IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Reportable	Yes / ~~No~~

CASE NO: EL 604/2020
Date heard: 28 January 2021
Date delivered: 23 February 2021

In the matter between:

BENJAMIN MZUVUKILE MFAZWE	**Applicant**
and	
A N GADI PROPERTY INVESTMENTS (PTY) LTD	**First Respondent**
G M VOIGT NO	**Second Respondent**
IDEC FINANCIAL SERVICES (PTY) LTD	**Third Respondent**

JUDGMENT

NOTYESI, AJ:

Introduction

[1] The applicant, Benjamin Mzuvukile Mfazwe, seeks an order that an enquiry relating to two entities namely, mnandi Fast Foods and Mpeto Attorneys be conducted in terms of sections 417 and 418 of the Companies Act 61 of 1973. He has alleged that they have received or are holding funds in the sum of R4 200 935, which sum is due to AN Gadi Property Investments (Pty) Ltd (in liquidation), the first respondent.

[2] Mr Mfazwe believes that the funds were in the trust account of Mpeto Attorneys at the instance of the two entities. His contentions are that once this court has authorised an enquiry, the entities would account for the funds and also disclose their whereabouts. According to him, the enquiry would result in the recovery of the funds.

He rejects the view held by the liquidators that, on the available evidence, no such funds exist in any attorney's trust account.

[3] In opposing the application, the respondents have challenged Mr Mfazwe's *locus standi* to institute these proceedings. They also contended that the proposed enquiry would serve no purpose as the alleged funds had, in previous litigation involving the first respondent , the applicant or his wife, Nontende Stella Mfazwe, been found by this court, to be non-existent. The liquidators contended that they have also investigated the allegations of funds being held in the trust accounts of the entities, and found no evidence supporting the allegations. According to the respondents, the proposed enquiry would be an abuse of the process of this Court and there is no valid ground for this application.

[4] The respondents have also been aggrieved by some allegations made in the applicant's replying affidavit. They have accordingly made an application for the striking out of the impugned allegations. There are accordingly two applications before this Court, the application to strike out and the main application.

The Parties

[5] For the sake of convenience, the protagonists in these proceedings are referred to simply as "*Mr Mfazwe*", *"Mr Voigt*" and *"A N Gadi Property Investments (Pty) Ltd*". Mr Mfazwe is the applicant. Mr Voigt, the second respondent, is cited in

his capacity as one of the liquidators of A N Gadi Property Investments (Pty) Ltd and a director of IDEC Financial Services (Pty) Ltd, the third respondent.

The issues

[6] I now turn to deal with the issues falling to be determined in these proceedings. I interpose here to mention that, although the issue in paragraph 6(b) is dispositive of the application, the remaining issues will nevertheless be dealt with so as to do justice to the submissions made by the parties, respectively. The issues for determination are-

(a) whether or not the applicant has the necessary *locus standi* to institute these proceedings;

(b) whether or not the courts have previously pronounced on the funds alleged to be either held or received into the trust accounts of Mpeto Attorneys and Mnandi Fast Foods totaling to R4 200 935;

(c) whether or not reasonable grounds exist for the authorization of an enquiry in terms of sections 417 and 418 of the Companies Act;

(d) whether or not the application is an abuse of the process of court;

(e) the application to strike in terms of rule 6(15); and

(f) the appropriate costs order.

Background

[7] In their answering affidavit the respondents have disclosed a long history of litigation involving the parties. It is appropriate to set out that litigation background before dealing with the above issues.

[8] Litigation involving these parties has a long and troubled history. In

September 2010, ABSA obtained a default judgment against A N Gadi Property Investments (Pty) Ltd in the amount of R3 051 196.33 plus interest. That judgment remains unsatisfied. On 24 May 2011, Mr Mfazwe brought an application before the Grahamstown High Court under case number 1769/2011 for A N Gadi Property Investments (Pty) Ltd to be placed in business rescue. ABSA intervened in those proceedings and opposed the relief sought by Mr Mfazwe and also brought a counter -application for the winding-up of A N Gadi Property Investments (Pty) Ltd.

[9] Pursuant to those proceedings, a judgment was delivered on 13 December 2013 dismissing Mr Mfazwe's application. A provisional winding-up order was granted against A N Gadi Property Investments (Pty) Ltd. Mr Mfazwe sought and was granted leave to appeal against the refusal of the application for business rescue.

[10] The matter was heard by a Full Bench of this Court on 30 March 2015. On 7 April 2015, the Full Bench dismissed the appeal. Thereafter, Mr Mfazwe, petitioned the Supreme Court of Appeal for leave to appeal, but the petition was dismissed on 6 July 2015. An application to the Constitutional Court was similarly dismissed. The provisional winding-up was eventually confirmed by order of this Court on

8 September 2015.

[11] During April 2018, Mr Mfazwe again launched an application before this Court for A N Gadi Property Investments (Pty) Ltd to be placed under business rescue. In that application, the respondents raised *res judicata* based on the previous dismissal of the application for business rescue. Mr Mfazwe withdrew that application and tendered costs.

[12] A subsequent business rescue application was launched by Nothende Stella Mfazwe, Mr Mfazwe's wife. She was a shareholder of A N Gadi Property Investments (Pty) Ltd. That application was dismissed on 3 September 2019. Mrs Mfazwe's application for leave to appeal against that judgment was dismissed on 24 March 2020.

[13] On 10 March 2020, Mr Mfazwe launched an application in the Grahamstown High Court against the above respondents and ABSA wherein he sought an order, in the main, that the provisional and final orders of liquidation be declared null and void, and be rescinded. The respondents opposed that application and filed a counter-application in which they sought an order in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 prohibiting Mr Mfazwe from instituting legal proceedings against any person without the leave of the court.

[14] At the hearing of this application, counsel advised the court that the last application and contest between the parties is still pending. In these proceedings, I will make reference to the judgments handed down pursuant to those court proceedings since the provisional winding-up of A N Gadi Property Investments (Pty) Ltd. The alleged funds held or being received by Mpeto Attorneys and Mnandi Fast Foods are central in those previous judgments.

The present application

[15] These proceedings were launched on 24 June 2020. The gravamen of Mr Mfazwe's case is that an examination must be authorised by this Court in terms of sections 417 and 418 of the Companies Act. He has urged the Court to order Mnandi Fast Foods and Mpeto Attorneys to provide full and detailed disclosures

as to the whereabouts of the funds and their willingness to pay the funds to the liquidators of A N Gadi Property Investments (Pty) Ltd.

[16] Mnandi Fast Foods is alleged to hold an amount of R1 854 480, whilst Mpeto Attorneys is said to have in their trust account an amount of R2 346 455. The respondents dispute the existence of these funds in any trust account. They allege that Mr Mfazwe has not furnished any evidence to the liquidators, despite several requests for such evidence having been made. Mnandi Fast Foods no longer exists. They alleged that Mr Mfazwe made no allegations in relation to when funds were transferred to Mpeto Attorneys, by whom the transfers were made, and who the directors who would have had knowledge of those funds are.

Applicable Law and Findings

[17] The respondents contend that Mr Mfazwe is not a creditor of A N Gadi Property Investments (Pty) Ltd and that, therefore, he lacks the necessary *locus standi* to launch this application.

[18] Mr Mfazwe, who appeared in person, countered the submission on *locus standi* by submitting that these proceedings are by their nature akin to an *ex parte* application. He claimed that the purpose of these proceedings is to inform the Court that there is information which may assist and empower the liquidators to wind-up a company in liquidation. He further contended that the liquidators should support rather than oppose the application, since the object is to empower them. This brings me to the provisions of the Act.

[19] Section 417(1) of the Companies Act reads:

> "In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company."

[20] In his founding affidavit Mr Mfazwe has alleged that, as a creditor, he is an interested party. He predicated his *locus standi* on the fact that he is a creditor of A N Gadi Property Investments (Pty) Ltd. Whether or not he is a creditor must be determined with reference to the wording, object and purport of sections 417 and 418. The Court must also consider Mr Mfazwe's pleaded case. The question relating to who qualifies to bring a section 417 application has previously been discussed by our Courts.

[21] In *Miller and Others v Nafcoc Investment Holding Ltd Co and Others*[1] the court held that the section does not envisage an application, much less an application from a limited category of persons – which eminently is sensible, for otherwise the Master would be unable to act unless he was given information from specified persons.

[22] In this regard Friedman J had the following to say in *Venter v Williams and Another*[2]:

> "For this reason the Court will generally require an application to be made to it for the constitution of such a commission by a person having an interest in the matter and will decline to exercise its discretion to convene such an enquiry unless such an application is made. But that does not

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[1] *2010 (6) SA 390 (SCA)*
[2] *1982 (2) SA 310 (N) at 313 H - G*

> mean that, if in fact the person who brings the irregularities or alleged irregularities to the Court's attention and asks for an enquiry is not a creditor or person with financial interest, the Court is obliged to decline to make an order in the matter."[3]

[23] The procedure provided by sections 417 and 418 is aimed at assisting officers of the court in the performance of their duties to the creditors of the company in liquidation, the Master and the court. The central purpose of an enquiry is to discover facts beneficial to creditors and uncover activities detrimental to wrongdoers.[4]

[24] According to Mr Mfazwe there were unaccounted funds held by certain entities in trust accounts. That information, if well made, would assist the liquidators in the winding-up of A N Gadi Property Investments (Pty) Ltd. The information would benefit the creditors, if such funds were recovered.

[25] The wording of the sections makes it open to any person to request an enquiry in terms of sections 417 and 418, since the court must be given sufficient and relevant information before authorizing an enquiry. The Act (the *Companies Act*) makes it abundantly clear that not only creditors, but also contingent and prospective creditors of a company, may apply for its liquidation.

[26] For the above reasons, I am satisfied that Mr Mfazwe, irrespective of whether he is a creditor or not, does have the necessary legal standing in terms of the Act to apply for an enquiry. There is no merit to the contrary submission. The objection based on legal standing can accordingly not be sustained. Whether this court

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[3] See also *Absa Bank Limited and Others v Wolpe and Others; In Re: Wolpe v Absa Bank Limited and Others* (9450/14, 20672/15) [2016] ZAWCHC 114 (31 August 2016) by Salie-Hlophe J.

[4] See also *Lynn NO and Another v Kruger and Ors* 1995 (2) SA 940 (N) at 944F and Pretorius and Others v Marais & Others 1981 (1) 1051 (A) at 1062 H – 1064 B.

has previously pronounced on the funds alleged to be either held or received into the trust accounts of Mpeto attorneys and Mnandi Fast Foods

[27] The respondents submitted that the issue of the alleged monies in the trust accounts has been dealt with and adjudicated upon in various judgments. In pursuit of that submission, they furnished this Court with the copies of the relevant judgments. The findings in those judgments must be considered to determine whether there is merit to the respondents' submission.

[28] In *Mzuvukile Benjamin Mfazwe v A N Gadi Properties & Absa Bank Limited,*[5] Sandi J said:

> "Save for the applicant's say so, there is no evidence of whatever nature or form from the attorneys who are holding the rentals in their trust account that the funds are indeed available in their trust account. Nowhere is it stated that such attorneys are willing and able to pay those funds to the respondents once legal proceedings have been finalized."

These remarks were made in respect of allegations by the applicant in a business rescue and provisional liquidation application. In that case it had been alleged:

> "That there was an amount of R3 996 906 held in an attorney's trust account; and that there were amounts of rentals due to the applicant in the sum of R193 853".

[29] In *Nothende Stella Mfazwe v A N Gadi Investments (Pty) Ltd*[6] Griffiths J observed:

> "The sum so diverted has been variously stated, but according to the applicant amounts presently to R4 200 935...". There is little doubt that the applicant intended to rely on the availability of the sum in excess of R4 000 000 allegedly being held in the attorney's trust accounts in a quest to establish a reasonable prospect for the rescue of the company. ...

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[5] Unreported judgment of the Eastern Cape Division by Sandi J – Case Number 1769/2012 delivered on 13 December 2013

[6] Unreported judgment of the Eastern Cape Division – Case Number 1338/2018 delivered on 3 September 2019 by Griffiths J para 8 and 20 of the judgment

> Despite this, in her replying affidavit she conceded that such monies no longer exist."

[30] Mrs Mfazwe was a director of A N Gadi Property Investments (Pty) Ltd. In the various applications involving the parties, Mrs Mfazwe stated in one affidavit that *"the rental amounts for the extended period in total R4 200 000.00 were paid to Nhlangulela Attorneys and Mpeto Attorneys."* Again, Mrs Mfazwe, in an affidavit in her application for business rescue, stated that *"I accept that the monies were withdrawn or utilized."* In that application it was conceded that the monies do not exist.

[31] In this application, the applicant persisted with the previous allegations made in the cases to which reference has been made and that ABSA has refused to claim R4 200 935 in trust funds.

[32] I am convinced that the Courts have dealt with the allegations about the existence, or rather the absence, of money in certain attorneys' trust accounts. The objective facts do not lead to a conclusion that such monies exist. The only allegation in that regard is Mr Mfazwe's mere say so. In *Benjamin Mzuvukile Mfazwe v A N Gadi Property Investments,*[7] Pickering J writing for the Full Bench, held –

> "The immediate problem with this submission is that, as was submitted by Mr. de la Harpe, who appeared for ABSA, there was quite simply no evidence before the Court a quo to the effect that any attempt at exercising its rights as cessionary would have resulted in ABSA effectively recovering the monies due to them. There is no evidence as to when, if ever, before ABSA obtained judgment, it was advised of the firstrespondent's problems relating to the division of the rentals."

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[7] Benjamin Mzuvukile Mfazwe v A N Gadi Property Investments (Pty) Ltd and Absa Bank Limited – Case number CA192/2014 delivered on 07 April 2015 by Pickering J (Full Bench Appeal).

[33] Needless to emphasize that in Mrs Mfazwe's application, a concession was made that such monies no longer existed. In these previous matters, a petition to appeal was dismissed by the SCA on 01 March 2017. The application to the Constitutional Court was dismissed on 15 June 2017.

[34] In view of the findings made in the court judgments since 2013, I am satisfied that the issue of the alleged monies totalling R4 200 935, being held in the attorneys' trust accounts, has been sufficiently adjudicated and concluded. I therefore conclude there is no evidence to supporting the contention that these monies exists. Whether or not reasonable grounds exist for the authorization of an enquiry in terms of sections 417 and 418 of the Companies

[35] In order to decide whether it would be appropriate to order an enquiry under the Companies Act, the Court must again consider the facts of the application and the section.

[36] It seems that the section provides that only a natural person, and not a juristic entity, may be summoned to such an interrogation.[8] The applicant is asking for the examination of two entities, namely Mnandi Fast Foods and Mpeto Attorneys. In respect of Mnandi Fast Foods, this entity no longer exists. The applicant fails to identify the person(s) from Mnandi Fast Foods who would be the subject of the enquiry. He does not make any allegation of the names and identities of the person(s) that are in possession of or have knowledge of the alleged amounts. There is paucity of information regarding the purpose and object of what is to be achieved pursuant to the authorization of the enquiry. All what the applicant is

[8] Simmons NO vs Gilbert Hamer & Co Ltd 1963 (1) SA 897 (N) at 913 - 916

content with is that a total amount of R4 200 935 is allegedly held in the trust account of attorneys or at the instance of these entities.

[37] Regarding Mpeto Attorneys, no allegations are made in the founding affidavit other than the allegations that there is an amount of R2 346 455 held in the trust account. There is no evidence about the directors of Mpeto Attorneys or where that company's registered or physical address is, if at all it exists. There is also no evidence to show at what stage Mpeto Attorneys received the alleged money. This court must also have regard to the views of the liquidators.

[38] It has been held:

> "The Court will be largely guided by the attitude of the liquidator. Whether or not he is correctly designated an officer of the Court, he performs certain statutory functions and the Court would in my view be right to assume that he was acting responsibly and fairly. The difficulties with which his task confronts him need hardly be emphasized. In the nature of things, the affairs of a company which has been placed in liquidation are often not readily diagnosed. The liquidator must strike a balance between on the one hand a cautious approach to the further expenditure of company funds and on the other a proper exercise of his function to recover in the interest of creditors monies due to the company."[9]

[39] Section 417 does not give the liquidator or any creditor or person the right to apply for the enquiry and it is the Court who orders the enquiry at its own discretion on information brought to it by an interested person.[10] An enquiry can have serious and far-reaching consequences and an application for an enquiry ought not to be readily granted. In particular a Court must be satisfied that these powers will not be used in a way that would be unjustifiably oppressive or vexatious.[11]

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[9] Merchant Shippers SA (Pty) Ltd vs Millman 1986 (1) SA 413 (C) at 417 - 418

[10] Trust Bank van Afrika Bpk vs Van der Westhuizen 1991 (1) SA 867 (W) at 871 and Venter vs Williams 1982 (2) SA 310 (N) at 313 - 314

[11] Bernstein *supra* at 767 – 768 and Cooper NNO vs S A Mutual Life Assurance Society 2001 (1) SA 967 (SCA) at 974

[40] In the answering affidavit, Mr Voigt, the liquidator, avers:

> "On 28 July 2017, I emailed the Applicant, which email I attach as "GV16", in which I requested books and records of Gadi Properties. To date no books or records as requested have been provided. On 20 November 2017 I met with the Applicant and Mr Kevin Kaschula, who the Applicant introduced as his consultant. The purpose of the meeting was to discuss the alleged monies held in trust by attorneys and which was allegedly owed to Gadi Properties. The Applicant provided bound copies of the record of appeal (referred to above) in which he had flagged a summons issued by Gadi Properties against Mnandi Fast Foods (Pty) Ltd. No other proof or evidence relating to monies in trust accounts was provided at the meeting or thereafter."

[41] The liquidator further made these averments in the answering affidavit:

> "... that the summons that were drafted by Attorneys Bate Chubb & Dickson against Mnandi Fast Foods (Pty) Ltd, were never served and the applicant instructed the attorneys to close the file. In any event, Mnandi
> Fast Foods is no longer trading and is dormant."

[42] On the facts presented by both the applicant and the respondents, there are no grounds to authorize an enquiry in terms of section 417 read with section 418 of the Companies Act. The proposed enquiry would serve no purpose in view of the allegations made by the respondents that these claims were investigated and no evidence found to support the claim of the existence of monies.

[43] To summarise, on the evidence adduced by the parties, there exists no reasonable grounds for this Court to authorize an enquiry in terms of sections 417 and 418. The applicant failed to adduce evidence or information upon which this Court must exercise its discretion in terms of section 417.

Whether the application is an abuse

[44] Courts are empowered and obliged to curtail what would be an abuse of an enquiry or use of the enquiry for ulterior motives. The applicant has been given an audience by the liquidators to place evidence about the existence of the alleged monies in the trust accounts. The liquidators have investigated the

information furnished by the applicant. I find it bizarre that the liquidators, as is suggested by the applicant, would refuse to follow up on monies that can easily be recovered. It would be to the advantage of the liquidators to collect more monies for the company in liquidation. It had been confirmed to the liquidators that there are no monies due to A N Gadi Property Investments (Pty) Ltd from any trust account of attorneys or Mnandi Fast Foods.

[45] The scathing and gratuitous allegations in the applicant's replying affidavit justify the respondents in contending that the application has been launched with an ulterior motive to harass the liquidators. The egregiously unsubstantiated statements in the replying affidavit should be seen as revealing of the motive in respect of the requested enquiry. Unprovoked statements such as *"the liquidators should be ashamed of themselves because of the bias, fraud, incompetence, failure in their fiduciary duties, lack of fairness and many other elementary wrongs they made in administering the liquidation of Gadi Properties*" should be telling of the obvious intent and motive for the enquiry.

[46] At the hearing of this matter, counsel for the respondents informed the court that the applicant has also launched another separate application in the Grahamstown High Court in which he seeks to set aside the liquidation and distribution account. "I find it incongruous of the applicant; in this case, to be calling for an enquiry pursuant to the liquidation of A N Gadi Property Investments (Pty) Ltd, whilst in another case, he is seeking an order *inter alia*, that the provisional and final orders of liquidation be declared null and void or rescinded." *The provisional and final orders of liquidation be declared null and void or rescinded.*

[47] I am aware of the caution in *Roering NO and another v Mahlangu and Others*[12] the essence of which is the fact that the issues canvassed in a section 417 enquiry may overlap with issues in pending or contemplated civil litigation and that should not be a ground for inferring abuse. The distinguishing factor in this case is that the applicant, in the Grahamstown case, has launched an application to set aside the entire liquidation. Bearing in mind that A N Gadi Property Investments (Pty) Ltd was placed in provisional liquidation in 2013, it should be obvious that the purpose of this application is to frustrate the finalization of the liquidation. On that conduct alone, abuse should be inferred. The attitude exhibited by the use of language in this application should lead to an irresistible inference that abuse is intended.

[48] The respondents have contended that the application is harassment by the applicant against them. There is no factual basis to support the application which means that it was instituted only for an ulterior purpose. There is merit to this submission having regard to the totality of the circumstances in this case.

[49] In *Kebble v Gainsford*[13] the court held that the question whether an enquiry is an abuse must, in all instances, depend on the particular circumstances of the case. In evaluating whether there is an abuse, the court is required to cumulatively weigh up all the factors, both for and against the holding of an enquiry, and *"it is the obligation of the party wishing to stop the enquiry to demonstrate a clear abuse*".

[50] In *Roering*[14] the court held:

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[12] 2016 (5) 455 (SCA) at para 41 – 47.

[13] 2010 (1) SA 561 (GSJ)

[14] Above n 12 at par 38

> "Once it is accepted that a permissible purpose in causing a witness to be summoned to an inquiry is to enable the liquidator to make an informed assessment of the merits of a potential claim or defence to a claim, it must follow that the fact that the individual concerned is a potential witness in other civil litigation, actual or contemplated, is neutral in determining whether the summons is an abuse. Something more must be identified as constituting an abuse."

[51] In *Ferreira v Levin*[15] in considering whether interim relief staying an enquiry should have been granted pending the outcome of the determination of a constitutional issue, the court held that such relief (i.e stopping an enquiry) must be *"absolutely necessary"*.

[52] The liquidators took all reasonable steps to secure evidence from the applicant about the existence of the alleged monies totalling to the sum of R4 200 935.00. The applicant produced no evidence to support the allegation of the existence of the alleged monies. Even in the present proceedings, the applicant is only content with bald and bare allegations about the existence of these monies. There is no evidence that would reasonably enable the court to order an enquiry.

[53] For the reasons set out above, the application must fail.

The application to strike out in terms of rule 6(15)

[54] The respondents also brought an application to strike out two paragraphs from the applicant's replying affidavit.

[55] The basis of the application is that the allegations contained therein are scandalous, defamatory, vexatious and irrelevant.

Paragraph 25 reads:

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[15] 1996 (1) SA 984 (CC)

> "The Liquidators should be ashamed of themselves because of the Bias, fraud, incompetence, failure in their fiduciary duties, lack of fairness and many other elementary wrong doings they made in administering the liquidation of Gadi Properties...."

[56] Paragraph 51 reads:

> "All the claims by white owned entities were proved (i) without being verified to the company's books, records and contractual agreements (ii) on different criteria than that of Black Claimants. Ultimately, claims by Black Claimants were disputed and disallowed. . . "

[57] An application to strike out any matter from an affidavit is regulated by rule 6(15) of the Uniform Rules of Court, which reads as follows:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

[58] An applicant for the striking out of any matter from an affidavit has to satisfy two requirements: firstly, that the matter to be struck out is scandalous, vexatious or irrelevant; and, secondly, that he or she will be prejudiced if the matter is not struck out.

In this regard, Mahomed CJ had the following to say in *Beinash v Wixley*[16]

> "What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place, the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced."

[59] The rationale behind the power of the court to strike out is that it promotes orderly ventilation of the issues before it, promotes focus on the real issues, presents proliferation of issues, unnecessary prolix and irrelevancies that unduly burden records in application proceedings.[17]

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[16] Beinash v Wixley 1997 (3) SA 721 (SCA) at 733A-B

[17] Gold Fields Ltd and Others v Motley Rice LCC 2015 (4) SA 200 (GJ), See also Absa Bank Ltd v Christo Jacobus Smith and Others supra at para 53

[60] The central submission of the respondent is that the averments contained in the above paragraphs are abusive, defamatory and can only be made to harass and annoy the respondents in circumstances in which they are without merit or any form of provocation. The allegations in paragraphs 25 and 51 do not support nor assist the applicant in the relief sought and the issues which need to be determined.

[61] The allegations in paragraph 25 contain far reaching conclusions which should be based on facts. These allegations impugn the integrity of the liquidators. They attack the credibility of the liquidators. There is no factual foundation for those conclusions. The liquidators are clearly prejudiced by those untested conclusions contained in the applicant's replying affidavit.

[62] I find the allegations in paragraph 51 to be irrelevant to the issues to be determined and prejudicial to the liquidators. I therefore, uphold the application to strike out paragraphs 25 and 51 of the replying affidavit.

Appropriate costs order

[63] The applicant appeared in person. I am aware that this is a matter that involves his family business and his emotions are understandable. The family lost a business. There has been no end in the litigation involving these parties since the first application that culminated in the judgment by Sandi J in 2013. Account has been taken of the applicant's conduct in these proceedings. I have found that the application is an abuse of process of this court. The allegations gratuitously made against the liquidators fall egregiously short of innocent litigation. I am unable to find any justification for impugning the integrity of the

liquidators. This court takes a dim view of this meritless litigation. This court must mark its displeasure against any conduct that seeks to undermine the dignity and integrity of other litigants.

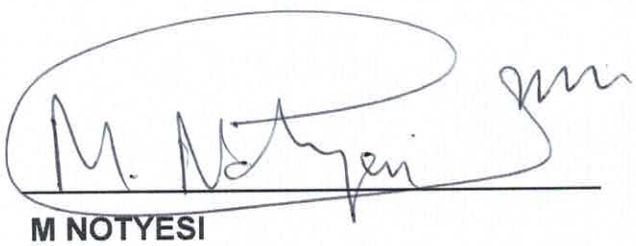
Conclusions

[64] I am satisfied that costs should be on a punitive scale in respect of both the main application and the application to strike out. Such costs should be on an attorney and client scale. Accordingly, costs must follow the results in the absence of any reason for departing from the general principle on costs.

Order

[65] In the result, it is ordered that:

1. Paragraphs 25 and 51 of the applicant's replying affidavit are hereby struck out from that affidavit;
2. The applicant's application is dismissed;
3. The applicant shall pay the costs of the application to strike out and the main application on an attorney and client scale.



M NOTYESI
ACTING JUDGE OF THE HIGH COURT

Appearances:

Applicant	:	In person
Counsel for the Respondents	:	Adv K L Watt
Instructed by	:	McWILLIAMS & ELLIOTT C/o Bax Kaplan Russell Inc Clevedon House 2 Clevedon Road Selborne East London