



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case no: 5733/2018

In the matter between:

DEREK MACDONALD URQUHART

First Applicant

PHILIP KOTZE

Second Applicant

BRIAN JOHN DOWDEN

Third Applicant

WONDERHOEK FARMS (Pty) Ltd

Fourth Applicant

and

THE MASTER OF THE HIGH COURT

First Respondent

DONOVAN MAJIEDT¹

Second Respondent

KAREN FONTEIN²

Third Respondent

FIRST RAND BANK LIMITED³

Fourth Respondent

Coram: OPPERMAN, J *et* MOENG, AJ

Heard: 5 August 2019

Delivered: 30 September 2019

Judgment: OPPERMAN, J

¹ Majiedt, co-trustee of the insolvent estates.

² Fortein, co-trustee of the insolvent estates.

³ FirstRand.

ORDER

1. The decision of the first respondent to issue summonses in terms of section 152(2) of the *Insolvency Act 24 of 1936* in respect of the first, second and third applicants is set aside.
 2. The fourth respondent is ordered to pay the costs of this application and the application dated 4 December 2018. Costs to include costs occasioned by the employment of two counsel.
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JUDGMENT

I Introduction

- [1] On 4 December 2018 an order on urgent application was granted by this court that pending the finalisation of a review in terms of Rule 53⁴ of the

⁴ Rule 53 Reviews

- (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —
 - (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
 - (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.
- (2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.
- (3) The registrar shall make available to the applicant the record despatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the

Uniform Rules read with section 151⁵ of the *Insolvency Act 24 of 1936* (the Insolvency Act) the first respondent is interdicted from continuing with the interrogation of the first, second and third applicants scheduled for 6 and 7 December 2018 and from issuing any further summonses in respect of the first, second and third respondents. Costs were reserved for later adjudication and after the hearing of the review.

- [2] The primary grounds for the review that now lies before the court are that the Master failed to properly apply his mind to the relevant facts and circumstances when making his decision, the issuing of summonses against the first, second and third applicants is aimed solely at obtaining a forensic advantage for the fourth respondent (FirstRand) in a pending trial between, among others, the fourth applicant (Wonderhoek) and Vaughn Victor Ontwikkelings Trust 1 (VVOT1) and Vaughn Victor

review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

- (4) The applicant may within ten days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit.
 - (5) Should the presiding officer, chairperson or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he or she shall —
 - (a) within fifteen days after receipt by him or her of the notice of motion or any amendment thereof deliver notice to the applicant that he or she intends so to oppose and shall in such notice appoint an address within 15 kilometres of the office of the registrar at which he or she will accept notice and service of all process in such proceedings; and
 - (b) within thirty days after the expiry of the time referred to in subrule (4) hereof, deliver any affidavits he or she may desire in answer to the allegations made by the applicant.
 - (6) The applicant shall have the rights and obligations in regard to replying affidavits set out in rule 6.
 - (7) The provisions of rule 6 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings.
- Rules 53(1), 53(3) to 53(5) of the Uniform Rules of Court have been amended (GNR 317 of 17 April 2015).

⁵

Section 151 Review

Subject to the provisions of section *fifty-seven* any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section *one hundred and twelve*.

Ontwikkelings Trust 2 (VVOT2). The intended interrogation by FirstRand of the first to third applicants constitutes abuse.

- [3] The matter stands unopposed by the Master, Majiedt and Fortein.
- [4] Firststrand contends that no case has been made out to review the decision of the Master.
- [5] Two issues stand to be adjudicated namely; did the Master, as is required in law, apply his mind to the issuing of the summonses and is there abuse of the section 152-process by the fourth respondent?

II The Law

- [6] Section 152(2) of the Insolvency Act decrees that:

If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate. (Accentuation added)

- [7] Bertelsman *et al*⁶ defended the object of interrogations in terms of the Insolvency Act in that it provides essential mechanisms for the investigation of the affairs of the insolvent estate. In *Podlas v Cohen and Bryden NNO and others* 1994 (4) SA 662 (T) the court held that an insolvent or other witness who is subpoenaed to attend an enquiry is not entitled to be heard on the question whether or not the subpoena should have been issued as this limited restriction of personal liberty is justifiable and proportional if weighed up against the public interest and the creditor's rights to establish the whereabouts of any assets and to investigate the insolvent's transactions. The insolvent and other witnesses are not entitled to access the information upon which the Master decided to hold an enquiry in terms of section 152 provided that the Master duly and properly considers any motivation for the issuing of any subpoena placed before him by the trustee or other interested party before invading the witnesses' privacy by summoning him or her.
- [8] The Supreme Court of Appeals ruled in *Mantis Investment Holdings (Pty) Ltd v Eastern Cape Development Corporation and others* 2018 (4) SA 439 (SCA) that:
- [6] The very essence of our Bill of Rights is that an individual should not be subjected to unreasonable intrusions on their liberty or the privacy of their person, property or effects. The Master has no reservoir of power outside the statutory instruments that authorise an intrusion upon those rights, and thus no general authority to make an order that impinges on those rights. A subpoena, even one at the hands of the Master, is a significant invasion of the rights of an

⁶ Mars: *The Law of Insolvency in South Africa*, 10th Edition, 2019, Internet: ISSN 2224-4743, Jutastat e-publications at page 456. Also see Lee Steyn: *Human Rights Issues in South African Insolvency Law*, Int. Insolv. Rev., Vol. 13: 1-25 (2004), Published on line in Wiley InterScience (www.interscience.wiley.com). DOI: 10.1002/iir.115.

individual and must therefore be exercised within certain clearly defined limits.

- [7] The request from the appellant's attorney to the co-liquidator for the employees of the first respondent and for all documents relating to the grant of the loan facility to be subpoenaed was forwarded by the latter to the Master. The request itself was unmotivated. Although no statutory provision was alluded to in support of the request, one would have been forgiven for thinking that it is to the provisions of the Insolvency Act that one had to look. Nor was there any articulation in the request as to the source of the envisaged power to be exercised by the co-liquidator or the Master. In simply forwarding the request to the Master, the co-liquidator did not bring an independent mind to bear on the application. Rather, he appears to have contented himself in acting as no more than a mere conduit. (Accentuation added)

- [8] '... as Berman J pointed out in *Foot v The Master*:
'... It is an obligation, the performance of which is demanded under threat of imprisonment if not carried out, it is an invasion of an individual's privacy which is countenanced only under specific conditions and specific circumstances.

...the purposes of interrogation must of necessity invoke this authority and exercise this power circumspectly, after due and proper consideration as to the need for such interrogation, the aim, ambit and purpose thereof and to ensure that the person concerned is not called for the examination on matters extraneous to the enquiry.

That person, in this case the Master, in considering whether to require the attendance of a particular person at an enquiry in terms of s 415 of the Act, must apply his mind to what may lawfully and relevantly be required of a proposed "interrogee" by way of oral evidence and delivery of books and records and other documentation.

He (the Master) is not the tool or agent of the liquidator, obliged to carry out the latter's instructions; the Master may take advice and may consult the liquidator, but calling for the attendance of a person at an enquiry under s 415 of the Act, he is his own man, performing a duty and exercising a right imposed and granted him by statute and he is required to bring an independent mind on the need for an enquiry and for an interrogation to be conducted

thereat and as to the manner in which this is to be carried out.' (Accentuation added)

- [9] *Roering NO and another v Mahlangu and others* 2016 (5) SA 455 (SCA) at [34], [36], [37] to [40] dictates the law on the abuse of interrogations in terms of the Law of Insolvency. The purpose of inquiries and summoning of witnesses 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."

- [10] 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.

- [11] 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. An example is an attempt to summon a witness with a view to destroying their credibility as a witness or to 'enable a dress rehearsal of the cross-examination'. Another example is of a summons directed at obtaining pre-trial discovery when a discovery order had been refused in proceedings already afoot. The court has also 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'.

[12] 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 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.

[13] The fundamental issue in determining whether there is abuse is whether the enquiry is being used for a purpose not contemplated by the Act. 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.

[14] Judicial review⁷

(a) Endicott Administrative Law paragraph 9.1.6

All public authorities ought to make the best possible decisions (and Parliament can be presumed to intend that they should do so). But that does

⁷ Section 33 of the *Constitution of the Republic of South Africa, 1996* defines "just administrative action":

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must—
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

not mean that the judges have jurisdiction to hold that a decision was *ultra vires* on the ground that it was not the best decision that could have been made.

(b) Wade and Forsyth Administrative Law (10 ed) at 28-29

The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is “right or wrong”? On review, the question is “lawful or unlawful”? Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not.

(c) Laws J in *R v Somerset County Council, ex parte Fewings & others* [1995] 1 All ER 513 (QB) at 515d-g

The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did.

- [15] Counsel for the fourth respondent argued that the court’s power to intervene and set aside a decision by the Master in a review in terms of section 151 of the Insolvency Act will only be exercised where the decision of the Master is “clearly wrong.”⁸

III The Master’s decision and the record

- [16] The Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 on 24 April 2018 stated that:

⁸ *Nedbank Ltd v Master of The High Court, Witwatersrand Local Division and others* 2009 (3) SA 403 (W) at paragraphs 68 to 73. Also see *Leech and others v Farber No and others* 2000 (2) SA 444 (W) and *Strauss and others v The Master and others NNO* 2001 (1) SA 649 (T).

“Undeniably, a rule 53 record is an invaluable tool in the review process.”

- [17] The record that caused a decision, such as in the instance, is vital. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.
- [18] Decision-makers exercising an executive power and who find their decisions subject to review are now compelled to produce the records of their decisions. It is therefore crucial for public sector entities to ensure that, even where their decisions do not amount to administrative action, they keep a proper record of the decision and their reasons therefor in order to produce it under Rule 53 should that decision ever be challenged.
- [19] The Master did not supply reasons to this court for the decision to summons the applicants as he was called upon in terms of Rule 53.
- [20] A, what must be regarded as the complete record of the proceedings on which the Master based his decision, was supplied by the Master on 23 January 2019. It is a bunch of letters and emails.
- [21] It is clear that the detail of the evidence of Victor (that will be explained later) that was adduced at the enquiry and caused the subpoenas against the applicants *in casu*, did not form part of the information that informed his decision to summons the applicants.

[22] The record consists of:

1. A letter from the attorneys representing the fourth respondent, FirstRand, dated 6 April 2018 in which Majiedt and Fortein are requested to convene an insolvency enquiry into the affairs of VVOT1 and VVOT2. Important from this letter is the reason for the requested enquiry:

FirstRand Bank Limited hereby requests the joint trustees to convene an insolvency enquiry to investigate all circumstances resulting in the registration of transfer of the FirstRand Bank bonded properties in the name of Vaughn Victor 1 Ontwikkeling Trust and Vaughn Victor 2 Ontwikkeling Trust.

FirstRand Bank Limited will fund the propose enquiry.

We propose that an enquiry be scheduled for two days.

2. A letter dated 10 April 2018 addressed to the Master by Majiedt and Fortein, being the joint trustees, in which they seek permission to hold an enquiry in terms of section 152 of the Insolvency Act. The reason for the enquiry is depicted as follows:

“... we are of the view that the holding of the enquiry is the only possible way for the Co-trustees to gain sufficient information in order to make a decision as to the ongoing litigation in these two insolvent estates.”

3. An email dated 16 April 2018 addressed to Majiedt and Fortein by the Master in which the Master grants permission to: “interrogate Mr Victor at an investigation to be conducted at the magistrate Wepener to enable you to make an informed decision as to the ongoing litigation on the conditions tendered in your application.”
4. The rest of the “record” consists of a string of e-mails between Majiedt and the Master concerning the change of venue for the enquiry from Wepener to Bloemfontein and that is irrelevant to the Master’s decision and the review.

IV The facts

[23] It is imperative to pause and emphasize, as part of the facts, the discrepancy of the justification for the enquiry. FirstRand requested the enquiry to investigate all circumstances resulting in the registration of transfer of the FirstRand Bank bonded properties. Majiedt and Fortein wanted the enquiry to obtain information on the pending litigation. This poses a real discrepancy and is an irregularity that caused the whole process to derail into a sloppy and unconstitutional process.

[24] The undisputed facts and process that existed during the period that the Master exercised his discretion to order the enquiry and the subpoenas for the applicants are the following:

1. Victor was previously a director of both Wonderhoek and Rohallion and was in control of its day to day affairs.
2. During the tenure of his directorship of Wonderhoek he caused twelve farms owned by Wonderhoek to be transferred to VVOT1 and VVOT2. Victor was a trustee and beneficiary of both.
3. The transfer was allegedly done without the knowledge and consent of co-directors at the time; Hugh Cathcart and the third applicant Dowden and apparently without any authority. The property was therefore, allegedly, illegally transferred to the trusts.
4. After the first applicant, Urquhart and the second applicant, Kotze were appointed as directors of Wonderhoek during May 2014, Victor resigned on 11 June 2014.
5. The epic battle in the court commenced in November 2014 under case number 5049/2014 between Wonderhoek and Victor. Wonderhoek seeks orders declaring that it is the owner of the twelve farms, restoring its title thereto as well as an order declaring

Victor to be a delinquent director as contemplated in section 167 of the Companies Act.

6. It came to light that VVOT2, represented by Victor, has on-sold two of the farms. The trusts had also mortgaged the farms to FirstRand. As result it became necessary to, amongst others, join FirstRand to case number 5049/2014; the Wonderhoek-case.
7. VVOT1 is indebted to FirstRand in an amount of more than R8 million. FirstRand registered a first and a second covering mortgage bond over the farms in Molteno on 20 October 2010 as security for this indebtedness.
8. There is also further litigation which involves Wonderhoek against Rohallion Farms (Pty) Ltd under case number 5425/2014 in this court of amounts totalling in excess of R100 million and also involving Victor.
9. After pleadings closed in the Wonderhoek action the parties made extensive discovery of all documents relevant to the case. Wonderhoek made discovery of many thousands of documents relevant to the circumstances of the transfer of the twelve farms to Firststrand, VVOT1 and VVOT2.
10. The Wonderhoek trial was set for trial and to run for three weeks on 4 September 2017. On 20 August 2017 Victor's then attorneys of record withdrew and on 23 August 2017 new attorneys were appointed. On 29 August 2017, four days before the trial was due to start, the Victor-team delivered an application for postponement.
11. Wonderhoek agreed to the postponement because of the prejudice claimed by FirstRand should the trial continue in Victor's absence.
12. During January 2018 FirstRand launched an application for the sequestration of VVOT1. A final sequestration was granted on 8 March 2018. FirstRand launched a further sequestration application

against VVOT2 and the final order for sequestration was granted on 5 April 2018.

13. The second respondent, Majiedt and third respondent, Fortein were appointed as provisional trustees of the insolvent estates. Majiedt's appointment was on the nomination of FirstRand. There was much animosity between Majiedt and Fortein after allegations that Majiedt acted to the exclusion of Fortein. Wonderhoek noted their concerns to the Master that Majiedt might not be seen to be objective in his dealings. The Master took cognisance of this fact but dismissed it.
14. On 12 March 2018 Wonderhoek tendered all documents relating to the Wonderhoek action to the Master. The Master again took cognisance of this but did not take the opportunity to familiarise himself with the evidence. The reason is unknown.
15. The animosity between Majiedt and Fortein continued but after a meeting of the creditors on 5 April 2018 they were appointed as co-trustees.
16. On 6 April 2018 FirstRand addressed its request for the enquiry to the Master *via* Majiedt as set out above. The 152-enquiry commenced in Wepener before the local magistrate and Victor testified. Counsel that conducted the interrogation of Victor also represents FirstRand in the Wonderhoek action.
17. Meanwhile, Wonderhoek and Rohallion launched proceedings to sequester Victor personally based on unpaid costs that they obtained against him. Victor opposed those proceedings but ultimately withdrew his opposition after the application was referred for hearing. He was provisionally sequestered on 18 September 2018 and finally so on 1 November 2018.

18. On 30 July 2018, after earlier exchange of correspondence between Du Plessis and the other parties in the Wonderhoek trial, Du Plessis, attorney for Wonderhoek, addressed a letter to the Judge President of this Court seeking the allocation of trial dates during the second term of 2019.
19. On 31 July 2018 Majiedt informed Du Plessis *via* e-mail that they have consulted with the advocate about the enquiry and that they require his assistance to serve subpoenas on the applicants: "...to give the appointed Trustees a better understanding of the current litigation which will assist in the finalization thereof."
20. I pause here to point out that it is the case for the fourth respondent that in the enquiry they do not seek a forensic advantage but depending on the evidence given by the applicants the trial may not be opposed or continue on an opposed motion basis.
21. Du Plessis proceeded to submit an extensive expose of the evidence that the applicant will render in the trial. This forms part of the evidence before court *in casu*. It is indeed comprehensive and supplies a more than clear "understanding of the current litigation" as requested by Majiedt and Fortein.
22. Further, Du Plessis indicated that they will provide them with all the information set out above in a *bona fide* attempt to place the trustees in a position to obtain understanding of all the issues in the litigation. However, the 152-enquiry and cross examination may not be abused to assess FirstRand's chances of success in the Wonderhoek trial.
23. Neither the Master nor Majiedt and Fortein replied to the above. The next move was from FirstRand in a letter dated 30 July 2018 wherein they informed du Plessis that:

6. Our client will not be ready for trial until such time as the insolvency enquiry has been finalised.

We urge that the representatives of your client co-operate and that further dates for the continuation of the insolvency enquiry be finalised as soon as possible.

24. Du Plessis then warned Majiedt and the fourth respondent on 1 August 2018 that their conduct amounts to abuse of the Insolvency Law. They did not reply; neither did the Master and he went forth and issued the summonses.
25. Clearly the Master were not informed of the situation that now developed or chose to ignore it.
26. On 5 November 2018 Du Plessis requested the content of the applications from Majiedt and Fortein that served before the Master and that directed his decisions. The Master replied that correspondence between the Master and practitioners is deemed confidential in terms of the Code of Examiners.
27. The urgent application on 4 December 2018 followed.

V Conclusion

- [25] Application of the law on the facts of the case must cause a finding by this court to be that the applicants are correct in their submissions that the decision of the Master was unlawful and grossly irregular.
- [26] It is evident from the record that the application made by the second and third respondents to the Master to convene an enquiry in terms of section 152(2) of the Insolvency Act was extremely limited in regard to the information put by them before the Master which would enabled the Master to properly apply his mind to the request.

- [27] The Master made no enquiries as to the various parties involved in the litigation or to the nature of any documents discovered in the course of the litigation thus far. Nor was any such information volunteered to the Master by the second and third respondents.
- [28] The Master was informed that the supposed purpose of the enquiry was to enable second and third respondent to make a decision on the fate of the pending litigation. It appears that the Master made no enquiries about what documents are already in their possession and what existing knowledge they have of the litigation. The Master accordingly failed to properly apply his mind.
- [29] Glaringly absent from the record is any subsequent request to the Master to permit the issue of summonses in respect of Urquhart, Kotze and Dowden. Nothing was put before the Master that would justify him taking a decision to permit the issue of summonses in respect of Urquhart, Kotze and Dowden.
- [30] The decision taken by the Master to produce various documents mostly already in the possession of VVOT1 and Firstrand, was accordingly taken without the Master applying his mind at all and thus falls to be reviewed and set aside.
- [31] The summonses requiring Urquhart, Kotze and Dowden to appear before the Master in order to be interrogated about the Wonderhoek trial accordingly constitutes an abuse. The purpose for summoning Urquhart, Kotze and Dowden to be interrogated at the enquiry is to obtain an improper forensic advantage for the FirstRand in the pending trial.

[32] In its supplementary affidavit Firstrand contends that the Master's decision to issue summonses in respect of the first to third applicants was based on the evidence given by Victor during his interrogation. In this regard:

1. The Master has delivered a record of the decision that the applicants seek to be reviewed and set aside. The record that serves before the court is the entire record of the decision as provided by the Master and excludes the evidence of Victor.
2. Firstrand seeks to introduce matter that does not emerge from the record. If FirstRand wished to supplement the record that the Master has delivered, then it should have done so properly within the provision of Rule 53. However, it has not done so, and this court must make its decision on the strength of the record that serves before it.
3. FirstRand makes repeated references to the "evidence of Mr Victor" but does not, at any stage, state what that is.
4. Tellingly, FirstRand states that: 'Suffice to say that the version of Mr Victor is different to that put forth by the first, second and third applicants.' This statement plainly supports the applicants' contention, made out in the founding affidavit, that the purpose behind the summonses is to obtain an improper forensic advantage for FirstRand in the pending Wonderhoek trial.

[33] The abuse is situated in the following proven facts:

1. Third and second respondents are presently in a position to decide whether or not to persist with the VVOT1 and VVOT2 defence in the Wonderhoek action.
2. This is particularly so where they have already obtained Victor's version under oath in the section 152-enquiry.

3. There is no need whatsoever for summonses to obtain documents that are freely available to them.
4. Wonderhoek has already provided second and third respondents with the detail of what its witnesses will testify to at the trial and has also tendered to provide, within the bounds of reasonableness, any further assistance that they may require.
5. The summonses have been obtained to obtain improper forensic advantage, primarily for FirstRand.
6. FirstRand has confirmed that it is financing the conduct of the enquiry and its counsel is conducting the interrogation. There can be no doubt the summoning of Urquhart, Kotze and Dowden in particular has been done in order to obtain a benefit for FirstRand, a third party.
7. There can also be no doubt that the purpose behind the summoning of Dowden is to conduct a dress rehearsal of the cross examination of him by FirstRand that will take place at the Wonderhoek trial. That manifestly amounts to an abuse of the enquiry process to obtain an improper advantage.
8. It can be reasonably inferred that the purpose of summoning Urquhart and Kotze is simply harassment as neither of them played any role whatsoever in the transfer to the VVOT1 and VVOT2, which occurred more than four years before they became involved in the Wonderhoek's affairs.

[32] The Master performed a mere rubber-stamping function in this case with severe prejudice to the administration of justice. It follows that the subpoenas cannot stand and must be set aside.

- [34] The decree in section 34 of the Constitution, 1996⁹ does not propose for the justice system to become a playground for strategic litigatory moves that bends the law like clay into distortions of fairness and truth. Access to justice is to be revered and not battered for strategic litigatory moves. Selby¹⁰ is correct when he stated that: “I decry such an approach when it replaces ‘the interests of justice’ with ‘I must win’.”

VI Order

1. The decision of the first respondent to issue summonses in terms of section 152(2) of the *Insolvency Act 24 of 1936* in respect of the first, second and third applicants is set aside.
2. The fourth respondent is ordered to pay the costs of this application and the application dated 4 December 2018. Costs to include costs occasioned by the employment of two counsel.

M. OPPERMAN, J

I concur

L.B.J MOENG, AJ

Appearances

⁹ 34. Access to courts.

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

¹⁰ <http://advocacyteaching.blogspot.com/2013/01/trial-advocacy-professors-tell-me-that.html>, Friday, January 4, 2013 *Advocacy, Strategy and Fairness: A.S. Dreier Responds to Selby's Review of His Book* We received the following from A.S. Dreier, author of *Strategy, Planning & Litigating to Win: Orchestrating Trial Outcomes with Systems Theory, Psychology, Military Science and Utility Theory*, in response to Hugh Selby's review of his book published on this blog in December.

For applicants: Adv. Ross Hutton SC
Adv. C van Castricum
Sandton

Instructed by: MDP Attorneys
Bloemfontein
Ref: MCM DU PLESSIS/WON1/0001

For fourth respondent: Adv. DM Leathern SC
Pretoria

Instructed by: Rorich Wolmerans Luderitz Inc.
C/O Peyper Attorneys
Bloemfontein
Ref: G STEENKAMP