REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2012/7667

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

7 SEPTEMBER 2012 FHD VAN OOSTEN

In the matter between

PAT NYATHI	**FIRST APPLICANT**
STRINI NAICKER	**SECOND APPLICANT**
TAMOLEDI SELANE	**THIRD APPLICANT**

and

MICHAEL PATRICK CLOETE NO	**FIRST RESPONDENT**
MEDIA INVENTIONS (PTY) LTD	
(IN LIQUIDATION)	**SECOND RESPONDENT**
NORMAN KLEIN NO	**THIRD RESPONDENT**
NAROTAM GOVIND PATEL NO	**FOURTH RESPONDENT**

Company - Winding-up - Enquiry in terms of ss 417 and 418 of Companies Act 61 of 1973 - examination of witness in terms of s 417(2)(a) of the Act – oral evidence as opposed to written interrogatories - commissioner exercising a discretion in deciding which option to authorise - such discretion to be exercised with due regard to circumstances of case - oral evidence preferable where liquidators unable to investigate

affairs of insolvent company due to absence of documents or information or where fraud of theft suspected – limited scope for allowing written interrogatories.
Company - Winding-up - Enquiry in terms of ss 417 and 418 of Companies Act 61 of 1973 - subpoenas issued in terms thereof to produce documents at enquiry - application for setting aside of based on vagueness regarding documents to be produced at the enquiry - mere fact that variety of documents to be produced not a ground for setting aside of subpoenas.
Review - Enquiry in terms of ss 417 and 418 of Companies Act 61 of 1973 - ruling by commissioner not to allow examination of witnesses by way of written interrogatories - discretion of commissioner properly exercised – application dismissed.
Costs - punitive costs order - applicants' conduct in making wide ranging unfounded allegations justifying punitive costs order.

J U D G M E N T

VAN OOSTEN J:

[1] This is an application firstly, for the review of the ruling made by the first respondent, in an enquiry in terms of s 417 and 418 of the Companies Act 61 of 1973 (the Act), not to allow the examination of the applicants by written interrogatory[1], and secondly, for an order setting aside the subpoenas issued in terms of s 417 of the Act and served on the applicants. In the notice of motion a review of the first respondent's refusal of an application for postponement of the proceedings was also sought but not pursued. The application is opposed by the third and fourth respondents.

[2] The second respondent was placed in final liquidation by order of this Court on 16 February 2011. The third and fourth respondents are the appointed joint liquidators of the second respondent (the liquidators). The first applicant was a former director of and majority shareholder in the second respondent. The second applicant was the general manager and the third applicant the chief executive officer of the second respondent. Pursuant to an application by the liquidators, the Master authorised the holding of a commission of enquiry in terms of s 417 as read with s 418 of the Act, into the affairs of the second respondent. The first respondent was appointed as the Commissioner to conduct the enquiry and he was further authorised to issue subpoenas for the attendance at the enquiry of certain named witnesses as well as such further witnesses

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[1] In terms of s 417(2)(a) of the Act.

as he may in his discretion regard necessary for the proper investigation into the affairs of the company.

[3] The Commissioner duly summoned the applicants to attend and to be examined at the enquiry and to produce documents in their possession relating to the affairs of the second respondent.

[4] The enquiry commenced on 7 November 2011 and before any witnesses were called to testify, counsel for the applicants requested the Commissioner to make a ruling that the examination of the applicants by way of written interrogatories, instead of oral evidence,[2] be authorised. The Commissioner, having heard argument, dismissed the application. This is the ruling that prompted the present application.

[5] The procedure provided by ss 417 and 418 of the Act[3] Hurt J held in *Lynn NO and ano v Kreuger and others* 1995 (2) SA 940 (N) 944F is aimed at "assisting officers of the Court in the performance of their duty to the creditors of companies in liquidation, the Master and the Court". The Constitutional Court on two occasions considered the nature of ss 417 and 418 enquiries. In *Ferreira v Levin NO and others; Vryenhoek v Powell NO and others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1), Ackermann J, during the course of the judgment in dealing with the constitutionality of s 417(2)(b) and after having reviewed the major statutory duties of the liquidator provided for in ss 391, 392, 400(1) and 402(b) of the Act, concluded as follows

> "The purpose of the enquiry under ss 417 and 417 is undoubtedly to assist the liquidators in discharging these duties
>
> 'so that they may determine the most advantageous course to adopt in regard to the liquidation of the company'[4]
>
> and
>
> 'to achieve his primary object, namely the ascertainment of the assets and liabilities of the company, the recovery of the one and the payment of the other, according to law and in a way which will best serve the interests of the company's creditors'"[5]

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[2] As provided for in s 417(2)(a) of the Act.
[3] Chapter 14 of the Act, which includes sections 417 and 418, has survived the repeal of the Act by the Companies Act 71 of 2008 (see Schedule 5 s 9 (1) of the new Act).
[4] *Per* Van Winsen J in *Western Bank Ltd v Thorne NO and others* 1973 (3) SA 661 (C) 666F.
[5] *Per* King AJ in *Merchant Shippers SA (Pty) Ltd v Millman NO and others* 1986 (1) SA 413 (C) 417D-E.

In the subsequent judgment of the Constitutional Court[6] on the constitutionality of the remaining portions of ss 417 and 418 of the Act which were not struck out in *Ferreira,* Ackermann J elaborated on the purpose of the enquiry procedure, as follows:[7]

> "As I have endeavoured to show in this judgment, the very purpose of the proceedings under sections 417 and 418 of the Act is in order to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it cannot get from its erstwhile 'brain' and other 'sensory organs' or other persons who have a public duty to furnish such information but are unwilling or reluctant to do so fully and frankly."

Finally, Nugent J (as he then was), in *Leech and others v Farber NO and others* 2000 (2) SA 444 (W) 450J, considered the nature of ss 417 and 418 enquiry to be

> "...essentially an interrogation in which information is sought to be pieced together to enable the affairs of the company to be properly wound up."

[6] Against this background it is necessary to examine the options for the examination on oath or affirmation, "either orally or on written interrogatories", of a person summoned to appear at an enquiry, provided for in s 417(2)(a) of the Act. The Commissioner, acts in a quasi-judicial capacity.[8] He conducts the enquiry, he has the main duty to examine witnesses and he has to regulate and control the interrogation (*Receiver of Revenue Port Elizabeth v Jeeva and others; Klerck and others NNO v Jeeva and others* 1996 (2) SA 573 (AD) 579I). The enquiry is of an inquisitorial nature.[9] In deciding an application for the examination to proceed by way of an oral interrogation as opposed to the submission of written interrogatories, the Commissioner is vested with a discretion[10] which must be exercised having due regard to the particular circumstances of the case. It is undesirable and in any event impossible to formulate an all-embracing list of criteria which need to be considered. In *Katz v Colonial Realty Trust (Pty) Ltd* 1954 (4) SA 302 (W), Rumpff J (as he then was) held that there must be good reasons for having a written enquiry rather than an oral examination. Useful guidance is

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[6] *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449).
[7] At p 808D.
[8] See *Absa Bank Ltd v Hoberman and others NNO* 1998 (2) SA 781 (C) 795C.
[9] See *Ex parte Brivik* 1950 (3) SA 790 (W).
[10] See *Mondi Ltd and another v The Master and others* 1997 (1) SA 641 (N) 645E.

derived from the English case of *Re Rolls Razor Limited* [1969] 3 ALL ER 1386, where it was stated by Megarry J

> "There may well be some cases in which it would plainly be oppressive or unreasonable not to submit written questions first. There will be other cases in which there plainly ought to be an oral examination without the prior submission of any written questions. Between these two categories there may be many cases in which the Court must determinate which cause is best suited to discover the relevant facts without being oppressive, vexatious or unfair. In order to do this, the Court must ... look at the facts of the case as a whole, without yielding to preconceptions; and in doing this, the Court should give all proper weight to the views of the liquidator without, of course, abandoning the proper exercise of its discretion, of treating the liquidator's views as being in any way decisive of the matter."

A written interrogatory, in my view, would be appropriate where, for example, the information sought is merely formal in nature. A written interrogatory as a precursor to oral examination may in certain circumstances be appropriate.[11] But where the liquidation of a company is *prima facie* the result of mismanagement or where fraud and theft on the part of the directors and other officers of the company appear to have led to the demise thereof, the submission of written questions will undoubtedly undermine the object and purpose of the enquiry.[12] The directors and other officers of the company are the "only eyes, ears and brains of the company and often the only persons who have knowledge of the workings off the company"[13] and the liquidators, not having any prior knowledge thereof are strangers to the affairs of the company[14] and therefore reliant on the oral examination and cross-examination of witnesses to delve for and hopefully discover the truth concerning the affairs of the company. In *Lynn NO* Hurt J dealt with it as follows:[15]

> "It is very often of fundamental importance for the liquidator of a company to find out what has been done with the assets of that company and how the company's business

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[11] See *Leech* supra at p 451A-B
[12] See *Ferreira* para 124.
[13] *Ferreira* para 124.
[14] See *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] 1 ALL ER 894 (CA) 900e; *Re Rolls Razor Ltd (No 2)* [1969] 3 ALL ER 1386 (Ch) 1396-7 (both referred to and quoted in *Ferreira* 1059G-1060G).
[15] At p 944F-I.

> has been run. Speed is of the essence of effectiveness in such an enquiry because, all too often, the liquidator must take early and urgent action in order to recover mismanaged or misappropriated assets for the benefit of creditors. The case under consideration seems to be an excellent example of the importance of the need for full information at a comparatively early stage of the winding-up. In this case, on the evidence which is before me, the probabilities indicate very strongly, if not overwhelmingly, that the only person who can give the applicants the information which they require is the first respondent. I think that the first respondent's prospects of persuading the Constitutional Court that the 'interrogation procedure' in respect of people who have been involved in the dealings of a company before its liquidation is unconstitutional are remote indeed. I cannot conceive of any other procedure which would enable liquidators, effectively and efficiently, to fulfil their task."

[7] Reverting to the facts of the present matter, the considerations relied on by the liquidators for the holding of an enquiry reveal an absence of information and financial records and documents concerning the second respondent having been furnished. Nor could any documents be found despite a "diligent search". Such information is necessary to enable them *inter alia* to recover substantial sums of monies owed to the second respondent. In the report of the liquidators for purposes of the second meeting of creditors, which was to be held on 19 May 2011, the estimated value of the assets of the second respondent is stated as R705 000, as opposed to its liabilities amounting to some R91,8m. The report further reflects that the liquidators were unable to meaningfully report on the affairs of the second respondent due to the non-availability of the necessary documents and other information. In these circumstances an enquiry was called for and was rightly ordered by the Master. The lack of co-operation by the applicants necessitated an oral interrogatory into the affairs of the second respondent. The applicants have failed either before the Commissioner or this Court to advance any reasons for a preference to the submission of written interrogatories. The sole reason counsel for the applicants advanced was that the written interrogatories would have "substantially shortened" the enquiry proceedings. In the circumstances of this case the contention does not bear scrutiny. The Commissioner's refusal of the request was fully justified and it follows that the application for the review thereof must fail.

[8] This brings me to the application for the setting aside of the subpoenas served on the applicants. The objection raised is that the subpoenas are vague in "failing to specify the documents or thing" the person being summoned is called upon to produce at the enquiry. The contention is without merit. In terms of the subpoenas the applicants are required to produce at the enquiry:

> "...all documents, and any documents, books or papers in your custody or under your control relating to the company but without any prejudice to any lien claimed with any regard to such books or papers.
>
> 3.1 In particular, and without limiting the generality of the aforegoing, you are directed and required to bring with you and to produce all documents, papers, records, receipts, books of account, acknowledgement of debt, cheques, credit notes, statements, bank statements, vouchers, purchase orders, invoices, cheques, written agreements, credit notes, bank deposit slips, proof of EFT, copy instructions, booking sheets and general source documents in your possession relating to the company.
>
> 3.2 All agreements and notes and any other pertinent information relating to the company.
>
> 3.3 All documents, papers, records, receipts, books of account, acknowledgement of debt, cheques, credit notes, statements, bank statements and general source documents in your possession relating to the lending of money by you at any time to the company as well as the payment to you by the company of any money at any time.
>
> 3.4 All agreements relating to the association between you and/or with the company at all material times.
>
> 3.5 Any information or documentation in respect of assets and liabilities of the company."

The documents required to be produced, although wide-ranging, are clearly specified and identified with sufficient clarity to inform the witness as to the exact nature thereof. I am unable to find any vagueness in the description. The mere fact that a variety of documents is required to be produced does not constitute a ground for the setting aside thereof.[16] Such difficulties as the applicants may have in this regard should be raised before and dealt with by the Commissioner. Counsel for the applicants, in any event, wisely did not pursue the contention any further. It is rejected.

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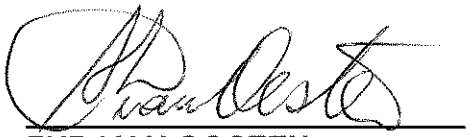
[16] See *Leech* supra p 455A-C and see *Beinash Wixley* 1997 (3) SA 721 SCA.

[9] Finally, something needs to be said concerning the conduct of the applicants in this application. The affidavits of the applicants are replete with irrelevant, wide-ranging and unfounded allegations attacking the motives, conduct and integrity of the liquidators, the attorney acting for the liquidators and the second respondent as well as the Commissioner. Counsel for the applicants was unable to advance any justification for any of those allegations. There clearly is none. The application, moreover, was ill-conceived right from the outset. As a mark of this Court's disapproval of the objectionable manner in which the applicants have conducted this case, an award of costs on a punitive scale, in my view, will be appropriate.

[10] In the result the application is dismissed with costs on the scale as between attorney and client.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	***30 AUGUST 2012***
DATE OF JUDGMENT	***7 SEPTEMBER 2012***