

Reportable: YES / NO
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT)**

CASE NO: 1559/2012

Case Heard: 31/05/2013

Date Delivered: 28/06/2013

In the matter of

FERNANDO MANUEL FREIRE GAUPO GARCAO

APPLICANT

and

DONOVAN THEODRE MAJIEDT NO

1ST RESPONDENT

EUGENE FREDERICK SAFFY NO

2ND RESPONDENT

CHAVONNES BADENHORST ST CLAIR COOPER NO

3RD RESPONDENT

MOLELEKWA ASHWORTH TAU NO

4TH RESPONDENT

DANIEL JACOBUS LIVERSAGE

5TH RESPONDENT

JOHN EDWARD BROIDO

6TH RESPONDENT

PAUL EKON

7TH RESPONDENT

GIDEON ANDRIES PETRUS KOTZE

8TH RESPONDENT

And also in the matter of:

DONOVAN THEODRE MAJIEDT NO

1ST APPLICANT

EUGENE FREDERICK SAFFY NO

2ND APPLICANT

CHAVONNES BADENHORST ST CLAIR COOPER NO

3RD APPLICANT

MOLELEKWA ASHWORTH TAU NO

4TH APPLICANT

and

FERNANDO MANUEL FREIRE GAUPO GARCAO

1ST RESPONDENT

DANIEL JACOBUS LIVERSAGE

2ND RESPONDENT

JOHN EDWARD BROIDO

3RD RESPONDENT

GIDEON ANDRIES PETRUS KOTZE

4TH RESPONDENT

PAUL EKON

5TH RESPONDENT

JUDGMENT

ERASMUS AJ

- 1 This matter involves three applications. The first is an application for a postponement(‘the interlocutory application’) for the postponement of another application(‘the main application’),pending the finalization of an application to review and set aside the authorization of the Master of the Northern Cape High Court (‘the Master’), of the enquiry in terms of section 417 of the Companies Act, No. 61 of 1973, which was

convened and held from 15 to 18 August 2011, alternatively, an order reviewing and setting aside the enquiry held in terms of section 417 of the 1973 Companies Act, which was convened and held from 15 to 18 August 2011 and further relief ('the review application').

2 The applicant in the interlocutory application ('Garcao') is also the applicant in the review application and the first respondent in the main application. The first, second, third and fourth respondents interlocutory application are the applicants in the main application. I shall refer to the applicants in the main application as 'the liquidators'. The other respondents in the interlocutory application are also respondents in the main application.

3 The main application is an application in terms of section 32 of the Insolvency Act, read with section 340 of the 1973 Companies Act and section 9 of the Companies Act, No. 71 of 2008. It was lodged on 7 September 2012. Garcao and the second, third and fourth respondents therein gave notice of their intention to oppose the main application on 25 September 2012. Neither Garcao, nor the other respondents have filed opposing affidavits in the main application.

4 The relief sought against Garcao in the main application is, *inter alia*, for the following relief:

4.1 To have the certain transactions of the company known as Meepo Investments Consortium (Pty) Ltd (now in liquidation) ('Meepo'),

declared void as dispositions not made for value, as contemplated in the Insolvency Act, , read with the Companies Act, No. 61 of 1973;

4.2 A declaration that the liquidators be entitled to recover the proceeds of the sales of the assets, alternatively the assets itself;

4.3 An order directing the first to fourth respondents in the main application to render an account, supported by vouchers, of all alienations of assets of Meepo during the 24 months immediately preceding the application for the winding-up of the company;

4.4 An order lifting the statutory privacy and confidentiality under section 417(7) of the 1973 Companies Act, attaching to the proceedings under master's reference number K35/2011, which served before the master on 15 to 18 August 2011.

5 The review application, case no 185/2013, was placed before me during the hearing of the application. It was issued on 1 February 2013. Garcao is the applicant and the master of the Northern Cape High Court is the first respondent in the review application. The liquidators are the second to fifth respondents in the review application.

6 On 12 February 2013, the liquidators gave notice of their intention to oppose the review application. They also opposed the interlocutory application and filed their opposing papers in respect hereof on 1

March 2013. Subsequently, on 5 April 2013, the liquidators caused the main application to be set down for hearing on 31 May 2013.

7 Meepo was placed under provisional liquidation on 21 February 2011 and was finally liquidated on 8 April 2011. The liquidators were appointed as provisional liquidators on 7 April 2011 and as final liquidators on 20 July 2011.

8 Before their appointment as final liquidators, the liquidators lodged an urgent application on 24 May 2011, for an order interdicting Garcao from alienating Meepo's assets in his possession or under his control, pending an investigation into certain transactions, in terms of section 417/418 of the 1973 Companies Act. On 10 June 2011, by agreement between the parties, an order was made¹ and the relevant paragraph of this order is paragraph 2.1.2, reads as follows:

'The Applicant's powers as Provisional Liquidators are extended to empower them to convene an investigation in terms of section 417 and/or section 418 of the Companies Act 61 of 1973 (read with Section 9 of Schedule 5 of the Companies Act, 71 of 2008) pertaining to the transactions recorded in the said Annexures "B1" and "B2".'

9 The liquidators caused an investigation into certain transactions. It is common cause that an enquiry was held during the period 15 to 18 August 2011 and that the enquiry was presided over by the assistant master. This enquiry is the subject matter of the review application.

¹Annexure 'A8' in the main application: Vol 1 p 72 - 75

- 10 The founding affidavit in the main application consists of 51 pages. In the first 9 pages pertain to the description of the parties, *locus standi* of the applicant, jurisdictional facts and the nature of the application is set out.² The background to the application is then set out. The deponent to the founding affidavit then proceeds to deal with the enquiry held at the master's office during the period 15 to 18 August 2011, the evidence led and the examination of witnesses. This comprises 28 pages of the founding affidavit.³
- 12 The full record of the enquiry is attached to the founding affidavit as annexure 'R'. The record comprises 4 volumes, consisting of almost 400 pages.⁴
- 13 In the founding affidavit in the main application, the deponent concludes:⁵

"Applicants aver and argument will be presented at the hearing that the evidence elicited through the Examination of the material witnesses in this matter under Oath at the Enquiry which sat at the Master's Office in Kimberley during the week commencing 15 August 2011 proves that the transactions represented by the Resolutions of the Directors of Meepo Investments dated 26 March 2010 and 31 July 2010 represent voidable transactions and ought to be set aside as dispositions for which no value has been received or promised... ."

²Main application: Vol 1 p 10 par 1 to p 18 par 7.3.4

³Main application: Vol 1 p 29 par 10 to p 57 par 11.10

⁴Main application: Vol 2 p 103 to Vol 5 p 501

⁵Main application: Vol 1 p 57 par 12.1

14 Mr Zietsman, on behalf of the liquidators, submitted that the relief pertaining to the striking out of the record of the enquiry and certain portions of the founding affidavit in the main application, is wholly dependant on the success of the review application. Mr Snellenburg, on behalf of the applicant in the interlocutory application, conceded that the further relief sought by Garcao in the interlocutory application need and should not be dealt with at this stage of proceedings.

15 The main application is based, to a large extent, on the record of enquiry before the assistant master and the evidence contained in the said record. The purpose and object of the review application is to have the master's authorization of this enquiry reviewed and set aside, alternatively, to have the enquiry itself set aside. If the applicant herein is successful in the review application, the record of these proceedings, attached to the founding affidavit in the main application, as well the allegations and submissions based on the record of those proceedings, will be inadmissible and the applicant will then be entitled to apply that it be struck from the record in the main application. An application to strike out must generally be made when the matter is before the court on its merits. If made prior to that stage, the application to strike out will be premature.⁶ I thus do not deem it necessary to deal with this aspect at this stage of proceedings.

16 Mr Zietsman submitted that the application for the postponement should be dismissed. He further submitted that, if it is dismissed, the

⁶ *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W); *Shephard v Tuckers Land & Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) at 177D–E

main application stands unopposed and the relief sought should be granted.

- 17 In respect of the application for the postponement, Mr Zietsman referred to the cases of *National Police Service Union v Minister of Safety and Security*⁷ and *Madinda v Minister of Safety and Security*⁸. A postponement cannot be claimed as of right. The applicant must show good cause for the postponement. The court has a discretion whether or not to grant a postponement, but should not grant the postponement unless it is satisfied that it is in the interests of justice to do so. In exercise its discretion, cognisance should, *inter alia*, be taken of thereasons for the postponement, whether the application has been timeously made, prejudice of the parties and the public interest, andwhether there are *bona fide* grounds on the merits as to the purpose for which the postponement is sought.
- 18 The reasons for the postponement are clear. The review application has been issued and has not been finalized. The outcome thereof is relevant to main application.
- 19 The application for the postponement has been timeously made, early February 2013. The review application was issued on 1 February 2013. At that stage the main application had not been enrolled.

⁷2000(4) SA 1110 (CC) par [4] and [5]

⁸[2008] 3 ALL SA 143 SCA

- 20 Although it is in the public interest that liquidation proceedings be finalized without undue delay, the liquidators themselves did not act with urgency in this matter. The enquiry before the assistant master took place in August 2011. There was a further enquiry scheduled for May 2012. The main application was only lodged on 7 September 2012. Notice of intention to oppose was given on 25 September 2012. The record of the further enquiry, that is the proceedings of May 2012, was only produced in November 2012. Thereafter no further steps were taken by the liquidators until the review application was lodged. The main application was only set down in April 2012. In my view the liquidators will not suffer prejudice that cannot be compensated by an appropriate cost order if the main application is postponed.
- 21 The purpose of the application for the postponement is for the finalization of the review application. I have already indicated that the outcome thereof is relevant in respect of the main application. If the applicant is successful and the enquiry is set aside, there is a reasonable prospect that a large section of the founding affidavit of the liquidators might be struck out. There is a likelihood that Garcao will be prejudiced if he is required to answer to the founding affidavit if there is a reasonable prospect of success in the review application.
- 22 The prospects of success in the review application is a relevant factor in the consideration of the interlocutory application. I do not deem it necessary or proper though to deal with the merits of the review application in depth, save in as far as set out below.

- 22.1 Mr Zietsman submitted that there is no reasonable prospect of success in the review application. He, *inter alia*, submitted that the decision to authorise the enquiry was made by the court and not the master and this decision is not susceptible to review. In terms of the court order of 20 June 2010, the court extended the powers of the provisional liquidators to empower them to convene an investigation in terms of section 417 and/or section 418. The investigation was convened by the master and presided over by the assistant master, not the court.
- 22.2 Mr Snellenburg submitted that it appears *ex facie* the witness summonses/subpoenas that the enquiry was an enquiry in terms of section 417 of the 1973 Companies Act. In terms of section 417(1) the Court may summon before it, or the master may summon before him, “any director or officer of the company or person ...”⁹
- 22.3 In a report dated 20 February 2013, the assistant master specifically directs the court’s attention to the fact that paragraph A of the witness summons/subpoena states that the enquiry is in terms of section 417 of the Act, although the heading states in terms of section 417 read with section 418. He further points to the fact that paragraph B also makes mention that the people are summonsed in terms of section 417(1). Paragraphs A and B of these documents read as follows:

⁹s 417(1)

“A. TAKE NOTICE that an enquiry in terms of section 417 of the Act into the affairs of has been authorised by the Master of the High Court, Kimberley and that such enquiry shall be held on the dates listed in paragraph B below.

B. TAKE NOTICE that you are hereby summoned, in terms of section 417(1) of the Act ,...”.

22.4 It is common cause that the master did not conduct the enquiry and that the assistant master presided over the enquiry. The assistant master did not play any active role in the proceedings and did not examine any witness. The liquidators were represented by an attorney who examined the witnesses. Mr Snellenburg submitted that only the master could and should have conducted the enquiry. He based these submissions on the judgment of *Swart & Others v Master of the High Court and Others*¹⁰. This matter involved an application to set aside the master’s authorization of an enquiry in terms of section 417 and involved the interpretation of sections 417 and 418 of the 1973 Companies Act. With reference to Blackman, Jooste & Evering: *Commentary on the Companies Act*¹¹ Goodey AJ concluded that authorization of the master had to be set aside.

22.5 From the wording of section 417(2)(a) it appears as if the legislation empowers only the court or the master to examine persons summoned before it or him. Section 418(2) provides that a commissioner has the same powers of examining witnesses as the court or master who

¹⁰2012(4) SA 219 (GNP)

¹¹Revision Service 5 p 14-480 and Swart *supra* par [5.5] to [5.6]

appointed him. The court has in inherent discretion to determine who may attend the enquiry and interrogate the witnesses, but the master has no such discretion.

- 22.6 Mr Snellenburg submitted that it was, in *casu*, only the master who may have examined the summoned person(s), under oath or affirmation, either orally or by way of written interrogatories.¹² In *casu* the assistant master presided in the proceedings. He did not play any role and did not ask questions. During the enquiry, the examination of the witnesses was conducted by an attorney who represented the liquidators. Even it is accepted that the assistant master was appointed as a commissioner in terms of section 418, it was his main duty to examine the witnesses. In *Receiver of Revenue, Port Elizabeth and Others v Jeeva and Others*¹³ Harms JA stated that the commissioner

"...is the person who conducts the enquiry. It is he 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 the procedural fairness appropriate to this forum, an aggrieved party may approach the Court for suitable relief".

- 22.7 With regard to the procedural fairness of the enquiry, it is common cause that the applicant in the interlocutory application was not afforded opportunity of a reply after cross-examination. It is also alleged that he was not given the

¹²s 417(2)(a)

¹³1996 (2) SA 573 (A) at 579

opportunity to re-examine any of the other witnesses. These omissions and the effect thereof constitute a valid point for argument during the review proceedings.

22.8 Mr Zietsman submitted that the review application was not lodged timeously. From the notice of motion in the review application it appears that Garcao seeks condonation for non-compliance with the time frames and the extension of such time frames, in as far as it may be necessary. This is a matter to be considered by the review court.

23 The master, *prima facie*, appears to have acted in terms of section 417 of the 1973 Companies Act. If this is so, he should have conducted the enquiry. I am not convinced that the decision *Swart & Others v Master of the High Court and Others* supra is wrong. If the assistant master was appointed as a commissioner in terms of section 418, there is a reasonable prospect that the review court might find that the assistant master then should have conducted the enquiry and not merely presided over the enquiry in the manner in which he did.

24 I deem it in the interest of justice that main application be postponed pending the finalization of the review application. With regard to the costs, Mr Snellenburg submitted that the liquidators should bear the costs of the unsuccessful opposition of the interlocutory application. I am of the view that reasonableness of the opposition of the interlocutory application should only be assessed after finalization of

the review application and that the costs of the interlocutory applications should therefore be reserved.

25 I make the following order:

1 THE APPLICATION UNDER CASE NUMBER 1559/2012 IS POSTPONED *SINE DIE*, PENDING THE FINALIZATION OF THE REVIEW APPLICATION UNDER CASE NUMBER 185/2013.

2 THE COSTS IN RESPECT OF THIS APPLICATION ARE RESERVED.

**S L ERASMUS
ACTING JUDGE
NORTHERN CAPE DIVISION**

For the Applicant (interlocutory application) : Mr Snellenburg

On instructions of De Jager Attorneys, Kimberley

For the First - Fourth Respondents: Mr Zietsman SC

On instructions of Adrian B Horwitz and Associates, Kimberley