IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No.: 9450/14

In the matter between:

ABSA BANK LIMITED (Registration No. 1986/004784/06)	First Applicant
CHRISTO JACOBUS SMITH	Second Applicant
ANNARI HARLEY	Third Applicant
ALBERTUS JOHANNES ERASMUS	Fourth Applicant
PIETER WILLEM STEYN	Fifth Applicant
PIETER SWART	Sixth Applicant
MARTIN CHARLES LEIGH	Seventh Applicant
LOUIS LEON VON ZEUNER	Eighth Applicant
WESSEL ANDRIES DE JAGER	Ninth Applicant

and

TESSA MARGOT WOLPE First Respondent

MICHAEL FITZGERALD SC N.O. Second Respondent
(in his capacity as the duly appointed Commissioner in the Section 417, 418 enquiry in A Million Up Investments 105 (Pty) Ltd (In Liquidation)

GAVIN CECIL GAINSFORD N.O. Third Respondent
(in his capacity as one of the duly appointed joint liquidators of A Million Up Investments 105 (Pty) Ltd (In Liquidation)

MARIO PAUL WALTERS N.O. Fourth Respondent
(in his capacity as one of the duly appointed joint liquidators of A Million Up Investments 105 (Pty) Ltd (In Liquidation)

STEPHEN MALCOLM GORE N.O. Fifth Respondent
(in his capacity as one of the duly appointed joint liquidators of A Million Up Investments 105 (Pty) Ltd (In Liquidation)

GARY NEIL SHAFF Sixth Respondent

GLM INVESTMENTS (PTY) LTD Seventh Respondent
(Registration No. 2003/003980/07)

QUANTUM PROPERTY GROUP LIMITED Eighth Respondent
(Registration No. 1984/002788/06)

LEONARD HIMELSEIN Ninth Respondent

PROTEA HOTEL GROUP (PTY) LTD Tenth Respondent
(Registration No. 1969/009272/07)

AND

Case No.: 20672/15

In the matter between:

TESSA MARGOT WOLPE Applicant

and

ABSA BANK LIMITED (Registration No. 1986/004784/06)	First Respondent
CHRISTO JACOBUS SMITH	Second Respondent
LOUIS LEON VON ZEUNER	Third Respondent
ANNARI HARLEY	Fourth Respondent
ALBERTUS JOHANNES ERASMUS	Fifth Respondent
PIETER WILLEM STEYN	Sixth Respondent
PIETER SWART	Seventh Respondent
WESSEL ANDRIES DE JAGER	Eighth Respondent
MARTIN CHARLES LEIGH	Ninth Respondent
DIANE EILEEN VASKYS	Tenth Respondent
PROTEA HOTEL GROUP (PTY) LTD	Eleventh Respondent
MICHAEL FITZGERALD SC N.O.	Twelfth Respondent
STEPHEN MALCOLM GORE N.O.	Thirteenth Respondent
GAVIN CECIL GAINSFORD N.O.	Fourteenth Respondent
MARIO PAUL WALTERS N.O.	Fifteenth Respondent

CORAM:	SALIE-HLOPHE, J
HEARD:	30 May 2016
DELIVERED:	31 August 2016

Case No.: 9450/14

COUNSEL FOR 1ST APPLICANT:	Adv. Leathern SC assisted by Adv. Turner

COUNSEL FOR 1ST RESPONDENT:	Adv. Duminy SC assisted by Adv. Davis
COUNSEL FOR 7TH-9TH RESPONDENTS:	Adv. du Toit SC assisted by Adv. Wickins
COUNSEL FOR 10TH RESPONDENT:	Adv. Pincus SC assisted by Adv. Walters

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Case No.: 20672/15

COUNSEL FOR APPLICANT:	Adv. Duminy SC assisted by Adv. Davis
COUNSEL FOR 1ST RESPONDENT:	Adv. Leathern SC assisted by Adv. Turner
COUNSEL FOR 11TH RESPONDENT:	Adv. Pincus SC assisted by Adv. Walters

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JUDGMENT TO BE DELIVERED ON 31 AUGUST 2016

SALIE-HLOPHE, J:

INTRODUCTION

[1] There are two related applications before this court, commonly referred to as the 2014 application and the 2015 application. The issue common to both applications is whether an enquiry previously ordered by this court in terms of

Section 417 [1]of the Companies Act 61 of 1973 into the affairs of a private company called A Million Up Investments 105 (Pty) Ltd (In Liquidation) ("AMU") should be allowed to continue or whether the order authorising the enquiry ("the 417 order") should be set aside and the enquiry terminated.

[2] For the sake of convenience, the chief protagonists in these proceedings are referred to simply as "Wolpe", "Absa" and "Protea". The liquidators of AMU who are cited as respondents in both applications are referred to as "the liquidators". Argument was also addressed on behalf of GLM Investments (Pty) Ltd, Quantum Property Group Limited and Leonard Himelsein ("Himelsein"),[2] in opposing the termination of the enquiry.

[3] In the 2014 application Absa Bank Limited ("Absa") sought a final order that the enquiry be terminated and the 417 order set aside. It sought by way of interim relief that the enquiry be suspended pending the determination of the final relief. Protea Hotel Group (Pty) Ltd ("Protea") which is cited as a respondent in both applications, made common cause with Absa.

[4] On 18 June 2014 Griesel J ordered that the enquiry be postponed indefinitely pending the determination of the final relief ("the Griesel order"). However, Absa did not proceed with the final relief and the enquiry could not proceed by virtue of this order.

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[1] *An enquiry in terms of s417 of the 1973 Companies Act into the affairs of A Million Up Investments 105 (Pty) Ltd (In liquidation) before Adv. Michael Fitzgerald SC was sanctioned by an order of court granted by Koen AJ on 26 July 2012 and amended on 10 August 2012. Paragraph 9 of the original order was amended so as to provide that Wolpe would bear the cost for convening the enquiry to the extent that it was instigated and conducted by her, as opposed to being costs in the liquidation of AMU as stipulated in the original order.*

[2] *Cited as 7th, 8th and 9th respondents in the 2014 application.*

[5] In the 2015 application Mrs. Tessa Wolpe ("Wolpe") sought an order authorising and directing the Commissioner to comply with the terms the 417 order and to continue with the enquiry (together with incidental relief). Both applications were set down by the Registrar for hearing simultaneously.

BACKGROUND:

[6] Welcoming incoming travellers to town via the Gardens area is a hotel known as "15 on Orange". Whilst opulent and lavish, it has formed the basis of a convoluted and tortuous background stemming from various court applications and disputes. The hotel was owned by a company known as A Million Up (Pty) Limited ("AMU"),[3] which company was placed under an order of provisional winding-up at the instance of Absa on 29 June 2012. The application was brought on the basis that AMU is unable to pay its debts as envisaged in Section 344(f) of the Companies Act, 61 of 1973 ("the 1973 Companies Act"). The order was made final on 14 August 2012.

[7] On 26 July 2012 Mrs Tessa Margot Wolpe ("Wolpe) brought an *ex parte* application for an enquiry in terms of Section 417 and 418 of the 1973 Companies Act into the trade, dealings and affairs or property of AMU. She claimed the basis for her *locus standi* by reason that she is a creditor of AMU having a loan account therein in approximately R5 million rands. Pursuant to the application, Koen AJ granted the order.

[8] Wolpe caused subpoenas to be issued and served on a number of Absa employees and Mr. Arthur Gillis of Protea. The enquiry was scheduled to commence on 3 September 2012.

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[3] *Registration number 2003/000611207/07.*

[9] On 28 August 2012 Absa launched an application under case number 16693/2012 for an order directing that a copy of the *ex parte* application be made available to Absa. It also sought that the 417 order be set aside as well as the subpoenas issued ("the 2012 application). Protea made common cause with Absa and sought to intervene in the 2012 application. Wolpe opposed the 2012 application. The parties entered into a settlement agreement, which was made an order of court by the Hlophe JP on 30 November 2012. The introduction to the settlement agreement recorded that the "*applicants and Wolpe wish to settle the application and to make mutually acceptable arrangements for the conduct of the enquiry".* At paragraphs 2.1 and 2.2 thereof Absa withdrew its challenge and undertook not to institute any further proceedings for the setting aside of the enquiry and obtaining a copy of the ex parte application.

[10] In March 2013 Wolpe arranged for the commissioner to issue subpoenas calling upon Messrs Gary and Peter Shaff ("the Shaffs') to attend the enquiry on 19 March 2013.[4] The enquiry did not proceed on the said date. Whilst the reasons are in dispute, it can be accepted that the Shaffs did not attend.[5]

[11] In September 2013 Wolpe, acting in the name of the liquidators, launched an application under case no: 15766/13 to have a pre-liquidation transaction where AMU purchased Protea's shares in the company 15 on Orange Hotel (Pty) Ltd set aside on the basis that it amounted to a collusive disposition in terms of section 31(1)

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[4] *The Shaffs were directors of AMU and directors and shareholders of Quantum Property Group Limited ("QPG") which held 100% of the shares in AMU).*

[5] *Wolpe alleged that the Shaffs refused to co-operate and threatened to apply to set aside the enquiry, though they did not act on their threat. Absa submits that Wolpe was not able to secure the Shaffs' attendance and thereafter she took no further steps to convene the inquiry until 2015.*

of the Insolvency Act 24 of 1936 ("the section 31 application"). [6] Wolpe alleged that Absa, Protea and the Shaffs were parties to or complicit in the alleged collusion. Success in the form of a final order would arguably have resulted in Absa's substantial secured claim against AMU to be forfeited. This in turn would probably have resulted in Absa's claim against Wolpe (qua surety for AMU in favour of Absa) extinguished and the loan account claim that she had against AMU would revert to her.[7]

[12] Wolpe also sought an interim order directing Absa to repay to the liquidators, pending the determination of the section 31 application, the advance payment made to it as a secured creditor from the proceeds of the sale of AMU's property, the 15 on Orange Hotel building.

[13] The liquidators contended that the making of the advanced payment was unexceptionable and in accordance with long established insolvency practice.[8]

[14] The judgment of Binns-Ward J found that Wolpe had failed to satisfy that the liquidators' act of making an advance payment to Absa was unreasonable or absurd He concluded in his judgment that the facts supported a finding that the payment was made in terms of the standard practice. The learned Judge found that Wolpe

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[6] *The principal application was for an order that a pre-liquidation transaction concerning the purchase of Protea Hotel Group (Pty) Ltd's shares in 15 on Orange (Pty) Ltd by AMU be declared to have entailed a collusive transaction within the meaning of section 31.*

[7] *Wolpe's loan account against AMU had been ceded in* securitatem debiti *to ABSA as security for her suretyship obligation.*

[8] *Mars,* The Law of Insolvency in South Africa, *9th edition at pg 541 expresses that view that an exception to the rule that dividends not be paid before confirmation of an account, is where a secured creditor who has realised his own security and who has proved his claim. Premature payment is sometimes made to a secured creditor where the trustee has realised the security and wishes to limit the estate's liability for payment of further interest, but a prudent trustee would make such payment conditional upon immediate repayment upon demand if for any reason the Master refuses to confirm the account in which payment is eventually awarded to the creditor.*

had not established a prima facie case of collusion and expressed the view that collusion was not apparent on the face of matters. Quoting from his judgment:[9]

"A collusive dealing in the relevant context entails an agreement entered into by a company, before its winding up, with the fraudulent purpose of prejudicing the rights of creditors. In other words, it is not sufficient only that the effect of the transaction is to occasion such prejudice, there must also be a fraudulent intention by the parties to the transaction to cause it. Having regard to the position in which AMU found itself in August 2011, when the allegedly collusive transaction was concluded, it would seem probable on the evidence before me that the only creditor that stood to be prejudiced by it would have been Absa itself. In the absence of any indication of there having been a likelihood of the possibility that there would be a free residue after the realisation of Absa's security should winding up intervene, the notion that prejudice to the unsecured creditors of AMU could be occasioned – never mind have been intended to be caused – seems far-fetched on the face of matters."

[15] In other words, it was not sufficient that the effect of the transaction caused prejudice, since there must have been fraudulent intent by the parties to the transaction to cause it. He reasoned that having regard to the position in which AMU found itself in August 2011, when the allegedly collusive transaction was concluded, it was probable on the evidence that the only creditor that stood to be prejudiced by it would have been Absa itself. This is so, he reasoned further, that in the absence of any indication of a free residue after realisation of Absa's security should winding up intervene, the notion that prejudice to the unsecured creditors of AMU would be occasioned – never mind have been intended to be caused – seemed unlikely. Furthermore, Absa had contractually undertaken (in favour of the

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9 *Page 262 – 2014 application, paragraph 20.*

liquidators) to repay the amount, together with interest at a favourable rate, if it is directed to do so by the Master or by a Court. In light of a concession on the part of Wolpe that Absa is well able to reimburse the amount, the prejudice alleged seemed to bear no merit. Our law appreciates that moral indignation, even if genuinely maintained, does not establish a cognisable basis for being aggrieved when prejudice cannot be shown.[10]

[16] On 25 February 2014, Wolpe withdrew the section 31 application, set down to be heard on 19 May 2014.

[17] In May 2014 Gary Shaff caused subpoenas to be served on a number of Absa employees and representatives of Protea, to testify at the enquiry convened by him, scheduled to run from 21 to 25 July 2014. In response, Absa launched the 2014 application on 27 May 2014 as a matter of urgency, seeking a *rule n*isi calling upon the respondents to show cause why: the 417 order should not be set aside ("the enquiry terminated and subpoenas issued by Gary Shaff be set aside "the final relief"). Pending the final relief, Absa sought an order directing that the holding of the enquiry on 21 July 2014 be stayed indefinitely ("the interim relief"). A similar application for similar relief was launched by Protea under the same case number. Wolpe filed a notice to abide the decision of the court. She filed a concise affidavit stating that the reason for her not having participated or conducted the enquiry is that she did not have the funds required to do so and that she had not abandoned any reliance on the *ex parte* order. She also recorded her reliance on the settlement agreement as a ground on which Absa should be precluded from applying to set aside the enquiry. Griesel J however found that the applicants were not precluded

[10] *Record page 263 / Paragraph 22 of the judgment of Binns-Ward J.*

from bringing the application, either by way of the settlement agreement entered in November 2012 or the subsequent ruling by the commission during January 2014.[11]

[18] Griesel J handed down a judgment on 18 June 2014 ("the Griesel judgment") in terms whereof he held that whilst "*Shaff had raised certain legitimate aspects calling for an enquiry"*, he found though that the subpoenas issued were overbroad, unreasonable and amounted to an abuse. In the circumstances of the case, he expressed that it was an irresistible inference that the subpoenas had been issued in order to harass Absa and Protea. He ordered that the holding of the enquiry be postponed indefinitely and excused non-compliance of the subpoenas issued at the behest of Shaff pending the final determination of the relief sought for the setting aside of the enquiry. It is worthy to quote from the judgment the following: [12]

"It is obviously not possible in the time available to deal fully with the comprehensive arguments addressed to me by counsel for the various parties. However, I regard it as important to announce my decision as speedily as possible so as to enable the parties to know where they stand."

[19] After the granting of the interim order, Absa took no steps to progress the 2014 application for the final relief which it sought for the setting aside of the s417 order and the termination of the enquiry. The order for the holding over of the s417 enquiry therefore remained unchanged. In September 2015 Wolpe attempted to reconvene the enquiry on the basis of the settlement agreement. Absa and Protea

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[11] *Griesel J found that the prima facie right is established in respect of the relief claimed in prayer 2.3 of the notice of motion be set aside as abuse.*

[12] *As it appears at paragraph 7.*

objected to the resumption of the enquiry on the basis that the final relief of the 2014 application had not yet been determined. The Commissioner indicated that, given the terms of the Griesel order, he was not inclined to resume the enquiry in the absence of a court order authorizing and directing him to do so. Wolpe thereupon launched the 2015 application on 27 October 2015, seeking an order authorising and directing the Commissioner to proceed with the enquiry and directing Absa and Protea to comply with the terms of the settlement agreement.

20] Absa and Protea opposed the 2015 application and the matter was postponed by agreement to 8 March 2016, with a timetable for the filing of further affidavits. In November 2015 Wolpe applied under Rule 6(5)(f) for the allocation of a date for the hearing of the 2014 application in respect of the final relief. As per her further request, the 2014 application was set down for hearing together with the 2015 application. Absa did not object to the simultaneous hearing of the two applications and delivered a composite affidavit serving as its replying affidavit in the 2014 application and its answering affidavit in the 2015 application. The liquidators abide the decision of this Court.

[21] Wolpe had applied at the hearing before this Court for the striking out of a number of paragraphs in Absa's founding affidavit in the 2014 application and its answering affidavit in the 2015 application ("the application to strike out"). This application is brought on the basis that the paragraphs sought to be struck repeat allegations and raise disputes which were finally disposed of in the settlement agreement in relation to the 2012 application.

[22] The case for Wolpe is that as the Court ordered an enquiry into the affairs of AMU under s417, the Commissioner remains authorised and obliged to comply with

his obligations in terms of the s417 order, until the order is set aside or rescinded. Absa and Protea undertook to Wolpe in the settlement agreement that they would not seek to set aside the enquiry and that they would co-operate in relation to it as agreed. Wolpe submitted that she never abandoned the enquiry. She ran out of money to fund it and always intended to continue with the inquiry if she secured funds to do so. Therefore, she argued, there is no basis for Absa or Protea to avoid complying with their obligations under the settlement agreement. The Griesel order, she submits, only intended to suspend the holding of the enquiry pursuant to the Shaff subpoenas pending the determination of the main relief in the 2014 application and not in perpetuity. Absa was under a duty to prosecute the main relief expeditiously, which it failed to do. She highlighted that the case for Absa was that the enquiry ought to be set aside on the basis of Shaff's conduct and no case against Wolpe was made. Wolpe argued further that the Griesel order should be seen as limiting Shaff only from resuming the enquiry. Wherefore it was not incumbent upon her to make out a fresh case for the enquiry as it had been made out in the *ex parte* application which led to the granting of the s417 order.

[23] Absa advanced various arguments why the enquiry should not be permitted to continue. It is simplified as follows:

i) Abuse of process by Wolpe;

ii) Abandonment of the enquiry by Wolpe;

iii) Winding up of AMU is at an advanced stage;

iv) Wolpe's lack of *locus standi*;

v) That claims against Absa or other creditors by AMU have prescribed;

vi) Absa's costs incurred in the enquiry are unreasonable.

[24] Protea's arguments were substantially common to those of Absa. Its distinct grounds of opposition to the 2015 application are that the application is procedurally irregular because it involves determination of the same question which is still pending in the 2014 application. Furthermore, that the 2015 application amounts to an application for a rescission, variation or supplementation of the Griesel order and ought therefore to have been brought in terms of Rule 42. It also strongly contended that Wolpe's institution and now pursuit of the s417 enquiry is to obtain litigious advantage in the proceedings instituted by QPG against ABSA and Protea ("the QPG action").[13] In other words, the argument is that Wolpe is abusing the enquiry for an ulterior purpose and that she has deliberately concealed material information relevant to the continuation of the enquiry and the enforcement of the Settlement Agreement.

DISCUSSION OF APPLICABLE LAW AND FINDINGS

The Settlement Agreement and the submission of res judicata and lis pendens:

[25] The settlement agreement in terms of which Absa agreed to the continuation of the enquiry was made an order of court on 30 November 2012.[14] It is so that a settlement or compromise has the same effect as *res judicata* and accordingly excludes any legal proceedings in respect of the original, disputed cause of action. The effect of a settlement is summarised in the following terms by Caney:

"Compromise, in the sense of agreement for the settlement of a dispute, has the effect of res judicata in that dispute unless there is a reservation of the right to

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[13] *Case number 10491/14 – Gauteng Local Division*.

[14] *Order granted by Hlophe JP.*

proceed upon the original cause of action. Unless and until set aside, and saving such reservation, it extinguishes the cause of action and ends litigation, and crystallizes the rights and obligations of the parties in the matter in issue; it founds an action for recovery of what has been promised in the compromise."[15]

[26] Whilst at first glance one would be inclined to agree that the settlement agreement had the effect of entrenching the s417 enquiry, it cannot mean that Absa was restrained from ever addressing it in further litigation. This is so especially where Wolpe changed focus and opted to pursue different legal channels. I would go so far as to say that in these circumstances it does not behove of Wolpe to shield herself against legal challenge in respect of the enquiry where she did not deem it so necessary to pursue the enquiry. After all, the enquiry was ordered based on her allegations and submissions.

[27] However, this settlement agreement must not be seen as an agreement settling litigation in isolation. It ultimately was an agreement to set out the parties' conduct in the course of a bigger objective, that being, the s417 enquiry. It is trite law that an enquiry remains an enquiry of the Court.

[28] Absa relied on the fact that by virtue of the fact Griesel J entertained its application in 2014, it must mean that the learned Judge did not deem the settlement agreement as a bar to litigation on the issue. On a reading of the judgment of Griesel J, I am of the view that the finding of a *prima facie* right is the right of Absa not to be subjected to unreasonable subpoenas. To that extent he found that Absa had a right to approach the court for relief, **notwithstanding the settlement**

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[15] *Caney the* Law of Novation*,* p57.

agreement. This I believe is the basis for which Griesel J entertained the application. Whether Absa would be restrained from again applying for a setting aside of the enquiry was a determination to be made by a different court hearing the final relief.

[29] This brings me to the next issue for determination. Absa's success before Griesel J in June 2014 did not mean that it could sit back in the comfort of an interim order halting the enquiry. Yet, that is exactly what it did seemingly with the consequence that in 2015 Wolpe launched yet another application, essentially asking the court to authorise and direct the commissioner to comply with the s417 order as well as declaratory relief *vis-à-vis* the settlement agreement.[16]

[30] Considering the fact that the bulk of the 2014 application concerned the conduct of the Shaffs, the averments necessary to motivate for the continuation of the enquiry would have had to be placed before the court in the form further affidavits. I believe though that that could have been achieved through supplementing the papers in the 2014 application and joinder of parties where necessary. However, notwithstanding that finding, it is not my view that the 2015 application is "fatally defective" or that the matter is *lis pendens*. In any event Absa had not opposed the procedure adopted by Wolpe in terms of Rule 6(f)(e) in setting down both matters for simultaneous hearing. Their acquiescence accordingly, in my view, disposes of the argument that the application is defective by virtue that it deals with a similar question as per the 2014 application. Protea agreed to the court order

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[16] *On 15 September 2015 settlement negotiations between Absa and Wolpe regarding the suretyship litigation was abandoned followed by a letter (2015 application page 173) from Wolpe's attorney to attorneys for Absa, Protea and the liquidators regarding Wolpe's intention to resume the enquiry. The 2015 application by Wolpe followed on 27 October 2015.*

of 6 November 2015[17] in which the parties arranged a timetable for the filing of further affidavits in the 2015 application and proceeded to file its answering affidavit in accordance therewith. Protea had thus acquiesced in the procedure adopted in that it had taken further steps in the matter and it does not behove of it now to complain of the alleged irregularity.

[31] The order resulting from the 2014 application had not been granted in perpetuity. It was clearly intended to be addressed by another court sooner rather than later. That is more so my view as Griesel J found that *"certain legitimate aspects [were raised] calling for an enquiry".*[18] He would not have intended in those circumstances to delay the enquiry for a substantial period of time, let alone halt it *ad infinitum*. Absa chose to sit in the comfort of an interim order, compelling other role players such as Wolpe to channel to court proceedings with a view to pronouncing on the viability and status of this enquiry as it relates not only to the Shaffs but to enquiry overall.

Abuse:

[32] Courts are empowered and obliged to curtail what would be abuse of an enquiry or use of the enquiry for ulterior motives. What constitutes as an abuse had been the subject of various court cases. The high water mark of the opposition to continuation of the enquiry is that Wolpe not only applied for the s417 order with ulterior motive, but that she is persisting in using the enquiry as a forum in which she could pursue her own agendas. This ulterior motive, Absa and Protea argue, is that she is attempting to use the enquiry for forensic advantage in respect of litigation

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[17] *Brought on the urgent roll before Erasmus J.*

[18] *2014 application – record page 169 – paragraph 10 of the judgment of Griesel J.*

which is pending against Absa and Protea and which she may benefit from in the form of being released from Absa's suretyship claim against her.

[33] In ***Kebble v Gainsford***[19] the court held that the question whether an enquiry is an abuse must, in all instances, depend on the particular circumstances of the case. In evaluating whether there is an abuse, the court is required to cumulatively weigh up all the factors, both for and against the holding of an enquiry, and *"it is the obligation of the party wishing to stop the enquiry to demonstrate a clear abuse."*

[34] In ***Roering and Another NNO v Mahlangu***, [20] the court held:

"Once it is accepted that a permissible purpose in causing a witness to be summoned to an enquiry is to enable the liquidator to make an informed assessment of the merits of a potential claim or defence to a claim, it must follow that the fact that the individual concerned is a potential witness in other civil litigation, actual or contemplated, is neutral in determining whether the summons is an abuse. Something more must be identified as constituting an abuse…."

[35] In ***Ferreira v Levin***[21] in considering whether interim relief staying an enquiry should have been granted pending outcome of the determination of a constitutional issue the Court held that said that such relief (i.e. stopping an enquiry) must be **"***absolutely necessary".*

[36] I could not on the papers find evidence of *"that something more"* nor a case of *"clear abuse"* to support the averments that Wolpe has an ulterior motive for pursuit of the enquiry. Wolpe denied in detail the allegations so raised. Counsel for Protea submitted that it was very plain to infer Wolpe's abuse of the process from the way in

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[19] *2010 (1) SA 561 (GSJ)*
[20] *(581/20150 [2016] ZASCA 79 (30 May 2016) - paragraph 38.*
[21] *1996 (1) SA 984 (CC).*

which matters had unfolded. Clearly the entanglement between the parties and the various role players are enmeshed with infighting. The one to the other seeks to succeed in various battles. The war between them is rampant and waging. However, whilst it is so that various theories can be possible, it certainly does not pass the muster of being the only reasonable inference that could be drawn from the facts and it remains in my view a conjecture. Even though Wolpe may hope to benefit from the enquiry, this is not a basis on its own to find that the enquiry is an abuse of process.

[37] In ***Roering*** supra the Court held that the fact that the issues canvassed in the course of a s417 enquiry may overlap with issues in pending or contemplated civil litigation is not as such a ground for inferring abuse.[22] It may be that there is a possibility that the enquiry and examination of witnesses could be advantageous in other litigation. In these circumstances Wolpe's denials of improper motive and collusion with the Shaffs and Himelsein can be accepted by this Court.

[38] In ***Ferreira*** supra Justice Ackermann spelt out the purposes of an enquiry. One of those purposes is to investigate the validity of claims by the company and to determine whether they should be pursued. It is 'obviously in the interest of creditors that doubtful claims which the company may have against outsiders be properly investigated before being pursued'.[23]

[39] The purpose of the enquiry is to discover facts beneficial to creditors and shareholders of AMU, uncover activities which were not only detrimental but were concluded fraudulently to the detriment of the company and to get to the bottom of

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[22] *Page 15, paragraph 26*

[23] *See Roering supra - paragraph 23 quoting from the judgment in* Moolman v Builders and Developers (Pty) Ltd (in Provisional Liquidation): Jooste Intervening *1990 (1) SA 954 (A) at 960G-I quoted with approval in* Ferreira *at paragraph 123.*

the collapse in circumstances where allegations are strongly indicative thereof. The stance of the liquidators must be taken into account when a court considers the further need (if at all) for a s417 enquiry previously ordered. In their affidavits[24] they drew the court's attention to the fact that the winding-up is at an advanced stage. A first liquidation and distribution account was advertised without objection and confirmed by the Master. An amended second liquidation and distribution and account was advertised without objection and was confirmed by the Master on 22 October 2015. Most of the funds available from the realisation of the assets have been distributed to creditors by way of dividends in terms of confirmed accounts. Approximately R500 000 of free residue funds was carried forward to be dealt with in a third liquidation and distribution account.

[40] The liquidators also raised the issue of the costs of the enquiry. Their submission is that the Wolpe must be responsible for the costs necessary for the convening of the enquiry and the conduct thereof to the extent that the enquiry is instigated and concluded by her, which costs ought to include the report by the Commissioner as per clause 5 of the s417 order. It had not been disputed that Wolpe (in the event of the enquiry continuing) would be liable for the costs of convening and conducting the enquiry to the extent that it is conducted by her, and that such costs include the costs of preparation of the Commissioner's report. I am concerned that the affidavits by the liquidators do not indicate to what extent, if at all, they had investigated or looked into allegations of dubious transactions and activities relating to the carrying on of the business of the hotel as well as the funding and management of the hotel project including the conclusion of the amended and restated loan agreement. No reference is made to it and no explanation is proffered

[24] *2015 Application – liquidator's affidavit – page 745.*

as to their failure to have done so and why they elected not to do so. Certainly their input in this regard would have assisted this Court, not to mention that its absence lends circumspection. In any event, the liquidators have indicated that they abide the decision of this Court.

[41] Notwithstanding the above findings, it remains to be decided whether the enquiry should be allowed to continue. In 2012 the Court ordered an enquiry on the strength of the facts and circumstances as set out therein. Whilst the question before me was whether the enquiry ought to continue, the reality is that the enquiry never started. I exercised what is referred to as a judicial peep of the *ex parte* application. Though I am not at liberty to set out the averments made in the *ex parte* application, I am satisfied that the issues so raised and upon which the *ex parte* order was granted had not been altered by subsequent events and the Commissioner remains obliged to comply with his obligations in terms of the s417 order. That the winding up is at an advanced stage cannot be deemed to be good enough reason to terminate the enquiry.[25] Sufficient cause for alarm had been raised in the *ex parte* application which had caused the granting of an enquiry. That time had been wasted in the course of the waging battle between the parties cannot prejudice what it is ultimately the Court's enquiry. Absa argued that various of the issues raised before the Court in the s417 application had since been addressed in various affidavits. This I do not agree to be dispositive of the concerns so dealt and in any event it requires to be ventilated through the medium of interrogation, which the form of statements under oath cannot appease or appropriately satiate. Lastly, whilst a Court had pronounced a view that the sale of the hotel did not amount to a

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[25] *Absa argued that due to the advanced stage of the winding up of AMU an enquiry will serve no purpose and will not benefit the* concursus creditorum *as Absa is the only secured creditor of AMU and that there is no chance of any recovery by any unsecured creditor of AMU.*

collusive disposition, this respectfully, is not the end of the matter. The need for the enquiry to my mind remains legitimate.

Wolpe's locus standi:

[42] The question begs whether Wolpe had the *locus standi* to bring the *ex parte* application in the first place? Reliance on her being a *"creditor of AMU"* had been the focus of strong submissions on the part of Absa. In February 2016 Wolpe delivered her replying affidavit to Absa. In that affidavit, she states that:

"My status as creditor of AMU and my locus standi to have brought the ex parte application were dealt with extensively at the first sitting of the enquiry where it was unequivocally conceded by the liquidators that I was "at least a contingent creditor of AMU" and that I in any event had sufficient interest and the requisite locus standi to bring the ex parte application".

[43] It thus remains to be considered whether the s417 order would have been granted had she brought the application as a contingent creditor instead of an ordinary creditor. It was Absa's submission that the Act does not permit it and the Court therefore would not have entertained the application nor would it have granted the order.

[44] Section 417 (1) of the Companies Act reads:

"In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company,

or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company."

[45] In ***Miller and Others v Nafcoc Investment Holding Co Ltd and Others***[26] the court held *inter alia* that the section does not envisage an application from a limited category of persons. This reasoning is eminently sensible, for otherwise the Master or the Court, as the case may be, would be unable to act unless he or it was given information from specified persons.[27]

[46] In ***Venter v Williams and Another***[28] the court found it was unlikely that a court will readily conduct an examination or cause an examination to be conducted (by a Commissioner to whom the Court's powers are delegated in terms of s418 of the Act) without first being satisfied that the company is likely to benefit from such an enquiry and that it will not, by doing so, dissipate funds of the company which otherwise would be available to creditors. At page 313 of the judgment, paragraph H the court stated the following:

"But that does not mean that, if in fact the person who bring the irregularities or alleged irregularities to the Court's attention and asks for an enquiry is not a creditor or a person with a financial interest, the Court is obliged to decline to make an order in the matter. "

[47] The Court further held[29] that in terms of the Companies Act not only creditors but also contingent and prospective creditors of a company may apply for its liquidation. That being the case, it is illogical to assume that a person who could apply for an enquiry under s417 must be any greater than one who applies for a

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[26] *2010 (6) SA 390 (SCA)*
[27] *Paragraph 9*
[28] 1982 (2) SA 310 (N)
[29] *Page 314 C*

winding-up order. That the purpose of a s417 enquiry is implemented with the anticipation of benefiting the company, it is arguably so that a person of a lesser interest could satisfy the legal standing in terms of the Act to apply for the enquiry.

[48] In ***Lynn NO and Another v Kruger and Ors***[30] the court said the procedure provided by section 417 and 418 is aimed at assisting officers of the court in the performance of their duty to the creditors of companies in liquidation, the Master and the Court.

[49] In ***Pretorius and Others v Marais & Others*** [31] the court held that the purpose of the enquiry is to discover facts beneficial to creditors and to uncover activities detrimental to wrongdoers.

[50] South African Insolvency law had in recent years seen the creation of a new corporate dispensation with the coming into being of the new Companies Act 71 of 2008.[32] This legislation also introduced a new business rescue regime. With the development of company law, policy considerations have come into play, such as providing a clear, facilitating, predictable and consistently enforced law and a protective and fertile environment for economic activity.[33] Five points of economic growth were identified, namely enterprise development, promoting investment, making companies more efficient, encouraging transparency and high standards of governance and following best practice jurisdictions internationally.[34] Goal statements in reviewing corporate law included simplification, flexibility, efficiency, transparency and predictability.[35] This rationale is clearly in line with our

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30 *1995 (2) SA 940 (N) at 944F.*
31 *1981(1) SA 1051 (A) at 1062H – 1064B.*
32 *Judgment by Griesel J – delivered 18 June 2014.*
33 Memorandum on the objects of the Companies Bill 2008 para 1.
34 Memorandum on the objects of the Companies Bill 2008 para 1.
35 To be or not to be? The role of private enquiries in the South African Insolvency Law *by .Joubert &Calitz.*

constitutional dispensation, international trends and boosting confidence in our economic development and growth by way of corporate accountability. Clearly the processes in the course of winding up of a company must be in line with the aforesaid principles. These principles must further form the basis and guidelines for determining the need for an enquiry and any subsequent quest for its termination.

[51] Applicants wishing to set aside an order in terms of section 417 must prove that the statutory balance does not protect them properly. I cannot find on the strength of the evidence before me that the statutory framework would not be able to protect Absa in these circumstances. If anything subpoenas previously issued in this very enquiry against Absa had been successfully contested by it for having been too broad, unreasonable and an act of abuse of power. This avenue remains open to Absa, or any aggrieved party as the case may be, in respect of any future subpoenas issued

[52] A reading of the supporting papers in the *ex parte* application satisfies why the enquiry was ordered. For determining the question presently before this Court, I am satisfied that the enquiry still serves a legitimate purpose and that sufficient cause existed and continues to exist for the enquiry to take place. In this matter an enquiry is patently indicated from the averments supporting the *ex parte* application, the relevance of which in my view had not been overtaken by subsequent events. I am not persuaded that there would be no benefit to the Court, to the Master or to AMU by virtue of the commencement of the enquiry. Nor am I persuaded that a balance of competing interests favours that of Absa and Protea. Whilst Absa and the relevant witnesses may be inconvenienced in having to prepare for and attend the enquiry, it does not justify the inference that the enquiry would cause undue prejudice to it. The prejudice to Absa and its employees and former employees as

the case may be is a relevant factor and indeed had been taken into account in the exercise of this Court's discretion. In any event, Absa and Protea have known of the enquiry for two years and agreed to the dates of its continuation in January 2014. [36] I am not persuaded that such inconvenience is so significant that it negates their duty to attend the enquiry and testify. Furthermore, if the rights of witnesses are infringed and the Commissioner fails to act, the Court's intervention can be sought. Until that occurs, however, it is premature for this Court to prevent the Commissioner from executing his duties in accordance with the order of 26 July 2012 (as amended) and an order by agreement of 30 November 2012.

Application to strike out:

[53] The rationale behind the power of a Court to strike out is that it promotes orderly ventilation of the issues before it, promotes focus on the real issues, presents proliferation of issues, unnecessary prolix and irrelevancies that unduly burden records in application proceedings.[37] Wolpe's application for striking out essentially revolves the argument that the complaints and averments raised by Absa in the 2014 application is a repeat of those made in the 2012 application. The argument follows that as the substance of the complaints are the same and in light of the fact that the 2012 application culminated in an order by agreement in November 2012, Absa is therefore legally barred since the settlement agreement operates to exclude further

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[36] Paragraph 3.2 of the settlement agreement provides:

> *"in the event that no agreement can be reached in terms of paragraph 3.1 then, subject to the provisions of paragraph 3.5(a) below, the parties agree that notification to their legal representatives by the respondents legal representatives of the date and time of the enquiry, at least two months prior thereto, will constitute proper and adequate notification thereof and that the* applicants will be bound *by such notification as if they had been specifically and individually summoned to attend the enquiry on that day and time;"*

[37] *Gold Fields Ltd and Others v Motley Rice LLC* 2015 (4) SA 200 (GJ).

litigation on the same grounds or causes of action. As such they are irrelevant to the determination of the applications now before court.

[54] I must stress that the s417 enquiry ordered by Koen AJ is not "Wolpe's enquiry". That she would have to fund the costs of convening and conducting the enquiry to the extent that it is conducted by her including the costs of the Commissioner's report, does not make it her enquiry. The enquiry remains that of the Court, having delegated powers to the Commissioner. Her conduct or election, failure or neglect in pursuing the enquiry promptly (and in circumstances where it was evidently available to her to do) cannot be decisive for termination or dispositive of the enquiry. Moreover, the fact that there had in 2012 been a settlement agreement is not a bar in these specific circumstances to allow a Court to be fully informed in adjudicating whether the enquiry ought to proceed or not, let alone some two or more years later. The effluxion of time and intervening events make it clear that the settlement agreement cannot be deemed to be binding on this Court in exercising its discretion as to whether to permit the enquiry to proceed. The Court has an unfettered discretion to take into account all matters relevant to the exercise of its discretion. Accordingly, I see no basis to exclude evidence that may be relevant to the exercise of the discretion and the application to strike out falls to be dismissed. In view of the fact that the application was not argued as a separate application but was heard as part of the main application, I see no need to deal with costs in respect thereof separately.

Costs:

[55] Having determined that circumstances justify the continuation of the enquiry, it is worthy to refer to the manner in which Wolpe conducted herself in the course of litigation up to this point. In 2012 Absa brought an application for the setting aside of

the *ex parte* order. The 2012 application was settled on terms recorded in a written settlement agreement concluded on 28 November 2012 and made an order of Court. Absa agreed to the continuation of the enquiry and undertook not to institute any further proceedings for the setting aside of the enquiry. This order by agreement clearly paved the way for the enquiry to proceed, which in my view would have had to and should have been proceeded *post haste*. Instead, approximately ten months later Wolpe surprisingly goes on what can be called a frolic of her own and a costly one too. On 25 September 2013 she brought an urgent application, in the name of the liquidators, for a *rule nisi* and an interdict to declare the purchase of the Protea Hotel Group (Pty) Ltd's shares by AMU as a collusive transaction within the meaning of s31 of the Insolvency Act.[38] Binns-Ward J dismissed the interim relief on 13 December 2013. Two months later she proceeded to withdraw the main application set down for hearing and tendered costs to the first to third applicants and third and fourth respondents up to and including Friday 13 December 2013 which were not already payable by her in terms of the order of Binns-Ward J.

[56] I have already indicated earlier in my judgment that resort to a further application as opposed to applying for set down with the filing of supplementary papers would have been a more cost effective approach.[39] But alas! Launching of a new application was clearly designed to show the force of power during this expensive and explosive warfare.

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[38] *This application was brought by Wolpe in the name of the three liquidators with herself as fourth applicant against the Shaffs as well as Protea and Absa as third and fourth respondent respectively - Case No: 15766/13.*

[39] *See paragraph 30 supra.*

[57] For the reasons set out above and taking into account the manner in which Wolpe chose to conduct herself *vis-à-vis* pursuance of the enquiry and the institution of the 2015 application, I believe that I am justified in deviating from the general rule that costs follow the result. Wherefore, save for a costs order in respect of the seventh to ninth respondents in the 2014 application, I do not see fit to otherwise grant a favourable costs order.

[58] In all circumstances of the case and for the reasons set out herein, it is not necessary to deal with further submissions raised in argument and accordingly I make the following orders:

i) *Prayers 2.1 and 2.2 of the notice of motion in case number **9450/2014** is dismissed with no order as to costs, save for costs in favour of the seventh, eighth and ninth respondents which costs shall include the costs of two counsel;*

ii) *The Commissioner is herewith authorised and directed to comply forthwith with the terms of the order issued in terms of Section 417;*

iii) *The first to eleventh respondents under case number **16693/2012** are declared to be bound to the terms of settlement agreement entered into on 28 November 2012 and which agreement was made an order of court on 30 November 2012. It is further ordered that the enquiry shall resume on a date to be determined in terms of sub-clause 3.2 of the settlement agreement.*

*iv) No order as to costs in respect of case number **20672/15**.*

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SALIE-HLOPHE, J

JUDGE OF THE HIGH COURT