IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 10316/2021

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

12/08/2022
DATE SIGNATURE

ARAUJO, CARLOS ALBERTO FERNANDES	Applicant
and	
KRIGE, NIEL N.O.	First Respondent
KRIEGE, NEL	Second Respondent
NDYAMARA, AVIWE NTANDAZO N.O.	Third Respondent
MADLALA, MANDLA PROFESSOR N.O.	Fourth Respondent
MULLER, JOHANNES ZACHARIAS HUMAN N.O.	Fifth Respondent
SWIFAMBO RAIL LEASING (PTY) LTD (in final liquidation)	Sixth Respondent
NDYAMARA, AVIWE NTANDAZO N.O.	Seventh Respondent
TIMKOE, NICHOLAS N.O.	Eight Respondent
RAILPRO HOLDINGS (PTY) LTD (in final liquidation)	Ninth Respondent

PASSENGER RAIL AGENCY OF SOUTH AFRICA	Tenth Respondent
WKH LANDGREBE & CO	Eleventh Respondent
BEE ONE INVESTMENTS (PTY) LTD	Twelfth Respondent
AM INVESTMENTS (PTY) LTD	Thirteenth Respondent
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Fourteenth Respondent
MASTER OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA	Fifteenth Respondent

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JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] The facts of this case are to a large extent similar to the ones under Case No. 8923/2021 and have been detailed in my judgment in that matter. Therefore, I will briefly summarise the facts to give context to this review application.

[2] The Applicant was subpoenaed to appear before a Commission of Enquiry ("the Enquiry") that was established to investigate the trade and dealings of the Sixth Respondent. Further, the First Respondent ruled that certain questions were relevant and that the Applicant was required to answer those questions (such as the source of the funds to purchase the shares and whether the Applicant knew Mr. Mashaba's involvement in the company Swifambo) that were posed to him on the basis that there was no justification for the Applicant to refuse to answer those questions.

[3] During the proceedings before the Enquiry, the attorney for the Applicant advised the Applicant not to answer any questions posed by the liquidator's attorneys. In addition, the Applicant's attorney indicated that they would institute the current proceedings seeking an order to *inter alia*: review and set aside the

First Respondent's decision to subpoena the Applicant; to order the Applicant to produce certain documents; and that the summons be declared null and void *ab initio* including the decision that the Applicant had no justifiable reasons not to answer certain questions. In addition, the Applicant asks for a punitive cost order against the Second Respondent.

[4] The First Respondent, Second Respondent, and Third to Sixth Respondents are the parties who oppose the relief sought by the Applicant.

THE PARTIES

[5] The Applicant is Carlos Alberto Fernandes, a major male businessman who resides and conducts business on a farm situated in the Western Cape.

[6] At the farm, the Applicant is:

3.1 the general manager of the business activities conducted on the farm, being a grape-growing farming enterprise (and the management of a luxury lodge); and

3.2 the farm's immovable property is owned by Okapi Farming (Pty) Ltd where the Applicant is the registered owner of 400 ordinary shares (out of 1000 issued ordinary shares) in the capital of Okapi.

[7] The First Respondent is Niel Krige N.O. an adult male who is cited in these proceedings by virtue of his appointment, by this Court, on 28 May 2019, as the Commissioner of the Enquiry in terms of section 417 of the Companies Act 61 of 1973 ("the Companies Act") as amended, read with Item 9(1) of Schedule 5 of the Companies Act 71 of 2008 to investigate into the affairs of the Sixth Respondent in terms of the provisions of section 418(1)(a) of the Companies Act 61 of 2008.

[8] The Second Respondent is also Niel Krige an adult male who is cited in these proceedings in a personal capacity because the Applicant seeks a costs order against him for having instituted these proceedings.

[9] The Third Respondent is Aviwe Ntandazo Ndyamara, N.O. who is an adult male professional liquidator and an administrator of insolvent estates, a director and shareholder of the Tshwane Trust Co (Pty) Ltd conducting its business in Pretoria. The Third Respondent is cited in these proceedings in his capacity as the joint final liquidator of the Sixth Respondent and because of the interest that he may have in the outcome of these proceedings. There is no relief sought against him.

[10] The Fourth Respondent is Mandla Professor Madlala N.O, an adult male professional liquidator and administrator of insolvent estates who is also a managing member of Msunduzi Asset Management & Recoveries CC and conducts business in Pietermaritzburg, Kwa-Zulu Natal. The Fourth Respondent is cited in this application in his capacity as the joint final liquidator of the Sixth Respondent and because of the interest that he may have in the outcome of these proceedings. There is no relief sought against him.

[11] The Fifth Respondent is Johannes Zacharias Human Muller N.O. an adult male professional liquidator and administrator of insolvent estates who is also a director and shareholder of Tshwane Trust Co (Pty) Ltd which conducts its business in Pretoria. The Fifth Respondent is cited in this application in his capacity as the joint final liquidator of the Sixth Respondent and because of the interest that he may have in the outcome of these proceedings. There is no relief sought against him.

[12] The Sixth Respondent is Swifambo Rail Leasing (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose address is 284 Milner Street, Waterkloof, Pretoria. The Sixth Respondent was liquidated on 28 May 2019. The Sixth Respondent is cited in this application because of an interest that it may have in the outcome of these proceedings, and there is no relief sought against it.

[13] The Seventh Respondent is Aviwe Ntandazo Ndyamara, N.O., an adult male professional liquidator and administrator of insolvent estates who is also a director and shareholder of Tshwane Trust Co (Pty) Ltd which conducts

business in Pretoria. The Seventh Respondent is cited in this application in his capacity as the joint final liquidator of the Ninth Respondent and because of an interest that he may have in the outcome of these proceedings. There is no relief sought against him.

[14] The Eighth Respondent is Nicholas Timkoe N.O., an adult male who is a managing member and professional liquidator and administrator of insolvent estates at Mike Timkoe Trustees CC which conducts business in Port Elizabeth. The Eighth Respondent is cited in this application in his capacity as the joint final liquidator of the Ninth Respondent, and because of an interest that he may have in the outcome of these proceedings. There is no relief sought against him.

[15] The Ninth Respondent is Railpro Holdings (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose address is 284 Milner Street, Waterkloof, Pretoria. The Ninth Respondent was liquidated and is only cited in this application because of an interest that it may have in the outcome of this application. There is no relief sought against it.

[16] The Tenth Respondent is the Passenger Rail Agency of South Africa, a legal person established in terms of section 22 of the Legal Succession to the South African Transport Services Act 9 of 1989 whose main place of business is at Prasa House, 1040 Burnett Street, Hatfield, Pretoria. The Tenth Respondent has a claim against the insolvent estate of the Sixth Respondent and is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[17] The Eleventh Respondent is W K H Landgrebe & CO, a partnership that carries on a business as chartered accountants and auditors, whose main place of business is Suite 7, Denavo House, 15 York Street, Kensington B Randburg. The Eleventh Respondent has a claim against the insolvent estate of the Sixth Respondent and is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought

against it.

[18] The Twelfth Respondent is BEE One Investments (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose registered address is Suite 7, Denavo House, 15 York Street, Kensington B, Randburg, and an owner of registered 20% ordinary shares in the capital of the Sixth Respondent. The Twelfth Respondent is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[19] The Thirteenth Respondent is AM Investments (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose place of business is 400 16th Road, Midrand, Gauteng. The Thirteenth Respondent is one of the creditors of the Sixth Respondent and is only cited in this application because of an interest that it may have in the outcome of these proceedings. There is no relief sought against it.

[20] The Fourteenth Respondent is the Commissioner for the South African Revenue Service a legal persona appointed in terms of section 6 of the South African Revenue Service Act 34 of 1997 whose main place of business is Lehae La Building, 299 Bronkhorst Street, New Muckleneuk, Brooklyn, Pretoria. The Fourteenth Respondent is only cited in this application because of an interest that it may have in the outcome. There is no relief sought against it.

[21] The Fifteenth Respondent is the Master of the High Court, Gauteng Division, Pretoria and is an office having been created as such by the Minister of Justice and Correctional Services of South Africa and being an office created in terms of the provisions of section 2 of the Administration of Estates Act 66 of 1965 whose main place of business is at Salu Building, Cnr. Andries & Schoeman Streets, Pretoria. The Fifteenth Respondent is cited in these proceedings because it is the administrative office that is charged with overseeing the administration of the insolvent estate of the Ninth Respondent, and there is no relief sought against it.

JURISDICTION

[22] The First Respondent was appointed by this Court as the Commissioner of the Enquiry which took place in Gauteng. In addition, the relief sought against the decisions of the First Respondent occurred within the jurisdiction of this Court. Therefore, this Court has the competency and power to adjudicate this matter.

THE ISSUES

[23] The issues for determination are:

(1) whether the decisions of the First Respondent to order the Applicant as a person capable of giving information *inter alia* concerning the trade and dealings of the Sixth Respondent, and that questions posed to the Applicant and the documents sought from the Applicant regarding Okapi Farming pertain to the trade, and dealings of the Sixth Respondent are reviewable and ought to be set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or section 151 of the Insolvency Act 24 of 1936 ("Insolvency Act").

(2) whether the provision of section 417(2)(b) of the Companies Act 61 of 1973 ("the Companies Act) are applicable; and

(3) whether the answers to the questions sought from the Applicant could incriminate him as the First Respondent had not consulted with the National Director of Public Prosecutions.

THE FACTS

[24] This matter stems from the liquidation of the Sixth Respondent as a result of a court order issued on 28 May 2019 which made a provision for the establishment of an Enquiry in terms of sections 417 and 418(1)(a) of the Companies Act to investigate the affairs of the Sixth Respondent.

[25] The First Respondent was appointed as the Commissioner of the Enquiry as per the court order.

[26] After the proceedings had commenced, the Applicant was summoned to appear before the Enquiry in terms of sections 417 and 418 of the Companies Act read together with Item 9(1) of Schedule 5 of the Companies Act 71 of 2008.

[27] The Applicant did not raise any objection against the summons to appear at the Enquiry and duly appeared before it using Zoom on 20 November 2020.

[28] During the Enquiry, the Applicant's attorney objected to the answering of certain questions that were posed to the Applicant by the liquidator's attorney (such as the price of shares that the Applicant sold to Mamoroko Makolele Trust, and the source of the Applicant's money to buy shares from Okapi Farming (Pty) Ltd)[1] because the questions did not pertain to the trade, dealings, affairs, or property of the Sixth Respondent. In addition, the Applicant contended that the said questions were not relevant to the Enquiry.

[29] The First Respondent ruled that the questions asked were relevant to the affairs of the Sixth Respondent and that the applicant had no justification not to answer the posed questions. Despite the ruling, the Applicant declined to answer the said questions on the basis that they were not relevant to the Enquiry proceedings and that the Applicant was in essence asked to provide self-incriminating answers.

[30] The Applicant expressed his intention to review the First Respondent's decision directing the Applicant to answer the questions. Consequently, on 1 March 2021 the Applicant instituted these review proceedings seeking various forms of relief such as the withdrawal of the complaint with the South African Police Service concerning the Applicant's refusal or failure to furnish certain documents to the First and Second Respondents.[2]

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[1] Enquiry proceedings volume 10: 001-82, 001-83, 001-132.
[2] Applicant's notice of motion paras 1-10.

[31] However, the Applicant later reduced the initial relief sought to *inter alia* seeking an order reviewing and setting aside the decisions of the First Respondent namely to: (1) issue summons for the Applicant to testify at the Enquiry, (2) rule that the questions posed were relevant and that the Applicant is the person capable of giving information, (3) the decision that the Applicant must furnish certain documents at the Enquiry, and (4) and the failure of the First Respondent to consult with the National Director of the Public Prosecutions before demanding that the Applicant answer certain questions that may incriminate him.

POINT IN LIMINE

[32] The Third to Sixth Respondents raised a point *in limine* to the effect that the application was irregular and had to be dismissed on the basis that the Applicant had joined but failed to serve the pleadings on the Tenth to Fifteenth Respondents who may have an interest in the outcome of this matter.

[33] In addition, the Third to Sixth Respondents contended that the Applicant had not withdrawn the review application against the Tenth to Fifteenth Respondents. Consequently, they argued that the application could not proceed without them.

[34] The Applicant addressed the issue of service. It eventually transpired that service was done on all the parties to this action. Therefore, this settles the issue related to service.

[35] Consequently, the point *in limine* cannot stand.

APPLICABLE LAW

[36] The question of whether the Master's decision to hold an Enquiry constitutes an administrative action and is thus reviewable under PAJA has been a subject of

litigation before the courts.[3] The First Respondent relying upon the matter between *Nedbank Ltd v The Master of the High Court, Witwatersrand Local Division*[4] argued that the court there *inter alia* indicated that when the Master gives effect to section 417 of the Companies Act, he does not act administratively, and therefore PAJA does not apply. The Applicant, without providing any basis for a contrary view submitted that the aforesaid decision delivered by my brother, Mbha J is "*clearly wrong*".[5] The Applicant, without explaining the relevance and/or lack of relevance thereof simply enlisted a reference to the case of *Firstrand Bank Ltd t/a Rand Merchant Bank and Another v Master of the High Court, Cape Town and Others.*[6]

[37] The case of *Firstrand Bank Ltd* is in my view distinguishable from the present one. There, the Master of the High Court, Cape Town made a decision to authorise a commission of enquiry. The Applicants who were proven creditors "*were simply not afforded any opportunity to place their contentions before Ms Vermaak despite the fact that she knew that they were opposing the application*"[7]. Indeed, I agree that PAJA was applicable in that case in so far as dealing with a procedural right was concerned. However, the facts of that case are far from the present one and do not assist the Applicant's case. The Applicant in this case has always been part of the process and was represented by his counsel throughout, from the time summons was issued up to the Enquiry. In addition, the First Respondent's decision concerns an ongoing process that does not put an end to the Enquiry.

[38] I find myself persuaded by the decision of the Constitutional Court in *Bernstein and Others v Bester NO and Others*[8] where Ackermann J who was supported by the majority of the court said:

> "The enquiry in question is an integral part of the liquidation process pursuant to a court order and in particular that part of

[3] For example, see *Gumede v Subel SC, Arnold NO* 2001 1 SA 649 (T), and *Nafcoc Investment Holding Co Ltd and Others v Miller* Case No 27442/2008 (WLD) (unreported).
[4] 2009 (3) SA 403 (W) 412, 416.
[5] Applicant's heads of argument at footnote 40.
[6] 2014 (2) SA 527 (WCC).
[7] *Ibid* at para 6.
[8] 1996 (2) SA 751 para 97.

> the process aimed at ascertaining and realising assets of the company. Creditors have an interest in their claims being paid and the enquiry can thus at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have some difficulty in seeing how section 24(c) of the Constitution can be applied to the enquiry, because it is hard to envisage an administrative action taken by the Commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others."

[39] In light of the above exposition, it is clear that a final decision will be in the form of a report prepared by the First Respondent at the end of the Enquiry. The report will constitute a final decision of the Enquiry. Consequently, it has become evident that the Applicant's remedy, if any, lies elsewhere and not under PAJA.

[40] I, therefore, do not deem it necessary to deal with judicial review under the legal framework of PAJA.

APPLICANT'S SUBMISSIONS

[41] The Applicant argued that even though he was a former director of Okapi Farming but the present shareholder, he was not a person capable of giving information about the trade and affairs of easing as per section 417(1) of the Companies Act.

[42] Furthermore, the Applicant contended that the questions asked to him were not relevant to the trade and affairs of the Sixth Respondent as per section 41(1) of the Companies Act. The questions posed to the Applicant were as follows:

> "1.8.2.1. "how did you fund the purchase of the shares? "
> 1.8.2.2. "what was the issued share capital of Okapi"
> 1.8.2.3. "do you still have any interaction with Mr Mashaba? Do you know him to this day or is it only from that one transaction that you knew him? "
> 1.8.2.4. "do you know that Mr Mashaba is involved in the company \

Swifambo? ";

1.8.2.5. "the shares you held in this company, did you hold them in your personal name?"

1.8.2.6. "these have been the payments in terms of that agreement in \terms of which you sold your shares?

1.8.2.7." who now holds that loan account? Who has that claim?"

1.8.2.8. "can you just identify for record purposes what the document at page 16 is?" (footnotes omitted)

[43] In addition, the Applicant argued that the answers sought from him could incriminate him as per the provions of section 417(2)(b) of the Companies Act.

[44] The Applicant argued that he sought to review the decision of the First Respondent under sections 6(1) and 6(2)(a)(iii) and/or 6(2)(c) and/or 6(2)(e)(iii) and/or 6(2)(h) and/or 6(2)(e)(vi)37 of PAJA on the grounds that such decisions constitutes an administrative action.

[45] The Applicant further contended that the decision of the Master to authorise an Enquiry as per sections 417 and 418 of the Companies Act constitutes an administrative action in terms of the provisions of section 1 of PAJA. Consequently, they argued that the First Respondent's denial that this is an administrative action is misplaced.

[46] Furthermore, the Applicant argued that the decision of the First Respondent that the Applicant is a person capable of giving information about the affairs and trading of the Sixth Respondent under sections 417 and 418 of the Companies Act, also costitutes administrative action under PAJA.

[47] Additionally, the Applicant contended that the decision of the First Respondent not to uphold the Applicant's objections about the relevance of the questions posed including the documents that the Applicant was required to furnish constitute administrative action under PAJA.

[48] The Applicant further sought relief in terms of section 151 of the Insolvency Act and further based his ground of review on the principle of legality. Without

being specific, the Applicant submitted that there are sufficient facts set out in the Applicant's founding affidavit to find a cause of action based on section 151 of the Insolvency Act and the principle of legality. The Applicant supported his submission with reference to the case of *Rabinowitz v Van Graan and Others*[9] where it was held that:

> "it is not necessary to refer to a specific section in a statute provided that the pleader formulates his case clearly or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply".

[49] The Applicant further argued that the decisions of the First Respondent were subject to being reviewed and set aside based on several facts and events. To this end, the Applicant provided comprehensive details *inter alia* about himself ranging from being a 40% shareholder of Okapi Farming up to that the Applicant and Okapi Farming did not receive any money from the MMR Trust or Mr. Mashaba.

[50] Further, the Applicant contended that he was not involved in the preparation of the CM100 statement of affairs insofar as it *inter alia* showed Okapi Farming as a debtor of the Sixth Respondent. The Applicant further contended that he has never been engaged in businesses that involved Mr. Mashaba.

[51] In light of the above submissions, the Applicant argued that it was evident that he was not a person capable of providing information into the dealings and

[9] 2013 (5) SA 315 (GSJ) para 15.

affairs of the Sixth Respondent. Furthermore, the Applicant argued that the documents that he was ordered to furnish by the First Respondent had nothing to do with the trade or dealings of the Sixth Respondent.

[52] Relying on *Pretorius and Others v Marais and Others*[10], the Applicant argued that it can only be matters of a company in liquidation such as the Sixth Respondent that can be investigated in an enquiry, not something else that does not affect the affairs of the Sixth Respondent. Accordingly, the Applicant argued that the information sought through the questions and the documents sought have nothing to do with the dealings or affairs of the Sixth Respondent. Therefore, the Applicant submitted that First Respondent erred in overruling his objections about "*the relevance of the questions in issue and documents in issue".*[11]

[53] Further, the Applicant argued that the first Respondent did not apply his mind when he issued the summons and that the First Respondent did not *inter alia* independently exercise his discretion when he decided to issue the summons.

[54] Furthermore, the Applicant contended that the answers sought by the First Respondent could have incriminated him. Consequently, the Applicant submitted that self-incriminating answers could only be given when there was a prior consultation with the National Director of Public Prosecutions.

[55] The Applicant sought a punitive costs order against the Second Respondent on the basis that he was not only opposing the costs order but also opposing the

[10] 2013 (5) SA 315 (GSJ) 1063 A-D.
[11] Applicant's heads of argument para 39.

merits.

[56] Ultimately, the Applicant also sought a cost order against the liquidators of the Sixth Respondents on the ground that they opposed the application.

FIRST AND SECOND RESPONDENT'S SUBMISSIONS

[57] The Respondents commenced their case by narrating the purpose of the Enquiry including the powers of the Commissioner of the Enquiry to summon certain persons who may know about the affairs of a company to testify at the Enquiry.

[58] The Respondents argued that the CM100 statement of affairs of 10 December 2018 read with a company search on Okapi Farming indicates that the Applicant is a person who is capable of giving information at the Enquiry about the Sixth Respondent. The Respondents further contended that the basis for the aforesaid submission is that CM100 confirms that there was a relationship between Okapi and the Sixth Respondent. In addition, the Respondents argued that Okapi owes the Sixth Respondent an amount of R24,000,000.00 and that the Applicant has been a director of Okapi Farming since 26 May 2005.

[59] The Respondents further submitted that the First Respondent did explain the basis for him to subpoena the Applicant as the CM100 statement of affairs that was launched with the Master of the High Court somehow shows that there was a relationship between the Applicant and the affairs of the Sixth Respondent. Consequently, the Respondents argued that such a decision was not merely a "rubber-stamping exercise as alleged by the Applicant" because the reasons were furnished to the Applicant laying the basis for the issuing of a summons.[12]

[60] Relying on the matter of *Pretorius v Marais and others,*[13] the Respondents contended that the review application was dismissed on the grounds that the Magistrate had correctly exercised his discretion when he opted to issue the

[12] 1st – 2nd Respondent's heads of argument para 42.
[13] 1981(1) SA 1051 (A).

subpoenas based on the information that was provided before him. Based on this, the Respondents argued that the liquidators had, in their request for the subpoena of the Applicant to testify at the Enquiry, provided persuasive reasons as to why they regarded the Applicant as someone capable of giving information regarding the affairs of the Sixth Respondent as per section 417(1) of the Companies Act.

[61] Additionally, the Respondents submitted that before the issuing of summons, a former director of the Sixth Respondent had confirmed that Okapi Farming is indebted to the Sixth Respondent for the amount more than R24,000,000.00.

[62] In light of the above, the Respondents argued that there were reasonable grounds for the First Respondent to issue summons to the effect that the Applicant is capable of giving the information that is sought.

[63] With regards to whether the questions posed to the Applicant are relevant to the trade or dealing of the Sixth Respondent as per sections 417(1) and 418(1)(c) of the Companies Act, the Respondents answered this question in the affirmative. They further stated that the Applicant has now through his affidavit provided the information (such as Okapi Farming acquired the farm for a purchase price of R6,000,000.00, and he sold ordinary shares in the capital of Okapi Farming to the Mamoroko Makolele Trust for the sum of R600.00) that was sought at the Enquiry. As a result, the Respondents submit that the relief sought has become academic and therefore the review application falls to be dismissed.

[64] Regarding the applicability of section 417(2)(b) of the Companies Act and whether the answers sought could incriminate the Applicant, the Respondents argued that the said provision is applicable and that the Applicant was required to answer the questions even though the answers would incriminate him. However, the Respondents further argued that the Applicant was not obliged to answer the questions as the First Respondent had not consulted with the National Director of public Prosecutions.

[65] The Respondents further argued that the Applicant had only answered certain questions before the Applicant's attorney intervened and stated that he had to caution his client about answering certain questions that may incriminate him and that the First Respondent had to obtain the consent of the National Director of Public Prosecutions. Based on this, the Respondents are of the view that the Applicant's attorney prevented a *"potential incrimination problem and while attempting to avoid it – uncovered it"*.[14]

[66] The Respondents argue that the preliminary questions posed to the Applicant were in no way intended to incriminate the Applicant but were directed at establishing the Applicant's shares and sales in Okapi Farming, including the Applicant's knowledge of one Mr. Mashaba.

[67] Furthermore, the Respondents argued that the Applicant had misunderstood the provisions of section 417(2)(b) of the Companies Act as it does not permit a witness to refuse to answer a question on the basis that it would lead to self-incrimination. However, if the witness so refuses, the Master or the Court may after consulting with the National Director of Public Prosecutions require the witness to answer the question. Consequently, the Applicant had to first refuse to answer the question posed to him before the First Respondent could consult with the National Director of Public Prosecutions. According to the Respondents', this opportunity did not arise because of the Applicant's repeated interjections. Therefore, the Respondents contended that this should also fail.

[68] The Respondents further contended that the Applicant's case as per the founding affidavit was based on section 6(1) of PAJA that authorises a person to institute review proceedings of an administrative decision.

[69] The Respondents argued that, for the first time, the Applicant in their heads of argument also sought to rely on section 151 of the Insolvency Act and/or the principle of legality. To this end, the Respondents argued that the Applicant relied on selective portions of the decision which states that:

[14] 1st – 2nd Respondent's head of arguments para 54.

> "It is not necessary to refer to a specific section in a statute provided that the pleader formulates his case clearly, or put different, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provision of the statute apply"[15].

The Respondents also pointed out that the Applicant has failed to refer to the same case where it provides that *"in this matter it is abundantly clear from the facts pleaded in the particulars of claim that the plaintiff relies on all the provisions in the Act…"*[16]

[70] According to the Respondents, the reliance on the aforesaid case is misplaced, and the omission of the portion that states that the case was pleaded in the particulars of claim has not been explained. As a result, the Respondents argue that the Applicant has failed to set out any grounds of review under PAJA or in the founding affidavit.

[71] The Respondents submitted that the Applicant relied on the case of *FirstRand Bank*[17] to contend that PAJA is the appropriate remedy even though their notice of motion did not make mention of the delivery of the record. To counter this, the Respondents relied on *Nedbank Ltd v Master of the High Court Witwatersrand Local Division and others*[18], where the court *inter alia* found that the institution of an enquiry pursuant to section 417 of the Companies Act was purely investigative and therefore not subject to review.

[72] Further, the Respondents argued that the Applicant failed to show the factual basis upon which he relies on his review application but resorted to unsubstantiated grounds for review.

[73] Concerning costs, the Respondents contended that there was no justification

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[15] *Supra* at fn 9, para 15.

[16] *Ibid,* para 16.

[17] *Supra* fn *6.*

[18] [2015] 3 All SA 688 (GP) (4 July 2015).

whatsoever for the Applicant to seek a personal costs against the Second Respondent.

[74] Ultimately, the Respondents argued that the Applicant's case was unfounded and sought to be dismissed with punitive costs.

THIRD TO SIXTH RESPONDENT'S SUBMISSIONS

[75] The Respondents submitted various documents that showed that the Applicant is involved in the affairs of Okapi Farming insofar as they relate to the Sixth Respondent. Based on this relationship between the two companies, the Respondents argued that the Applicant is the relevant person to give information at the Enquiry, especially with regards to whether the Sixth Respondent has a sound claim against Okapi Farming.

[76] Furthermore, the Respondents submitted that the Applicant through his founding and answering affidavits has shown that he has *"material information*" about the affairs of the Sixth Respondent, Eleventh Respondent, and Mamoroko Makolele Trust. According to the Respondents, they do not understand why all of a sudden the Applicant has provided the information that was required at the Enquiry to the effect that the Eleventh Respondent and Mamoroko Makolele Trust were "recipients of large amounts of funds from the monies Swifano (the Sixth Respondent) received from PRASA".[19]

[77] The Respondents further contended that the Applicant instituted these review proceedings to derail the Enquiry, something that is tantamount to abuse of the court process.

[78] The Respondents also contended that the Applicant, through his founding affidavit, based his review application on PAJA. As a result, the Respondents argued that the Applicant's "belated" reliance on section 151 of the Insolvency Act and the principle of legality did not assist the Applicant's case as these

[19] Para 23, Third to Sixth Respondents heads of argument.

were only raised in the heads of argument.[20]

[79] Relying on Wade and Forsyth[21] who state that when subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? … the question is lawful or unlawful? Therefore, the Respondents argued that the Applicant has failed to disclose any discernible cause of action under PAJA or on the principle of legality.

[80] According to the Respondents, the Applicant failed to fully and satisfactorily deal with the factual basis upon which his case is based but echoes the grounds of review as provided in PAJA that the First Respondent was *inter alia* biased or reasonably suspected to be biased, acted procedurally unfair, and acted unreasonably.

[81] The Respondents contend that the Applicant has relied on various legislation without *"demonstrating a ground for review of any of the impugned decisions"*.[22] To this end, the Respondents argued that the Applicant has not shown that the First Applicant was *inter alia* biased, or made decisions that were based on irrelevant considerations. To illustrate their point, the Respondents argued that all the aforesaid allegations were dealt with in the recusal application.

[82] The Respondents further argued that the Applicant's challenge about the issuing of the summons is based on speculation as there is no factual basis advanced to the effect that the information presented before the First Respondent to *"issue summons for the Applicant was not such that the Commissioner could not do so lawfully"*.[23]

[83] The Respondents argued that it cannot be said that the Applicant does not have material information about the Sixth Respondent's affairs in so far as it relates to the debt owed by Okapi Farming to the Sixth Respondent.

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[20] Ibid para 26.

[21] Wade & Forsyth, Administrative Law, Eleventh Edition, Oxford.

[22] *Ibid* para 29.

[23] *Ibid* para 31.

[84] All in all, the Respondent's case is that the First Respondent had sufficient and relevant information before him before he could issue the summons. Consequently, the Respondents argued that the relief sought in prayers 1 and 2 should be dismissed.

[85] The Respondents argued that the Applicant's challenge to the decision of the First Respondent in ordering the Applicant to furnish the financial statements and supporting documents had no merit because the Applicant did not provide any reason in the founding affidavit to the effect that the decision is wrong. In addition, the Respondents argued that the Applicant only attempts to provide a reason in the heads of the argument in that the required documents are not relevant to the affairs of the Sixth Respondent. Based on this, the Respondents contended that a case for the review of that decision has not been made.

[86] Furthermore, the Respondents contended that the restated statement of affairs form CM100 of the Sixth Respondent which lists Okapi Farming as a debtor of the Sixth Respondent, including the sale and NNP agreements wherein in the Sixth Respondent's funds were allegedly expended in a manner that involves Okapi Farming, show that financial statements of Okapi Farming are relevant to prove or disprove the statements made under oath in the restated CM100 statement of affairs by Mr. Mashaba. Based on this, the Respondents contended that the Applicant cannot claim that he has nothing to do with the preparation of the statement of affairs. According to the Respondents, whether the Applicant prepared or confirmed the statement, this ought to be investigated by the liquidators and the First Respondent was duty bound to direct the Applicant to provide the documents.

[87] The Respondents also contended that the Sixth Respondent's auditor provided different explanations about the amounts paid from the account of the Sixth Respondent to his firm's account. Consequently, the Respondents argued that the said explanation raised more questions instead of providing answers and this led the liquidators to seek information from the Applicant who is the sole director and shareholder of Okapi Farming when the amounts were paid. According to the Respondents, this shows that it was necessary to investigate

the Sixth Respondent's alleged claim against Okapi Farming and by virtue of being a sole director, the Applicant is the person who can provide the required information as per section 417(1) of the Companies Act.

[88] The Respondents further contended that the Applicant could have given the information requested at the Enquiry because he has in any event provided the said information in these review proceedings. In addition, the Respondents argued that there appears to be no self-incriminating answers from the evidence contained in the Applicant's affidavit. Therefore, the Applicant could have furnished the requested information at the Enquiry.

[89] The Respondents further argued that the restated statement of affairs of the Sixth Respondent was given to the liquidators by the Applicant's attorney who was representing one Mr. Mashaba. Based on this, the Respondents argued that an inference could be made in that the Applicant brought this review application only in the interests of Mr. Mashaba, Mr. Landgrebe and the MM Trust who are also involved in litigation with the liquidators about certain amounts that were paid by them or certain companies to the Sixth Respondent.

[90] With regards to obtaining the consent of the Director of Public Prosecutions before certain questions are asked in terms of section 417(2)(b) of the Companies Act, the Respondents argued that the Applicant had misunderstood the aforesaid provision as it only comes into play after the question has been asked to the Applicant not before the question is posed.

[91] Furthermore, the Respondents argued that the Applicant has failed to identify the decisions or ruling made by the Commissioner.

[92] The Respondents further contended that there is no ground provided for the review of the First Respondent's decision except that the questions were irrelevant to the affairs of the Sixth Respondent.

[93] Consequently, the Respondent's argued that the Applicant's application had no merit and had to be dismissed.

EVALUATION OF SUBMISSIONS

[94] With regards to the Applicant's relief sought in terms of section 151 of the Insolvency Act and/or the principle of legality, this was not pleaded in the founding affidavit but somehow found its way into the Applicant's heads of argument. The Applicant conceded this aspect. In essence, this was an attempt by the Applicant to introduce a completely new case. In *Man Financial Services (Pty) (RF) Ltd v Elsologix (Pty) Ltd and Others*[24] Van Nieuwenhuizen AJ, as she was then, said:

> "…It is of course trite that not must an applicant in motion proceedings make out a proper case in the founding papers and that an applicant is bound to the case made out therein and may not make out a new case in the replying affidavit *[or heads of argument*] (emphasis added)."

[95] I agree with the above legal position. The Applicant must stand or fall by averments made in his founding affidavit. Accordingly, the Applicant's sudden reliance on the aforesaid grounds must fail. The same applies to the issue of the Applicant concerning the ruling to produce certain documents. The explanation only found its way into the Applicant's heads of argument.

[96] Concerning the Applicant's contention that the questions that he was required to answer and the documents sought in respect of Okapi Farming were not relevant to the trade and affairs of the Sixth Respondent, I agree with all the Respondent's submissions that the answers provided for by the Applicant in his founding affidavit that Okapi Farming *inter alia* acquired the farm for a purchase price of R6,000,000.00, and that he sold ordinary shares in the capital of Okapi to the Mamoroko Makolele Trust for the sum of R600.00 show that the questions are relevant to the dealings and affairs of the Sixth Respondent. The information provided by the Applicant shows that the answers and documents sought from him are sufficient proof to show that *"were reasonable grounds for*

[24] [2021] ZAGPJHC 112 (24 August 2021) (unreported) para 6.

believing that the documents were relevant"[25] in the investigation of the affairs of the Sixth Respondent.

[97] I need not take this further as the provision of answers by the Applicant has clearly shown that the questions are relevant. In any event, it has already been established that it is not up to the Applicant to determine which questions are relevant and/or not relevant but that the First Respondent may do so as per the provisions of section 417(1) of the Companies Act. The Respondents were correct in that the matter has become moot. Consequently, this ground also has to fail.

[98] With regards to the First Respondent's decision to issue the summons, the Applicant argued that the First Respondent did not *inter alia* independently exercise his discretion when he decided to issue the Summons. However, the Applicant did not justify the basis for his assertion. To this end, the First and Second Respondents argued that the Applicant did not advance any factual basis to the effect that the information presented before the First Respondent to issue summons for the Applicant was not such that the Commissioner could not do so lawfully. On the contrary, a former director of the Sixth Respondent has confirmed that Okapi Farming is indebted to the Sixth Respondent for the amount of more than R24,000,000.00. Further, the rationale for the issuing of summons is comprehensively dealt with in the First Respondent's Report.[26]

[99] This court asserted that:

> "I fail to understand why the Applicant contends that the summons was issued with bold statements that are not backed up by any documentation. I say so because a careful reading of the transcript of the Enquiry shows that there are documents that reveal that certain amounts may have come from the Sixth Respondent..."[27]

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[25] *Gumede v Subel* 2006 3 SA 498 (SCA) para 17.
[26] Commissioner's Report CaseLines: 003:1 para 38.
[27] *Fernandes v Niel N.O. and Others (8923/2021) [2022] ZAGPPHC 493* para 60.

[100] In my view, the issuing of summons triggers the crux of this case. Without the summons, there would have been no questions posed to the Applicant. Accordingly, the overwhelming evidence before this Court which shows that the summons was not issued outside the perimeters of the law, largely weakens the Applicant's case as a whole.

[101] With regards to the Applicant being the relevant person to provide information at the Enquiry, the Applicant sought to convince the Court that even though he was *inter alia* a former director of Okapi Farming and a current shareholder, he was not a person capable of giving information about the trade and affairs of the Sixth Respondent. The Applicant says so even though a former director of the Sixth Respondent had confirmed that Okapi Farming is indebted to the Sixth Respondent for the amount of more than R24,000.000.00 before the issuing of a summons. Further, the Respondents pointed out various documents that show that the Applicant is involved in the affairs of Okapi Farming in so far as they relate to the Sixth Respondent.[28] This evidence is indisputable.

[102] In light of the above, it cannot be accepted that the Applicant is not the relevant person to provide information at the Enquiry. The Applicant has provided useful information in these proceedings that was required from him at the Enquiry.

[103] Concerning the averment that the Applicant provided self-incriminating testimony at the Enquiry, there is no doubt that section 417(2)(b) of the Companies Act is applicable and that the Applicant may not refuse to answer such a question that might incriminate him. However, there is an exception. Further reading of the section provides that the Applicant may refuse to answer on the basis that such information will amount to self-incrimination. Once this occurs, the First Respondent will be required to consult with the National

[28] Commissioner's Report CaseLines: 003:1 para 38.

Director of Public Prosecutions to compel the Applicant to answer the questions. Therefore, it means that the Applicant is not obliged to answer any questions where the answers sought could incriminate the Applicant until such time that the First Respondent has consulted with the National Director of Public Prosecutions. Indeed, the First Respondent has correctly pointed out that the Applicant is not obliged to answer the questions as the First Respondent has not consulted with the National Director of Public Prosecutions.

[104] It has long been settled in *Ferreira v Levin NO and Others' Vryenhoek and Others v Powell NO and Others*[29] where Ackermann J, as he was then, said:

> "… no incriminating answer given pursuant to the provisions of section 417(2)(b) of the Companies Act on or after 27 April 1994 shall be used against the person who gave such answer, in criminal proceedings against such person…".

[105] This matter has become moot because the Applicant has in any event provided the answers that were sought in the Enquiry. The Respondent's assertion that there is no possibility of an incriminating answer is sound. Accordingly, the Applicant's argument has no merit.

[106] With regards to the Applicant's contention that he was not involved in the preparation of the CM100 Statement of Affairs and that he has never been involved in businesses that had to do with Mr. Mashaba, the Applicant appears to be missing the point. An Enquiry is a fact-finding mission aimed at investigating the affairs and dealings of the insolvent company. It is at the Enquiry where the Applicant can confirm and/or deny his involvement in the preparation of the statement including the knowledge and/or lack of knowledge about Mr. Mashaba.

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[29] 1996 (1) BCLR 1 at para 157.

[107] Having carefully considered the transcript of the Enquiry, Applicant's, First and Second Respondent's, Third to Sixth Respondent's written and oral submissions, I am of the view that the Applicant has failed to make a case for judicial review under PAJA, the Insovency Act and the principle of legality.

[108] I, therefore, conclude that the Applicant's application falls to be dismissed in its entirety.

COSTS

[109] The courts are often reluctant to award punitive costs except in exceptional circumstances where the conduct of a party to a litigation is found to be objectionable.[30] In *Mribatsi v Minister of Police and Others*[31] Molahlehi J correctly indicated that:

> "the consideration behind punitive costs is to punish a litigant who is in the wrong due to the manner in which he or she approached litigation or to deter would-be inflexible and unreasonable litigants from engaging in such inappropriate conduct in the future". I need to stop and ask myself whether the conduct of the Second Respondent, in this case, was objectionable and warrants punitive costs?"

[110] In my view, the conduct of the Second Respondent is justifiable in defending the personal cost order sought against him. I find it difficult to comprehend why the Applicant would want a personal cost order against someone who was performing an official duty. There is no evidence whatsoever that has been placed before this court to justify unwanting conduct on the part of the Second Respondent.

[111] The same applies to the liquidators of the Sixth Respondent, they have provided useful information to this Court. I do not see the basis of a cost order

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[30] *Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Others* 2013 (4) All SA 346 (GPN) paras 34 and 35.
[31] Unreported Case No: 34907/2019 at para 14.

against them.

[112] On the contrary, the Applicant brought this case *inter alia* on the basis that the questions posed to him were not relevant and that the answers sought from him were self-incriminating. Surprisingly, the Applicant voluntarily answered the very same questions that he was not at liberty to give before the Enquiry. Is this conduct not objectionable? In my view, the answer is in the affirmative. The Applicant's case is all over the place. It is difficult to understand. At times, the Applicant even invented a completely new case in the heads of argument. I do not think that this application was *bona fide*.

[113] I am therefore of the view that the circumstances of this case justify the awarding of punitive costs against the Applicant.

[114] The First and Second Respondents and the Third to Sixth Respondents have been largely successful parties in this matter. The costs should therefore follow the result.[32]

ORDER

[115] I, therefore, make the following order:

(a) The application is dismissed:

(b) The Applicant is ordered to pay the costs of this application on an attorney and client scale and such costs include the costs of two counsels.

[32] *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (2) SA 64 (CC) at para 15.

M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 August 2022.

APPEARANCES:

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Instructed by:	Tintingers Incorporated
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Instructed by:	Schabort Potgieter Incorporated
Date of Hearing:	17 March 2022
Date of Judgment:	12 August 2022