IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 1518/2016

In the matter between:

ABDUL KADER HOOSEN SHAIKH **APPLICANT**

vs

TRAFFORD TRADING (PTY) LTD (IN LIQUIDATION) **FIRST RESPONDENT**

NATIONAL BARGAINING COUNCIL FOR THE

LEATHER INDUSTRY OF SOUTH AFRICA **SECOND RESPONDENT**

JOHN DOUGLAS MICHAU **THIRD RESPONDENT**

THE MASTER OF THE HIGH COURT, DURBAN **FOURTH RESPONDENT**

ORDER

The following order is granted:

a. The application is dismissed.

b. The applicant shall pay the costs of the second respondent, such costs to include the costs of senior counsel.

JUDGMENT

D. Pillay J

Introduction

[1] The applicant, Abdul Kader Hoosen Shaikh seeks to interdict the second and third respondents from interrogating him under ss 414, 415, 416 of the Companies Act 61 of 1973 (CA). Trafford Trading (Pty) Ltd (Trafford) is the first respondent of which Mr Shaikh was its sole director and manager. The National Bargaining Council for the Leather Industry of South Africa (the Council) is the second respondent and only creditor of Trafford. John Douglas Michau is the third respondent and is the liquidator of Trafford. The Master of the High Court is the fourth respondent. The third and fourth respondents abide the decision of this court.

[2] The second respondent's claim against Trafford is for underpayment of remuneration due to the Council on behalf of the latter's former employees. On 2 November 2005 an arbitrator declared the amount of the claim to be R282 853.53. On 3 March 2006 the Council applied to liquidate Trafford. On 23 March 2012 Vahed J granted the provisional order for winding-up. Mokgohloa J confirmed the final order for liquidation on 5 November 2013 and refused leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal refused the petition for leave to appeal.

Ancillary Grounds

[3] Mr O. A. Moosa who had represented Mr Shaikh and Trafford throughout the various proceedings until this hearing had included in his heads of argument submissions that the Council's claim had prescribed and that the liquidator was partial to the Council. Mr Findlay now appearing for Mr Shaikh correctly abandoned these submissions. Manifestly the chronology above shows that the liquidation interrupted prescription.

[4] In so far as the prescription point is pitched at protecting Mr Shaikh against prejudice he would suffer as a result of the delay in the prosecution of claims against him personally, this contention must also fall away. Mr Shaikh has been the principal architect of the delay of more than ten years in settling the Council's claim. The history of the Council's claim dates back over a decade. Mr Shaikh applied unsuccessfully on behalf of Trafford for an exemption to the Council's Exemptions Committee. That dispute wound its way to arbitration, the Labour Court, [1] the Labour Appeal Court[2] and eventually to the Constitutional Court, which on 15 September 2011 conclusively rejected Trafford's appeal. At every step Trafford and Mr Shaikh failed in their bid to avoid the Council's claim.

[5] To compound the delay, Mr Shaikh applied for the same relief as in this application in his previous application launched on 20 May 2015 under case no 5050/2015. His erstwhile attorneys had failed to deliver heads of argument in time for that matter which was enrolled on the opposed roll for 18 February 2016. The Council consented to Mr Shaikh withdrawing that application and tendering its costs. Almost simultaneously with negotiating the withdrawal and with no indication to the Council or its attorneys of his intentions, Mr Shaikh launched this application. Even before 18 February 2016 Mr Shaikh signed the founding affidavit in this application and filed it on 17 February 2016 for substantially the same relief.

[6] Why Mr Shaikh had to withdraw the application instead of applying formally for an adjournment and tendering the costs of the other side becomes clear from the response from the Council to Mr Shaik's request for the adjournment. The Council's attorney pointed out that

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[1] *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of SA & others* [2010] 1 BLLR 95 (LC).

[2] *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of SA & others* DA11/09) [2011] ZALAC 35 (1 January 2011).

> 'given the very long history of filibustering by your client. . .my client is entirely unwilling to allow your client to delay the matter any further.' [3]

Thereafter, Mr Shaikh followed with the offer to withdraw the application altogether and tender costs. Seemingly Mr Shaikh and his attorney accepted that no court would accede to his application for a postponement notwithstanding Mr Shaikh's tender of costs because of his conduct.

[7] In these circumstances, Mr Shaikh's lament that the Council

> 'has every intention of not affording [him] an opportunity of presenting this matter for argument' and that 'any difficulty [in pursuing the matter to finality] cannot be attributed to [him]' [4]

is insincere.

[8] As for the alleged partiality of the liquidator, notwithstanding Mr Findlay's concession, elucidating the role and function of the liquidator is material to assessing what scope, if any, would the liquidator have of subjecting Mr Shaikh to 'vexation and oppression', which is his principle challenge to the interrogation.

[9] Because the Council is funding the costs of the liquidator does not necessarily indicate partiality or bias on his part. The liquidator in a compulsory winding-up has the statutory duty to consider the interest of creditors. The function of liquidators is not to speculate but:

> '. . .to pursue the interests of creditors and members, which in the case of a company unable to pay its debts means its creditors. That is doubly important in the present case because the only source of the finance to pursue the present litigation is the creditors of the company.'[5]

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[3] Page 28 of Pleadings email from Mr Hay to Mr Khan.
[4] Para 9.5-9.6 of Mr Shaikh's Founding Affidavit. Pages of the indexed bundle?
[5] *Motala & others* v *Master of the High Court & others* (313/13) [2013] ZASCA 185 (29 November 2013) para 14.

[10] In rejecting the Cape decision in *James v Magistrate Wynberg & others* 1995 (1) SA 1 CPD at 16C-D, upon which Mr Shaikh relied the Appellate Division in *Receiver of Revenue, Port Elizabeth v Jeeva & others; Klerck & others NNO v Jeeva & others* 1996 (2) SA 573 (A) opined that even though

> '. . .the liquidator has fiduciary duties towards, say, creditors, [it] does not mean that he can always be evenhanded. He is obliged, should the occasion arise, to dispute a creditor's claim or to impeach a transaction between a creditor and the company. I do not accept as a general proposition that in such circumstances the relevant creditor can object to an examination or litigation on the ground of the liquidator's perceived bias.'[6]

In short, the liquidator acts

> 'in neither an administrative nor quasi-judicial capacity. He is not in a position of authority *vis-à-vis* with the witness. He does not determine or affect any of his rights. He simply represents the company in liquidation at the inquiry.'[7]

Given the legislative scheme expatiated further below a liquidator has little scope to act out any bias even if he was subjectively so inclined.

<u>Principal Ground</u>

[11] The singular issue in dispute remaining for my determination is whether the interrogation in terms of ss 414, 415, 416 of the CA is illegitimate, if the purpose is to enable the Council to establish whether it has a claim against Mr Shaikh in order to sue him personally in terms of s 424. Would such interrogation be an 'oppressive, vexatious, unfair and/or impermissible' use of s 414.

[12] In this application Mr Shaikh no longer regards the purpose of the interrogation to be 'actuated by an ulterior purpose' as he did when he opposed the liquidation of Trafford. In all the proceedings against Trafford and potentially Mr Shaikh the Council

[6] *Receiver of Revenue, Port Elizabeth* at 579E-F.
[7] Above at 579I-580A.

has been forthright about its intentions to recover its claim. Throughout all the proceedings the Council has enjoyed unqualified success. Therefore Mr Shaikh can hardly be surprised now that its pursuit has been relentless and unwavering.

[13] The Council's aim in liquidating Trafford for purposes of interrogating Mr Shaikh and eventually proceeding against him under s 424 was pleaded, argued and rejected by two judges of this Division and two from the Supreme Court of Appeal. If the two judges of this Division were wrong on this point, which is a point of the law, then the Supreme Court of Appeal would not have refused leave to appeal. Assuming in favour of Mr Shaikh that different considerations apply now when deciding the point in an application to interdict the interrogation, I examine the requirements for s 414 of the CA. Manifestly the requirements for liquidation are different from the requirements for interrogation under s 414 and litigation under s 424 of the CA.

[14] Section 414(2) of the CA provides:

> '(2) The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-
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> *(a)* who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or
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> *(b)* who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph *(a)*, to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.'

[15] For Mr Shaikh, it was submitted that there is a distinction between an interrogation conducted by a creditor or liquidator into the affairs of the liquidated

company, as opposed to an interrogation designed to establish whether a creditor has a claim against a third party. The former purpose is legitimate and permissible on the basis of *Cooper & others NNO v SA Mutual Life Assurance Society & others* 2001 (1) SA 967 (SCA) but not the latter.

[16] First, Mr Shaikh is not a third party but the managing and sole director of Trafford. So was Mr Kebble the sole surviving director of the company in liquidation in *Kebble v Gainsford* 2010 1 SA 561 (GSJ). Because of Mr Shaikh's fiduciary duties the Council has a stronger case for interrogating him than it would for a third party.[8] Furthermore, s 414 allows the Master to subpoena 'any person' who has material information about the company.

[17] Second, it is for the Master to believe or form the opinion that the person to be subpoenaed may be able to give material information concerning the company or its affairs.[9] So the issue of the Council's motive or purpose is immaterial. Furthermore, the primary purpose of an interrogation by any creditor or liquidator is to establish whether claims of creditors can be recovered, be it from the company, its office bearers, employees, debtors or any other person. There would be no point in incurring the costs and inconvenience of conducting an enquiry for any subversive purpose if the prospects of recovering the claims of creditors are non-existent. This is especially so in the case of Councils that are statutory bodies funded partly by workers' wages.

[18] Third, the notion of 'oppression' arises from the prospect of the person interrogated incriminating himself and risking prosecution.[10] However, s 415 (1) which gives effect to the constitutional protection against self-incrimination would address his

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[8] *Cloverbay Ltd (joint administrators) v Bank of Credit and Commerce International SA* [1991] 1 All ER 894;
[9] *Cooper* above para 11; *Henochsberg on the Companies Act 61 of 1973* (5ed) vol 1 issue 26at 873.
[10] *Cloverbay* 900.

concerns. As a general rule an interrogation in terms of subsection (1) would not be admissible as evidence in criminal proceedings in a court of law against Mr Shaik if he gives any incriminating answer or information. He risks prosecution if he gives false evidence, makes a false statement or fails to answer lawful questions fully or satisfactorily.[11] What he may not do at such interrogation is to refuse to answer any question upon the ground that the answer would tend to incriminate him. [12] In so far as this application is Mr Shaikh's preemptive strike to achive what he may not at the interrogation it must fail.

[19] Fourth, in *Receiver of Revenue, Port Elizabeth* above the court went on to clarify that it is the commissioner, or in this instance the Master:

> '. . .who has to act in a quasi-judicial capacity. He has the main duty to examine the witnesses. He has to regulate and control the interrogation. Should he fail in his duty to apply procedural fairness appropriate to this forum, an aggrieved party may approach the Court for suitable relief. . . .'[13]

[20] The Master is in charge of the interrogation process, not the Council and the liquidator. Mr Shaikh advances no criticism of the Master; consequently, any contention that the Master will not afford him a fair hearing is unfounded and at least premature.

[21] Fifth, in substantiation of his submission that the interrogation would 'amount to oppressive, vexatious, unfair and/or an impermissible use of s 415,' Mr Shaikh relied on *James v Magistrate Wynberg & others* 1995 (1) SA 1 (CPD) at 16C-D; *Simon & another v The Assistant Master & others* 1964 (3) SA 715 (TPD) at 718E and *Anderson & others v Dickson & another NNO (Intermenua (Pty) Ltd Intervening)* 1985 (1) SA 93 (NPD) at 111H. On the basis of these decisions, purportedly confirmed in *Cooper,* it was submitted that the interrogation would be *'impermissible'* in law.

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[11] S 415 (5).
[12] S 415 (3).
[13] At 579H-I.

[22] Contrary to this submission, *Cooper* applied *Simon* and *James* and considered *Anderson* but only in the context of determining that delictual claims did not concern the company or its affairs in terms of s 414(2).[14] These cases did not bar an interrogation in contemplation of prosecuting claims under s 424 for carrying on business recklessly or fraudulently. As a general rule in South Africa following *Cooper* and the United Kingdom[15] the courts would not allow oppressive interrogation or production of information. Citing *Ex Parte Brivik* 1950 (3) SA 790 (W) at 791E-H Harms JA reminded:

> 'The Court is careful to see that the inquisitorial powers of the section are not used for purposes of vexation or oppression. . .but an applicant is not required to make out a *prima facie* case that there has been misfeasance or actionable conduct of any kind. It is sufficient if the Court is satisfied that there is a fair ground for suspicion ... and that the person proposed to be examined could probably give information about what is suspected.'[16]

[23] Sixth, if the Master or the presiding officer had no grounds for issuing the subpoena, Mr Shaikh could have applied to the court to have it set aside on review under s 151 of the Insolvency Act 24 of 1936 read with s 339 of the CA. Prudently Mr Shaikh did not resort to this avenue. After all, who else but the sole director and manager of Trafford could 'give material information concerning the company or its affairs'? Once the Master issued the subpoena to secure Mr Shaikh's attendance on 25 June 2015, the Council and the liquidator were entitled invoke all their rights flowing from it to interrogate Mr Shaikh.

[24] Seventh, Mr Shaikh's plea of 'vexation or oppression' would be facetious if it were not cynical, having regard to the nature, origin and purpose of the Council's claim. The debt arises in terms of the Labour Relations Act 66 of 1995 (LRA) read with subordinate legislation in the form of agreements of the Council that are extended to employers and employees in the leather industry, and the common law of contract. The

[14] *Cooper* para 12.
[15] *Cloverbay* at 894; *Re Mid East Trading Ltd v Lehman Bros Inc v Phillips and Others* [1998] 1 All ER 577 at 585.
[16] *Cooper* para 13.

amount claimed constitutes a portion of the minimum prescribed wages of Trafford's employees payable to the Council on their behalf. An employer can be exempted from paying over this portion to the Council if it shows good cause to an Exemptions Committee of the Council.

[25] The rationale for creating a statutory right and enforcement mechanism for payment of minimum wages was to redistribute wealth and resources in order to promote the constitutional values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[17] Furthermore, the stated purpose of the LRA is:

> '*(a)* to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996. . .
>
> (*c)* to provide a framework within which *employees* and their *trade unions*, employers and *employer's organisations* can –
>
> > (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest. . . .'[18]

[26] Unmistakeably, the constitutional and statutory scheme aims to achieve social transformation through redistribution of resources and protection of vulnerable persons who, in this instance, are workers who find themselves between the rock of low wages and the hard place of unemployment. The Council as the collective voice that endeavours to balance the interests of employers, trade unions and their respective members has constitutional and statutory obligations to enforce its agreements. Conversely, employers like Trafford and Mr Shaikh have corresponding obligations to abide by such industry agreements.

[27] Eighth, constitutional and statutory obligations aside, the profound moral principle, based upon good faith and foundational human values embedded in the

[17] Section 1(a) of the Constitution of the Republic of South Africa, 1996.
[18] Section 1 of the Labour Relations Act 66 of 1995.

common law prescript *pacta servanda sunt* quite simply means: agreements must be kept.[19] This principle should be intrinsic, if not intuitive generally but especially when compliance is called for as a patriotic commitment to social transformation and, at its most basic, a commitment to simply obey the law. Mr Shaikh, who as a businessman of some forty-seven years should appreciate the moral principle of keeping to agreements.

[28] Instead, as the mind and manager of Trafford, Mr Shaikh did everything to avoid his legal and moral obligations. Impermissibly and unconscionably Trafford's business was so structured that its survival was premised on avoiding its liability to the Council from the outset.[20]

[29] Ninth, to the economic, social and other incalculable costs of all the processes Mr Shaikh and Trafford initiated unsuccessfully must be added the costs of his failed opposition of the liquidation application and the aborted predecessor to this application. Throughout Mr Shaikh engaged the services of senior counsel. On any estimates his litigation costs to date must at least equal if not exceed the claim. What motivated this relentless resistance to pay not only a legal but also a moral and social debt is a question Mr Shaikh has yet to answer. Equally curious is the fact that the Council, whose trade union's members are 'soft targets' for recalcitrant employers, is the only creditor. Why? In these circumstances there is not merely a belief but a strong suspicion that Mr Shaikh must have material information about Trafford and its affairs.

[30] In conclusion, Mr Shaikh is so insensitive to the social needs of poor workers dependant on minimum wages for survival that it hardly lies in his mouth to plead 'vexation or oppression'. Public interest compels the court to be less concerned about his oppression arising from the interrogation.[21] Nothing from the text and purpose of s 414 of the CA prohibits, as a matter of law, the interrogation of the managing and sole director of a company for the purposes of determining whether there is a basis to sue

[19] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 349.
[20] This was the finding of the Labour Appeal Court in *Trafford* above.
[21] *Cloverbay* above 904.

him personally in terms of s 424 of the CA. Trafford's failure to pay the claim of the Council is therefore not only a breach of a statutory and contractual duty, but also a moral dereliction.

[31] In my view the proverbial horse has bolted. Mr Shaikh allowed the subpoena to be issued unchallenged; he cannot now seek to withdraw or impede the rights of the Council and the liquidator flowing from it. Whatever process, if any, the Council and liquidator intend to invoke to recover the claims of creditors, be it s 424 or any other means is their prerogative and would depend on whether the prerequisites for such process are met at that stage. It would be premature to pronounce on the propriety of proceedings in terms s 424 at this stage and no relief is claimed in respect of such proceedings.

[32] Section 424 can be invoked even without liquidating the company. [22] With liquidation comes the opportunity and tactical advantage of interrogating 'any person… able to give material information concerning the company or its affairs'. Consequently, the next predictable step after confirming the order for liquidation has always been the interrogation in terms of s 414, 415, 416 of the CA. Mr Shaikh should have been in no doubt that the Council would implement its plan to interrogate him as pleaded in the liquidation proceedings and, depending on his responses, proceed to hold him personally liable in terms of s 424 of reckless trading. If Mr Shaikh did not carry on the business 'recklessly or with intent to defraud creditors …or for any fraudulent purpose' he should have no concerns about the interrogation, which then may not even lead to s 424 proceedings.

[22] *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and others* 1999 (3) SA 480 (W) at 487G-H.

[33] Mr Shaikh has no choice but to comply with the subpoena failing which, he 'shall be guilty of an offence'[23] punishable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment.[24]

The Order

[34] In the premises, I grant the following orders:

a. The application is dismissed.

b. The applicant shall pay the costs of the second respondent, such costs to include the costs of senior counsel.

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D. PILLAY J

[23] Section 414(3) of the Companies Act 61 of 1973.
[24] Section 441(1)(f) above.

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Date of Hearing	:	17 November 2016
Date of Judgment	:	29 November 2016