

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 3584/02

In the matter between:

RODNEY MITCHELL

First Applicant

PETER GRAHAM GARDENER

Second Applicant

and

PETER BARRIE HODES N.O.

First Respondent

ROBERT JOHN WALTERS N.O.

Second Respondent

GAVIN CECIL GAINSFORD N.O.

Third Respondent

JUDGMENT : 13 DECEMBER 2002

VAN HEERDEN J:

Introduction

This is an application for an order in, *inter alia*, the following terms:

- '2. *Reviewing and setting aside the ruling, alternatively the refusal to make a ruling, by the first respondent on Friday 31 May 2002 in the section 417 commission of enquiry into the affairs of LeisureNet Ltd*

(in liquidation);

3. *Declaring the first respondent's ruling, alternatively his refusal to make a ruling as sought, on Friday 31 May 2002, to be inconsistent with the provisions of section 35 of the Constitution;*
4. 4.1 *Directing that no examination of the applicants in terms of the provisions of section 417 of the Companies Act, 61 of 1973, shall take place in respect of any matter that has a bearing on the criminal charges against them, or which might have a bearing on the criminal charges as amended and amplified in due course, pending the finalisation of the pending criminal proceedings against them;*
 - 4.2 *Alternatively to paragraph 4.1 above, remitting the matter to the first respondent for reconsideration of the applicants' application by him;*
5. *Directing such persons as may oppose this application to pay the costs thereof.*

The events which gave rise to this application were, briefly, as follows:

LeisureNet Limited (in liquidation) ('*LeisureNet*') was placed under a provisional winding-up order by this court on 7 October 2000, which order was made final on 30 November 2000. LeisureNet was wound up on the basis that it was unable to pay its debts within the meaning of section 344(f), read together with section 345(1), of the Companies Act 61 of 1973, as amended ('*the Companies Act*'). Also on 30 November 2000, this Court granted an application made by the

second and third respondents (then the joint provisional liquidators of LeisureNet) for the appointment of a commission of enquiry in terms of sections 417 and 418 of the Companies Act, to enquire into the trade, dealings, affairs and property of LeisureNet (*'the Commission'*). In terms of section 418(1) of the Companies Act, the first respondent, a practising senior advocate of the Cape Bar, was appointed by the Court as Commissioner (*'the Commissioner'*). On 23 March 2001, the second and third respondents were appointed the joint final liquidators of LeisureNet (*'the LeisureNet liquidators'*). The Commission commenced its work on 1 June 2001, and by 28 June 2002, it had heard the evidence of 21 witnesses over 49 days.

The first and second applicants (*'Mitchell'* and *'Gardener'*, respectively) were the founders of the Health and Racquet Club business which was subsequently taken over and conducted by LeisureNet. They were at all material times the joint chief executive officers of LeisureNet, only resigning from their positions as such in August 2000 shortly before the liquidation of the said company. Pursuant to summonses issued by the Commissioner, both Mitchell and Gardener testified before the Commission on 8 February 2002 and again appeared before the Commission on 13 March 2002. On both such occasions, they had been ordered, in terms of the relevant summonses, to produce to the Commission certain documents relating to, *inter alia*, offshore entities known as Clockwork Limited (*'Clockwork'*), Moreland Overseas Limited (*'Moreland'*), Ajax Way Investments Limited (*'Ajax Way'*) and Kinsman Consultancy Limited (*'Kinsman'*). It would appear that the first two companies were created for the benefit of Mitchell and his family, and the last two for the benefit of Gardener and his family. (Mitchell and Gardener deny, however, that they are *'the corporate controllers'* of these companies.) All four companies are registered in the British Virgin Islands and are administered by the Insinger de Beaufort Trust (Jersey) Limited registered in Jersey (*'the Insinger Trust'*). Mitchell and Gardener denied having in their possession any documentation relating to these British Virgin Island companies (*'the BVI companies'*), and the Commissioner was informed that they were unable to procure any such documentation from the Insinger Trust themselves.

On Saturday, 30 March 2002, Mitchell and Gardener were arrested by representatives of the Directorate of Special Operations (*'the Scorpions'*), and appeared in court on Wednesday, 2 April 2002. According to the *'Draft Charge Sheet'*, they face the following charges:

- Count 1 : Fraud;
- Court 2 : Fraud, alternatively theft;
- Count 3 : Contravention of section 234 of the

Companies

Act; 1

- Court 4 : Fraud, alternatively a contravention of section

104 of the Income Tax Act 58 of 1962;

- Count 5 : (Only in respect of Gardener) Fraud, alternatively a contravention of section 59 of the Value Added Tax Act 89 of 1991.

Mitchell had been summoned to testify before the Commission during the week commencing 27 May 2002, and Gardener during the week commencing 3 June 2002. During the course of Mitchell's examination on 27 May 2002, counsel appearing for Mitchell and Gardener raised an objection to the line of examination being pursued and thereafter sought a ruling from the Commissioner in terms identical to those of prayer 4.1 of the Notice of Motion in the present proceedings, as set out above. The Commissioner declined to make the ruling sought and the applicants now seek to have that decision reviewed. The Commissioner abides the decision of the court, while the LeisureNet liquidators oppose the application.

Background

Many of the facts set out below are common cause, while others appear from the applicants' allegations, as set out in their founding and replying papers before the Court and in the various Annexures thereto. To the extent that I have incorporated facts derived from allegations made by the LeisureNet liquidators in their answering affidavits and in the Annexures thereto, I have indicated the

¹ ie failure by the director of a company to disclose his or her interest in a contract to which the company is a party and which is of significance in relation to the company's business.

points of factual dispute between the parties, to the extent necessary for the purposes of the present proceedings.

LeisureNet is a public company registered in South Africa. Prior to its liquidation, it was listed in the Hotels and Leisure sector of the JSE Securities Exchange ('JSE'). It owned *inter alia*, the Health and Racquet Club business which operated 85 health clubs in South Africa. It also held 57.8% of the ordinary issued share capital in Healthland International Limited ('*Healthland International*'), a company registered in Malta, which company was in turn the holding company of LeisureNet's offshore operations. At the time of LeisureNet's provisional liquidation, Healthland International had 17 subsidiaries throughout Europe and Australia, which subsidiaries owned 22 operating health clubs, with a further 17 health clubs under development in the United Kingdom, Spain, Germany, Austria and Australia.

LeisureNet's offshore expansion commenced in approximately 1997. In 1998, Healthland Holdings Limited ('*Healthland Holdings*') and Healthland Management Limited ('*Healthland Management*'), both registered in Malta, were established as wholly-owned subsidiaries of Healthland International. Healthland Holdings was the holding company of Healthland Europe Limited (formerly known as LeisureNet International Limited – '*LeisureNet International*'). Prior to 1 May 1999, LeisureNet International held a 50% interest in Healthland Germany

Limited. This company in turn had a wholly-owned subsidiary, Healthland Germany GmbH, which operated the health clubs in Germany and Austria. The managing director of Healthland Germany GmbH was one Johan (Hans) Eduard Moser (*'Moser'*). The other 50% of the shares in Healthland Germany Limited were held by Dalmore Limited (*'Dalmore'*), a company registered (in 1985) in Jersey in the Channel Islands and administered by Ernst & Young Trust Company (Jersey) Limited (now known as the Royal Bank of Canada Trust Company (International) Limited). The registered shareholders of Dalmore are Cacique Investments Limited, Damor Investments Limited and Paternoster Nominees Limited, all with the same registered office address as Dalmore. The shareholders of these companies are not known to the LeisureNet liquidators.

Although this is not entirely clear from the papers before this Court, it appears to have been generally believed by the LeisureNet board of directors that Dalmore was the chosen *'corporate vehicle'* of Moser. In addition to Moser, a German citizen, who had at one time lived in South Africa, Dalmore was represented by a Cape Town attorney (and erstwhile director of LeisureNet) by the name of Joubert Rabie (*'Rabie'*). Rabie is apparently a long-time friend and business associate of Mitchell, Gardener and Moser. According to one of the (three) versions advanced by Rabie in his evidence before the Commission in this regard, Mitchell and Gardener were each the beneficial owners of 20% of the shares in Dalmore, although this has been denied by Mitchell and Gardener, both of whom assert that they never held any interest in Dalmore. Furthermore, according to Rabie's testimony before the Commission, he (Rabie) is effectively the beneficial owner of 15% of the shares of Dalmore, while Moser is effectively the beneficial owner of 45% of such shares.

On 16 April 1999, Dalmore sold its 50% shareholding in Healthland Germany to LeisureNet International for a price of DM10 million, with effect from 1 May 1999, in terms of a sale of shares agreement concluded (on the former date) between Dalmore, Moser, Healthland Germany, LeisureNet International and LeisureNet. Rabie, acting under a power of attorney, signed the sale of shares agreement on

behalf of Dalmore and Moser, while Gardener signed the agreement on behalf of LeisureNet and its subsidiaries. The LeisureNet board of directors purported to ratify this transaction on 26 May 1999.

According to the LeisureNet liquidators, the acquisition by LeisureNet International of Dalmore's 50% interest in Healthland Germany was a fraudulent transaction in a number of respects, including the following:

- the purchase consideration was grossly inflated in that Healthland Germany GmbH was at the time technically insolvent and the shares in Healthland Germany purchased by LeisureNet apparently worth almost nothing;
- the alleged beneficial interest of Mitchell and Gardener in Dalmore was unknown to the other members of the LeisureNet board of directors when they ratified the transaction;
- contrary to the terms of the sale of shares agreement and to the decision of the LeisureNet board on 26 May 1999, the purchase price of DM10 million was not funded by the issue of shares in LeisureNet but, in fact, the payment was made in cash. It is alleged that LeisureNet funds in the amount of DM10 million approved by the Exchange Control Division of the South Africa Reserve Bank for the expansion and/or development of health clubs in Spain was, on the instructions of Gardener, utilised for the payment of the purchase price. The recipient of these funds was Dalmore but, from Dalmore, DM4 million of the DM10 million was channeled to Ajax Way and Clockwork.

While Mitchell and Gardener admit that DM4 million of the sum of DM10 million '*that was paid by LeisureNet International*' was subsequently paid by Dalmore to two of the BVI companies, they allege that this was the consequence of '*an entirely separate agreement*' that they had with Moser. All the other allegations made by the LeisureNet liquidators concerning the fraudulent nature of the sale of shares by Dalmore to LeisureNet International are denied by the applicants.

Investigations made by the LeisureNet liquidators and testimony before the Commission have also allegedly raised serious concerns about certain '*management contracts*' entered into at different times between Healthland Management, on the one hand, and the various abovementioned British Virgin Island companies, on the other, in terms of which substantial sums of money were apparently paid from LeisureNet Group funds to the latter companies. According to Mitchell and Gardener, these payments were made as '*management fees*', as agreed upon with the boards of the LeisureNet companies, under a scheme whereby Mitchell and Gardener '*donated*' their offshore work to the BVI companies, which companies in turn provided management services to the Healthland (ie the LeisureNet offshore) group. Issues such as the justifiability of these management fees, and the backdating of certain of the management contracts (to a date on which the contracting parties were not yet in existence), appear to require explanation.

Similarly, the liquidators also have grave concerns about the manner in which Mitchell and Gardener each acquired a 5% equity interest in Healthland International at a nominal – or no – cost, Mitchell's interest being held in Moreland and Gardener's interest in Kinsman. Mitchell and Gardener allege that these shares were acquired as part of a share incentive arrangement and that the issue of the shares to the two BVI companies was approved by the LeisureNet board.

Apart from various other issues canvassed in the papers before this Court, reference is also made to the fact that, while LeisureNet was not able to finance its offshore expansion by means of its own resources, it committed itself to support Healthland International and the latter's subsidiaries in various ways, including the provision of extensive guarantees amounting to hundreds of millions of rands. It is also alleged by the liquidators that LeisureNet's financial position was materially misrepresented to its bankers, creditors and shareholders, particularly in relation to its annual financial statements for the financial year ending 31 December 1999. The material misrepresentation was allegedly attributable to, *inter alia*, a questionable accounting policy (a revenue recognition policy colloquially referred to as '*upfronting*'), which resulted in a gross exaggeration of LeisureNet's debtors, and the non-disclosure of contingent liabilities amounting to almost R1 billion. It would appear that the substance of

most (if not all) of these allegations are denied by Mitchell and Gardener.

During February 2002, in applications brought *ex parte* by the LeisureNet liquidators, Louw J of this Court granted orders directing that letters of request be issued asking the Royal Court of Jersey to act in its aid for the purpose of recognising the appointment of the LeisureNet liquidators. In terms of these orders, the LeisureNet liquidators were authorised to institute legal proceedings in any court of competent jurisdiction in Jersey so as to obtain recognition of their appointment as liquidators, to institute legal proceedings for the recovery of all movable property belonging to LeisureNet situated in Jersey, and to institute any other proceedings to achieve the proper and effective winding-up of LeisureNet. Letters of request were issued by the Registrar of this Court and, on 26 February 2002, the Royal Court of Jersey, acting in aid of this Court at the instance of the LeisureNet liquidators, granted relief against Mitchell, Gardener, Rabie, Moser, Dalmore and the four BVI Island companies. The substance of the orders granted in Jersey was that various entities in Jersey, including the Insinger Trust, and certain banks and trust companies, were required to deliver up to the LeisureNet liquidators documentation concerning the affairs of Mitchell, Gardener, Rabie, Moser, Dalmore and the four BVI companies. Moreover, the assets of these parties in Jersey were frozen pending possible substantive relief to be obtained by the LeisureNet Liquidators.

An urgent application subsequently made by Mitchell and Gardener to set aside both orders made by Louw J was dismissed with costs (by Nel J) on 3 May 2002 (see *Gardener & Another v Walters & Another NNO: In re Ex Parte Walters & Another NNO*).² Mitchell and Gardener applied for leave to appeal against the judgment of Nel J and also applied to the Royal Court of Jersey for a stay of its order granted on 26 February 2002, pending the resolution of their application for leave to appeal against Nel J's judgment. On 24 May 2002, the Royal Court of Jersey dismissed this application. An application for leave to appeal against this order by the Royal Court of Jersey was subsequently also dismissed. Mitchell and Gardener thereafter withdrew their application for leave to appeal against the judgment of Nel J.

As indicated above, the arrest of Mitchell and Gardener on 30 March 2002, and subsequent events before the Commission, ultimately led to the abovementioned decision made by the Commissioner on 31 May 2002, which decision the applicants now seek to have reviewed.

Nature of the present proceedings

² 2002 (5) SA 796 (C).

In their main answering affidavit, the LeisureNet liquidators contended that the decision made by the Commissioner on 31 May 2002 does not constitute ‘*administrative action*’ and is therefore not subject to ‘*judicial review*’, properly so called. In their main replying affidavit, the applicants, whilst not conceding that the actions of the Commissioner do **not** constitute ‘*administrative action*’, took the view that their classification as such was not a prerequisite for the relief sought by them. According to the applicants, whatever the nature of the Commissioner’s conduct, this Court has the power to control the proceedings of the Commissioner.

In argument before this Court, Mr **Gauntlett SC**, who together with Messrs **Woodland** and **Manca** appeared for the respondents, submitted that the impugned ruling by the Commissioner was made pursuant to a judicial or *quasi* judicial function and that, at common law, it does not constitute administrative action. Counsel relied in this regard, *inter alia*, on certain *obiter dicta* by Ackermann J in *Bernstein & Others v Bester & Other NNO* 1996 (2) SA 751 (CC). As will be discussed in greater detail below, this case concerned the constitutional validity of sections 417 and 418 of the Companies Act, which sections provide for an enquiry, during the winding-up of a company, by the Master of the High Court, by the Court itself, or (as in the present case) by a commissioner appointed in terms of section 418. One of the grounds on which the constitutionality of these sections was challenged in the *Bernstein* case was that the mechanism set up by these sections violated sections 24(b) and (c) of the Constitution of the Republic of South Africa Act 200 of 1993 (‘*the interim Constitution*’).³ Speaking for the majority of the Constitutional Court, Ackermann J commented as follows:

‘The enquiry in question is an integral part of the liquidation process pursuant to a Court order and in particular that part of the process aimed

³ Section 24(b) entitled all persons to procedurally fair administrative action where their rights or legitimate expectations were affected or threatened, while section 24(c) gave all persons the right to be furnished with written reasons for administrative action which affected their rights or interests.

at ascertaining and realising assets of the company. Creditors have an interest in their claims being paid and the enquiry can thus, at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have some difficulty in seeing how section 24(c) of the interim Constitution can be applied to the enquiry, because it is hard to envisage an “administrative action” taken by the Commissioner in respect whereof it would make any sense to furnish reasons. The enquiry is after all to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others.’⁴

The learned judge also had difficulty in seeing how a commissioner appointed to conduct a section 417 enquiry could be described as an ‘*executive organ of the State*’ for the purposes of section 7(1) of the interim Constitution.⁵

Both these statements were *obiter*, Ackermann J indicating expressly ⁶ that it was unnecessary to give an answer to these questions. Even assuming that the enquiry conducted under sections 417 and 418 of the Companies Act did indeed constitute administrative action in terms of section 24 of the interim Constitution, the learned judge could find nothing in those sections which was inconsistent

⁴ At para [97].

⁵ At para [98]. Section 7(1) provided that the Bill of Rights (Chapter 3) of the interim Constitution (and thus also section 24) bound all legislative and executive organs of State at all levels of government.

⁶ At para [99].

with the administrative justice rights relied upon by the applicants. In particular, nothing in the sections in question prevented the applicants from approaching the High Court to vindicate their administrative justice rights, should actions taken and procedures adopted by the Commissioner violate such rights.⁷

Interestingly, in their separate judgments in the *Bernstein* case, Kriegler J (Didcott J concurring) and O'Regan J specifically declined to endorse the doubts expressed by Ackermann J on the question as to whether an enquiry under sections 417 and 418 of the Companies Act constituted '*administrative action*' as contemplated by section 24 of the interim Constitution.⁸ Kriegler J was also not prepared to '*commit [himself] to agreeing, if only with a doubt, as to whether a commissioner appointed under section 417 is an executive organ of the State*'.⁹

After judgment had been reserved in this matter, the Court requested the parties to make supplementary written submissions on the following:

'Having regard to the fact that the decision of the Commissioner [the first respondent] was made after the date of commencement of the promotion of Administrative Justice Act, No.3 of 2000 ("the Act"):

1.1 *Does the decision of the Commissioner fall within the definition of "administrative action" as contained in section 1 of the Act?*

1.2 *If so, what will the effect of the provisions of sections 6 and 8 of the Act be?*

⁷ At paras [100] – [101].

⁸ At paras [131] and [155]. For comment on the approach taken by Ackermann J in this regard, see further Van Wyk '*Administrative Justice in Bernstein v Bester and Nel v Le Roux*' (1997) 13 *SAJHR* 249 at 255-256; De Waal '*Is there a General and Residual Right to Procedural Fairness in South Africa?*' (1997) 13 *SAJHR* 228 at 245-246; Henderson '*The Meaning of "Administrative Action"*' (1998) 115 *SALJ* 634 at 636-638; Hoexter '*The Future of Judicial Review in South African Administrative Law*' (2000) 117 *SALJ* 484 at 507-509; and see also *Strauss and Others v The Master and Others NNO* 2001 (1) SA 649 (T) at 665A-666D.

⁹ At para [155].

In their supplementary written submissions, both Mr **Burger SC**, who together with Messrs **Fagan** and **Butler** appeared for the applicants, as also counsel for the LeisureNet liquidators contended that the impugned ruling by the Commissioner does **not** constitute '*administrative action*' as defined in section 1(i) of the Promotion of Administrative Justice Act 3 of 2000. Although the two sets of counsel gave different reasons for this conclusion, it is not necessary, for the purposes of this case, either to canvass such reasons or to express any view as to the correctness (or otherwise) of the conclusion. An analysis of the supplementary written submissions furnished on behalf of the applicants makes it abundantly clear that the applicants are relying for the relief sought by them only on the inherent power of the High Court to control the proceedings at enquiries held in terms of sections 417 and 418 of the Companies Act. The applicants do not purport to be attempting to enforce administrative justice rights in terms of section 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996 ('*the Constitution*'). Nor, would it seem, do the applicants rely on the kind of judicial review of the exercise of public power, flowing from the application of the doctrine of legality (and which may conveniently be referred to as '*rationality review*'), described by the Constitutional Court in *Pharmaceutical Manufacturers of SA & Another: In re Ex Parte President of the Republic of South Africa & Others*.¹⁰

¹⁰ 2000 (2) SA 674 (CC) at paras [83] – [86] and [90]. In this case, the Constitutional Court found that, irrespective of whether or not the action in question constituted '*administrative action*', the principle of legality entailed a duty to exercise public power in a rational manner: '*It is a requirement of the rule of law that the exercise of public power by the Executive and other*

As indicated above, this Court appointed the first respondent as commissioner pursuant to the provisions of section 418 of the Companies Act. By so doing, the Court in effect delegated to the first respondent its wide-ranging powers, under section 417 of the Companies Act, to summon before it persons believed to be capable of giving information concerning the trade, dealings, affairs or property of a company in liquidation, and to examine such persons on oath. The first respondent thus obtains his authority to act as Commissioner from his appointment by the Court and, in conducting the enquiry, performs what would otherwise be the Court's functions on its behalf. Indeed, an enquiry by a commissioner appointed by the Court has been described as '*the Court's enquiry*'.¹¹ With the amendment of sections 417 and 418 of the Companies Act in 1985,¹² however, the power to order an enquiry, and to appoint a commissioner to conduct such enquiry, has been extended to the Master, in which event an application to the Court is not necessary. (See, in this regard, the

functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action' (para [85], per Chaskalson P). The Constitutional Court went on to hold that '[t]he question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry' (para [86]), and that '[r]ationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful' (para [90]).

11 See *Lok & Others v Venter NO. & Others* 1982 (1) SA 53 (W) at 58A-H; *Venter v Williams & Another* 1982 (2) SA 310 (N) at 313C-E; *Foot NO. v Alloyex (Pty) Ltd & Others* 1982 (3) SA 378 (D) at 383F.

12 See sections 9 and 10 of the Companies Amendment Act 29 of 1985.

judgment of Tebbutt J in *Van der Berg v Schulte*.¹³) Notwithstanding this amendment, even an enquiry ordered by the Master remains subject to the Court's control.

As was pointed out by Ackermann J in the *Bernstein* case (*supra*):

'The judgment [in the Van den Berg case] is not authority for the proposition that, merely because the Master of the Supreme Court [now the High Court] orders such an enquiry, the Supreme Court loses its power to prevent oppressive or otherwise improper enquiries being instituted or to prevent enquiries from being conducted in an oppressive or otherwise improper manner. This cannot be the consequence of the amendment. Whether the order is made by the Master or by a Judge, it is still an order issuing from the Supreme Court. Our Supreme Courts have over many years taken the view, based on the English and other authorities, that they have the power to prevent s 417 type enquiries which would result in oppression or intervene where enquiries are conducted in an oppressive or vexatious manner or result in hardship to the examinee or where unusual, special or exceptional circumstances are present.' ¹⁴

It is also established law that the nature of a commissioner's functions in conducting an enquiry is such that he or she is obliged to act in accordance with

¹³ 1990 (1) SA 500 (C) at 508I-509H.

¹⁴ At para [35] and the other authorities there cited.

the norms of natural justice, applying the standards of procedural fairness and impartiality appropriate to this forum, failing which an aggrieved party may approach the Court for suitable relief.¹⁵

Counsel for the LeisureNet liquidators argued that, in exercising its power to prevent the mechanism of sections 417 and 418 being used oppressively, vexatiously or unfairly towards the examinee, the High Court acts, not on the basis of judicial review, or of appeal, but by virtue of its inherent jurisdiction to control the decisions and conduct of its delegee **as a delegee**. This may well be so. However, it is in my view not necessary to attach any label to such proceedings for the purposes of this case: **if**, as is alleged by the applicants, the Commissioner's ruling infringes or threatens to infringe their rights to a fair trial in terms of section 35 of the Constitution, such ruling would, at the very least, result in hardship to the applicants, thus triggering the Court's power to intervene in the manner discussed above.

The Applicants' case

The applicants rely heavily on the fact that they have been arrested and that criminal proceedings are pending against them. The enquiry is a public one and, throughout the enquiry proceedings thus far, representatives of the Scorpions and of the South African Revenue Services have been present. Only the first three charges against the applicants have been formulated in detail and it would appear that the contents of the '*General Preamble*' to the '*Draft Charge Sheet*', and of the first three counts, have been formulated by the State largely on the basis of the evidence given at the enquiry thus far.

It is also apparent that the State will in all probability amplify the existing charge sheets and that further evidence given at the enquiry will be utilised by the State in so doing. In particular, the VAT and income tax charges (counts 4 and 5) are

¹⁵ See, for example, *Schulte v Van der Berg & Others NNO* 1991 (3) SA 717 (C) at 720I-721B; *Receiver of Revenue, Port Elizabeth v Jeeva & Others*; *Klerck & Others NNO v Jeeva & Others* 1996 (2) SA 573 (A) at 579H-I; *Absa Bank Ltd v Hoberman & Others NNO* 1998 (2) SA 781 (C) at 796E-H; and cf *Advance Mining Hydraulics (Pty) Ltd & Others v Botes NNO & Others* 2000 (1) SA 815 (T) at 824B-825A.

totally devoid of any detail at this stage and, from the main replying affidavit filed on behalf of the LeisureNet liquidators in the present proceedings, possible evasion of VAT and of the payment of income tax forms an important part of the intended examination of the applicants by the LeisureNet liquidators. It is thus more than likely that the information which will be used by the State in '*fleshing out*' the VAT and income tax charges will be derived, in large measure, from evidence to be led at the enquiry. To put it bluntly, by giving further evidence at the enquiry prior to the finalisation of the pending criminal proceedings against them, Gardener and Mitchell will probably, to a greater or lesser extent, be '*writing their own charge sheets*', at least in respect of the VAT and income tax charges.

In dealing with the potential prejudice to the applicants in being compelled to give evidence at the enquiry while criminal proceedings in respect of the same subject-matter are pending against them, counsel for the applicants highlight the following aspects of the intended ambit of the examination of the applicants by the LeisureNet liquidators:

- Firstly, in paragraph 37.1 of the main founding affidavit, the applicants state the following:

'As appears from what I have described above, the second and third respondents intend to examine us upon the issues raised in the charge sheet and which might be raised in the charge sheet after its amendment ... It is also clear that the second and third respondents intend to cross-examine us in order to pursue the thesis in the affidavits filed on their behalf so far.'

In the main answering affidavit, the LeisureNet liquidators admit that they '*do intend to examine Mitchell and Gardener on the issues referred to*' in the said paragraph 37.1.

- Secondly, in paragraph 20 of the founding affidavit, the applicants summarise the contentions of the LeisureNet liquidators as these

appear in the founding papers filed in the recognition application brought before Louw J, and state that these are some of the issues upon which the liquidators intend to examine them. In answer, the LeisureNet liquidators state that:

'We do not dispute that we contend that Mitchell and Gardener participated in a fraudulent scheme, that the value of the shares was either nil or insubstantial and that Mitchell and Gardener had secret, undisclosed interests in Dalmore at the time of the transaction and that they misled the board of LeisureNet as to the form of the purchase consideration for the Dalmore transaction. These are issues in respect of which we intend to examine Mitchell and Gardener.'

- Thirdly, in the founding affidavit, the applicants allege that the liquidators intend to examine them beyond the ambit of what has already been ventilated at the enquiry and in the various court proceedings referred to above:

'Our examination by the liquidators will in all likelihood deal with,
inter alia:

*38.1 The contentions of wrongdoing on our part that
are advanced by the liquidators in their affidavit [filed
in the recognition application], ... and in their affidavit*

in the proceedings before Mr Justice Nel;

38.2 *The relationships between the second applicant and me and our immediate families on the one hand and the BVI companies and, ultimately, the Insinger de Beaufort Trust on the other hand;*

38.3 *The extent, if any, to which it may be alleged that we might exercise control over the BVI companies;*

38.4 *The extent to which witnesses and documentary evidence relied upon (and to be relied upon by the State in criminal proceedings) is unreliable, slanted, ill-informed, biased, incomplete or not contextualised (as the case may be);*

38.5 *The evidence available to us to answer and rebut the averments now contained in the draft charge sheet;*

38.6 *Questions on tax and VAT which might incriminate us without being able meaningfully to consider the risk of incrimination due to the vagueness of the charges as formulated at present. These questions would also require us to show our hand in respects other than relative to possibly incriminating matters.'*

The liquidators admit that they do intend to question Mitchell and

Gardener on the issues referred to in paragraph 38.1 to 38.6, but point out that their answers may not be used against them in a subsequent criminal trial.

The applicants' case is summarised in paragraph 39 of the main founding affidavit as follows:

*'Compelling us to testify before the conclusion of the criminal proceedings will enable the State to have a comprehensive insight into our defence even before the charge sheet has been finalised. **It will erode our common law rights, our right to silence, our right to a fair trial and our constitutional rights.**'* (emphasis added).

The crisp issue (as formulated by applicants' counsel) is thus whether or not the applicants' common law and/or constitutional rights to a fair criminal trial will be violated should they be compelled to testify before the Commissioner, pending the conclusion of the pending criminal trial, on issues which relate to such pending trial.

The applicants contend that their right to the relief sought is in essence the right of an accused person not to be compelled to give evidence at an insolvency enquiry whilst criminal proceedings in respect of the same subject-matter are pending against such person. This, according to the applicants, is not only a constitutional right, but is also a right which has been consistently recognised at common law. The applicants rely on a number of cases decided prior to the advent of the interim Constitution to illustrate the '*well-established principle of South African law*' that –

'Where civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person, [the usual practice] is to stay the civil proceedings until the criminal proceedings have been disposed of

(per Tindall J in *Gratus & Gratus (Prop.) Ltd v Jackelow*).¹⁶

In the *Gratus* case, the applicant sought the provisional sequestration of the respondent's estate. In its petition, the applicant alleged that the respondent was indebted to it in respect of monies stolen from it by the respondent. The respondent filed an affidavit in which he stated that criminal proceedings were pending against him. He stated that, by reason of the pending criminal proceedings, he was unable to deal with or comment on any allegations made in the petition, as any statement made by him at that stage would prejudice him in his defence in the criminal trial.

In dealing with this issue, Tindall J expressed the view that the '*principle at the root of the practice*' referred to above –

*'is ...that the accused may be prejudiced in the criminal proceedings if the civil proceedings were heard first, because he might give evidence in the civil proceedings and might be subjected to cross-examination, or he might be compelled to disclose information in his possession before the criminal proceedings were disposed of.'*¹⁷

As the respondent made no statement in the proceedings before Tindall J disputing the allegations made by the applicant, the Court granted the provisional order. However, the Court held that the respondent '*certainly might be*

¹⁶ 1930 WLD 226 at 230.

¹⁷ Ibid.

prejudiced if, pending the decision of the criminal proceedings, he were examined under the Insolvency Act, or if he were interrogated by the provisional trustee.¹⁸ This possibility of prejudice was averted by a direction being given by the Court, with the agreement of the applicant, that pending the decision of the criminal proceedings, there would be no examination or interrogation of the insolvent.

Similarly, in *Du Toit v Van Rensburg*,¹⁹ Corbett J (as he then was) also had to deal with a petition for the sequestration of the respondent's estate in circumstances where it appeared that a criminal charge was pending in respect of matters which formed, to some extent, the subject-matter of the sequestration application. The respondent had not yet been given notice of the application and, accordingly, his attitude to both the application and the allegations contained in the petition was not known. In his judgment, Corbett J (without citing the *Gratus* case, but referring to the case of *Standard Bank v Johnson*²⁰) stated that '[i]t has been held that where civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person it is the usual practice to stay the civil proceedings until the criminal proceedings have been disposed of,'²¹ and described the principle underlying this practice in substantially the same words as those utilised by Tindall J in the *Gratus* case (as cited above).²²

In deciding whether or not to grant the provisional sequestration order in such circumstances, Corbett J held that it was '*basically a question as to whether there is a danger that the respondent will suffer prejudice in those criminal proceedings by reasons of the granting of such order*'.²³ The learned judge granted the provisional order, but (as in the *Gratus* case) averted the possibility of prejudice to the respondent by directing that no examination of the respondent in terms of the Insolvency Act or interrogation of him by a provisional trustee was to take place pending the finalisation of the application.

In *Irvin & Johnson Ltd. v Basson*,²⁴ the Court (per Trengove J) accepted the correctness of the approach in the *Gratus* and *Du Toit* cases (*supra*), holding that –

'...if it is shown that the proceedings in an insolvency, and examination of

¹⁸ Ibid.

¹⁹ 1967 (4) SA 433 (C).

²⁰ 1923 CPD 303.

²¹ At 435H.

²² At 436A.

²³ At 436B.

²⁴ 1977 (3) SA 1067 (T).

*an insolvent, are likely to prejudice the insolvent in his defence in related criminal proceedings, the Court has a discretion to stay all proceedings against him until the criminal proceedings have been concluded.'*²⁵

In the unreported judgment of Kriegler J in *Havenga v Rheeder & Another NNO*²⁶ and in the case of *Kamfer v Millman & Stein NNO & Another*,²⁷ an insolvent's interrogation on issues forming the subject-matter of pending criminal proceedings against such insolvent was stayed, pending the finalisation of the criminal proceedings. In the *Havenga* case, Kriegler J referred to the practice followed in the *Gratus & Du Toit* cases (*supra*), and described the principle underlying the practice as follows:

*'Die beginsel onderliggend aan die praktyk is duidelik, naamlik regverdigheid teenoor 'n persoon wat 'n strafsak moet tegemoet gaan en wat onberekenbaar benadeel kan word as hy onder wederregtelike verpligting staan om sy hand te openbaar nog voor die strafsak begin het.'*²⁸

This terminology was also used by Brand AJ (as he then was) in the *Kamfer* case (*supra*).²⁹ It is, however, important to point out that Brand AJ, in considering the potential prejudice that may result for an interrogee in an enquiry in terms of sections 417 and 418 of the Companies Act, referred **specifically** to the provisions of section 417(2)(b) of the Act, in terms of which the interrogee

'... may be required to answer any question put to him at the examination

notwithstanding that the answer may tend to incriminate him, and any

answer given to any such question may thereafter be used in evidence

²⁵ At 1072H

²⁶ Case No. 287/88, TPD.

²⁷ 1993 (1) SA 122 (C).

²⁸ At pgs 7-8 of the typed judgment.

²⁹ At 125J-126C.

against him.'

It is also important to note that, as emphasised by counsel for the LeisureNet liquidators, a perusal of Kriegler J's judgment in the *Havenga* case makes it clear that the potential prejudice relied upon by the applicant in that case was such prejudice as may result from an insolvent being compelled to incriminate himself. Thus, in summarising the applicant's complaint, Kriegler J stated that: '*Applikant beroep hom op hierdie hof om beskerming teen die benadeling wat hy met betrekking tot die strafsak ly, as gevolg daarvan dat hy verplig word om ingevolge artikel 152 [of the Insolvency Act 24 of 1936] alle vrae te beantwoord, selfs dié oor aspekte wat in die strafsak aan die orde sal wees en wat hom moontlik kan inkrimineer*'³⁰ (emphasis added).

Based on their analysis of the pre-interim Constitution cases, the applicants argue that, despite the language of judicial discretion and the notional weighing-up of competing interests utilised in these cases, the South African courts have invariably intervened by staying the further interrogation of an accused person in an insolvency or winding-up enquiry, once the potential for prejudice to such accused person has been established. This was expressly recognised by Nugent J in the case of *Davis v Tip NO & Others*.³¹ Arguing that it is '*axiomatic*' that no individual's common law rights have been diminished by the advent of the 1993 and 1996 Constitutions, counsel for the applicants thus contend that the ruling of the first respondent obliging the applicants to give evidence at the section 417 enquiry – **despite the fact that they have been arrested and charged** – has the consequence of placing the applicants in a worse position than that in which they would have been prior to the '*new*' South African constitutional dispensation. According to the applicants, it therefore follows, from the '*axiomatic position*' relied upon by them, that the Commissioner's ruling was

³⁰ At pgs 3-4 of the typed judgment.

³¹ 1996 (1) SA 1152 (W) at 1157D-E.

wrong.

Turning to the position after the advent of this ‘new’ constitutional dispensation, the applicants argue that the judgments of the Constitutional Court in *Ferreira v Levin NO & Others*; *Vryenhoek & Others v Powell NO & Others*³² and in the *Bernstein* case (*supra*) cannot be interpreted so as to prevent the applicants, **as accused persons**, from invoking their fair trial rights under section 35(3) of the Constitution,³³ in the context of an enquiry held in terms of sections 417 and 418 of the Companies Act.

In the *Ferreira* case, the Constitutional Court considered the constitutional validity of section 417(2)(b) of the Companies Act. As indicated above, this section provides that any person summoned to testify at an enquiry under section 417 into the affairs of a company in the course of winding-up,

‘may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to such question may thereafter be used in evidence against him.’

The applicants in that case had not been arrested or charged and were therefore not ‘*accused persons*’. With one dissent,³⁴ the Court declared the provisions of section 417(2)(b) to be invalid,

‘to the extent only that the words “and any answer given to any question may thereafter be used in evidence against him” in s 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of

³² 1996 (1) SA 984 (CC).

³³ Including their right to remain silent (section 35(3)(h)) and their right not to be compelled to give self-incriminating evidence (section 35(3)(j)).

³⁴ Kriegler J, who held that the application was not ripe for hearing (at paras [205]-[207]).

false evidence or the making of a false statement in connection with such questions or answers or a failure to answer lawful questions fully and satisfactorily.³⁵

Two of the judges based their finding of invalidity on the inconsistency of the provision with section 11(1) of the interim Constitution³⁶ and eight of the judges found such provision to be unconstitutional because of its inconsistency with section 25(3) of such constitution³⁷

Emphasising that, unlike Mitchell and Gardener, the applicants in the *Ferreira* case were not accused persons, counsel for Mitchell and Gardener argued that there is a '*fundamental point*' about the *Ferreira* case which is easily misunderstood: that the Constitutional Court in that case interfered with the provisions of section 417 of the Companies Act to a very limited extent for one reason only, namely that **that was all the Court was required to do**. The constitutional validity of section 417(2)(b) of the Act was the one issue which was within the exclusive jurisdiction of the Constitutional Court. The various other issues which had been (incorrectly, so the Court held) referred to the Constitutional Court – such as whether the evidence given against an examinee at an enquiry may be used against him or her at a subsequent civil trial – were matters which could be determined by the Division of the Supreme Court which had so referred them.³⁸ According to applicants' counsel, the judgment of the majority did **not** deal exhaustively with the rights of an accused person to a fair trial, but merely tested the constitutional validity of section 417(2)(b) of the Companies Act against the complaint of the applicants in that case to the effect

³⁵ At para [157].

³⁶ *Per* Ackemann J at para [127] and Sacks J at paras [245], [249], [261] and [269]. The approach of these two judges was that, as the applicants (examinees) were not '*accused persons*', they had no standing to rely on section 25(3) (the right of an accused person to a fair trial) of the interim Constitution. They could, however, rely on section 11(1) (the right to freedom), which incorporated a residual right against self-incrimination.

³⁷ *Per* Chaskalson P at paras [168] and [186] (Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ concurring), Mokgoro J at para [208] and O'Regan J at para [244]. Section 25 of the interim Constitution was the precursor to section 35 of the final Constitution. Section 25(3) gave to every accused person '*the right to a fair trial, which shall include the right –*

...

c) *to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;*

d) *... not to be a compellable witness against himself or herself*’.

³⁸ See paras [11]-[19], read with para [158].

that, although they had not yet been arrested or charged, they were required to answer questions at the section 417 enquiry which might incriminate them, and which might thereafter be used in evidence against them.³⁹ According to counsel, the judgment of the Constitutional Court was certainly not intended to suggest that **any** evidence could now be given at a section 417 enquiry, on the basis that the examinee could take his chances at a subsequent criminal trial. This conclusion, so it was argued, was borne out by the following statement by Chaskalson P in his majority judgment:

*'The finding that section 417(2)(b) of the Companies Act is inconsistent with the Constitution is in essence based on a finding that the section infringes the rule against self-incrimination ... The rule against self-incrimination is not simply a rule of evidence. It is a right which by virtue of the provisions of section 25(3) is, as far as an accused person is concerned, entitled to the status of a constitutional right. It is inextricably linked to the right of an accused person to a fair trial. The rule exists to protect that right. If that right is not threatened the rule has no application.'*⁴⁰

Counsel for the applicants further submitted that the judgment of the Constitutional Court in the *Bernstein* case (*supra*) did not stand in the way of the relief sought by the applicants; on the contrary, the judgment of Ackermann J (writing for the majority) in that case must be interpreted so as to support the applicants' case.

In the *Bernstein* case, the whole mechanism created by sections 417 and 418 of the Companies Act, and not just the obligation to answer potentially self-incriminating question in terms of section 417(2)(b), was subjected to constitutional challenge. In addition to the right to a fair trial (and, in particular, the privilege against self-incrimination), the applicants relied on their right to freedom and security of the person; their right to personal privacy (both in

³⁹ At para [160].

⁴⁰ At para [159].

general and, in particular, the right not to be subjected to seizure of private possessions); the right to just administrative action; the right to fairness in civil litigation, and the right to equality. The Constitutional Court rejected all the arguments. In dealing with the challenge based on the right to personal privacy, Ackermann J, writing for the majority, stated the following:

'[60] ... Section 417(2)(b), before it was declared invalid to the extent

*indicated in the order of this Court in **Ferreira v Levin**, in express and unequivocal terms compelled an examinee to answer a question even though this might tend to incriminate the examinee and further provided that such incriminating answer could be used thereafter in evidence against the examinee, **inter alia** in criminal proceedings. On the clear wording the provision could simply not be read down so as not to exceed the examinee's chap 3 rights. Accordingly, the Court could not avoid declaring the provision in question invalid to the extent indicated in its order. There is no other provision in s 417 or s 418, or for that matter in any other provision of the Act which expressly or by necessary implication compels the examinee to answer a specific question which, if answered, would threaten any of the examinee's chap 3 rights. It must, in my view, follow from this that the provisions of ss 417 and 418 can and must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's chap 3 rights ...*

[61] *In this context the provisions of s 418(5)(b)(iii)(aa) of the Act are*

important. The subparagraph in question provides that a person who, having been duly summoned under s 417 or s 418 to the examination

*“fails, **without sufficient cause** ... to answer fully and satisfactorily any question **lawfully** put to him in terms of s 417(2) or this section ... shall be guilty of an offence”.*

(Emphasis supplied.) Nothing could be clearer, in my view, than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee’s chap 3 rights, this would constitute “sufficient cause”, for purposes of the above provision, for refusing to answer the question unless such right of the examinee has been limited in a way which passes s 33(1) scrutiny. By the same token the question itself would not be one “lawfully put” and the examinee would not, in terms of this very provision, be obliged to answer it ...’

(See also, in this regard, the judgment of Ackermann J, writing for the whole Constitutional Court, in *Nel v Le Roux NO & Others*.⁴¹)

Applicants’ counsel, relying on this part of Ackermann J’s judgment in the *Bernstein* case, argued that the applicants, having been arrested and charged, **are** able to invoke their right to a fair trial, including their right to remain silent and their right not to be compelled to give self-incriminating evidence at this stage of the enquiry, notwithstanding the judgment of the Constitutional Court in the *Ferreira* case. In relying on their right to a fair trial, the applicants emphasised that this right (embodied in section 35(3) of the Constitution) is broader than the

⁴¹ 1996(3) SA 562 (CC) at paras [6]-[8].

list of specific rights set out in that subsection – ‘*it embraces a concept of substantial fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.*’⁴²

Relying on, *inter alia*, Kriegler J’s formulation in the *Havenga* case (*supra*) to the effect that ‘*incalculable prejudice*’ (‘*onberekenbare benadeling*’) could be suffered by an accused person having to ‘*show his hand*’ before the trial, counsel for the applicants argued strenuously that this concept of ‘*showing one’s hand*’ goes wider than the danger of self-incrimination, ie it is not confined to the risk that, by being compelled to answer questions at a winding-up enquiry, the examinee may incriminate him or herself, and that such incriminating evidence could subsequently be used against the examinee at the criminal trial. According to the applicants, the essence of their complaint is not **merely** that they may be compelled to incriminate themselves by giving evidence at the enquiry. Their complaint is much broader – they contend that they will suffer prejudice in that the manner in which the State will present its case; the witnesses it will call; the witnesses it will attempt to avoid calling; the way in which it will formulate the charges; and the approach it will adopt to cross-examination will be based upon, or at the very least informed and shaped by, the evidence to be given by the applicants at the enquiry. This prejudice is not eliminated by the ‘*direct use immunity*’ in respect of incriminating evidence given at the enquiry, which use immunity was (in effect) ‘*read in*’ to section 417(2)(b) of the Companies Act by the *Ferreira* case.

Reverting to the abovementioned ‘*axiomatic position*’ relied upon by them, applicants’ counsel concluded that the *Ferreira* and *Bernstein* cases must be interpreted so as to allow the applicants, as accused persons, to invoke their fair trial rights under section 35(3) of the Constitution in a manner which will prevent them from having to ‘*show their hand*’ before the finalisation of their criminal trial. If the *Ferreira* and *Bernstein* cases were to be interpreted so as to compel them to testify at the winding-up enquiry, despite the fact of their arrests and the charges against them, their rights as accused persons would not be as well protected under the Constitution, as they were protected at common law – this, according to applicants’ counsel, could not have been the intention of the framers of either the interim or the final Constitutions.

The Liquidators’ case

Counsel for the LeisureNet liquidators accepted that the Court’s ‘*discretion*’ to stay civil proceedings against a person until related criminal proceedings against

⁴² See *S v Zuma & Others* 1995 (2) SA 642 (CC) at para [16].

such person have been concluded is not a '*discretion*' in the traditional sense of the term. With reference to the cases of *Davis v Tip NO & Others (supra)*⁴³ and *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & De Wet NNO*,⁴⁴ counsel proceeded from the premise that, once it is established that the accused person might suffer prejudice if the civil proceedings were to continue, the Court effectively has a duty to intervene so as to avoid such prejudice occurring. It is clear from the ruling made by the Commissioner on 31 May 2002, which forms the subject of the present proceedings, that this was in fact that point of departure adopted by the Commissioner.

The liquidators' counsel rejected as untenable the '*axiomatic position*' relied upon by the applicants, contending that the structure of the applicants' argument founded on this '*axiom*' is '*as unsound as it is strategic in conception*'. Counsel relied in this regard on the judgment of the Constitutional Court in the case of *Pharmaceutical Manufacturers of SA & Another: In re Ex Parte President of the Republic of South Africa & Others (supra)*, in which a unanimous court (per Chaskalson P) rejected an attempt to compartmentalise law in South Africa into common law, statutory and constitutional components.⁴⁵ Counsel emphasised that, in the words of Chaskalson P:

'There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from Constitution and is subject to

⁴³ At 1156J-1157E.

⁴⁴ 1997 (2) SA 636 (W) at 648A-F.

⁴⁵ At paras [17]-[57].

*constitutional control.*⁴⁶

According to the liquidators, the only correct approach to the applicants' claim of rights is an integrated one, taking the Constitution and the pronouncements of (*inter alia*) the Constitutional Court regarding the constitutional validity of a statutory compulsion to provide evidence in investigative enquiries as its starting point. Counsel emphasised that, not only is this so as a matter of principle, but most pertinently for the present proceedings, Ackermann J in this *Bernstein* case (*supra*) (writing for the majority and without dissent on this point), held in relation to sections 417 and 418 themselves that:

*'The Constitution has in principle brought about the fundamental change to the way in which the evidential privileges of a witness or those of an examinee at any statutory enquiry ... should be approached.'*⁴⁷

In analysing the common law cases relied upon by the applicants (discussed in detail above), the LeisureNet liquidators pointed out that, prior to the advent of the 1994 constitutional dispensation, the evidence which an accused person gave at a winding-up enquiry, including self-incriminating evidence, **could** be used against such person at a subsequent trial. Thus, in an attempt to ensure that such a person was given a fair criminal trial, the South African Courts in the pre-constitutional decisions relied upon by the applicants made orders which effectively prevented the interrogation of such a person prior to the finalisation of the pending criminal trial. In so doing, the potential prejudice to the accused person which the courts sought to avoid was that which might result from such person being forced to incriminate himself or herself. As pointed out by the liquidators, the kind of prejudice now being relied upon by the applicants – the risk that the State will obtain a tactical advantage in the forthcoming criminal trial should the applicants be compelled to '*show their hand*' prior to the finalisation of such trial – was not pertinently raised before, or considered by, the Court in any of these pre-constitutional cases.

The liquidators fundamentally disputed the applicants' proposition that they enjoy '*a right not to be compelled to give evidence at an insolvency enquiry while criminal proceedings in respect of the same subject matter are pending against*

⁴⁶ At para [44].

⁴⁷ At para [62].

them'. Their answer to the applicants' contention that the *Ferreira* and *Bernstein* cases must be interpreted so as to allow the applicants, **as accused persons**, to obtain the relief currently sought by relying on their rights to a fair trial under section 35(3) of the Constitution, was a crisp one: According to the liquidators, the following principles emerge from the Constitutional Court judgments in the *Ferreira* and *Bernstein* cases:⁴⁸

- The statutory mechanism provided by sections 417 and 418 of the Companies Act (save for the '*offending*' part of section 417(2)(b) which formed the subject of the *Ferreira* case) serve important public purposes and is constitutionally valid;
- An examinee may be required to answer any question put to him or her at a section 417 enquiry notwithstanding the fact that the answer may tend to incriminate such person;
- No incriminating evidence given pursuant to statutory compulsion at such an enquiry may be used in criminal proceedings against the person who gave evidence other than in criminal proceedings for perjury;
- The safeguard which an examinee has in ensuring that his or her right to a fair trial is not prejudiced, is the use immunity conferred upon such examinee in relation to his or her evidence. Regarding direct evidence, there is a complete use immunity. In relation to derivative evidence, the Court ultimately hearing the criminal trial has a discretion to disallow such evidence if the examinee's right to a fair trial will be

⁴⁸ As also from the subsequent Constitutional Court cases of *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC) and *Parbhoo & Others v Getz NO & Another* 1997 (4) SA 1095 (CC).

compromised should such evidence be allowed;

- Notionally, an examinee may refuse to answer questions which may infringe constitutional rights on the basis that he or she has '*sufficient cause*' to do so within the meaning of section 418(5)(b)(iii)(aa) of the Companies Act. However, a refusal to answer questions on the basis that the compelled evidence may prejudice the examinee in a future criminal trial, in particular the potential infringement of the right to a fair trial under section 35(3) of the Constitution, will **not** constitute such '*sufficient cause*'.

In providing the abovementioned safeguards to persons in the position of the applicants, the Constitutional Court in both the *Ferreira* and *Bernstein* cases emphasised the important public purposes which the provisions of section 417 and 418 of the Companies Act seek to achieve. Thus, it was argued on behalf of the LeisureNet liquidators, in balancing the important public purposes served by these provisions against the rights of the examinee, it is explicable why the Constitutional Court left the mechanism completely intact, save for the offending part of section 417(2)(b), and why an examinee should be compelled to testify on all relevant matters subject, of course, to the safeguards set out above. The liquidators stressed the fact that the declaration of invalidity in respect of section 417(2)(b) in the *Ferreira* case did not affect any of the other provisions of sections 417 and 418 of the Companies Act and, as was observed by Ackermann J in that case, it was not contemplated that the declaration of invalidity would have any significant impact on the purpose or efficacy of enquiries under these provisions:

'A declaration of invalidity will not effect any of the other provisions of sections 417 or 418 of the Companies Act and will have insignificant, if any, impact on the purpose or efficacy of enquiries under these proceedings.'

It is common cause that the issues before the Commission are complex and intertwined. Moreover, the liquidation of LeisureNet and the collapse of the LeisureNet group represents one of the largest corporate collapses in South African financial history. The total estimated claims of creditors against LeisureNet amount to R1,15 billion. The total claims admitted to proof against LeisureNet (of more than 4 000 creditors) amount to R659 million, comprising secured claims of R336 million, preferent claims of R23 million and concurrent claims of R306 million. Counsel for the liquidators contended that, were the argument on behalf of the applicants to be accepted, it would in substance mean that they could not be examined in any meaningful way. Thus, particularly in light of the fact that the applicants were the chief executive officers of LeisureNet, granting the relief sought by the applicants would effectively stultify the purpose which the statutory mechanism of the winding-up enquiry is intended to achieve.

Counsel for the liquidators made a detailed analysis of the *Ferreira* and *Bernstein* cases. I will return to this analysis in greater detail below. In summary, so it was argued, the Constitutional Court upheld the constitutional validity of the mechanism provided by section 417 and 418 of the Companies Act, subject to the one ‘*qualification*’ to section 417(2)(b) imposed in the *Ferreira* case, which qualification was imposed on the basis of the privilege against self-incrimination. On the correct interpretation of *Ferreira* and *Bernstein*, read together as they must be, examinees in the position of the applicants cannot rely on their fair trial rights under section 35(3) of the Constitution to escape being examined at a section 417 enquiry. The effect of these decisions, according to counsel, is that company officials may now **not** escape being examined by invoking the spectre of potential future prejudice in pending criminal proceedings. Finally, it does not assist the applicants to attempt to distinguish the present matter from that of *Ferreira v Levin*, on the basis that they rely on the right to silence, and not specifically on the privilege against self-incrimination. Given that the decision in the *Ferreira* case is that the public purpose of a section 417 enquiry justifies an examinee being compelled to answer questions that **are** self-incriminating, then undoubtedly, a *fortiori*, an examinee must be obliged to answer neutral or less injurious questions. It could not have been the intention of the Constitutional Court that the right to silence could emasculate the remaining legislative provisions of sections 417 and 418, when the right against self-incrimination cannot. If the sections are consistent with this more onerous construction then, logically, so are the less onerous.

Discussion

In my view, the liquidators’ criticism of the applicants’ argument is well founded.

As indicated above, the applicants, having taken it as ‘*axiomatic*’ that no common law rights have been diminished by the advent of the 1993 and 1996 Constitutions, then formulate the question to be answered as follows: Does the interpretation which the Constitutional Court has placed on sections 417 and 418 of the Companies Act have the result that an individual’s rights *qua* accused person are as well protected now, even though such individual be compelled to testify at an insolvency enquiry, as they were protected at common law?

To my mind, this is an incorrect approach. As argued by counsel for the liquidators, it is clear from recent pronouncements of the Constitutional Court⁴⁹ and the Supreme Court of Appeal⁵⁰ that, in determining whether particular actions, omissions or decisions infringe or threaten to infringe the constitutionally protected rights of individuals, an integrated approach must be followed. The common law must not be treated as a body of law separate and distinct from the Constitution by first attempting to seek an answer in the common law, and only thereafter – and separately – considering the effect of the Constitution.

In my view the answer to the question as to whether the applicants are entitled to the relief sought by them is not to be found in an analysis of the pre-1993 Constitution cases relied upon by the applicants, followed by an attempt to ‘*test*’ the relevant Constitutional Court cases (particularly the *Ferreira* and *Bernstein* cases) against the former line of cases. The question is simply whether, in the light of the Constitutional Court judgments in *Ferreira* and *Bernstein*, the applicants **can** now be compelled to continue to testify at the section 417 enquiry on issues that may have a bearing on matters raised in the charge sheets against them, notwithstanding the fact of their arrests and the fact that the charge sheets have not yet been finalised, or whether such compulsion is unconstitutional.

49 See, for example, *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) at para [111]; *Pharmaceutical Manufacturers Association of SA & Another In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at para [44]; *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras [33]-[36].

50 See, for example, *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at paras [88]-[89]; *Minister of Safety & Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) at para [17]-[18]; *Van Heerden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA) at para [12].

I agree with the contention advanced by counsel for the applicants that neither the *Ferreira* case, nor the *Bernstein* case, purported to deal exhaustively with the impact on section 417 enquiries of the examinee's broad right to a fair trial, in circumstances where such examinee is an accused person. Moreover, in neither case, did the Constitutional Court **directly** address the issue of whether the arrested person's section 35(1)(a) right to remain silent during pre-trial investigations or the accused person's section 35(3)(h) right to remain silent during plea proceedings and trial have an impact on section 417 enquiries.⁵¹ As argued by applicants' counsel, the judgment of the majority in the *Ferreira* case simply tested the constitutional validity of section 417(2)(b) of the Companies Act against the complaint of the applicants in that case (who had not yet been arrested or charged) to the effect that they were required to answer questions at the section 417 enquiry which might incriminate them, and which might thereafter be used in evidence against them. The finding that section 417(2)(b) of the Companies Act was, to a limited extent, inconsistent with the interim Constitution was '*in essence based on a finding that the section infringes the rule against self-incrimination*'.⁵²

This is not, however, the end of the matter. A large portion of the judgment of Ackermann J in the *Ferreira* case (with which portion the majority agreed) was devoted to the determination of whether, in the South African context, both a direct and a derivative use immunity was necessary to save section 417(2)(b) from being unconstitutional, or whether a direct use immunity by itself would suffice. In the course of this discussion, Ackermann J analysed in considerable detail the judgments of different judges of the Supreme Court of Canada in the case of *Thomson Newspapers Ltd et al v Director of Investigation and Research et al*.⁵³ This case concerned certain provisions of the Canadian Combines Investigation Act (RSC 1970 c C-23), which Act embodied a complex scheme of economic regulation, providing for a system of investigation and research which allowed the Director to determine facts relevant to particular issues of market behaviour, including breaches of prescribed guidelines set forth in the Act. In terms of section 17 of the Act, the Director of Investigation and Research could, in the course of carrying out an investigation under the Act, apply *ex parte* for an order requiring any person to be examined under oath and to produce business records or other documents. Section 22(2) of the Act protected examinees who were compelled to testify by providing that no oral evidence given by an examinee could subsequently be used against him or her in criminal proceedings, except on a charge of perjury. However, nothing in that section

51 See, in this regard, De Waal 'Revitalising the Freedom Right? *De Lange v Smuts NO* 1998 (3) SA 785 (CC)' (1999) 15 *SAJHR* 217 at 227-228.

52 *Id* at para [159].

53 (1990) 47 CRR 1 (also reported at (1990) 67 DLR (4th) 161, the latter report being cited by Ackermann J).

protected the examinee from the use of derivative evidence obtained as a result of the compelled testimony. The applicants, who had been served with orders to appear before the Restrictive Trade Practices Commission to be examined under oath and to produce certain documents, attacked section 17 of the Act, contending that it violated, *inter alia*, section 7 of the Canadian Charter of Rights and Freedoms.⁵⁴

Of the five judges in that case, only Wilson and Sopinka JJ came to the conclusion that the direct use immunity contained in section 20(2) of the Act was **not** sufficient to prevent section 17 of the Act from violating the '*fundamental justice*' provision in section 7 of the Canadian Charter. La Forest J, while holding that section 17 of the Act did constitute a deprivation of liberty within the meaning of section 7, concluded that it did so in accordance with the principles of fundamental justice, stating that:

'... the use of derivative evidence derived from the use of the s 17 power in subsequent trials for offences under the Act does not automatically affect the fairness of those trials. It follows that complete immunity against such use is not required by the principles of fundamental justice. The immunity against the use of actual testimony provided by section 20(2) of the Act together with the judge's power to exclude derivative evidence where appropriate is all that is necessary to satisfy the requirements of the Charter.'⁵⁵

L'Heureux-Dubé J followed a similar approach, concluding that –

'As far as it compels individuals to testify in their personal capacity ... s 17 of the Act does not infringe s 7 of the Charter ... Section 20(2) of the Act affords witnesses sufficient protection to conform to the requirement of fundamental justice embodied in s 7 of the Charter. The right enabling an

⁵⁴ Section 7 guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁵⁵ *Id* at 63 (see also the *Ferreira* case at paras [76] and [112]).

accused not to be compelled to testify at his own trial in our legal system

does not extend to witnesses in proceedings such as the one set up by

s 17 of the Act. It suffices, for the purpose of s 7 of the Charter if witnesses are afforded subsequent use protection guaranteed by s 20(2) of the Act. Derivative evidence, which consists mainly of real evidence, cannot be assimilated to self-incriminating evidence and does not go to the fairness of the judicial process which is what, in the end, fundamental justice is all about.’⁵⁶

In the *Ferreira* case, Ackermann J favoured the approach adopted by La Forest J, rather than that adopted by Wilson J. The learned Judge regarded as important the following distinction drawn by La Forest J between the direct use of compelled testimony and the use of evidence derived from compelled testimony:

*‘There are serious grounds on which objection can be raised to an absolute rule that testimonial immunity must always extend to evidence derived from compelled testimony. While allowing the Crown to use such evidence in criminal proceedings may in a formal sense be equivalent to permitting direct reliance on the compelled testimony itself, there is an important difference between the type of prejudice that will be suffered in the two cases. It is only when the testimony itself has to be relied on that the accused can be said to have been forced to actually **create** self-incriminatory evidence in his or her own trial. The compelled testimony is evidence that simply would not have existed independently of the exercise of the power to compel it; it is in this sense evidence that could have*

⁵⁶ Id at 80-81.

been obtained **only** from the accused.

*By contrast evidence derived from compelled testimony is, **by definition**, evidence that existed independently of the compelled testimony. This follows logically from the fact that it was evidence which was found, identified or understood as a result of the “clues” provided by the compelled testimony. Although such evidence may have gone undetected or unappreciated in the absence of the compelled clues, going undetected or unappreciated is not the same thing as non-existence. The mere fact that the derivative evidence existed independently of the compelled testimony means that it **could** have been found by some other means, however low the probability of such discovery may have been.’⁵⁷*

Ackermann J referred quite extensively to the reasons given by Wilson J for her conclusion that section 17 of the Canadian Combines Investigation Act violated a person’s right to liberty and security of the person (within the meaning of section 7 of the Canadian Charter) in a manner which was not in accordance with the principles of fundamental justice. Some of the reasoning followed by Wilson J is particularly instructive for purposes of the present proceedings, as it is to a large extent similar to the reasoning followed by counsel for the applicants in support of their argument that the applicants will suffer ‘*incalculable prejudice*’ should they be compelled to ‘*show their hand*’ in the section 417 enquiry, prior to the finalisation of the criminal proceedings against them. Thus, for example, Wilson J referred specifically to a situation ‘*where the compelled testimony given by the individual may be used to build a case against him in what is, in effect, a subsequent criminal prosecution.*’⁵⁸ Moreover, following the reasoning of the

⁵⁷ Id at 51-52 (see also the *Ferreira* case at para [134]).

⁵⁸ Id at 119.

United States Supreme Court in *Kastigar v United States*,⁵⁹ in which case it was held that both a direct use immunity and a derivative use immunity was necessary in order to escape constitutional challenge to a statute limiting the right against self-incrimination, Wilson J stated the following:

*'It seems to me that in order to prevent a suspect from being conscripted against himself in a criminal or **quasi**-criminal proceeding ..., the suspect must be protected against the use of evidence derived from testimony given at the earlier investigatory proceeding as well as against the use of the testimony itself. Otherwise the suspect is convicted, metaphorically if not literally, out of his own mouth. He has, as the United States Supreme Court put it, through the use of the derivative evidence been "forced to give testimony leading to the infliction of penalties affixed to criminal acts".'*⁶⁰

Referring to the '*flexible approach*' advocated by La Forest J to balancing the interests of the individual and those of the State - by vesting in the trial judge a discretion to determine when, and when not, derivative evidence flowing from compelled testimony should be admitted against an accused - Wilson J concluded that:

'The judge's discretion under section 24(2)⁶¹ is no guarantee of protection

⁵⁹ 406 US 441 (1972).

⁶⁰ *Id* at 136.

⁶¹ Section 24(2) of the Canadian Charter provides that '[w]here, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights of freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.' The equivalent section in the South African Constitution is section 35(5), in terms of which '[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise detrimental to the administration of justice.'

against the use of derivative evidence obtained as a result of a witness's compelled testimony. It is merely a discretion and one which is required to be exercised on a very specific basis, namely whether or not the admission of the evidence would bring the administration of justice into public disrepute.'

For the purposes of evaluating the applicants' arguments in the present proceedings, the following passages from the judgment of La Forest J in the *Thomson Newspapers Ltd*, relied upon by Ackermann J in the *Ferreira* case as 'significant', are in my view of considerable importance:

'The fact that derivative evidence exists independently of the compelled testimony means ... that it could also have been discovered independently of any reliance on the compelled testimony. It also means that its quality as evidence does not depend on its past connection with the compelled testimony. Its relevance to the issues with which the subsequent trial is concerned, as well as the weight it is accorded by the trier of fact, are matters that can be determined independently of any consideration of its connection with the testimony of the accused. If it were otherwise, it would not, in fact, be derivative evidence at all, but part of the actual testimony itself ...

What prejudice can an accused be said to suffer from being forced to confront evidence "derived" from his or her compelled testimony, if that accused would have had to confront it even if the power to compel testimony had not been used against him or her? It do not think it can be said that the use of such evidence would be equivalent to forcing the accused to speak against himself or herself; once the derivative evidence is found or identified, its relevance and probative

*weight speak for themselves. The fact that such evidence was found through the evidence of the accused in no way strengthens the bearing that it, taken by itself, can have upon the questions before the trier of fact.'*⁶²

In adopting a '*flexible approach*' to the question of derivative use immunity in the context of compelled testimony at investigative enquiries, La Forest J also made the following (in my view, very pertinent) statements:

'In short, a general requirement of derivative use immunity would mean that in many cases the use of the power to compel testimony would furnish wrongdoers with the type of "immunity baths" that were characteristic of the transaction immunity formerly available in the United States ... Law enforcement authorities would be faced with the choice of either securing information quickly at the risk of jeopardising subsequent prosecutions, or conducting more protracted and widely cast investigations. Either way, the advantages the community currently enjoys from the power to compel testimony would be severely restricted. While I accept that this price must be paid where the use of evidence derived from compelled testimony would undermine the fairness of a person's trial, I cannot accept that it should also have to be paid where the use of the derivative evidence would not have that effect ...

In my view, derivative evidence that could not have been found or appreciated except as a result of the compelled testimony under the Act should in the exercise of the trial judge's discretion be excluded since its admission would violate the principles of fundamental justice ... I do not think such exclusion

⁶² Id at 52-53 (see also the *Ferreira* case at para [111]).

*should take place if the evidence would otherwise have been found and its relevance understood. There is nothing unfair in admitting relevant evidence of this kind ... **The touchstone for the exercise of the discretion is the fairness of the trial process.***⁶³ (Emphasis added.)

It is important to note that, in the deciding to follow an approach whereby a blanket exclusion of derivative evidence flowing from compelled testimony at section 417 enquiries is **not** applied, but where such evidence is dealt with by the trial judge on the flexible basis of discretionary admissibility, Ackermann J specifically referred to the fact that section 25(3) of the interim Constitution⁶⁴ guarantees to every accused person the broad right to a fair trial, which right is not limited to the specific rights enumerated in that subsection.⁶⁵ The learned judge emphasised the extremely important public purposes served by the holding of a section 417 enquiry, stating that:

‘Evidence obtained as a result of such an enquiry cannot be equated with evidence obtained as a result of unlawful conduct. Where, for example, derivative evidence is obtained as a result of torture there might be compelling reasons of public policy for holding such evidence to be inadmissible even if it can be proved independently of the accused. Otherwise, the ends might be allowed to justify the means. The admission of evidence in such circumstances could easily bring the administration of justice into disrepute and undermine the sanctity of the

⁶³ At 59 and 61 (see also the *Ferreira* case at para [112].

⁶⁴ The precursor to section 35(3) of the 1996 Constitution.

⁶⁵ See the *Ferreira* case at paras [149]-[150].

constitutional right which has been trampled upon. The same considerations do not apply to derivative evidence obtained as a result of the application of section 417(2)(b) at a section 417 enquiry.’⁶⁶

Pointing out that the officers of a company have a responsibility to account to shareholders for the way in which the company conducts its affairs and, if the company goes insolvent, to account to shareholders and creditors for the failure of the business, Ackermann J opined that –

*‘Giving evidence at a section 417 enquiry is part of the responsibility to account. It cannot simply be said that the administration of justice would necessarily be brought into disrepute by the subsequent use, even in criminal proceedings against the examinee, of **derivative evidence** obtained as a result of the application of section 417(2)(b) of the Act. Indeed, the public, and especially the victims of the crime, might find a denial of the right to use such evidence inexplicable.’⁶⁷*

The learned judge went on to state that:

‘Although no statistical or other material was placed before us, it is quite apparent that the United States has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, more particularly when regard is had to the particularly high crime rate, which one can take judicial notice of, currently prevalent in South Africa. This in my view gives added

⁶⁶ Id at para [150].

⁶⁷ Id at para [151].

*weight to the considerations of efficiency, economy of time and the most prudent use of scarce resources, highlighted by La Forest J in **Thomson Newspapers** and to which I have already referred, and supporting the adoption of a flexible approach in dealing with the admissibility of derivative evidence. The flexible approach is narrowly tailored to meet important state objectives flowing from the collapse and liquidation of companies and the resulting duties of liquidators to protect the interests of creditors and the public at large, while at the same time interfering as little as possible with the examinee's right against self-incrimination. It is balanced and proportional and, in my view, fully justifiable in an open and democratic society based on freedom and equality. To the extent that this conclusion is in conflict with any of the general views expressed in **Park-Ross and Another v The Director, Office of Serious Economic***

Offences,⁶⁸ *I disagree with those views.*⁶⁹

As was argued by counsel for the liquidators, the honest conduct of the affairs of companies is indeed a matter of great public concern, requiring the exposure of dishonest conduct and the restoration to the company of assets misappropriated from it. Such exposure cannot effectively take place unless the affairs of companies which fail can be thoroughly investigated and reconstructed. This objective is often impossible to achieve without the full co-operation of the directors and other office-bearers of the company. Moreover, the liquidation of a company is not infrequently the result of mismanagement involving fraud and theft on the part of the directors and other officers of the company. Such persons are '*the only eyes, ears and brains of the company*' and often the only persons who have detailed knowledge of the operation of the company prior to its liquidation. In the words of Sachs J in the *Ferreira* case:

'The whole purpose of getting to the bottom of the collapse so as to inform

68 1995 (2) SA 148 (C). In the *Park-Ross* case the first applicant was served with a summons in terms of section 5 of the Investigation of Serious Economic Offences Act 117 of 1991 (now repealed). The first applicant contended that if he were to attend an enquiry under section 5 and be questioned there, his constitutional rights (including his right to a fair trial and his right to remain silent in terms of section 25 of the interim Constitution) would be infringed. Tebbutt J (Scott J concurring) held (at 162F-164I) that an enquiry under section 5 did not form any part of the criminal process and could not be regarded as an investigative stage in the criminal process. This was despite the fact that information garnered or documents disclosed could set in train a process which could lead to incrimination or give rise to real evidence of an incriminatory nature. There was thus no justification either from the wording of section 25 of the interim Constitution, or generally, to extend the scope of the right to remain silent to an enquiry under Act 117 of 1991. Tebbutt J was nevertheless of the view that the use of evidence given by a person at such an enquiry in any subsequent criminal trial of that person would indeed constitute a violation of his or her right to remain silent in terms of section 25(3)(c) of the interim Constitution (which section set out the rights of accused persons). However, because section 5(8)(b) of Act 117 of 1991 excluded the use of evidence given by an examinee in any subsequent criminal trial of such examinee, section 5 was not, in the view of Tebbutt J, in conflict with the interim Constitution. It is perhaps particularly important to note, for the purposes of the present proceedings, that Tebbutt J held (at 165D-J) that section 5(8)(b) of Act 117 of 1991 must be interpreted so as to exclude **both** direct testimony by the examinee **and** derivative evidence from use in any subsequent criminal proceedings against such examinee. Ackermann J in the *Ferreira* case, referring **specifically** to this part of Tebbutt J's judgment, adopted a different (and narrower) approach to use immunity in the context of section 417 enquiries. The '*flexible approach*' of Ackermann J in the *Ferreira* case was in turn approved by Kriegler J in *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at paras [10]-[14], Kriegler J also holding that '[i]nsofar as the decision in **Park-Ross** is inconsistent with this conclusion, it must be taken to be incorrect' (at para [14]).

69 Id at para [152]. For discussion of this aspect of the reasoning of Ackermann J, see Klare '*Legal Culture and Transformative Constitutionalism*' (1998) 14 *SAJHR* 146 at 176-177, especially notes 63-64.

and reimburse as much as possible those who invested or traded in good faith, would be defeated if the director could shield him or herself behind the right not to answer incriminating questions. It is precisely in areas where assets have been fraudulently disposed of, that specially penetrative investigations for their recovery might be required. Company directors and other officials who appeal to the public for funds and engage in public commercial activity with the benefit of not being personally liable for company debts, cannot complain if they are subsequently called upon to account for their stewardship, at least, for the purposes of discovering all assets so as to minimise the loss to creditors and give full information to shareholders ... Indeed, it would be ironical if crooked directors were more able to avoid submitting themselves to enquiry than honest ones.’⁷⁰

I have dealt somewhat extensively with the reasoning followed by Ackermann J in the *Ferreira* case for rejecting the constitutional necessity of a derivative use immunity in the context of section 417 proceedings. To my mind, it is in this reasoning that an answer to the complaint of the applicants in the present proceedings is to be found. It is true that, unlike the situation in the *Ferreira* and *Bernstein* cases, the applicants currently before me have already been arrested and charged. It is also true that at least some of the charges against them have not yet been properly and fully formulated. Should they be compelled to testify further at the section 417 enquiry, they may well be deprived of certain ‘*tactical advantages*’ in the conduct of their criminal trials. It is possible, indeed probable, that the State will use the evidence to be given by them at the section 417 enquiry to complete the content of the charges against them – or even to formulate such charges. In the end, however, the State will have to prove the charges against them beyond reasonable doubt and, in so doing, the State will

⁷⁰ Id at para [261]. See also, in this regard, paras [122]-[127], and the *Bernstein* case (*supra*) at paras [15]-[27].

not be able directly to rely on any of the evidence given by them in the course of the section 417 proceedings. This obviously applies, not only to the charges currently levelled against them, but also to any further charges which the State may, in terms of section 81 of the Criminal Procedure Act 51 of 1977, join in the criminal proceedings against them at any time before evidence is led in the criminal trial. Insofar as the State's case against the applicants may depend on evidence derived from their compelled testimony, it will be the duty of the trial judge to ensure a fair trial, if necessary by the exercise of his or her discretion to exclude, in appropriate circumstances, some or all of such derivative evidence. I agree with Ackermann J that the trial judge is the person best placed to take that decision.⁷¹

Given the key position occupied by the applicants in the affairs of the LeisureNet group, and the extremely complex and intertwined nature of the issues upon which the liquidators need to examine them, the effect of the relief sought will, if granted, delay indefinitely, and substantially stultify, the very purpose of the section 417 proceedings. In my view, a careful analysis of the judgments of the Constitutional Court in the *Ferreira* and *Bernstein* cases, with particular reference to the emphasis on the extremely important public policy objectives achieved by section 417 enquiries, supports the conclusion that the applicants **cannot** be allowed to rely on either their fair trial rights under section 35(3) of the Constitution, or on the potential loss of an ill-defined '*tactical advantage*' at their criminal trial, to escape being examined on matters pertaining to the trade, dealings, affairs and property of LeisureNet, including such matters as may have a bearing on the criminal charges against them.

Finally, regard should be had to the case of *Equisec (Pty) Ltd v Rodrigues & Another*,⁷² to which the Commissioner made reference in his ruling on 31 May 2002. In that case, it was alleged by the applicant, a stockbroker, that it had been instructed by the first respondent (its client) to sell a parcel of shares on behalf of the first respondent. It sold the shares for R4 million and paid that

⁷¹ This was also the approach followed by the Constitutional Court in *Key v Attorney-General, Cape Provincial Division, and Another* (*supra*). In that case, the applicant – the accused in a pending criminal trial – sought (*inter alia*) an order that all evidence relating to the criminal proceedings against him derived from documents seized in raids on his home and office (made in terms of section 6 of the now repealed Investigation of Serious Offences Act 117 of 1991) '*is inadmissible and may not be used against [him] in the criminal proceedings*'. The Court (per Kriegler J) held that this was a matter for the trial judge, not for a pre-emptive order: '*Ultimately, as was held in Ferreira v Levin, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision ... If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded*' (at paras [13]-[14]; see also paras [10]-[11] and [15]).

⁷² 1999 (3) SA 113 (W).

amount into the first respondent's bank account. In due course, it was discovered that the share certificate submitted to it by the first respondent was stolen and the share transfer form was a forgery. As a consequence, the applicant was unable to make good delivery of the shares it had sold. The applicant ascertained that all but about R5 000,00 had been withdrawn from the first respondent's bank account. It immediately notified the police, who arrested the first respondent. The applicant then applied urgently for the provisional sequestration of the joint estate of the first and second respondents, who were married in community of property. A provisional sequestration order was granted in the absence of the first respondent, who was by then in custody. A prosecution of the first respondent was imminent but, in the interim, the applicant sought to secure the final sequestration of the estate of the respondents.

On the return day, the application was opposed by the first respondent who, in a counter-application, sought an order staying the sequestration proceedings until such time as the criminal prosecution against him had been finalised, on the grounds that he would otherwise be prejudiced in the conduct of his defence at the criminal trial.

The Court (per Nugent J, as he then was) summarised the prejudice upon which the first respondent relied as follows:

*'... the first respondent would prefer for the moment to say nothing at all about the matters which have given rise to his prosecution, which of course he is ordinarily entitled to do. If the sequestration proceedings are not stayed, however, he might be called upon to disclose information relating to those self-same matters and he wishes to avoid being placed in that position.'*⁷³

The Court held that there were two circumstances in which the first respondent would face the prospect of disclosing information which may be relevant to whether he had committed the offence with which he was then charged. The first circumstance was that he was called upon to answer the allegations made against him by the applicant in the founding affidavit if he was to avoid his estate being finally sequestrated. Nugent J regarded the choice which the first

⁷³ Id at 115J-116A.

respondent faced in this regard – between abandoning his defence to the civil proceedings or waiving his right to remain silent – as not constituting prejudice against which he should expect to be protected by the Court.

The second circumstance to which Nugent J referred is the one which is relevant to the present proceedings. The learned Judge correctly observed that, if the provisional sequestration order were to be made final, the first respondent could expect to be called upon to submit to compulsory interrogation in terms of section 65 of the Insolvency Act 24 of 1936. The judge noted that the applicant had indicated quite openly that the very purpose for which it required the final sequestration of the respondent's estate was so that it could utilise the provisions of section 65 in order to establish from the first respondent the whereabouts of the moneys, which at that stage were unknown to the applicant.

In dealing with this '*second circumstance*', Nugent J made the following pertinent comments about compulsory interrogations in terms of section 65 of the Insolvency Act:

'Section 65(2) of the principal Act as amended provides that a person who is liable to be interrogated in terms of the section may not decline to answer any question

"upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer".

*Section 65(2A) aims at securing some protection for the person under interrogation by requiring that that part of the proceedings in which he is required to answer such questions should be held **in camera** and by providing further that his answers to those questions should not be published and are generally inadmissible in subsequent criminal proceedings.*

Clearly it was the intention of the Legislature when amending the Insolvency Act to render a person liable to answer questions under interrogation notwithstanding

*that criminal proceedings are pending against him. Furthermore, there is no suggestion in argument before me that the provisions of that section are unconstitutional and thus invalid and it is not immediately apparent to me that the section might be, taking into account the safeguards which have been introduced by section 65(2A) of the Act against the use of the testimony given in the course of such an enquiry. (Compare **Ferreira v Levin NO & Others; Vryenhoek v Powell NO & Others** 1996 (1) SA 984 (CC) (1996 (1) BCLR 1); **Bernstein & Others v Bester & Others NNO** 1996 (2) SA 751 (CC) (1996 (4) BCLR 449).) That being so, it would seem to me that where the Legislature has expressly authorised the interrogation of a person who might have knowledge of the affairs of the insolvent estate, notwithstanding that he is facing a criminal prosecution, it is not open to me to frustrate that legislation by staying the sequestration merely to avoid that occurring. If there are circumstances in which this might be done, in my view, they would at least require to be exceptional circumstances and there are none in the present case. One must not lose sight of the fact that the applicant has a legitimate interest in establishing the whereabouts of the assets which were in the possession of the first respondent and in doing so at the earliest opportunity in order to avoid their being dissipated or concealed and it is for that purpose that the Insolvency Act allows for such an enquiry. The safeguards contained in section 65(2A) seem to me to go a long way towards, at the same time, preserving the interests of the first respondent and I can see no good reason why it should be necessary to intervene any further. In my view, no good grounds have been made out for suspending the sequestration proceedings.’⁷⁴*

One of the ‘safeguards’ referred to by Nugent J in section 65(2A) of the Insolvency Act – namely, the direct use immunity provided for in section 65(2A) (b) – is substantially the same as the safeguard given to examinees in section 417 proceedings by the decisions of the Constitutional Court in the *Ferreira*, *Bernstein* and *Parbhoo* cases. Applicants’ counsel sought to distinguish the *Equisec* case from the present case by pointing out that, unlike section 65 (2A) (a) of the Insolvency Act, there is no provision in sections 417 and 418 of the Companies Act for holding *in camera* that part of the proceedings where self-

⁷⁴ Id at 117B-I.

incriminating evidence may be given by an examinee, nor for prohibiting the publication of information regarding such evidence.

If, however, one has regard to the provisions of section 67(1) of the Insolvency Act, the distinction sought to be drawn by applicants' counsel between the protection afforded to an examinee by section 65(2A) of the Insolvency Act and the protection afforded to examinees in section 417 enquiries, is more apparent than real. In terms of section 67(1) of the Insolvency Act, should it appear from a statement made at a section 65 interrogation that there are reasonable grounds for suspecting that any person has committed any offence, the Master is obliged to transmit such statement, or a certified copy thereof, and all necessary documents to the Attorney-General (now the Director of Public Prosecutions), so as to enable the latter to determine whether any criminal proceedings should be instituted.⁷⁵ Thus, the holding of the relevant part of the insolvency interrogation proceedings *in camera*, and the prohibition upon the publication of information regarding possibly self-incriminating questions and answers, will **not** prevent the evidence given at the proceedings from being accessible to the State and from potential use by the State to formulate criminal charges, and build a criminal case, against the examinee.

In view of the above, the views expressed by Nugent J in the *Equisec* case on the constitutionality of compelling testimony by an accused person, in the context of insolvency interrogation proceedings, (*obiter* though they may be) are indeed pertinent to the present proceedings. To my mind, the inevitable tension between the rights of an examinee in section 417 proceedings (in particular, the broad right to a fair trial of an examinee who is also an accused person) and the indubitable public interest in the proper investigation of corporate collapses, has been adequately and fairly balanced by the Constitutional Court by the introduction of a direct use immunity, and by making the use of derivative

⁷⁵ See, in this regard, *Du Plessis NO v Oosthuizen*; *Du Plessis NO v Van Zyl* 1995 (3) SA 604 (O) at 613G-614A.

evidence at a subsequent criminal trial subject to the discretion of the trial judge (whose duty it is to ensure compliance with fair criminal trial standards).

It cannot be gainsaid that the ruling made by the Commissioner on 31 May 2002 is very sketchy and does not grapple with the issues raised by the applicants in support of the relief sought by them from the Commissioner. However, it follows from what I have said above that, in my view, the ruling made by the Commissioner was not unconstitutional, oppressive or unfair to the applicants, and there is accordingly no reason for this Court to interfere with such ruling.

In the circumstances, I would recommend that the application be dismissed with costs, including the costs of two counsel.

.....
B J VAN HEERDEN

TRAVERSO AJP: I agree and it is so ordered.

.....
J H M TRAVERSO