

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2025/048966

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES/NO
<u>23/11/26</u>	
DATE	SIGNATURE

In the matter between:

JATISH LUTCHMAN

First Applicant

UMBONO CLOUD SERVICES (PTY) LTD

Second Applicant

and

RENé BEKKER NO

First Respondent

MONICA GEZINA COWIN NO

Second Respondent

OCCULAR TECHNOLOGIES (PTY) LTD
(In liquidation)

Third Respondent

THE MASTER OF THE HIGH COURT
JOHANNESBURG

Fourth Respondent

JUDGMENT

P F LOUW, AJ

- [1] The applicants apply that an order that was made by the first respondent in her capacity as the commissioner in proceedings conducted under sections 417 and 418 of the 1973 Companies Act into the affairs of the third respondent, compelling the first applicant to furnish the second applicant's annual financial statements and ancillary documents to the second respondent, being the liquidator of the third respondent, be reviewed and set aside under section 151 of the Insolvency Act 24 of 1936. The order was made orally on the 5th of February 2025 and in writing on 23 February 2025, reading that the first applicant must furnish "Umbono's signed annual financial statements, and all supporting documentation utilised to prepare the annual financial statements (page 31 para 5.9, transcript for 5 February 2020)" to the second respondent. (The portion between brackets is a reference to the transcript of the recording of the proceedings of the 5th of February 2020 when the commissioner orally instructed the production of the documentation.) Section 417(3) empowers the commissioner presiding over a section 417 examination to require any person summoned under subsection (1) and examined under subsection (2) to produce any books or papers ("documents" herein) in his or her custody or control relating to the company. Section 418(5)(b)(iii)(bb) exposes an examinee who does not produce the documents ordered by a commissioner to criminal prosecution and sanction.
- [2] The applicants seek costs against the second respondent. They initially also sought costs against the first respondent. The first respondent delivered an affidavit pointing out that no grounds for a costs order against her exist whereafter the applicants and the first respondent reached an accommodation which is reflected below in the order which I make. The first respondent does not oppose the application but the second respondent, as liquidator of the third respondent, actively opposes it.
- [3] For ease of reference the following shorthand is used herein. The second applicant is referred to as Umbono. The first applicant is referred to as Mr Jay Lutchman. The third respondent is referred to as Occular and the second respondent as the liquidator. The first respondent is referred to as the

commissioner. Mr Jay Lutchman's brother, known as Pommie, was a director of Occular and references to him will be to Mr Pommie Lutchman. Supporting roles were played by a Mr Malgas and a Mr Dempsey, directors of Umbono, who are referred to by their surnames. I refer to the proceedings in issue as the 417 process or proceedings.

- [4] Both conceptual and factual questions must be considered herein. The primary conceptual question is whether the commissioner presiding over a 417 process relating to company A can in principle order a director of company B to produce documents containing financial information (including the annual financial statements) of company B. As will become clearer below, this question can only be answered with the definite “maybe, it all depends on the facts”, the facts being whether the documents of company B concern “the trade, dealings, affairs or property” of company A. The factual question is whether the documents of Umbono which the commissioner ordered Mr Jay Lutchman to produce in Occular’s 417 process concern the trade or dealings or affairs or property of Occular. The preposition “concerning” means “about” or “regarding”, indicating a relationship between two things, akin to causation. As in all matters regarding causation, a normative test is indicated to determine whether X is linked to Y. The nouns trade, dealings, affairs and property have wide dictionary meanings. Nevertheless, there is a point on any continuum between X and Y (Z) that is too far from X to be rationally and reasonably linked to X. The factual question herein is whether the documents of Umbono are close enough to the trade, dealings, affairs and property of Occular to be susceptible to the commissioner’s impugned order. The liquidator contends that they are, Umbono contends that they are not.
- [5] The common ground facts can be summarised in a few sentences. Up to 2021 Occular conducted business in the information technology sector. The business had two divisions, one aimed at dealing in hardware, the other in software, known as the Occular Cloud Services Division. Mr Pommie Lutchman was a director of Occular and his brother Mr Jay Lutchman, an employee thereof. Occular experienced financial distress and Mr Jay Lutchman resigned from his position with Occular and established Umbono in 2021. On 12th January 2022 Occular

concluded a transaction with the fledgling Umbono in terms of which Umbono bought the Cloud Services Division from Occular. The whole business, including employees, constituting the division was transferred from Occular to Umbono. During April 2022 (three months after the sale of the business) Occular's financial distress drove it to a short-lived business rescue experiment which ended in May 2022 when it was liquidated. Umbono continued in business and acquired at least two new subscription clients.

- [6] In the inevitable 417 inquiry which followed Occular's liquidation, the liquidator fixed her canon on the sale of the Occular Cloud Services Division. Mr Pommie Lutchman, Mr Jay Lutchman, Mr Dempsey and Mr Malgas were examined about the transaction. The transaction was subject to the suspensive condition that the parties thereto had to conclude a so-called Master Service Level Agreement within seven days of the signature of the sale agreement. Mr Pommie Lutchman and Mr Jay Lutchman testified that the intended Master Service Level Agreement was not concluded and that the condition was not waived. Mr Jay Lutchman, it should be noted, denied the liquidator's allegation that the suspensive condition was not fulfilled or waived in his replying affidavit in these proceedings. The denial is bold and not supported by any document and seemingly contradicts what he testified at the 417. No Master Service level Agreement has come to light. The sum of the evidence of Mr Dempsey and Mr Malgas on the point was that the Umbono board did not adopt any resolution relating to the sale and it can thus be accepted that the benefit of the suspensive condition was not waived. Furthermore, the 417 elicited evidence which show that the full purchase price fixed in the sale agreement was not paid. Various facts were also established during the 417 showing a continuing close relationship between Mr Pommie Lutchman and a major shareholder of Umbono. For these and a handful of other considerations, Mr Acker (the liquidator's counsel) was justified in arguing that the ostensible sale of the Occular Cloud Services Division to Umbono was part of a stratagem to save the treasure on the sinking ship, Occular. It would appear from what I have seen in the papers that the liquidator extracted adequate evidence at the 417 to establish claims under one or more of sections 26, 29, 30 or 31 of the Insolvency Act.

- [8] Returning for a moment to the suspensive condition. It would seem that it is undisputable on the available evidence that the condition was neither fulfilled nor waived. The consequence is that the sale agreement was void *ab initio* (cf **Africast (Pty) Ltd v Pangbourne Properties Ltd** [2014] 3 All SA 653 (SCA) paragraph 37 and **Codevilla v Kennedy-Smith** NO 2025 2 SA 42 (SCA) paragraphs 53 and 54). The invalidity of the sale agreement means that there was no *causa* for the transfer of the purported *merx*. The liquidator is accordingly entitled to vindicate the *merx* with one of the *condictiones sine causa*, probably the *condictio indebiti*. Given the judgment of the Supreme Court of Appeal in **Yarona Health Care Network (Pty) Ltd v Medshield Medical Scheme** 2018 1 SA 513 (SCA) at paragraphs 49 and 50, the liquidator will not have to tender return of the amount paid to Occular in proceedings for the return of the Occular Cloud Services Division. Umbono will have to institute its own enrichment action to claim repayment thereof. That claim will be subject to the normal limitations of the law of enrichment. As I see it, the liquidator probably has an unanswerable claim to recover Occular Cloud Services Division from Umbono.
- [9] It appears that the 417 has been successful by not only placing the peregrinus liquidator in Mr Pommie Lutchman's shoes, but the enquiry has provided the liquidator with strong evidence to recover the asset allegedly sold, pursue one or more of the specialist insolvency actions and consider whether an order collapsing the two companies into one entity under section 20(9) of the 2008 Companies Act could be obtained. But the liquidator wants more, namely the financial statements and ancillary documents of Umbono running over a number of years. To achieve this (as noted above) the commissioner, at the request of the liquidator, orally ordered Mr J Lutchman on the 5th of February 2025 to present all financial statements as well as all the financial documentation of Umbono to the liquidator. The order was apparently recalibrated in the written order which I quoted above. What is immediately striking about the order is that it concerns all the "signed annual financial statements" of Umbono and is not limited to specific years. In her answering affidavit in this application the liquidator said that the order is limited to certain years only, but that is not what the order conveys. Secondly, the category of "supporting documentation utilised to prepare" the annual financial statements is exceedingly vague and broad.

Arguably all documents generated by a company during the course of a financial year are distilled into its financial statement of that year. This could include every contract, vouchers of every expense, every communication with the tax authorities, every management account and possibly every resolution taken by the board. The annual financial statement is after all the mirror which reflects the year's business. The second striking aspect of the order is that it concerns the business and affairs of the independent company, Umbono, and not the liquidated company, Occular, which raises the rationality of the order, which relates to the causative aspect referred to above.

- [10] The liquidator has demonstrated that the state of our law is that a commissioner may in principle order documentation from parties other than the company in question. The liquidator also identified three essential reasons why the annual financial statements and the source documentation are required for purposes of the winding-up of Occular. I deal with these two buckets in turn.

- [11] First, insofar as the state of the law is concerned, Wallis JA provided a concise historical and comparative overview of the powers of liquidators (and trustees in insolvency proceedings) to investigate the financial position of the insolvent in his judgment in **Roering NO v Mahlangu** 2016 5 SA 455 (SCA). The case concerned the setting aside of a summons issued by a commissioner to a person on the ground that it is an abuse of process. Although the route by which the law concerning 417 inquiries was considered differs from the route in this case (dealing with an order to a witness who has testified to furnish documents to the liquidator), the legal principles are of course the same. Apart from the comprehensive overview of the law with regards to inquiries, Wallis JA expressly held in paragraphs 36 and 38 that an assessment of the merits of a claim or a defence on an informed basis is a legitimate purpose of the process.

- [12] **Gumede v Subel NO** 2006 3 SDA 498 (SCA) is important to this application because documents pertaining to company B (in the example given in paragraph [4] above) were ordered to be provided in the 417 of company A. Objection was made to the production of the documents on the basis that they were confidential. The commissioner dismissed the objection on the ground that he considered the documents relevant to the affairs of the company and that it was sufficient for him

to believe on reasonable grounds that they were relevant. The documents impacted on the enquiry as to whether an opportunity had been available to company A and if so whether the opportunity had been improperly diverted by the interrogee to an associated company. The court held that there was reason to believe that the documents requested were relevant. Where documents are reasonably believed to be relevant to the affairs of a company, the relevance in principle prevails over a claim of privacy. The documents were relevant because they could throw light on the affairs of company A. (See paragraphs 17 and 20 of the judgment of Lewis JA for the court). It should be noted that the documents sought were well-defined and few in number.

- [13] It may also be stressed that the present proceedings are a review of “the third kind” as the concept was used in **Johannesburg Consolidated Investment Co v Johannesburg Town Council** 1903 TS 111 at 117 where Innes CJ held that in such a case the court may decide the matter de novo. (See **Nel and another NNO v The Master (Absa Bank and others intervening)** 2005 1 SA 276 (SCA) at 286.) This means that the review is not limited to a strict process-orientated consideration of the decision under review but also has an element of an appeal which triggers the question whether the decision was correct. The corollary is that the usual deference shown to the decision-maker in the strict administrative review sense does not apply here.
- [14] Section 417 read with section 418 of the 1973 Companies Act provide in sum that any person who is known or suspected to have in their possession any property of the company or who is believed to be indebted to the company, or any person deemed capable of giving information concerning the trade, dealings, affairs, or property of the company, may be summoned to give evidence or produce documents. The potential scope of a 417 enquiry is wide. The dealings, affairs and property of the company form the boundaries of legitimate concern for the liquidator and commissioner. One of the crystallised purposes of an enquiry is to investigate the validity of claims by the company and to determine whether they should be pursued. In **Ferreira v Levin NO** 1996 1 SA 984 (CC) Ackermann J held that it is obviously in the interest of creditors that doubtful claims which the company may have against outsiders be properly investigated

before being pursued. In **Bernstein v Bester and others NNO** 1996 2 SA 751 (CC) at paragraph 16(f) he held that a 417 enquiry is the mechanism by which liquidators can properly investigate doubtful claims against others before pursuing them and "it is permissible for the interrogation to be directed exclusively at the general credibility of an examinee, where the testing of such person's veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound-up."

- [12] Against these principles the reasons for the order as provided by the liquidator fall to be considered.
- [13] The commissioner produced a report in which she gave reasons for her order. Apart from providing references to well-known authorities about the purposes of 417 proceedings, giving a synopsis of some of the facts and referring to her obligation to produce a report in terms of section 418, the commissioner stated that the financial documents of Umbono is required to follow the transaction by which Occular's assets were sold to Umbono. The liquidator asserted that the documents are relevant to the trade, dealings and affairs of Occular specifically with regards to the payment of the purchase price, the value of the merx as well as the profit or loss made by the division since 2022. I am at a loss to understand why the vast number of documents sought will throw any light on the payment of the purchase price. As mentioned, the payment of the purchase price is not central to an action for restitution of the merx. If the liquidator needs documents of Umbono dealing specifically with this aspect, an order isolating and describing the precise documents may of course be drafted. I also fail to see how the value of the merx or the profitability of Umbono has anything to do with the affairs, trade or dealings of Occular. Once again, if a clearly drafted order specifies a document, things may be different. But to get all financial statements – not knowing what they may contain – is not only overbroad but the vast majority must by necessary implication be irrelevant to Occular. I am singularly unconvinced by the commissioner's reasons for the order that she made. In his argument, Mr Acker contends that the purchase price was so low that fraud is indicated which is exacerbated by the evidence that was unearthed of the close relationship between Pommie Lutchman and an Umbono shareholder.

- [14] The facts stated are of course all correct, but I fail to see why the financial affairs of Umbono have any bearing on the integrity of the sale. If the sale is void or impeachable, the asset sold must be recovered, and recovery in principle includes the fruits of the thing transferred (less production costs, see the contribution of Brand JA, writing as FDJ Brand in **LAWSA** 2 ed vol 9 Enrichment paragraph 213) as well as its appurtenances, which must include its books of account because the books of a business form its skeleton. Apart from enrichment and the Insolvency Act remedies which all concern the recovery of the thing sold, I have seen no mention of any possible delictual claim against Umbono. Such claims may lie against the Lutchman brothers and others, but I fail to see how the financial information of Umbono may be relevant to them. There is also no hint of a contractual claim against Umbono wherein its financial affairs may inform the liquidator's decision to claim such damages, and I fail to conceptualise such a claim.
- [15] As I noted above, the factual question is whether the financial documents of Umbono concern the trade, dealings, affairs or property of Occular. "Concern" connotes a link between the document sought and the matters listed in the section. The link between them must be direct, proximate or not too removed in order to be legally relevant. Determining the link is a normative matter, in other words, one that requires judgment. In my view, the documents sought are so far removed from the trade, dealings, affairs or property of Occular that they are irrelevant to the 417 proceedings. I do not see the issue as one of privacy. If that were the case relevance would be irrelevant because the objection would be that relevant documents do not have to be disclosed because they are private. The mere fact that the documents are those of a different legal entity does not shield them against disclosure, as Subel's case demonstrates.
- [16] I should add that the vague body of documents which the commissioner ordered to be produced other than the annual financial statements is so broad that no rational meaning can be attached to it. The fact that the commissioner was prepared to make such a wide order redounds on the integrity of her decision. It is irrational and not worthy of deference.

[17] In my view the application must succeed. I can see no reason why costs should not follow the event. Both parties placed the costs in the C category, which seems correct to me. I make the following order:

- a. The order made by the first respondent orally on 5 February 2025 and in writing on 23 February 2025 requiring the second applicant to produce the signed annual financial statements, all financial documentation and all the underlying documentation in the proceedings held in terms of sections 417 and 418 of the Companies Act 61 of 1973 pertaining to the affairs of the third respondent is reviewed and set aside;
- b. the second and third respondents are ordered to pay the applicants' costs jointly and severally, which costs are to be taxed on scale C;
- c. it is noted that by agreement between the applicants and the first respondent the applicants are to pay the first respondent's costs to the extent set out in the letters dated 26 and 27 August 2025.



P F LOUW
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 20 January 2026

Delivered on: 23 January 2026

Appearances:

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