

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2023-039641**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIG

In the matter between:

EBRAHIM ABOOBAKER LAHER

Applicant

and

MICHAEL FITZGERALD N.O.

First respondent

MONICA COWIN N.O.

Second respondent

ANIKA VAN JAARSVELD N.O.

Third respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Fourth respondent

EOH MANAGED SERVICES PS (PTY) LTD

Fifth respondent

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The Order is further uploaded to the electronic file of this matter on CaseLines by the Judge his/her secretary. The date of this Order is deemed to be 18 April 2023.

ORDER

- a. The application is dismissed;
 - b. The applicant is to pay the fifth respondent's costs, on scale C.
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JUDGMENT

HA VAN DER MERWE, AJ:

- [2] In this application the applicant (**Mr Laher**) seeks an order setting aside a summons issued by the first respondent (**the commissioner**), in his capacity as a commissioner of an enquiry in terms of section 417 and 418 of the Companies Act 61 of 1973. The summons calls on Mr Laher to attend the enquiry.
- [3] The commissioner was appointed by an order of this court handed down by Crutchfield AJ (as she then was) on 30 March 2021. The second and third respondents (**the liquidators**) are the liquidators of Silver Touch IT Solutions (Pty) Ltd (in liquidation) (**Silver Touch**), the company in liquidation to which the enquiry pertains. The Master is the fourth respondent. The fifth respondent (**EMS**) is a proven creditor of Silver Touch. Only EMS opposed the application, although in a supplementary affidavit that was admitted with Mr Laher's consent, the liquidators indicate that the absence of opposition by them should not be interpreted to mean that they have no interest in Mr Laher giving evidence at the enquiry, or that they have no questions to put to him, if he appears at the enquiry.
- [4] EMS is not only a participant in the enquiry, but also its funder. The summons was issued at its instance.
- [5] In substance, Mr Laher's case is that the summons constitutes an abuse and as such, it should be set aside. Mr Laher contends that if he were to testify at the enquiry, EMS will put questions to him that do not relate to the affairs of Silver Touch, but to other matters that include two pending actions brought against him

in which Silver Touch does not feature. Mr Laher's case is that it would amount to an abuse if he were to be called upon to answer questions that do not bear on Silver Touch. That is the case EMS was called upon to meet. Mr Blou, who appeared for EMS, conceded that, in principle, questions which have no bearing on Silver Touch are not permissible. But, he argued, the topics on which EMS intends to interrogate Mr Laher do bear on Silver Touch in one way or another. Much of EMS's answering affidavit is devoted to those topics which EMS contends both involve Mr Laher and which bear on Silver Touch in some way.

- [6] The proper starting point is Wallis JA's judgement in *Roering N.O. and another v Mahlangu and others*¹ (**Roering**):

"If there is to be a challenge to the conduct of an enquiry, that must either be a review falling under PAJA or a residual category of review derived from the common law. In either event, the proper way in which to challenge the summoning of a witness is by way of review proceedings and the decision that falls to be attacked is that of the commissioner, not the liquidators. Any attack on the commissioner's decision to summon a witness must give weight to the considered view of the commissioner as to the necessity for that particular individual to be summoned."² (footnotes omitted)

- [7] The following passage from *Roering* is also relevant:

"Furthermore, when an allegation is made, as was made here, that the examination by the liquidators would involve an improper 'fishing expedition', the primary issue is whether the commissioner would permit that. Here there was no suggestion that, had Ms Mahlangu given evidence, the commissioner would not have exercised his powers to prevent any abuse by the liquidators. Of course, instances may arise where liquidators interrogating a witness at an enquiry may overstep the permissible bounds of the enquiry and abuse their statutory rights. But an aggrieved person, who is entitled to be legally represented, is entitled to complain, and it is then for the commissioner to prevent any abuse. If the witness is dissatisfied with the commissioner's approach, that may be the subject of a review, but one cannot start from the

¹ 2016 (5) SA 455 (SCA)

² Para [52]

perspective that the commissioner will not discharge their duties properly and prevent abuse from occurring.”³

- [8] The focus should therefore be on whether the decision by the commissioner to issue the summons is open to attack. To the extent that EMS and its aims enter the picture, the operative question is not whether EMS will interrogate Mr Laher on out-of-bounds topics. The operative question is whether the commissioner would allow EMS to put such questions to Mr Laher. These are the questions I am to decide.
- [9] The commissioner filed an affidavit in which he deals with the reasons for him issuing the summons which Mr Laher seeks to set aside. In his affidavit, the commissioner refers to the judgement by Crutchfield AJ, by which he is authorised to issue summonses (‘subpoenas’ as it is referred to in the order) as he may in his discretion regard necessary for the proper investigation of the affairs of Silver Touch. He goes on to explain that, from the evidence led before him at the enquiry, it appears that EOH Mthombo (Pty) Ltd (**EOH Mthombo**) and EOH Afrika (Pty) Ltd (**EOH Afrika**) made payments to Silver Touch and that Mr Laher had an involvement in those payments. The commissioner says that it is apparent to him that Mr Laher could “*likely contribute to my understanding of these transactions and payments*”.
- [10] EMS, EOH Mthombo and EOH Afrika are all subsidiaries of EOH Holdings Ltd. The subsidiary companies are collectively referred to in EMS’s affidavits as ‘the EOH Group’. Mr Laher was director of EOH Holdings Ltd and EOH Mthombo from 1 April 2017 to 31 July 2018. Mr Laher’s employment with EOH Mthombo commenced in 2009.
- [11] In EMS’s answering affidavit, it is alleged that Mr Laher approved payments made by EOH Mthombo to Silver Touch, that aggregate to R39 871 500. In 27 instances he approved the payments on his own and in 11 instances, he was a joint approver of the payments. It is further stated in EMS’s answering affidavit that there are no records available or in the possession of the ‘EOH Group’ which tends to explain the payments approved by Mr Laher. These allegations are not

³ Para [53]

seriously disputed in Mr Laher's replying affidavit. In all events, the application of the rules in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴ means that this application should be decided on EMS's version.

[12] In short therefore, I am to decide this application on at least these facts: Mr Laher approved payments in significant amounts to Silver Touch, for which there is no explanation and for which Mr Laher offers no explanation in his affidavits.

[13] On those facts and all other things being equal, it is hard to see how Mr Laher could not legitimately be summoned to an enquiry in terms sections 417 and 418 of the Companies Act of 1973. But, argued Mr Desai on behalf of Mr Laher, it makes a difference that the payments in issue were made *to* Silver Touch, as opposed to questionable payments made *by* Silver Touch. If Silver Touch made payments for which there is no legitimate explanation, one may well imagine that such payments may be impeachable under the relevant sections of the Insolvency Act 24 of 1936 or the Companies Act of 1973, or the common law. If the payments are set aside, it will redound to the benefit of Silver Touch and thus to its creditors. However, in respect of payments made to Silver Touch, the opposite is the case. If such transactions are set aside, it would create an additional liability for Silver Touch, to its detriment and the detriment of its creditors.

[14] In my view, it does not make a difference that the payments in question were made to Silver Touch. In all events, it clearly concerns the dealings and affairs of Silver Touch. The permissible bounds of an enquiry in terms of section 417(1) include "*the trade, dealings [and] affairs*" of the company in liquidation. In *Bernstein and others v Bester and others NNO*⁵ Ackerman J found that an enquiry in terms of sections 417 and 418, has amongst its objectives determining the assets *and* liabilities of the company in liquidation.⁶ Ackerman J also found that the subject-matter of an enquiry is the affairs of the company in liquidation in the "*very widest sense*".⁷

⁴ 1984 3 SA 623 (A) at 634H - 635C

⁵ 1996 (2) SA 751 (CC)

⁶ At 766D

⁷ At 777E

- [15] That said, there is reason to believe that the interrogation of Mr Laher may assist the liquidators to pursue a claim on behalf of Silver Touch. EOH Mthombo obtained a judgement by default against Silver Touch for the payment of the capital amount of R12 419 375.61. EOH Mthombo's cause of action in the action in which it obtained the default judgement, is that payments EOH Mthombo made to Silver Touch, were tainted by fraud. If it turns out that Mr Laher was instrumental in the payments that were made by EOH Mthombo, it may render him liable to Silver Touch, as joint wrongdoer for a right of recourse in terms of the Apportionment of Damages Act 34 of 1956. I make no definitive finding in this regard – only that for present purposes, Mr Laher's evidence may result in a claim by Silver Touch against him.
- [16] As it is clear that the liquidators are not only entitled to interrogate Mr Laher if he appears before the commissioner, but also that they indicated that their failure to oppose the application should not be interpreted to mean that they do not have questions to put to Mr Laher, I fail to see how it could be that the summons issued by the commissioner can be described as an abuse, or otherwise open to attack, in relation to questions the liquidators may put to Mr Laher.
- [17] Moreover, the commissioner's affidavit is not contested by Mr Laher, although he is at a disadvantage to deal with it insofar as the commissioner refers to the evidence led before him in the (secret) enquiry. Nonetheless, on the allegations made in EMS's answering affidavit on the payments approved by Mr Laher, he is at no disadvantage. To the contrary, as he is the one who approved the payments, he is probably better placed than the deponent to EMS's answering affidavit to deal with the payments. As set out above, Mr Laher did not engage with the substance of those allegations in his replying affidavit. The effect and substance of the allegations in the answering affidavit (for present purposes) is no different than the evidence referred to by the commissioner, i.e. evidence of Mr Laher's involvement in payments made to Silver Touch. It may well be that the commissioner refers to the same evidence on Mr Laher's involvement with the payments, or he may refer to other evidence. Either way, the effect is the same: Mr Laher can be expected to give relevant evidence on a matter within the legitimate bounds of the enquiry.

[18] The questions that which EMS may legitimately put to Mr Laher is, perhaps, another matter. Mr Desai referred me to the decision in *Simon and another v The Assistant Master and others*⁸ in which De Vos J held that it would not be proper to allow a creditor to pursue a line of questioning that was aimed at, not its own claim against the company in liquidation, but against third parties. Such a line of questioning would not affect either the financial interests of the company in liquidation, or its creditors, *qua* creditors, and for that reason the line of questioning would be impermissible. If Mr Desai's argument is upheld, the effect of it, at its highest for Mr Laher, would be that EMS is not entitled to interrogate Mr Laher on certain topics. That however would not bring Mr Laher any closer to the order he seeks for the setting aside of the summons. I therefore need not decide this issue and it seems to me that I should not do so either. For one, my finding on this topic would be an *obiter dictum*,⁹ inasmuch as I am not required to determine the topics on which EMS is entitled to interrogate Mr Laher – I am to decide whether the summons issued by the commissioner should be set aside. Also, it seems to me that the questions that EMS may put to Mr Laher should be left to the commissioner. It is not for this court to dictate to the commissioner how he should conduct the enquiry.¹⁰ The court will retain its oversight function, but that is not engaged unless and until the commissioner allows a participant at the enquiry to put an impermissible question to Mr Laher.

[19] In this context, I should deal with the submissions made by Mr Desai on the commissioner's conduct of the enquiry. Mr Desai submitted that Mr Laher cannot expect the commissioner to shield him from impermissible questions, because despite the ample laments of abuse in Mr Laher's affidavits, the commissioner did not say anything about it in his affidavit. This argument is a *non-sequitur*. The commissioner's silence on the topic in no way indicates any disposition on his part. In my view the commissioner was wise not to deal with Mr Laher's laments. If he did, he may well have given an impression of having formed a view on the matter. Moreover, as I set out above, Mr Laher did not deal with the

⁸ 1964 (3) SA 715 (T)

⁹ *Willoughby's Consolidated Company Ltd v Copthall Stores Ltd* 1918 AD 1 at p. 21

¹⁰ *Yiannoulis v Grobler* 1963 (1) SA 599 (T) at 601F - H

commissioner's affidavit at all, so if the commissioner is to be challenged in this fashion, the challenge should have been put to him.

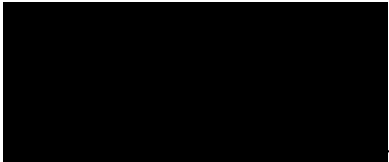
[20] Mr Desai also submitted that there is significance in the fact that the commissioner considered only the affidavits delivered in this application and not the parties' heads of argument. I cannot find fault with the commissioner limiting himself to the facts. It also does not in any way indicate that the commissioner will allow impermissible questions being put to Mr Laher.

[21] In summary therefore, following the approach I am enjoined to follow as set out in *Roering* above, there are no grounds on which the decision by the commissioner to issue the summons can be faulted. Mr Laher is at liberty to raise an objection to an impermissible question put to him at the enquiry and there is no reason on the facts before me to believe that the commissioner will not properly deal with such an objection. The application should therefore be dismissed.

[22] The parties are agreed that costs should follow the result and that costs should be on scale C in terms of rule 67A(3) read with rule 69. I should deal with one matter so far as costs are concerned. In terms of rule 67A(2)(c), one of the factors I may have regard to in awarding costs is "*unnecessary or prolix drafting*". As I set out above, much of EMS's answering affidavit deals with its contentions on the permissible topics on which it may interrogate Mr Laher. As I also set out above, that is not a matter I am required to decide. That despite, I do not consider EMS's answering affidavit to contain unnecessary material. The permissible topics of an interrogation is an issue in this application, because Mr Laher made it an issue in his founding affidavit. EMS was therefore entitled to deal with it.

[23] I make the following order:

- a. The application is dismissed;
- b. The applicant is to pay the fifth respondent's costs, on scale C.

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H A VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT

Heard on: 16 April 2024

Delivered on: 18 April 2024

For the applicant: Adv M Desai instructed by Vally Attorneys

For the fifth respondent: Adv J Blou SC instructed by Werksmans Attorneys