IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

..... 26/10/21.

CASE NO: 46000/2021[C]

In the matter between:

NOKWAZI NGONYAMA	First Applicant
THUNDERCATS INVESTMENTS 92 (PTY) LTD	Second Applicant
and	
RALPH LUTCHMAN N.O.	First Respondent
In his capacity as the appointed joint provisional liquidator of Bosasa Youth Development Centres (Pty) Ltd	
CLOETE MURRAY N.O.	Second Respondent
In his capacity as the appointed joint provisional liquidator of Bosasa Youth Development Centres (Pty) Ltd	
OFENTSE ANDREW NONG N.O.	Third Respondent
In his capacity as the appointed joint provisional liquidator of Bosasa Youth Development Centres (Pty) Ltd	
TSEPHO HARRY NONYANE N.O.	Fourth Respondent
In his capacity as the appointed joint provisional liquidator of Bosasa Youth Development Centres (Pty) Ltd	
MEYER JOFFE N.O.	Fifth Respondent

BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD (*IN LIQUIDATION*) Sixth Respondent

THE MASTER OF THE HIGH COURT Seventh Respondent

JUDGMENT

Headnote

Urgent application to be excused from answering questions in a section 417 enquiry – no good reason shown – HMI Healthcare v Medshield distinguished – section 417 enquiry, on the facts, not an abuse and neither was the subpoena sought to be evaded

SUTHERLAND DJP:

1. This purpose of this urgent application is to excuse the first applicant (who is the director of the second applicant) from answering a subpoena to testify before the commission set up pursuant to section 417 of the Companies Act to enquire into the affairs of the 6th respondent (herein called BYDC). The interrogation is set down on Monday next, 25 October 2021, a few days away. There was some debate about urgency, but I pass over that as peripheral. Owing to the urgent need for an order, the reasons furnished are succinct.

2. This matter is an aspect of a broader tussle about the fate of the Bosassa Group of companies in the wake of its collapse and the apparent suicide of its controlling mind, Gavin Watson. BYDC was an affiliate. All the companies in the group have been subjected to a process of winding up. The applicants assert a claim against BYDC. These claims are the subject of an action instituted against BYDC's liquidators, the first to fourth respondents.

3. The application is in parts A, B and C. Only part A is the concern of this judgment. The critical question is whether a creditor (within the broad scope of section 417 to include a potential creditor whose claim may eventually be accepted) who is subpoenaed to testify can decline to do so. It is assumed for the purpose of analysis that a person may do so for good cause. Thus, has the first applicant advanced good cause?

4. The applicants' grievances can be summed up thus:

   4.1. They believe the subpoena is a ruse intended to gain a tactical advantage in the coming action by the applicants to assert their claim. (This species of stance has been rubbished by the SCA in *Roering NO v Mahlangu 2016 (5) SA 455 (SCA)* and no more need be said about it.)

   4.2. They have been denied sight of the ex parte and secret application that set up the section 417 commission of enquiry They claim a right to see it *qua* interested party. An application to the commissioner to compel the liquidators to produce the papers was dismissed. They propose to review the decision.

   4.3. They also believe that BYDC is not insolvent and can pay its debts. They doubt it was ever insolvent, but even if it were, they believe it is not insolvent now. Thus, they say, an application in terms of section 354 of the Companies Act to set aside the liquidation would succeed and in consequence, the liquidator's section 417 commission would be dissolved (at least as regards BYDC) and the first applicant would not have testify.

   4.4. Thus, interim relief as prayed in Part A is appropriate pending sight being obtained of the ex parte papers and a section 354 application.

5. The applicant's case relied heavily on certain dicta by Du Plessis J in *HMI Healthcare Corporation v Medshield v Medical Scheme 2012 JDR 0798 (GNP).* In that case, a

director of the wound-up company was subpoenaed to appear before section 417 enquiry set up by a creditor, Medshield, who was also a business rival of the director and the wound-up company. The contention was advanced that the section 417 enquiry was an abuse designed to pry into trade secrets. A demand was made to produce the ex parte papers before testifying because it was contemplated that the section 417 enquiry be set aside as an abuse. The director's case succeeded. It was said by Du Plessis J, pp 4-6:

> "The applicants also apply for an interim interdict staying the enquiry pending three different future events, one whereof is an intended application to set aside the order of 20 April. I shall deal with the interim interdict in due course.
> As for access to the *ex parte* papers, it is the applicants' case that they want insight into the *ex parte* application in order for them to consider whether the order was properly sought and obtained and whether it was correctly granted. If not, they intend to apply to this court to set aside the order of 20 April. Mr Theron for Medshield submitted that the applicants have no right to apply for insight into the *ex parte*application because the consequent order of 20 April does not affect their rights.
> In my view the order of 20 April affects the applicant's rights in different ways. Firstly, the applicants are creditors of Calabash. As such they will be affected if the costs of the enquiry are ultimately ordered to be costs in the liquidation. More generally, creditors of a company in liquidation have an interest in the conduct of an enquiry into the company's affairs end whether such enquiry was properly authorised. Subject to what I say later about the confidentiality of the enquiry, the applicants have by virtue thereof that they are creditors of Calabash a right of insight into the papers in the *ex parte* application.
> The order of 20 April further affects the applicants' rights: Under that order information belonging to the applicants is being subjected to scrutiny by third parties. Mr Theron correctly pointed out that it is the civil duty of every citizen to give relevant evidence at, for Instance, an enquiry under sections 417 and 418. To do such a duty, the argument continued, does not affect rights. In a manner that is presently relevant. I accept that the civil duty to give evidence and to produce documents may trump or limit other rights. In this case the applicant's civil duty, however, only arose if the order of 20 April was validly granted. Therefore, the applicants have a clear right of insight into the *ex parte* papers in order for them to ascertain whether the order had been validly granted.
> Mr Theron submitted that the applicants do not make out a case that there is anything wrong with the *ex parte* application or with the order. It is obvious why the applicants did not make out such a case: They have not had insight into the *ex parte* application. In my view the applicants did not have to make out such a case. The case that they had to and did make out is that they have a right of insight into the *ex parte* application.
> Turning to the confidentiality provision of section 417(7), there may be cases in which the need for confidentiality will trump the right to ensure that the order was correctly obtained and granted. This is not such a case. Medshleld, the only party with the relevant knowledge, does not on the papers raise facts to show that the enquiry will be compromised if the applicants saw the *ex parte* papers. Accordingly, I conclude that the applicants have made out a case for an order under section 417(7) granting them access to the papers in the *ex parte*application.
> The applicants seek an order for the enquiry to be stayed pending the finalisation of an application for the setting aside of the order of 20 April, such application to be launched within 15 days after they have had sight of the *ex parte* application. Mr Theron submitted that the order cannot be granted because the applicants do not make out a *prima facie* right to have

> the order of 20 April set aside. As they have not had sight of the *ex parte* application, the applicants do indeed not show that the order may be set aside. As creditors ofCalabash and for the reasons set out earlier, the applicants have a direct and substantial interest in the order of 20 April. That order was granted in their absence. In terms of rule 6(12)(c) read with rule 6(14) the applicants have a right to have the order of 20 April reconsidered."

6. However, it seems to me that the foundation of the dicta articulated, in somewhat broad terms it must be said, is nevertheless confined to a situation where the section 417 enquiry can be cogently suspected of being an abuse. It is the abuse that affords the good cause to refuse to testify. In my view, that factor distinguishes *HMI Healthcare* from the present case. I can find no cogent reason to accuse the liquidators of an abuse.

7. The saga involving the applicants and BYDC and Watson, who is accused of defrauding the applicants in particular, has been surging along for over two years. The SCA recently heard an appeal in relation to the related claims against Watson's estate, based on his alleged fraud.

8. At an early stage of the saga, a claim was made against BYDC and then withdrawn, but after the SCA decision, the applicants resurrected their claim. The prospects of this claim against BYDC were mentioned in the SCA hearing and ostensibly scoffed at by the liquidators. However, after the SCA's hearing and when the claim was indeed asserted, the subpoena was issued. The allegation that BYDC was not properly subjected to a liquidation order was then made for the first time.

9. The nature of the claim by the applicants is for the return of shares in another company donated by them to BYDC in consequence of a fraud perpetrated by Watson on the applicants, and one other, in the course of concluding an oral agreement 17 years ago. Watson had resisted the claim against him on the basis that the applicants fully aware that BYDC was not what was it outwardly purported to be, ie, a benevolent instrument to

advance disadvantaged Black people, on which footing the applicants had made the donation of lucrative shares that they now seek to claw back. It takes no imagination to suppose that any reasonable liquidator would want to have the details from one of the surviving contracting parties. To conclude an abuse is far-fetched. Indeed, it is not improbable that a liquidator would be at risk of being accused of imprudence or neglect were he to do otherwise.

10. Moreover, the notion that, of all the affiliates in the defunct Bosassa group of companies, BYDC would not be commercially insolvent is also far-fetched. The liquidators' have put up information to show a shortfall of R67m before winding up and a shortfall of R47m afterwards. Moreover, the substratum of the business, ie, the running of youth detention centres has evaporated. There is nothing put up to rebut any of this data. Plainly, the parrot is a dead parrot.

11. The applicants try to circumvent this conclusion by saying that their inability to counter these allegations is because they have not seen the ex parte papers. This is a non sequitur. The critical information is in the liquidation application. The spes that some snippet of data, perhaps a misrepresentation that can be extracted from the ex parte papers is just that, a spes. Overall, there is nothing substantial to afford a reasonable inference that the status of BYDC is likely to be cogently challenged or that the ex parte papers are a likely source of such data. This finding must not be construed to imply that the applicants do not have a right to inspect the ex parte papers or that the commissioner was necessarily correct in not compelling the liquidators to disclose them to the applicants, issues about which I express no view.

12. Accordingly, in my view the application relating to Part A must fail. The necessary requirements for interim relief are absent. There is no right to decline to answer the subpoena save on good cause shown. No good cause, even prima facie is shown. The notion of irreparable harm is fatuous. Both de jure and, de facto with able representation to guide her, no improper question needs to be answered. The statutory framework in the form of the companies Act and its institutions serve the public purpose and precious objections to be being questioned ought not to be indulged.

THE ORDER

The application is dismissed with costs, including the costs of two counsel.

Roland Sutherland
Deputy Judge President, Gauteng Division, Johannesburg

Heard: 20 October 2021
Judgment: 22 October 2021

For the Applicants:
Adv L Morison SC,
with him Adv T Scott.
Instructed by Knowles Husain Lindsay.

For the Respondents:
Adv M Leathern SC,
With him Adv C Marques.
Instructed by VFV Attorneys.