REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

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

Case No: 109/2021

In the matter between:

CRAIG MASSYN **1st Applicant**

and

ALMERO SMUTS DE VILLIERS N.O. **1st Respondent**
CHRISTIAN FINDLAY BESTER N.O. **2nd Respondent**
LAILA ESSOP N.O. **3rd Respondent**

Coram: Bozalek J

Heard: 15 April; 5, 6 & 11 May 2021

Delivered: 1 June 2021

JUDGMENT

BOZALEK J

[1] This application arises out of the liquidation of Imagina FX (Pty) Ltd (hereinafter 'the company') which was placed into final liquidation on 9 November 2020 after having been provisionally liquidated on 7 October 2020. The company conducted the business of a fund manager trading in foreign currencies by buying and selling currencies and taking advantage of fluctuating relative values between them. To this end it used funds solicited from members of the public which funds were estimated to have been in excess of R1.5bil.

[2] The applicant in the present matter was one of two directors of the company and allegedly the guiding force behind the so-called Imagina FX Investments Scheme. The company was liquidated at the instance of three investors/creditors who alone placed more than R20mil in the scheme and sought its liquidation when it was unable to honour their withdrawal request made after their investigations apparently revealed that the company's business activities were both in contravention of financial services legislation and fraudulent. The company did not oppose the liquidation and in fact consented thereto.

[3] The first applicant is Advocate Almero de Villiers S.C. and he abides the Court's decision. The second and third respondents in this application are the provisional liquidators (hereinafter 'the liquidators') of the company and the relief sought against them arises from an application which they made to this Court on an ex parte basis pursuant to which they obtained an order on 19 October 2020 authorising the bringing of that application, extending their powers to include certain of those listed in sec 386(4) of the Companies Act, 61 of 1973 ('the Act'), establishing an enquiry into the affairs of the company in terms of sec 417 of the Act, appointing Mr de Villiers as commissioner and authorising him to summons persons to be examined by at the enquiry including but not limited to twenty two persons amongst whom was the applicant. I shall refer to that application as the extension of powers application.

[4] The sec 417 enquiry (hereinafter 'the enquiry') appears to have got off to a stuttering start and presently stands adjourned pending the outcome of this application. It gave rise to an application in November 2020 in which the applicant sought to set aside a subpoena served on him to appear before the enquiry. Further litigation relating to the affairs of the company comprised an application by the liquidators for an Anton Piller

order executable against the applicant and two others which application was heard before Baartman J, the setting aside application having been heard by Binns-Ward J.

[5] In terms of the amended notice of motion the applicant seeks the following relief:

1. the rescission of the order of this Court per Salie AJ in the extension of powers application which established the enquiry and extended the powers of the respondents.
2. in the first alternative, removing Mr de Villiers as the commissioner and setting aside the subpoenas issued by him on 2 November and 1 December 2020 for the applicant's interrogation at the enquiry, in the further alternative, merely setting aside the subpoenas.

[6] The relief sought is opposed by the liquidators. Inasmuch as the alternative relief involved a review proceeding, a voluminous record of more than 800 pages was filed. I deal firstly with the applicant's argument that the extension of powers order made by Salie AJ establishing the enquiry and extending the powers of the liquidators should be rescinded.

[7] The first basis upon which it was contended that Salie AJ's order should be set aside was the contention that the applicants in that matter (the liquidators) had failed to establish a jurisdictional requirement, namely, that the company was unable to pay its debts in the course of being wound up. A related argument, as I understood Mr Sievers' submissions on behalf of the applicant, was that no sec 417 enquiry could be established before the company had been placed in final liquidation, it being common cause that Salie AJ's order was made whist the company was in provisional liquidation.

[8] Section 417 of the Companies Act, 61 of 1973 ('the Act'), under the heading **Summoning and examining of persons as to affairs of company** provides as follows:

> *'(1) 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'.*

[9] Section 418 provides, under the heading **Examination by commissioners** provides as follows:

> *'(1)(a) Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purposes of taking evidence or holding any enquiry under this Act in connection with a winding up of any company'.*

[10] In regard to the question of whether a sec 417 enquiry can be established while the company is still in provisional liquidation, I was referred to no clear authority on this point. Section 1 of the Act defines a winding up order as including an order whereby a company is placed under provisional winding up for so long as such order is in force and Chapter 14 of the Act is still applicable to the winding up of insolvent companies by virtue of sec 224 of the 2008 Companies Act read with item 9 of sec 9. Where an appropriate case is made out there is good reason to read sec 417(1) as permitting the establishment of an enquiry even whilst the company is still in provisional liquidation. Opposition to a final order could result in extended litigation and thereby frustrate the main purpose of a sec 417 enquiry which is to obtain information about the affairs of the company on an expeditious basis so that the liquidators can perform their functions and

act in the best interests of the creditors and shareholders. It would appear, furthermore, that the authors of Henochsberg support the interpretation contended for by the liquidators.[1]

[11] Clearly before an enquiry could be established to look into the affairs of the company it had to be a company *'unable to pay its debts'*. On behalf of the applicant it was argued that neither the provisional nor the final winding up order demonstrated that the company was unable to pay its debts and nor was there any factual basis in the liquidation application itself to support such a claim. The applicant contended further that this issue was also not addressed in the extension of powers application pursuant to which the enquiry was established. It is necessary therefore to consider in greater detail the case made out by the applicants in the liquidation application as well as that of the liquidators in the extension of powers application.

The liquidation application

[12] In paragraph 8 of the founding affidavit in the liquidation application the first applicant, Mr Theo van Wyk, set out the grounds for the relief sought as being that *'Imagina FX is unable to pay its debts, alternatively that its liabilities exceed its assets and in the further alternative, that it is just and equitable that it should be wound up'*. He proceeded to describe the company's business, that it had attracted investor funds in excess of R1bil and that it had approximately 1000 investors. Various alleged irregularities on the part of the company and/or its directors or its associated companies were pointed out, including allegations that it conducted its trading activities in contravention of the relevant financial services legislation, that the written fund

[1] Henochsberg Vol 1 at 891.

management contracts with its investors were concluded with defunct or liquidated companies, that the bank account into which investment funds were initially paid belonged to a company other than Imagina FX and that two companies, Praesidium Advisory and Praesidium Wealth which were key components of the investment scheme, had had their licences suspended by the Financial Sector Conduct Authority (hereinafter 'the FSCA') in May 2020 following complaints from investors that those companies had operated an unapproved foreign collective investment scheme. It was further alleged that the company's online platform was experiencing *'operational difficulty'* and that its trading activities were effectively frozen. The deponent referred to communications from the company to investors referring to delays in payments to investors and attributing this to the suspension of Praesidium Advisory's FSP licence and confirming that the company had been asked by the FSCA to suspend all trading activities with effect from mid-July 2020. In that communication the FSCA also indicated that the company was in no position to give any indication as to when it would be in a position to pay funds to its investors. The deponent referred to a press release by the FSCA on 18 September 2020 ('the FSCA September statement') which indicated that, based on its investigation into the affairs of Praesidium and the company, there was *'a strong indication the majority of clients' funds (was) unlikely to be recovered'*. Moreover, Mr Theo Van Wyk deposed that on 15 September 2020 he had requested payment of the amount of R22 300 000.00 in respect of investments made by him and two members of his family but no such payments were received.

[13] In paragraph 52 of his affidavit Mr van Wyk concluded that the company was unable to pay the amounts that were due and payable to the applicants due to the fact that its activities and accounts were frozen and it had admitted its inability to do so at that

stage. He also referred to the FSCA's September statement that the majority of clients' funds were unlikely to be recovered adding that investors thus faced the prospects of not getting their capital back, let alone any profits.

[14] As mentioned the company did not oppose the application. In fact, on 6 October 2020, the day before the urgent application for liquidation served before Court, an attorney acting on behalf of the company and the applicant wrote to the Mr van Wyk's attorney stating inter alia that:

> *'We were in any event considering the liquidation of Imagina due to the fact that the trading platform on which it operated has suspended its accounts and is therefore unable to continue its business of Forex Trading at this stage.*
>
> *In the premises, it is our instruction that our client consents to the provisional liquidation of Imagina FX on 7 October 2020 ...'*

[15] In the same email the attorney stated that the founding affidavit in the liquidation application contained *'several factual incorrect allegations, wild assumptions and unwarranted conclusions'* but did not specify them. The email contained no assertion that the company was able to pay its debts. There being no opposition to the application for liquidation, neither the provisional nor the final liquidation order were accompanied by reasons from the Courts which made the orders.

[16] The extension of powers application served before Salie AJ. In the liquidators' founding affidavit Mr Bester referred to the preceding application for the company's liquidation. He stated that the company had been provisionally wound up on an urgent basis *'because it was unable to pay its debts as envisaged in and by sec 344(f) of the 1973 Companies Act, and in addition, its liabilities exceeded its assets and it was just and equitable to do so'*. Mr Bester proceeded to describe the business of the company and,

briefly, all the alleged irregularities previously mentioned surrounding the company's trading activities. He mentioned that all of the company's trading activities had been effectively terminated in June 2020 as a consequence of the suspension of the Praesidium FSP licence through which the company traded and that its investment accounts had been frozen by the FSCA. He went on to explain that, notwithstanding that the directors of Praesidium and the company had signed an undertaking to the FSCA to repatriate all funds held offshore to a South African bank account, this had not taken place. In fact, he stated, funds managed by the company for its clients had apparently recently been transferred without client knowledge, consent or authority from Mauritius to Cyprus. He also relied on the FSCA's September statement.

[17] Regard being had to the specific averments made regarding the company's inability to pay its debts, the allegations concerning the alleged irregularities and the unlawfulness of the company's trading activities, the FSCA's September statement and the fact that all these allegations went unanswered, the irresistible inference must be that the company was unable to pay its debts. This was the primary basis for the liquidation application and on the overwhelming probabilities this was the case which the Court accepted had been made out when granting the provisional and final orders of liquidation.

[18] Similarly, Salie AJ could scarcely have doubted that the company had been liquidated in the first place on the basis of its inability to pay its debts and would no doubt also have been aware that this was a prerequisite to the establishment of an enquiry in terms of sec 417 of the Act.

[19] On behalf of the applicant Mr Sievers referred to a number of cases which had grappled with wording in the Act dealing with the workings of a company being unable

to pay its debts with particular reference to precisely when that inability is to be determined. In *Taylor and Stein NNO v Koekemoer*[2] it was held that even though a company is placed under a compulsory winding up order or resolves to be wound up voluntarily for a reason or on a ground other than an inability to pay its debts, the provisions of sec 415 of the Companies Act, dealing with the examination of directors and others, would nevertheless apply if in fact the company was unable to pay its debts.

[20] Section 415 provides that the Master or officer presiding at any meeting of creditors of a company which is being wound up and is unable to pay its debts may call and administer an oath to any director of the company or any other person present at the meeting and may interrogate the director or the person so called. The Court found that that the expression in sec 415(1) *'a company which is being wound up and is unable to pay its debts'*, bears its ordinary meaning, namely, a company which is unable to pay its debts at the time that the section is invoked by the liquidator or a creditor who has proved a claim.

[21] Applying these findings to the present matter it cannot, in my view, be credibly argued that the liquidators were precluded from relying on sec 417(1) of the Act in applying for the establishment of an enquiry inasmuch as they had failed to prove, at the stage of such application, that the company was unable to pay its debts. I have already found that the company's inability to pay its debts must have been the basis upon which the provisional (and final) liquidation order were granted. When the liquidators applied ex parte for the establishment of the enquiry i.e. when they invoked sec 417(1), there was nothing to suggest either that this position had changed or that the liquidators had found

[2] 1982 (1) SA 374 (TPD).

anything to suggest that the creditors who had applied for the company's liquidation on the basis of its inability to pay its debts were mistaken in regard to the company's solvency.

[22] There is another reason why the applicant's submission that the liquidators had failed to establish this vital jurisdictional requirement (that the company was unable to pay its debts) cannot be accepted. That reason relates to the form of the relief sought by the applicant and the incidence of the onus in regard thereto. The applicant seeks the rescission of the order made by Salie AJ establishing the enquiry and extending the powers of the liquidators. In *Hudson v The Master and Others*[3] the applicant applied for an order reviewing, setting aside and/or correcting the Master's ruling rejecting the applicant's objection to the first liquidation and distribution account in respect of a company in liquidation in which the applicant held a 50% shareholding. The objection related to all the costs of an enquiry held by the liquidators in terms of sec 417 of the Act. The applicant contended that such an enquiry could only be held in circumstances where the company was insolvent. It alleged that this was not the case and that the company had been placed in liquidation on a just and equitable basis due to a dispute between the joint shareholders. In applying *Taylor and Stein* the Court held that the time to determine the inability of the company to pay its debts was when the relevant section was invoked and in effect this permitted the liquidators to rely on sec 417(1) of the Act (and the company's insolvency) even though the company had been initially placed into liquidation on the basis merely of it being just and equitable to do so.

[23] Significantly for the present case, the Court held further that the first principle in

[3] 2002 (1) SA 862 (TPD).

regard to the burden of proof is that a person who claims something from another in a court of law has to satisfy the Court that he is entitled to it. It was an essential element of the applicant's case in that matter that the company was able to pay its creditors when the application for the enquiry was launched. Accordingly, the onus rested on the applicant to establish that fact. It was held further that, in accordance with the Plascon Evans rule, to the extent that a *bona fide* dispute of fact had arisen on the affidavits in relation to that issue, the applicant was bound to accept the respondent's version of the facts.

[24] Applying the principles enunciated in *Hudson* to the present matter, inasmuch as the applicant relied in his rescission application on the allegation that the jurisdictional fact of the company's inability to pay its debts had not been established, he had to go further and at the very least assert that the company was able to pay its debts at the material time. However, at no stage prior to the granting of either the provisional or the final liquidation order was it ever asserted on behalf of the company that it was able to pay its debts. Nor has any such averment been made by the applicant in the present proceedings. In my view it is incongruous, in post-liquidation proceedings, to claim in relation to a company placed into liquidation on the basis that it cannot pay its debts, and which company at no stage resisted the liquidation application or claimed otherwise, that an enquiry set up on that basis must be set aside without asserting, let alone proving that it is able to pay its debts.

[25] There is therefore no room for a finding that the order made by Salie AJ establishing the enquiry must be set aside on the basis that a jurisdictional requirement for such an order, the inability of the company to pay its debts, was not established.

[26] This brings me to the second leg of the applicant's challenge to the order of Salie AJ, namely the extension of the liquidators powers. As I understand Mr Sievers' arguments this challenge is made on the basis that the liquidators had sought and been given powers without making out a case therefor.

[27] Section 386 of the Companies Act deals with the powers of liquidators and provides, in sub-section 5 that *'the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets'*.

[28] In *Moodliar NO and others v Hendricks NO and others*[4], which similarly concerned an application for the extension of the liquidators' powers, the Court accepted that the applicants were required to set out the facts and circumstances showing that the powers sought were necessary – as opposed to merely useful or convenient – for the purpose of winding up the affairs of the company. It accepted furthermore that the exercise must be conducted in the light of the principle that it is the primary duty of the provisional liquidator to look after the property of the company in liquidation and to preserve the status quo, pending the appointment of a final liquidator. The question, it held, was whether the extended power/s sought could be justified in terms of the factual matrix of the case. The Court granted the extended powers notwithstanding the opposition of the majority shareholder of the company (a trust) and the chief executive officer. The granting of the provisional order had been opposed and it was clear that a final order would similarly be opposed. The Court found that if the granting of a final

[4] 2011 (2) SA 199 (WCC).

order was but a remote possibility that would weigh heavily against the exercise of a discretion in favour of the applicants, the provisional liquidators. On the facts, however, the financial position of the company was clearly tenuous, to put it at its lowest, and if the applicants were to perform their powers within the law and with the confidence necessary to execute their mandate, they would require legal advice, this being one of the powers which they sought. In the present matter neither the company nor any interested party opposed the granting of the provisional liquidation order and at the stage when the liquidators sought their extended powers there was no indication that there would be any opposition to the granting of a final order.

[29] In *Chavonnes Badenhorst St Clare Cooper NO and Another v Myburgh and Others* Binns-Ward J stated as follows regarding a similar application:

> *'[82] In order to obtain leave in terms of s 386(5), a liquidator must demonstrate that the leave sought is* necessary *for the winding up of the affairs of the company and distributing its assets. The founding papers in the current matter were not drawn with that requirement in mind. The relief sought in terms of paragraph 2 of the notice of motion is essentially a rehash of all the powers in s386(4)(a) to (h). The supporting affidavit does not make out a case that all of them are necessary in this matter. A stark example is the power sought to carry on any part of the business of the company. Quite why that power should be needed in the case of a company that divested itself of all of its operational capital and ceased trading more than six years ago is a mystery which nothing in the founding papers is directed at solving. The question was also not addressed by any of the parties in argument. The relief that will be granted in terms of paragraphs 2 and 3 of the notice of motion will be trimmed down accordingly.'*

[30] In their commentary on sec 385 Henochsberg (Henochsberg on the Companies Act) the authors state that in practice, in view of the comprehensive powers contained in

sec 386(4) which every liquidator has, the provisions of 386(5) are more often invoked by provisional liquidators whose powers are ordinarily restricted by the Master in terms of sec 386(6).

[31] I do not, furthermore, understand the role of the provisional liquidator to be a passive one i.e. merely limited to preserving the assets of the company pending the appointment of a permanent liquidator. In *Ex parte: Klopper NO: in re Sogervim SA (Pty) Ltd*[5] the Court stated as follows:

> *'When a provisional or final winding up order is made the circumstances or the affairs of a company may be such that that it is in the interest of the company and the general body of creditors that some other person than the Master should as soon as possible take all the property into his control and custody and attend to urgent matters for the preservation of the property and the beneficial winding up of the company. To meet such a situation the Master has the power to appoint a provisional liquidator as soon as a provisional or final winding up order is made and he then holds the office until the appointment of a liquidator (sec 124 (2)). The Master, in appointing a provisional liquidator may, under sec 130 (4), restrict his powers. The extent to which his powers will be restricted will depend on the circumstances of each particular case. In the case of* Renwick and Others v Transvaal Taxicab Co*, 1910 T.H. 27, the learned judge stated that, because of the position of a provisional liquidator, he should be restricted in his powers. Indeed, a provisional liquidator should not be given power to do what may amount to a liquidation of a company prior to the statutory meetings of creditors and contributors being called and a final liquidator being appointed, <u>unless the circumstances really dictate such a course</u>.'* [my underlining]

[32] Against this background one turns to examine the extended powers which the liquidators sought in the present matter and the case which they made out therefor. The liquidators brought a composite application, namely, to establish the enquiry to be held in

[5] 1971 (3) SA 791 (TPD)

terms of sec 417 of the Act and for an extension of their powers. In prayer 2 they sought authorisation to bring the application in terms of sec 386(5) and there can be no quarrel with this relief which was clearly necessary. In prayer 3 the liquidators sought extended powers, the first of which was to institute or defend action other legal proceedings in terms of sec 386(4)(a). Further powers sought were those set out in sec 386(4)(b), (h) and (i), namely, to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof etc., secondly, to sell any movable property of the company by auction or otherwise and finally, to engage the services of bookkeepers, accountants, auditors, forensic accountants, investigators, etc. *'for any purpose for which they may be required in relation to the affairs of Imagina FX'*.

[33] The first point to be noted is that the liquidators did not simply ask for all the powers listed in sec 386(4) but exercised a discretion as to which they were seeking. In making out their case for extended powers the liquidators set out the background to the liquidation application and described the company's business and the irregularities which had surfaced. They pointed out that as a consequence of the Praesidium's FSP licence, through which Imagina FX traded its forex accounts, its clients' suspension of investments accounts were purportedly frozen by the FSCA and all trading activities of the company were effectively terminated in June 2020. The liquidators also explained that the trading activities of the company had been conducted unlawfully and in non-compliance of several statutory provisions regulating investments of a similar nature in South Africa. They alleged that the funds managed by the company had apparently recently been transferred, without the knowledge or consent of clients, from Mauritius to Cyprus. They also relied on the FSCA's September 2020 statement. The liquidators

concluded that given the extent of the claims of clients, their potential magnitude and the likely complexity of the alleged fraud committed it was not possible to foresee and describe precisely what might be required from them as liquidators in the foreseeable future but that it was clear that urgent and immediate investigations were required and steps taken to protect the interests of thousands of clients who had placed their savings in the hands of the company. The liquidators were concerned also to prevent the dissipation of further funds from any trading accounts or any other bank accounts through which the company conducted its business or into which it had placed funds. The liquidators added that they also needed to prevent the destruction of information relating to the whereabouts of investor funds and to take action to recover and repatriate funds from foreign banking accounts.

[34] In my view the liquidators, although not stipulating precisely what legal action they foresaw as necessary, made out a strong case for the power to institute or defend actions in terms of sec 386(4)(a). Once this conclusion is reached the ancillary powers sought in terms of prayers 3.2 – 3.4 of the notice of motion must necessarily be justified, namely, to obtain legal advice on any question of law affecting the administration of the company, in so doing to engage the services of attorney and counsel, to agree their fees and/or conclude written agreements with such persons and to pay the agreed costs and disbursements.

[35] A further power sought by the liquidators was to agree to any reasonable offer of composition made to the company by any debtor. The liquidators made no mention of any particular debtors let alone the prospect of any such offer being made. The company's business viz trading on behalf of clients and using their funds to purchase

forex does not readily suggest a business in which such debts would arise. In the circumstances I consider that the liquidators failed to make out a case for such extended power as being necessary to their function or duties as liquidators.

[36] The liquidators sought the power to sell any movable property of the company but no reference is to be found in the application to any such movable property. On behalf of the liquidators, Mr van der Merwe submitted that the investments made on behalf of clients would constitute such movable property. Such investments would, however, constitute incorporeal property and not movable property in the ordinary sense of the phrase. In any event the liquidators failed to explain why and in what circumstances they would regard it as necessary to sell such movable property or investments rather than to realise and/or repatriate such property. In the circumstances the liquidators made out no case that such a power was necessary and it should not have been granted.

[37] Counsel for both parties were *ad idem* that should the Court find that the liquidators had failed to establish such extended powers were necessary but nonetheless had been granted by Salie AJ, it would lie within this Court's inherent jurisdiction to rescind such part of the order. Section 173 of the Constitution provides that the Courts, including the High Courts *'have the inherent power to protect and regulate their own process and to develop the common law taking into account the interest of justice'*. Given that the application for extended powers was brought ex parte but is now challenged by an affected party this seems is an appropriate case for the Court to invoke its inherent jurisdiction to trim the powers initially granted.

[38] In prayer 3.7 the liquidators sought the power to engage the services of professional accountants, investigators etc for any purpose required in relation to the

affairs of the company and to treat such costs as costs in the administration of the company in liquidation. What is particularly relevant in this regard is that the company's business was of an investment trading nature and was conducted on a variety of internet platforms of a transnational nature, that it traded in foreign currency, that the business had a strong offshore component, namely, in Mauritius, and that clients' funds were deposited in offshore accounts and transferred in certain instances from Mauritius to other offshore accounts i.e. Cyprus. Needless to say all these dealings and investments can be difficult to track or can be easily concealed since they may only exist in cyberspace. Similarly, assets or funds held in overseas accounts can be dissipated or moved through computer transactions overnight. In these circumstances and given the unanswered allegations of widespread irregularities and illegalities attendant upon the company's business and further allegations regarding the scope of the investments involved and the large number of investors it is clear that the liquidators had no viable alternative but to act swiftly to try to get to the bottom of the company's affairs and to locate and preserve its assets. Faced with a dearth of information and with what appears to have been an un-cooperative attitude on the part of the company's management and administrators, the liquidators had to be proactive and to this end under this head they made a strong case for the extended powers they sought. When regard is had to the description of the scope and nature of the company's business and its transnational nature it appears that a proper case was made out that persons of such expertise would be required to investigate and analyse the company's affairs as a matter of urgency and, accordingly, that such powers were necessary.

[39] In the result I conclude that the provisional liquidators established a case that all the powers they sought were necessary for them in their role as provisional liquidators

save for the two I have specifically mentioned. For these reasons I consider that, save for the power to sell movable assets and to agree to any reasonable offer of composition, the order made by Salie AJ granting the liquidators extended powers is not rescindable.

[40] It follows then that the applicant has failed to establish a case for the setting aside of those parts of Salie AJ's order establishing the enquiry or granting the liquidator certain of their extended powers. Consequently, this Court must consider the alternative relief sought in terms of the amended notice of motion, namely, removing the first respondent as commissioner of the enquiry and setting aside the subpoenas issued by him on 2 November and 1 December 2020 respectively.

[41] The case for the first respondent's removal as commissioner was made on the basis that he had not and would not be able to effect his obligations with the strict impartiality required of someone in his position. The applicant placed reliance on the case of *Absa Bank v Hoberman and Others NNO*[6], where this Court did remove a commissioner appointed in terms of sec 417. The Court held that by the very nature of his/her functions a commissioner is obliged to act in accordance with the precepts of natural justice, which enjoin him/her to apply procedural fairness and even-handed impartiality to all persons who might be prejudiced or otherwise adversely affected by his/her actions. It held further that if a commissioner were to conduct the enquiry in a partial or biased manner he/she would be acting in conflict with the aforesaid precepts and would ordinarily be disqualified from continuing to exercise his/her functions as a commissioner. That would be the case not only where the commissioner demonstrated an actual bias or a lack of impartiality but also where his conduct provoked a reasonable

[6] 1998 (2) SA 781.

suspicion of bias. In such cases, it held further, he/she might justifiably be requested to recuse himself and, in the event of his failure or refusal to do so, the Court might be approached to remove him by terminating his/her appointment as a commissioner. The Court held further that rather than speaking of a reasonable suspicion it would be appropriate to speak of a *'perception of bias'*, objectively assessed on reasonable grounds and further, that it was important to note that reasonableness lies at the heart of the enquiry into bias.

[42] In the present matter the conduct of the commissioner upon which the applicant claimed a reasonable perception of bias was set out in his supplementary founding affidavit in broad terms as follows:

1. the preparation of the Rule 53 record by the liquidators/their attorneys on his behalf;
2. the commissioner being represented in these proceedings by the liquidators' attorneys;
3. the commissioner's alleged failure to exercise his powers judicially when he issued subpoenas for the applicant on 2 November and 1 December 2020.

[43] In a second supplementary founding affidavit following the late inclusion into the Rule 53 records of the written reasons furnished by the commissioner on 2 December 2020 for issuing the second subpoena, the applicant added the following further conduct on the commissioner's part and upon which he based his reasonable perception of bias:

1. the commissioner's finding that certain arguments advanced on behalf of the applicant had previously been abandoned;
2. the commissioner's alleged failure to apply his mind to the contents of the subpoena/s which he issued;
3. the manner in which the Rule 53 record was supplemented by the commissioner's reasons as well as the fact that such reasons were circulated

by the liquidators' attorneys.

[44] In argument the applicant's counsel also sought to rely on the fact that the subpoenas issued by the commissioner also bore the signature of the provisional liquidators' attorneys.

[45] In dealing with this challenge to the commissioner it is first necessary to briefly describe the circumstances of his appointment and thereafter his role in these proceedings. The commissioner was proposed by the liquidators in the application which served before Salie AJ. In that application the commissioner was described as a senior advocate of the Cape Bar with more than 37 years' legal experience, having extensive experience in the field of corporate liquidations and insolvency and as being someone who had acted previously as a commissioner in such enquiries. It was stated that the commissioner had served as an Acting Judge of this Court, his last term as an Acting Judge being the third term of 2020.

[46] The commissioner's only participation in these proceedings has been the filing of a brief affidavit dated 24 February 2021. In it he affirmed his impartiality and objectivity as commissioner in the enquiry and advised that he abided the Court's decision in the application. He also explained the circumstances which led to the liquidators' attorneys purportedly filing a notice of intention to oppose on his behalf and how it was that those attorneys had filed the Rule 53 record on his behalf. Finally, he advised that he had nothing to add to the written reasons which he had given for the issuing of a subpoena against the applicant on 1 December 2020.

[47] I turn to deal with each of the instances said to reveal bias or a reasonable perception thereof on the part of the commissioner.

[48] It is common cause that the Rule 53 record was prepared and circulated by the liquidators' attorneys on behalf of the commissioner. In his affidavit the commissioner advised that on occasion he had requested those attorneys to perform tasks of an *'administrative or formal'* nature on his behalf such as filing the Rule 53 record. He stated that this was necessitated by the fact that he did not want to incur legal costs in a matter where he was abiding the Court's decision. In an opposing affidavit the liquidators referred to a letter sent by their attorneys to the applicant's attorneys on 29 January 2021 advising that the commissioner was currently acting in the High Court and had requested them to file the Rule 53 *'on his behalf after he had sight of the aforesaid record of documents'*.

[49] On 28 January 2021 the liquidators' attorneys filed a notice of intention to oppose the present application on behalf of *'the respondents'* thus, on the face of it, including the commissioner. On 25 February 2021, and after the import of their notice of opposition had been pointed out to them, the liquidators' attorneys filed a notice of withdrawal as attorneys of record for the commissioner recording in that notice that they had never had any mandate to oppose the proceedings on behalf of the first respondent (the commissioner).

[50] In his affidavit in these proceedings the commissioner recorded that it had been drawn to his attention that the liquidators' attorneys had filed a notice of intention to oppose purporting to indicate that he joined in the defence of application together with the liquidators. He advised that this was not correct and that he had never instructed those attorneys to act on his behalf or to oppose the application since he at all times intended to abide the Court's decisions. By the time of argument this explanation was accepted by

the applicant, namely, that the liquidators' attorneys had filed the notice of opposition on behalf of the commissioner in error and, objectively, one can see how that error was easily made.

[51] In due course the commissioner heard argument on behalf of the applicant as to why he should set aside the first subpoena which he had issued calling upon him to attend at the enquiry and give evidence. He declined to set aside the subpoena and furnished written reasons for that ruling on 2 December which he transmitted to the liquidators' attorneys with the request to forward them to the applicant's attorneys. In error those written reasons were not initially included in the Rule 53 record. On 26 March 2021, having realised the omission, the liquidators' attorneys sought to introduce that document into the Rule 53 record but were met with opposition from the applicant. I ruled that the Rule 53 record had to be supplemented by the addition of those reasons and, at the request of the applicant, granted him a postponement to file a supplementary founding affidavit dealing with the contents of those reasons. This in turn led then to an opposing affidavit from the provisional liquidators, a replying affidavit and two applications to strike out.

[52] Both in the papers and in argument much was made by the applicant of the initial omission of these written reasons from the Rule 53 record and, more particularly, the manner in which these reasons had been transmitted to the applicant's attorneys. In regard to the omission the liquidators explained that in preparing for the initial hearing it was discovered that the commissioner's reasons were not included in the record. They pointed out that the commissioner had referred to his reasons in his explanatory affidavit and added that there was nothing sinister about the liquidators' attorney earlier

transmitting the reasons to the applicant's attorneys at the commissioner's request. In an affidavit the provisional liquidators' attorney explained that he had received the reasons from the commissioner on 2 December 2020 and transmitted same to the applicant's attorney on 3 December.

[53] It was not suggested on behalf of the applicants that the reasons had not been sent to them on 3 December 2020 and it was obviously simply an oversight not to have included the document as part of the Rule 53 record.

[54] The commissioner's handling of the liquidators two applications to subpoena the applicant formed a large part of his complaint of bias on his part and must therefore be dealt with at this stage. The background to the issuance of the subpoena begins with the extension for powers application pursuant to which the sec 417 enquiry was established and the commissioner authorized to summons a range of persons to be examined, including the applicant. The order further stipulated that such persons were to be examined concerning the trade, dealings, affairs or property of the company, to produce all relevant books, records or documents and that the signature of the commissioner or the registrar of the High Court would be sufficient for the validity of the subpoenas.

[55] On 2 November 2020 the provisional liquidators' attorneys addressed a letter to the commissioner setting out the basis upon they requested him to issue a subpoena against the applicant. They advised that the applicant was a co-director of the company and the *'mastermind behind the investment scheme, that appears … to be an unlawful Ponzi type investment scheme'*. The letter records that the commissioner was provided with a bundle containing all the High Court applications launched up to that time which were said to reveal that the applicant had played an integral part in the affairs of the

company. It pointed out that the commissioner's authority to subpoena the applicant had been specifically sought and granted in the extension of powers application. Attached to the letter was a draft subpoena in respect of the applicant which set out a wide range of records, documents, trading accounts, statements and communication which he should be required to produce at the enquiry.

[56] The commissioner duly issued the subpoena. When the applicant attended the enquiry his senior counsel placed on record that they wished his interrogation to be adjourned until such time as an Anton Piller application which the liquidators had launched against the applicant and two other had been finalised. Counsel also appeared to contend that the information on which the subpoena was based had been tainted by irregularities in the execution of the Anton Piller order. The commissioner took the view that the subpoena could only be set aside by a Court. The proceedings were adjourned on the basis that the applicant would approach the High Court to challenge the validity of the subpoena.

[57] The return day of the Anton Piller application and the applicant's application challenging the subpoena issued by the commissioner came before Binns-Ward J. He heard argument regarding the subpoena application and appeared to take the view that the appropriate person to consider whether the subpoena should be set aside was the commissioner. Ultimately, both the applicant and the liquidators accepted the Court's prima facie view and the application was, by agreement, finalised by the Court dismissing it and ordering each party to pay their own costs. Before making such order the Court heard argument concerning whether certain irregularities in the execution of the Anton Piller order had tainted the subpoena inasmuch as its terms could have been

informed by evidence irregularly obtained and/or accessed by the liquidators or their legal representatives in the course of the execution of the Anton Piller order. However, the opposing affidavit put up by the liquidators provided an explanation for the terms of the subpoena and indicated that there had been no such tainting of the subpoenas. The applicant's senior counsel was constrained to admit during argument that in the light of that explanation under oath and the provisions of the Plascon Evans rule he could not argue for the granting of any relief.

[58] The next significant step was a further hearing before the commissioner on 1 December 2020 when another senior counsel (Mr Sievers) acting on behalf of the applicant renewed the application to have the commissioner set aside the subpoena based on three grounds: firstly, that irregularities with regard to the Anton Piller orders execution had *'rendered up certain documents which had affected the decision to issue the subpoena thus tainting it'*; second, that the subpoena lacked specificity and thirdly, that Salie AJ's order extending the liquidators powers and authorising the sec 417 enquiry was invalid since it had been granted prior to a final order of liquidation.

[59] The application was opposed and full argument heard. The commissioner refused the application and the following day provided written reasons, which, insofar as they are relevant, read as follows:

> *'[3] The first two grounds upon which the application is bought, has been comprehensively dealt with … in the High Court, Cape Town (case) … heard by the Honourable Justice Binns-Ward … and was effectively abandoned during those proceedings.*
>
> *[4] I believe that the subpoena in question is not tainted in any material way due to any alleged irregularities in the Anton Piller process ….*
>
> *[5] Paragraph 35 (page 70) of the answering papers state exactly what was*

placed before me when I issued the said subpoena.

[6] The allegation is made that any further information, not contained in the documents referred to in paragraph 35 (supra) was obtained from the FCSA in consequence of their investigation.

[7] The aforesaid allegations are not disputed or contradicted. No facts were alleged which would show that my decision to issue the subpoena was tainted by irregularity.

...

[9] I am also of the view that the subpoena does not lack specificality (sic) to the extent which would invalidate it. Sections 417/418 confer wide powers on the Commission of enquiry. In any event, if documentation or to loosely defined a failure to comply, the subpoena cannot be enforced or vest culpability as a result of a failure to comply;

[10] The final point ... raised is that by virtue of the very invasive nature of a sec 417 enquiry ... such an enquiry may only be convened after a final order of liquidation has been granted.

[11] Mr Sievers could not produce any authority in support of this point;

[12] I have no doubt ... that the opening words of sec 417(1) 'in any winding up of a company unable to pay its debts ...' envisage not only a company which is finally wound up, but also one which is subject to a provisional winding up order'.

[60] In the applicant's second supplementary affidavit herein above applicant expanded on why he regarded these reasons as strengthening his reasonable apprehension of bias on the commissioner's part. Firstly, it was alleged that the commissioner erred in both fact and in law when he held that certain arguments had been abandoned. In this regard it must be noted that the fact that the commissioner may have erred in fact or in law is in itself no indication of bias. Secondly, on my reading of the papers and the Rule 53 record the commissioner was substantially correct when he made this finding, notwithstanding that on 1 December 2020 Mr Sievers did not explicitly state that he had abandoned those arguments and notwithstanding that before Binns-Ward J such '*abandonment*' was

limited to the proceedings before that Court.

[61] Before Binns-Ward J the applicant's counsel conceded that, faced with an explanation on oath from the liquidators explaining that irregularities in the execution of the Anton Piller order had not in any way affected or tainted the subpoena, the application could not succeed. Before the commissioner on 1 December 2020 the applicant was unable to advance any further evidence suggesting that such irregularities had tainted the issuance of the subpoena. It is entirely understandable why on that day counsel spent virtually no time in argument dealing with this ground but contented himself with stating that he could take that matter no further and why the commissioner did not uphold that ground or the contention that the summons lacked specificity.

[62] A further complaint by the applicant is that the commissioner failed to apply his mind to the contents of the subpoena instead merely rubber-stamping the liquidators' pro-forma subpoena. Little meaningful argument was directed to me in this regard. Furthermore, the argument lacks an appreciation of the commissioner's role. It was the liquidators, acting through their attorneys, who initially formed a view as to what documentation the applicant should be required to bring to the enquiry. Having regard to the terms of the subpoena it is difficult to see on what basis it was expected of the commissioner that he would second-guess the terms of the pro-forma subpoena and little if any argument was directed either to the commissioner or this Court in support of any such contention.

[63] During argument I gained the impression that the applicant may have suspected, on no factual basis which was ever conveyed to this Court, that the commissioner had had regard to documents seized pursuant to the Anton Piller order when he considered

the request for a subpoena from the liquidators' attorney. That no factual basis at all was established for any such suspicion puts the matter to rest but in any event, as the commissioner's reasons make clear, he in fact had no regard to any unauthorised documentation.

[64] A further complaint by the applicant in this regard was that on the day after the commissioner refused the application to set aside the first subpoena, and notwithstanding his written reasons for doing so, he issued a second subpoena in respect of the applicant at the request of the liquidators. As I understand the initial argument on behalf of the applicant the submission was that the issuance of the second subpoena undermined the commissioner's reasons for refusing to set aside the first subpoena. During argument this argument was overtaken by an agreement between the parties that the issue was moot by reason of the subpoena having a limited lifespan with the result that a fresh/second subpoena had in any event to be issued by the commissioner in respect of the applicant. The applicant's counsel later qualified this concession on the basis that it did not detract from his case that the commissioner's issuance of a second subpoena indicated that he merely acted at the behest of the liquidators and rubber-stamped their applications.

[65] In my view the arguments made on behalf of the applicant in this regard are not persuasive. The first subpoena called upon the applicant to attend at the enquiry on 16 and 17 November 2020. In the absence of the applicant being warned by the commissioner to attend the enquiry at a later stage, that subpoena would have to be replaced by a further subpoena at a later stage. On 1 December 2020 the liquidators' attorney addressed a letter to the commissioner requesting him to issue a second subpoena in respect of the applicant on the same basis as the first letter requesting a

subpoena but referring him also to the Anton Piller application and the application seeking the setting aside of the first subpoena. The terms of the second subpoena are to all intents and purposes the same as those of the first subpoena and required the applicant to attend at the enquiry on 10 and 14 December 2020.

[66] Against this background it seems to me that the commissioner acted lawfully and independently in issuing both the first and the second subpoena and I can see no factual or legal basis advanced by the applicant which establishes any irregularity or any conduct on the commissioner's part which indicates bias or a reasonable apprehension thereof. Having regard to the contents of the affidavits and the Rule 53 record as a whole I find that, as far as the discrete subject of the commissioner's handling of the subpoena/s is concerned, the applicant has failed to establish any case of bias on the part of the commissioner or a reasonable apprehension of bias on his part.

[67] Having dealt with the commissioner's handling of the two subpoenas, insofar as that is relevant to the question of his independence and impartiality, I return to what remains of the attack upon his impartiality. A final factor relied upon by the applicant was that the subpoenas issued by the commissioner were also signed by the provisional liquidators' attorneys, the argument being that this somehow suggested or created an apprehension of bias or lack of impartiality on his part. I see this as yet another highly technical, formalistic complaint lacking any substance. Amongst a host of other items the subpoena contains provisions relating to the liquidators' tender of travel and other expenses which might be incurred by the witness and sets out the contact details of the liquidators' attorney in the event of queries in this regard. This alone would, to my mind, justify that attorney's decision to append his firm's details and his signature to the

subpoena. In addition, as was pointed by the liquidators, the Uniform Rules of Court, in Form 16, provide the template for a subpoena in civil matters. It makes provision for signature both by the Registrar of the High Court and the attorney for the party at whose instance the witness is subpoenaed. I was not referred to any standard form for witnesses being subpoenaed by a commissioner of a sec 417 enquiry. There is thus no merit to this point at all.

[68] As mentioned it was submitted on behalf of the applicant that a reasonable apprehension of bias on the part of the commissioner had been established by the fact that the Rule 53 record had been supplemented with his reasons dated 2 December 2020, not by the commissioner but by the liquidators' attorneys and that, prior thereto, those reasons had been transmitted to the applicant's attorneys again not by the commissioner but by the liquidators' attorneys acting on his behalf. In my view this submission is not well-founded in either respect.

[69] The commissioner's stance in this application was that he abided the Court's decision and his role in these proceedings was minimal, viz filing a brief explanatory affidavit. Clearly all the parties overlooked the fact that the original Rule 53 record omitted the commissioner's 2 December 2020 reasons until this was belatedly realised by the liquidators' attorneys. I see nothing sinister in them moving to supplement the record rather than the commissioner himself. As far as the original transmission of the reasons, Mr van der Merwe, on behalf of the liquidators, readily conceded that it was not *'best practice'* for the commissioner to have circulated his reasons through the liquidators' attorneys rather than doing so directly himself by transmitting them to the applicant's attorneys. Following the latter course of action would have underlined the

commissioner's independence and impartiality. The same comments apply, albeit to a lesser extent, to him requesting the liquidators' attorneys to file the Rule 53 record on his behalf after he had considered same.

[70] Notwithstanding these shortcomings, in my view, on any reasonable basis these were minor matters of form rather than of substance and I fail to see how the commissioner's conduct in using the provisional liquidators' attorneys for these limited tasks could ever reasonably be seen as compromising his independence or impartiality or, for that matter, as creating a reasonable apprehension of bias on his part.

[71] On behalf of the applicant, Mr Sievers emphasised that he relied also on the cumulative weight of the various alleged instances of bias or lack of impartiality on the part of the commissioner based inter alia on the principles set out in the *Hoberman* case. That case is instructive and there the Court did remove the commissioner notwithstanding that the enquiry had reached an advanced stage. In *Hoberman* the commissioner appears to have gone off on a tangent of his own and thereby created the impression that he was biased against one of the major creditors of the liquidated company, Absa. The commissioner gave an interview to a magazine during the course of the commission, made an unprovoked attack on Absa's chief executive during his testimony before the commission and had a private meeting with a witness at a time when the witness was still testifying before him. In evaluating these facts against the principles relating to bias the Court stated inter alia as follows:

> *'It is difficult to escape the impression that these decisions demonstrated a negative sentiment towards Absa. At that stage, however, Hoberman, could have countered or even dispelled such impression by continuing with an objective gathering of relevant information*

> ...
> *The inevitable conclusion to be drawn from this conduct is that the negative sentiment towards Absa, which he had already begun to demonstrate by embarking on a public investigation of Diedericks' allegations in Millennium, was transformed into an incontrovertibly negative stance by his expressed desire to "take on" Absa'.*

[72] The above brief description of the commissioner's conduct during the enquiry in the *Hoberman* matter is a world removed from the conduct of the commissioner complained of by the applicant in this matter, namely, issuing two subpoenas against the applicant, a co-director of a company in liquidation and which power was specifically authorised by Salie AJ, and requesting the liquidators' attorneys both to compile the Rule 53 record in these proceedings subject to his approval and to transmit his reasons for not setting aside a subpoena to the applicant's attorneys.

[73] In argument Mr Sievers emphasised that he relied also on the cumulative weight of the various instances of alleged bias of lack of impartiality as making his case for a reasonable perception of apprehension of bias by the applicant. However, in my view the weight of each instance of conduct complained is so little that having regard to their cumulative weight makes no difference at all to my conclusion that such conduct could never justify a reasonable apprehension of bias on the part of the commissioner by the applicant or someone in his position.

[74] For these reasons, save for the two extended powers found not to have been justified, the application must fail. The main relief sought by the applicant was the setting aside of the enquiry and all the extended powers granted to the liquidators. Alternative substantive relief sought was the removal of the commissioner and the setting aside of the

subpoenas he authorised. The applicant has failed in all these challenges and such relief as he has achieved is minimal and of little practical relevance to the enquiry. In the result I see no reason to depart from the general rule that a successful party is entitled to its costs. The applicant utilised the services of three counsel, including two senior counsel to deal with a range of legal issues, some relatively complex. In the circumstances the liquidators are entitled to the costs of the two counsel they used. No case for the costs order to be on an attorney and client scale has, to my mind, been made out.

[75] In the result the following order is made:

1. Paragraphs 2.5 and 2.6 of the Order of Salie AJ dated 19 October 2020 in case number 15082/2020 are rescinded;

2. The application is otherwise dismissed with costs such to include the costs of two counsel.

BOZALEK J

For the Applicant	:	Adv F Sievers SC et Adv Katz SC et Adv K Perumalsamy
Instructed by	:	Enderstein Van Der Merwe Inc
For the 2nd – 3rd Respondents	:	Adv J van Der Merwe SC et Adv M van Staden
Instructed by	:	Mostert & Bosman Attorneys