IN THE SOUTH GAUTENG HIGH COURT)

CASE NO: 09/1668

In the matter between:

ROGER AINSLEY RALPH KEBBLE	Applicant
and	
GAVIN CECIL GAINSFORD N.O.	First Respondent
MICHAEL MMATHOMO MASILO N.O.	Second Respondent
MELITA MEISEL N.O.	Third Respondent
ELIZABETH WILANDA PRINSLOO N.O.	Fourth Respondent
RENE BEKKER N.O.	Fifth Respondent
RANDGOLD AND EXPLORATION COMPANY LIMITED	Sixth Respondent

JUDGMENT

I. INTRODUCTION

[1] This is an application to set aside a Summons ("the Summons"), calling upon the Applicant ("Kebble") to testify at an enquiry convened in terms of Sections 417 and 418 of the Companies Act 61 of 1973 ("the Companies Act"). The enquiry concerns a company in liquidation, BNC (Pty) Limited ("the Company").

[2] The First to Fifth Respondents ("the Liquidators") are the liquidators of the Company.

[3] The Fifth Respondent ("the Commissioner") is the Commissioner appointed to conduct the enquiry into the affairs of the Company by the Master of the High Court pursuant to an Order ("the Master's Order") signed by the Master on 20 March 2006.

[4] The Sixth Respondent ("Randgold") is the only proven creditor of the Company with a proved claim in an amount of R169 500 000.

[5] Kebble and his late son, Brett Kebble ("Brett"), were the sole directors of the Company prior to its liquidation. As a result of

the death of Brett, Kebble is the sole surviving director of the Company.

[6] Kebble maintains that he was a non-executive director of the Company, and knows nothing of the manner in which the Company conducted its affairs. The Liquidators dispute this.

[7] The Company was placed in final liquidation on 11 April 2006 at the instance of Randgold.

[8] After the Master's Order was granted, Kebble entered into two settlement agreements with Randgold, dated respectively 1 October 2006 ("the first settlement agreement") and 28 February 2008 ("the second settlement agreement") (collectively "the settlement agreements").

[9] Pursuant to the settlement agreements, Kebble agreed to pay Randgold an amount of R30 million in settlement of any claims that Randgold might have against him. He also agreed to pay an amount of R5 000 000 in settlement of any amounts that JCI

Limited ("JCI"), an affiliate of Randgold, might have against him.

[10] In the first settlement agreement, Randgold undertook, as against Kebble only, to cease funding the Master's enquiry to the extent that Kebble might be called upon to give evidence at the enquiry.

[11] Kebble contends that the effect of the settlement agreements was to discharge Randgold's claim against **the Company** with the result that there are no longer any proved creditors of the Company.

[12] Kebble maintains that, insofar as the liquidators now seek to interrogate him at the enquiry, the enquiry is an *"abuse"* for the following reasons:

[12.1] The only proved creditor of the Company, Randgold, allegedly does not want the enquiry to continue and Randgold's claim has allegedly been satisfied pursuant to the settlement agreements.

[12.2] The Liquidators are allegedly possessed of sufficient information to attend to the winding-up of the Company, including the pursuit of any litigation contemplated by them, and no further enquiry is therefore necessary.

[13] The Liquidators dispute these contentions.

II. ANALYSIS OF THE FACTS

A. EVENTS PRECEDING THE WINDING-UP OF THE COMPANY

[14] In paragraph 19 of the founding affidavit, Kebble relies upon allegations made by Randgold in support of its application to wind up the company. He does not appear to contest the accuracy of these allegations. The following appears from the allegations in the winding-up petition upon which he relies:

[14.1] Both Kebble and Brett (who were the sole directors of the Company) were directors of Randgold.

[14.2] On 24 August 2005, Brett and one of the other directors of Randgold, Buitendach resigned from Randgold's Board and P H Gray and J C Lamprecht were appointed as new directors. On 7 October 2005, a certain Nurek was appointed to the Board as a non-executive director.

[14.3] The new directors suspected the former members of the old Board of Randgold of managing the affairs of Randgold in a reckless and fraudulent manner. They therefore appointed forensic accountants Umbono Financial Advisory Services ("Umbono") to investigate.

[14.4] Umbono's investigation allegedly revealed that the Company had been used as a vehicle to perpetrate a fraud on Randgold.

[14.5] Consequent upon this investigation, Randgold launched successful winding-up proceeding against the Company. The Company was placed in provisional

liquidation on 10 March 2006 and the order was made final on 11 April 2006.

[14.6] Kebble makes the following statements in his founding affidavit:

> "18 I have no personal knowledge in relation to these allegations. Although I was registered as a director of BNC between 1996 and 2004, I was never aware of or involved in any of its activities; **to the best of my knowledge, it was a dormant entity that never traded.**
>
> ...
>
> 41.1 As is set out in the founding affidavits filed respectively by Randgold in the liquidation application, and by the liquidators in the Section 386 (5) application, BNC was a dormant entity that did not conduct any business or trading activities and had no employees. **BNC was only ever used as a vehicle for the misappropriation of funds flowing from the sale of the DRD shares.**"

[15] It is common cause that Brett was a shareholder in the Company and that his deceased estate is insolvent.

B. THE FIRST SETTLEMENT AGREEMENT

[16] On 1 October 2006 Kebble, Randgold and JCI concluded the first settlement agreement.

[17] The following were material terms of the first settlement agreement:

[17.1] The *"Randgold claims"* were defined as:

> "All and any claims of whatsoever cause arising enjoyed by Randgold and/or any Associate Company of Randgold **against Kebble**".
>
> [emphasis added]

[17.2] The *"Randgold amount"* was defined as:

> "The amount of R30 000 000...which Kebble has agreed to pay Randgold on account of the Randgold Claims".
>
> [emphasis added]

[17.3] Pursuant to clauses 6 and 7, Kebble undertook to pay an amount of R30 million in instalments on account of the Randgold claims and an amount of R5 million to JCI in instalments on account of JCI's claim against Kebble.

[17.4] The following clauses are also relevant:

> "12.1 Upon the fulfilment of all of Kebble's obligations in terms of this Agreement, Randgold accepts payment of the Randgold amount **in settlement of the Randgold Claims.**
>
> 12.2 Upon signature of this Agreement by Kebble all or any claims of whatsoever nature from whatsoever cause arising enjoyed by Kebble against Randgold and/or its associate and/or its subsidiary company shall be deemed to have been waived in their entirety and Kebble shall have no further entitlements in respect thereof.
>
> **19.1 The parties record, that the 417 enquiry has been convened at the instance of Randgold to take place on the 2nd October 2006.**
>
> **19.2 Randgold shall instruct Tabacks Incorporated, to postpone the 417 enquiry *sine die* on the 2nd October 2006. Furthermore, Randgold undertakes to Kebble not to fund the 417 enquiry into the trade, dealings and affairs of BNC any further...**

> 19.5 Following the conclusion in all respects of the mediation and arbitration processes as envisaged in the Mediation Agreement and provided that Kebble has complied with all of his obligations in terms of this Agreement, **Kebble shall have an option to acquire Randgold's proved claim in the insolvent estate of BNC from Randgold on terms acceptable to Kebble and Randgold at a purchase price not exceeding R100 000 .00...**
>
> 25. This Agreement together with Annexures constitutes the entire Agreement between the parties as to subject matter hereof and no Agreements, representations, undertakings, conditions, terms or warranties other than those contained herein shall be binding on the parties, unless reduced to writing and signed by all of the parties hereto."
>
> [emphasis added].

[18] After conclusion of the first settlement agreement, Kebble made various payments to Randgold and the enquiry was postponed *sine die*. Kebble alleges that a dispute subsequently arose which led to his withholding payment of the amounts for August, September and October 2007.

[19] As a result of this dispute, the parties concluded the second settlement agreement on 28 February 2008. Pursuant to the second settlement agreement, the parties settled the disputes

between them relating to the provisions of the first settlement agreement.

[20] The material terms of the second settlement agreement were as follows:

> "10.1 Randgold undertakes within 4 (four) days of signature hereof to address a letter to the Liquidators of BNC, requesting them to take no further action against Kebble, and Michael Patrick Crawford and/or M P Crawford Holdings (Pty) Limited and/or Fordcraw Properties (Pty) Limited (hereinafter collectively referred to as "the Crawford Parties"). **Randgold however furnishes no warranty that the liquidators of BNC will heed such request. It should moreover be understood that the failure on the part of the Liquidators of BNC to heed the said request will in no way impact on the liability which Kebble has undertaken in terms of this Agreement.**
>
> 10.2 Randgold undertakes not to fund any litigation between the Liquidators of BNC may institute (sic). Should the Liquidators of BNC, however, raise a contribution against Randgold, in terms of the laws governing the winding-up of companies, Randgold's compliance therewith shall not be construed as the provision of funding as herein contemplated.
>
> 10.3 **Should the Liquidators of BNC recover monies from any of the Crawford Parties and should such recovery or any portion thereof form part of any dividend which Randgold receives from the Liquidators of BNC pursuant to the claim which Randgold has proved in the estate of BNC, then and in such event Randgold shall, within 14 (fourteen) days of payment of the dividend to it, pay that portion of the dividend that derives from the recovery from the Crawford parties to Kebble.**
>
> 11.1 The settlement agreement as read together with this agreement shall constitute the parties agreement.

> 11.2 Insofar as this Agreement is in any way inconsistent with the Settlement Agreement and/or introduces new terms and/or has the effect of deleting any terms contained in the Settlement Agreement, this Agreement shall take precedence over the Settlement Agreement.
>
> 11.3 Save for as is amended by this Agreement, the Settlement Agreement shall be binding on the parties and of full force and effect between them."
>
> [emphasis added]

[21] The Liquidators were not party to either of the settlement agreements. Kebble alleges that the Liquidators were invited to participate in the settlement agreements but declined to do so unless they were "*paid their usual fee which they contended was due to them calculated on the settlement amount of ...R30 million*[1]*."* Kebble and Randgold allegedly refused to pay these amounts to the Liquidators.

[22] In paragraph 27 of the founding affidavit, the Liquidators state:

> "It is correct that in 2006 the Liquidators were approached by Randgold who requested that we be party to the settlement agreements. The liquidators were of the view of that we had insufficient knowledge to do so and we could not settle in the manner apparently proposed by the Randgold/Kebble settlement, namely, **that nothing be realised within BNC itself.** This course of conduct was too risky for the liquidators: other creditors could have appeared and demanded realisations in respect

[1] Founding affidavit: paragraph 41.10.

> of which they would have been entitled to a dividend. **The liquidators requested Randgold to indemnify us should other creditors (not party of the settlement) sue the liquidators for compromising BNC's claims.** Randgold was not prepared to furnish such an indemnity. Accordingly (and contrary to what is stated in paragraph 41.10 of the founding affidavit) the liquidators had not become party to the settlement because Randgold and the Applicant had refused to pay Liquidators fees on the settlement amount, but because of the reasons I have just given".

[emphasis added].

[23] It appears that Kebble is referring to the percentage of the settlement amount that the Liquidators would have been entitled to recover under the statutory tariff had the settlement amount been paid to the Company instead of directly to Randgold.

[24] In fact, had the payment been made to the Company, it would have been available for distribution to creditors, including any other creditor that might wish to prove a claim once there was no longer a risk of a contribution. Had Kebble wished to be released from any claims that the estate might have had against him, this would have been the proper and legitimate way to obtain such a release.

[25] The machinery of the Insolvency Act sets its face against Creditors entering into side deals with the former principals of an

insolvent company as these types of arrangements frequently lead to one creditor being preferred over others. The Liquidator's refusal to make the estate a party to any settlement agreement in the absence of a benefit to the estate would be entirely proper.

[26] In my view, it is not necessary to resolve the dispute between Kebble and the Liquidators concerning the Liquidator's motivation in refusing to participate in the settlement. Suffice it to say, it would have been legitimate for the Liquidators to refuse to participate in the settlement unless the settlement proceeds flowed into the insolvent estate. Had the settlement proceeds been paid to the Liquidators, they would have been entitled to their statutory remuneration percentage. Liquidators are entitled to be remunerated and the entire machinery of our insolvency law provides for such remuneration.[2]

[27] If the Liquidators refused to make an insolvent company a party to the settlement without obtaining an indemnity from Randgold, that would also have been a legitimate approach in the

[2] *In Re Calgary and Edmonton and Co Ltd* [1975] 1 All ER 1046, 1051d.

circumstances. In doing so, they were merely looking out for the interests of other creditors who might to come to light later, while at the same time protecting themselves.

C. EVENTS SUBSEQUENT TO THE CONCLUSION OF THE SECOND SETTLEMENT AGREEMENT

[28] On 10 March 2008, after conclusion of the second settlement agreement Randgold's attorneys, Van Hulsteyns, addressed correspondence to the Liquidators referring to the settlement agreements. Paragraph 3 of the letter stated:

> "3. In terms of the Agreement concluded between the parties on 28 February 2008, we have been requested by our client to address this letter to you and to request on its behalf, that the liquidators of BNC Investments (in liquidation) take no further action against Kebble, Michael Patrick Crawford and/or M.P. Crawford Holdings (Pty) Limited and/or Fordcraw Properties (Pty) Limited."

[29] On 1 October 2008, the Liquidators obtained an order directing Randgold to contribute towards the legal costs of litigation initiated by the Liquidators to recover assets for the Company.

[30] Thereafter, on 10 December 2008, the Liquidators procured the issue of the summons against Kebble to compel him to testify in

the pending 417 enquiry. Kebble now moves to quash that summons.

III. KEBBLE'S CONTENTION THAT THE RANDGOLD CLAIM HAS BEEN SATISFIED PURSUANT TO THE SETTLEMENT AGREEMENT

[31] In paragraph 41.3 of the founding affidavit Kebble states:

> "41.3 Randgold compromised its claim against BNC by entering into the aforesaid settlement agreements with me."

This contention is central to Kebble's argument that the enquiry is an abuse. He maintains, as this estate no longer has any proved creditors, it is no longer in the interests of creditors to conduct an enquiry. It appears to be his case that, in pursuing the enquiry, the Liquidators are off on a frolic of their own with the intention to generate fees for themselves rather than acting in the interests of creditors.

[32] The Liquidators dispute Kebble's contention that Randgold's claim has been compromised.

[33] In reply, Kebble contends, for the first time, that, when he acknowledged liability to Randgold he was *"assuming"* the Company's liability to Randgold. In support of this contention he alleges in the replying affidavit that:

> "8.1 Randgold did not enjoy any claims against me whatsoever.
>
> 8.2 The *"Randgold claims"* arose against me on 1 October 2006 only by virtue of my having assumed BNC's liability immediately prior to the conclusion of the settlement agreement.
>
> 8.3 The intention and the effect thereof was to compromise Randgold's claim against BNC."

[34] I find this contention difficult to follow. There is no language in either of the settlement agreements that suggests that Kebble assumed **the Company's** liability to Randgold or that it was ever the intention of the parties to extinguish **the Company's liability to Randgold.**

[35] On the contrary, the language of both settlement agreements negates this contention. The first settlement agreement affords Kebble an option to purchase Randgold's claim against the Company for R100 000 00. If it was the intention of the parties that the Randgold claim against the Company would be

extinguished, then it could not thereafter have been assigned to Kebble.

[36] Moreover, if Kebble in fact assumed the liability of the Company to Randgold, there would have been no claim to cede to him. He could not as a matter of law have acquired a claim against himself by way of cession.

[37] For whatever reason Kebble did not exercise the option afforded to him under the first settlement agreement. That option was subsequently extinguished pursuant to clause 7 of the second settlement agreement.

[38] Clause 10 of the second settlement agreement also demonstrates that it was never the intention of the parties to extinguish Randgold's claim against the Company. This clause expressly contemplated that Randgold's claim against the Company would remain in effect and that, if there was any recovery of moneys from *"the Crawford parties"* based upon Randgold's claim, that recovery would be paid to Kebble.

[39] There is another obstacle to Kebble's contention. An *"assumption of liability"* is a delegation. That is a **tripartite agreement** pursuant to which one party agrees to assume the liability of another with the consent of the creditor. In the present case, the Liquidators (i.e. the representatives of the alleged delegating company) were not party to the "*assumption*" agreement. Therefore, no legally enforceable assumption or delegation occurred.

[40] On 5 February 2008, Randgold filed an affidavit dealing with the alleged assumption and extinction of Randgold's claim against the Company. Randgold disputes that the effect of the settlement agreements was to extinguish Randgold's claim against the Company.

[41] Randgold has also put up an affidavit by Peter Gray (who represented Randgold in concluding the settlement agreements) to the following effect:

> "6. I deny that it was ever agreed that the liability of BNC to Randgold would be assumed by Kebble or for that matter that the claim by Randgold against BNC has been compromised and moreover that the 1 October 2006 settlement agreement and the 28 February 2008 agreement contemplates this eventuality."

[42] Kebble put up a replying affidavit to Randgold's affidavit. In that document he contended that Gray had orally advised him that he confirmed Kebble's version - i.e. that there was an assumption by Kebble of the Company's liability to Randgold. He maintained that Gray had agreed to sign an affidavit to that effect, but had thereafter refused to do so.

[43] I do not need to resolve this dispute. As a matter of law the parties statements of intent with regard the meaning of an Agreement are inadmissible in evidence.[3]

[44] In any event, I am of the opinion that the express language of the settlement agreement negates any intention by the parties to discharge Randgold's claim against the Company. It is plain from the express language of the settlement agreement that the parties intended that Randgold's claim against the Company would remain in force and that there might even be a subsequent dividend on it.

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[3] *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) 768 D-E; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) 455 A-C; *Total South Africa (Pty) Limited v Bekker N.O.* 1992 (1) SA 617 (A) 624G.

[45] It follows that Randgold remains a significant creditor of the Company. The Company apparently has no assets to satisfy this claim other than claims against third parties.

[46] Accordingly, even if Randgold's claim falls to be reduced by R30 million (i.e. the amount allegedly paid by Kebble to Randgold), the Company remains insolvent in a very significant amount. All of the machinery of the Insolvency Act appertaining to companies *"unable to pay their debts"* as contemplated by sections 339 and 417 of the Companies Act therefore remains at the disposal of the Liquidators.

[47] Once Kebble's contention that the only claim against the Company has been settled falls away, he cannot rely upon this fact in support of his argument that the proposed enquiry is an abuse.

[48] During the course of argument Kebble's counsel appeared to evolve a secondary argument based upon the terms of the settlement agreements. He maintained that Randgold had disclaimed any interest in the enquiry and that any recovery

against Kebble by the Liquidators on a claim under Section 424 of the Companies Act would indirectly enable Randgold to recover more from Kebble than it was entitled to under the settlement agreements. In this context, the enquiry allegedly amounted to an abuse. This secondary contention is analysed in more detail below.

IV. CLAIMS BY OR AGAINST THE INSOLVENT COMPANY

A. POTENTIAL CLAIMS OF OTHER CREDITORS

[49] The liquidators contend that, although Randgold is the only creditor that has a proved claim, there are other potential creditors.

[50] The Liquidators allege in their answering affidavits that, where creditors are aware, as is in the present case, that there is a risk that creditors will have to make a contribution, creditors usually wait to see whether there are realisations in the estate before proving claims. This allegation is not contested by Kebble. In

any event, it accords with commercial reality in insolvency matters.

[51] The Liquidators contend that there are potential additional claims by Hawkhurst Management and Consolidated Mining Services (Pty) Limited, which could easily exceed R70 million.

[52] In the view I take of the matter, it is enough that Randgold has a significant proven and unsatisfied claim that runs into many millions of rand. However, the potential for other claims supports the Liquidators' argument that there is a need for an enquiry.

B. THE CLAIMS TO BE INVESTIGATED IN THE PROPOSED INSOLVENCY ENQUIRY

[53] The Liquidators list certain potential claims by the Company that the Liquidators wish to investigate during the course of the enquiry. These include:

[52.1] A transfer of JCI shares to Fordcraw Properties (Pty) Limited that may be capable of being set aside as a

disposition without value under section 26 of the Insolvency Act.

[52.2] A potential claim against Kebble under Section 424 of the Companies Act.

[52.3] A claim against Hawkhurst Investments (Pty) Limited ("Hawkhurst") to set aside a pledge of shares in JCI to Hawkhurst;

[52.4] A claim against Sociéte Generale ("SocGen") to set aside dividends paid by the Company to SocGen with respect to preference shares, allegedly in contravention of Section 90 and 98 of the Companies Act.

[54] Kebble does not dispute that these are legitimate claims that a liquidator might ordinarily be entitled to pursue in liquidation. Instead, it is Kebble's case that the Liquidators at this stage know so much about these claims that an enquiry is unnecessary. According to Kebble, if the Liquidators pursue an enquiry on these issues they would simply be trying to *"dot their i's or cross*

their t's" or "*enquire into credibility*". Kebble maintains that this is not the proper purpose of an enquiry.

V. THE CONCEPT OF *"ABUSE"* IN A 417 ENQUIRY

[55] In 1995, in *Bernstein and Others v Bester and Others N.O.* 1996 (2) (SA 751) (CC), the Constitutional Court considered the constitutionality of Section 417 and 418 of the Companies Act in the light of our new constitutional dispensation. The Court held those sections to be constitutional.

[56] In the process of delivering its judgement, the Court carefully and exhaustively analysed the nature and purpose of the 417 enquiry and the proper approach under our modern law to evaluate whether there is an abuse of the machinery of the Act.

[57] Ackermann J held as follows:

> "[15] Some of the major statutory duties of the liquidator in any winding-up are:
>
> (a) **to proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable;**

(b) to give the Master such information and generally such aid as may be requisite for enabling that officer to perform his/her duties under the Act;

(c) to examine the affairs and transactions of the company before its winding-up in order to ascertain –

(i) whether any of the directors and officers or past directors or officers of the company have contravened or appear to have contravened any provision of the Act or have committed or appear to have committed any other offence;

(ii) in respect of any of the persons referred to in subpara (i), whether there are or appear to be any grounds for an order by the court under s219 of the Act, disqualifying a director from office as such;

(d) except in the case of a member's voluntary winding-up to report to the general meeting of creditors and contributories of the company, the causes of the company's failure, if it has failed;

(e) if the Liquidator's report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the grounds mentioned in (c) above, the Master must transmit a copy of the report to the Attorney-General.

[16] The Enquiry under ss417 or 418 has many objectives.

(a) It is undoubtedly meant to assist liquidators in discharging these aforementioned duties so that they can determine the most advantageous course to adopt in the liquidation of a company.

(b) In particular it is aimed at achieving the primary goal of liquidators, namely to determine what the assets and

liabilities of the company are, to recover the assets and to pay the liabilities and to do so in a way that would best serve the interest of the company's creditors.

(c) Liquidators have a duty to enquire into the company's affairs.

(d) This is as much one of their functions as reducing assets of the company into their possession and dealing with them in a prescribed manner, and is an ancillary power in order to recover properly the company's assets.

(e) It is only by conducting such enquiries that liquidators can:

(i) determine what the assets are and who the creditors and contributories of the company are;

(ii) properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.

(f) It is permissible for the interrogation to be directed exclusively to the general credibility of an examinee, where the testing of such persons veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound-up.

(g) Not infrequently the very persons who are responsible for the mismanagement of and depradations on the company are the only persons who have knowledge of the workings of the company prior to liquidation (such as directors, other officers and certain outsiders working in collaboration with the former) and are, for this very reason, reluctant to assist the liquidator voluntarily. In these circumstances it is in the interests of creditors and the public generally to compel such persons to assist.

(h) The interrogation is essential to enable the liquidator, who most frequently comes into the company with no previous

knowledge and finds that the company's records are missing or defective, to get sufficient information to reconstitute the state of knowledge that the company should possess; such information is not limited to documents because it is almost inevitable that there will be transactions which are difficult to discover or understand from the written materials of the company alone.

(i) The liquidator must, in such circumstances, be enabled to put the affairs of the Company in order and to carry out the liquidation in all of its varying aspects.

(j) The interrogation may be necessary in order to enable the liquidator, who thinks that he may be under a duty to recover something from an officer or an employee of a company, or even from an outsider concerned with the company's affairs, to discover as swiftly, easily and inexpensively as possible the facts surrounding any such possible claim.

(k) There is a responsibility on those who use companies to raise money from the public and to conduct business on the basis of limited liability to account to shareholders and creditors for the failure of the business, if the company goes insolvent. Giving evidence at as 417 enquiry is part of this responsibility. This responsibility is not limited to officers of the company in the strict sense, but extends also to the auditors of the company...

[19] In *Clover Bay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* the Court of Appeal outlined the following criteria for the exercise of the Court's discretion whether to order an examination:

"It is clear that in exercising the discretion the Court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to any assessment of whether or not there is a cause of action and the

degree of oppression is small (for example in the case of ordering the premature discovery of documents) a balance will manifestly come down in favour of making the order. **Conversely, if the Liquidator is seeking merely to dot the i's and cross the t's on a fairly clear claim by examining the proposed defendant to discover his defence, the balance would come down against making the order.** Of course, few cases would be so clear: it would be for the Judge in each case to reach his own conclusion"

[20] The Court went on in *Cloverbay* to comment on a number of considerations which would specifically be taken into account in exercising the discretion. The first consideration is that the purpose of the provisions is to enable the liquidator to reconstitute the state of knowledge to the company in order to make informed decisions. The purpose is not to place the company in a stronger position in civil litigation than it would have enjoyed in the absence of liquidation. **Second, the appropriate strategy is not to require proof of the absolute need for information before an order for examination will be granted, but proof of a reasonable requirement of the information. Third, the case for examination would be much stronger against officers or former directors of the company, who owe the company a fiduciary duty, than it is against third parties.** Fourth, an order for oral examination is more likely to operate oppressively against an examinee that an order for the production of documents. **The Court is also likely to treat an application for the holding of a s417 enquiry from an office holder, such as the liquidator with more sympathy than it would treat a similar request from a contributor...**

[52] The fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that a power should, for this reason, be characterised as infringing s11(1) of the Constitution. The law does not sanction such abuse; **it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena**. Absent such proof it is the duty of persons who are subpoenaed to co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so..."

[emphasis added]

[58] In *Clover Bay Limited (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] 1 All ER 894 (CA) 896 the Court of Appeal also held:

> "Before doing so, I must first say something about the correct approach and in particular about the importance attached by Slade J to **the question whether or not the Applicant has reached a firm decision to sue. In my judgement experience has shown that test to be unsatisfactory, depending as it does on the subjective state of mind of the liquidator or administrator, in each case.** Although I am unable to accept the judge's finding that the joint administrators in this case had adopted the attitude which he attributed to them, in my judgement there must be a temptation to seek to get as much information as possible before taking a decision whether or not to sue. **The more information there is as to the facts and possible defences to a claim the better informed will be any decision and the greater the likelihood of such decision being correct.** It is the function of the liquidator or the administrator to do his best for the creditors. True he is an officer of the court and must not act in any improper way but, like a judge, I can see nothing improper in a liquidator or administrator seeking to obtain as much information as possible before committing himself to proceedings. **Moreover, a test based on the subjective state of mind of a liquidator or administrator inevitably leads to undesirable disputes of fact, such as have arisen in this case, as to what is his state of mind...**
>
> Nor do I think there is any simple test that can be substituted. **The words of the statute do not fetter in the Court's discretion in any way. Circumstances may vary infinitely..."**
>
> [emphasis added].

[59] In *Ex Parte Clifford Homes Construction (Pty) Limited* 1989 (4) SA 610 (W) 61, Stegmann J held:

> "It is by no means unusual to find in such cases that a scheme of arrangement under s311 of the Companies Act is put forward; that it promises the concurrent creditors a few cents in the rand more than the liquidators estimate that they would receive if the winding-up were to be completed; and the liquidation is brought to an end by that means.
>
> In such cases the liquidator's duty to investigate the question of the possible personal liability of the insolvent company's directors (including the sequestrating creditor) or other officers often receive the most formal and superficial treatment, if it is noticed at all.
>
> What is needed of course is a liquidator, who, with great thoroughness, will probe the insolvent company's records for indications as to the probable date by which the insolvent company had lost its issued share capital; the probable date by which each of its directors and officers (including the sequestrating creditor) must have come to know of the facts, or else probably deliberately closed his eyes to it; and, whether, with knowledge (or a carefully preserved ignorance) of that fact, any of them thereafter caused or allowed the insolvent company to obtain goods and services on credit without disclosing to the supplier that the company was in fact trading in insolvent circumstances; and the liquidator who would set up the facts and the likely inferences to be drawn from them, relating to the possible personal liability of the directors and officers in a careful and thorough report to the creditors prepared in terms of s402(d) of the Companies Act".

[60] Based on the above cases, I cannot conclude that the Liquidator's ability to conduct an enquiry is nearly so severely fettered as Kebble contends. Whether the proposed 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 of the factors both for and against the holding of an enquiry.

[61] For example, cross-examination as to credibility is in some circumstances permissible and in others not. Cross-examination for the purpose of *"dotting i's and crossing t's"* is also sometimes allowed and sometimes not.

[62] A fundamental duty of the liquidator is also to investigate whether offences have been committed. That potential offences are sought to be investigated may support the need for an enquiry.

[63] Kebble contends that an enquiry cannot be conducted for the sole purpose of determining whether offences have been committed. I do not see any such limitation in the language of the Constitutional Court judgment in *Bernstein*. On the contrary, this seems to be a legitimate purpose for an enquiry.

Even if I am wrong in this regard, the fact that the circumstances of a major **admitted** fraud need to be investigated is certainly a factor that will strengthen the need for an enquiry which also has as its objective the potential to: (i) recover other assets for the

estate; and (ii) determine the existence or validity of other potential claims against the insolvent company.

[64] In the unusual circumstances of this case, where a company was admittedly formed only as a vehicle for fraud, it is surely legitimate to conduct an enquiry to interrogate the sole surviving director of that company concerning his knowledge as to the nature and details of that fraud.

VI. APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

[65] I have noted above that Kebble's contention that the Randgold claim against the Company has been discharged is unsustainable. As a result, the principal prop to his argument that there is an abuse falls away. He has to rely upon other considerations.

[66] In my opinion, his ancillary contention that the continuation of the enquiry against him would effectively deprive him of the benefit of his bargain with Randgold is also unsustainable. If he wished to obtain a release from the Company or the Liquidators, Kebble should have taken pains to ensure that the Liquidators

were party to the settlement agreement. To do that, he would have had to make his payment to the estate for the benefit of **all** creditors (whether proved or otherwise).

[67] Kebble's second main contention is that the Liquidators have sufficient information at this stage and do not need to conduct an enquiry. Kebble seeks to bolster this argument by his submission that he knows nothing of the affairs of the Company.

[68] This argument is similarly unsustainable. This is not a case in which the Liquidators have made a subjective decision to sue. They are merely of the subjective opinion that they may have a claim against Kebble and three other entities, which they propose to investigate in a 417 enquiry.

[69] Even if the Liquidators had formed a subjective intention to sue, as pointed out in *Clover Bay*, that would not preclude them from going forward with an enquiry.

[70] I have reviewed the Liquidator's summary of some of the potential claims that they may have. The summary is skeletal. It

certainly does not indicate that the Liquidators have the kind of detail that is necessary for them to be able to institute action. In this regard, I am mindful of the fact that Liquidators come to their office without any first hand knowledge of the manner in which the Company's affairs were conducted. Therefore, they need the assistance of an enquiry to place them on a level playing field in any potential litigation that may ensue.

[71] The analysis of the authorities, as set forth above, indicates that it is not incumbent upon the Liquidators to demonstrate a need for the enquiry. It is the obligation of the party wishing to stop the enquiry to demonstrate a ***"clear abuse"***. I do not believe that Kebble has even come close to making such a showing.

[72] On the contrary, this is clearly a case where an enquiry is warranted and should proceed for the following reasons.

[73] First, Kebble is the only surviving director of the Company. He maintains that he has no knowledge of the affairs of the Company. It is in the circumstances necessary for the Liquidators to bring him to an enquiry to explain how it is

possible for him to claim that he has no such knowledge and to test the veracity of that contention.

[74] It may very well transpire that, if he is confronted with certain documentation relating to a particular transaction, his memory will be refreshed sufficiently for him to help the Liquidators understand it better. However, this application is not the appropriate place to decide whether there are in fact such documents.

[75] It would be unfair for a Court in an application like this to expect the Liquidators to expound on all matters on which they wish to question the witness and all the documents and facts that they wish to put to him. If the Liquidators are compelled to give such a preview of the evidence, it may weaken their ability to conduct an effective enquiry.

[76] **Second, this is a Company which, on Kebble's own version was formed merely as a vehicle for a fraud.** It conducted no legitimate business. If Kebble's testimony is taken at face value, the business of the company was fraud.

[77] In such a situation, it is all the more important that the Liquidators be afforded an opportunity to interrogate the sole surviving director concerning the affairs of the Company.

[78] Kebble argues that the fact that the Company was simply a vehicle for fraud is somehow a factor in his favour. This argument is disingenuous and cynical. In my opinion, the stronger the evidence of fraud, the more likely that an enquiry is justified. In this case, the examinee himself confirms that the sole purpose of the Company was to commit fraud.

[79] Third, the Company is significantly under water. Randgold's claim (even if it has been reduced by R30 million) exceeds R100 million and remains unpaid as a result of an undisputed fraud. It is surely in the public interest for the Liquidators to use all of the machinery of Section 417 to conduct a full enquiry into the causes of the Company's failure.

[80] Fourth, the fraud that was admittedly committed appears to be of a complex nature. In such a situation it is even more important

that the sole surviving director of the company be interrogated on the details of the transaction than in other situations.

[81] Fifth, it is apparent Kebble was willing to pay R30 million out of his own pocket in order to bring the enquiry to an end and to avoid Randgold pursuing further claims against him. This is not the action of a person who has no knowledge of the affairs of a company. *Prima facie*, the very fact that he sought to enter into such a settlement strengthens the inference that he should be interrogated.

[82] Sixth, as a matter of public policy, it is undesirable to permit an examinee, who is a former director of a company that was conceived in fraud, to avoid a liquidator's enquiry through a settlement to which the Liquidators are not a party.

[83] A former director who wishes to enter into a compromise with all of the Company's creditors should include the Liquidators in the transaction or use the open and public machinery of section 311 of the Companies Act. Had Kebble followed the section 311 route, the Court might have had to consider whether the

settlement was fair to creditors or whether it might permit wrongdoers to go unpunished[4]. Kebble chose not to follow this procedure. He has only himself to blame if the enquiry now proceeds.

[84] Seventh, Kebble himself has conceded that the Company or the Liquidators may have legitimate claims against the other three entities listed in the answering affidavit. The Liquidators should have the opportunity to investigate these claim and to question the sole surviving director about them.

[85] Eighth, as long as the Randgold claim against the Company remains unpaid and it is not yet clear that there are no other unsatisfied claims, the Liquidators have a duty to diligently pursue all potential assets, claims and recoveries for the benefit of **all** creditors.

[86] Ninth, the fact that the Liquidators have conducted their own investigations and have properly prepared the groundwork for their enquiry can never be held against them. If Kebble's

[4] *Ex Parte Chenille Corporation of SA (Pty) Limited* 1962 (4) SA 458 (T) 464; *Mahomed v Kazi's Agencies (Pty) Limited* 1949 (1) SA 1162 (N); Companies Act, section 311(4).

contention was sustained, it would be very difficult for a liquidator to ever hold an effective enquiry. If a liquidator has not done his homework and prepared for the enquiry, he will accomplish little in the enquiry. If he is well prepared for the enquiry, according to Kebble, the enquiry then becomes unnecessary.

[87] In deciding this application, I also take account of the fact that the enquiry against Kebble has not yet commenced. The Commissioner is an officer of the Court, duly appointed by the Master, to protect the examinee from improper questions and abuse. If questions are asked at the enquiry that are abusive, it will be the duty of the Commissioner to disallow them. If the Commissioner exercises her discretion incorrectly, her decision will be subject to review. Nothing in this judgment would preclude such a review.

[88] Whatever may happen at the enquiry, there is no indication at this stage that the questions to be asked of Kebble will be abusive in nature. The objection to the interrogation is premature.

VI. CONCLUSION

[89] Kebble has failed to demonstrated a ***"clear abuse"***. On the contrary, the evidence put forward by Kebble and the liquidators suggests that there is a need for an enquiry. In reaching this decision, I do not in any way pre-judge the merits or strength of the Liquidator's claims against Kebble or any other party.

[90] Both parties were represented by Senior and Junior Counsel. It is therefore appropriate that any costs award should include the cost of two counsel.

[91] Accordingly, I make the following Order:

> "The Application is dismissed with costs, including the costs of two counsel."

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P.N. LEVENBERG, AJ
ACTING JUDGE OF THE HIGH COURT

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