had to do was explain that he had assumed guilt to protect his uncle from being arrested. Instead he lied under oath, stating that he would have disclosed any previous convictions, and denying both that he had any such convictions and that he had any knowledge of a person known as Enver Mohamed Dawood.

[82] As I have mentioned, the appellant contended that he had been unable to tell the whole story as the manner his uncle had escaped into exile was not a matter of public knowledge and that, in accordance with the practices of the ANC, he was not permitted simply to reveal the events that took place without first consulting the organisation. This is somewhat dubious to say the least, particularly taking into account the years that have elapsed since the event and the restoration of democracy in this country. But even accepting that part of his story to be true, he could easily have explained why he had pleaded guilty in respect of offences committed by his uncle without disclosing how his uncle came to escape into exile. After all, the escape into exile had little to do with why he pleaded guilty, which he now says was in order to protect his uncle from being arrested by the police. Even if for some reason permission was required to disclose how his uncle had escaped, there seems to have been no reason why he could not have asked for it as soon as he became aware that the Master was concerned about whether he had been convicted of theft and fraud. Indeed that is what he ought to have done before he was ever appointed a liquidator.

[83] In her letter to the appellant on 5 September 2011, Ms Rossouw drew attention, to the responsibility the Master owes to the public, and members of companies and their creditors, to ensure that the winding-up of companies and the administration of sequestrations are conducted in their best interests ‘in a context of absolute honesty and transparency’. She stated that it was essential

for the proper carrying out of the Master's responsibilities for the persons appointed as liquidators and trustees not only to be scrupulously honest and transparent, but also to be seen to be so. In all of this, she was indisputably correct.

[84] Ms Rossouw went on to state that due to the appellant's convictions and his lying under oath, she felt that he could not be entrusted with the administration of companies in liquidation as well as sequestrations involving, as they do, substantial funds in the insolvent estates. It seems to me to go without saying that scrupulous honesty is required from persons holding the position of liquidator or trustee of an insolvent estate. That indeed is reflected in the provisions of s 372*(f)* of the Companies Act which provides for the disqualification of persons convicted of certain criminal offences.[36] The appellant's previous convictions and his evasiveness and untruths relating thereto which I have chronicled above, show without doubt that the Master was correct in reaching the conclusion that she did. Her decision was based upon a proper and correct appreciation of the facts, and was neither irrational nor unreasonable.

[85] On this basis alone, the appellant's challenge to his September 2011 removal from the panel must fail. But the appellant's lies and criminal convictions were not the only relevant considerations which were taken into account. As set out in her letter of 5 September 2011 the Master also had regard to the appellant's conduct in the winding-up of the Pamodzi Group of companies, particularly his refusal to answer any questions at the s 381 enquiry[37] and his loan of R3 million to Aurora and receipt of repayments, all

[36] See further s 372*(d)* of the Companies Act where the disqualification arises from the person's removal from an office of trust by the court.
[37] Paragraphs 24 and 25 above.

without the knowledge of his joint liquidators or the Master and which compromised his integrity.

[86] These additional considerations were validly taken into account in considering whether the appellant should remain on the panel. Under s 379*(b)* of the Companies Act, the Master is empowered to remove a liquidator if 'he has failed to perform satisfactorily any duty imposed upon him by (the Companies Act) or to comply with the lawful demand of the Master'. The circumstances which prevailed at the Pamodzi Group's mines – including the stripping of headgear and other assets, the failure to pay wages and other dues, the impoverishment of workers – in themselves spoke of the liquidators not performing their duties properly. The Master was entitled to know exactly why all of this was going on; and it was the appellant's duty, as liquidator, not only to know why but to explain why to the Master. Instead, the appellant simply refused to say anything. This made the position of the Master intolerable, as I have already dealt with earlier in this judgment,[38] and the decision to remove him as liquidator of the Pamodzi Group was not only understandable but justifiable. It, too, was based upon a correct appreciation of the facts and was neither irrational nor unreasonable.

[87] The conflict of interest arising from the appellant's loan of R3 million to Aurora and its repayment in tranches should also not be underestimated. Although it may have helped Aurora's short term difficulties, it resulted in the appellant as the liquidator of an insolvent company having a direct interest in the running of that company's business and becoming a creditor of the company entrusted with running the insolvent's mines. Moreover, the appellant received repayments of funds which Aurora could have used to comply with its

[38] Paragraph 26 above.

obligations under its agreements to run the mines. As the Master said, this was adverse to the interest of creditors who were entitled to know that Aurora was in the position in which it found itself and may well have decided to cancel the sale had they known that it could not pay what it had agreed.

[88] In *Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA) this Court, stated that liquidators should be wholly independent and occupy a position of trust not only towards creditors but also the companies in liquidation whose assets vest in them.[39] It went on to say that liquidators should expected to act impeccably in the liquidation process,[40] and cited with approval[41] the following passage in *Hudson & others NNO v Wilkins NO & others* 2003 (6) SA 234 (T) para 13:

'A liquidator may be removed from office if there is sufficient suspicion of partiality or conflict of interest, since a liquidator must be and appear to be independent and impartial. He or she must be seen to be independent . . . A Court will exercise its discretion to remove a liquidator if it appears that he or she, through some relationship, direct or indirect, with the company or its management or any particular person concerned in its affairs, is in a position of actual or apparent conflict of interest.'[42]

[89] The appellant, through making this loan and receiving repayment from the company supposed to be running the Pamodzi Group's mines, all without the knowledge of the Master or his joint liquidators, clearly lacked impartiality and put himself in a situation of conflict of interest. In itself, this may have been sufficient justification for his removal. As mentioned earlier, Ms Rossouw certainly regarded it in a very serious light,[43] and with ample justification.

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[39] Paragraph 1.
[40] Paragraph 133.
[41] Paragraph 125.
[42] See further *Ma-Afrika Groepbelange (Pty) Ltd & another v Millman & Powell NNO & another* 1997 (1) SA 547 (C) at 561H-J also cited with approval in *Standard Bank v The Master of the High Court* para 126.
[43] Paragraph 27 above.

[90] Possibly certain of the factors that I have mentioned above, individually, might not have required the appellant's removal as liquidator. But that is an issue unnecessary to consider. Cumulatively, there can be no doubt that the Master was perfectly entitled to remove the appellant from the panel for the reasons given in her letter of 5 September 2011. Importantly, that letter had been preceded by letters of 17 and 25 August 2011 which, read together, called upon the appellant to show reason why he should not be removed from the panel for these reasons. The Master acted fairly and responsibly in affording him the opportunity of being heard before taking the final decision. The appellant declined the invitation and made no representations relevant thereto. There is thus no reason to impugn the decision to remove the appellant from the panel.

[91] The decision of 5 September 2011 to remove the appellant from the Master's panel must therefore stand. As explained above, that renders nugatory any consideration of whether the Master's earlier decision to remove him as a liquidator from the Pamodzi Group is to be set aside. A resolution of that issue is simply moot as it will have no practical effect. Simply put, that decision was overtaken by the event of his subsequent removal from the panel. For these reasons the appeal must fail.

The Masters refusal to restore the appellant to the panel

[92] There is a further aspect that should be mentioned. In my view, the question whether the appellant was entitled to any of the relief he sought, either at the outset or in the amended notice of motion, was overtaken by subsequent events. As already mentioned,[44] in January 2014 the Master refused to restore the appellant to the panel. In essence this was the same decision that had been

[44] Paragraphs 48-49 above.

taken in September 2011 when his name was removed from the panel, namely that he was not a suitable person to be appointed as a liquidator or trustee. As I have said, a decision to remove from the panel is the flip side of a decision not to appoint to the panel. Both involve the same essential issue.

[93] For the reasons given, the decision in January 2014 not to restore the appellant to the panel was an administrative decision having a direct, external legal effect in that the Master would not appoint him as a liquidator or trustee. The appellant indeed argued that the appointment or removal of persons from the panel was administrative action, but contended that not seeking to have the Master's decision of January 2014 set aside did not result in its remaining extant. Instead he argued that although requested to reconsider the matter in the light of the expungement, the Master had 'made no new decision based on the expungement and had relied solely on her decision and reasons of 5 September 2011'. He therefore argued that in order to avoid endlessly being returned to the same place, as the 2014 decision was premised solely on the existence of the 2011 decision, it would fall if the latter was set aside. In this regard he relied on the judgment of this Court in *Seale* in which it was said that 'if the first act is set aside, the second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent'.[45]

[94] The argument is groundless. The Master was asked to reinstate the applicant on the panel due to a change in circumstances, namely the expungement of his previous convictions. The applicant, as he himself argues, was entitled to bring such an application at any time after his removal. But when he did, it was refused for the same reasons that the Master had removed him from the panel, save of course for the fact that his previous convictions had

[45] *Seale v Van Rooyen NO & others; Provincial Government, North West Province v Van Rooyen NO & others* 2008 (4) SA 43 (SCA) para 13.

been expunged. Those reasons had been spelt out earlier, including, in particular, the fact the appellant was a stranger to the truth who had lied to the Master and had acted in conflict with the interest of the creditors of a company of which he had been appointed liquidator. It is clear from the Master's reasons in dismissing the 2014 application that the change in the appellant's circumstances was not sufficient for her to feel that he could be reinstated to the panel. This was not a decision which depended for its validity on the first act as was the case in *Seale*. It was a separate and independent decision based on reasons similar, but not identical, to those which had prevailed when the appellant's name had been removed from the panel. But just as much as it had been an administrative action to remove the appellant from the panel, the Master's refusal to restore him to the panel constituted an administrative action.

[95] The appellant has never sought to review the latter decision and have it set it aside. That being so, it remains binding. It therefore renders nugatory the relief the appellant seeks in these proceedings as the validity of the earlier decisions of the Master is now irrelevant. The subsequent decision that despite the change in his circumstances (the expungement of his convictions) he remains a person whom the Master is not prepared to appoint, has that effect.[46]

[96] The relief which the appellant asks for would, if granted, therefore have no practical effect. The decision in 2014 that he is not a suitable person to be on the Master's panel, and which he has not challenged, results in the matters raised in the amended notice of motion no longer being live issues. The contrary submission by the appellant that they remain live and continue to have practical effect must be rejected. For this reason as well, the appeal must fail.

[46] Cf *City Capital* paras 43-44.

Costs

[97] That brings me to the question of costs. The general rule in civil litigation is, of course, that cost should follow the result. Counsel for the appellant however invoked the so-called principle in *Biowatch*[47] in arguing that should the appeal be dismissed, the appellant had been seeking to enforce his constitutional rights and should therefore not be mulcted in costs. The general rule laid down in *Biowatch* applies in constitutional matters involving organs of state, and operates to shield unsuccessful litigants from paying costs to the state in order 'to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights'.[48]

[98] However, although the review of a public officer's decision is a constitutional issue, that is not the end of the matter. The *Biowatch* rule does not constitute a licence to litigate with impunity against the state. As was stressed in *Biowatch* itself,[49] the mere labelling of litigation as 'constitutional' and dragging in specious references to the Constitution, is insufficient for the rule to apply. The issues at hand are to be genuine and substantive, and raise constitutional considerations relevant to their adjudication. As the Constitutional Court commented in *Lawyers for Human Rights*:[50]

'(The rule) does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, *Biowatch* said, if the constitutional grounds of attack are frivolous or vexatious, or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the "character of the litigation and [the litigant's] conduct in pursuit of it", even where the litigant seeks to assert constitutional rights.'

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[47] *Biowatch Trust v Registrar, Genetic Resources, & others* 2009 (6) SA 232 (CC); 2009 10 BCLR 1014 (CC).
[48] *Harrielall v University of KwaZulu-Natal* (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017) para 11.
[49] Paragraph 25.
[50] *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) para 18.

[99] In the present case, although the appellant sought a review of the Master's decision, this was no more than a civil challenge to an adverse administrative action which the appellant sought to overturn to the benefit of his own private pocket. It neither has a 'radiating impact on other private parties'[51] nor does it raise constitutional imperatives and considerations such as the interpretation of legislation[52] relevant to its adjudication. And as I have already pointed out, there is no discrete legal point of public importance which falls to be decided; which is also a relevant factor. Furthermore, for the reasons set out earlier in this judgment, the decisions the appellant was challenging arose from his own conduct in discharging his duties in relation to the Pamodzi Group; in concealing the grounds of his disqualification; and in his dishonest responses to the Master's legitimate enquiries. All these are relevant factors to be considered in regard to an order for costs.

[100] Furthermore, and importantly, it was only after the appellant had unsuccessfully sought to be re-admitted to the panel in 2014, an administrative action that he did not challenge, that he sought to breathe life into litigation that he had left to lie idle for years. Only then did he pertinently attack a previous administrative action which, in any event, was no longer relevant in the light of the Master's refusal to have him back on the panel. And even then, it took him a year after that refusal to act. In these circumstances, the appellant's continued attempt to introduce and persist in litigating issues that had been overtaken by events, was in my view frivolous and vexatious in the sense explained in *Lawyers for Human Rights*[53] in that it was unlikely to lead to a positive result in his favour. This is particularly so as he knew that his application to be restored to the panel had been refused, and had not sought to challenge that decision

[51] Per Sachs J in *Biowatch* para 28.
[52] Compare eg *Kruger v National Director of Public Prosecutions* [2018] ZACC 13 para 83.
[53] Paragraph 19.

which was an absolute bar to him achieving success on the amended notice of motion he thereafter sought to introduce.

[101] In these circumstances, I see no reason not to award costs against the appellant. Although, like the court *a quo*, the appellant's disgraceful and dishonest conduct tempted me to award costs on a punitive scale, at the end of the day, I feel that a would not be appropriate despite what, at first blush, also appears to have been a gratuitous smear attack upon the Master and others in the appellant's papers.

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

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L E Leach

Judge of Appeal

Appearances

For the Appellant:	A Subel SC (with him I B Currie)
Instructed by:	Knowles Husain Lindsay Inc, Sandton
	McIntyre Van der Post, Bloemfontein
For the Respondent:	J Suttner SC (with him P Cirone)
Instructed by:	The State Attorney, Johannesburg
	The State Attorney, Bloemfontein