



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 6832/2011

Before: The Hon. Mr Justice Binn-Ward

In the application of:

MICHAEL BENSON

in re:

CELEST TAIT N.O.

JOHANNES STEPHANIS VAN EEDEN N.O.

Second Applicant

(in their capacities as the trustees for the time being

of the Votha VW Trust IT 3163/2007)

CELEST TAIT N.O.

Third Applicant

WOUTER JACOBUS KRIEGLER N.O.

Fourth Applicant

LOUW KRIEGLER N.O.

Fifth Applicant

(in their capacities as the trustees for the time being

of the Canterbury Trust IT 272/92)

and

TREVOR PAUL JASON

First Respondent

MICHAEL BENSON

Second Respondent

DESMOND BOTHA

Third Respondent

and

MI FITZGERALD SC N.O.

Additional Respondent

JUDGMENT DELIVERED: 5 DECEMBER 2012

[1] This matter concerns an application brought by Mr Michael Benson ('Benson'), who

is one of three respondents in other proceedings brought by the trustees of the Votha VW Trust and the Canterbury Trust in terms of s 424 of the Companies Act 61 of 1973 ('the Companies Act'). The current proceedings were brought because of the employment in the s 424 proceedings of extracts from the record of an enquiry held in terms of ss 417 and 418 of the Companies Act. The relief sought before me goes to the decision of the commissioner who conducted the enquiry to authorise the disclosure of the record of the enquiry. Consequent upon that decision the record is being used by the trustees in the s 424 proceedings.

[2] Benson and his two co-respondents in the s 424 proceedings were the directors of Yethu Projects (Pty) Ltd. The company was placed into liquidation in terms of a final winding up order made on 14 April 2010. The trustee-applicants in the s 424 proceedings were judgment creditors of the company when it was placed into liquidation. Indeed, the winding up proceedings were instituted at their instance. Their claims against the company were proved at the first meeting of creditors. At the request of the trustees the liquidators of the company applied to court for an enquiry to be held into the affairs of Yethu Projects in terms of ss 417 and 418 of the Companies Act. Advocate MJ Fitzgerald SC of the Cape Bar was appointed by the court as the commissioner to conduct the enquiry. Benson was examined at the enquiry on 21 January 2011.

[3] The order in terms of which the commission of enquiry was established contained the following provision (in para. 9):

The record of this application and any proceedings in this Court pursuant thereto, save for this order, and all proceedings before the Commissioner shall be kept private and confidential and shall not be disclosed without prior leave from the Commissioner first being had and obtained.

The order also provided that the 'petitioning creditors' (i.e. the trustees) would fund the enquiry; with the funding falling to be treated as a loan to the company in liquidation, repayable as a first charge on any free residue in the winding up, and only if there was a free residue. It is not unusual for creditors in the context of the winding-up of a company that is unable to pay its debts to request and fund such enquiries. Their object in doing so is to obtain information which might assist them to obtain the payment of their claims.

[4] In the s 424 proceedings the trustees seek orders declaring Benson and his former co-directors personally liable for the company's judgment debt and for certain consequential relief. The commissioner acceded to a request by the trustees' attorneys for permission to use the record of the enquiry, thus, in effect, granting leave of the nature contemplated in the aforementioned provision of the court order establishing the commission. (He also, in response to a separate request, granted leave to Benson's co-respondents in the s 424 proceedings to disclose the record.) The commissioner did not afford Benson prior notice or the opportunity of a hearing before granting leave for the record to be disclosed. The trustees have relied in their papers in the s 424 proceedings on the evidence given by Benson at the enquiry held before Adv. Fitzgerald.

[5] In the proceedings before me (which have been labelled, incorrectly, I think, as an 'interlocutory application') Benson has applied for orders setting aside the decision by the commissioner to grant leave for the enquiry record to be used in the s 424 proceedings and declaring that all references to the enquiry evidence in the affidavits and annexures filed of record in the s 424 proceedings are inadmissible in those proceedings. In the alternative he

sought leave to file further affidavits in the s 424 proceedings. The applicants in the s 424 proceedings have since agreed that Benson may file a further set of affidavits. They also agreed to a postponement of those proceedings pending the determination of the current application. They oppose the grant of an order impugning the commissioner's decision to authorise the disclosure of the record. The commissioner, who was cited as a respondent in the current proceedings, has given notice that he abides the decision of the court.

[6] In terms of s 417(1A) of the Companies Act Benson was entitled to be represented by a legal representative during his appearance before the enquiry. He chose not to be represented. He explained his choice stating that he understood that the purpose of the enquiry was to ascertain the whereabouts of the company's assets. He did not realise, so he averred, that the enquiry might be used to 'seek evidence to substantiate a claim against [him] in [his] personal capacity'.

[7] The record indicates that the commissioner noted the absence of any legal representative in attendance when Benson was called to be examined. Before any questions were directed to Benson the commissioner drew the examinee's attention to his right to be represented and asked him if he was content to proceed without representation. Benson, who had been supplied with a copy of the text of ss 417 and 418 as an annexure to the summons requiring him to appear at the enquiry, responded affirmatively. The commissioner then explained to Benson that he would be required to answer questions that could incriminate him, but pointed out that he would ensure, especially as he was not represented, that Benson was not questioned unfairly.

[8] Benson complains in his founding affidavit in the 'interlocutory application', however, that he had not been advised that it was possible to refuse to answer a question on

the ground that his answer might incriminate him. He also stated that he had not been advised that he was not compelled to answer a question that would result in an unjustifiable infringement of his constitutional rights. He furthermore pointed out that it was not explained that his answers at the enquiry might be used in civil proceedings against him later. He stated that he had not been asked to sign a copy of the transcript of his evidence and had not verified its accuracy. Benson claimed that it came as a shock to him to find that extracts from the record of the enquiry were being used against him by the applicants in the s 424 proceedings, including copies of the bank statements of the Benson Family Trust. He said that he felt that he 'had been set up and trapped by the sophisticated legal manoeuvring of the [trustees] and that it seemed to him that he 'was a powerless and voiceless pawn caught up in the [trustees'] calculated machinations'. He added that he did 'not believe that his dignity was adequately respected and protected during [the] process'.

[9] It is trite that enquiries of the nature involved here must be conducted fairly and in a manner respectful of an examinee's constitutional rights. It is also well-established that an examinee who contends that his examination is unfair or being conducted in a manner that unjustifiably infringes his constitutional rights is entitled to approach the court for protection. If such a complaint is held by the court to be well-founded it will grant appropriate relief.¹ Benson, however, did not provide any particularity in support of his aforementioned complaints. For example, he gave no specific instance of being required to answer any particular question in a way that could be said to have resulted in an infringement of his constitutional rights, or of where the commissioner's failure to disallow any line of questioning might have had such an effect. If his objective had been to establish that his examination at the enquiry had been unfair or unlawful in any manner, his failure to

¹ *Bernstein v Bestier NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449), at para. 35.

substantiate his broadly stated complaints has resulted in its non-achievement. The object of the generalised and unsubstantiated statements summarised in the preceding paragraph appears in fact to have been to found a basis for his complaint that the commissioner had acted irregularly by authorising the disclosure of the record without first giving him an opportunity to be heard.

[10] Benson submitted in his supporting affidavit (at paras 42-49) that the duty [of the commissioner] 'to apply the *audi* principle was particularly acute....given the following circumstances:

42.
- 42.1 The enquiry order provided that all proceedings before the Commissioner would be kept private and confidential and would not be disclosed (without the Commissioner's leave).
- 42.2 To the knowledge of the applicants and the Commissioner, I was not represented at the enquiry.
- 42.3 Neither the examining counsel nor the Commissioner gave any indication at the enquiry that the evidence may be used to found a claim against me in terms of section 424 of the Companies Act.
- 42.4 The transcript of the enquiry was not confirmed by me, nor to the best of my knowledge by any of the other examinees, in terms of section 417(2)(a) of the Companies Act.
- 42.5 Not only do the applicants seek to use the enquiry evidence in *civil* proceedings, but they also seek to use it in *criminal* proceedings against me.
- 42.6 The enquiry evidence is to be employed not by the liquidator for the benefit of the body of creditors, but rather by a creditor of Yethu for its private benefit.
- 42.7 In the main application the applicants make grave allegations regarding my character and integrity, and they seek a judgment which would result in my financial ruin.
43. As stated above, the Commissioner did not provide me with an opportunity to make representations in relation to the applicants' and other respondents' requests that the enquiry evidence by used. In the premises I submit that the norms and precepts of natural justice were not met when the impugned decisions were made.
44. Furthermore, I submit that my right to a fair public hearing has been violated.
45. In addition, in allowing the applicants leave to use the enquiry record in litigation, they have been afforded an unfair advantage in the litigation between them and me. In the

circumstances my rights to the equal protection and benefit of the law has likewise been infringed.

46. For the reasons set out above I submit that the enquiry evidence was improperly obtained by the applicants and the other respondents.
47. I am advised that prior to 17 January 2003 section 417(2)(b) of the Companies Act provided that any answer at an enquiry may be used in evidence against the examinee. However, this section of the Companies Act was amended and the amended section does not provide for answers being used in evidence against an examinee.
48. It is also relevant that the Commissioner, in my respectful view, did not accurately or adequately explain the law when he stated, without qualification, that I was obliged to answer questions which tend to incriminate me.
49. In all the circumstances I submit that the impugned decision ought to be set aside and/or the enquiry evidence should be declared inadmissible in the main application.

[11] An appreciation of the objects of ss 417 and 418 of the Companies Act is necessary to assess whether there is any merit in Benson's complaint and to give context to the confidentiality provision in the court order. The objects of the statutory provisions were discussed extensively by the Constitutional Court in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) 984 (CC) and *Bernstein* (see note 1),² and it is thus unnecessary to go over them again here in any detail. Suffice it to say that the provisions are intended to assist liquidators to reconstitute the affairs of the company so that it may be decided, amongst other matters, who the company's creditors are, and against whom the company enjoys claims that may be prosecuted with reasonable prospects of success. The provisions are intended not only for the benefit of the liquidators, but obviously also for that of the company's creditors. Thus, in terms of s 418(1)(c), a creditor or his legal representative is entitled to interrogate any witness at the enquiry. The central object of the provisions is to allow for the collecting and testing of evidence for subsequent use in matters concerning and related to the winding up of the company concerned. The settlement of creditors' claims is very much part of the winding up process, and s 424 of the Companies

² See especially *Bernstein* supra, at para. 15-16 and *Ferreira v Levin* supra, at para 122-124.

Act is part of the statutory machinery available to facilitate that in liquidations in which the circumstances permitting its invocation are present.³ That Benson may have been ignorant that his answers at the enquiry might be used against him in subsequent civil proceedings is neither here nor there. He was required to answer all questions properly allowed by the commissioner and to do so truthfully irrespective of the consequences. He was not entitled to refuse to answer a question merely on the grounds that his answer might count against him in subsequent civil proceedings. It is not an abuse of the statutory enquiry process to use it for the gathering of information for possible future civil litigation; that is in fact one of its legitimate purposes, see *Pitsiladi v Van Rensburg and Others* NNO 2002 (2) SA 160 (SECLD).⁴

[12] There was, of course, a duty on the commissioner to ensure that the enquiry was not conducted in a manner that would be oppressive, vexatious, or unfair to any examinee, but Benson has adduced no evidence that might demonstrate that the commissioner failed to discharge this duty. The conduct of the enquiry would, for example, have been oppressive, vexatious, or unfair towards Benson had the commissioner permitted his examination on matters not related to the liquidation of the company, but merely for the purpose of gathering material for use against him in subsequent unrelated claims. The examination would also have been tainted if the examinee had been questioned in a manner that led to the

³ Section 424 of the Companies Act allows that when it appears that any business of a company was being carried on recklessly or with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose, the court may, on application to it, declare that any person who was knowingly a party thereto to be personally responsible for all or any of the debts or other liabilities of the company. ⁴ The limitations on the use of evidence elicited in a s 417 enquiry in other civil proceedings except against the person who gave such evidence, and then only to the extent that he gave it in his personal capacity (as to which see e.g. *O'Shea NO v Van Zyl NO & Others* 2012 (1) SA 90 (SCA), *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) 897 (N) and *Engelbrecht NO and Others v Van Staden and Others* [2011] ZAWCHC 447 (6 December 2011), at para. 17-22), are not issues of relevance in the application before me. It is perhaps significant, however, that the judgments in *O'Shea* and *Engelbrecht* appear to have proceeded on the assumption that evidence given by X in his personal capacity at an enquiry in terms of the Insolvency Act or s 417 of the Companies Act would be admissible against X in that capacity, at least for certain purposes, in subsequent civil proceedings.

unjustifiable infringement of any of his constitutional rights. As already observed, however, Benson has made no particularised or substantiated allegations to that effect concerning the conduct of the enquiry.

[13] Having regard to the legitimate purposes of the enquiry remarked on earlier, the duty on the commissioner to see to it that the proceedings were conducted fairly did not extend to advising the examinees that the evidence led at the enquiry might be used in subsequent civil proceedings against them. One of the bases for the attack on the constitutionality of ss 417 and 418 in *Bernstein* supra, was that Tollgate Holdings' auditors who gave evidence at the enquiry in that case had not been warned that their interrogation might be used to obtain evidence for use against them in subsequent civil proceedings of which they had been given no forewarning. That complaint formed part of the general background against which it was contended on behalf of the auditors that the provisions violated 'the cluster of rights comprising the right to freedom and security of the person..., the right to personal privacy...and the right not to be subject to the seizure of private possessions or the violation of private communications, as a component of the right to personal privacy'.⁵ The determination of the case makes it clear that the provisions of ss 417 and 418 do not in themselves bring about an unjustifiable infringement of constitutional rights. Whether or not such an infringement is actually occasioned in a given case is dependent on the manner in which the enquiry is conducted. The Constitutional Court's judgments in *Bernstein* also put paid to the argument that the procedural and evidential advantages that an interrogation at a duly conducted enquiry in terms of those provisions might give a claimant in subsequent proceedings occasion an unjustifiable infringement of the examinee's right to equality.

⁵ *Bernstein* supra, at para. 44.

[14] Pursuant to the judgment in *Ferreira v Levin* the provisions of s 417(2), which are also applicable in respect of any examination conducted before a commissioner appointed in terms of s 418, were amended to provide that self-incriminatory answers given by an examinee at such enquiries could not be used against him or the company of which he had been an officer in subsequent criminal proceedings, except in proceedings relating to perjury or the giving or making of a false statement.⁶ Thus Benson's apparent concern about the commissioner having authorised the disclosure of the record in circumstances in which the trustees had indicated an intention to use it in criminal proceedings is without foundation; and it is reasonable to assume that the commissioner would have been conscious of the implications of s 417(2) when he made the decision.

[15] Moreover, the notion that an examinee may refuse to answer a question that might require a criminally self-incriminating answer is not correct. The provisions of s 417(2)(b) are to the effect that if an examinee refuses to answer a question on the grounds that the answer may be criminally self-incriminatory he may not be obliged to answer until the person presiding at the enquiry has consulted with the Director of Public Prosecutions having jurisdiction. The qualification on compulsion is thus plainly for the benefit of the prosecution service, and not for the protection of the examinee. It merely requires that any decision by the judge or other officer presiding at the enquiry whether or not to compel an answer must be deferred until after the prescribed consultation with the prosecuting authority. The reason for the provision is to assist in the informed and proper prioritisation of potentially conflicting public interests; viz. the public interest in the achievement of proper accountability in respect of the management of failed companies, on the one hand, and in obtaining the prosecution and conviction of persons guilty of criminal conduct connected

⁶ The amendments were effected in terms of the Judicial Matters Amendment Act 55 of 2002, with effect from 17 January 2003.

with the management of such companies on the other hand. Thus Benson's apparent understanding that his rights were in some way infringed as a consequence of the commissioner not having advised him 'that it was possible to refuse to answer on the ground that the answer might tend to incriminate' him is predicated on an incorrect apprehension of the import of s 417(2).

[16] No unfairness was entailed in the commissioner's omission to give an exposition of the provisions of s 417(2) to the Benson before he testified at the enquiry: It in no manner exposed Benson to self-incriminatory answers being used against him in subsequent criminal proceedings. The provisions of s 417(2) imposed a duty on the commissioner to be on guard not to require answers to questions put at the enquiry that might give rise to criminally self-incriminating answers by any examinee without first discharging the obligation of consultation with the prosecuting authority. In my view the duty obtains generally, and not only when an examinee might seek to refuse to answer a question on the grounds that the answer might be self-incriminating.⁷ However, the restriction against the use of self-incriminating evidence given by an examinee in subsequent criminal proceedings against the examinee applies irrespective of whether or not the person presiding at the enquiry discharges the obligation imposed in terms of the proviso to s 417(2)(b).

[17] There is also nothing in the point that Benson seeks to make about not having been called upon to confirm the record. The provisions of s 417(2)(a) of the Companies Act are directed at a situation in which the oral evidence is taken down by hand or in shorthand and subsequently transcribed. That will rarely by the case in the modern age. It would in any

⁷ The opinion to the contrary reflected in Kunst et al (ed), *Henochsberg on the Companies Act* Vol 1, LexisNexis, (looseleaf [Issue 30]), at 894(5) is founded on construing the proviso to s 417(2)(b) narrowly, in a manner that would render the public interest objective of the provision ineffectual except where an examinee elects, by his refusal to answer a question, to trigger it incidentally. That gives a most unbusinesslike result, which the legislature is unlikely to have intended.

event always be open to an examinee to challenge the accuracy of any part of the enquiry record which any person might seek to use against him in other proceedings.

[18] In arguing that the commissioner's duty to ensure that the enquiry was conducted fairly extended to advising the examinees of the possible future use of their testimony against them Benson's counsel relied heavily on the decision in *Advance Mining Hydraulics (Pty) Ltd v Botes NO 2000 (1) SA 815 (T)*. The judgment does not, however, go that far. In that matter an enquiry was set aside because the presiding officer at an enquiry held in terms of s 415 of the Companies Act failed to advise an examinee of his right to legal representation. The circumstances of the case were peculiar, more particularly because action was taken against the examinee concerned in terms of s 69 of the Insolvency Act 24 of 1936⁸ by the magistrate presiding at the enquiry. In the current case, of course, it is apparent that Benson was not only aware of his right to be legally represented, he was also, as mentioned, reminded of it by the commissioner. Furthermore, there is no indication in the evidence, unlike the position in *Advance Mining*, that anything happened during the course of his examination that would have merited the commissioner revisiting the witness's election to proceed without representation. It is apparent from the judgment in *Advance Mining* that while drawing an unrepresented examinee's attention to his right to representation in terms of

⁸ Section 69 of the Insolvency Act provides:

(1) A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

(2) If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

(4) Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.

s 417(1A) (or s 415(6)) of the Companies Act would generally be regarded as an intrinsic part of the duties of any person presiding at an enquiry in terms of s 417 (or s 415), the content of the duty to ensure that the examination of witnesses is conducted fairly does not lend itself to straight-jacketed circumscription, being otherwise dependent on the circumstances and how the questioning proceeds.⁹

[19] The terms of the order quoted in paragraph [3], above, were plainly framed with the provisions of s 417(7) of the Companies Act in mind. Section 417(7) provides:

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

The object of s 417(7) is to preserve, to the extent considered appropriate by the Court or the Master, as the case may be, the secrecy of the enquiry. The effect of s 418 in the context of the enquiry under consideration in the current matter is to empower the court to delegate its functions to a commissioner. The terms of the order in issue included a delegation of the court's powers in terms of s 417(7). It was not argued that the relevant provision in the order had been incompetent.¹⁰ One of the advantages of a secret or confidential enquiry is that the witnesses who are summonsed to give evidence do not have prior insight into or knowledge of the other evidence that has preceded theirs. The effect assists in the exercise of getting to the bottom of the company's affairs. The advantage would be susceptible to being lost if anyone privy to the proceedings were able to disclose the record; cf. *Siyanda Resources (Pty) Ltd v Moloto NO; Mashile-Nkosi v Moloto* [2010] ZAGPJHC 14 (26 March 2010), at para. 50.¹¹ In my view that is the primary reason why the person presiding over the enquiry

⁹ See further the discussion on the concept of fairness in para. [24], below.

¹⁰ Benson's counsel pointed in argument to the absence of any cross-reference to s 417(7) in s 418(1)(d), but disavowed any intention on the basis thereof of seeking to impugn para. 9 of the court order.

¹¹ <http://www.saflii.org/za/cases/ZAGPJHC/2010/14.pdf>.

is given the power to control the use by anyone of the record of the proceedings; cf. *Koize v De Wei NO and Another* 1977 (4) SA 368 (T).

[20] A case has to be made out for a confidential enquiry when the application to establish the enquiry in terms of ss 417 and 418 is made. Similarly, if the Master determines that such an enquiry is to be held there has to be an objectively identifiable reason for the decision if the power is to be exercised rationally - which, like all public power, it must be if it is to be validly exercised.¹² There is no *numerus clausus* of reasons that might support the holding of a private and confidential enquiry. Thus it is conceivable, for example, that an enquiry might be constituted in terms of s 417 or 418 because of the perceived need, for reasons related to the peculiarly affected rights or interests of the contemplated examinees in the given case, to protect their evidence from the public gaze.¹³ If that were the position in a given case, the effect on the rights or interests concerned would plainly be a consideration that the person presiding over the enquiry would have to take into account before permitting the veil of privacy and confidentiality to be lifted, and it might well be a consideration that would require that the examinees be afforded a hearing on the question before a decision to that effect is taken. There is no suggestion, however, that any special considerations pertaining to the rights or interests of Benson personally, as an erstwhile director of the failed company, were a factor in the establishment of the confidential enquiry in the current matter.

[21] The responsibility of directors to account for their administration of a company that has been placed into compulsory liquidation is well established; and having to give evidence at an enquiry in terms of ss 417 and 418 is a manifestation of a circumstance in which the duty falls to be discharged; see e.g. *Ferreira v Levin* supra, at para 151. The permissibility of

¹² *Pharmaceutical Manufacturers Assoc of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241), at para. 85.
¹³ Cf. e.g. para. 22 of the judgment of Mason CJ in *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486, accessible at <http://www.austlii.edu.au/cases/cth/HCA/1989/21.html>.

the use of evidence adduced at such an enquiry against the examinee in subsequent proceedings is implicit in the express provisions of s 41(2)(c) of the Act, which restrict the use only in criminal proceedings, and has been recognised in a number of reported judgments of the superior courts over many years, most recently, subsequent to the amendment of s 41(2)(b) in terms of Act 55 of 2002, in *Venter NO and Another v Coetzee and Others* [2006] ZAFSHC 12 (1 June 2006).^{14 15} The implication in the argument of Benson's counsel that the provisions of s 41(7) are invariably intended for the benefit or protection of persons examined at an enquiry in terms of ss 417 or 418 is misplaced. While in given circumstances s 41(7) might well be applied to that effect, the primary purpose of the provision is to assist in the achievement of the objects of the enquiry.

[22] The legal characterisation of an enquiry in terms of ss 417 and 418 is a matter of debate.¹⁶ In *Bernstein*, Ackermann J expressed the view that the conduct of such an enquiry did not fail to be characterised as 'administrative action', but the question has been left open. Assuming for argument's sake that the commissioner's decision to authorise the use of the record was indeed administrative action, it would not follow, merely by reason thereof, that Benson would be entitled to a hearing before the commissioner made his determination. He would have been entitled to a hearing only if he had some right that might be adversely affected by the decision, or a legitimate expectation to be heard; see *Grey's Marine How Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (2005) (10) BCLR 931; [2005] 3 All SA 33, at para. 29-30. Benson has not sought to establish that he had any legitimate expectation to a hearing and, for the reasons I have discussed, I do not consider that he has established that he had any rights that would be adversely affected in a

¹⁴ <http://www.saflii.org/za/cases/ZAFSHC/2006/12.html>.

¹⁵ See also note 4, above.

¹⁶ Cf. *Mitchell and Another v Hodes and Others* NNO 2003 (3) SA 176 (C), at 185ff, under the subheading

'Nature of the present proceedings'.

cognisable sense by the commissioner's authorisation of the use of the record in proceedings against him.

[23] In a supplementary note submitted some time after the hearing of argument, at a stage when I was on the point of delivering judgment, Benson's counsel contended that it would be useful to test Benson's entitlement to a hearing by postulating whether notice would have been required to have been given to him had an application been made to court to use the record. I do not find the analogy helpful. A request for authorisation to disclose the record does not amount to seeking relief against a third party; as mentioned,¹⁷ its determination bears primarily on whether or not the reason for the privacy and confidentiality of the enquiry itself will be prejudiced by the release of the record. A decision by the person conducting an enquiry whether or not to authorise the disclosure of the record is integral to the conduct of the enquiry and does not lend itself comfortably to comparison with the procedural requirements in litigious proceedings. The decision to authorise the disclosure of the record is a discretionary one, falling to be made incidentally to the conduct of the enquiry. The process to be followed in properly making it, including whether any person should be given a hearing on the question, will depend on the circumstances.

[24] The *audi* principle is one of the tenets of natural justice which gives expression to a general legal requirement of fairness. What fairness requires cannot be determined in the abstract; it is very much dependant on the context of the question to be dealt with. Compare *Doozy v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL), at 106d-h, cited with approval in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A), at 231-2.¹⁸ Whatever might be the correct

¹⁷ See para. [19], above.

¹⁸ 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive

characterisation of these proceedings – whether as an application for review in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000, or one made on the second of the grounds identified in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111,¹⁹ or on the basis that what Benson is in fact doing is seeking the court's intervention to remedy an impropriety by the commissioner,²⁰ I am not persuaded on the evidence that has been adduced, having regard to the considerations bearing on Benson's position reviewed earlier in this judgment, that fairness required that he be heard by the commissioner before the trustees' request for authorisation to disclose the record was granted.

[25] Even were I wrong in this conclusion, it seems to me that it is too late now for Benson to obtain a reversal of the commissioner's decision. The disclosure of the record of proceedings has not only been authorised, the evidence in the record has already been used.

judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

See too the dicta of Sachs LJ in *Re Pergamon Press Ltd* [1970] 3 All ER 535 at 542, [1971] Ch 388 at 403: 'In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. That need for flexibility has been emphasised in a number of authoritative passages in the judgments cited to this court. In the forefront was that of Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118, and the general effect of his views has been once again echoed recently by Lord Guest, Lord Donovan and Lord Wilberforce in *Wiseman v Borneman* [1969] 3 All ER 275 at 277, [1971] AC 297 of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate (see per Lord Reid in *Wiseman v Borneman* [1969] 3 All ER 275 at 277, [1971] AC 297 at 308) the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.' This passage was cited by Mann J (as he then was) in *R v Monopolies and Mergers Commission, Ex parte Elders LXL Ltd* [1987] 1 All ER 451 (QB) at 461b-f, a case also referred to by Corbett CJ in *Du Preez loc cit*.¹⁹ Cf. *Gumede v Subel NO* 2006 (3) SA 498 (SCA), at para. 23-23.²⁰ Bernstein supra, at para. 35.

The bringing of this application was therefore misguided in my view. The power invested in the commissioner in terms of the court order and exercised by him in the decision that is under attack went to the disclosure of the record, not to its use. The admissibility of the enquiry record as evidence should have been attacked in the s 424 proceedings and not in what have, in effect - notwithstanding the label 'interlocutory', been discrete proceedings involving the commissioner, who is not a party in the s 424 application. (Although the papers in the s 424 application were placed before me, I was not required or enjoined to have regard to them save in the respects that the papers before me specifically directed.)

[26] The effect of an irregular authorisation of the disclosure of the record by the commissioner in the circumstances of this case would in any event not necessarily be to exclude its use as evidence against Benson in the s 424 proceedings. As observed, it appears to me that that is the real object of the current application. Even if the provenance of the evidence used by the trustees in the s 424 proceedings were in any way tainted, the admission of the evidence obtained improperly is a matter falling within the discretion of the court seized with those proceedings; cf. *Protea Technology Limited and another v Wainer and others* [1997] 3 All SA 594 (W) and *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W), at 549J-550C.

[27] The question of whether Benson should be permitted to deliver additional affidavits is also a question that should properly be decided in the s 424 proceedings, and not by this court which has been called upon to review and set aside a decision by a commissioner in a s 418 enquiry. I therefore do not propose to determine it. In view of the concession by the applicants in the s 424 proceedings that he may do so, it seems that in any event the issue is not likely to be contentious and the sanctioning of their introduction is likely to be a

formality. (The further affidavit which Benson wishes to introduce has already been deposited to, and was included in the papers in the current proceedings.)

[28] In the result –

- (i) the application for orders setting aside the decisions of the commissioner authorising the disclosure of the record of the enquiry proceedings in terms of s 417 and 418 of the Companies Act 61 of 1973 in respect of Yethu Projects (Pty) Ltd (in liquidation) is refused with costs, including the costs of two counsel;
- (ii) the questions concerning the admissibility of the references to the enquiry evidence in the affidavits and annexures filed of record in the proceedings instituted in terms of s 424 of the Companies Act under case no. 6832/2011 and the introduction in those proceedings - as agreed to by the applicants in those proceedings - of an additional set of affidavits by Michael Benson, *qua* second respondent, are deferred for determination, if necessary, by the judge who becomes seized with those proceedings.

Judge of the High Court

A.G. BINNS-WARD

