



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 11969/18P

In the matter between:

**RE-VOLT KZN PROJECTS CC
CK NO. 2005/106008/23**

APPLICANT

And

LALLISA INVESTMENTS (PTY) LTD

RESPONDENT

**WULAGANATHAN REDDY N.O. AS TRUSTEE
FOR THE STEVE REDDY FAMILY TRUST**

FIRST INTERVENING PARTY

WULAGANATHAN REDDY

SECOND INTERVENING PARTY

ORDER

1. The counter application is granted.

2. The order granted on 28 November 2019 is reconsidered and it is set aside.
3. The costs of interlocutory applications are ordered to be costs in the counter application.
4. The applicant (Re-volt KZN Projects CC) is ordered to pay costs of the counter application, including costs of senior counsel, where so employed.

JUDGMENT

Mngadi J

[1] On 9 July 2020 by means of an urgent ex-parte application, Re-Volt KZN Projects CC (Revolt) a duly registered and incorporated close corporation (Revolt) citing Lallisa Investments (Pty) Ltd (Lallisa) sought an order directing the holding of an enquiry in terms of s417 read with s 418 of the Companies Act 61 of 1973 (the Act) in respect of Lallisa a company in liquidation.

[2] The ex-parte application relied on a founding affidavit deposed to by Jaybalan Pillay (Pillay). Pillay stated that he was a member and representative of Revolt and he was duly authorized by member's resolution, which authorized the institution of an application for an order to convene an investigation and appointed him to represent and act on behalf of Revolt in such application.

[3] Pillay stated that Revolt instituted liquidation of Lallisa due to the failure of Lallisa to pay it a substantial amount for the construction of a partially completed shopping Centre which indicated that Lallisa was unable to pay its debts. A final liquidation order was granted on 29 March 2019. Ranjith Choorilall, Aneel Darmalingam and Pierre Berrange were pointed final joint liquidation of Lallisa. The joint liquidators agreed amongst themselves that Choonilall would act as the lead liquidator.

[4] He stated that the creditors of Lallisa authorized the final joint liquidators to hold enquiries in terms of the provisions of the Act which covered the interrogation provided for in s417 and s418 of the Act. Chonilall obtained the consent of the magistrate of Durban to convene the investigation. The investigation proceeded before the Magistrate. The directors of Lallisa in particular Steve Reddy (Reddy) and members of his family and attorney Moodley were represented by attorneys De Villiers and Petit. In the course of the enquiry Reddy's lawyers contended that the enquiry was improper, null and void. This resulted in litigation, which has not been finalized in that an order was made that the enquiry was null and void because the Master of the High Court had not given consent for the holding of the enquiry.

[5] Pillay stated that Revolt requested by a letter dated 19 November 2019 that the liquidators obtain the Master's consent and the enquiry be held. To date the Master has not authorized the holding of an investigation despite numerous requests made to the joint liquidators and the Master.

[6] Pillay stated that it is necessary that an investigation in terms of the Act be held. He stated that Lallisa contracted the appointment of various service providers to erect a shopping complex on a property consisting of three sub-divisions owned by three different legal entities. He stated that to facilitate the development, the three sub-divisions were notarial tied in terms of a notarial tie agreement, which restricted the right of each individual owner to alienate or encumber or lease each sub-division separately.

[7] Pillay stated that notwithstanding that the deemed date of liquidation of Lallisa was 18 October 2018 and the provisional order of liquidation was granted by consent on 15 February 2019, the subdivisions were sold and transferred to Redacres Property Group (Pty) Ltd (Redacress) on 18 March 2019. The sole director and shareholder of Redacress is Pragasen Reddy who is the son of Reddy the director of Revolt. The sale of the sub-divisions to Redacres has on 27 May 2019 been set aside by a court order.

[8] Pillay stated that it is essential for the general body of Lallisa's creditors that the mechanism provided for in section 417 read with s418 of the Act be utilised to investigate the trade, dealings, affairs, assets and property of Lallisa. Pillay stated that Lallisa disclosed in affidavits that for the development it used certain of its funds, borrowed funds from shareholders and other related parties, when these funds were exhausted, its attempts to raise funds from numerous sources including from financial institutions failed.

[9] Pillay stated that it is urgent to hold the enquiry because the information obtained at the commission will assist the liquidators to know what steps are required to be taken and not delay the administration of the affairs of the company to the detriment of the general body of its creditors. He stated that the directors of the company have failed to furnish any material information to the liquidators despite a letter served on Reddy, on 13 March 2019 by the sheriff. The delay causes a real risk that relevant documents may disappear and the assets of Lallisa may lose their value.

[10] Pillay stated that an estate of an insolvent company should be administered and finalised expeditiously. The liquidators have been unable to do so primarily due to the reluctance and non-cooperation of the directors and other persons who are in possession of information relevant to the administration of the Estate.

[11] Ranjith Chronilall (Choonilall) confirmatory affidavit, stated that he was one of the three joint liquidators of Lallisa, he has read the affidavit deposed to by the Pillay and he confirmed the allegations relating to him and his firm. Choonilall is an attorney and insolvency practitioner. In his subsequent affidavit he stated that the Intervening Parties have not furnished material documents and information required for proper liquidation process of the company in liquidation. The analysis of the documents he has received requires that Reddy explain certain transactions but he has not done so. It is essential that an enquiry in terms of s417 of the Companies Act be held.

[12] On 28 November 2019 the court (Seegobin J) granted the ex parte order. On 26 February 2020 a counter-application by Intervening Parties was lodged. It sought the reconsideration and setting aside of the ex parte order granted on 28 November 2019 which had been suspended on 18 December 2019. The Intervening Parties were the Steve Reddy Family Trust (the Trust) the First Intervening Party and Wulaganathan Reddy (Reddy) the second Intervening Party.

[13] The counter application is supported by a founding affidavit deposed to by Reddy. He stated that he is the second intervening party and he represent the first intervening party of which he was a trustee and he was authorised by his co-trustees.

[14] Reddy stated that the ex-parte application was brought with an ulterior motive to ground or support to the applicant's application to sell the development property and take the proceeds for itself. This is evident in a pending court application instituted by the applicant. He stated that the s417 inquiry is intended merely as a fishing expedition and an attempt to harass and subject him and his to interrogations. Choonilall was endeavoring to bring about sale of all the three sub-divisions although only the owner of the one sub-division was in liquidation. The applicant's Mr Bann Pillay was anxious to try and effectively take over the entire development by forcing an auction of all three sub-divisions. In case 6421/19P the joint liquidators sought a court order for the sale of all three sub-divisions and the proceeds thereof to firstly be used to pay the applicants claim in full and the balance to the other creditors.

[15] Reddy stated that all documentations and relevant financial information has been obtained by the applicant and Choonilall from Lallisa and its auditors have been examined extensively. The applicants, he stated, has an ulterior motive in wishing to cross-examine him and general harass him and his immediate family who all have been subpoenaed. The applicant wants to obtain the information from him in s417 enquiry in order to use it in the then pending litigation not related to the liquidation of Lallisa.

[16] Reddy stated that the applicant ought to have cited the liquidators of Lallisa when it launched the application. It also failed cite the Master, other creditors and the Chief Magistrate of Durban. The applicant requested Berrange, one of the joint liquidators, to pay R20 000 before he could be furnished with the copy of the set of application papers, but Choonilall was furnished with a set of papers and a confirmatory affidavit obtained from him. He stated that on 18 December 2019, the applicant agreed for the papers to be kept confidential and such an order was made without out any averments in the papers justify such an order.

[17] Reddy stated that the order of 28 November 2019, granted leave to the applicant, a creditor to hold s417 interrogations and to subpoena any person and any document, which is so vague and results in abuse. The applicant has subpoenaed him, his wife, daughter, his son, and others. Previously, Choonilall subpoenaed his accountant, his bankers, his previous attorneys, his current attorney of record and his secretary, but subpoena against his current attorney and his secretary was subsequently withdrawn. He stated that the applicant before he is granted authority, must give reasons why it is necessary to subpoena a particular person.

[18] Reddy stated that there is no money in the estate to fund the interrogation. In the earlier enquiry, the Master indicated that the applicant would have to pay costs of the interrogation. The applicant failed to advise the court of the requirements of the Master. It obtained an order that the costs of the enquiry be paid by the company in liquidation. Intervening Parties are concerned as creditors of Lallisa they shall be required to carry the costs of s417 enquiry. The applicant by approaching the court is avoiding carrying the costs of the enquiry.

[19] Reddy stated that he is the director of Nightingale Investments (Pty Ltd) which owns one of the three sub-divisions and the other sub-divisions are owned by his wife. The properties were sold in order to raise funds by having a mortgage registered in order to pay Lallisa creditors, which sale was opposed by Revolt and cancelled by a court order.

[20] The applicant responded to the counter application by an answering affidavit deposed to by Pillay. Pillay indicated that because of events subsequent to the main application, it is necessary for himself to disclose all material facts. He then deposed to an affidavit of 100 pages with paragraphs. In my view, Pillay's affidavit takes a form of a founding affidavit rather than an answering affidavit.

[21] Pillay stated that since Reddy referred to evidence obtained in the first enquiry he has waived the confidentiality attached to the first enquiry which means he has admitted that the evidence obtained in the first enquiry is admissible against him in these proceedings.

[22] Pillay raised various *points in limine*, namely;

- (a) The counter application is brought in terms of Rule 6 (12) c but the Intervening Parties are not parties against whom the order of 28 November 2019 was granted.
- (b) The Intervening Parties have not joined the three joint liquidators, other proved creditors although their identities and interests are known to them.
- (c) Reddy is cited as a singular trustee but there are three trustees in the Trust. Reddy has no authority to represent the other two trustees, which constitutes non-joinder.
- (d) None of the Intervening Parties are creditors in the estate of Lallisa. The Intervening Parties seek to set aside the entire enquiry, a right they do not have. They are not seeking relief exusing them from attending the enquiry nor complain against any subpoena directed at them.

[23] Pillay, further, stated in answering relating to the merits as follows;

- (1) any person known or suspected to have in their possession any property of the company, or is believed to be indebted to the company or deemed capable of giving information concerning the trade, dealings, affairs of property of the company may be summoned to give evidence or produce documents. The Intervening Parties are such persons and they make no case for actual abuse except suspicion of abuse. He stated that Reddy was sole director and the controlling mind of Lallisa. The Trust in which

Reddy was a trustee was the sole shareholder of Lallisa. There is a trail of funds from Lallisa to Reddy and to the entities Reddy and his family members had interest. The development property was owned by entities Reddy and his family had interests in. Reddy concluded deals with entities his family were controlling which resulted in funds flowing away from Lallisa. Reddy on behalf of Lallisa concluded a building contract with applicant but failed to pay the applicant for the work done. The applicant's claim is secured as it holds undisturbed builders lien over all three sub-divisions.

[24] Pillay stated the documents and information in possession of the liquidators is wholly inadequate and lacking for the liquidators to perform their statutory duties. He stated that the role of Reddy in Lallisa indicates that he is a person whose has an interest in and the direct knowledge relating to the dealings and affairs of Lallisa. Reddy listed the documents relevant that the liquidators did not have. Pillay referred to the uncompleted evidence of Reddy in the first enquiry and the suspicion coming from that evidence.

[25] Pillay then refers to a list of questions the liquidators are entitled to have answers on. He also refers to proved claims against Lallisa in total of R28 689 707, 18.

[26] Pillay pointed out that although called by the Master to do so on 7 November 2019 Reddy has failed to complete and deliver a proper statement of affairs on form CM 100. Pillay concluded that there are genuine well founded and bona fide reasons for the enquiry in terms of s417 and s418 of the Act and for Reddy to be interrogated. He stated that the ex parte application was by a major and secured creditor. There is no evidence that the Master would have fixed any conditions with the approval and consent to hold the enquiry. He denied that the applicant required the inquiry to gather support for the other pending litigation and he stated the enquiry is essential for the proper administration of the estate of Lallisa for benefit of the creditors.

[27] Pillay contends that the order made on 28 November 2019 is highly workable and it is essential. The improvements on the sub-divisions is estimated at R36 million,

which is at the expense of the creditors of Lallisa and the enquiry, is on a creditor's application and not a liquidator's application. The matter, contends Pillay, in an enquiry the court cannot make any ruling regarding the costs of the enquiry.

[28] Pillay contends that the second enquiry is present to any application by a creditor. The application and the enquiry remain confidential. The applicant was not obliged to serve papers on the master or the liquidators. Reddy has not furnished all the required books. He has not lodged any claim against Lallisa and he has done nothing to preserve the property of Lallisa. He has behaved in a delinquent or reluctant manner by abandoning the first meeting of creditors and failed to attend second meeting of creditors. He failed to complete statements of affairs on form CM 100 and he failed to comply with other requirements to furnish documents. He interdicted and had the first enquiry set aside. Reddy, thereafter, interdicted and sought to set aside the second enquiry. His reasons for not wanting the enquiry to proceed are all apocryphal. He has breached the confidentiality attached to the s417 enquiry. The Intervening Parties are not entitled to the information they sought.

[29] Pillay concluded by asking for the dismissal of the counter application with costs on the punitive scale.

[30] On 18 June 2020, the applicant applied to strike out certain parts of Reddy's affidavits in support of the counter application. It paras 1.4; 3.3; 3.4; 3.5; 4.1.2; 4.6.3; 4.11;16; 24; 25.2; 25.4; 28; 30.3; 31; 38.1; 38.2;and 41 either as being speculative with no factual foundation or being hearsay. On 13 august 2020, the Intervening Parties filed an application supported by an affidavit seeking to strike out opposing papers to the counter application on the grounds, *inter alia*, that the answering affidavit was filed late out of time, it was not accompanied by an application for condonation, and it was unlawful and inadmissible. Subsequently, the applicant applied for condonation to the late filing of the answering affidavit which application was granted on 23 July 2021.

[31] Reddy responding to the answering affidavit stated that he has never waived confidentiality attached to the first enquiry, all the information and documentation relating to the enquiry are invalid as *pro non scripto*. The applicant admits that it has received copies of bank statements received as a result of subpoena issued in the initial enquiry. The applicant in the hearing on 18 December 2019 merely advised the court that all the joint liquidators were in support of the order sought in the ex-parte application whereas one Berrange had not given his support to such an application.

[32] Reddy stated that the order granted ex-parte is so wide in that it allowed applicant to subpoena whoever they liked without any control. The applicant on 18 December 2019 assured the court that the court that the application needed to be kept private and confidential and now he refers and incorporates in his papers evidence obtained in the first s417 enquiry.. There is no reason why the other creditors should be burdened with costs of this application or the costs of the enquiry, the applicant has *carte blanche* to subpoena whoever it likes all at the expense of the creditors and worse still not under the control of the master or other joint liquidators.

[33] The applicant filed an affidavit, deposed to by Pillay, opposing the Intervening Parties application to strike out and constituting its founding affidavit for condonation for late delivery of the answering affidavit and forming the basis of its strike out application. In my view, it is not necessary to traverse the averments in that affidavit. Firstly, the court granted the applicant condonation for late delivery of the answering affidavit. That court, in my view, would not have granted condonation for filing an affidavit liable to be strike out *in toto*. Pillay made the averments, *inter alia*, to show that the Intervening Parties, were intent on delaying the matter. In my view, this aspect of the matter, at this stage requires no further investigation because the parties have filed their complete set of papers. Pillay, in addition, concentrated on the averments in the affidavit to be struck out in that they were either speculative, hearsay, and irrelevant. Again, in my view, it is not necessary to analyze whether each averment alleged to be liable to be strike out ought to be strike out because each party has responded to the alleged averments and

each party has not alleged nor shown any prejudice to it if the offending averment is not strike out.

[34] The Intervening Parties maintained that when the applicant applied for an ex parte it assured the court that the enquiry was private and confidential. Even after the order was granted, the applicant refused to give papers relating there to on the basis that they were private and confidential. It follows, they contend, that evidence and documents obtained in the first enquiry remains private and confidential. In addition, they contend, the first enquiry has been found to have been irregular which renders it a nullity. They contend that such evidence and documents are inadmissible.

[35] Pillay maintained that the disclosures did not materially interfere with the confidentiality of the evidence of the enquiry as a whole. Pillay contends that evidence lead in the botched enquiry is admissible for the following reasons; Reddy by introducing the evidence in his founding affidavit waived any confidentiality attached to the enquiry. The invalidity of the enquiry was founded in a technicality, namely; lack of the Master's written consent to convene the enquiry, there was no deliberate violation of any rights of Reddy; the intervening creditors have not have not alleged any breach of their rights protected under chapter 2 of the constitution. Pillay contends that there are cogent reasons to admit the evidence. It was part of a process believed to be a lawful process. The documents obtained during the enquiry were documents that needed to be obtained for the proper administration of the estate. The validity of the enquiry does not affect the right of the liquidators to be in possession and have access to the documents.

[36] Pillay stated that the facts that the liquidators have in their possession bank statements of Lallisa, it does not mean that the applicant has in its possession the bank statements, and the Intervening Parties have not shown any prejudice caused to them. The applicant and the joint liquidators will suffer substantial prejudice if the affidavit of Choonilall is strike out as it refers to the unexplained movement of Lallisa's fund which is a highly relevant factor in respect of the relief.

[37] Pillay denied that the court was not advised that all the joint liquidators were in support of the ex-parte joint application. It was meant that all liquidators were in support of holding an enquiry. Berrange was not opposed to the holding of an enquiry. Pillay disputed that the applicant will have *carte blanche* to subpoena whomever it likes. He stated that the joint liquidators will, most certainly, be present in the s417 enquiry and participate therein. Reddy is as a sole director of Lallisa is obliged to present at the enquiry and he has a right to participate and be legally represented. The subpoena will have to be applied for through the magistrate who will exercise a discretion before authorizing the issue of subpoena. Pillay stated that costs incurred in the application for the enquiry and the enquiry are subject to Master's approval when they are claimed in the liquidation and distribution account. The intervening parties have a right of objection. The decision of the Master may be taken on judicial review.

[38] On 24 August 2021 the intervening parties filed a replying affidavits deposed to by Reddy. The intervening parties stated the following as *points in limine*:, namely;

(1) Non-Joinder: The ex-parte order ought not to have been granted *ex-parte* but the applicant should have cited the following; Creditors of Lallisa including the Intervening Parties , the Master of the High Court, the Chief magistrate of Durban and the liquidators of Lallisa. The parties with direct and substantial interest in the outcome of the application. (2) The citation of Lallisa was defective. It was not cited as a company in liquidation and the joint liquidators were not cited. (3) The application was meant to bypass the Master's decisions. The master in a letter dated 14 March 2019 doubted whether anything would be achieved by s417 enquiry and indicated that a creditor insisting on holding the enquiry must undertake to bear the costs. The applicant, if not happy with the Master's decision should have taken the decision of review. (4) It has not been shown that the holding of an enquiry is likely to benefit Lallisa. It must be shown that the holding of an enquiry shall not dissipate funds of Lallisa that would otherwise be available to creditors. The Master required the applicant to bear the costs of the enquiry which Re-Volt seeks to avoid which constitutes an ulterior motive. (5) No approval by all joint liquidators. Berrange does not support holding of an enquiry. The

enquiry is to the prejudice of the general body of creditors. The applicants want to use the enquiry to collect the evidence to use in the litigation it is involved with, without itself bearing the costs of the enquiry.

[39] Reddy denied that he waived any confidentiality attaching to the first enquiry. The evidence obtained unlawfully at the first enquiry is not admissible. He indicated that the transcripts of portions of his evidence do not disprove what he has said in the affidavits. He denies also that the counter application is any way defective. Reddy stated that he is a substantial creditor in the estate of Lallisa. He lent Lallisa in excess of R44 million rand. He has not proved a claim because of certainty of a contribution by concurrent creditors primarily owing to the reckless and incompetent manner in which Choonilall is conducting the affairs of Lallisa's liquidation at the behest of the applicant. Reddy admitted that the applicant proved a claim at the first meeting of creditors but does not support that its claim is secured in the form undisturbed builder's lien over all the three properties. Reddy stated the claims on loan account reflected as from Steve Reddy Family Trust whereas the loan were from him personally emanating from the Trust. Reddy stated that there was request to deliver from CM 100, which was erroneously left out, and it was later sent under cover of a letter dated 18 July 2019.

[40] Reddy reiterated that he supplied the liquidators with all the documents relating to the dealings and financial affairs of Lallisa. Lallisa was a property development company. The liquidators have had access to all of the building contract payments made, bank statements etc. It is not clear why the information supplied is insufficient to enable the joint liquidators to perform the statutory duties.

[41] After the file was allocated to me for hearing on the opposed roll, it was not clear what issues were for determination. On enquiry directed at the parties, the response indicated differing views. The Intervening Parties adopted the stance that the struck out application be determined first, so that, in case it does not succeed, they shall consider supplementing the replying affidavit. The applicant on the other hand contended that the striking out application(s) be determined together with the main application. After

perusing the papers and to avoid the unnecessary postponement of the matter, ten (10) days before the date of hearing, I directed that the applications for strike out shall be determined simultaneously with the main application on the date of the hearing.

[42] I gave the above-mentioned directive in view of the history of the litigation, the main issue for determination and because a full set of papers had been filed. Further, the general rule is that striking out application should be set down for hearing at the same time as the hearing of the main application. In application for the strike out is an interlocutory application or applications incidental to pending proceedings. Courts generally refuse to hear applications for strike out of alleged offending matter prior to the filing of the answering or replying affidavit. Therefore there bearing no opportunity to object until the matter is before the court on its merits, the allegation to which objection is intended to be made must meanwhile be dealt with in the answering or replying affidavit although this does not contribute a waive if the right to object. I took the above general rule as not inflexible, if demonstrated otherwise, the court can hear and rule on the strike out application, before the matter is enrolled for the hearing of the main relief. In this matter the Intervening Parties did not indicate in what manner they indicated to seek leave to file a supplementary affidavit if their application to strike out did not succeed.

[43] Both parties have made much store or averment in affidavits to be strike out mainly as hearsay. Neither party indicated what prejudice would be caused by the averment if not struck out. It is trite that the court may not strike out the averment, even if the ground to strike out is established, unless the applicant will be prejudiced in the claim or defence. (See *Putio Ltd v TV & Radio Guarantee Co (Ltd)* 1984 (1) SA 443 (W) at 465D-F; *Beinash v Wixley* 1997 (3) 721 (SCA) at 733B). However, the fact that offending averments are not struck out; it does not mean that they shall be ignored. The court shall give no weight to averments, which are clearly hearsay, or averments, which are conclusions or opinions not supported by any facts; the deponent has no personal knowledge of.

[44] The parties in their affidavits have traversed issues repeatedly and at length. The applicant sought relief by means of an *ex-parte* application. When responded to it, the Intervening Parties responded by a counter application supported by an affidavit. The applicant responded by a lengthy answering affidavit expanding to its founding affidavit to the *ex-parte* application, which elicited a lengthy replying affidavit with lengthy averments.

[45] There is an argument whether evidence and documents obtained during the aborted s417 enquiry are admissible to be used in this application. Both parties when it suited them referred to the aborted s417 enquiry. The fact that the aborted enquiry took place and the issues around it, including the reasons for it to be aborted are common cause. In my view, no general rule relating to admissibility need to be founded, it depends what piece of evidence and for what purpose is being introduced and the basis it is objected to. In this matter, nothing much turns on that. The aborted enquiry is a nullity and the record of the said inquiry can prove nothing. It is inadmissible to prove a fact by a transcript of the record of the enquiry of what a person said at the enquiry. However, evidence presented before the enquiry, which existed it, does not become inadmissible because it was presented in the aborted enquiry. In terms of s417 (4) of the Act, the enquiry is private and confidential except if the court or master has ordered otherwise. Therefore, a witness or any other person cannot waive the privacy and confidentiality of the s417 enquiry. Reddy had not completed giving evidence before the enquiry when it was aborted. Therefore, no excerpts of his incomplete evidence can selectively be used.

[46] The Intervening Parties make a case that no proper case has been made for the relief obtained in the *ex-parte* application. The Master did not support the application for the relief and neither did all the joint liquidators. There was also no creditors' resolution in support for the relief. There is also no evidence of the either the Master, all joint liquidators or the creditors being approached and requested to give consent to the one creditor to approach court and seek relief sought in the *ex-parte* application.

[47] The enquiry in terms of s417 read with s418 has as its primary purpose to assist the liquidators of the company to determine its assets and liabilities in a way, which will best serve the interests of the company's creditors. Section 417 provides :

'In any winding – up of a company unable to pay its debts, the master of the court may, at any time, after a winding –up order has been made summon before him or it 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 trade, dealings, affairs or property of the company'.

The provisions of s418 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 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 assigned the winding-up order'.

[48] The Court or the Master, may examine the summoned person, under oath or affirmation, either orally or by way of written interrogatories, and may reduce his answers to writing and require him to sign them. The examination or enquiry is private and confidential unless the Court or the Master, as the case may be directs otherwise. Section 418 empowers the Master or the Court as the case may be, to delegate its power under s 417 either to a commissioner or in case to the Court to also either to the Master.

[49] The winding up of a company in liquidation because of the inability to pay its debts is an urgent process. The liquidator is required to proceed without delay to recover and take possession of all the assets and property of the company, to apply such assets and property in satisfaction of the costs of the winding up process and claims of creditors and to distribute the residue amongst the shareholders or those entitled to it, and to report as required on his findings. The disadvantage faced by the liquidator as an outsider is the lack of knowledge of the company's affairs and dealings,

and the failure of those knowledgeable, who may be responsible for the failure of the company, to co-operate in the liquidation process, and the unavailability of properly kept company documents.

[50] The provisions of ss417 and 418 of the Act are part of the urgent liquidation process. It is a robust process which it should not be allowed that it is frustrated by delays. The applicant for a the intervention in terms of ss417 and 418 is usually the liquidator but it could be any person with direct and substantial interest in that there be an intervention. The application may be made ex parte as an urgent application. Technical defects in the application may be overlooked in particular, if substantively, a good case for intervention has been made out. In my view, some of the issues raised by the Intervening Parties may be overlooked, namely; that persons that may have an interest in the relief sought were not cited and were not given notice, that the Lallisa as a company in liquidation is not properly cited, that the joint liquidators are not cited.

[51] The Intervening Parties contend that the applicant sought and obtained the ex-parte order as an abuse of the process and for an ulterior motive. They contend that the applicant intends to use the enquiry to serve its own interest. They refer to the attempt by the applicant to alienate the sub-divisions forming the development property to benefit itself to the exclusion of other creditors, its attempt to drive the liquidation process to the exclusion of the other creditors, the liquidators (except Choonilall who is colluding with applicant) and to exclude the Master. The applicant answers these accusations by pointing that it is a major creditor, it is not a liquidator, there has been an unreasonable delay in the winding up of the estate of Lallisa to its prejudice. There is no evidence that it does not intend to use s417 enquiry for the purpose of such an enquiry, and that it is agreed by everybody including Reddy that there is a need for an enquiry. The Intervening Parties are not, it is contended, persons against whom the ex parte order was granted and there is not provision allowing them to challenge and seek reconsideration and setting aside of the exparte order in the manner they have done. They were required to bring an application joining all the interested persons.

[52] It is correct that the counter application is not in a format stipulated in Rule 6(5) (b) (iii) in that it provided for no date for to oppose and for filling of an opposing affidavit. Rule 6(12)(c) provides that a person against whom an order was granted in such persons absence in an urgent application may by notice set down the matter for reconsideration of the order. It is correct that the ex parte order was not granted against any person. But it cannot be denied that the relief granted ex parte in the urgent application affected other person including the Intervening Parties. Rule 6(8) provides for the anticipation of an order granted ex parte with a return date by an affected person. The ex parte order did not have a return date, it was granted as a final order. It can be accepted that the Intervening Parties had a substantial interest in the relief granted in terms of the ex parte order. It means they have *locus standi*. The court, which granted the ex parte order (Seegobin J), suspended the ex parte order at the instance of the Intervening Parties, which has the effect of a finding that the Intervening Parties had *locus standi*, and were granted leave to intervene in the matter. The requirement of *locus standi in judicio* is adequate interest in the subject matter of litigation, also described as direct and substantial interest, which is not too far removed, interest, which is actual, not abstract or academic, it must be legal interest. In that case, the granting of leave to intervene to an interested person with *locus standi* is a matter of formality (*Fullard v Fullard* 1979(1) SA 368 (T)). The Intervening Parties once granted leave to intervene they became persons against whom the ex-parte order was given as envisaged in Rule 6(12)(c)(iii). The counter-application seeking only the relief to reconsider and set aside the ex-parte order constituted a notice setting down the matter for reconsideration of the ex-parte order. It was not required, in my view, of the Intervening Parties to seek to join parties not joined by the applicant when the ex-parte order was sought. The provisions of Rule 6(12) are clear, the Intervening Parties could not seek to be excluded from the ex -parte order as a relief, they could only seek its reconsideration. If they succeed in having the ex parte order reconsidered to the extent of it being set aside, which results in the s417 enquiry envisaged in the ex parte falling away, so be it.

[53] It is trite that a party alleging abuse bears the onus to prove it, and a clear case of abuse must be established. The fact that information obtained in a s417 enquiry may be used in civil litigation between the parties does not mean that the holding of a s417 enquiry for a purpose to assist the liquidators in the liquidation process of the company is an abuse (*Roering & another NNO v Mahlangu* (581/2015) [2016] ZASCA 79). In *Bernstein and others v Bester and others NNO* [1996] ZACL 2; 1996 (2) SA 751 (CC) it was held that a liquidator is entitled to obtain information, not only to ascertain whether the company has a cause of action but also in order to assess whether the case is sufficiently strong to spend the creditors' money in pursuing it, and conversely, to ascertain whether there is an adequate defence to a claim against the company. In my view, the Intervening Parties have alleged abuse but they have proved abuse. The applicant is a major creditor of Lallisa. It is understandable that it would be anxious to recover the debt owed to it. Lallisa was liquidated at the instance of the applicant. The applicant is entitled to use any lawful means at its disposal to ensure payment of its debt. The evidence in its totality show no other objective on the part of the applicant other than to recover the debt owed to it. The applicant has established a compelling case for a proper investigation to which Reddy and others close to him are central.

[54] The application for a s417 enquiry, ordinarily, will be made to the Court or the Master, by the liquidator who is best suited to know why the effective administration of the winding-up necessitates that being an examination or enquiry, although such an application may also be made by any person having an interest in the company in liquidation. The applicant was entitled to make an application to Court for s417 enquiry. In the same breath, the applicant as a major creditor was entitled to demand that the liquidators hold an enquiry as directed by the creditors' resolution. The applicant stated first and second creditors' meetings were held on 15 May 2019 and 31 July 2019 respectively. The creditors in the said meetings authorized the joint liquidators to hold enquiries in terms of the Companies Act 61 of 1973. However, the applicant did not explain why the joint liquidators did not hold the required enquiries. A liquidator has a duty to submit not later than three months after date of appointment to a general meeting of creditors and contributors of the company, and has to set out, *inter alia*, the

capital carried by the company, its estimated assets and liabilities, the causes of the failure of the company(if it failed) and the progress and prospects of the winding up, and to indicate whether or not further examination is in his opinion desirable in regard to any matter relating to the promotion, formation, or failure of the company or its business. The interrogatories may occur at any general meeting of creditors convened by liquidators. The Master or officer presiding at the meeting may subpoena any person to appear at such meeting for the purpose of being interrogated. It is a person who is known or is on reasonable grounds believed to be or have been in possession of any property owned or formally owned by the company; or is known or is on reasonable grounds believed to be indebted to the company; or is one who in the opinion of the Master or such officer may be able to give material information regarding the company or its officers, whether before or after the commencement of the winding-up. The Master or the presiding officer also may subpoena any person to produce at the meeting any book or document, or an extract from it, which is known, or is on reasonable grounds believed to be in such persons possession or custody or under his control; or one which contains material information concerning the company's property or affairs. It is required that the Master or officer presiding at such a meeting issues a subpoena in terms of s414(2) of the Act for a person who is neither a director nor officer of a company in liquidation to appear at an enquiry, he must apply his mind to what may lawfully and relevantly be required of such a person by way of oral evidence and delivery of books, records and other documentation. The Master has a duty to keep an independent mind on the matter and to establish the legitimate purposes required for an enquiry of this nature before issuing a subpoena, and in the absence of such an approach in the granting and issuing of a subpoena constitutes an abuse of the procedure.

[55] The person seeking establishment of s417 enquiry is not required to make out a *prima facie* case that there has been an actionable conduct. There is no onus as such on the applicant. It suffices to show a fair ground for suspicion and that the person proposed to be examined can probably give information about what is suspected. It is

the Master or the presiding officer who determines the need and the relevance of the information or documents required, not the party seeking to prevent disclosure.

[56] The applicant in the application stated that Choonilall interacted with the Master to obtain his consent to hold interrogation in terms of s417 read with s418 of the Act. The Master's staff advised Choonilall that since the creditors adopted a resolution to hold an enquiry, the Master's consent was not necessary. Choonilall then made the necessary arrangements with the magistrate and the enquiry commenced. In the course of the enquiry, Reddy's lawyer objected on the basis that the Master had not given consent for the enquiry. In my view, the applicant who was at all times using the same lawyers with Choonilall, misled the court (Seegobin J) in the following respects: 1. The applicant failed to disclose to the court that despite the creditors resolution and for no known reason, the liquidators had not convened an enquiry. 2. The applicant failed to disclose to the court that there was no creditors' resolution authorizing the applicant to apply for a court enquiry. 3. The applicant failed to disclose to the court that it was not all three liquidators who were supporting a s417 enquiry. 4. The applicant failed to disclose to the court that the Master had raised queries with Choonilall before he could consider giving consent for s417 enquiry and Choonilall had not addressed the Master's queries. 5. The applicant failed to disclose to the court that before the Master it conveyed that it would carry the costs of the s417 enquiry whereas before court it was praying for the costs to come from the winding up of Lallisa.

[57] The s417 Court enquiry has been described as a necessary draconian measure. It is broad and wide in its terms and objectives. It is applied for without any notice to the persons to be subjected to the enquiry. It compels persons subpoenaed to comply and co-operate failing which they be sanctioned. They have no right to disclosure and no right to the access of the record of the enquiry. The evidence given by the persons subpoenaed is admissible against them in subsequent civil proceedings. The Court usually authorizes the holding of the enquiry but it does not itself conduct the enquiry. The liquidators' enquiry is driven by and controlled by the liquidators; the same applies

to the Master's enquiry. The liquidators and the Master are involved in the liquidation process and are in the better position to determine what is necessary, and they are required to act impartially, independently and with an open mind and in a fair even handed manner. The said safeguards are important to ameliorate the draconian nature of s417 enquiry. In this matter, the applicant has proffered no explanation why the liquidator's enquiry not held, and why the Master's enquiry was not held. The correspondence with the Master shows that the Master raised queries, which have not been shown to have been illogical or unreasonable. The Master answered communication directed to him promptly. The applicant stated that it placed the liquidators on terms to obtain the consent of the Master for a s417 enquiry, but they failed to comply. However, his correspondence shows that he gave the liquidators and the Master one day which indicates that it wanted to proceed with a court enquiry without the liquidators and the Master having taken a decision on the necessity thereof. The applicant stated in the ex parte application that that it had tried all avenues with joint liquidators and the Master's office to convene a proper enquiry to no avail. This is clearly not borne out by any pointed averments nor with the correspondence relating to the communication with the Master's office.

[58] There is no doubt that there has been a delay in the winding up of Lallisa. However, the applicant cannot rely on the delay because it is working closely with Choonilall, the lead liquidator. The Intervening Parties cannot be blamed for the delay as long as their objections are founded in law. The court in deciding whether to order a court s417 enquiry exercises a judicial discretion, taking into consideration, *inter alia*, the following: The liquidator has to reconstruct the state of knowledge of the company in order to make informed decisions; there must be proof of a reasonable requirement for information that could not be obtained anywhere else by reasonable means; the case for an court enquiry is strong against officers or former directors of the company who owe the company a fiduciary duty than against third parties; the court is likely to treat an application for a court s417 enquiry by an office holder .e.g., liquidator with more sympathy than of a third party; and the wide discretion the court has in terms of s417 is balanced by weighing of interests of the parties and that the court will not allow abuse of

the process. It is important not to place too many checks and balances as that may counter the effectiveness of the remedy.

[59] The ex-parte order granted on 28 November 2019 reads as follows:

1. It is ordered that an interrogation in terms of Section 417 read with Section 418 of the Companies Act 61 of 1973 be held in respect of the respondent.
2. The applicant is authorized and granted leave to hold the interrogation in terms of Section 417 read with 418 of the Companies Act 61 of 1973 in respect of the respondent commencing on 8 January 2020.
3. The Chief Magistrate of Durban or his appointee, be and is hereby appointed as Commissioner in the aforesaid interrogation.
4. The interrogation is hereby referred to the Chief Magistrate of Durban or his appointee who shall convene and conduct the same.
5. The costs and expenses incidental to the interrogation shall be paid out of the assets of respondent.
6. The costs of this Application shall be borne by the Respondent.
7. The Registrar is directed to ensure that this file and order remain confidential.'

The Intervening Parties contend that the *ex-parte* order is as broad. It gives to the creditor power to hold the interrogation and the *carte blanche* to subpoena whoever it decides to subpoena, which the applicant did in the aborted enquiry. The applicant refuses to disclose the names of persons it intends to subpoena to the enquiry. This, they contend, is open to abuse by the applicant and it shall lead to the escalation of costs resulting in reducing the assets of Lallisa and result in substantial contribution required from the creditors. They state that the Master in his queries wanted clarity whether the applicant would bear the costs of s417 enquiry; the applicant is avoiding to deal with those queries.

[60]] The purpose of the enquiry under s417 and 418 is to assist liquidators in discharging their duties in an efficient and effective manner. Their duties are, *inter alia*, to recover and reduce in to possession all assets of the company, examine the affairs and transactions of the company before its winding-up order, to ascertain whether any of the directors and officers or past directors and officers of the company have

contravened any provisions of the Act or have committed or appeared to have committed any other offence. The liquidation process since it relates to the taking over assets and property of a failed company requires to be carried out without a delay, speed is of the essence. The holding of s417 and 418 need not be delayed so that information obtained may be used to recover assets of the company. The delay may defeat the purpose of the enquiry. The interpretation of the provisions relating to the holding of an enquiry must take into account the purpose of the enquiry.

[61] The applicant has not explained why the liquidators did not conduct the enquiry in accordance with the creditors' resolution. It also has also not explained why the queries raised by the Master for the Master to give consent for a Master's enquiry were not attended to. The result is that there are no basis for a contention that the liquidators and/or the Master needs assistance to efficiently and effectively carry out the liquidation process. The ex-parte order grants authorization and leave to hold the interrogation in terms of Section 417 read with 418 of the Companies Act 61 of 1973 to the applicant. But the provisions of the Act (ss417 and 418) provides for only the Master's or the Court's enquiry. The entire order relates to the applicant holding an enquiry in terms of ss417 read with 418. The ex-parte order is an order not provided for. It is an unlawful order. The applicant's counsel acknowledging the difficulty, sought to have the ex-parte order amended in his oral argument in reply. It would be a substantial amendment belatedly requested from the bar not in terms of the Rules of court. The applicant's counsel when asked whether in seeking such an amendment was the applicant tendering the costs occasioned by such a belated amendment, stated that he had no instructions to tender costs. In my view, it has not been shown that such an amendment could be granted without any proper application and without addressing the prejudice to the other party.

[62] The applicant has not succeeded to show any need for a Court s417 enquiry. It can still pursue the convening of the liquidators or Master's enquiry. In addition, the

order granted on 28 November 2019 is irregular. As a result, the counter application is granted.

[63] It is ordered as follows:

1. The counter application is granted.
2. The order granted on 28 November 2019 is reconsidered and it is set aside.
3. The costs of interlocutory applications are ordered to be costs in the counter application.
4. The applicant (Re-volt KZN Projects CC) is ordered to pay costs of the counter application, including costs of senior counsel, where so employed.

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Mngadi 

APPEARANCES

Case Number : 11969/18P

For the Applicant : Mr Nepaul

Instructed by : Anand Napaul Attorneys

DURBAN

For the Intervening Parties : G D Harpur SC

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PIETERMARITZBURG

Date matter argued : 6 May 2022

Judgement delivered on : 11 May 2022