IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER : 5955/2010

In the matter between

SIYANDA RESOURCES (PTY) LTD	First Applicant
FESI, NTLANGANISO	Second Applicant
and	
LEBOGANG MICHAEL MOLOTO NO	First Respondent
WASSERMAN, J SC NO	Second Respondent

AND

CASE NUMBER : 06013/2010

In the matter between :

DAPHNE MASHILE-NKOSI	First Applicant
BRIAN AMOS MASHILE	Second Applicant
KALAHARI RESOURCES (PTY) LTD	Third Applicant
and	
LEBOGANG MICHAEL MOLOTO NO	First Respondent
JOHAN GEORGE WASSERMAN NO	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent

JUDGMENT

André Gautschi AJ

Introduction

[1] On 23 February 2010 two applications came before me by way of urgency. I identify them for the sake of convenience as the Siyanda Resources application (case number 5955/2010) and the Kalahari Resources application (case number 6013/2010).

[2] After hearing argument, I made the following orders :

2.1 In the Siyanda Resources application :

"It is ordered :

1. It is declared that the application is urgent and the applicant's non-compliance with the Uniform Rules in respect of time periods and service is condoned;

2. The first respondent is ordered to, on or before 2 March 2010, deliver a copy of each of the notice of motion and supporting affidavits that were placed before his Lordship Mr Justice Coppin on 3 February 2010 under case number 2010/3701, to each of the applicant;

3. The applicants may deliver supplementary founding affidavits within 10 days of having received delivery of the notice of motion and affidavits referred to in the previous paragraph;

4. The respondents may deliver supplementary answering affidavits within 15 days after delivery of any supplementary founding affidavits and the applicants may deliver supplementary replying affidavits within 10 days after delivery of any supplementary answering affidavits;

5. (Deleted)

6. Pending the final determination of the application referred to in Part B of the applicants' notice of motion, the Commission of Enquiry into the affairs of Siyanda Mining Corporation (Pty) Ltd held in terms of section 417 and 418 of the Companies Act, 1973, is stayed;

7. The costs of the appearance on 23 February 2010 are reserved for determination in the application referred to in Part B of the applicants' notice of motion. "

2.2 In the Kalahari Resources application :

"1. That the Applicants' non-compliance with the rules of the above Honourable Court in regard to service and time limits be condoned and that this application be heard as one of urgency in terms of the provisions of Rule 6(12).

2. That pending final determination of the application in Part B, the commission of enquiry in terms of section 417 and 418 of the Companies Act, 1973, into the affairs of Siyanda Mining Corporation (Proprietary) limited (in liquidation) *("**the section 417 enquiry**")* be stayed.

3. That the First Respondent be and is hereby ordered to deliver to the attorneys of record of the Third Applicant, within three days from the date of this order, a complete copy of the application papers in the *ex parte* application launched by the First Respondent (as applicant) in the above Honourable Court under case number 2010/3701 pursuant to which an order was issued, *inter alia,* that the section 417 enquiry be held, a copy of which order in annexed to the Notice of Motion marked "XX".

4. That the Applicants be and are hereby granted leave to file a supplementary founding affidavit not later than 10 days after compliance by the First Respondent with paragraph 3 above.

5. That the costs of the application in regard to the relief claimed in Part A be reserved for determination at the hearing of the application for the relief claimed in Part B. "

[3] I indicated that my reasons would follow. These are those reasons.

The parties and the relevant facts

[4] I shall identify the parties before describing their inter-relationship. The applicants in the Siyanda Resources application are respectively Siyanda

Resources (Pty) Ltd ("Siyanda Resources") and Ntlanganiso Fesi ("Fesi"). The respondents are respectively Lebogang Michael Moloto NO ("the liquidator") and J Wasserman SC NO ("the commissioner"). The applicants in the Kalahari Resources application are respectively Daphne Mashile-Nkosi ("Nkosi"), Brian Amos Mashile ("Mashile"), and Kalahari Resources (Pty) Ltd ("Kalahari Resources"). The respondents are respectively the liquidator, the commissioner and the Master of the High Court.

[5] Kalagadi Manganese (Pty) Ltd ("Kalagadi") holds potentially lucrative mining rights to prospect for manganese over three farms in the Northern Cape. Kalagadi is owned by Kalahari Resources (40%), Arcelor Mittal Limited ("Arcelor Mittal") (50%) and the Industrial Development Corporation ("the IDC") (10%). Kalahari Resources is owned by Siyanda Mining Corporation (Pty) Ltd ("SMC"), which holds 8.33% of the issued shares, and 17 other shareholders whose identities are not relevant to these applications. SMC in turn has three shareholders, namely Tshozi Investments (Pty) Ltd ("Tshozi"), an entity controlled by one Sandi Majali ("Majali") (85%), Siyanda Resources (10%) and Fesi (5%). SMC is currently in liquidation, and Moloto is the liquidator.

[6] The articles of association of Kalahari Resources provide *inter alia* for the disposal of its shares by shareholders. Article 107 obliges a shareholder which is desirous of disposing of its shares (defined in the articles as the "disposer") to a third party, to offer such shares firstly to the initial shareholders of Kalahari Resources (as defined), thereafter to the subsequent shareholders (as defined), thereafter to the remaining shareholders (as defined), and only in the

event of the shares offered by the disposer not being accepted by any of the aforesaid shareholders, is the disposer then entitled to offer its shares to the named third party.

[7] SMC gave notice to the Kalahari Resources shareholders in January 2009 of its intention to dispose of its 8.33% shareholding to NEHAWU Investment Company (Pty) Ltd ("NEHAWU"). SMC subsequently contended that it had acquired the right to dispose of its shares to NEHAWU, but that it had been prevented and frustrated from doing so by "wilful delaying tactics, alternatively a wilful refusal or neglect to adhere to statutory and contractual obligations on the part" of Kalahari Resources and its shareholders. In June 2009, SMC launched an application against Kalahari Resources and 19 other respondents. Part of the relief sought was that Kalahari Resources be ordered to provide its audited annual financial statements for the year ending 2008 to SMC. This application was resolved pursuant to various undertakings which were given to SMC by Kalahari Resources. The detail of that application is not relevant to this application.

[8] In November 2009 SMC launched a further urgent application against the same respondents, triggered by a special resolution which had been passed at a general meeting of shareholders of Kalahari Resources, amending article 107 by introducing a lock-in period and thereby preventing the sale of shares in Kalahari Resources within a certain period. SMC sought *inter alia* an interdict to stop the resolution being given effect to, and sought a copy of the shareholders' agreement between Kalahari Resources, Arcelor Mittal, IDC and

Kalagadi, as well as the audited annual financial statements of Kalahari Resources for the year ended 2009. This application was apparently settled on the basis of certain undertakings given by Kalahari Resources to SMC, including, *inter alia*, not to give effect to the special resolution adopted at the general meeting, and to provide its financial statements to SMC.

[9] On 18 December 2009 a meeting was held of the SMC shareholders (Tshozi, Siyanda Resources and Fesi). At that meeting, Majali, on behalf of Tshozi, proposed to wind-up SMC voluntarily in terms of section 349 read with section 350 of the Companies Act, 61 of 1973 ("the Companies Act"). The special resolution was passed, despite protest by the minority shareholders. It was also resolved that Moloto be appointed as the provisional liquidator.

[10] The special resolution was signed on 18 December 2009 and lodged with the Registrar of Companies on 21 December 2009.

[11] On 13 January 2010, Majali deposed to an affidavit in an apparent attempt to comply with section 350 of the Companies Act. He confirmed *inter alia* that SMC had no debts, and attached what he said was a certificate from the auditors of SMC. The "certificate" is simply a letter from chartered accountants Gobodo which does not purport to be a certificate, i.e. it does not "certify" any of the contents. It states (and I summarise) that to the best of their knowledge and belief SMC's sole investment is an 8.33% shareholding in Kalahari Resources, SMC received an amount of R18 646 4000 from Kalahari Resources, and SMC does not have any debt. It does not state that it has no

debts "according to the records of the company", as is required by section 350(1)(b)(ii)(bb). (It may be that the winding-up under section 350 is invalid as a result, and that the subsequent steps invoking sections 388 and 417 are similarly invalid, but I express no view on these aspects.)

[12] It appears that Moloto was appointed as liquidator of SMC on 1 February 2010, and within 24 hours launched an *ex parte* application in terms of section 388 read with section 417 of the Companies Act, to convene a commission of enquiry in terms of sections 417 and 418 of the Companies Act into the affairs of SMC[1].

[13] On 3 February 2010 Coppin J granted a order on the *ex parte* application, the relevant parts of which reads as follows :

> "1. An order is granted in terms of the provisions of Section 388 of the Companies Act, 61 of 1973 ("the Act") that the provisions of Sections 417 and 418 of the Act are made applicable to the liquidation of Siyanda [SMC].
>
> 2. A commission of enquiry ("the enquiry") into the affairs of Siyanda be held in terms of the provisions of Sections 417 and 418 of the Act.
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> 3. The scope of the enquiry shall be to investigate the financial affairs of Siyanda, including its trade, dealings, affairs, rights, obligations, assets and liabilities and in particular all matters relevant to any shareholding in Kalahari Resources (Pty) Ltd … and the value of such shareholding.
>
> 4. Adv J G Wasserman SC ("the commissioner") be appointed. …
>
> …"

Coppin J deleted from the draft order presented to him, the following paragraph :

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[1] Section 417 must be read with section 418, and it is in terms of the latter section that the court delegates its powers under section 417 to a commissioner (Venter v Williams 1982 (2) SA 310 (N) at 313). For convenience, however, I shall simply refer to "the section 417 enquiry".

> "7. That the record of this application shall be kept private and confidential and shall not be disclosed without prior leave of the Court or the Commissioner having been obtained."

I shall deal later with this deletion.

[14] Following the order of Coppin J, no time was wasted, and on 8 February 2010 the commissioner signed subpoenas *duces tecum* (for all intents and purposes identical) calling upon Nkosi and Mashile to appear at the enquiry on Wednesday 24 February 2010 and to produce the documents listed in annexures A and B attached to the subpoena. Annexure A to the subpoena lists a host of documents in relation to Kalahari Resources, and annexure B the same documents in respect of Kalagadi.

[15] The intention to hold the enquiry on 24 February 2010 and to call various witnesses, including Nkosi and Mashile, to be interrogated at that enquiry, gave rise to the present applications.

[16] Both applications were brought in two parts, and in each case the main application (part B) sought a setting aside of the order granted by Coppin J, alternatively (in the Siyanda Resources application) a setting aside of the convening of the section 417 enquiry and (in the Kalahari Resources application) that the subpoenas against Nkosi and Mashile be set aside. The relief sought in part A of each notice of motion, by way of urgency, was largely along the lines of the orders which I granted.

Locus standi

[17] *Mr Potgieter* (who appeared with *Mr van der Merwe* for the liquidator) attacked the *locus standi* of the various applicants to seek to set aside the order of Coppin J. The applicants may for this purpose be divided into three categories. First, Siyanda Resources and Fesi as members; second, Nkosi and Mashile as witnesses[2]; and third Kalahari Resources as the company whose affairs were to be investigated to determine the value of SMC's shareholding.

[18] The winding-up of SMC occurred in terms of section 350 of the Companies Act (a members' voluntary winding-up), which is an appropriate procedure where the company has no debts, or security has been furnished to the Master for the payment of any debts. Section 388 of the Companies Act allows for the provisions relevant to a compulsory winding-up to be made applicable to a voluntary winding-up. The section reads :

> "388. **Court may determine questions in voluntary winding-up**
>
> (1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.
>
> (2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit."

It is this section which the liquidator invoked in order to seek the convening of a section 417 enquiry.

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[2] I use this term for convenience – prospective examinee may be better.

[19] I accept that section 388 may appropriately be invoked to direct that there be a section 417 enquiry, if the company which was wound-up voluntarily is unable to pay its debts[3].

[20] It will be seen from section 388(1) that the application could be made *inter alia* by any member of the company. Siyanda Resources and Fesi would therefore have *locus standi* to bring an application of the nature which served before Coppin J. *Mr Potgieter* also conceded (correctly in my view) that, had the members become aware of the *ex parte* application before the order had been granted, they would have been entitled to intervene and oppose. Under those circumstances I can see no merit in the submission that the members do not have *locus standi* to seek to set aside the order of Coppin J.

[21] It was then submitted that the members at best have a financial interest in the enquiry, since they have an interest in the residual value of the estate which could be diminished by the costs of the enquiry. I do not agree that this is a mere financial interest and not a legal interest. Their rights (to the residual value of the estate) are directly affected by the order of Coppin J, and they would therefore fall within the class of persons who have a sufficiently direct and substantial interest in the subject matter of the judgment or order[4].

[22] As far as the witnesses are concerned, *Mr Potgieter* conceded that they would have *locus standi* to attack the subpoenas issued against them, and the

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3 Henochsberg of the Companies Act, 5th ed, Vol 1 p 833. Section 388 should be liberally construed Re Union Bank of Kingston-on-Hull (1880) 213 ChD 808; Craig v Formosa G.M. & Prospecting Co Ltd (in liquidation) 1917 WLD 111 at 112; Henochsberg *supra* at 833; Blackman *et al* Commentary on the Companies Act Vol 3 p 14-366

4 Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD)

enquiry insofar as it affected them, but resisted the notion that they would have the right to set aside Coppin J's order or the entire enquiry. It is in my view little comfort for a witness to be limited to the setting aside of the subpoena issued and served upon him or her, where the subpoena may be technically in order but the enquiry ought never to have been authorised. Logically a witness would have *locus standi* to have the convening of the enquiry set aside. As it happens, there is ample authority that a prospective witness has *locus standi* to oppose an application to have a section 417 enquiry convened, if he happens to learn of it, or to move to have the order set aside once it has been made[5].

[23] In Friedland v the Master[6] Stegmann J found that a proposed witness may only resist an order which would subject him or her to an examination under section 417 and 418 of the Companies Act, on the following grounds, namely :

> "(1) jurisdiction;
>
> (2) oppression or hardship; and
>
> (3) possible unusual, special or exceptional circumstances which it may seem appropriate to entertain."[7]

Although a witness therefore has limited *locus standi*, he or she has *locus standi* nevertheless. The finding which I make later in this judgment, regarding the object of the section 417 enquiry, would give the witnesses *locus standi* under ground (3), and possibly (2).

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5 *Ex parte* Liquidators Ismail Suliman & Co (Pty) Ltd 1941 WLD 33 at 34; *Ex parte* Likwidateurs van Trust Staal (Edms) Bpk (in Likwidasie) : In re Trust Staal (Edms) Bpk 1968 (2) SA 133 (O); Friedland and Others v The Master and Others 1992 (2) SA 370 (W)

6 *Supra*

7 Friedland v the Master *supra* at 379E-F

[24] Kalahari Resources is mentioned by name in Coppin J's order, and it is clear that in terms of that order it is to be subjected to scrutiny of its books and records in order to determine the value of its shares. Its rights are adversely affected by the order, and it clearly has *locus standi* in this matter.

[25] It was submitted by *Mr Potgieter* that when a court orders an enquiry, it does not determine the rights or obligations of any party, and that the enquiry is ordered at the court's own discretion on information brought to it by interested persons. It was contended that no rights and obligations are determined other than imposing the obligation on the party to attend the enquiry. The function of the enquiry was simply to allow the liquidator to obtain information required by him to enable him to discharge his duties. That in my view is too simplistic an approach. Each of the applicant's legal rights are affected adversely by the order.

[26] *Mr Potgieter* went further to contend that, since the convening of the enquiry had been authorised by a court order, the applicants were bound by that order and powerless to enquire into its validity. That is a startling proposition. The order was obtained *ex parte* and, as I have shown, adversely affects the rights of each of the applicants. Our law makes ample provision for rescission of an order obtained in the absence of a party. In addition recourse may be had (in a suitable case) to rules 6(8) and 6(12)(c). To say that a party is bound by and powerless with regard to a court order is to deny that party the right to rescind the order.

[27] There is in my opinion therefore no merit in the attack on the applicants' *locus standi.*

Liquidator had no authority

[28] The applicants contend that the liquidator had no authority to have brought the *ex parte* application.

[29] Section 350(3) provides as follows :

> "(3) Unless otherwise provided, in a members' voluntary winding-up the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court, subject to such directions as may be given by the company in general meeting."

It is common cause that the liquidator did not obtain directions from the company in general meeting before launching the *ex parte* application.

[30] The failure by the liquidator to obtain the requisite authority to litigate is not fatal to proceedings brought by him against a third party because it is not open to the latter to challenge the liquidator's authority. The provisions of section 386(4)(a) were enacted for the protection of creditors and members and to prevent the assets of the company from being squandered in useless litigation. If the liquidator acts without authority then he may be made to bear the costs personally[8]. It is however open to a third party to challenge the existence of the liquidator's authority where such authority was required to exercise a particular

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[8] Henochsberg *supra* p821; Tannenbaum's Executors and Tannenbaum v Quakley and the Liquidator of Varachio Store (Pty) Ltd 1940 WLD 209 at 214; Waisbrod v Potgieter and Others 1953 (4) SA 502 (W) at 507-8; Patel v Paruk's Trustee 1944 AD 469 at 474-475; Sifiris & Miller NNO v Vermeulen Bros 1973 (1) SA 729 (T) at 730-731; *cf* Toubkin NO v Donges NO 1951 (3) SA 72 (T).

power other than the power to litigate in the name and on behalf of the company[9].

[31] In Lok and Others v Venter NO and Others[10] Goldstone J found that an application for an order under section 417 fell within the rule enunciated in the Waisbrod case[11], and held that the authority of the liquidator could not be questioned by parties affected by the order[12]. Consequently he found that such parties did not have *locus standi* to attack the validity of the proceedings initiated by the liquidator where the liquidator was not properly authorised[13]. This conclusion is undoubtedly correct.

[32] However, Goldstone J went further and found that the liquidator in that matter had the implied authority of the court under section 386(5). That section provides :

> "(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets."

Goldstone J held as follows[14] :

> "When he was approached for an order by the liquidator, HUMAN J was satisfied that an order should issue under s 417. When I was approached to extend the order, I was similarly satisfied. In my opinion, the terms of those orders constituted sufficient authority from the Court under s 386(5), albeit implied authority, and,

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9 *Ex Parte* Du Plessis 1965 (2) SA 438 (T) at 440; Du Plessis v Protea Inryteater (Edms) Bpk 1965 (3) SA 319 (T) at 320

10 1982 (1) SA 53 (W)

11 *Supra*

12 At 57A-B

13 At 57D-E

14 At 57H to foot

> notwithstanding that the necessity to confer such authority might not actually have been considered at the time the orders were issued."

I respectfully disagree. Section 386(5) allows the court to grant leave to a liquidator to do any thing the court may consider necessary for winding-up the affairs of the company. I accept that that may include seeking the convening of a section 417 enquiry. However, the leave of the court must be sought. Section 350(3) provides that the liquidator does not require the sanction of the court if he has directions given by the company in general meeting. When he brings an application, as was done here, and does not ask pertinently for the leave of the court, that may be (and it may be assumed by the court) because he has the necessary directions given to him by the company in general meeting. The court would only grant him the necessary leave if he did not have the requisite authority, and then he must specifically ask therefor. In my respectful view, the court cannot by default be assumed to have given directions or authority when such are not requested.

[33] In my view therefore the liquidator acted without authority, but that in itself does not nullify the steps taken, nor does that in itself give a basis for the order of Coppin J to be assailed.

The object of the section 417 enquiry

[34] The avowed purpose of the section 417 enquiry is to ascertain the value of SMC's shareholding in Kalahari Resources by delving into the affairs of Kalahari Resources and Kalagadi. That much is clear from Coppin J's order (see paragraph 3 quoted in paragraph above) and the contents of the

subpoenas served on Nkosi and Mashile. This amounts to a shareholder demanding the right to delve into the affairs of the company in order to ascertain the value of its shares.

[35] A director has the right to inspect the accounting records of a company[15]. This right exists for the benefit of the company and may be invoked by the director only to enable him to discharge his personal obligations to the company and his statutory obligations; the right terminates on removal of the director from office[16]. A member does not have the right to inspect the accounting records of the company, unless the articles provide therefor[17]. A member is entitled to receive copies of the company's annual financial statements[18] and to obtain copies of the minutes of the company's general meetings[19], but is not entitled to sight of the minutes of directors' and managers' meetings maintained in terms of section 242[20]. In other words, a member is not entitled to demand that the company open its books and records to it.

[36] In the Clutchco case[21] a 30% shareholder wished to sell his shares to the majority shareholder. His request for access to the company's books of first accounting entry was denied. He sought such access in terms of section 53(1)

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15 Section 284(3) of the Companies Act; Wes-Transvaalse Boeresake (Edms) Bpk and Another v Pieterse and Another 1955 (2) SA 464 (T) at 467/8; Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA) at 492C-D

16 Conway and Others v Petronius Clothing Co Ltd and Others [1978] 1 All ER 185 (Ch) at 201-202

17 Henochsberg *supra* at p546(1)

18 Sections 286, 302 and 309 of the Companies Act

19 Sections 204 and 206 of the Companies Act

20 Clutchco (Pty) Ltd v Davis *supra* at 492B-C; Janit and Another v Motor Industry Fund Administrators (Pty) Ltd and Another 1995 (4) SA 293 (A) at 303B-F

21 Clutchco (Pty) Ltd v Davis *supra*

of the Promotion of Access to Information Act, No 2 of 2000 ("PAIA"). The avowed purpose was to enable him to determine the real value of his 30% shareholding. After setting out the different rights of directors and shareholders, and recounting the myriad provisions designed to protect the interests of shareholders, Comrie AJA, who delivered the judgment of the court, held as follows at 493C-F :

> "[17] The machinery established by legislation and the common law for the protection of shareholders is, in my opinion, not lightly to be disregarded. In enacting PAIA, Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred. A far more substantial foundation would be required.
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> [18] In my view, the respondent failed to lay such a foundation. His complaints were not of a serious nature and no detailed criticism of the auditors was advanced. In addition, the respondent's proposed *modus operandi* was lacking in specificity. He claimed that access to the books of first entry would enable him to "reconstruct" them and that the reconstructed version would enable him to place a proper value on his shares. These broad and general assertions were not supported by, for example, an affidavit by an experienced accountant and auditor. I conclude that the respondent failed to show that the access which he sought was required for the exercise or protection of the rights which he asserted. The Court *a quo* should, accordingly, have dismissed the application with costs."

At 492D-E, Comrie AJA said the following :

> "Arguably – I express no views – there may be special instances where a court could order some form of access in terms of s 252 (member's remedy in case of oppressive or unfairly prejudicial conduct) but that section is not applicable here. The position is, therefore, that the Companies Act does not afford the respondent the right of inspection or right to information which he seeks."

[37] Nor, in my view, would the court have the power to demand such access on behalf of a member, save possibly upon a proper case made out reflecting special circumstances. Take the example of a husband, who is a minority member of a private construction company, in the throes of a divorce. His wife wishes to know what his shares in that company are worth, and in order to

determine such value accurately, would need access to the books and records of the company, including minutes of board meetings, in order to see, *inter alia*, what work-in-progress there was, what contracts were in the pipeline, and so on. In other words, matters not readily ascertainable from the statutory annual financial statements or minutes of general meetings, to which a member is entitled. The wife accordingly subpoenas the directors of the company (which may even include her husband) to produce the books and records of the company at the trial. Unless the board of directors agrees to make such documents available, such a subpoena could in my view be set aside at the behest of the company, since it amounts to granting the member access to documents to which he would not otherwise have been entitled to have access[22].

[38] If a court does not have the competence, in the absence of special circumstances, to allow a member to delve into the affairs of the company, why should a liquidator have that power? *Mr Potgieter* submitted that the liquidator has far-ranging powers, and could enquire into matters which the member could not. That may be true up to a point, but it does not in my view permit the liquidator to enquire into the affairs of another juristic person on behalf of a member, if the member itself did not have that power and could not have obtained the sanction of the court therefor.

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[22] As indicated above, a director's right of access to the accounting records of a company may only be exercised *qua* director, and not, in the example given, *qua* husband : see Conway v Petronius Clothing Co Ltd *supra*

[39] The purpose of a section 417 enquiry is to enquire into the affairs of the company itself. That may involve identifying and valuing assets of the company. The commissioner would be entitled to subpoena witnesses, for instance, to establish that a particular motor vehicle or immaterial property right belonged to the company, and to place a value thereon. He or she may subpoena witnesses to establish that particular shares in the company are the property of the company in liquidation, and to place a value on those shares with reference to, for instance, the annual financial statements to which the company in liquidation as a member would be entitled. But it is quite another thing to delve into the affairs of that other company. I am not aware of any authority which permits this, nor were counsel able to direct my attention to any. The asset is the shares, not the company itself, which is a separate and distinct juristic person.

[40] In the present applications there is no attempt by the liquidator to justify the invasive enquiry envisaged. It is said that the liquidator is entitled to determine the true value of SMC's shares in Kalahari Resources. That is simply not sufficient. There are no special circumstances alleged, and on the strength of the Clutchco decision[23] even an application under PAIA would fail.

[41] The entire basis of the section 417 enquiry is therefore, in my view, flawed. It sets out to enquire into the affairs of another company, a separate juristic person, on behalf of a member of that company, which in my view is not authorised by the Companies Act or any other law. It amounts to an enquiry,

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[23] Clutchco (Pty) Ltd v Davis *supra*

not into the affairs of SMC, but into the affairs of Kalahari Resources and Kalagadi, for an improper or impermissible purpose. It also could not be "just and beneficial"[24] for the section 417 enquiry to be convened.

[42] This finding gives the applicants the *prima facie* right to have the section 417 enquiry set aside, and entitles them in my view to a stay of the enquiry in the interim.

Sight of the *ex parte* application

[43] The applicants complain that they have not been provided with a copy of the *ex parte* application, despite having requested this.

[44] The liquidator relies on section 417(7), which provides :

> "(7) Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise."

[45] I must immediately deal with the deletion by Coppin J to which I refer in paragraph [13] above. It will be appreciated that paragraph 7 of the draft order deleted by Coppin J was an attempt to enforce the privacy and confidentiality embodied in section 417(7). I was not informed why the paragraph was deleted by the learned Judge and no explanation is proffered in the affidavits. All that the first respondent tells me in the answering affidavit in the Kalahari Resources application is that :

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[24] The wording of section 388(1)

> "The Applicants' conclusions from the fact that part of the draft order was deleted are incorrect."

It is tempting to read into the deletion the fact that Coppin J was of the view that the record of the application should not be kept private and confidential. However, another plausible inference is that this was a matter already catered for by section 417(7), and there was no need for such an order. The safest, I believe, is that I should ignore the deletion, and draw no inference from it.

[46] The applicants point to the fact that the *ex parte* application was not purely brought under section 417, but under section 388 read with section 417. There is no secrecy, they point out, inherent in section 388. I think that is too simplistic an approach. Section 388 is simply a stepping stone to invoking section 417. The thrust of the *ex parte* application is to invoke section 417, and accordingly due regard must be had to section 417(7).

[47] Again, each category of applicant must be considered separately.

[48] Siyanda Resources and Fesi as members could have brought the *ex parte* application themselves, as we have already seen. It is also said in a letter addressed by the liquidator's attorney to Siyanda Resources' attorney that "Your client, as 10% shareholder, should presumably support an enquiry into the affairs of the company.", and, "Your client, as member, is invited to partake in the enquiry.". Given that attitude, there seems to be no good reason why the respondents should resist making the *ex parte* application available to the members. Indeed, in the correspondence the answer given in response to a request for such a copy, was simply that section 417(7) required a court order

before this could be done, and no reasons were given why the content of the application could not be viewed by the members. I cannot perceive of any reason why the members should not see that application.

[49] Kalahari Resources is, as I have shown, directly affected by the order, and is about to have its affairs uncovered in order to establish the value of its shares. I equally see no reason to withhold the content of the *ex parte* application from it. The liquidator did not advance any reasons in the answering affidavit why Kalahari Resources could not have sight of the *ex parte* application papers.

[50] The two witnesses, Nkosi and Mashile, are in a different position. The *ex parte* application leading to the convening of an enquiry will often contain an indication of what the enquiry is aimed at and what is hoped to be achieved thereby. Should a witness have sight thereof, the efficacy of the interrogation might be adversely affected. I would therefore ordinarily not permit a witness to have sight of the *ex parte* application. No special circumstances seem to be present in this case to deviate from that rule. Blackman *et al*[25] state with reference to Australian authority that where a proposed examinee seeks to have an order set aside, the court will ordinarily exercise its discretion in terms of section 417(7) to order disclosure of material by the person seeking the order, where the justice of the case so requires it. The learned authors , with reference to English and Australian authority, seem to favour allowing disclosure where the proposed examinee may by unfairly prejudiced in his application to have the order set aside if the content of the application is not

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[25] *Supra* Vol 3 p 14-476 and 477

disclosed to him. The onus would rest on the proposed examinee to show why section 417(7) should be relaxed.

[51] The applicants have submitted that it is clear that there are matters in the *ex parte* application deserving of investigation, and that they need access thereto in order to attack it on its merits. They point out that the voluntary winding-up was effected on the basis that the company had no debts, and yet, inevitably, it had to be alleged in the *ex parte* application that the company was unable to pay its debts and that therefore the enquiry was required. This was confirmed in a letter by the liquidator's attorney dated 10 February 2010, in which it was stated that SMC was indebted to SARS and was unable to pay its debts. That is remarkable given the content of the affidavit of Majali to which I have referred above.

[52] The witnesses may therefore advance, as a reason to have sight of the application, the about face in regard to whether SMC had debts or not, and whether it was unable to pay those debts. I consider that in itself to be insufficient to tip the scales in favour of the witnesses. The inference that an about face had occurred is one which can be drawn without sight of the application papers. It is also not necessary to have sight of the application papers if I am correct that the section 417 enquiry has been convened for an improper or impermissible purpose. I am further mindful of the fact that the witnesses are likely to have access to the application papers by virtue of my directing that they be made available to the other applicants. On balance, I am not inclined to deviate from what I consider to be the usual and salutary rule

that witnesses should not have sight of the application papers in the absence of special circumstances.

[53] Accordingly, I ordered that the *ex parte* application papers be furnished to the members and Kalahari Resources, but declined to make them available to the witnesses.

Conclusion

[54] For these reasons, I gave the orders which I set out in paragraph 2 above.

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ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	23 February 2010
Date of judgment	:	26 March 2010
For applicants in the Siyanda Resources matter	:	Adv P F Louw SC, with him Adv M A Chohan (instructed by Webber Wentzel)
For applicants in the Kalahari Resources matter	:	Adv J P Daniels SC, with him Adv P T Rood (instructed by Edward Nathan Sonnenbergs)
For first respondent in both matters	:	Adv M V R Potgieter SC, with him Adv H A van der Merwe (instructed by Senekal Simmons Inc)

No appearance for the other respondents