

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE HIGH COURT – PORT ELIZABETH)**

CASE NO. : 3521/2012

Heard on : 06 June 2013

Date delivered: 19 November 2013

In the matter between:

ABSA BANK LIMITED

First Applicant

MARIA RAMOS

Second Applicant

And

PAUL ERASMUS JOOSTE N.O.

First Respondent

JACOBUS HENDRIKUS JANSE

VAN RENSBURG N.O.

Second Respondent

THE MASTER OF THE EASTERN CAPE

HIGH COURT

Third Respondent

JUDGMENT

MAJIKI J:

[1] This is an application launched by the applicants to set aside the summons authorised by the first respondent, in his capacity as the commissioner in the enquiry of Milkwood Construction Limited (in

liquidation) (“Milkwood”), issued against the second applicant. The enquiry was ordered (“the order”) by this court on 7 February 2012 on application by NJO Du Plessis Building Contractors CC (under supervision) (“NJO”) in terms of the provisions of sections 417 and 418 of the Companies Act 61 of 1973, as amended (“the Act”).

[2] The applicants further sought an order interdicting and restraining first respondent from authorising summons against any employee of the first applicant in the enquiry into the affairs of Milkwood, without the prior leave of this court.

[3] The relevant terms of the said order were :-

- 3.1 that leave was granted to the applicant, [NJO], to conduct a commission of enquiry into the affairs of Milkwood in terms of the provisions of section 417 and 418 of the Act;
- 3.2 that leave was granted to NJO to appoint attorneys, counsel and forensic auditors to assist and advise the applicant in the execution of the enquiry;
- 3.3 that advocate Paul Erasmus Jooste be appointed as commissioner in terms of the provisions of Section 418, to report to the Master of the High Court, in respect of the following;
 - 3.3.1 the identity of witnesses who gave evidence before him, the nature, contents and necessity of the evidence of each such witness, the relevancy thereof and to what extent the evidence contributed to the investigatory process into the affairs of the liquidated company;

- 3.3.2 the particulars of assets and monies that were discovered through the investigatory process, and to what extent the enquiry procedure disclosed assets and monies for the advantage of the creditors of the liquidated company and the reasons therefore;
- 3.3.3 the particulars of transgressions and irregularities, if any, disclosed through the evidence and whether such should be referred to the National Prosecuting Authority;
- 3.4 that the commissioner is authorised to issue summons in respect of any person or entity referred to in the application or during the enquiry, to appear at the enquiry to be interrogated by the liquidator, the legal representative and/or the creditors of the liquidated company;
- 3.5 that the individuals identified in the application or during the enquiry, be interrogated before the commissioner at a time and date and venue fixed by the commissioner and that such individuals and/or entities be called upon to give evidence in respect of their appointment or association with the business, the operation of the scheme and/or the assets or liabilities of the liquidated company;
- 3.6 that each of the persons so identified and who are interrogated at the enquiry, be instructed to present all books and documentary proof which are in their possession and under their control and which may disclose assets or monies of the liquidated company;
- 3.7 that the commissioner is authorised to issue summons against any person or entity to appear at the enquiry and to give evidence in

respect of any issue that might have arisen during the enquiry or thereafter in order to effect due compliance with this order;

3.8 that the commissioner is authorised to issue summons against any person or entity not being referred to specifically in the application or during the enquiry, to appear at the enquiry and present books and documents or proof which may be necessary to facilitate the enquiry and with the intention to effect due compliance with this order;

3.9 that the signature of the commissioner, alternatively the Master be regarded as sufficient for official authorisation of any summons issued before or during the enquiry;

3.10 that the evidence presented in this application and the evidence presented at the enquiry be regarded as confidential and which may not be disclosed without the prior written authorisation by the Master, except that the applicant is granted leave to use any transcript of the enquiry for the purposes of further steps, including litigation, that may flow from the enquiry;

[4] In terms of the first respondent's summons, the second applicant or her duly authorised agent was called to appear before the first respondent, in order to testify to matters within her knowledge. Alternatively, to provide material or relevant information, in respect of her association with the affairs and property of Milkwood and in particular matters within her knowledge concerning the dealings and association of Milkwood with NJO, Milkwood and erf 1109 Marina Martinique CC (in liquidation) ("erf 1109").

[5] The second applicant or her duly authorised agent were required to produce all documents, records and papers in her possession, custody or within her power or under her control relating to the affairs and dealings of Milkwood. She or her duly authorised agent were specifically required to bring with them and produce to first respondent the documents set out in annexure “A” to the summons.

[6] Annexure “A” listed the following:

“1. All documents relating to Development Bonds and/or Loans made to, or on behalf of, or between the Company Milkwood (Pty) Ltd (in liquidation) and Erf 1109 including :

- (a) All loan agreements in respect of the development on Erf 1109, Marina Martinique CC from Absa Bank;
- (b) Proof of all progress payments made in respect of the development of Erf 1109 including the dates of such payments, the underlying cause of such payments, the amounts, the instructions to pay and the payees;
- (c) The details of both bond accounts, including the statements on both bond accounts;
- (d) Copies of the sale agreements pertaining to three stands sold to NJO du Plessis Building Contractors CC
- (e) The bank statements in respect of account numbers 7010032238 and 7010032288 for the period of the development;
- (f) Copies of the Absa bank bond settlement account number 299098117;
- (g) The bank statements of Milkwood Construction (Pty) Limited for the entire period of the development on Erf 1109;
- (h) All certificates for progress payments in respect of the development on the property of Erf 1109;

- (i) Copies of all correspondence, whether electronically or otherwise, in respect of development on Erf 1109.

Background information leading to the present application

[7] Erf 1109 is the owner of the property known as Erf 1109, Dolphin Drive, Aston Bay, which was to be developed. Milkwood was a management company formed and managed by five people. Milkwood was responsible for, and entitled to drive the development on the property, it was more of a facilitator for the development on the property of Erf 1109. NJO was contracted as a builder on the property of Erf 1109 upon facilitation by Milkwood. At the time of the institution of these proceedings NJO was under the supervision of the business rescue practitioner.

[8] A loan agreement was entered into between the first applicant and Erf 1109. Subsequently a development bond of 76 million rand in favour of the first applicant was registered over Erf 1109. Erf 1109 authorised drawdowns of funds to various third parties and first applicant would effect the payments upon Erf 1109's written instructions. Milkwood, as facilitator entered into a written agreement with NJO to erect 32 apartments on the property owned by Erf 1109.

[9] Erf 1109 defaulted on the loan agreement and was liquidated at the instance of first applicant. The enquiry into the affairs of Milkwood was prompted by the fact that according to the second respondent, (Jacobus Van Rensburg, business rescue practitioner in NJO) 5 million rand was paid to members of Milkwood, even though it was supposed to have been paid to NJO as the sole recipient of progress payments on the development bond. The payments made to the members of Milkwood could not be accounted for and Milkwood refused to pay NJO.

[10] The applicants in their main supportive affidavit attacked the summons on the basis that the first respondent sought documents relating to the affairs of Erf 1109; that the second applicant was summoned in her personal capacity and not as chief executive officer or chairperson of Absa; that Van Rensburg referred to the issuing of subpoena of Ms Ramos, whereas s.417 of the Act refers to issuing of summons; that the summons exceeded boundaries of paragraph 11 of the order in that the second applicant was advised that she would be required to testify and disclose everything she knew relating in any way to the affairs of Milkwood. Milkwood was not owed any monies by Erf 1109, according to the second respondent it was NJO which was owed by Milkwood.

[11] Further, that the loan agreement indicated that the loan account would be held from where Absa administered the loan after the final drawdown, being Greenacres, Port Elizabeth. The second applicant is in Johannesburg therefore is not the relevant person to be summoned; that first applicant did not have any documents, records or papers relating to the affairs of Milkwood as paragraph 3 of the summons required the production of; that documents in paragraphs (a)-(c) (e) and (f) of annexure "A" had already been furnished to the commission; that paragraph (i) of annexure "A" did not specify or sufficiently describe what was required; documents referred to in paragraph (d) could not be provided they were not identified as relating to Milkwood or Erf 1109; that documents requested in paragraph (f) were said to be bulky and that documents requested in paragraph (g) did not exist.

[12] Furthermore, that the summons is self contradictory, it summoned the second applicant to appear in person or provide material or relevant information in respect of her association with the affairs and property of Milkwood, and in particular matters within her knowledge concerning the dealings and association with Milkwood and NJO, Milkwood and Erf 1109. The clear indication of this is that the second applicant on the one hand was

summoned to attend the enquiry and remain in attendance until excused, whilst also informed that she need not attend should the requested documents be produced prior to her date of appearance.

[13] Furthermore, the summons was attacked on the basis that it was issued to secure a benefit for NJO in its litigation against directors of Milkwood. No employee of first applicant would know of dealings between Milkwood, NJO and Erf 1109. Absa employees answered truthfully, to the extent that the transmission account and statements were made available to the commission showing a record of payments made. The first respondent did not produce the transcript relating to or disclose the evidence on which he based his ruling that Erf 1109, Milkwood and NJO were interrelated. He also did not make attempts to seek permission of the Master to do so.

[14] The applicants advanced their reason in approaching the court directly by way of this application as being that the first respondent, who ordinarily would rule on their objections raised at the enquiry, had already found that the enquiry was and would be hampered by first applicant's refusal to partake in the enquiry. The first respondent failed to take into account that the undertaking sought by the first respondent, to the effect that the first applicant's employees would not be subjected to questioning beyond the terms of the court order, was not given, and that the first respondent's enquiry as to who would pay for the search of the documents was not answered. The threat to subpoena was made to terrorise the applicants.

[15] In his answering affidavit the second respondent stated that he, as the business rescue practitioner of NJO, could not obtain information or a clear explanation regarding the millions that flowed to Milkwood, in addition there was no accounting for the said monies but it was clear that they disappeared. He then obtained a court order for a commission of enquiry into the affairs of Milkwood.

[16] The first applicant's officials were subpoenaed so that the second respondent, NJO and Erf 1109 could get clarity on the monies paid to Milkwood from the development bond. The first applicant withdrew from the commission, each witness that was called from first applicant could not provide information about the file of the development bond, its whereabouts and under whose control it was.

[17] When an attempt to summon the chairman of first applicant failed, the first respondent summoned the second applicant because she could not say the file was not under her control, wherever it was in South Africa. Various witnesses who testified stated that it was in George, Cape Town, Johannesburg, even when reference was made to Port Elizabeth, there was evidence that an official who was involved in the handling of the file was dismissed for suspected irregularities. The applicants cannot hide behind the fact that they have complex administrative systems. They must have accessed the file when they applied for liquidation of Erf 1109.

[18] According to first respondent, after he heard evidence of two (2) witnesses, i.e. employees of first applicant, he concluded that the three entities were so interrelated that one could not get to the bottom of the affairs of Milkwood without reference to Erf 1109 and NJO. Furthermore, the said witnesses were ducking and diving from giving the commissioner information pertaining to payments made from the development bond. It then became necessary for him to enquire as to why monies were paid to Milkwood. However, he could not successfully summon the chairperson of the first applicant as it turned out that he was a non-executive director and had left the employ of the first applicant.

[19] It is common cause that the order authorised an enquiry into the affairs of Milkwood and that Milkwood never had an account with the first respondent or conducted business with first respondent. Therefore, any payments made to any director of Milkwood concerned Erf 1109. It is also common cause that NJO was a creditor of Milkwood.

Issue

[20] The following issues were raised whether the summons issued fell within the ambit of the court order authorising an enquiry into the affairs of Milkwood; whether the first respondent could enquire into matters relating to the development bond of Erf 1109; and whether the first respondent could call for witnesses to testify about the affairs of Erf 1109 and payments made from the development bond of Erf 1109, in particular those made to Milkwood.

[21] Furthermore, whether the first respondent gave due and proper consideration to the matter and the contents of the summons before he exercised his power to authorise the summons; whether the summons substantially and technically complied with what the first respondent stated it was required to convey in order to facilitate the objectives of the commission of enquiry and whether the applicants have made out a case for the granting of the final interdict sought in favour of its employees.

[22] The respondents argued, and correctly in my view, that the fundamental question that requires to be answered is whether the summons called for relevant information and whether the commissioner had reasonable grounds for believing that the second applicant might be able to give material information concerning the affairs of Milkwood.

[23] Section 417 of the Act provides:

“Summoning and examination of persons as to affairs of company. –

- (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.

- (2)
 - (a) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

 - (b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.

- (3) The Master of the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien ...

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

Section 418 of the Act provides:

1. *Examination by commissioners –*
 - (a) Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a Commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.
 - (b) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such Commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order.
2. A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the Commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.

[24] According to *Henochsberg on the Companies Act, Volume 1*, at page 889 there is no limitation upon the matters about which there can be

interrogation provided, of course, in each case that, or those, contemplated concerns, or concern, the trade, dealings, affairs or property of the company. The scope of the investigation is no less extensive than that of one under s.415. The judicial dicta regarding s.415 apply *mutatis mutandis* in relation to s.417.

[25] Examination under s.417, or an enquiry under the same provisions read together with s.418, are automatically private and confidential unless the court or master as the case may be, were to direct otherwise. A person who seeks examination under s. 417 or an enquiry under s. 417 read with s. 418, while carrying no onus of proof as such, must satisfy the court, or the master that in the circumstances such an examination or enquiry is to be preferred and that there is a fair ground for suspicion that the person sought to be examined can probably give information about what is suspected.

[26] Section 415 (1) of the Act provides that :

“Examination of directors and others at meetings.-

- (1) 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 or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414(2)(a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the company: Provided that the Master or

such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

[27] Section 415(2) of the Act provides that :

“In connection with the production of any book or document in compliance with a subpoena issued under section 414(2)(b) or the interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness subpoenaed to produce a book or document or give evidence in a magistrate’s court shall apply: Provided that a banker at whose bank the company concerned keeps or at any time kept an account, shall be obliged, if subpoenaed to do so under section 414(2)(b), to produce-

- (a) any cheque in his possession which was drawn by the company within one year before the commencement of the winding-up; or
- (b) if any cheque so drawn is not available, any record of the payment, the date of payment and the amount of the cheque which may be available to him, or a copy of such record, and shall, if called upon to do so, give any other information available to him in connection with any such cheque or the account of the company.

[28] According to *Henochsberg supra*, at page 880 - 881 the scope of the interrogation for which s.415 provides is defined in the widest terms and no matter affecting the company’s affairs is outside its ambit. In this regard the author refers to *Moolman v Builder’s & Developers (Pty) Ltd : Jooste Intervening 1990 (1) SA 954 (A)* at 960. The object of the legislature is, the facilitation of the gathering of information necessary to enable the winding up

to be properly and effectively administered and the greatest financial benefit to the creditors be obtained. In approving the views of De Vos J in *Simon v The Assistant Master* 1964 (3) SA 715 (T) Horn AJ in *Lordan v Dusky Dawn Investments (in liquidation)* 1998 (4) SA 519 (SE) at 525 held that an interrogation, the purpose of which is to expose misdemeanours or liability of directors for mismanagement with no actual or potential effect upon the financial interests of the company or its creditors, should not be permitted by utilization of s.s 415 or 417. The purpose of the interrogation which would not relate to the affairs of the company, and which cannot at all affect the administration of the winding up is an abuse of the provisions of s.415, for example, the use of the section to get facts about alleged claim which a proved creditor proposes to enforce against someone other than the company.

[29] The applicants argue that they furnished to the commission all the required information through their employees who testified and also submitted the statements reflecting payments they made. Furthermore, that the actual file in respect of the development bond was not sought by the respondents in the summons. However, even if the respondents had done so, they would not be able to furnish it because it was subject to client confidentiality.

[30] The first applicant argued that it was denied of copies of the exhibits with which they were confronted; that the undertakings it sought were not given by the commissioner, with regard to payment of costs of launching extensive investigations and making of copies of documents and that it was not given the clarity it sought as to who was allegedly in control of the required documents and where they were allegedly to be found.

[31] The first applicant argued further that the summons was defective in form and substance and was an abuse of process. Furthermore, there was no legal basis for authorisation of subpoenas against first respondent and its

employees without authorisation of the court and further that the summons is self contradictory.

[32] In my view the applicants have not substantiated their assertion that the summons is defective in form and substance. The information sought in the summons is in respect of the applicants' association with the affairs of Milkwood, in particular about the payments made to the directors of Milkwood from the development bond. Evidence suggesting that irregular payments were made to Milkwood or its directors from the development bond of Erf 1109 was led by the employees of the first applicant at the enquiry. When they were asked about the development bond file they could not give a definite answer about its whereabouts. I also find no basis for the assertion that it is contradictory to ask second applicant to come or furnish the required information, the key issue would be the supply of the required information.

[33] Erf 1109 was liquidated at the instance of the first applicant. The correspondence requested under (d) and (i) of annexure "A" would be part of the information contained in the development file. I find merit in the respondents' argument that the first applicant used the information contained in the file in its application for the liquidation of Erf 1109. In my view, the applicant ought to make an effort to furnish the information so required.

[34] NJO was a creditor of Milkwood. In my view, in the absence of a finding that the interrogation was of no actual or potential effect upon the financial interests of the company or its creditors, there should be no basis for finding that the actions of the second respondent were an abuse of the provisions of s.417.

[35] As regards confidentiality in *Gumede and Others v Subel NO and Others*; 2006 (3) SA 498 (SCA) at 505-506 [para 19], held that a bare assertion that documents are confidential does not entitle the person to be

interrogated to withhold them. The proper approach to determine whether there is a reason to believe that the documents requested will throw light on the affairs of the company before the winding up. Relevance will outweigh privacy. Moreover, the first applicant on its own version had already availed the transmission account and statements to the commission.

[36] Section 417(5) provides that any person summoned under s.417(1) shall be entitled to witness fees. It therefore would have been open to the applicants to claim any fees for the costs they would have incurred in searching and copying of the required documents, in line with this section. The reliefs the applicants are seeking are not aimed at securing the furnishing of such undertakings. In my view, the respondents could record at the commission the difficulties they had with complying in full with the summons.

[37] With regard to whether the summons is a subpoena *ad testificandum* and *duces tecum*, the second applicant was summoned to an enquiry held in terms of s.417. The intended examination of the second applicant therefore was in terms of ss. 417 and 418. The summons was framed as such in line with the court order. It is in the answering affidavit that the document is interchangeably referred to as a subpoena and or summons. Its content and purpose are indicative that it was issued as a summons.

[38] Section 414(2) provides for the issuing of subpoena of persons to the meeting of creditors of a company being wound up. S.417 provides for summoning and examination of persons by the Master or Courts.

Section 418 provides that every magistrate and every other person appointed for the purpose by the Master or Court, shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding up of any company. Section 418 (2) confers to the commissioner the same powers of summoning and examination of witnesses and of requiring the production of documents as the Master who or

Court which appointed him or her. The first respondent was appointed by Court, the first respondent therefore could and did validly issue the summons of the second applicant. *In Lategan and Others v Lategan and Others 2003 (6) SA 611 (D)* at 618 Magid J referred to *Jessel MR* in *Re Gold Co (1879) 12 Ch D 77* at 82, in connection with rights of somebody summoned in terms of s.115 of English Companies Act, which has a large measure of similarity with our s. 417 and quoted:

“He is not more nor less than a mere witness, like a witness in any other case; but he has this protection, that in an ordinary action the subpoena issues as a matter of right at the option of the litigant, whereas in this case it cannot be issued without the opinion of the Judge of a Superior Court being that it is a proper case in which to issue a summons, which comes in lieu of the subpoena”

Magid J found that the authority issuing summons is required to apply its mind to the question whether it is a proper case to issue summons whereas the authority issuing the subpoena does not have that duty. In summing up the issues that should be born in mind by the Court in authorising an examination in terms of s.417, he further referred at page 618 to authority in *Bernstein and Others v Bester and Others NO 1996 (2) SA 751 (CC)* at 770 D-E and quoted Ackermann J as follows :

“Moreover, judicial control over the manner in which the examination is conducted complements the control which the Court exercises over whether the examination should take place in the first place. Courts have long recognised that the examination is open to abuse and that the proceedings ought to be watched carefully.

[39] An enquiry into the affairs of Milkwood cannot be limited to investigation of monies owed to Milkwood. The applicants suggest that, the enquiry was sought in order to benefit NJO; Milkwood had no claim against Erf 1109, according to them there was no need to enquire into the payments made by or on behalf of Erf 1109 to Milkwood. In *Lordan's* case *supra*, the Court's view with regard to an interrogation by a creditor, was that the matters investigated and dealt with at the meeting of creditors must have some immediate or mediate bearing, actual or potential on the financial interests of at least the interrogating creditor. The scope of the s.417 investigation is no less extensive than that under s.415 and the judicial dicta regarding s.415 is equally applicable in relation to s.417. An investigation into the affairs of Milkwood, above interrogating the payments received by Milkwood, would also include those that have a bearing on the financial interest of the interrogating creditor, NJO in this instance.

[40] The first respondent had ruled that Milkwood, Erf 1109 and NJO are interrelated. The applicants have not sought a review of the said decision. In my view the summons called relevant information. The commissioner applied his mind in this regard.

[41] I am not persuaded that any of the applicants' objections could not validly be raised at the commission. They do not justify the granting of an order setting aside the summons.

[42] Similarly, I am not persuaded that the applicants have made out a case for the granting of the final interdict against the first respondent from authorising a summons to any of the first applicant's employee in the enquiry into the affairs of Milkwood.

Consequently, the application is dismissed with costs.

B MAJIKI

JUDGE OF THE HIGH COURT

Counsel for the Applicant : Advocate Olivier SC

Instructed by : Messrs Sandenbergh Nel Haggard
c/o McWilliams & Elliot Incorporated
83 Parliament Street
Central
PORT ELIZABETH

Counsel for the Respondent: Advocate Coller

Instructed by : Messrs Rob McWilliams Attorneys
11 Lenox Street
Glendinningvale
PORT ELIZABETH