REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: 2013/37534

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

Date: ……..2015 _____

In the matter between

QEDANI MAHLANGU **APPLICANT**

And

THE MASTER OF THE SOUTH GAUTENG HIGH COURT **FIRST RESPONDENT**

COMMISSIONER ADVOCATE CHARLES SCOTT STEWART **SECOND RESPONDENT**

LEIGH WILLIAM ROERING N.O. **THIRD RESPONDENT**

MABATHO SHIRLEY MOTIMELE N.O. **FOURTH RESPONDENT**

J U D G M E N T

MOSIKATSANA AJ:

Introduction

[1] This is an application for an order to set aside a summons issued under s 417(1) of the *Companies Act*, 61 of 1973 as amended (the Act). The application is opposed by the third and fourth respondents.

[2] The third and fourth respondents are the appointed joint liquidators of 3P Consulting (Pty) Limited (in liquidation), Master's reference: G1259/2010 (3P Consulting).

[3] The applicant was a member of the executive council for the department of health in the Gauteng province (MEC for Health) at the relevant time.

[4] The first respondent is the Master of the South Gauteng High Court (the Master) and the second respondent was appointed by the Master as Commissioner to conduct the enquiry. He was further authorised to issue a summons for the attendance at the enquiry of witnesses for the proper investigation into the financial affairs of 3P Consulting.

Factual Background

[5] The Gauteng health department (the department) had a service level agreement with 3P Consulting for the implementation of a turnaround strategy, for the department. The agreement was extended but due to

allegations of impropriety the agreement was subsequently cancelled by the department on allegations of irregularities.

[6] Before its winding-up, 3P Consulting sued the department for approximately R99, 096, 157.86 (ninety nine million and ninety six thousand one hundred and fifty seven rands eighty six cents) excluding interest and costs as set out in the notice of motion dated 13 October 2011 Case No: 38995/2011(the judgment application). The department opposed the proceedings on the basis that it received no value. After pleadings were closed, the dispute was referred to oral evidence. Before hearing the oral evidence 3P Consulting was placed into final winding-up. After investigation, the liquidators have determined that 3P Consulting has creditors with claims in excess of R100, 000 000 (one hundred million rands). 3P Consulting's only asset is its claim of R99, 000 000 (ninety nine million rands) against the department. 3P Consulting wound up because the department had not paid the debt.

[7] In order to make a decision on whether or not to proceed with the judgment application, the liquidators obtained the Master's authority to convene an inquiry in terms of ss 147 and 148 of the Act. The enquiry commenced on 29 April 2013. At the request of the joint liquidators and having duly applied his mind to the matter, the Commissioner summoned the applicant to attend the enquiry on 29 July 2013 in order to testify on matters within her knowledge in respect of her dealings and association with the business, trade property and affairs of 3P Consulting.

[8] The applicant attended on that date. The applicant undertook to give evidence. However, she asked for a postponement to the 27 August, 2013 to refresh her memory. The Commissioner granted the postponement. On 27

August, 2013 the applicant did not attend the enquiry as previously undertaken by her. Instead her legal representatives explained to the enquiry that the applicant was unable to attend as she was ill. They produced a medical certificate to support their claim.

[9] By agreement with the applicant's legal representative, the enquiry was postponed to 15 October, 2013. On 9 October, 2013 the applicant brought an urgent application to excuse her from attending the enquiry pending the court's decision on whether the summons should be set aside. The urgent application was heard on 15 October, 2013 which coincided with the date to which the enquiry was postponed. The court granted the applicant the relief sought pending the hearing of the application to set aside the summons to attend the ss 147 and 148 enquiry. The application to set aside the summons was set down at the instance of the third and fourth respondents for 24 March, 2014 before this court.

[10] On 17 March, 2014 the applicant filed an application for a two week postponement of the application to set aside the summons from the 24 March, 2014. The applicant's reason for seeking a postponement of the application to set aside was that her counsel on the matter was not available on the 24 March 2014. The postponement application was opposed by the third and fourth respondents. Fortuitously, this matter was heard on 27 March, 2014 at which stage, the postponement application was abandoned and the matter proceeded on the merits.

Dispute on the merits

Applicants' submissions

[11] The applicant concedes that the provisions of ss 417 and 418 of the Act are constitutional[1] and that they are aimed at assisting liquidators determine the best course to adopt in the liquidation of a company, to properly assess and determine the company's assets and liabilities, to recover the assets and to pay liabilities and to discharge this obligation in a manner that is in the best interests of the creditors.

[12] The applicant launches a two-pronged approach to its arguments. First she alleges that the summons is an abuse of process. Secondly, she contends that the summons is vague.

Arguments on Abuse

[13] The applicant concedes that it is not incumbent upon the third and fourth respondents to demonstrate the need for an inquiry, but that she carries the obligation as the party wishing to stop the enquiry, to demonstrate a clear abuse.[2]

[14] The applicant also acknowledges a general right or entitlement on the part of liquidators to obtain information in order to make an informed decision whether to institute proceedings on behalf of a company in liquidation. However, the applicant argues through counsel that in this instance, the summons is an abuse because a decision has already been made to press a claim in Case No: 38995/2011 against the department for R99, 096, 157 .86 excluding interest. The applicant states that all the information that the third

[1] *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 CC.
[2] *Kebble Gainsford & Others NNO* 2010 91) SA 561 [71].

and fourth respondents require may be gleaned from the documents filed in Case No: 38995/2011. The applicant contends that the summons in this instance will not serve its intended purposes of pre-litigation information gathering, but that it will be used as a trial run or 'pre-hearing' of the evidence to be led in the civil litigation under Case No: 38995/2011.

[15] Applicant's counsel relies on the following dicta in *Cloverbay Limited (Joint Administrators) v Bank of Credit and Commerce International*[3] which outlines the criteria to be applied by a court in exercising its discretion whether or not to allow 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), the 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 of a fairly clear claim by examining the proposed defendant to discover his defence, the balance would come down against making the order. Of course, a few cases will be so clear: it will be for the judge in each case to reach his own conclusion.'

[16] Applicant's counsel further states that the applicant cannot state definitively, whether the work allegedly rendered by 3P Consulting had been actually performed or not. Nor can she advance the department's case that there was double billing or other forms of irregularities. Counsel also states that the applicant is no longer the MEC for health and has no possession or control of any documents from the department. Applicant's counsel further states that the applicant is not a former officer of 3P Consulting and owes no fiduciary

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[3] SA [1991] Ch 90 (CA) [1991] 1 ALL ER 894.

duty to 3P Consulting and if anything she is an employee of the other party to the pending civil litigation. Applicant's counsel submits respectfully that it cannot be suggested that the commissioner applied his mind in making the decision to summon the applicant to be examined. He also states that there is no reasonable basis for suspecting that the applicant has any document in her possession or control. Applicant's counsel further states that applicant attended the enquiry and pleaded for an opportunity to consider the matter properly before attending further. He states that the applicant was overwhelmed by the prospect of being examined in the enquiry and that this has no bearing on whether objectively viewed, the summons constitutes an abuse.

Respondent's submissions

[17] The joint liquidators state that they have no direct or personal knowledge of 3P Consulting's trade, dealings and affairs, and in particular those with the department. For this reason, they state that they cannot make an informed decision whether or not to continue with the civil litigation initiated by 3P Consulting against the department. They argue that the applicant can provide useful information to them in the winding-up of the estate and in deciding whether they should continue with the litigation that 3P Consulting instituted against the department prior to its winding-up.

[18] The liquidators also state that in order to set aside the summons, the applicant must make out a clear case of abuse. They argue that the applicant has not made a proper case for setting aside the summons.

[19] The liquidators refer to the decision of the Constitutional Court in *Bernstein*[4] where the provisions of ss 417 and 418 were found to be constitutional. In particular, they refer to paragraphs [15] and [16] of the *Bernstein* decision for listing of the duties of the liquidator in any winding-up.

[20] The liquidators refer to paragraph [33] of the *Bernstein* decision where Ackermann J remarked that in Australia a liquidator is entitled to obtain information not only to ascertain whether she or he has a cause of action but also to evaluate whether she or he has a sufficiently strong case to justify spending the creditors' money in pursuing it, or whether there is an adequate defence to a claim against the company.

[21] The liquidators also quote the following extract from the decision in *Cloverbay*[5] where in holding that the liquidator is entitled to obtain as much information as possible before deciding whether or not to institute legal proceedings the Court of Appeal held:

> '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…*'

[22] The liquidators further referred to *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[6] for the proposition that the purpose of an enquiry is ultimately to minimise loss to creditors and to give full information to

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[4] Supra note 1.
[5] Supra note 3.
[6] 1996 (1) SA 984 CC par [261].

creditors. They also referred to *Kebble*[7] to highlight the fact that the determination as to whether an enquiry is an abuse is a factual determination.

[23] Flowing from the above legal authorities, the liquidators argue that:

[23.1] they have a duty to enquire into the affairs of 3P Consulting;

[23.2] they are entitled to gather as much information as possible, to assess whether to proceed with the judgment application against the department;

[23.3] the applicant's contention, that the enquiry, is aimed at bolstering the civil case against the department, and that this constitutes abuse is not true;

[23.4] they did not institute the case, it is not their case and they have not yet decided to pursue it and cannot be said to be attempting to bolster it;

[23.5] the applicant is not a party to the judgment application and cannot rely on it to make out a case of abuse;

[23.6] the applicant has failed to adduce any evidence in support of her contention of abuse;

[23.7] contrarily, her founding affidavit demonstrates the need for an enquiry as she alleges improprieties and irregularities in the award as well as the extension of the contract;

[23.8] as in *Kebble* allegations of fraud, impropriety and irregularity strengthen rather than undermine the need for an enquiry;

[23.9] the fact that a witness summoned to testify at an enquiry may be a witness at or a defendant in subsequent proceedings related or unrelated to the liquidated company on its own does not constitute a basis for setting aside the summons. The liquidators cite *Levin v Ensor NO and Others* 1975 920 SA

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[7] Supra note 2

118 (D) at 121 -122 and *Pretorius v Marais* 1981 (1) SA 1051 (A) at 1062J-1065A for the latter proposition.

[24] The liquidators also argue that the commissioner filed a report confirming that the applicant is able to provide information concerning the trade, dealings, affairs and property of 3P Consulting and that the postponements were granted based on assurances that the applicant could assist the commissioner. The liquidators further argue that the applicant never disputed the validity of the summons or that she is able to assist the enquiry. They contend that the applicant was apparently misleading the commissioner. The liquidators conclude that a proper case has not been made for setting aside the summons and that the application should be dismissed with a punitive costs order on the attorney and client scale.

Issue for determination

[25] The issue to be determined is whether the applicant has made out a clear case of abuse for the setting aside of the ss 147 and 148 summons.

Legal determination of the issues

[26] 3P Consulting instituted civil litigation against the department which has been referred to oral evidence. The joint liquidators state in their heads that the enquiry will assist them in making a decision whether or not to proceed with the case initiated by 3P Consulting against the department. The liquidators argue that the purposes of ss 417 and 418 of the Act include the gathering of

information for purposes of assessing whether or not to proceed with the judgment application. To support this proposition the liquidators refer to para [33] in *Bernstein* where Ackermann J alluded, without setting out any principle for our courts to follow, to the Australian judicial practice of allowing the holding of an enquiry to gather information to determine prospects of success at trial[8]. It is trite that in our law as in English law, the holding of an enquiry in order to 'dot the i's and cross the t's' or in other words, to weigh the prospects of success in ongoing civil litigation is impermissible, an abuse of process and unfair.[9]

[27] Tritely, the court has discretion to prevent abuse of process by setting aside a summons. However, the applicant has the duty to satisfy this court that this is a proper case for the setting aside of the summons. In support of her claim the applicant has argued inter alia that the summons is an abuse of process as she has no information regarding the business activities of 3P Consulting, that any information that the liquidators require in order to determine whether to proceed with the civil case against the department may be gleaned from the court records in that case. Applicant's counsel also argues that she is not an office bearer of 3P Consulting and therefore owes no fiduciary duty to the shareholders and creditors of 3P Consulting. Applicant's counsel further argues that at the relevant time, the applicant was an employee of the department which is involved in civil litigation with 3P.

[28] In my view ss 417 and 418 of the Act have to be invoked and applied with circumspection, particularly as against the applicant who is not the controlling

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[8] See *Re Spedley Securities Ltd: Ex Parte Potts & Gardiner* (1990) 2 ACSR 152 (Supreme Court of New South Wales) at 155-6.
[9] See *Cloverbay* supra note 3.

mind or officer of 3P Consulting and who owes no fiduciary duty to the shareholders of 3P Consulting. The applicant was at the relevant time an executive officer of the department. The applicant's relationship with 3P Consulting is at arm's length and inherently adversarial. The applicant, in my view, hardly qualifies as a person who can shed light on the operations of 3P Consulting.

[29] The joint liquidators argued in their heads that the applicant having initially undertaken to testify at the enquiry, subsequently reneged. They conclude that the applicant misled the enquiry when she undertook to testify and after she had been given opportunity to refresh her memory. It is worth considering that even though ss 147 and 148 are constitutional, they have variously been described as inquisitorial and draconian[10] with an expansive reach that is sometimes not justified by the purposes for which they were legislated[11]. For this reason, it is plausible as applicant's counsel has argued that the applicant, daunted by the prospect of testifying at the enquiry, became irresolute and prevaricated. However, the applicant's subjective reaction to being summoned to testify is not the subject of my enquiry and has no significant bearing on my findings into the fairness or otherwise of the process.

[30] A further concern I have with the issuance of a summons for the applicant to testify under these circumstances where proceedings have already been instituted, is that the enquiry may be abused to gain pre-trial forensic advantages not permitted by rules of court to elicit information that may be

[10] See *Botha v Strydom* 1992 (2) SA 155 (N) 159 G-I; *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) A-B.
[11] Y Joubert and J Calitz 'To be or not to be? The Role of Private Enquiries in the South African Insolvency Law' PER/PELJ 2014 (17) 3

used to uncover the inherent strengths and weaknesses in 3P Consulting's civil lawsuit against the department. The abuse of the inquiry by going on a fishing expedition in the manner suggested above, is exacerbated by the fact that unlike in a trial, a ss 417 and 418 enquiry is relatively fluid and open-ended, lacking the structural protections of a trial, such as chief-examination, cross-examination, re-examination, relevance and admissibility.

[31] The joint liquidators argued that they did not institute the judgment application, that it is not their case, that they have not yet decided to pursue it and that they cannot be said to be attempting to bolster it. Even if the liquidators didn't initiate the judgment application, it does not alter the fact that if the enquiry proceeds, it will provide them with a pre-trial forensic tool not provided by the rules of court such as discovery and inspection to weight their chances of success at trial.

For the above reasons, the summons is in my view an abuse of process, oppressive and unfair.

ORDER:

[33] I Make the following order:-

[33.1] The application to set aside the summons is granted with costs.

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T L MOSIKATSANA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR APPLICANTS	**N CASSIM SC**
INSTRUCTED BY	**NGCEBETSHA MADLANGA ATTORNEYS**
COUNSEL FOR RESPONDENTS	**GD WICKINS**
INSTRUCTED BY	**BROOKS BRAND INC ATTORNEYS**

DATE OF HEARING	**27 MARCH 2014**
DATE OF JUDGMENT	**26 JANUARY 2015**