IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Holderness, AJ)

[Not Reportable]

Case No.: 2488/2017

In the matter between:

BRAAM SWART	First Applicant
PETRUS JOHANNES VAN DER WESTHUIZEN	Second Applicant
JOHANNES CHRISTIAAN THIART	Third Applicant
ARNO SWART	Fourth Applicant
JACQUES BRINK THERON	Fifth Applicant
HUGO VAN NIEKERK	Sixth Applicant
MUHAMAD KHAN	Seventh Applicant

and

MAGISTRATE A FOURIE	First Respondent
LEANNE LOMBARD N.O.	Second Respondent
MANYANE KINLON MALEMA N.O.	Third Respondent
ABSA BANK	Fourth Respondent
PIETER DEMPSEN NEETHLING	Fifth Respondent

JOHANNES HENDRIK BOTHA Sixth Respondent

PETRUS HERMANUS SWART Seventh Respondent

THE MASTER OF THE HIGH COURT Eighth Respondent

In an application for urgent interim relief

JUDGMENT DELIVERED ON 13 FEBRUARY 2017

HOLDERNESS AJ

[1] This is a matter which came before me on a Friday afternoon in the urgent motion court seeking interlocutory interdictory relief concerning an interrogation at a meeting of creditors to be held before a magistrate in the district of Paarl on the following Monday morning.

[2] I only received the papers at 16h30 on Friday. It was contended by Mr Ferreira, appearing for the second and third respondents, that the filing of the application on an hour's notice was a deliberate stratagem to prevent his clients from having an opportunity to file opposing papers and prepare for the hearing.

[3] The urgency, according to the applicants, arose from a misunderstanding between Mr Ferreira and Mr Woodland, counsel for the applicants, in terms of which Mr Woodland was under the impression that of the applicants filed an application to set aside the subpoenas by 10 February 2017, the meeting of creditors would not proceed on 13 February 2017.

[4] According to the applicant's attorney, when Mr Woodland sought confirmation earlier on 10 February 2017 from Mr Ferreira that they would not proceed if the application were delivered during the course of the day, Mr Ferreira informed him that he agreed to the meeting not proceeding only if the application had been *granted* before 13 February 2017.

[5] Pandemonium ensued, culminating in the present application being brought at the last minute. In the brief affidavit filed by the second and third respondents' attorney, he stated that counsel in fact agreed to the application being filed within seven days of the creditors meeting held on 23 January 2017 and postponed to 13 February 2017.

[6] I indicated that I was not inclined to strike the matter from the roll on the basis that any urgency relied upon by the applicants was, as alleged by the respondents, self-created. Particularly because I did not know whose version was correct (and as it is interim relief I am in any even bound to accept the applicants' version), and that as the issues arose out of an agreement between the respective parties' counsel, it could not be resolved without them giving evidence, which of course is not feasible in the circumstances.

[7] I now turn to deal with the interim relief sought. The applicants are members of a close corporation which is currently under winding up and is unable to pay its debts. On 20 December 2016, the presiding officer issued subpoenas, addressed to the applicants, in terms of section 66(1) and (2) of the Close Corporations Act, 1984 ('the Act') as read with sections 414(2), 415 and 416 of the Companies Act, 1973. The subpoenas required the attendance of the applicants at the meeting of creditors to be interrogated and further required the applicants to bring with them a long list of specified documents.

[8] The applicants have launched an application to set aside the subpoenas and to permanently stay the interrogation by Bella Rosa Investment Holdings (Pty) Ltd or its legal representatives, or former legal representatives, which has been set down for hearing on 10 March 2017. The current urgent relief sought before me is for interim interdicts to stay the operation of the subpoenas and the interrogation of the applicants, at the postponed meeting of creditors on 13 February 2017.

[9] The statutory provisions, referred to above and in terms of which the subpoenas were issued have the following relevant features:

1.1 the applicant as members of the close corporation have a duty to attend the first and second meetings of the creditors of the corporation under winding up, unless they have been excused by the Master or the officer presiding at such meeting;

1.2 a subpoena may be addressed to only a person who on reasonable grounds is believed to have been in possession of any property belonging to the corporation, indebted to the corporation or in the opinion of the Master or presiding officer able to give material information concerning the corporation or its affairs and the only documents that may be required under the subpoena which contains such information;

1.3 an interrogation may proceed only in respect of matters concerning the corporation, its business or affairs or concerning any property belonging to the corporation – the presiding officer is required to disallow any question

> which is irrelevant or which in the presiding officer's opinion would prolong the interrogation unnecessarily.

[10] Mr Woodland pointed out the extensive nature of the documents sought in the subpoenas. *Prima facie*, the documents appear to me to traverse subject matter far beyond the permitted scope of the affairs or business of the corporation or its property, and it therefore appears that the officer issuing the subpoena seems not to have applied the statutory provisions which empower the issuing of such a subpoena and define the scope of documents which may be required thereunder.

[11] In my view there is a *prima facie* case to stay the operation of the subpoenas as in relation to the attendance of the applicants, no such subpoena was necessary as it is their duty to attend such a meeting without any subpoena and further the documents sought therein appear to be a "fishing expedition" far exceeding the legitimate bounds of the statutory provisions.

[12] In relation to the interrogation of the applicants, the submission has been made that there is presently existing civil litigation between brought by the creditor who is driving the interrogation against the applicants as sureties for the corporation. The fear has been expressed that admissions might be made in the interrogation which might be used against the applicants in the civil litigation.

[13] As members of a close corporation presently under winding up, the applicants have a statutory duty to attend any meetings of the creditors and be subjected to interrogation concerning all matters relating to the corporation or its affairs and concerning any property belonging to the corporation. The fact that during the interrogation admissions might be

made which might compromise their position in civil litigation is not a reason to nullify or suspend their statutory obligations.

[14] It is only where the purpose of the interrogation is to further this extraneous civil litigation and is not in fact directed at acquiring information concerning the corporation, its affairs or property belonging to the corporation, that it becomes an abuse.

[15] I have now had an opportunity to read the application to set aside the subpoenas and to permanently stay the interrogations by the legal representatives of Bella Rosa specifically, which sets out in some detail the acrimonious nature of the relationship between Van Zyl, of Bella Rosa, and the members of the corporation which has been wound up.

[16] Whilst it is not unusual for the same legal representatives to act for both the petitioning creditor and liquidator, nor for the petitioning creditor to fund the winding up, it appears, on the facts in this case, that an interrogation specifically by the legal representative for the creditor / liquidators, may have the result that the proceedings are conducted in a manner oppressive to the members, particularly in light of the pending litigation between the parties and the detrimental effect of any admissions elicited as a result of such conduct and subsequently used against the members in the related surety action

[17] The relevant principles regarding applications of this nature were set out by Thring J in *James v Magistrate, Wynberg, and others*[1], which was referred to by Farlam J in *Lane and Another NNO v Magistrate, Wynberg*[2]. It is apparent from the relevant case law that the Court has the discretionary power to stay an interrogation of an insolvent or a witness at a

[1] 1995 (1) SA 1 (C)
[2] 1997 (2) SA 869 (C) a part of the judgment not affected by the subsequent decision of the Appellate Division

creditors' meeting. In the exercise of this discretion it will weigh up the potential prejudice to the person sought to be interrogated if the interrogation proceeds, against the potential prejudice to be suffered by the creditors if the interrogation is stayed: see *De Jager v Booysen NO and Swanepoel NO*[3]. The Court has power to prevent interrogation which is oppressive or vexatious.

[18] In *De Jager supra* the Court confirmed that an interrogation which is oppressive or vexatious will always constitute an abuse of the provisions of s 65 of the Act.

[19] During argument, Mr. Ferreira declined to avail himself of the opportunity to file a more comprehensive opposing affidavit during the weekend before I prepared these reasons, and when I enquired from him what prejudice the respondents would suffer if the interrogation was stayed pending the main review application, he pointed out that it was in the interests of the creditors that the liquidation not be delayed and that the costs of the meeting on Monday would be substantial as he was on brief and other witnesses were due to appear to be examined.

[20] After further questioning I established that witnesses other that the applicant had been subpoenaed to appear on 13 February 2017, and that the day would therefore not be wasted.

[21] In paragraph 2.1 of the notice of motion, the applicants seek an order staying the section 414 notices against themselves and against the fourth and fifth respondents. The fourth and fifth respondents were not given notice of this application, and as far as I can tell, have not indicated that they require a stay of the notices. Mr. Woodland was not on record for

[3] 1963 (4) SA 760 (W) at 764G--765A

the fourth and fifth respondents, and did not object to the interrogation of other witnesses proceeding today. I am, however, satisfied that the documents listed in the subpoenas served upon the fourth and fifth respondents appear to be impermissibly broad, and that the subpoenas to produce such documents should accordingly be stayed until the outcome of the application to review and set aside such subpoenas.

[22] Considering the unduly broad scope of the documents listed in the subpoenas served upon the applicants, the history of the litigation between the parties, and the pending litigation in the surety action, I am satisfied that the applicants have made out a *prima facie* case for the interim relief sought, and that the other requirements for an interim interdict have been met.

[23] I indicated to counsel, on Friday afternoon, that I would receive any further submissions over the weekend by email. I waited until Sunday evening to prepare these reasons. At 07h45 this morning, I received a note from Mr. Ferreira. Reliance is made on the decision in *Receiver of Revenue Port Elizabeth v Jeeva and Others*[4], where the Court rejected the general proposition that a creditor may object to an examination on the ground of the liquidator's perceived bias.

[24] It is well established that insolvency interrogations are open to abuse, particularly in circumstances such as those in the present matter. I have briefly considered the *Jeeva* decision and I am of the view that the facts in that case are distinguishable and do not preclude me from granting interim relief in the present application. In the present matter, the decision of the Magistrate to issue subpoenas which are unduly broad is subject to review and to being set aside, and the only prejudice to the second and third respondents is a delay of less

[4] 1996 (2) SA 573

than a month, and costs if the meeting is cut short today, which they could well recover in due course. Weighed against the potential prejudice to the applicants if the interrogations proceed, I am satisfied that the balance of prejudice favours the granting of the interim relief sought.

[25] In the result I order as follows:

1. The applicants' non-compliance with the rules and practices relating to service and time periods is condoned;

2. Pending the final determination of the relief sought in the main application, under case number 2488/2017, to review and set aside the subpoenas:

    2.1 the notices in terms of section 414 of the Companies Act, 1973, attached to the founding papers in this application and requiring the applicants to appear before the first respondent for the purposes of interrogation with respect to Silver Falcon Trading 84 CC (in liquidation), and the fourth and fifth respondents, requiring them to produce the documentation listed in the subpoenas, be stayed; and

    2.2 the interrogation of the applicants by Bella Rosa Investment Holdings (Pty) Ltd or its legal representatives, or former legal representatives, be stayed.

3. All issues of costs shall stand over for determination at the hearing of the application for review launched by the applicants on 10 February 2017 and set down for hearing on 10 March 2017.

HOLDERNESS, AJ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES

For the Applicant(s):	Adv G Woodland SC
For the Respondent(s):	Adv A Ferreira
Date of Hearing:	10 February 2017
Judgment delivered on:	13 February 2017