

**SOME ADMINISTRATIVE LAW ASPECTS
OF STATE REGULATION OF INSOLVENCY
LAW REVISITED**

**Musenwa v Master of the North Gauteng
High Court (Unreported 54849/10) [2010]
ZAGPPHC 190 (5 November 2010)**

1 Introduction

A general analysis of the global norms recognised by international institutions worldwide yields the conclusion that the essential proposition of insolvency practitioners in all systems is the same: that every effective insolvency system requires competent and ethical insolvency practitioners who should have the experience and expertise necessary to deal with the range of business and legal issues which arise in insolvency matters (see Principle D8 of the World Bank's "Principles for Effective Insolvency and Creditor/debtor Regimes" http://siteresources.worldbank.org/INTGILD/Resources/ICRPrinciples_Jan2011.pdf (accessed 2011-08-30)). In *Standard Bank v The Master of the High Court* (2010 4 SA 405 (SCA)) the Supreme Court of Appeal also held that liquidators occupy a position of trust towards creditors and companies in liquidation and that they are required to be independent, to regard equally the interests of all creditors, and to carry out their duties without fear, favour or prejudice.

This contribution is a discussion of the recent decision in *Musenwa v Master of the North Gauteng High Court* ((Unreported) 54849/10) [2010] ZAGPPHC 190 (5 November 2010)) in which the core issue was to decide on the competence and integrity of an insolvency practitioner in order to decide whether the Master of the High Court (Master) acted lawfully in removing the practitioner from its panel. The note will attempt to underline the importance of a fresh approach by policy and law makers to the concept of regulation of South African insolvency law.

2 Facts

This matter was heard in the urgent court on 18 October 2010 in which the application was for interim interdicts, pending a review of a decision of the Master. The applicant sought relief from the court directed at, firstly restoring his name to the panel of previously disadvantaged persons held by the Master. In addition, the applicant sought various interim orders, pending the outcome of his review application, restoring him to his previous offices, interdicting the Master from removing the applicant in any further insolvent

estates and setting aside all decisions of the Master which had the effect of removing the name of the applicant from a panel of liquidators. The court dismissed the applicant's application for relief, and was then requested to give reasons for its judgment (par 2). The following is a summary of the facts of the case:

During 2009 the applicant and a certain Mr Strydom were appointed as joint provisional liquidators in the winding-up of Coal Experts (Pty) Ltd. Mr Strydom took charge of the administration of the estate and during the process realized some of the company's assets for the amount of R10 million. The joint-liquidators subsequently decided to apply to the Master for an interim fee, and the applicant was entrusted with submitting the application for the approval of such fee to the Master (in terms of s 63 of the Insolvency Act 24 of 1936 (hereinafter "Insolvency Act")). The trustee is entitled to a reasonable remuneration for his services to be taxed by the Master according to the tariff as set out in the Act Tariff B of Schedule 2 to the Insolvency Act (made applicable to companies by Annex CM 104 read with Reg 24 of the Winding-up Regs). The applicant afterwards returned to Mr Strydom claiming that the application had been approved and on strength of a document pertaining to have originated from the Master's office, Mr Strydom paid an amount of R200 000 to the applicant. It later emerged that the Master in fact refused the application for an interim fee and that the document produced by the applicant was probably a forgery. The applicant protested that the document was produced by a Master's official which mistakenly was under the impression that he had the appropriate powers to approve such application (par 4-6).

The Master consequently held a formal enquiry at which the applicant was heard on whether, and if so to what extent, the applicant was indeed a party to the alleged misappropriation. The Master concluded that the applicant was indeed implicated in the misappropriation of funds and thus was not a fit and proper person to be appointed as office-holder in the case in question and should be removed in all those cases where he had previously been appointed. He was also accordingly removed from the Master's so-called panel of liquidators (par 6).

The sole ground on which the interim relief was sought was that the act of removing a person from its panel, represented an administrative act by the Master; thus engaging the Promotion of Administrative Justice Act 3 of 2000 (hereinafter "PAJA") and that the Master had not granted the applicant any opportunity to be heard prior to taking the decision to remove him from the list. The applicant further conceded that, although the Master conducted an enquiry into the circumstances of the case where he was granted the opportunity to give evidence, the applicant claimed that he was entitled to "more than that". He also claimed that he should have been presented with a charge sheet and procedures should have been followed similar to those in a disciplinary enquiry (par 10).

3 Judgment

Relying on the the *dictum* in *Simon NO v Air Operations of Europe AB* (1999 1 SA 217 (SCA) 228F-H) the court considered all the facts affirmed by the applicant, alongside such facts set out by the respondent that were not being disputed, and found that the applicant could not establish a *prima facie* right and thus could not succeed in obtaining the final relief sought. The court held further that the applicant could not dispute the fact that after the Master had established on reasonable grounds that the applicant was not a suitable person for appointment to office in an insolvent estate he would have failed his duty if he had appointed the applicant in any of the offices in question. In addition, the Master would also have failed its duties if he had failed to remove the applicant from the list of possible appointees (par 14).

In granting reasons for its conclusion, the court held that, despite the objection by the applicant, there was in the court's view a strong probability, established on the facts presented in the papers, that there was a misappropriation of funds in the estate and that the applicant was indeed a party to the misappropriation. The court further ruled that the applicant alone benefitted from the misappropriation and, although the applicant maintained that he was innocent of any intention to defraud the estate or the co-appointed liquidator, the applicant had undertaken to repay the funds. Contrary to his undertaking, at date of the application, the estate had not yet received any such payments (par 5).

The court held that "the balance of convenience is overwhelmingly against the applicant and the remedy of reinstatement, pending the final determination of the applicant's review, would not be 'just and equitable' as that expression is used in s 8(1) of PAJA" (par 16). In addition, that although the applicant indicated that his entire livelihood depended on his income as insolvency practitioner the court was of the opinion that to reinstate him under the mentioned circumstances would impose a person on the Master as well as the public in general whose integrity was in doubt. The court further reasoned that, even if the applicant were to succeed in due course in establishing that according to PAJA he had not been given a fair hearing, the court "strongly doubt that any court would, in the exercise of its equitable discretion under s 8(1) of PAJA, order that the applicant's name be restored to the list pending such a hearing" (par 17). As part of the reasons for its findings the court paid attention to the following:

At the outset the court established that the compilation of the list of potential practitioners did not constitute an administrative action in terms of PAJA. The court referred to the principle articulated by Chaskalson P in *President of the Republic of South Africa v South African Rugby Football Union* (2000 1 SA 1 (CC) par 142) and argued that the list was not compiled in the process of executing certain legislation but was rather connected to the implementation of the Minister's socio-political policy (par 11).

The court then leapt to making the following statement: "[i]f the action taken by the Master in removing the applicant's name from the list was not an administrative action, then the applicant was not entitled to a hearing

before his name was removed from the list” (par 12). Furthermore the court admitted that, if it was wrong and the applicant was indeed entitled to such an alleged hearing, the court found no reason why the applicant should have been granted a charge sheet or a formal hearing to defend himself against the allegations of misappropriation of funds. The court argued that the applicant should have known that he was being scrutinised on his part in the misappropriation and that, if the outcome was that he was found to be responsible, his removal, both from the list and as liquidator in office, would inevitably follow (par 12). The court believed that the formal enquiry conducted by the Master into the behaviour of the liquidator in this particular estate was sufficient and amounted to a fair hearing (par 12).

4 Reference to certain matters arising from the judgment

4.1 Policy by the Minister of Justice and Constitutional Development

In the late 1990s the Department of Justice and Constitutional Development (Department of Justice) recognised that the insolvency profession had to be transformed in order to make the insolvency profession more representative of the diversity of South African society. The Department set about finding a method in which this could be done swiftly and effectively and the solution was introduced in the form of an informal “policy document” issued by the Department (it is not clear when the policy document was implemented for the first time). The original policy document is termed “Policy: Strategy on / procedures for appointment of liquidators and trustees”, and is undated. The document would appear to have been implemented in 1998 or 1999. The document does not only deal with the appointment of trustees and liquidators, but also *inter alia* with topics such as training and the lodging of requisitions. See Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* (LLD thesis, University of Pretoria, 2009 part V) for a more detailed discussion of the appointment of an insolvency practitioner.

In 2003 the Minister of Justice and Constitutional Development (Minister of Justice), reacting to persistent allegations of corruption and fraud during the appointment procedures of insolvency practitioners, introduced a Judicial Matters Amendment Act 16 of 2003 (see Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 2007 *SA Merc LJ* 123). This amendment to the current Act authorises the Minister of Justice to determine a policy for the appointment of insolvency practitioners by the Master (the relevant power was inserted into s 158(2)-(3) of the Insolvency Act, s 15(1A) of the Companies Act 61 of 1973 (Companies Act) and s 10 of the Close Corporations Act, respectively).

In the *Musenwa*-case (*supra*) Tuchen J refers to the “determination of the Minister under s 15(1A)(a) of the Companies Act, 1973 and s 158(2) of the Insolvency Act, 1936” (par 2) and then mentions that this *policy* trenches

upon the previously unfettered discretion of the Master to appoint any suitable person to office. The court then continues to point out that the compilation of a list of suitable previously disadvantaged persons by the Master was a direct result of the mentioned policy (par 2). Section 158(2) and (3) read as follows:

- “(2) The Minister may determine policy for the appointment of a *curator bonis*, trustee, provisional trustee or co trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.
- (3) Any policy determined in accordance with the provisions of subsection (2) must be tabled in Parliament before publication in the *Gazette*.”

The difficulty that arises as a result of the reference by the court to this policy is the following: the legislative amendments provide for the application of a policy document that has been accepted and approved of by Parliament. To date this has not yet been done, although the Master continues to apply what seems to be a revised policy document, also referred to as an “informal policy”, making provision for the appointment of historically disadvantaged individuals in certain estates (the Department of Justice is apparently in the process of finalising the policy document as referred to in section 158 of the Insolvency Act). It could, however, be argued that although the court might not have been aware that the policy referred to in section 158 has not yet been legally incorporated into our law, reference to such document may create some confusion.

4.2 *Master's panel*

The second issue to be addressed deals with the conduct of the Master when appointing a person to hold office as an insolvency practitioner in an insolvency estate. Tuchen J makes the following statement:

“This list was compiled pursuant to a determination of the Minister under s 15(1A)(a) of the Companies Act, 1973 and s 158(2) of the Insolvency Act, 1936 that the Master keep a list of previously disadvantaged persons who the Master regarded as suitable for co-appointments to the offices of trustee, liquidator and the like together with more experienced insolvency practitioners” (par 2).

One must note in passing that one important difference between the wording of section 368 of the Companies Act and section 18(1) of the Insolvency Act, is that section 368 requires the appointment of a “suitable person” as provisional liquidator. By “suitable” is meant an independent person who is able to discharge the responsibilities of such office competently, honestly and impartially (see, eg, *Murray v Edendale Estates Ltd* 1908 TS 17 22; *In re Greatrex Footwear (Pty) Ltd (II)* 1936 NPD 536 537-539; *Wolstenholme v Hartley Farmers Agricultural Co-operative Co Ltd* 1965 4 SA 73 (SR); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W) 614; and *Krumm v The Master* 1989 3 SA 944 (D)). Although the Insolvency Act sets out certain disqualification criteria for the appointment of the practitioner, it does not categorically state who should be appointed by the Master as a provisional or final trustee or liquidator. In

order to circumvent the lack in statutory guidelines the Master, of his own accord, commenced the use of a register to which he could add the names of persons who, in his view, qualified as persons suitable for appointment as practitioners. Over time this became known as the “Master’s panel” (Calitz “The Appointment of Insolvency Practitioners in South Africa: Time for change?” 2006 *TSAR* 721).

Although the list of previously disadvantaged individuals compiled by the Master was a result of the more recent “informal policy”, it should be noted that the original list or Master’s panel has a long and contentious history. The main point of concern is that the Master’s professed panel has no legal status whatsoever and is vulnerable to any litigation challenging its constitutionality (see Burdette “Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry” 2005 unpublished paper presented at the Commonwealth Law Conference, London; and Calitz 2006 *TSAR* 728). It also stands to reason that, although the aim and purpose of any state regulation in South African insolvency law should be to ensure compliance with the underlying values of the Constitution, it is submitted that the process of compiling a list according to a policy determination that has not yet been formally enacted into law also puts the Master at risk of running the risk of constitutional challenges. While this non-statutory arrangement instituted by the Master no doubt goes a long way towards ensuring that suitable persons are appointed to act as practitioners, the system is far from perfect and it is submitted that the system still lacks the structure, transparency and certainty which a formal statutory framework will provide.

4 3 *Interrogations in an insolvent estate*

Within South African insolvency law there are different types of interrogations which can as a rule be divided into public and private enquiries. The Insolvency Act provides for three different types of interrogations: the provision primarily aimed at investigating the validity of claims lodged for proof at a meeting of creditors (s 42 of the Insolvency Act), a creditor’s enquiry in order to investigate the affairs of the insolvent (s 64, 65 and 66 of the Insolvency Act) and a private Master’s enquiry in terms of the provisions of section 152 of the Insolvency Act. Corresponding provisions contained in the Companies Act also provide for public enquiries by creditors (s 415 and 416 of the Companies Act), and provisions relating to private enquiries before the Master or a Commissioner appointed by the Master or the Court (s 417 and 418 of the Companies Act; see also Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander and Steyn *Mars: The Law of Insolvency in South Africa* (2008) 418 (hereinafter “Mars”). The Companies Act furthermore sets out the role of the Master in relation to the conduct of the liquidator in general. Section 381(1) of the Companies Act expressly states that the Master is bound to “take cognisance of” the liquidator’s conduct and to investigate and take action “as he may think expedient” in any situation where there is reason to believe, or an interested party complains, that the liquidator is in default in relation to

the administration of the winding-up (Kunst, Magid, Borraine and Burdette *Meskin, Insolvency Law and its Operation in Winding-up* (1990) (loose-leaf edition) (hereinafter “Meskin”) par 15.2.6.3).

The constitutionality of the interrogation process in the South African insolvency law has been thoroughly tested in our courts, and some of the most significant constitutional judgments, such as *Ferreira v Levin*; *Vryenhoek v Powell* (1996 1 SA 984 (CC)); and *Bernstein v Bester* (1996 2 SA 751 (CC)), dealt with the constitutionality of section 417 or 418 of the Companies Act in terms of the Interim Constitution. The court rejected an attack on the provisions of sections 417 and 418 of the Companies Act and found that the mechanisms embodied in these provisions furthered very important public-policy objects, such as the honest conduct of the affairs of a company (*Bernstein v Bester supra* par [50] 782A).

According to section 379(1) of the Companies Act the Master has the power to remove a liquidator from his office as such on a number of grounds, one of which is that the liquidator is “in his [the Master’s] opinion ... no longer suitable to be the liquidator of the company concerned”(s 379(1)(e)). Meskin is of the opinion that “[i]t is submitted that, ordinarily, before reaching this opinion, the Master should exercise his powers under section 381 of the Companies Act. It is submitted, further, that, in this context, the Master should adopt the same approach as would the court in deciding whether there is good cause for removal” (Meskin par 4.32). In terms of section 379 (2) the court may remove a liquidator from office where there is good cause for removal. Meskin further states that:

“‘Good cause’, in this context, would include, it is submitted, misconduct of any kind not covered by any of the provisions of sections 373 or 379(1) of the Companies Act; but ‘cause’, it is submitted, should not be confined to misconduct or personal unfitness for office; it includes any conduct which is such that the Court is able to conclude that it would be to the advantage of all the persons interested in the winding-up that the removal should ensue, having regard to the true interests of the winding-up and the purpose for which the liquidator is appointed” (*In re Adam Eytton Limited; Ex parte Charlesworth* (1887) 36 Ch 299 (CA) 303-304, 306; *Greenacre’s Executors v Kemp* 1916 TPD 247 255; *James v Magistrate, Wynberg* 1995 1 SA 1 (C) 14 and cases there cited; *Standard Bank of SA Ltd v The Master of the High Court* 2009 5 SA 13 (E) par 10; and see Meskin par 4.34).

In the *Musenwa* case (*supra*) the court recognised that the Master held a formal enquiry into the misappropriation at which the applicant was called to testify as to whether, and if so to what extent, the applicant was a party to the misappropriation (par 6). The Master subsequently concluded that the applicant was implicated in the fraudulent scheme and was “thus not a fit and proper person to be appointed to the offices in question and should be removed in those cases where he had been appointed” (par 6). Unfortunately the court does not mention the particular provision of the Act according to which this aforementioned enquiry was held, however, as the result was that the liquidator was removed from office, and since section 381(1) expressly states that the Master is bound to “take cognizance of” the liquidator’s conduct and to investigate and take action “as he may think

expedient”, it seems more likely that the Master must have been acting in accordance with section 381 of the Companies Act.

It is submitted that on the surface it appears that the Master followed the correct procedure prior to removing the applicant from office. Firstly, the Master conducted a section 381 enquiry into the conduct of the liquidator and not only found the applicant to be no longer suitable to hold office as the liquidator of the company concerned, but as the applicant was party to the misappropriation of funds it is also self-evident that the removal would be to the advantage of all the persons interested in the winding-up process.

The court further held that “if I am wrong and the applicant was entitled to a hearing, I can see no reason why the applicant should have required a charge sheet or a formal hearing to defend himself against the allegations that there was a misappropriation and that he was party to the misappropriation” (par 12). Within the context of an insolvency enquiry it has repeatedly been ruled that a witness is not entitled as of right to have access to the information in the Master’s possession before giving evidence, as the information at his disposal is required in the public interest to be made available to the trustee (see *Leech v Farber* NO 2000 2 SA 444 (W); *Pitsiladi v Van Rensburg* 2002 2 SA 160 (SE); and see Mars 425). This principle was also clearly pointed out in the *dictum* of Nugent J in *Leech v Faber* (*supra* 452F):

“It may well be that particular questions will be asked of, or propositions put to, a witness which he requires an opportunity to consider more fully in order to place himself in a position to provide a meaningful reply but that is a matter which can and should be dealt with by the commissioner if and when it arises.”

It should, however, be mentioned that *Leech v Faber* (*supra*) dealt with an enquiry contemplated by section 417 and 418 which essentially is an interrogation in which information is sought to be pieced together to enable the affairs of the company to be wound up properly (*Leech v Faber supra* 445H-I). Nugent J, held further that to require the presiding officer to disclose all information in his possession or indeed any suspicions he may have in relation to the particular witness as a precondition to questioning him, seems to be entirely inconsistent with the nature and purpose which is served by such enquiry (*Leech v Faber supra* 445I-J).

In *Podlas v Cohen and Bryden* (1994 4 SA 662 (T)) Spoelstra J went on to state, expressly, that “an enquiry in terms of section 152 of the Insolvency Act (which is equivalent to s 417 of the Companies Act) is purely investigative” and that “the presiding officer neither made findings that could detrimentally affect any person’s rights, nor determined any rights, but simply recorded the evidence and regulated the proceedings” (*Podlas v Cohen and Bryden supra* par 97). It has also been held in *Nedbank Ltd v The Master of the High Court, Witwatersrand Local Division* (2009 3 SA 403 (WLD)) that the decision by the Master to hold an enquiry is simply an investigative procedure and therefore not an “administrative act” which affects the rights of parties and which is, therefore, not reviewable (see also Calitz (LLD thesis, University of Pretoria, 2009) part V for a more detailed

discussion of the role of the presiding officer in interrogations in an insolvent estate). And in *Roux v Die Meester* (1997 1 SA 815 (T) 824B-C) the court reiterated that an enquiry under section 152 of the Insolvency Act was purely investigative in nature and did not envisage a ruling affecting a person's rights, consequently a constitutional principle providing for the right to procedurally fair administrative action, where a person's rights or legitimate expectations were affected or threatened, could not be applicable.

The question arises whether the same legal principles relating to the access to information by the witness in the case of a section 417 and 418 enquiry could be applied to an enquiry in terms of section 381 of the Companies Act. Whereas the enquiries in terms of section 152 of the Insolvency Act and section 417 and 418 of the Companies Act are clearly investigative in nature and as such do not affect the rights of an individual, it is submitted that an enquiry into the conduct of a liquidator in terms of section 381 has a more dramatic and forceful effect in that the outcome of such investigation could result in the removal of the liquidator from office and as such the rights of such individual could be adversely affected. It could thus be argued that the decision by the Master to hold such an enquiry does amount to administrative action and would *per se* be subject to the provisions of procedural fairness under PAJA.

It must be stated that, although the aim of this note is not to provide a detailed exposition or comprehensive overview of the administrative law aspect of insolvency enquiries, the *Musenwa* case (*supra*) raises some interesting questions and it is therefore disappointing that the court did not embark on a more thorough analysis of the matter.

5 Discussion and Comments

It is clear from the judgment that the court did not make a clear distinction between the compilation of the so-called list or Master's panel and the action of removing an individual from such list. The nature of the action of compiling the list was discussed and the court reached the correct conclusion that it indeed did not amount to an administrative action. However, the court then leapt to the conclusion that "if the action taken by the Master in removing the applicant's name from the list was not administrative action, then the applicant was not entitled to a hearing before his name was removed from the list" without analysing the nature or the outcome of such action and also not recognising that the removal from the list represented a separate action. Although the court was correct in its argument that the compilation of such a list simply expressed the wishes as included in a governmental policy, the further act of removing someone from the list of potential appointees barred such person from taking any further appointments as office-holder in an insolvent estate and subsequently prevented such person from earning a livelihood. It is thus clear that the action of compiling a list stands apart from the action of removing a person from such a list, with the result that the second action had a more detrimental outcome in regard to the such a person.

In moving from a culture of authority to a culture of justification and accountability it must be clear that the Constitution, and especially the Bill of Rights, has fundamentally changed the way any state-authority or state-administration is supposed to function (Burns *Administrative Law under the 1996 Constitution* (2003) 49; and Calitz (LLD thesis, University of Pretoria, 2009) 165). For instance, it is precisely because of the principle of accountability that the Master is drawn into the discussion on the constitutional aspects of insolvency law. This is particularly so since some of the most important specific provisions flowing from the principle of accountability are part of the Bill of Rights and include, most significantly, the right to access to information in section 32 and the right to just administrative action in section 33 (Currie and De Waal *The Bill of Rights Handbook* (2005) 17).

The Bill of Rights contains several provisions of significance for administrative law, and for the purposes of this study the right to just administrative action in particular represents the most important provision. In terms of section 33(1) of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) thereof requires the enactment of national legislation to give effect to such right, and this requirement was given effect to by the enactment of PAJA (*Kiva v Minister of Correctional Services* [2006] JOL 18512 (E) where the court held that, because PAJA gives effect to a constitutional right, the provisions thereof must be generously interpreted (see Meskin par 1.8). The concept of "organ of state" plays a decisive role in determining whether an action is classified as an administrative action and whether it is subject to the application of the principles of just administrative action (Burns 14). The court's approach to the definition places the focus on a functional rather than a control test. The question is therefore not whether the particular decision-maker is under the control of the state, but whether it performs a public function in terms of legislation (*Mittalsteel South Africa v Hlatshwayo* (326/05) [2006] ZASCA 93 par 7)). Evidently, the Master does qualify as an organ of state, as he/she often exercises a public power or public function in terms of legislation, with the result that his/her decisions will be subject to the provisions of PAJA (Meskin par 1.8; see also *Transnet Ltd v Chirwa* 2007 2 SA 198 (SCA) for a detailed discussion of the nature of "public power"; and see also Calitz (LLD thesis, University of Pretoria, 2009) 169).

Meskin also states that the Master may disqualify a person permanently from appointment as a liquidator or provisional liquidator of a company by directing Assistant Masters and other public servants in the Master's office that such person should not be appointed as such (*Lipschitz v Wattrus* NO 1980 1 SA 662 (T); and see also Meskin par 4.28). Meskin further submits "that such a decision by the Master may be classified as an 'administrative action' as defined by section 1 of the Promotion of Administrative Justice Act 3 of 2000, and that if the Master has not furnished reasons for his decision, he may be required to do so in terms of section 5 of such Act" (see Meskin par 4.28). In terms of our common law as well as the Constitution the *audi alterem partem* rule generally has to be complied with before a decision which constitutes an administrative action is taken (De Ville *Judicial Review*

of *Administrative Action in South Africa* (2003) 244). Further the requirement of procedural fairness under PAJA will similarly also require that a person normally be heard before the taking of such decision (Currie and De Waal 667).

PAJA provides for certain minimum requirements of procedural fairness in section 3. Section 3(1) states that, when administrative action “materially and adversely affects the rights or legitimate expectations of any person” that administrative action must, in order to be valid, be procedurally fair. While the Act acknowledges that what is fair depends on the circumstances of each case, section 3(2)(b) provides that the following are the minimum requirements of procedural fairness:

- “(a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.”

Thus in section 3(2)(b)(ii) of PAJA the opportunity of the affected party to be given a reasonable opportunity to make representations is acknowledged. A fair hearing would according to De Ville in most instances require that the person concerned should be given the opportunity to present and dispute information and arguments (De Ville 254). De Ville also refers to the case of *Turner v Jockey Club of South Africa* (1974 3 SA 633 A), where it was held that the affected person had the opportunity to produce his evidence and of correcting or contradicting any prejudicial statement or allegation made against him in the case of a disciplinary tribunal. According to Hoexter the two main components of procedural fairness are a fair hearing by an impartial decision-maker and the concept of procedural fairness in the form of *audi alterem partem* is concerned with giving people an opportunity to participate in the decisions that will affect them and also, importantly, giving them a chance of influencing the outcome of those decisions (Hoexter *Administrative Law in South Africa* (2007) 327). Baxter also indicates that the principles of fairness “are considered to be so important that they are enforced by courts as a matter of policy, irrespective of the merits of the particular case in question” so that the merits cannot justify a breach of fairness (Baxter *Administrative Law* (1984) 540; and Hoexter 347).

It is submitted that, as the removal of a person from the Master’s list of possible appointees clearly constitutes an administrative action, the person affected would be entitled to fair hearing. The Master’s enquiry in this case dealt specifically with the conduct of the applicant in the particular estate in question and resulted in his subsequent removal from office. Again, it should be emphasised that the removal of a person from the Master’s panel has a more severe outcome as it bars the person from taking appointments in all other matters. It is therefore submitted that a separate process relating purely to the removal of a person from the panel should have been followed,

as in my opinion there should have been a direct relation between the action of removal of the person from the list and the process followed prior to such action.

The above discussion on the significance and meaning of “administrative action” is by no means all-inclusive or complete and the court’s ruling did not shed much light on the complicated concept of the administrative law aspects of state regulation of insolvency law in South Africa. The *Musenwa* decision added new questions and has not, as many wished for, eliminated uncertainty with regard to the Master’s supervisory function in our insolvency law.

6 Conclusion

Whilst being mindful thereof that the *Musenwa* case represents only an application for an interim interdict and an exposition of the courts grounds in support of its findings, the judgment is nonetheless somewhat disappointing, given the relevance of the issues within the South African insolvency-law context. Although the court’s final decision can’t be faulted the court overlooked the opportunity of shedding some light on various controversial matters relating to the present regulatory functions of the Master as well as the administrative law matters at stake.

The Master at present acts as regulator in South African insolvency law, but is limited in power and scope to the functions and powers granted within the four corners of the Insolvency Act (see Calitz (LLD thesis, University of Pretoria, 2009 part IV) for a detailed discussion of the administrative law aspects of state regulation in South African insolvency law). Although the Insolvency Act sets out certain disqualification criteria for the appointment of trustees and liquidators, it does not categorically state who should be appointed by the Master as a provisional or final trustee or liquidator (see s 55 of the Insolvency Act for a list of these disqualifications; and the provisions in s 372 of the Companies Act in respect of the disqualification of a liquidator are almost identical to the provisions of s 55 of the Insolvency Act). It should also be noted that, although there are various indications that the Department of Justice and Constitutional Development (Department of Justice) is in fact in the process of finalising its policy on the regulation of insolvency practitioners, the insolvency profession remains at date still one of the few unregulated professions in South Africa. As the situation stands now, the Master and particularly officials responsible for the appointments of provisional trustees and liquidators, are on a daily basis subject to criticism and are not only vulnerable to statutory-review proceedings but are also confronted with the constitutional aspects of possessing a discretionary power to appoint a person as office-holder without any legal or statutory guidelines. The unfortunate result is that the appointment of insolvency representatives by the Master will always be viewed with cynicism and beset with controversy.

Concern is sometimes raised regarding the impact of the procedural constraints in the Constitution and other relevant legislation applicable to the

Master in that these could have the effect of impeding the efficient, effective and swift finalisation of an insolvent estate. However, it must be noted that in redefining the role of the law as well as of any public institution, tension will always exist between the procedural fairness and rationality advocated by the Constitution and PAJA, on the one level, and the need for effective, efficient and expeditious public administration, on the other (Corder "Reviewing Review: Much Achieved, Much More to Do" in Corder *Realising Administrative Justice* (2002) 18; and see also Calitz (LLD thesis, University of Pretoria, 2009) part IV for a detailed discussion of the administrative law aspects of state regulation in South African insolvency law).

As the Insolvency Act was in place long before the new constitutional dispensation, it is important that the regulatory principles of our law should be brought in line with the values expressed in modern administrative and constitutional law in order to avoid the negative impact of uncertainty which would undoubtedly result in more litigation. The author has chosen to conclude by citing the following opinion which encompasses the very essence of the matter: in the late eighties the then President of the Constitutional Court, Arthur Chaskalson J, said of administrative law that it was the

"interface between the bureaucratic state and its subjects. The day to day lives of ordinary people are profoundly affected by the way those who hold power of their lives exercise that power. Important steps towards the creation of a just society can be taken by opening up the administrative process and developing an equitable system of administrative law" (Chaskalson "The Past Ten Years: A Balance Sheet and Some Indicators for the Future" 1989 *SAJHR* 298-299).

Juanitta Calitz
University of Johannesburg