CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 153/16

In the matter between:

NICOLAAS JOHANNES SWART	Applicant
and	
CONRAD ALEXANDER STARBUCK	First Respondent
JAMES HENRY VAN RENSBURG	Second Respondent
TSIU VINCENT MATSEPE	Third Respondent
MASTER OF THE HIGH COURT, PRETORIA	Fourth Respondent

Neutral citation:	*Swart v Starbuck and Others* 2017 ZACC 23
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Khampepe J (majority): [1] to [49] Jafta J (dissenting): [50] to [114] Zondo J (concurring): [115] to [121]
Decided on:	29 June 2017
Summary:	Insolvency Act 24 of 1936 — section 82(8) — claim by insolvent for the payment of damages — leave to appeal Uniform Rules of Court — rule 53 — condonation — constitutional challenge — judicial review

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

The following order is made:

1. Condonation is granted.
2. Leave to appeal is refused, with costs.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Madlanga J, Mhlantla J and Pretorius AJ concurring):

Introduction

[1] This is an application for condonation and leave to appeal. The applicant seeks leave to appeal against the dismissal of his appeal by the Supreme Court of Appeal, including the order on costs. In the Supreme Court of Appeal, the applicant appealed the order of the High Court of South Africa, Gauteng Division, Pretoria (High Court) dated 3 December 2013. There, the High Court dismissed the applicant's claim for damages under section 82(8) of the Insolvency Act[1] (Act).[2]

[1] 24 of 1936.

[2] *Nicolaas Johannes Swart v Conrad Alexander Starbuck*, unreported judgment of the Gauteng Division of the High Court, Pretoria, Case No 48444/2008 (3 December 2013) (High Court judgment).

[2] The applicant is Mr Nicolaas Johannes Swart, a farmer who is a rehabilitated insolvent[3] residing in Limpopo.

[3] The first to third respondents are Mr Conrad Alexander Starbuck, Mr James Henry van Rensburg and Mr Tsiu Vincent Matsepe respectively. They are insolvency practitioners who were trustees of Mr Swart's insolvent estate (together the trustees). The fourth respondent is the Master of the High Court, Pretoria. Mr Starbuck is the only respondent participating in this matter.

Background

[4] Mr Swart's estate was sequestrated on 1 November 2005. At the time, he was the registered owner of certain immovable properties known as portions 5, 8 and 13 of the farm Doorndraai 2A (Registration Division KR, Limpopo Province) (the properties).

[5] On 16 November 2005, the L J Moller Trust submitted three *conditional* offers to Mr Starbuck to purchase the properties. At this point, although Mr Starbuck had not been officially appointed as a provisional or final trustee, he had already been advised by the Master of the latter's intention to appoint him as a provisional co-trustee.

[6] On 1 December 2005, the three offers were accepted by Mr Starbuck. Each was subject to the suspensive condition that "the Seller and/or Master . . . grant the required consent, if applicable . . . . [T]his agreement is subject to such consent being obtained and it shall fall away and be regarded as pro non scripto if such consent

[3] Mr Swart's estate was sequestrated on 1 November 2005. The Act provides for the rehabilitation of an insolvent by effluxion of time in terms of section 127A(1), which provides:

> "Any insolvent not rehabilitated by the court within a period of ten years from the date of sequestration of his estate, shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the said period of ten years."

cannot be obtained."[4] The effect of the suspensive condition in each offer was that, if the consent was not obtained, the contracts would be regarded as though they had not been written.[5]

[7] On 12 January 2006, and before their formal appointment as provisional trustees, the trustees submitted a written application to the Master for the authority to sell the properties in terms of section 80*bis*[6] read with section 18(3)[7] of the Act. The application motivated the decision to sell the properties of the insolvent estate prior to the second meeting of the creditors, and included: (i) consents from the two secured

[4] *Swart v Starbuck* [2016] ZASCA 83; 2016 (5) SA 372 (SCA) (SCA judgment) at para 5.

[5] This was an express term of the contracts. In addition, generally speaking, a suspensive condition *suspends the operation* of all obligations flowing from a contract until the occurrence of a future uncertain event. If the uncertain future event does not occur, the obligations never come into operation. See *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* [2012] ZASCA 160; 2013 (2) SA 133 (SCA) at para 21; and *Diggers Development (Pty) Ltd v City of Matlosana* [2011] ZASCA 247; [2012] 1 All SA 428 (SCA) at para 29. See also *Southern Era Resources Ltd v Farndell NO* [2009] ZASCA 150; 2010 (4) SA 200 (SCA) at para 11.

[6] Section 80*bis* is headed "Sale of movable or immovable property on authorization of Master" and provides:

> "(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.
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> (2) The Master may thereupon authorize the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorize the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale."

[7] Section 18 is headed "Appointment of provisional trustee by Master" and in relevant part provides:

> "(1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee.
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> (2) At any time before the meeting of the creditors of an insolvent estate in terms of section forty, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.
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> (3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct."

creditors; (ii) a circular that was sent to all known creditors regarding the sale of the properties; (iii) valuations of the properties; and (iv) the offers to purchase received from the Trust.[8] It is apposite to recapitulate here that the creditors and not the insolvent are the masters of the realisation of the assets in the insolvent estate; hence their consent and involvement were pivotal.[9]

[8] On 24 January 2006, the trustees were appointed as provisional trustees of Mr Swart's insolvent estate. On 31 January 2006, the Master consented to the sale of the properties.[10] On 13 April 2006, the trustees executed written powers of attorney in which they declared that the properties were sold on 1 December 2005 and authorised transfer to the purchaser. The properties were transferred to the Trust on 14 June 2006. On 12 October 2006, at the second meeting of the creditors, the creditors approved the trustees' report reflecting the sale and transfer of the properties to the Trust.

Litigation history

[9] Mr Swart instituted action against the Master and the trustees in the High Court for damages in the amount of R11 410 000.

[10] He argued that, when Mr Starbuck entered into the contracts, he was not a trustee and therefore lacked the necessary capacity to enter into the sale agreements. He also argued that the provisions of section 82(1) of the Act ought to have been complied with.[11] Mr Swart contended that, because that section was not complied

[8] SCA judgment above n 4 at para 6.

[9] See *Janse van Rensburg v Muller* [1995] ZASCA 136; 1996 (2) SA 557 (A).

[10] Their final appointment as trustees followed on 16 November 2006.

[11] Section 82(1) provides that a trustee shall, as soon as he is *authorised to do so at the second meeting of the creditors*, sell all property in that estate in such a manner and upon such conditions as the creditors may direct, and specifically reads:

> "Subject to the provisions of sections eighty-three and ninety the trustee of an insolvent estate shall, as soon as he is authorized to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct: Provided that if any rights acquired from the State under a lease, licence, purchase,

with, the trustees were liable to pay statutory damages to him in terms of section 82(8) of the Act.[12]

[11] The trustees argued that the offers to purchase signed by Mr Starbuck were "subject to the permission of the [M]aster being granted and by implication their formal appointment by the [M]aster".[13] They submitted that they had been granted authority to sell the properties, in terms of section 80*bis*, after their appointment as provisional trustees, and that section 82(8) was accordingly not applicable. They denied any maladministration or liability on their part.

[12] The High Court held that the offers to purchase could only constitute valid offers once the suspensive condition had been complied with.[14] The High Court found that, because the trustees had been granted the necessary authorisation by the Master to sell the properties in terms of section 80*bis*, section 82 was not applicable.[15]

[13] As to the allegation that the properties could have been sold for a much higher price, after considering a great deal of evidence on the point, the High Court found

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> or allotment of land is an asset in that estate, the trustee shall, in his administration of the estate, act in accordance with those provisions (if any) which by the law under which the rights were acquired, are expressed to apply in the event of the sequestration of the estate of the person who acquired those rights: Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the *Gazette* and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct."

[12] Section 82(8) provides:

> "If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section, or if any person in good faith and for value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section."

[13] See SCA judgment above n 4 at para 11, referring to the trustees' plea in the High Court.

[14] High Court judgment above n 2 at para 66.

[15] Id at para 75.

that there was *no basis on which it could be said that the properties could have been sold at a higher price.*[16] Accordingly, there was no link between the conduct of the trustees and the alleged loss which Mr Swart may have suffered. The action was dismissed with costs, including the costs of two counsel.

[14] Mr Swart then appealed to the Supreme Court of Appeal.

[15] The Supreme Court of Appeal held that Mr Swart's claim was based squarely on section 82(1) read with section 82(8) of the Act and that Mr Swart's cause of action thus depended on, amongst other things, the absence of a valid authorisation by the Master for the sale of the properties in terms of section 80*bis* of the Act. The Court found that the Master had authorised the sale of the properties in terms of section 80*bis* read with section 18(3) of the Act.[17]

[16] In passing, the Court noted that the authorisation by the Master is administrative action which has legally valid consequences until set aside. It then held that, as no application was made by Mr Swart to set the authorisation aside, it remained legally valid. Mr Swart's claim should have failed on this basis alone.[18]

[17] The Court then considered Mr Swart's cause of action as pleaded and found that section 82 had no application to the facts at hand as the sale had taken place pursuant to the Master's valid authorisation.[19]

[18] Finally, the Court held that it was of no consequence that at the time of Mr Starbuck's conditional acceptance of the offers to purchase, the trustees had not

[16] Id at para 81.

[17] SCA judgment above n 4 at para 6. The Court noted that the application included a consent from the two secured creditors; a circular sent to all known creditors regarding the offers to purchase received from the Trust; valuations of the properties; and the three written offers to purchase received from the Trust. The Court also noted that no creditor responded to the circular by objecting to the anticipated sale of the properties.

[18] Id at para 17.

[19] Id at para 18.

yet been appointed.[20] The agreements of sale, resulting from the three offers to purchase, were subject to a suspensive condition and they only became final and binding upon the fulfilment of the condition.[21]

[19] For these reasons the Court dismissed Mr Swart's appeal with costs, including the costs of two counsel.

In this Court

[20] In his application for leave to appeal to this Court, Mr Swart persists with the argument that section 82 of the Act should apply to this matter and that the Master's section 80*bis* authorisation was irregular. In addition, he has added a new string to the bow of his attack to the effect that the appeal should be upheld on the basis that sections 18(3) and 80*bis* of the Act are unconstitutional. Mr Swart also attempts to raise a number of questions in this application that have not been canvassed in the Courts below.[22]

[21] Mr Starbuck submits that Mr Swart's application must fail on the basis that the constitutionality of sections 18(3) and 80*bis* of the Act is being raised for the first time. In the circumstances, he argues that Mr Swart is precluded from raising a constitutional challenge at this stage. He also submits that the sale of the properties was authorised by the Master and that the sale of the properties was valid by virtue of the fact that the authorisation has neither been challenged nor set aside by a court of law.

[20] Id at para 25.

[21] Id at para 28.

[22] For example: whether insolvency law and practices pose a potential threat to fundamental rights; what caution needs to be applied in matters where access to courts and the *audi alteram partem* principle is restricted; and whether it can be said that insolvent persons and concurrent creditors have equal protection of the law and access to courts if they are not afforded the opportunity to raise a collateral challenge to the validity of administrative action by the Master.

[22] On 28 November 2016, the Acting Chief Justice issued directions calling for the parties to file written submissions addressing specific issues. This matter has been decided without an oral hearing.

Condonation

[23] Mr Swart asks this Court to condone the late filing of his application, which ought to have been filed in this Court on 21 June 2016. He submits that the violent protests taking place in Pretoria on 21 June 2016 precluded his attorneys from serving papers on the respondents and this Court timeously.[23] The application was, however, served electronically on the respondents and this Court on 21 June 2016. The physical application was subsequently filed on 6 July 2016. No explanation is tendered for this additional lapse in time.

[24] The explanation is satisfactory and the delay was not long. In addition, it would seem that no prejudice will be suffered by the respondents if the late filing is condoned. Accordingly, I find that the interests of justice weigh in favour of granting condonation.[24]

Merits

Cause of action and relief sought

[25] It is apposite, in the light of the relief Mr Swart seeks in this Court, to begin with the cause of action that he has actually raised. He claims that he is entitled to R10 627 288, pursuant to the provisions of section 82(8) of the Act.[25]

[26] The High Court and the Supreme Court of Appeal judgments regarding this claim are well-reasoned and cannot be faulted. It cannot be put more plainly:

[23] The correspondent attorney has deposed to an affidavit in support of this.

[24] See *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[25] Section 82(8) is set out at n 12 above.

Mr Swart's claim was based on section 82(1) read with section 82(8) of the Act. The application of this section depends on, amongst other things, the absence of a valid authorisation by the Master for the sale of the properties. The Master authorised the sale of the properties in terms of section 80*bis*. This authorisation has legally valid consequences until it is set aside. This authorisation has not been set aside. Section 82 can find no application in the present matter.

[27] In the circumstances, there is no damages claim to be proved in terms of section 82(8) of the Act. In any event, even if there were a damages claim to be proved under any other branch of the law, the conclusion is inescapable that Mr Swart has not been able to prove any damages. This fact is perspicuous from the judgment of the High Court where, after hearing evidence on this point, it concluded that *"there is no basis on which it can be found that the said properties would have been sold at a higher price at auctions*".[26]

[28] I have read the judgment of my colleague, Jafta J (second judgment). It states that "if the claim was delictual, I would not have hesitated to declare that the trustees were liable for any damages proved at a later trial in the High Court".[27] I disagree. Whether in terms of the Act or in terms of delict, Mr Swart was not able to prove any damages: the statement that "there is no basis upon which it can be found that the said properties would have been sold at a higher price" holds true regardless. The trustees cannot be held liable for damages that have not been proved. This Court cannot simply ignore the factual findings of the High Court.

[29] What then is left for this Court to decide?

[30] Mr Swart has attempted to raise two other issues in this Court. The first is a challenge to the constitutionality of insolvency law in general and sections 18(3)

[26] High Court judgment above n 2 at para 81.

[27] Second judgment at [113].

and 80*bis* of the Act in particular, which he raises here for the first time. The second is, ostensibly, a challenge to the validity of the Master's authorisation in terms of section 80*bis* of the Act. For the sake of completeness, I will deal briefly with each of these issues.

Constitutional challenge

[31] Having regard to this Court's jurisprudence, it would be imprudent for us to consider Mr Swart's constitutional challenge as it is being raised impermissibly for the first time in this Court of final appeal.[28]

Validity of the section 80bis authorisation

[32] The second judgment would make a declaratory order that the Master's authorisation was unlawful. In my view, such an order would be inappropriate. It has neither been sought nor is it of any consequence. In addition, this route gives little regard to settled principles applicable to the review of administrative action.

[33] The authorisation in terms of section 80*bis* is an administrative act within the meaning of the Promotion of Administrative Justice Act.[29] As a result, even if the Master's authorisation in terms of section 80*bis* was unlawful, it remains valid and

[28] See *Prince v President, Cape Law Society* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22, where Ngcobo J stated:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. . . . I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case."

See also *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC) at para 109; and *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 39-40.

[29] 3 of 2000.

binding, as it continues to have legally valid consequences until it is set aside.[30] These legally valid consequences include the sale of the properties.

[34] It begs reiteration here that the sale agreements were subject to the suspensive condition that the sales would come into effect only once the requisite permissions (including the Master's permission under section 80*bis*) had been obtained.[31] The effect of the suspensive conditions was this: once the Master's permission was obtained under section 80*bis*, the suspensive conditions were fulfilled, and legally binding sale agreements came into effect. The effect of this Court's administrative law jurisprudence is that these valid sales endure, regardless of the validity of the Master's authorisation, until such time as that authorisation is set aside by a court.

[35] It is common cause that no attempt has been made by Mr Swart to set aside this authorisation. To validly set it aside would require rigorous engagement with principles of administrative law. It does not appear that the second judgment would set the authorisation aside either – it would merely declare the authorisation

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[30] See *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*) at para 31:

> "Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. *If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court*." (My emphasis)

See also *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima*) at paras 88-93; *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) (*Merafong*) at paras 34-6; and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at paras 101 and 106.

[31] This is of relevance because pending the fulfilment of a suspensive condition, the contract is inchoate (see *Joseph v Halkett* (1902) 19 SC 289 at 293). In the context of sale, the Supreme Court of Appeal has held that a contract of sale subject to a suspensive condition that has not yet been fulfilled is not a sale. In *Corondimas v Badat* 1946 AD 548 at 551, Watermeyer CJ enunciated the principle relating to a contract of sale subject to a suspensive condition:

> "[W]hen a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled . . . . Until that moment, in the case of a sale subject to a true suspensive condition, such as this is, it is entirely uncertain whether or not a contract of sale will come into existence at some future time."

See also above n 5.

"unlawful". In accordance with the law as it stands, the Master's authorisation remains valid and binding – as does the resultant sale of the properties.

[36] Mr Swart could have challenged the decision of the Master but failed to do so.[32] All he has done is contend that section 80*bis* of the Act was not complied with because at the time that the trustees submitted the recommendation to sell the properties, they had not yet been formally appointed as provisional trustees. However, without a proper challenge to the Master's authorisation, the contention cannot be entertained. Accordingly, the matter must be decided on the basis that the authorisation was granted and remains valid.

[37] The process required to be followed in order for the Master's decision to be set aside is set out in rule 53 of the Uniform Rules of Court. Where this rule has not been complied with, it would be inappropriate and unfair to the respondents for a court to consider the lawfulness of the Master's decision. It must remain in force until such time as a proper application for review has been brought. This would be in line with the well-established principle[33] that "until a court is appropriately approached and an

[32] See SCA judgment above n 4 at para 13, where it was correctly pointed out that—

> "[o]ur law has recognised that in certain circumstances an insolvent has locus standi by virtue of his or her real interest in the administration of the estate".

See also *Francis George Hill Family Trust v South African Reserve Bank* [1992] ZASCA 50; 1992 (3) SA 91 (A) at 107 B-H; *Nieuwoudt v Meester van Hooggeregshof* [1988] ZASCA 72; 1988 (4) SA 513 (A); *Muller v De Wet NO* 1999 (2) SA 1024 (W); [1999] 2 All SA 163 (W) at para 1029D-1030H; and *Mears v Rissik, Mackenzie NO and Mears' Trustee* 1905 TS 303 at 305.

In addition, section 151 of the Act specifically makes provision for an aggrieved person to review any decision of the Master. The section, in relevant part, provides:

> "[A]ny person aggrieved by any decision . . . of the Master . . . may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors."

[33] See *Merafong* above n 30 at para 42; *Kirland* above n 30 at paras 101-3; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 85; and *Camps Bay Ratepayers' Association and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Harrison*) at para 62.

allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence".[34]

[38] To require Mr Swart to adhere to the process prescribed in rule 53 is not undue formalism.[35] Indeed, as this Court held in *Kirland*, the procedural safeguards applicable to mounting a review application perform an important role in ensuring that interested parties are given proper notice of the review application, and an adequate opportunity to be heard on whether the decision should be set aside. Further, they ensure that the full record of the relevant decision is placed before the Court, so that the Court has all the relevant facts against which to consider the lawfulness of the decision.[36]

[39] The notice of motion in this application makes no reference to an intended review of the Master's decision. Further, the founding affidavit does not set out any grounds of review. In these circumstances, it would not be fair to the respondents for this Court, at this late stage in the litigation and this many years later, to entertain a challenge to the Master's decision. Furthermore, there is nothing of substance that this Court can do for Mr Swart; even the proposed declaration of unlawfulness formulated in the second judgment provides no effective relief.

[40] Of course, the rule 53 process is not required to be followed in instances where a collateral or reactive challenge is brought. However, I am not convinced that the

[34] *Tasima* above n 30 at para 147.

[35] Rule 53 requires that proceedings for judicial review be "by way of notice of motion directed and delivered by the party seeking to review such decision" to all affected persons. The notice of motion must "set out the decision or proceedings sought to be reviewed" and "be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected". The notice must call on the relevant decision-maker whose decision will be brought under review, and all other parties affected, to show cause why the decision should not be reviewed and set aside. It must also call upon the decision-maker concerned to send a record of the offending proceedings to the registrar within 15 days of receiving the notice, together with any reasons the decision-maker wishes to give or which the law requires her to give, and notify the applicant that she has done so.

[36] *Kirland* above n 30 at paras 65 and 67.

issue of a collateral challenge comes into play here.[37] In the light of this, my view is that the validity of the Master's section 80*bis* authorisation was never properly challenged by Mr Swart, either directly or collaterally.

[41] The second judgment entertains a challenge to the Master's authorisation, but omits to engage with various principles applicable to the review of administrative action. Some of these are touched on above. However, one stark omission begs mentioning here: engagement with the long delay in bringing the purported administrative challenge and the principle of finality.

[42] It has long been accepted that an application for review must be brought within a reasonable time.[38] If we *were* seized with a review application here, could we simply ignore that it is 10 years overdue and that no explanation has been given for this delay? I think not. Engaging with this application in spite of the 10-year time-lapse and the absence of any acceptable explanation of the delay would undoubtedly have dire consequences for the principle of finality, which is of import to administrative law.[39] This route would not only flout the principle but would also

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[37] The Supreme Court of Appeal in *Oudekraal* above n 30 at para 35 described a collateral challenge thus:

> "It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'."

This Court in *Merafong* above n 30 at para 23 stated:

> "Relying on the invalidity of an administrative act as a defence against its enforcement, while it has not been set aside, has been dubbed a collateral challenge – 'collateral' because it is raised in proceedings that are not in themselves designed to impeach the validity of the act in question."

The facts of Mr Swart's case do not lend themselves to an understanding that he at any point mounted a collateral challenge against the Master's authorisation. It seems that Mr Swart seeks to impermissibly invalidate the section 80*bis* authorisation in proceedings where he was *dominus litis* in attempting to enforce the payment of damages for his own benefit in terms of section 82(8) of the Act.

[38] *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) (*Khumalo*) at paras 44-8, 69 and 73.

[39] See *Khumalo* id at paras 46-8. See also *Gqwetha v Transkei Development Corporation Limited* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) at para 22; and *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F.

disregard potential prejudice to the Master, the trustees and possibly the creditors of Mr Swart's formerly insolvent estate.[40]

[43] A further impediment to Mr Swart's purported attack on the Master's authorisation is section 157 of the Act, which provides:

> "(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.
>
> (2) No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith."

[44] Subsection (1) makes it clear that nothing that has been done by the Master or the trustees pursuant to the provisions of the Act can be deemed invalid simply because of a formal defect unless, in the opinion of a court, it has resulted in substantial injustice that cannot be rectified by an order of court. The directions of this Court specifically asked Mr Swart to point to any substantial injustice which he may have suffered as a result of the purported formal defects in the granting of the Master's authorisation.

[45] In this regard, he merely contends that the properties could have been sold at a higher price. However, as already stated in this judgment, Mr Swart cannot prove this. Mr Swart has failed to point to any other substantial injustice.

[46] In addition to subsection (1), subsection (2) makes plain that no defect or irregularity in the appointment of the trustees can vitiate anything done by them in good faith. If there were a defect or irregularity in the appointment of the trustees, this would not vitiate the sale of the properties if the sale of the properties was effected in

[40] Recently in *Aurecon*, this Court acknowledged that unreasonable delay in legality review proceedings must be considered in the broader context of the matter, including the prejudice that would result for other parties and the consequences of setting aside an action or decision. See *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5 at para 37 and *Khumalo* above n 38 at para 52.

good faith. Mr Swart makes no averments to indicate bad faith on the part of the trustees. On the contrary, the good faith of the trustees seems evident on the facts. At the time when the properties were sold the trustees had received the authorisation of the Master; they had received the consent of the two secured creditors; and they had issued a circular alerting all creditors of Mr Swart's insolvent estate of the intention to have the land sold.

[47] For the above reasons, it would not be in the interests of justice for this Court to consider whether the Master's section 80*bis* authorisation was valid or not. Leave to appeal should be refused on the basis that it is not in the interests of justice to determine the matter.

Costs

[48] I have found that the application for leave to appeal ought to be refused. Mr Starbuck has successfully opposed this application. As of November 2015, Mr Swart became a rehabilitated insolvent by effluxion of time. There is no reason why costs should not follow the result.

Order

[49] The following order is made:

1. Condonation is granted.
2. Leave to appeal is refused, with costs.

JAFTA J (Mojapelo AJ concurring)

[50] I have read the judgment prepared by my colleague Khampepe J (majority judgment). I am unable to agree with the outcome it reaches and the reasons supporting that outcome. In my view leave to appeal should be granted and the appeal must be upheld.

[51] Before the first to third respondents (trustees) were appointed, they concluded an agreement in terms of which assets of the applicant's insolvent estate were sold to a third party. In the main, this raises the question whether the sale was lawful. The subsidiary issue that arises from this question is whether the assets were disposed of in compliance with section 80*bis* of the Insolvency Act[41] in terms of which the trustees had claimed to have acted.

[52] On 28 November 2016 the Acting Chief Justice issued directions calling on the parties to file written submissions on specified issues.[42] The parties have lodged the submissions and the matter was decided without oral hearing.

[41] 24 of 1936 (Act).

[42] The directions read:

> "1. The parties are directed to file written submissions of not more than 25 pages which shall include the following issues:
>
> 1.1. Whether it is competent to adjudicate the constitutional challenge that was raised for the first time in this court.
>
> 1.2. Whether the Master's approval to sell the applicant's farms was issued in compliance with section 80*bis*, pertaining to the trustee's recommendation.
>
> 1.3. If section 80bis was not complied with, what was the effect of that non-compliance on the master's approval?
>
> 1.3.1. Did such non-compliance result in substantial injustice envisaged in section 157(1) of the Insolvency Act?
>
> 1.4. Whether the applicant had locus standi to challenge the master's approval on review.
>
> 1.5. If he lacked legal standing
>
> a) whether the Supreme Court of Appeal correctly applied *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA), and
>
> b) what remedy did he have in relation to the master's approval?
>
> 1.6. How would the resolution of the issues in paragraphs 1-5 impact upon the applicant's claim for damages?
>
> 2. Written argument, including argument on the merits must be lodged by—
>
> 2.1. the applicants, on or before Friday 16 January 2017; and
>
> 2.2. the respondents, on or before Friday 23 January 2017."

Legal framework

[53] For a better understanding of the issues, it is necessary to begin by outlining the relevant statutory provisions. Lying at the heart of the matter are provisions of the Act which divest insolvent persons of their estates and vest them in the Master of the High Court (Master) until a trustee is appointed, at which stage the estate vests in the trustee.[43] This position is triggered by an order that sequestrates the estate of an insolvent person. From the moment such an order is granted, the insolvent person may not deal with or dispose of assets in his or her estate. The authority to exercise rights in respect of the estate property vests in the Master until a trustee is appointed. On the appointment of the trustee, that authority relocates to the trustee.

[54] The Master is empowered to appoint a provisional trustee as soon as an estate is sequestrated, regardless of whether the sequestration is provisional or final.[44] After the appointment of a provisional trustee and at any time before the first meeting of creditors, the Master may give directions to the provisional trustee, which could be given to him or her by creditors at their second meeting.[45] A provisional trustee may exercise powers and duties of a trustee.[46] But a provisional trustee may not initiate or defend legal proceedings without the authority of the court. The only proceedings he

[43] Section 20(1) provides:

> "The effect of the sequestration of the estate of an insolvent shall be—
>
> (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him."

[44] Section 18(1) provides:

> "As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee."

[45] This is authorised by section 18(2).

[46] Section 18(3) provides:

> "A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct."

or she can institute without authority are proceedings where he or she seeks such authority. More importantly for present purposes, the provisional trustee may not sell any property belonging to the insolvent estate without the authority of the court or the Master.

[55] The authority contemplated in section 18(3) is a valid authority. This means that for a provisional trustee to sell assets of the insolvent estate, he or she must be in possession of a valid authority from a court or the Master, empowering him or her to sell the property in question. Section 80*bis* outlines a process to be followed in obtaining authority from the Master.[47] Briefly, this section prescribes a jurisdictional fact which must be in place before the Master issues approval. It requires the trustee to furnish the Master with a written recommendation incorporating reasons why authority to sell is sought. I return to this issue later.

[56] Section 82(1) is the other provision that governs a sale of assets of the insolvent estate.[48] However, this provision applies to a sale authorised by creditors at the second meeting of the creditors. It requires a trustee to sell all the property in the insolvent estate upon being authorised to do so and to act in terms of a direction issued by creditors at the meeting in question. Section 82(8) protects innocent purchasers of the assets against liability arising from a sale conducted in contravention of section 82.

[47] The full text of the section is quoted in [83] below.

[48] Section 82(1) provides:

> "Subject to the provisions of sections *eighty three* and *ninety* the trustee of an insolvent estate shall, as soon as he is authorized to do so at the second meeting of the creditors of that estate sell all the property in that estate in such manner and upon such conditions as the creditor may direct: Provided that if any rights acquired from the State under a lease, licence, purchase, or allotment of land is an asset in that estate, the trustee shall, in his administration of the estate, act in accordance with those provisions (if any) which by the law under which the rights were acquired, are expressed to apply in the event of the sequestration of the estate of the person who acquired those rights: Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the *Gazette* and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct."

[57] Section 82(8) provides:

> "If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section, or if any person in good faith and for value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section."

[58] Apart from protecting innocent purchasers, the section stipulates that the acquisition by those purchasers would be valid even though it came about through an unlawful sale. In order to compensate for the loss suffered by the insolvent estate, the section imposes liability on the trustee who sold its assets in contravention of the section. Such trustee is held liable to make good to the estate twice the amount of the loss suffered. The applicant invoked this section as a basis for his statutory damages claim. It is now convenient to set out the relevant facts.

Factual background

[59] Mr Nicolaas Johannes Swart was the owner of the immovable properties described as Portions 5, 8 and 13 of the farm Doorndraai 2A, before his estate was sequestrated on 4 October 2005. A final sequestration order of his estate was granted by the Court on 1 November 2005. It appears from the papers on record that the Master did not appoint a trustee of his estate until 24 January 2006 when the trustees were appointed as provisional trustees.

[60] However, even before his appointment as a provisional trustee, Mr Conrad Alexander Starbuck had received and accepted three offers to purchase the immovable properties of the insolvent estate. But these offers were subject to the Master granting authorisation. It is not clear from the papers in what capacity

Mr Starbuck received and accepted the offers from the trust. At that time he had not been appointed as a provisional trustee but was merely advised by the Master that he was contemplating appointing Mr Starbuck as a provisional co-trustee. What is unusual is the fact that he accepted and signed the offers as the seller without the participation of the other two potential co-trustees. The offers were accepted on 1 December 2005.

[61] Later on 12 January 2006, Mr Starbuck together with his co-trustees Messrs James Henry van Rensburg and Tsiu Vincent Matsepe purported to act as trustees of the insolvent estate. Without any statutory power, they submitted a written application to the Master purporting to act in terms of section 80*bis* of the Act. In the application they sought authority to sell the properties of the insolvent estate by private treaty or public auction. It is not apparent from the papers how the Master treated the request upon its receipt as it was made by persons who were not trustees.

[62] But what emerges from the record is that the Master appointed them as provisional trustees only on 24 January 2006, 12 days after they had submitted the request. On 31 January 2006, the Master granted the requested approval purportedly in terms of section 80*bis*. As it appears from the judgment of the Supreme Court of Appeal, the approval was issued in these terms:

> "The powers of the provisional trustees are hereby extended in terms of s 80*bis* of the Insolvency Act 24 of 1936, as amended, to sell the immovable properties of the abovementioned insolvent estate, subject to the following conditions."

[63] The trustees who had then assumed the status of provisional trustees received the purchase price in the composite sum of R1 625 000 from the trust. The properties were transferred to the purchaser on 14 June 2006.

[64] The first meeting of the creditors of the insolvent estate was held on 7 September 2006 and their second meeting took place on 12 October 2006. The

creditors approved the sale and transfer of the properties to the Trust at the second meeting.

[65] The applicant avers that the Trust has paid R450 000 for Portion 5 together with water rights on it. On 13 June 2006 it sold the water rights for R1 million, making an immediate profit of R550 000. The applicant further states that in oral evidence on record, Mr Moller of the Trust testified that he and Mr Boyle of the Boyle Family Trust contrived to obtain a lower price for the property sold by the trustees. As a consequence the Moller Trust later sold Portion 13 of the farm to the Boyle Family Trust for R709 585, making a profit of R234 585. And Mr Moller further testified that on 26 February 2007 he sold the remaining water rights to Akanani Mine for the sum of R3 791 568. From these facts the applicant concludes that the unusual process followed by the trustees and the Master in disposing of the properties was not in the interests of the creditors who were owed about R2 million as well as the insolvent estate which could have had a residue, had the properties been sold after the second meeting of the creditors.

[66] Notably, these averments are not disputed by the trustees. The only affidavit filed in this Court on behalf of the trustees was deposed to by Mr Starbuck. With regard to the purchase price paid by the Trust and the amounts for which the properties were resold, Mr Starbuck merely states:

> "The applicant conveniently fails to disclose to the court that the applicant attempted to sell the farm, which included the water rights, directly before his sequestration for R450 000. This is a clear indication that the value of the property, on the applicant's own conduct, never amounted to the imaginative values that had to be realised two years after sequestration.
>
> An insurmountable fact pertaining to the alleged damages, which is denied, is the fact that the experts agreed that the value of the property (including water rights) was at the time of the sale almost equal to the amount for which the trustees sold the properties and that after taking into account costs which would have been incurred after a sale by auction the damages, if any, were negligible.

> The applicant further neglects to state that the secured creditors, whose claims are the majority of the debt in the insolvent estate, supported the sale in the manner and at the price that the trustees effected the sale."

[67] It is significant to note that, unlike the applicant who referenced specific parts of the record containing the evidence, Mr Starbuck does not name the experts whose testimony he relies on and does not point where such evidence is on the record. In addition, the fact that the applicant had offered the farm for sale for R450 000 before sequestration does not prove its value on 1 December 2005 when Mr Starbuck agreed to the price. It is not clear what he means by "imaginative values that had to be realised two years after sequestration". The properties were sold by the trustees within two months from the date of provisional sequestration and resold later within six months from the date of the final sequestration.

In the High Court

[68] Aggrieved by the trustees' conduct, the applicant instituted a damages claim in the High Court seeking payment of R 11 410 000. Although the pleadings do not form part of the record before us, the applicant's case may be gleaned from the High Court's judgment. In paragraph 59 that Court recorded his case in these terms:

> "The plaintiff's claim for damages is not based on a delictual claim but on the following grounds:
>
> There was no authorisation given to the defendants in terms of section 80(bis) of the Act for the alienation of the involved property. As a result thereof, the transfer of parts 5, 8 and 13 of the farm Doorndraai was irregular.
>
> The purchase offer marked NS 6, 7 and 8 was not agreed to on behalf of all the curators, alternatively, the first defendant entered into the offer of purchase in his personal capacity.
>
> The first, second and third defendants did not have the necessary capacity to enter into the purchase agreement on behalf of the estate on 1 December 2005.
>
> The first, second and third defendants did not have authorisation to sell the property in terms of section 80(bis) of the Act.

> The sale of the properties occurred contrary to sections 82 and 80(bis) of the Act.
>
> The first, second and third defendants are liable to the plaintiff's estate in terms of section 82(8) for double the amount of the loss that the estate suffered."[49] [Own Translation]

[69] What emerges from the quoted statement is the fact that the applicant's claim was not rooted in delict but was based on section 82(8) of the Act. He contended that the properties were sold in contravention of sections 82 and 80*bis*. It is also apparent from the High Court's judgment that the trustees advanced a defence based on section 80*bis*. They claimed that the properties were sold in terms of that section after they had obtained approval from the Master. Compliance with section 80*bis* became a contested issue at the trial.

[70] It also appears from the High Court's judgment that the process that led to the impugned sale was initiated by First National Bank which had obtained a judgment against the applicant. Having attached the applicant's property, a sale in execution was conducted but was unsuccessful. Mr Verster, an employee of the bank, discussed the matter with Mr Starbuck as the bank wanted to have payment of the debt as soon as possible. Mr Starbuck indicated to Mr Verster that he was appointed as the trustee of the insolvent estate. They discussed the valuation of the property in question. At

[49] High Court Judgment at para 59. In Afrikaans this paragraph reads:

> "Eiser se els vir skadevergoeding is ni gebaseer op 'n deliktuele els nie maar op die volgende gronde:
>
> Daar was geen magtiging gegee aan die verweerdes in terme van Artikel 80 (bis) van die insolventslewet vir die vervreemding van die bretrokke elendon nie. Gevolglik was die oordrag van gedeelted 58 en 13van die plaas Doorndraal met waterregte onreelmatig.
>
> Die koopooreenskomste gemerk NS 6,7 en 8 is nie aangegaan namens al die kurators in die boedel nie, alternatlewelik, het die eerste verweerder die koopooreenkomste in sy persoonlike hoedanigheld aangegaan.
>
> Die eerste, tweede en derde verweerders het nie oor die nodige bevoegheid beskik om enige koopooreenkomste namens die boedel van die eiser op 1 Desember 2005 te sluit nie.
>
> Die eerste, tweede en derfe verweerders het nie magtiging gehad vir die verkoping van die eiendom ingevolge Artikel 80 (bis) van die Insolvenslewet nie.
>
> Die verkoping van die eiendomme het plaasgevind in stryd met die bepalings van Artikel 82 (8) van die Wet aanspreeklik teenoor die eiser se boedel vir dubbel die bedrag van die verlies wat die boedel gely het."

that time the first meeting of the creditors had not yet taken place. It was decided between Mr Verster and Mr Starbuck that the Master's consent for the sale be obtained. According to Mr Verster, the process was commonly followed by the bank. Where offers were made to purchase a property like the present and if such offers were accepted by the bank, it required the trustee to get consent to sell the property from the Master. Mr Verster had encouraged Mr Starbuck on a regular basis to speed up the process.[50]

[71] This explains Mr Starbuck's conduct of acting in haste and signing offers to purchase at particular prices even before his appointment as a provisional trustee. If the record accurately reflects Mr Verster's evidence, Mr Starbuck misled him when he indicated that he was already appointed as the trustee. The correct position was that, when they agreed to have the properties sold, Mr Starbuck was not a trustee of the insolvent estate, whether provisionally or otherwise. Even when they submitted the application for the Master's approval on 12 January 2006, they were not trustees of the insolvent estate. The Master had merely informed Mr Starbuck that he was intending to appoint him.

[72] Having heard evidence from both sides, the High Court held that the properties were properly sold in terms of section 80*bis*. It rejected the contention that this section was not complied with. The Court held further that section 82, on which the applicant based his claim, did not apply to the present matter. Accordingly, the applicant's claim was dismissed with costs.

[73] Unhappy with the outcome, the applicant appealed to the Supreme Court of Appeal. That Court upheld the conclusions of the High Court on the validity of the Master's approval and compliance with section 80*bis*, in terms of which the properties were purportedly sold. With regard to the applicability of section 82, the Supreme Court of Appeal held that the section did not apply here

[50] High Court judgment above n 2 at paras 49-53.

because the sale was carried out before the creditors' second meeting. It pointed out that this section applies to a sale that follows the creditors' second meeting. In addition, that Court concluded that the applicant's claim had to fail because it depended upon the absence of a valid authorisation by the Master. Here the Master had issued permission which constituted administrative action that had legal consequences until set aside.

In this Court

[74] I agree with the majority judgment that condonation should be granted to the applicant for reasons fully set out in that judgment.

Leave to appeal

[75] I do not agree that leave should be refused. The majority judgment holds that the matter does not raise a constitutional issue.[51] I disagree. The matter concerns the exercise of public power conferred by section 80*bis*. The Supreme Court of Appeal has defined the exercise of power in terms of the section by the Master as constituting administrative action. The applicant seeks to challenge the validity of the Master's approval which is pivotal to the outcome of the case. If that approval was invalid, the consequences would be that the purported sale of the applicant's property would be unlawful. Whether the sale remains intact despite the invalidity of the approval is a matter we may determine only if leave to appeal is granted.

[76] What remains for consideration is the question whether it is in the interests of justice to grant leave. Factors like the prospects of success play an important role at this stage of the enquiry. This is so because here this is the only court to which an appeal can be brought. The Supreme Court of Appeal has had the opportunity to consider the matter. It seems to me that on the crucial issue relating to

[51] Majority judgment at [31].

compliance with section 80*bis* and the consequences of non-compliance on the validity of the Master's approval, there are prospects of success.

[77] On its face section 80*bis* requires a recommendation by a trustee to precede the granting of approval by the Master as a condition for the exercise of power by the Master. The facts show that, when the trustees submitted the purported recommendation, they were not yet appointed as provisional trustees. The question that needs to be considered by this Court, which was overlooked by the other Courts, is whether section 80*bis* contemplates the present "recommendation" as a jurisdictional fact for the granting of an approval. In these circumstances leave to appeal must be granted.

Issues

[78] In their written submissions the parties confined themselves to the issues raised in this Court's directions of 28 November 2016. Those are the issues we must determine. They are:

(a) Whether it is competent to adjudicate the constitutional challenge that was raised for the first time in this Court.

(b) Whether the Master's approval to sell the applicant's farms was issued in compliance with section 80*bis*, pertaining to the trustees' recommendation.

(c) If section 80*bis* was not complied with, what was the effect that non-compliance had on the Master's approval in light of section 157(1) of the Insolvency Act?

(d) Whether the applicant had *locus standi* to challenge the Master's approval on review.

Constitutional challenge

[79] For the first time in the proceedings before this Court, the applicant sought to attack the validity of sections 18(3) and 80*bis* of the Act. He contended that these provisions are inconsistent with his right to not be arbitrarily deprived of property which is guaranteed by section 25 of the Constitution. In addition he submitted that the impugned provisions limit his administrative justice rights entrenched in section 33 of the Constitution.

[80] No reasons were advanced as to why this challenge was raised for the first time in this Court in view of the general principle that constitutional challenges must be raised in the lower courts, as it is undesirable for this Court to sit over such matters as a court of first and last instance. However, the rule admits of an exception in special circumstances. In special cases where there are compelling reasons in support of a challenge raised for the first time, this Court does entertain such constitutional challenges.[52]

[81] The applicant's case does not meet the test for entertaining a constitutional challenge raised for the first time in this Court. A further defect is that the Minister responsible for the administration of the Act is not joined as a party. Accordingly, we must decline the request to adjudicate the constitutional attack.

Compliance with section 80bis

[82] An answer to this question requires us to interpret the section in order to determine the conditions it lays down for the exercise of power by the Master. That construction will also tell us the roles played by persons mentioned in it and their significance in the scheme of the section and the entire Act.

[52] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC); *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 34; and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC).

[83] Section 80*bis* provides:

> "(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.
>
> (2) The Master may thereupon authorize the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorize the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale."

[84] It is apparent from the opening words of the section that it regulates the sale of the property of an insolvent estate which occurs before the second meeting of the creditors. Once the second meeting has been held, the sale of such property may only be conducted in terms of section 82 and under the authority and direction of the creditors themselves. Such authority and directions may flow from the second meeting only. But creditors have no role to play in the scheme created by section 80*bis*. Instead it is the Master who authorises a sale on any conditions he or she deems fit.

[85] However, the Master does not have the power to initiate the process that culminates in a sale. The section confers this power exclusively upon a trustee of the insolvent estate. The power is not untrammelled. It is subject to conditions. The first is that the trustee in question must consider the issue and be satisfied that the property of the estate ought to be sold forthwith. This means that there must be cogent reasons for not waiting for the second meeting of creditors and depriving them of the role they play in the process under section 82 and for replacing them with the Master.

[86] The second condition is that once so satisfied, the trustee must submit a written recommendation to the Master in which he or she seeks authorisation for selling the property. This recommendation must contain reasons which satisfied the trustee that the property in question must be sold forthwith. The recommendation and the reasons furnished are crucial to the exercise of the power by the Master. He or she must consider the recommendation and the reasons before approving the sale. In short, the recommendation is a condition precedent or jurisdictional fact for the exercise of the Master's power. Absent it the Master may not exercise the power.[53]

[87] The issue that needs to be determined here is whether when the Master issued the approval on 31 January 2006, he or she had the necessary recommendation. According to the trial Court it was common cause that when the trustees submitted the written request on 12 January 2006, they were not trustees of the insolvent estate. They were appointed as provisional trustees later on 25 January 2006.

[88] In terms of the Act the word "trustee" means the trustee of an estate under sequestration and includes a provisional trustee. And one becomes a trustee only upon appointment by the Master. Nobody may be a trustee in the eyes of that Act before he or she is appointed by the Master. It is the appointment that entitles a person to exercise powers of a trustee under the Act. This is apparent from the scheme of the Act outlined earlier in this judgment. Upon sequestration, the estate of the insolvent vests in the Master until a trustee is appointed. The appointment of a trustee has the legal effect of vesting that estate in the trustee. It is this legal consequence which empowers a trustee to act in terms of section 80*bis* and submit a recommendation to the Master for the sale of property of the insolvent estate.

[89] Here the trustees purported to exercise powers in terms of section 80*bis* at a time when no estate vested in them. At the relevant time the estate vested in the

[53] *Roberts v Chairman of Local Road Transportation Board (1)* 1980 (2) SA 472 (C) at 476G–477A. See also *Pinetown Town Council v President of the Industrial Court* 1984 (3) SA 173 (N) at 179A–E.

Master. The fact that they were informed that the Master intended to appoint them as co-trustees did not clothe them with any legal capacity under the Act. They had no power to determine whether the property of the applicant's estate should be sold before the second meeting of the creditors. Until their appointment on 24 January 2006 what they did purportedly in terms of section 80*bis* had no legal effect.

[90] Moreover, the Master knew when he received the so-called recommendation that those who submitted it were not trustees as he had not appointed them as trustees. Further, the Master knew when he granted the approval purportedly in terms of section 80*bis* that he did not have the necessary recommendation.

[91] Although the impugned recommendation is not part of the record before us, the High Court judgment quotes the following as reasons furnished in it:

> "(a) The sale of the property should occur on an urgent basis before the second meeting of the creditors.
>
> (b) The saving of costs - if the property is sold expeditiously in contrast to a sale on auction and that an auction would not necessarily ensure a better price.
>
> (c) The property will be sold voetstoots and for cash."[54]

[92] None of these reasons tell us why the property had to be sold before the creditors' second meeting and what the advantage is to anybody in opting for the section 80*bis* process as opposed to section 82. To merely state that the sale must be held urgently before the second creditors' meeting does not tell us why this should happen. It is not clear what costs were to be saved by invoking section 80*bis*. Nor does the fact that the property was to be sold voetstoots and for cash support the decision to apply section 80*bis*. All these reasons do not show us why the trustees were satisfied that the property had to be sold forthwith.

[54] High Court judgment above n 2 at para 72.

[93] The only reasonable explanation for the course followed by the trustees is to be found from the evidence of Mr Verster, an employee of one of the creditors. It will be remembered that he testified to the effect that it was a practice commonly followed by First National Bank to require a trustee to get the Master's approval if privately made offers were accepted by the Bank. And that in this instance Mr Starbuck was "encouraged on a regular basis to speed up the process". This was done after a sale in execution, following the attachment of the property for a judgment debt, was unsuccessful. Therefore the process was activated at the instance of one creditor who had acted individually to the exclusion of the other creditors who could have participated in the process during the second meeting of creditors. The Bank did not want this to happen hence the property had to be sold before the second meeting of the creditors.

[94] Had the Master applied his mind to these issues, together with the fact that the request to sell was made by persons who were not functionaries envisaged in section 80*bis*, he is likely to have declined to grant an approval. This is because steps preceding the granting of the approval did not comply with the requirements of the provision. Consequently, I hold that there was no compliance with the provisions of section 80*bis*, pertaining to the trustees' recommendation.

The effect of non-compliance

[95] Non-compliance with section 80*bis* has a fatal effect on the Master's approval. It is a well-known principle of our law that where the exercise of statutory power depends on the existence of jurisdictional facts, the repository of the power may not exercise it in the absence of such jurisdictional facts. In *South African Defence and Aid Fund* a jurisdictional fact was defined in these terms:

> "[It] is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom

> the power resides is not bound to exercise it. On the other hand, *if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid*."[55]

[96] This principle was affirmed by this Court in *South African Rugby Football Union* where the Court said that *South African Defence and Aid Fund* remains a leading authority in our law on jurisdictional facts.[56] In *Harrison* this Court said:

> "The process of approving plans is provided for in section 7 of the Building Act. I shall soon return to the provisions of section 7 in detail. Two comments are, however, pertinent for present purposes. Firstly, section 7(1) requires a recommendation by the building control officer as a precondition for any decision to be taken by the City on an application for approval in terms of section 4. *In the context of administrative law, that recommendation is therefore a jurisdictional fact, the existence of which is a prerequisite for the exercise of the power under section 7*."[57]

[97] In *Paola* the Supreme Court of Appeal rejected the argument that approval of building plans submitted by an official, who was later appointed as a building control officer had been validly approved. There the Court said:

> "I cannot agree that the third respondent's decision to approve the plans without considering a recommendation from a duly appointed building control officer can be regarded as valid, or that the fact that a necessary condition precedent to the exercise by the third respondent of its discretion to approve plans was not fulfilled can be regarded as 'a mere irregularity of no real consequence'. I agree with counsel for the appellant's contention that jurisdictional facts necessary for the exercise of the statutory power were not present. It is not possible, in my view, to interpret sections 5, 6 and 7 of the Act in any other way."[58]

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[55] *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 3 (C) at 34G-H.

[56] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*).

[57] *Harrison* above n 33 at para 14.

[58] *Paola v Jeeva NO* [2003] ZASCA 100; [2003] 4 All SA 433 (SCA) at para 14.

[98] Since here there was no recommendation by duly appointed trustees, the purported approval by the Master was invalid. Unless what was done as a result of this invalid approval was preserved by the Act, it follows that what was done on the strength of the invalid approval was also invalid. This is because an invalid act that was performed unlawfully cannot render legal another act which is unlawful. Nor can an unlawful act justify another act that is unlawful.

[99] Ordinarily it is unlawful to dispose of another person's property without the owner's authority. But if one is authorised by a statutory provision to do so, the disposal becomes lawful if the relevant statutory requirements are met. Here the trustees invoked section 80*bis* as justification for selling the applicant's property to the trust. Their conduct could be justified only if section 80*bis* had been complied with.

Effect of section 157(1) on the non-compliance

[100] The failure to follow section 80*bis* would ordinarily be fatal to a sale that was conducted on the authority of an invalid approval. But there are provisions in the Act which suggest otherwise. One such provision is section 82(8) quoted in paragraph 8. It provides that if property of an insolvent estate is sold in contravention of section 82 but is purchased by a third party in good faith, the purchase shall be valid. However, I agree with the High Court and the Supreme Court of Appeal that section 82 does not apply to the present case.

[101] The other provision that condones non-compliance is section 157(1). It reads:

> "(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court."

[102] The heading of this section is "Formal defects". This suggests that the section was designed to regulate non-compliance with formalities. It stipulates that nothing

done in terms of the Act will be invalid by reason of a formal defect or irregularity. The word "formal" qualifies both the defect and the irregularity. This reveals that Parliament sought to condone formal defects and irregularities. Even then the defect must not cause a substantial injustice which cannot be remedied by a court order. If the defect is not formal, this provision finds no application.

[103] The nature and extent of non-compliance with section 80*bis* we are concerned with here cannot be described as a formal defect. This non-compliance is not about a failure to follow formalities. An appointment of a trustee is a substantive matter which has the consequence of vesting the entire estate of an insolvent person in the trustee. As demonstrated in this judgment, the act of appointing a trustee alone confers on the appointee extensive powers with far reaching consequences. Accordingly, I hold that section 157(1) does not apply here.

[104] But even if it applied, the defect would give rise to a substantial injustice which cannot be remedied by any order of court. The total claims proven against the estate amounted to R2 155 959. If the properties were sold after the second meeting of the creditors, they could clearly have fetched a much higher price. This is borne out by the fact that some of the properties were resold at a higher price before the second meeting of the creditors was held.

[105] Moreover, a distinction must be drawn between the preservation of what was done in non-compliance with formalities on the one hand and the wrongful consequences of the non-compliance, on the other. Section 157(1) does not protect functionaries who cause damage by not following its requirements from liability for their irregular conduct. Its focus is the protection of the act wrongly performed. It insulates the sale from invalidity. There are no reasons of principle or public policy which militate against holding those who do not follow the Act liable for any damage they cause.

[106] Protection of property is entrenched in our law. It is guaranteed by section 25 of the Constitution which outlaws arbitrary deprivation of property. This section permits deprivation of property if it is effected in terms of a law of general application. The deprivation envisaged is the one effected in compliance with the requirements of the law authorising it. The bottom line is that a justified deprivation must follow the spirit and letter of the law that permits it.

[107] In a claim for damages arising from deprivation of property all that a claimant needs to prove is the taking away of property without his authorisation as the owner. Such deprivation is taken as prima facie unlawful. Once a deprivation of this kind is established, the onus falls on the person who caused it to establish a ground that justifies it.

[108] In *Zealand* this principle was endorsed in these terms:

> "It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification."[59]

[109] The burden fell on the trustees to justify their disposal of the property of the insolvent estate. Reliance on the invalid approval granted unlawfully by the Master could not constitute justification. Therefore the High Court and the Supreme Court of Appeal erred in holding that the sale was lawful.

Locus standi

[110] While I accept that the applicant had the legal standing to challenge the Master's approval on review, I do not think that his claim for damages depended on a

[59] *Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) at para 25. See also *Minister of Home Affairs v Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC).

successful review of the approval. On the approach laid down in *Zealand*, the trustees could avoid liability only if they proved that the sale was authorised by the Act. They have failed to discharge the onus that rested on them. The issue whether the applicant could have taken the Master's approval on review is immaterial.

Remedy

[111] The rejection of the defence advanced by the trustees does not automatically result in the claim for damages succeeding. Much depends on the nature of that claim. Although the Supreme Court of Appeal was willing to entertain a delictual claim that was advanced belatedly on appeal, I am not convinced that this Court should do likewise. The judgment of the trial Court explicitly states that the applicant's claim for damages is not based on a delictual claim.[60] It is clear from that judgment that the applicant pleaded a statutory claim based on section 82 of the Act only.

[112] I agree with both Courts that section 82 applies only to sales that are conducted after the second meeting of creditors and subject to the creditors' instructions. As the impugned sale occurred before such meeting, it fell outside the scope of section 82. Indeed the trustees who effected it claimed to have acted in terms of section 80*bis* and not section 82. Their purported authorisation was granted by the Master and not the creditors.

[113] If the claim was delictual, I would not have hesitated to declare that the trustees were liable for any damages proved at a later trial in the High Court. The difficulty is that the applicant restricted his cause of action to a statute. But since in the notice of motion filed in this Court, the applicant also seeks further or alternative relief, I am inclined to merely declare that the impugned sale was unlawful.

[114] Accordingly, I would uphold the appeal and order the Master to pay costs in

[60] High Court judgment above n 2 at para 59.

the High Court and Supreme Court of Appeal. It was the duty of the Master to ensure that the relevant provisions were complied with. He knew that the trustees had not been appointed when they submitted their request for approval. He was also aware that his exercise of power under section 80bis depended upon a recommendation by duly appointed trustees and that he should apply his mind to reasons furnished in support of the request. But he failed to discharge the supervisory obligation imposed on him by the Act.

ZONDO J

[115] I have read the judgments by my Colleagues, Khampepe J (first judgment) and Jafta J (second judgment).

[116] The first judgment sufficiently sets out the factual background and litigation history in this matter. It is, therefore, unnecessary to repeat those in this judgment. It is only necessary to point out that the first, second and third respondents were appointed by the Master of the High Court (fourth respondent) as trustees on 24 January 2006 and the Master authorised the sale of properties by the trustees on 31 January 2006.

[117] For the reasons given up to and including paragraph 28 of the first judgment and those set out below, I agree with the first judgment's conclusion that the application for condonation should be granted but that it is not in the interests of justice that leave to appeal be granted in this matter. For the same reasons I would also say that the application for leave to appeal should be dismissed because there are no reasonable prospects of success. I, thus, concur in the order proposed in the first judgment.

[118] With regard to the challenge to the validity of the Master's authorisation of the sale of the properties, the only bases upon which the applicant contended that the sale

or transfer of the properties in question was in breach of section 80*bis* and section 82(1) of the Insolvency Act[61] were that:

(a) the offer to purchase the properties was accepted by the first respondent before the Master had appointed him as a trustee;

(b) the first, second and third respondents applied to the Master for authority to sell the properties on 12 January 2006 which was before they were appointed as trustees and, therefore, before they had authority to make that application;

(c) the Master granted authority for the sale of properties in response to an application that was made by the first, second and third respondents before they had authority to make such an application.

[119] It is in the above context that in his action in the High Court the applicant contended that the properties were sold without the Master's authority. In this regard it is, in my view, important to note that—

(a) when the first, second and third respondents were appointed as trustees on 24 January 2006, the respondents' application to the Master for the authority to sell the properties was pending before the Master and they did not withdraw it; this means that, even after the first, second and third respondents had been appointed as trustees, they continued to seek the Master's authorisation in respect of which they were waiting to hear from the Master when they were appointed.

(b) when the Master considered and decided the application for authority to sell the properties, he knew that the first, second and third respondents had not changed their minds about their application for the authority to sell the properties.

[61] 24 of 1936.

[120] Given the above, the question that arises is: what should the first, second and third respondents have done after they had been appointed if they sought to avoid the alleged non-compliance with the Insolvency Act? The answer can only be that they should have withdrawn the application they had submitted before they were appointed and resubmitted the same application. That, in my view, would be the height of formalism. In my view, it was in order that they did not withdraw their application.

[121] To the extent that the first, second and third respondents' application to the Master may not have been lawful before the applicants were appointed, it became lawful when they were appointed and they did not withdraw it. Accordingly, when the Master granted the first, second and third respondents authority on 31 January 2006, that was lawful because they were by then already trustees and still wanted the Masters authorisation.

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