THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 581/2015

In the matter between:

LEIGH WILLIAM ROERING NO	**First Appellant**
MABATHO SHIRLEY MOTIMELE NO	**Second Appellant**
and	
QEDANI MAHLANGU	**First Respondent**
THE MASTER OF THE SOUTH GAUTENG HIGH COURT	**Second Respondent**
COMMISSIONER ADVOCATE CHARLES SCOTT STEWART	**Third Respondent**

Neutral citation: *Roering and Another NNO v Mahlangu* (581/2015) [2016] ZASCA 79 (30 May 2016)

Coram: WALLIS, WILLIS, SALDULKER and ZONDI JJA and TSOKA AJA

Heard: 20 May 2016

Delivered: 30 May 2016

Summary: Company law – Enquiry in terms of ss 417 and 418 of the Companies Act 61 of 1973 – summons to attend – application to set aside summons – abuse of process – what constitutes – fact that the issues canvassed may overlap with issues in pending or contemplated civil litigation not as such a ground for inferring abuse.

ORDER

On appeal from: Gauteng Local Division, Johannesburg of the High Court (Mosikatsana AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the High Court is altered to read as follows:

'The application is dismissed with costs.'

JUDGMENT

Wallis JA (Willis, Saldulker and Zondi JJA and Tsoka AJA concurring)

Introduction

[1] In June 2007 the Department of Health, Gauteng (the Department) concluded a service level agreement with 3P Consulting (Pty) Ltd (3P Consulting) in terms of which 3P Consulting was obliged to establish a Project Management Unit for the Department. On 23 March 2009 the agreement was extended for a further three years. After the April 2009 general election, the first respondent, Ms Qedani Mahlangu, was appointed as the member of the executive council (MEC) for health in Gauteng. Shortly thereafter a review of projects occurred and on 1 July 2009 the Department wrote a letter to 3P Consulting stating that it would no longer perform in terms of the extended agreement. According to Ms Mahlangu's affidavit this was 'due to serious allegations of impropriety as well as irregularities in the award as well as the extension of the agreement'.

[2] After that there was extensive litigation between the parties. On 18 February 2010 the South Gauteng High Court (Lamont J) granted a declaration that the services agreement between 3P Consulting and the Department was validly concluded and extended. However, he refused to grant judgment for payment of certain invoices that 3P Consulting alleged were due, owing and payable and remained unpaid. He held that it was disputed that these amounts were in fact payable. However, he made it clear that this was no more than a finding of absolution from the instance, leaving 3P Consulting free to pursue the claim in other proceedings.

[3] The Department's appeal to this court against that decision failed[1] and on 7 February 2011 the Constitutional Court refused leave for a further appeal. On 13 October 2011, 3P Consulting instituted application proceedings against the Department claiming payment of some R99 million. It is not apparent from the notice of motion whether this related only to amounts allegedly due to it prior to 1 July 2009, or whether it included amounts said to have become due thereafter. Counsel was not in a position to enlighten us in that regard. If they were the same claims as had been advanced before Lamont J, it was unclear on what basis proceedings were again pursued by way of application instead of action. Be that as it may, the Department defended the application. According to Ms Mahlangu, its grounds for doing so were that 'it received no value, the contract documents and other related documents are irregular and that the entire action is tainted by fraud'. Not surprisingly in the circumstances the application was referred to trial, but, before the trial could proceed, 3P Consulting was placed in provisional

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[1] *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* [2010] ZASCA 156; 2012 (2) SA 542 (SCA).

and then final liquidation. The present appellants are its duly appointed liquidators.

[4] The only significant asset of 3P Consulting was its claim against the Department. The liquidators obviously had no personal knowledge of that claim or of the grounds for its defence. They accordingly sought and obtained leave from the Master of the South Gauteng High Court[2] for an enquiry to be convened pursuant to the provisions of ss 417 and 418 of the Companies Act 61 of 1973 (the Act).[3] Their purpose in doing so was to gather information and make an informed decision on whether or not to continue the litigation. After hearing the evidence of a number of witnesses the liquidators formed the view that Ms Mahlangu would be able to provide important information relating to 3P Consulting's dealings with the Department. They accordingly asked the commissioner[4] to authorise and issue a summons for Ms Mahlangu to appear before the commissioner and give evidence as part of the enquiry.

[5] The present litigation arises from the commissioner's decision to accede to that request. I will deal with Ms Mahlangu's response to the summons in greater detail later in this judgment. It suffices for present purposes to record that she applied to the Gauteng Local Division, Johannesburg of the High Court for an order setting it aside as an abuse of process. That application was granted by Mosikatsana AJ. This appeal is with his leave.

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[2] The Master is the Second Respondent in this appeal but has played no part in the proceedings either here or in the High Court.

[3] Although this Act was repealed by the Companies Act 71 of 2008 the provisions of Chapter 14 of the old Act, which includes ss 417 and 418, remain in force by virtue of Item 9(10 of Schedule 5 to the new Act.

[4] The Commissioner is the third respondent in this appeal but, like the Master, has played no role in the proceedings in either this court or the High Court.

Proceedings at the commission

[6] An odd feature of this case is that, when she was initially summoned to give evidence to the commission, Ms Mahlangu did not regard the summons as an abuse and indicated that she wished to be as helpful as possible. She appeared on 29 July 2013, together with Mr Lekabe, the State Attorney, South Gauteng, and asked for a brief postponement in order to enable her to be properly prepared. She explained that she had moved on from the Department of Health and had filled two other offices as a member of the executive council in the Gauteng administration since then, including her current position as the MEC for Infrastructural Development. Accordingly, she was not in possession of any files from her former department and wanted the opportunity to refresh her memory before testifying. Mr Lekabe explained that it 'would make no sense for her to come here and sit here and keep on saying: "I can't remember. I can't remember." It will defeat the purpose of the enquiry.'

[7] At one stage in the proceedings Ms Mahlangu herself intervened to plead for a postponement. She asked the commissioner to give her the benefit of the doubt that she came before him 'with good intentions'. She explained her position as follows:

'So all I'm simply asking for is to let me just go through all the necessary things that will help me to remember what would have happened in the meetings that I would have presided over. As in all the management meetings I've had, and on the basis of that and any other thing that I would remember, so that I come here prepared and I will be able to answer you diligently and honestly.'

She asked for a few days so that she could go back and prepare. Mr Lekabe chimed in and told the commissioner that:

'Ms Mahlangu wants to come here and assist this enquiry. That is what she wants to do, but provided she is prepared to do so.'

[8] In response to these pleas the enquiry was adjourned to 27 August 2013. On that day Ms Mahlangu did not appear and a medical certificate was tendered on her behalf. But five people appeared to represent her. Two were officials, one a legal adviser in the Department of Infrastructure Development and the other a legal adviser in the Department of Health. Two were from the firm of attorneys that represented her in this appeal and one was an advocate. Two other people were present from the anti-corruption task team although their role was obscure. On this occasion the enquiry was adjourned to 15 October 2013. Although the merits of the summons were not discussed, it was indicated that it was unnecessary to issue a fresh summons. There was no suggestion that summoning Ms Mahlangu was an abuse.

[9] In the circumstances, it must have come as something of a surprise to the commissioner and the liquidators when, shortly before 15 October 2013, they were confronted with an urgent application for an order that Ms Mahlangu be excused from attending the enquiry pending an application to set aside the summons as an abuse, joined with an application for a penal costs order against anyone opposing the application. An interim order was granted on 15 October 2013 and, as noted above, a final order setting aside the summons was made on 26 January 2015.

[10] There is nothing in the papers to indicate what caused this change of heart on the part of Ms Mahlangu. Counsel endeavoured to explain it from the bar on the basis that between the first and the second sessions of

the enquiry she changed legal advisers. There are two obstacles to accepting that contention. The first is that it nowhere appears in the affidavits where one would have expected to find an explanation. While there is reference to her changing legal advisers, she does not say that the advice she obtained from her new advisers was different from that of her original legal team. The second is that the new legal team gave no indication to the commissioner and the liquidators that there was any problem with or objection to the summons. As matters stand it is unexplained. That does not mean that she cannot contend that the issue of the summons was an abuse. But, in the light of her original co-operative attitude, it does indicate that her allegations of abuse must be scrutinised with care, as they may have been raised purely in an endeavour to avoid being examined and not because the allegations of abuse are genuine.

The claim of abuse

[11] Ms Mahlangu claimed in her founding affidavit that the liquidators wished to use the enquiry proceedings 'to obtain information from me to bolster its case against the Gauteng Province'. She went on to contend that it was 'unfair, prejudicial and detrimental to fair play in any litigation process' to permit one of the parties to use the mechanism of an enquiry under the Act 'to gather information from a representative of the other party (and against the wishes of the other party) to build or better its case in civil litigation'. This she characterised as an abuse.

[12] Although at points in the affidavits there are hints that Ms Mahlangu did not possess any information relevant to the dealings between the department and 3P Consulting, these hints were belied by statements from her own mouth. One cannot gather information from someone who does not possess information. Indeed, had that been the

case one cannot see why she would have been reluctant to testify. When asked she could simply have told the commissioner that she had no information regarding the issues under investigation. No doubt she might have been able to point to relevant officials who might have had knowledge, but beyond that the whole matter could have been disposed of relatively quickly and painlessly.

[13] In fact that was not the position. It emerged that she was concerned that the information she had, or her lack of information on important issues, might bolster the liquidators' case. The statements in her affidavits quoted earlier in paragraphs 1 and 3, dealing with the reasons for the Department attempting to avoid the contract and the defence to the monetary claims, supported the conclusion that she had knowledge of these matters. So did her statements when she first appeared before the enquiry. In her capacity as MEC she chaired the meetings at which these matters were discussed and decisions were taken. Counsel accepted that she had knowledge of matters relevant to the Department's dealings with 3P Consulting in regard to this contract and this claim. He went so far as to say that she was a central witness for the Department's case.

[14] In regard to the liquidators' purpose in asking for Ms Mahlangu to be summoned to the enquiry, Mr Leigh Roering, the first appellant, deposed to the affidavit on behalf of the liquidators. He explained that the reason for 3P Consulting going into liquidation was its non-receipt of the money claimed in the pending litigation, which resulted in it being unable to pay its creditors. In the light of the evidence of the witnesses who had testified thus far in the commission, he said that the liquidators had obtained insight into the affairs of 3P Consulting, which had led them to the conclusion that Ms Mahlangu could give them important information

in regard to its relationship with the Department. While the nature of that information was not specified, the commissioner filed a report in which he said that he was at all times of the opinion that Ms Mahlangu was a person capable of giving information concerning the trade, dealings, affairs and property of the company in liquidation. That information must have related to the company's dealings with the Department.

[15] In her replying affidavit Ms Mahlangu did not challenge these statements by Mr Roering and the commissioner. She complained of the failure to include a copy of the application made to the Master before the commission was established, although, as her challenge was to the summons addressed to her and not the decision of the Master to establish the commission in the first place, that was hardly relevant. She said that the application was necessary in order to determine whether the commissioner was justified in issuing the summons, but failed to explain why this was so. She said that there was no evidence that the former directors of 3P Consulting were unwilling to assist the liquidators. But that did not meet the point that the liquidators and the commissioner had formed the view that she was in possession of relevant information. As regards the commissioner's report she complained that it did not take the form of an affidavit. That ignored the well-established practice of functionaries such as the Master or the Registrar of Deeds, or persons conducting enquiries, such as commissioners or arbitrators, placing information before a court by way of a report rather than an affidavit. It is only if the contents of the report become controversial that an affidavit is called for. Had Ms Mahlangu brought review proceedings, a matter with which I deal at the conclusion of this judgment, the commissioner might have been obliged to act differently.

[16] On the face of it the liquidators had every reason to think that Ms Mahlangu was in a position to give information to the commissioner about the alleged irregularities in the award and extension of the contract that led to the attempt to cancel it. She would be able to say on what factual basis the Department claimed that it received no value in respect of the invoices that are the subject of the claim in the application that has been referred to trial. As the political head of the Department at that time she would be best placed to given an overview of the information on the basis of which the relevant decisions were taken. These were obviously relevant to the liquidators' task. They needed to know the foundation for the contention that the documents were irregular and the claim tainted by fraud before they advised creditors whether to proceed with the trial and incur the expense of doing so.

[17] Essentially, Ms Mahlangu contended that obtaining information on those matters was an abuse of process in the light of the application claiming the sum of R99 million from the Department. In argument both of her counsel repeatedly returned to the proposition that, because there was pending litigation in which she would be a central witness for the Department, it was an abuse of process to require her to give evidence at the enquiry. They claimed that it would confer an improper advantage on the liquidators in pursuing the litigation. This argument was advanced without any reference to the facts or any evidence that, in the particular circumstances of this case, requiring Ms Mahlangu to give evidence would cause any special or particular harm to her or to the Department in the conduct of its case, assuming that the litigation proceeds. There was no evidence to show that the liquidators were already in possession of the information they wished to obtain from her, or that this could be obtained from the former officers of 3P Consulting. We were told that there was

evidence available to the liquidators in the form of the affidavits filed in the application, but those were not placed before us to illustrate the proposition that summoning her to the enquiry was an abuse.

[18] Stripped of the emotive language in which the argument was couched, it amounted to no more than this: In any situation where litigation by the liquidators is underway or contemplated it would be an abuse for a potential witness for the other party to that litigation to be summoned to an enquiry in terms of ss 417 and 418 of the Act to be questioned about matters bearing upon that litigation. The proposition is extreme. It would mean that in any situation where liquidators were considering whether to pursue a claim instituted by the company before its liquidation, whether they came on the scene after litigation had commenced or whether they were contemplating instituting such litigation, it would constitute an abuse were they to seek to examine a potential witness for the other party at an enquiry under the Act.

[19] If correct, the ramifications of this would be significant for the task of liquidators of companies and trustees of insolvents. If it were an abuse in this instance to summon Ms Mahlangu and examine her, merely because she was a potential witness in the pending litigation, then, by parity of reasoning, it would be an abuse in any other similar case. There is no reason to distinguish Ms Mahlangu's position and this litigation from any other possible witness and any other litigation. And it is not apparent that the position would be altered if the litigation were not actual but merely potential. Once the spectre of future litigation arose it would be an abuse to seek to bring a potential party or a witness for the other side to an enquiry and examine them in regard to issues bearing upon that litigation. Against that background I turn to consider the law on this topic.

The law

[20] The necessity in bankruptcy proceedings for a means whereby liquidators or trustees can investigate the financial position of the insolvent or insolvent company has long been recognised. It can be traced back to s 117 of the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict c 106), which provided that a bankrupt could be examined by the court:

'touching all matters relating to his trade, dealings, or estate or which may tend to disclose any secret grant, conveyance or concealment of his lads, tenements, goods, money or debts …'

Such enquiries were made available in the case of companies in 1862 and were first imported into South African legislation in 1868. They have remained part of our law ever since.[5] The Constitutional Court has affirmed the constitutional legitimacy of such provisions.[6]

[21] Section 418, read with s 417, of the Act provides that, where a company in liquidation is unable to pay its debts, an application may be made to the Master for an examination or enquiry relating to the affairs of the company. Section 417(1) sets out the permissible scope of the enquiry. Any person who is known or suspected to have in their possession any property of the company, or is believed to be indebted to the company, or any person deemed capable of giving information concerning the trade, dealings, affairs, or property of the company may be summoned to give evidence or produce documents. The potential scope of such an enquiry is extremely wide. In the present case it would encompass all the issues surrounding the claim by 3P Consulting against

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[5] The history is traced in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC) (*Ferreira*) paras 115 to 119. It is possible that the first enactment of such provisions was even earlier than the Victorian era. See *Re Excel Finance Corporation Ltd John Frederick Worthley v Richard Anthony Fountayne England* [1994] FCA 1251; (1994) 124 ALR 281, para 27 (*Excel Finance*).

[6] *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC) (*Bernstein*).

the Department. After all, that claim was the main, if not the sole, asset of the company and an enquiry into it would be one related to the dealings, affairs and property of the company. An initial submission that the validity of the claim did not come within the permissible scope of an enquiry in terms of s 417(1) was abandoned when counsel accepted that the claim was an asset of 3P Consulting and that it was therefore legitimate to enquire into its validity.

[22] The Master is entitled to appoint a commissioner to conduct the enquiry. That is what the Master did in this case when he appointed Mr Stewart as the commissioner. Once appointed the commissioner may summon witnesses and require the production of documents. The liquidators, creditors, members and contributories may be present and represented at the enquiry and are entitled to interrogate any witness, provided the scope of the interrogation is restricted to matters falling within s 417(1). It would be impermissible, for example, for a member to examine a witness with a view to establishing that they had a claim for defamation against that witness. A person summoned to an enquiry is entitled to legal representation and to be furnished with a copy of their evidence. A witness is obliged to answer any question put to them, but incriminating answers are not admissible in evidence against them in later criminal proceedings.[7]

[23] In *Ferreira* Justice Ackermann spelt out the purposes of an enquiry.[8] One of those purposes is to investigate the validity of claims by

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[7] See para 1 of the order in *Ferreira* para 157. The section has since been amended. See s 417(2)*(c)* of the Act. It excludes the use in criminal, but not civil, proceedings of incriminating answers and incriminating derivative evidence obtained in consequence of those answers.
[8] *Ferreira* paras 122 to 124. See also the summary in *Bernstein* para 16.

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'.[9] The enquiry is the mechanism by which liquidators can properly investigate 'doubtful claims against outsiders before pursuing them'.[10] Importantly:

'It is permissible for the interrogation to be directed exclusively at the general credibility of an examinee, where the testing of such person's veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound up.'[11]

[24] Had it not been for the form the argument took, the statement of principle set out above would have sufficed for the purposes of this case. But counsel seized upon a passage from an English case in the Court of Appeal in regard to the purpose of an enquiry and deployed it in support of an argument that the ambit of the enquiry is more limited than that which might be indicated by these statements of principle. The passage comes from the judgment of Browne-Wilkinson V-C in *Cloverbay*,[12] and reads as follows:

'(T)he reason for the inquisitorial jurisdiction contained in s 236 is that a liquidator or administrator comes into the company with no previous knowledge and frequently finds that the company's records are missing or defective. *The purpose of s 236 is to enable him to get sufficient information to reconstitute the state of knowledge that the company should possess.*' (Emphasis added.)

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[9] *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste Intervening* 1990 (1) SA 954 (A) at 960G-I quoted with approval in *Ferreira* para 123.
[10] *Bernstein* para 16(e)(ii).
[11] *Bernstein* para 16(f).
[12] *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90 (CA) at 102; [1991] 1 All ER 894 at 900, para 58.

[25] In referring to that passage in *Bernstein*,[13] in the context of the decision to convene an enquiry, Justice Ackermann said the following:

'The first consideration is that the purpose of the provisions is to enable the liquidator to reconstitute the state of knowledge of the company in order to make informed decisions. The purpose is not to place the company in a stronger position in civil litigation than it would have enjoyed in the absence of liquidation.'

Using this as his foundation, counsel contended that the information that might be obtained by examining Ms Mahlangu would go beyond reconstituting the state of knowledge of the company as at the date of liquidation, and would place the company in a stronger position in the pending litigation than would otherwise be the case. That was the basis for his contention that summoning Ms Mahlangu to the hearing would be an abuse. He relied on the judgment in *Kebble*[14] in support of this, although he overlooked the fact that in that case the court declined to set aside a summons.

[26] There is a twofold fallacy in this argument. The first is that it treats Browne-Wilkinson V-C's statement of the statutory purpose as if it reflected the only purpose for an enquiry. The second is that it treats the obtaining of an advantage in civil litigation as a bar to the issue of a summons. Neither is correct as a survey of authorities from various jurisdictions reveals.

[27] As to the first of these propositions counsel found himself in good company in that Hoffmann J (later Lord Hoffmann) had construed the same passage in *Cloverbay* as imposing a constraint on the purposes for

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[13] *Bernstein* para 20.
[14] *Kebble v Gainsford and Others NNO* 2010 (1) SA 561 (GSJ) paras 57 and 58.

which an enquiry could be ordered in England.[15] He held that its effect was to limit the purposes of an enquiry to obtaining the information 'to which the company was entitled from its officers and servants, past or present, as a matter of contract or fiduciary duty.' But that view was held to be incorrect by the House of Lords in *Spicer & Oppenheim*.[16] Speaking for the House, Lord Slynn of Hadley said:[17]

'I do not think that reading the judgment overall such a limitation to "reconstituting the company's knowledge" was intended to be laid down in the *Cloverbay* case.
In any event for my part I do not think that such a limitation exists.'

[28] That conclusion was justified when regard was had to the history of provisions of this ilk and the construction they have been given down the years by the courts. In *Re Gold Co*[18] it was said:

''(T)he whole object of the section is to … enable assignees, who are now called trustees, in bankruptcy to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed.'

Buckley J (as he then was), said in *Re Rolls Razor Ltd*:[19]

'It is, therefore, appropriate for the liquidator, when he thinks that he may be under a duty to try to recover something from some officer or employee of a company, or some other person who is, in some way, concerned with the company's affairs, to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim.'

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[15] *British and Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)* [1992] BCLC 314 at 320.
[16] *British and Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)* [1992] 4 All ER 876 (HL)(*Spicer & Oppenheim*).
[17] At 876a-b.
[18] *Re Gold Co* (1879) 12 ChD 77 at 82. Quoted with approval in *Bernstein* para 22.
[19] *Re Rolls Razor Ltd* [1968] 3 All ER 698 (Ch) at 700 approved in *In Re Esal (Commodities) Ltd* [1989] BCLC 59 (CA) at 64 and cited with approval in *Spicer & Oppenheim* 883c-884d and *Ferreira* para 124.

[29] A similar approach to the purpose for which the section may be used is to be found in other jurisdictions having similar legislation flowing from the same legislative history. In Hong Kong it has been said:[20]

'… it is now settled that while one of the purposes … is to enable the company's knowledge to be reconstituted, it is not the sole purpose of the provision … The provision may be used to discover facts and documents relating to specific claims against specific persons which the applicant has in contemplation and *it is in itself no bar that the applicant may have commenced or may be about to commence proceedings against the proposed witness or someone connected with him …*' (Emphasis added.)

[30] The position in New Zealand is the same. In *Carrow Holdings*,[21] Heath J said:

'Generally speaking, a liquidator will not be prevented by the Court from convening an examination simply because a firm decision to issue proceedings against the proposed examinee has been made or, indeed, in circumstances where the proceedings have, in fact, been issued.'

In *Re Smith (A Bankrupt)*[22] the New Zealand Court of Appeal dismissed an application by the wife of the bankrupt to set aside a summons where the purpose of the enquiry was to determine whether there was a claim against her personally. It held that the purpose was to determine whether to continue with existing proceedings against the wife with the same knowledge that the wife had.[23]

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[20] *The Joint and Several Liquidators of the New China Hong Kong Group Ltd and Others v Ernst & Young & Others* 2003] HKCFI 903; [2003] 3 HKLRD 799; [2003] 3 HKC 252 para 23. See also *The Joint Liquidators of Chark Fung Securities Co Ltd and Others v Chan Kwong Hung* [2001] 2 HKC 335 at 339B.

[21] *Carrow Holdings Limited (in liquidation) v Sadiq HC* [2008] NZHC 825 para 27

[22] *Re Smith (A Bankrupt)* [1992] NZFLR 241 (CA) at 244-245.

[23] *Re Ex Ced Foods (formerly Cedenco Foods)(in liquidation) and Cedenco Ohakune (in liquidation)* [2012] NZHC 3037, para 66.

[31] In Australia the problem of a liquidator using an enquiry to ascertain information about actual or potential litigation was dealt with by Street J in the following terms: [24]

'A liquidator needs information concerning his company just as much in connection with current or contemplated litigation as in connection with other aspects of its affairs. In using the statutory machinery of private examination he will in many cases be gathering evidence as an ordinary and legitimate use of this procedure. ... In my judgment it is immaterial in basic substance whether the private examination is sought to be used by a liquidator to gather information in connection with proceedings he believes he might be able to bring, proceedings he contemplates bringing, proceedings he has decided to bring, and proceedings he has already brought. There is no presently relevant distinction in substance between gathering information referable to commencing proceedings and gathering information referable to continuing proceedings.'

[32] The same approach to similar powers of enquiry is adopted in Singapore. In *W & P Piling*[25] Rajah V-C said:

'Section 285 is couched in extremely generous terms. It should not therefore be interpreted in a constricted manner by reference to any apocryphal purposes. It clearly cannot be used for any collateral purpose that affords no benefit to the company. Other than that, it may be invoked for any proper purpose that can benefit the company and which is within the statutory powers of the liquidator and the scheme of the companies legislation. … Furthermore, a liquidator has no mandate to commence litigation which has no real prospect of succeeding.'

The learned judge went on to say that:

'Information may be sought and facts and documents discovered in relation to a specific claim that the liquidator contemplates against the examinee or a related

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[24] *Re Hugh J Roberts Pty Limited (In Liquidation)* (1970) 2 NSWR 582 at 585, in a passage quoted with approval by the Court of Appeal in *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 518 (*Hong Kong Bank*) and by Mason CJ in *Hamilton v Oades* [1989] HCA 21; (1988-89) 166 CLR 486 at 497.

[25] *Liquidator of W & P Piling Pte Ltd v Chew Yin What and Others* [2004] 3 SLR 164; [2004] SGHC 108 para 27. See also *Pricewaterhousecoopers LLP and Others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] SGCA 20 paras 42 and 57.

entity. There is no rule that precludes the ordering of information against a proposed witness or someone connected with him …'

[33] I have no doubt that this approach correctly reflects the law in South Africa. In *Ferreira*,[26] Justice Ackermann cited Lord Slynn's conclusion in *Spicer & Oppenheim* with approval. In *Bernstein*,[27] he specifically rejected the narrow understanding of *Cloverbay* that the purpose of an enquiry was limited to reconstituting the state of knowledge that the company should possess. It would be a work of supererogation on my part to cite the countless cases in South Africa, of which *Bernstein* was one, where the clear purpose of an enquiry was to determine whether the company in liquidation had a sound claim against a third party. The proposition by counsel that the purpose of the enquiry must be so limited must be rejected.

[34] The second aspect of counsel's proposition is more directly connected to the issue of abuse. There is no doubt that courts have the power, and indeed the obligation, to restrain the use of the power of enquiry where it would constitute an abuse. The more difficult issue lies in determining what constitutes an abuse. Counsel's argument was that it is an abuse when the person sought to be examined is a potential witness in future proceedings and as a result of the examination of that witness the liquidators acquire insight into what the witness may say if called at the trial. Unspoken, but lurking behind this submission, was a fear of the potential risk that interrogation might extract valuable admissions from the witness, or the witness might be shown to be flawed or unreliable.

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[26] *Ferreira* para 125.
[27] *Bernstein* para 21.

[35] While the Constitutional Court in both *Ferreira* and *Bernstein* said that our courts must be astute to prevent enquiries in terms of ss 417 and 418 from being used as an instrument of abuse, it did not seek to expand on the meaning of that expression. But it did refer to Australian cases as a helpful guide to the approach to be adopted by South African courts. Thus it quoted with approval the following statement by Gleason CJ in *Hong Kong Bank*:[28]

'(w)hile the Court would not permit a liquidator, or other eligible person, to abuse its process by using an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial procedures, such as discovery or inspection, on the other hand, the possibility that a forensic advantage will be gained does not mean that the making of an order will not advance a purpose intended to be secured by the legislation.'

Immediately after this Justice Ackermann added the following far-reaching comment:

'The liquidator is entitled to obtain information, not only to ascertain whether she/he has a cause of action, but also in order to assess whether the case is sufficiently strong to justify spending the creditors' money in pursuit of it, and, conversely, whether there is an adequate defence to a claim against the company.'[29]

[36] What constitutes an improper forensic advantage will depend upon the circumstances of each case. Summoning a witness in order to benefit a third party, such as a creditor, in pursuing proceedings against that witness or an entity that they represent, would be such a case. In *Hong Kong Bank* the example was given of an attempt to summon a witness with a view to destroying their credit as a witness or to 'enable a dress rehearsal of the cross-examination'. Another example mentioned in *Excel*

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[28] *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519.
[29] *Bernstein* para 33.

Finance[30] was of a summons directed at obtaining pre-trial discovery when a discovery order had been refused in proceedings already on foot. In *Re Sasea Finance*[31] the court refused to consent to an enquiry where its sole purpose was to extract 'damaging admissions and unconvincing justifications' for the purpose of a possible negligence claim against auditors. Engineering an enquiry shortly before a trial in which the liquidator is the plaintiff in order to obtain ammunition to attack the defendant in the trial has been described as 'a classic example of harassment'.[32]

[37] Where the evidential material is available to the liquidators from an alternative source, or it can be obtained simply and expeditiously without resort to the process of an enquiry, that will tend to show that the liquidators have an ulterior motive in seeking to examine the witness and that the commissioner should not have acceded to the request to summon that witness. But the fundamental issue in determining whether there is abuse is whether the enquiry is being used for a purpose not contemplated by the Act. As it was put in *Excel Finance*:[33]

'Whether there will be, in a particular case, a use of the process or an abuse of it will depend upon purpose rather than result. The consequence of an examination may well be that the examiner has conducted a "dress rehearsal" of cross-examination which may take place at a subsequent trial. The fact that the trial has commenced, or is contemplated, may throw light upon the purpose. But merely because other proceedings had been commenced, or are contemplated, would not involve, of itself, an abuse of process.'

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[30] *Excel Finance* para 76.
[31] *Re Sasea Finance Ltd* [1998] 1 BCLC 559.
[32] *Botha v Strydom and Others* 1992 (2) SA 155 (N) at 160C-E.
[33] *Excel Finance* para 77.

[38] 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 the abuse. It is inherent in the process of such an enquiry that there is a possibility that the examination of the witness will be advantageous in future litigation. It may generate information that proves valuable in that litigation or helpful lines of enquiry. It may demonstrate that a witness is a poor witness who is unlikely to withstand cross-examination. Admissions may be made that are of assistance. The inability of a witness to provide a credible explanation for a transaction may be extremely helpful. As any experienced practitioner knows, often what is important is not what the witness can say, but what they are unable to say. Provided the underlying purpose remains the proper one of assessing the merits of a claim or a defence on an informed basis, if these advantages accrue to the liquidator along the way they are not illegitimate.

[39] Before leaving this topic there are two other factors that I should mention as bearing upon an investigation into whether an enquiry, or a summons to attend an enquiry, is an abuse. Hoffmann J (as he then was), pointed out in *Re J T Rhodes Ltd*[34] that the cases that describe the powers of examination as redolent of the Inquisition or Star Chamber were drawn from an era where the notion of personal privacy in regard to business

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[34] *Re J T Rhodes Ltd* [1987] BCLC 77 at 80. In *Botha v Strydom* supra at 159G-I they were described as 'Draconian'. See also *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others* 1995 (2) SA 433 (SE) at 443A-D.

dealings was more stringent than it is today and the powers of inspection and examination that we now regard as normal in our modern highly regulated commercial environment would have been regarded as anathema. By contrast, our society is deeply concerned at the public level with the consequences of corporate collapses, especially where that has a broad social impact on employees and vulnerable investors.[35] The general public has a legitimate interest in knowing that, when companies are liquidated, those who have warranted the reliability of financial reports and those who promoted these public ventures will have to explain why things went wrong. That suggests that courts should not too readily infer that a summons to attend an enquiry is an abuse.

[40] The second factor is that the evidence obtained from a witness at an enquiry will, in many instances, be inadmissible in later civil proceedings. That will not necessarily be so where those proceedings are brought against the witness personally, as may be the case in a claim against a former director, but where those proceedings are brought against an entity such as a company, a close corporation or a trust the evidence given at an enquiry will usually be inadmissible against them.[36] That is a considerable safeguard against abuse where the use to which the evidence may be put is limited to assisting the liquidator to form a picture of what occurred and investigating a possible claim.

Was the summons addressed to Ms Mahlangu an abuse?

[41] I have already summarised the contentions advanced on Ms Mahlangu's behalf. They were unsupported by any evidence at all that

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[35] *Bernstein* para 23.
[36] *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) and *O' Shea NO v Van Zyl and Others NNO* [2011] ZASCA 156; 2012 (1) SA 90 (SCA) paras 19 to 25.

pointed to the summons being an abuse. At the outset she and the State Attorney, South Gauteng, did not regard it as an abuse. She did not indicate, even in broad terms, what evidence she was capable of giving in regard to the dealings between 3P Consulting and the Department. It was contended that the nature of that evidence emerged from the affidavits filed by the Department in opposing the claim for judgment, but as those affidavits were not placed before the court in these proceedings we do not even know whether Ms Mahlangu was one of the deponents. Nor can we know whether the areas that she can traverse in her testimony could be adequately or better dealt with by others.[37]

[42] It was also suggested that this material would emerge in the course of the trial, but that misses the point. The liquidators were seeking to explore the matter, in order to determine what advice they should give the creditors in regard to continuing the present litigation. They could not do that properly, expeditiously or inexpensively by following the often laborious processes of preparing for trial. Additionally, they did not have the benefit, as they would in many other jurisdictions, of witness statements furnished in advance of trial. Lastly, there was no guarantee that Ms Mahlangu would testify at the trial, in which event the liquidators would be compelled to litigate without knowing what light she could cast on the dispute.

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[37] In argument there were suggestions that evidence might be better forthcoming from people such as the Director-General of the Department, but no foundation was laid for this. There was a complaint in the affidavit against a 'senior representative of the other party to the litigation' being required to give evidence. Enquiries as to whether it was permissible for 'junior representatives' to do so and whether Ms Mahlangu was standing upon her dignity attracted a hasty withdrawal. For a public representative to adopt the stance that they were too important, or too busy, to attend at an enquiry, would be to deny the legacy of our first president, the late President Mandela, who gave evidence and submitted to cross-examination in the SARFU case, even though the decision to require him to do so was unfounded. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) paras 20-22 and 240-245.

[43] The suggested prejudice to the Department was not established. Ms Mahlangu's evidence at the enquiry would, for the reasons dealt with above, not be admissible against the Department. If, as she said, the purpose was to obtain information from her to bolster the case against the Department, she neither indicated what that information might be nor gave any good reason why it should not be disclosed to the liquidators. She said that she did not wish the liquidators 'to gain inside knowledge I have of my employer's business'. Her perception that she is a mere employee is curious. She is in fact an elected public representative, appointed by the Premier of the province to hold the office of an MEC in the province. That aside, she has not taken the court into her confidence in regard to the nature of her knowledge, or why it may affect the outcome of the litigation, or why it should remain confidential.

[44] In short, there was no evidence at all to support Ms Mahlangu's allegations that the summons addressed to her constituted an abuse. Her contention that this was so was based on an erroneous understanding of the circumstances in which a person may be summoned to attend and give evidence at an enquiry under ss 417 and 418 of the Act. The liquidators had clear and justifiable reasons for seeking her testimony. The commissioner properly summoned her to attend. No abuse was involved.

[45] The court below was asked by Ms Mahlangu to approach the matter on the basis that the liquidators had already decided to press ahead with the litigation against the Department; that all the information it could obtain from Ms Mahlangu was already to be found in the affidavits delivered in those proceedings and that the purpose of summoning Ms Mahlangu to the enquiry was to use it as a 'trial run or "pre-hearing" of the evidence to be led' in that litigation. Somewhat contradictorily, it was

also argued that she could not state definitively whether the work contracted for had been performed and that she could not advance the Department's case in regard to other irregularities. No finding was made in regard to these submissions but none of them had any support in the application papers before the court. What was before the court and undisputed was the evidence of the liquidators that they had still to take a decision on whether to proceed with the litigation and that the enquiry, including calling Ms Mahlangu as a witness, was directed at giving informed advice to creditors in this regard.

[46] Notwithstanding this the judge in the high court said that Ms Mahlangu's relationship with 3P Consulting was at arm's length and inherently adversarial. She accordingly 'hardly qualifies as a person who can shed light on the operations of 3P Consulting'. Needless to say that was factually incorrect and involved the wrong approach to the issue of abuse. Equally incorrect was the view that 'the enquiry may be abused to gain pre-trial forensic advantages not permitted by rules of court to elicit information that may be used to uncover the inherent strengths and weaknesses in 3P Consulting's civil lawsuit against the Department'. It was not the potential for abuse, which should in any event be prevented by the commissioner, but the existence of actual abuse that was relevant.

[47] As far as can be ascertained from the judgment the reason the judge upheld Ms Mahlangu's application was his view that if the enquiry proceeded 'it will provide them with a pre-trial forensic tool not provided by the rules of court such as discovery and inspection to weigh their chances of success at trial'. That involved a fundamental misunderstanding of the purpose of an enquiry under ss 417 and 418. It was not a proper basis for a finding of abuse. It follows that the appeal

must succeed, but before finishing this judgment it is appropriate for me to make some remarks about the form of the proceedings in this case.

Form of proceedings

[48] Ms Mahlangu claimed an interdict preventing the commissioner from compelling her to give evidence and an order setting aside the summons. Her case was then argued on the basis that it was a straightforward application in which, provided she established the abuse of which she complained, she was entitled to relief. The position of the Master and the commissioner was disregarded. I am not satisfied that this approach was correct. While courts have a power to intervene in such proceedings and prevent them from being abused, that power cannot be divorced from the provisions of the statute or the principles of our law that apply to challenging decisions made in the exercise of statutory powers.

[49] Ms Mahlangu's legal advisers may have been misled by the reliance that has been placed on foreign cases, especially those from England, in our own jurisprudence relating to such enquiries. As Justice Kriegler warned in *Bernstein*[38] too facile a reading of foreign legal material is to be eschewed, because, when removed from their own environment, they may mislead. In England and in several of the other jurisdictions to which I have referred an enquiry of this type can only be convened by order of court, as was formerly the position in this country. As a result, the English cases, of which *Cloverbay* is a prime example, are concerned with the question of when such an enquiry should be convened. They are not dealing with the circumstances in which the court

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[38] *Bernstein* para 133.

should overturn a decision to convene an enquiry on the grounds that it is an abuse. In South Africa the Master is empowered by s 417(1) to conduct such an enquiry or to appoint, in terms of s 418(1)*(b)*, a commissioner to conduct an enquiry. Experience teaches us that this is now the normal way in which such enquiries are convened.[39] The conduct of the enquiry is then delegated to the commissioner who exercises the statutory powers set out in s 418 of which one is the power to summon witnesses to the enquiry and another of which is to regulate the questioning of witnesses.[40]

[50] In the light of these provisions, where the Master has exercised the power to convene an enquiry and appoint a commissioner to conduct it, the position may be that such a decision can only be challenged by way of judicial review.[41] In any event, it is not simply a matter of the court substituting its decision for that of the Master. As the cases demonstrate some weight is to be attached to the decision of the Master and it may not be overturned simply because the court disagrees with it. It can only be set aside on limited grounds of which the one most likely to be relevant here would be that it was unreasonable in the sense of being a decision that a reasonable decision-maker could not reach.[42] In this case the Master's decision is not challenged. It must be taken therefore that the convening of an enquiry into the affairs of 3P Consulting and the appointment of Mr Stewart to act as commissioner was entirely justified. There was nothing in the record to gainsay that conclusion.

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[39] Meskin *Henochsberg on the Companies Act* (5 ed, 1994, looseleaf, current ed Kunst, Delport and Vorster) Vol 1, p 888 (Service Issue 32).
[40] Section 418(1)*(c)* of the Act.
[41] *Leech and Others v Farber NO and Others* 2000 (2) SA 444 (W) at 448F-H. The position appears to be the same in Australia where a Commissioner of the Australian Securities Commission and not a court that makes orders for the convening of an enquiry. See *Excel Finance*.
[42] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 44.

[51] The attack was instead directed at the decision by the commissioner to summon Ms Mahlangu to attend and give evidence. But that was not directly addressed in the papers. Instead it was attacked obliquely on the basis that the motives of the liquidators in seeking to have her summoned to the enquiry were improper. This is not a permissible approach, because it is the commissioner who decides that a witness is to be summoned, not the liquidators, although they may ask the commissioner to do so. The position of the commissioner must be distinguished from that of the liquidators and their motives. As Harms JA pointed out in *Jeeva*:[43]

'The Commissioner, against whom no complaint has been laid, is the person who conducts the inquiry. It is he who has to act in a quasi-judicial capacity. He has the main duty to examine the witnesses. He has to regulate and control the interrogation. Should he fail in his duty to apply the procedural fairness appropriate to this forum, an aggrieved party may approach the Court for suitable relief …

… [t]he position of the liquidator is quite different. He, in this context, acts in neither an administrative nor quasi-judicial capacity. He is not in a position of authority vis-à-vis the witness. He does not determine or affect any of his rights. He simply represents the company in liquidation at the inquiry. He is, or may be, an adversary of the witness. As adversary he can have no higher duty towards his opponent than any other litigant has.'

Where there is no foundation for the commissioner to issue a summons compelling a witness to attend an enquiry the commissioner's decision may be challenged.

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[43] *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others NNO v Jeeva and Others* [1996] ZASCA 5; 1996 (2) SA 573 (A) at 579H–580B.

[52] An enquiry under these sections of the Act has been said to be a 'complex administrative proceeding'.[44] Whether that is a correct description is debatable.[45] If there is to be a challenge to the conduct of an enquiry that must either be a review falling under PAJA[46] or a residual category of review derived from the common law. In either event, the proper way in which to challenge the summoning of a witness is by way of review proceedings and the decision that falls to be attacked is that of the commissioner not the liquidators.[47] Any attack on the commissioner's decision to summon a witness must give weight to the considered view of the commissioner as to the necessity for that particular individual to be summoned.[48]

[53] Furthermore when an allegation is made, as was made here, that the examination by the liquidators would involve an improper 'fishing expedition' the primary issue is whether the commissioner would permit that. Here there was no suggestion that, had Ms Mahlangu given evidence, the commissioner would not have exercised his powers to prevent any abuse by the liquidators. Of course, instances may arise where liquidators interrogating a witness at an enquiry may overstep the permissible bounds of the enquiry and abuse their statutory rights. But an aggrieved person, who is entitled to be legally represented, is entitled to

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[44] *Schulte v Van der Berg and Others NNO* 1991 (3) SA 717 (C) at 721A-B.
[45] In *Bernstein* Ackermann J said that there was difficulty in seeing how such an enquiry can be characterized as administrative action, (paras 96-98) although ultimately the question was left open (para 99). The judgments of Kriegler J (para 131) and O'Regan J (para 155) specifically refrained from endorsing those doubts. There can be little doubt that the Master and the commissioner are exercising public powers, but the debate is whether they are engaged in making decisions of an administrative nature. See also *Mitchell and Another v Hodes and Others NNO* 2003 (3) SA 176 (C) at 185E-189C.
[46] The Promotion of Administrative Justice Act 3 of 2000.
[47] Without directly referring to the problem the judgments in both *Gumede and Others v Subel SC, Arnold and Others* [2006] 3 All SA 411 (SCA) and *Miller and Others v Nafcoc Investment Holdigs Company Ltd and Others* [2010] 4 All SA 44 (SCA) proceed as if the court was concerned with a review of the Master's decision or the commissioner's decision.
[48] See *Bato Star* supra paras 46 – 48. *Leech v Farber NO* supra at 448I-449C.

complain and it is then for the commissioner to prevent any abuse. If the witness is dissatisfied with the commissioner's approach that may be the subject of a review, but one cannot start from the perspective that the commissioner will not discharge their duties properly and prevent abuse from occurring.

[54] Although, therefore, I have proceeded in this judgment to deal with the issues raised on the footing that they fell exclusively within the court's domain and that no weight should be given to the commissioner's views, I do not think that this is a correct approach. As it is the one most favourable to Ms Mahlangu it does not affect the result.

Conclusion

[55] In the result the appeal is upheld with costs and the order of the High Court is altered to read:

'The application is dismissed with costs.'

Justice M J D Wallis

Judge of Appeal

Appearances

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