IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 185/13

Heard On: 27 March 2015

Delivered on: 08/05/2015

In the matter between

FERNANDO M F GAPUO GARCAO	**Applicant**
And	
THE MASTER OF THE NORTHERN CAPE HIGH COURT, KIMBERLEY	**1st Respondent**
DONOVAN THEODORE MAJIEDT N.O	**2nd Respondent**
EUGENE FREDERICK SAFFY N.O	**3rd Respondent**
CHAVONNES BADENHORST ST CLAIR COOPER N.O	**4th Respondent**
MOLELEKWA ASHWORTH TAU N.O	**5th Respondent**

Coram: BM Pakati J et L Lever AJ

APPLICATION FOR LEAVE TO APPEAL

PAKATI J

[1] Mr Fernando Garcao, the applicant, applies for leave to appeal the order granted by Kgomo JP and myself on 08 August 2014. The second to fifth respondents, Donovan Majiedt, Eugene Saffy, Chavonnes Cooper and Molelekwa Tau NNO, respectively, in their capacity as the liquidators of

Meepo Investments Consortium (Pty) Ltd (in liquidation), oppose the application. For convenience I will refer to them as Liquidators. The first respondent is the Master of the High Court, Kimberley.

[2] In his application for leave to appeal filed on 29 August 2014 the applicant listed the following grounds:

"1. Reasonable prospects exist that a court of appeal may disagree from the findings of fact and law and can reasonably arrive at a conclusion different to that of the court a quo;

2. The Court a quo, with respect, erred in finding that by extending the liquidators' powers to convene an enquiry, should they so decide, in terms of s 417 and/or 418 [the Companies Act, 61 of 1973] means that the enquiry was not convened by the Master and was a section 417 and 418 enquiry. The liquidators decided to apply to the Master to convene an enquiry in terms of s 417 as is evident from the body of the subpoena;

3. The Court a quo erred in not finding that the Master convened the enquiry, as is evident from the heading of the subpoenas, "Master's Enquiry"..;

4. The Court a quo erred in finding that the enquiry was an enquiry in terms of section 417 and 418 of the Companies Act, 1973. The summons called the applicant up in terms of section 417 of the Companies Act;

5. Once a Master convenes an enquiry the provisions of section 417 is peremptory, he must hold the enquiry;

6. *The Court a quo erred by not holding that the dictum in Swart and Others v Master of the High Court Pretoria and Others 2012 (4) SA 219 (GNP) was distinguishable from the facts in this matter;*

7. *The Court a quo erred in finding that R v Herholdt and Others 1957 (3) SA 236 (A) at 252G-253A was not distinguishable on the facts from the facts in this matter;*

8. *In that the Court a quo erred in finding that the applicant did not prove that the fact that he was never advised of his right to re-examination was not prejudicial to him;*

9. *In that the Court a quo found that the applicant was the recipient of unlawful dispositions because he did not address the issue in these proceedings. The main application was postponed sine die;*

10. *The finding, with respect, prejudges the main application; and*

11. *In that the Court a quo erred by not granting condonation and granting the order for the review and setting aside of the proceedings of 15 to 18 August 2011 or beyond."*

[3] The order granted by Olivier J on 10 June 2011 was by agreement between the parties. Para 2.1.2 of the said order reads thus:

"The applicants' powers as Provincial Liquidators are extended to empower them to convene an investigation in terms of ***<u>Section 417 and/or Section 418 of the Companies Act 61 of 1973</u>*** *(read with Section 9 of Schedule 5 of the Companies Act, 71 of 2008) ["the Act"] pertaining to the transactions recorded in the said Annexures "B1" and "B2""* (My emphasis).

The heading in the subpoena addressed to the applicant clearly describes the type of enquiry that was to be held. It reads as follows:

"THE ENQUIRY IN TERMS OF SECTION 417 read with SECTION 418 OF THE COMPANIES ACT, NO 29 of 1985, AS AMENDED (the Act).

[4] The argument that the content of the subpoena refers to the enquiry in terms of s 417 cannot be sustained. The heading of the subpoena and the order by Olivier J are express and clear and need no further clarification. The assistant Master, Mr WK Van Rensberg, presided as the Commissioner in terms of s 418 (1) (a) of the Act and filed a Report dated 07 September 2012. It stated in no uncertain terms that the enquiry was convened in terms of s 417 and 418 of the Companies Act. S 418 (1) (a), (b) and (c) of the Act sets out the powers of the Master and the prescribed procedure as follows:

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(1)

(a)Every magistrate and every other person appointed for the purposes by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.

(b) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order.

(c) The Master, if he has not himself been appointed under paragraph (a), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an

attorney, with or without counsel, who shall be entitled to interrogate any witness: Provided that a commissioner shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily."

[5] Adv PJJ Zietsman, on behalf of the applicant, argued that the enquiry could only be held by the Master in terms of peremptory provisions of s 417 of the Act or in terms of s 417 read with s 418 held by the Master or a Court or a Commissioner. In support of this proposition he relied on the case of **SWART AND OTHERS v MASTER OF THE HIGH COURT PRETORIA AND OTHERS 2012 (4) SA 219 (GNP)**. In terms of s 417 only the Master is authorised to conduct the enquiry, his argument goes. He argued further, for the first time, that the summons issued was irregular. He stated that the liquidators' powers were extended only to the Liquidators and could not be delegated to the Master or his assistant. This is contrary to the initial argument by the applicant that the enquiry and the examination of persons had to be conducted by the Master in terms of the peremptory provisions of s 417 of the Act. The applicant's case is difficult to comprehend.

[6] In response Adv P Zietsman SC, on behalf of the respondents, submitted that the contention that the enquiry was conducted in accordance with s 417 is not substantiated by the evidence even after the review application was dealt with. He submitted further that there were no prospects of success on appeal.

[7] The argument that s 417 only empowers the court or the Master to examine persons summoned before it and that only the court can allow any person to examine and not the Master cannot be sustained. This aspect is fully covered in our judgment delivered on 08 August 2014 with

regards to the case of **Swart** *supra* and R v **HERHOLDT AND OTHERS 1957 (3) SA 236 (A).** I do not intend to repeat same here. S 417 (2) (a) of the Companies Act provides as follows:

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

The use of the word 'may' above is obviously directory and not peremptory. The enquiry was convened by the Liquidators in terms of the order granted by Olivier J on 10 June 2011. The Assistant Master therefore conducted the proceedings as a Commissioner appointed by the Master in compliance with s 418 (a) of the Act and the powers stipulated in s 418 (c).

[8] The applicant argued that the presiding officer did not advise him of his rights to re-examination and that omission rendered the proceedings irregular, unfair and unjust. He did not allege that this failure prejudiced his case. This was never an issue initially. In **BENSON, IN RE: TAIT NO AND OTHERS v JASON AND OTHERS [2012] ZAWCHC 377** Binns-Ward J held:

"The examinee at an Enquiry in terms of Section 417 and 418 of the Companies Act, 61 of 1973,complains of an omission by the presiding officer to advise him of a right affecting the fairness or constitutionality of the proceedings, it is necessary that the examinee provide some particularity in support of his complaints of unfairness or infringement of his constitutional rights before the complaint becomes justiciable and

since applicant provided no particularity, the Court's findings in this regard cannot be faulted."

No particularity was provided by the applicant in this regard.

[9] The applicant failed to address the Liquidators' allegations in his Answering Affidavit in Case No 1559/2012 (the Main case). He had a number of chances at his disposal to respond to the allegations that he was the recipient of an unlawful disposition not made for value from Meepo Investments. He failed to do so in his Founding and Replying Affidavits and in his application for review. The evidence led during the enquiry also served before the Court in the review application still this was not disclosed. The only conclusion that one can reach is that he has something to hide.

[11] The applicant failed to make a case for condonation of his late filing of the review application. No reason was advanced why the Court erred in this regard. There were also no justifiable reasons advanced for the Court to set aside the proceedings that took place from 15 to 18 October 2011 or beyond.

[12] In my view, there are no prospects of success. No other court may arrive at a different decision.

ORDER

The application for leave to appeal is dismissed.

PAKATI J

I concur

LEVER AJ

On Behalf of the Applicant:	*ADV PJJ ZIETSMAN*
Instructed by:	*DE JAGER ATTORNEYS*
On Behalf of the Respondent:	*ADV P ZIETSMAN (SC)*
Instructed by:	*ADRIAN HORWITZ & ASS.*