



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2026-178123

In the matter between:

CHADLEY DOLLIE

Applicant

And

JOCHEM ECKHOFF N.O.

First Respondent

MARIA VAN ROOYEN N.O.

Second Respondent

[cited in their capacity as the duly appointed
Liquidators of Dolmar Group (Pty) Ltd (In provisional
Liquidation)]

JOCHEM ECKHOFF N.O.

Third Respondent

LAURETTE VAN DER MERWE N.O.

Fourth Respondent

[cited in their capacity as the duly appointed
Liquidators of Iowa (Pty) Ltd (In provisional
Liquidation)]

JOCHEM ECKHOFF N.O.

Fifth Respondent

KARIEN VAN DER WESTHUIZEN N.O.

Fourth Respondent

[cited in their capacity as the duly appointed
Liquidators of Silver Creek Durbanville (Pty) Ltd
(In provisional Liquidation)]

ADVOCATE CLAIRE MORGAN N.O.
STANDARD BANK LIMITED

Seventh Respondent
Eighth Respondent

Neutral citation: *Dollie v Eckhoff N.O and Others* (Case no 2025-178123) [2026]
ZAWCHC ... (3 September 2026)

Coram: LEKHULENI J

Summary: Company law – Commission of enquiry in terms of ss 417 and 418 of the Companies Act 71 of 1973 - Application to stay the hearing of those proceedings pending rescission application of the order establishing such commissions. Prima facie case not established – Application for the stay of ss 417 and 418 enquiries dismissed.

Heard: 29 July 2026

Delivered: 3 September 2026

JUDGMENT

LEKHULENI J:

Introduction

[1] This is an application the applicant brought on an urgent basis, consisting of two parts: Part A and Part B. In Part A, the applicant sought an order condoning non-compliance with the prescribed forms, time periods, and service requirements under rule 6(12), and leave to have the application heard as urgent. Further, the applicant sought an order in Part A directing the respondents to provide copies of the papers in each of the applications brought by the respondents in case numbers 2026-125892, 2026-125893, and 2026-125894 to the applicant's legal representatives within 5 days, subject to such confidentiality directions this Court may impose. Alternatively, that the applicant's legal representatives be granted leave to uplift copies of the said papers from the court files.

[2] Pending the final determination of the relief sought in Part B of the application, the applicant sought an order that the commission of enquiry convened pursuant to the orders of this Court under case numbers 2026-125892; 2026-125893; and 2026-125894 and presided over by the seventh respondent in terms of ss 417 and 418 of the Companies Act 61 of 1973, (*‘the Companies Act’*) as amended, be stayed.

[3] In Part B, the applicant seeks an order rescinding the orders of this Court made under case numbers 2026-125892; 2026-125893; and 2026-125894 convening the commission of enquiry and appointing the seventh respondent to preside thereover in terms of ss 417 and 418 of the Companies Act as amended. Alternatively, the applicant seeks an order setting aside the summonses issued pursuant to the said orders to the extent that they exceed the trade dealings, affairs or property.

[4] The matter was enrolled and heard as one of urgency, and this Court was enjoined to consider only Part A of the applicant’s application. Essentially, the applicant sought an order staying the hearing of the commission of enquiry convened under s 417 read with s 418 of the Companies Act, pending the outcome of his application in Part B to rescind the order directing that the hearing of such an enquiry be held. The enquiry envisaged in ss 417 and 418 was scheduled for 30 and 31 July 2026. After hearing arguments from both parties on 29 July 2026, I granted an order dismissing the applicant’s application and indicated that reasons would follow. What follows are the reasons for that order.

The parties

[5] The applicant is an adult businessman and the sole director of Dolmar Group (Pty) Ltd (in provisional liquidation) (*‘Dolmar’*), Iowa (Pty) Ltd (in

liquidation) (*Iowa*), and Silver Creek Durbanville (Pty) Ltd (in liquidation) (*Silber Creek*). For convenience, I shall refer to these companies collectively as *the companies*. The first through the sixth respondents are the joint provisional liquidators of the companies described above. The seventh respondent is an advocate of this division and is cited in her capacity as the court-appointed commissioner tasked with convening certain enquiries pursuant to ss 417 and 418 of the Companies Act. The seventh respondent did not oppose the application but instead filed a notice to abide. The eighth respondent is Standard Bank Limited (*Standard Bank*), a company with limited liability, duly registered and incorporated in terms of the statutes of the Republic of South Africa, and a bank duly registered in terms of the Banks Act 94 of 1990.

The applicant's case

[6] The applicant brought this application to stay the enquiry scheduled for hearing on 30 and 31, July 2026. He contended that he had not been cited in the applications which gave rise to the orders authorising the enquiries set down for those dates. According to him, he was not given notice of those applications and was not afforded an opportunity to be heard before the orders were granted. This was notwithstanding that he is the sole director of the companies and has consistently resisted their final liquidation. The applicant further asserted that the provisional liquidators secured the orders *ex parte* and *in camera*. Despite subsequent requests, he contends that he has not been furnished with the papers or the factual material placed before the Court when the *ex parte* orders were obtained.

[7] The applicant further pointed out that, to secure the *ex parte* orders, the respondents would have been required to allege and prove, when the application was brought, and s 417 was invoked, that the companies were unable to pay their debts in the manner contemplated by s 339 of the Companies Act. A

factual inquiry of the companies' assets and liabilities would have been necessary demonstrating they were unable to settle debts in the winding-up process, this being a distinct and independent analysis from commercial insolvency.

[8] In the winding-up applications brought by Standard Bank against the companies under separate case numbers, which applications are to be heard collectively, the applicant stated that the only debts of the companies were recorded as claims by Standard Bank. Each claim arose from loan funding advanced to the respective company. A provisional winding-up order was granted on an unopposed basis. Since then, however, those debts have become materially disputed on the basis that they have prescribed. A consolidated answering affidavit has been filed, and that issue now awaits determination by this Court.

[9] Because those claims are materially disputed and remain pending before this Court, the applicant contends that it was impermissible for the liquidators to rely on them to establish an inability to pay debts, the jurisdictional fact required to convene an inquiry under s 417 of the Companies Act. Insofar as the claims were relied upon, and the material dispute concerning them was not disclosed, the applicant argues that the *ex parte* orders were obtained unlawfully, constitute an abuse, and fall to be set aside.

[10] Moreover, the applicant emphasised that the liquidators were appointed only on a provisional basis. In his view, their primary responsibility is to safeguard the assets of the companies for the benefit of the general body of creditors. Accordingly, the applicant argues that the liquidators were required to seek an extension of their powers to convene the inquiry. To do so, they had

to demonstrate that such an extension was necessary to wind up the companies' affairs and distribute their assets.

[11] The applicant submitted that in this case, winding up the companies and distributing their assets is unnecessary because: firstly, the companies were not finally liquidated and no distribution would take place until the return date had been determined; secondly, there is no evidence to suggest that assets needed to be recovered as the applicant has handed over control of all assets to the liquidators and has complied with all requests made by them and thirdly, the companies therefore, are not unable to pay their debts in winding-up and as such, there was no basis to seek an extension of powers to convene such an enquiry.

[12] The applicant impugned the fact that he has been subpoenaed to appear at the enquiry and compelled to produce an array of documents, including his personal bank statements; correspondence which, according to him, relates to unrelated companies; businesses with no clear nexus to the companies in liquidation. According to the applicant, these subpoenas are overbroad, clearly a fishing expedition, and have no foundation in respect of the companies' affairs. From the applicant's perspective, the liquidators are evidently abusing their position as provisional liquidators, particularly given that their appointment may be imminently discharged.

[13] The applicant asserted that a stay of the enquiry was therefore necessary. The alleged debt of Standard Bank should not have been taken into consideration for purposes of obtaining the *ex parte* orders. Further, given that the liquidators approached the court on an *ex parte* basis, they had a heightened duty to disclose all material facts to the court. Insofar as they failed to do so,

that will constitute a further ground of abuse and be the basis for setting aside the order.

[14] To confirm the alleged unlawfulness of the enquiry, the applicant stated that he first needed access to the papers filed in the *ex parte* applications. The applicant submitted that he was entitled to those papers to the extent that they materially affect him as a person subpoenaed to appear at the enquiry and in his capacity as the sole director of the companies. Absent such access, he contended that he would be required to attend the enquiry without being able to determine the lawfulness of its constitution. Accordingly, the applicant requested the application papers from both the liquidators and the commissioner, asserting that the respondents had identified no prejudice resulting from their disclosure. He therefore prayed that the application be granted in accordance with the relief sought, as set forth in paragraphs 1 and 2 of this judgment.

The respondents' case (liquidators)

[15] The liquidators opposed the applicant's application. They contended that, following their appointments, they investigated the companies' affairs and discovered transactions that merit serious concern. Firstly, they identified a very substantial volume, both in number and in value, of fund transfers effected among the companies and other entities controlled by the applicant. According to the liquidators, substantial transfers took place during periods when the companies made no payments to their major creditors, notwithstanding their obligations to do so and despite the applicant's assurances that such payments would be forthcoming.

[16] The liquidators noted that no apparent commercial explanation for these transfers was provided, and they intend to investigate these payments,

including whether the companies hold claims against the recipients. Secondly, the liquidators assert that they found evidence suggesting that some of the companies may have transferred their restaurant businesses to different entities, including one possibly under the control of the applicant. They seek to determine the causa and commercial basis for these transfers, including whether they were effected for value and what had become of the revenue. These investigations may also uncover claims held by the companies.

[17] The liquidators asserted that before they decided to apply for the convening of s 417 enquiries, they considered the information they had at their disposal; they considered that further investigation may lead to claims by the companies; they took advice; they factored in the financial ramifications; and reflected on their duties as liquidators. According to them, they determined that the costs of the inquiries were necessary and worthwhile, may potentially be recouped through the recovery of claims, and would eventually advantage creditors; for that reason, they would be sought as costs in the winding up of the companies. They also decided that, given the facts, they were required to proceed without delay and filed the necessary application. Consequently, the court granted the s 417 orders on 5 June 2026.

[18] The liquidators also applied confidentially to the commissioner to issue subpoenas in respect of individuals they have identified at this stage as potentially helpful with their investigations. They identified the applicant as a person who could potentially provide assistance. As the sole director of the companies, they observed that the applicant must possess knowledge of the companies' dealings, which the liquidators intend to investigate.

[19] Moreover, they assert that the applicant appears to have personally received and confirmed certain transfers of funds. The records that the

liquidators required the applicant to bring to the enquiries included records pertaining to the companies and other entities controlled by the applicant that appear to have been involved in the transfers of funds the liquidators wish to investigate; records of entities that may have acquired the companies' restaurant operations; and the applicant's personal bank statements. Pursuant to the request, the commissioner issued the subpoenas. The liquidators applied for the dismissal of the applicant's application with costs, including the cost of counsel on scale C.

Issues to be determined

[20] From the above discussion, this Court had to determine three issues in dispute, *Firstly*, whether it is permissible in law for the provisional liquidators, the respondents herein, to bring an application under s 417 read with s 418. If so, whether their application was an abuse of process. *Secondly*, whether the s 417 application documents that served before Sher J when the *ex parte* order under s 417 was granted should be provided to the applicant. *Thirdly*, the question arises as to whether the court should grant an interdict staying the s 417 enquiry.

The applicable principles

(a) The scope of ss 417 and 418 of the Companies Act

[21] Before addressing these disputed issues, I deem it proper to consider the principles distilled over the years relevant to insolvency inquiries that apply to the present application. The necessity in bankruptcy proceedings for a means whereby liquidators or trustees can investigate the financial position of the insolvent or insolvent company has long been recognised.¹ A legislative basis for holding such enquiries has been part of South African law for over 150

¹ *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 544 (SCA) para 20.

years. Such enquiries were made available in the case of companies in 1862 and were first imported into South African legislation in 1868.² They have remained part of our law ever since. The Constitutional Court has affirmed the constitutional legitimacy of such provisions.³

[22] Section 418, read with s 417, of the Companies Act provides that, where a company in liquidation is unable to pay its debts, an application may be made to the Master for an examination or inquiry relating to the affairs of the company. The primary purpose of a s 417 inquiry is to allow liquidators to gather information to assist them in discharging their duties to wind up the company.⁴ In consequence of the information revealed at an enquiry, offences or irregularities, if any, and dishonest conduct of the affairs of the company are exposed.⁵ The acquisition of information may also lead to the recovery of assets or funds for the benefit of the company and its creditors.⁶

[23] Section 417(1) delineates the permissible scope of the enquiry.⁷ Any person who is known or suspected to have in their possession any property of the company, or 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 such an enquiry is extremely wide. Section 417 provides a procedure whereby, in certain circumstances, a person may be brought before the Court or the Master; it does not determine rights or impose obligations other than the obligation to attend the examination.⁸

² *Roering NO and Another v Mahlangu and Others* Fn 1, para 20.

³ *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC).

⁴ Joubert et al *The Law of South Africa* 3rd edition volume 6-part 3 (LAWSA) para 85.

⁵ *Papiyana & others v Master of the High Court & others* [2010] JOL 26559 (GSJ) para 17.

⁶ See *Other Bester & others NNO* 1996 (2) SA 751 (CC) at 767G and *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* at 1057G.

⁷ *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA) para 21.

⁸ *Shapowloff v Stirling Henry Ltd* 1972 2 NSWLR 691 CA (NSW) 693.

[24] The Master or the Court may appoint a commissioner to conduct an enquiry. That is what occurred in this matter: the Court appointed the seventh respondent, Advocate C Morgan, as the commissioner to conduct the enquiry. Upon appointment, the commissioner is empowered to summon witnesses and require the production of documents. This is precisely what happened here. The commissioner summoned the applicant to appear before the inquiry on 30 and 31 July 2026, and to produce the relevant document. The applicant now seeks to impugn those summonses and the constitution of the enquiry. A person summoned to an enquiry is entitled to legal representation and to be furnished with a copy of their evidence. A witness is obliged to answer any question put to them, but incriminating answers are not admissible in evidence against them in later criminal proceedings.⁹

[25] In *Bernstein & others v Bester & others NNO*,¹⁰ the Constitutional Court noted that Courts in many foreign jurisdictions have recognised the (potentially) oppressive nature of a s 417 type enquiry, while at the same time pointing out that there is a need for a speedy process through which the liquidator is enabled to obtain the necessary information about the company's affairs and dealings, and to trace the whereabouts of assets and possibly recover some assets for the financial benefit of creditors. The Court added that courts normally exercise control over the enquiry in two ways. First, courts have scrutinised applications to hold the enquiry. Second, courts have intervened to prevent the oppressive or unfair conduct of proceedings in the enquiry itself. The Court explained the purpose of the s 417 enquiry and stated as follows:

⁹ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 157.

¹⁰ 1996 (2) SA 751 (CC).

‘As I have endeavoured to show in this judgment, the very purpose of the proceedings under sections 417 and 418 of the Act is in order to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it cannot get from its erstwhile brain and other sensory organs or other persons who have a public duty to furnish such information but are unwilling or reluctant to do so fully and frankly.’¹¹

[26] I emphasise that the duty to attend and give evidence at the enquiry forms part of the responsibility to account to shareholders and creditors for the failure of the business, a responsibility inherent in the use of companies to raise money from the public and to conduct business on the basis of limited liability.

[27] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,¹² the Constitutional Court observed that 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 the company’s 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. Importantly for present purposes, the Court noted that when raising funds and trading with the protection of not being personally liable for company debts, the company officials implicitly undertake to submit to such enquiry and effectively waive in advance any claim not to answer questions of an incriminating kind that relate to their management of the company's affairs.

[28] There exists considerable support for the contention that, in particular, directors and others concerned with the management and affairs of a failed company all have a duty to creditors and shareholders to provide a candid, full,

¹¹ At para 121.

¹² 1996 (1) SA 984 (CC) at 1117.

and truthful account of their stewardship.¹³ A prospective examinee at a proposed enquiry has no right to receive proper notice of the liquidator's application to the court.¹⁴ However, an examinee who becomes aware of the application or that an order has been made has locus standi to oppose the application or to move to have the order set aside.¹⁵ It is for the prospective examinee to establish facts that will entitle him or her to relief. However, the grounds on which he may validly seek to resist an order are very narrow.

(b) Confidentiality

[29] Section 417(7) of the Companies Act provides that any examination or enquiry conducted under this section or s 418 along with any associated application, shall remain private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise. The default position for s 417 enquiries are private and confidential. Section 417(7) operates to deny all persons access to the application and any documents accompanying it and to the examination or enquiry itself, the record of it and to any books or papers produced at it.¹⁶ However, a witness is entitled, at his own cost, to a copy of the record of his own evidence in terms of s 418(4).

[30] Accordingly, prior to his interrogation, whether by the court or, as the case may be, the Master under s 417 or at a commission constituted in terms of s 418, a person summoned has no access to the application and cannot compel discovery of documents in the possession of the applicant or the commissioner, subject however to any direction in terms of s 417(7).¹⁷

¹³ *Spedley Securities Ltd v Bond Corporation Holdings Ltd* (1990) 1 ACSR 726 SC (NSW) at 738.

¹⁴ *Friedland and Others v The Master and others* 1992 (2) SA 370 (WLD).

¹⁵ *Ex parte Liquidators Ismail Suliman & Co (Pty) Ltd* 1941 WLD 33.

¹⁶ *Kotze v De Wet NO and Another* 1977 (4) SA 368 (T) at 375.

¹⁷ *Goodman And Others v Druker NO* 1961 (4) SA 161 (W).

[31] The Court possesses the authority to revoke confidentiality in the liquidators' s 417 applications. The Court or the Master may lift the confidentiality veil if it appears that, without access to the application, the examinee will be unfairly prejudiced in the conduct of his opposition or in his application to have the s 417 orders set aside. The proposed examinee must demonstrate that he has an arguable case to which the material is relevant. Even if he shows an arguable case, the proposed examinee must also show that the material sought will be, or at least ought to be, relevant to that arguable case, and point to the material's relevance to show that he will be unfairly prejudiced if it is not disclosed. Simply, there must be a genuine, articulable basis for challenging the confidentiality veil.

[32] Against this backdrop, I turn to consider the applicant's application in light of the disputed issues discussed above. I will discuss the issues in dispute *ad seriatim*.

Is it permissible in law for the provisional liquidators to apply for a s 417 read with s 418 enquiry?

[33] The applicant contended that the liquidators had been provisionally appointed. In the applicant's view, their primary responsibility is to safeguard the assets of the companies for the benefit of the general body of creditors. Accordingly, the applicant asserts that the liquidators had to seek an extension of their powers to convene the enquiry. The applicant submitted that the liquidators herein are clearly abusing their position as provisional liquidators, and they do so in circumstances where their appointment may soon be discharged.

[34] Where an appropriate case is made out, there is good reason to read s 417(1) of the Companies Act as permitting the establishment of an enquiry even

whilst the company is still in provisional liquidation.¹⁸ As Bozalek J noted in *Massyn*, opposition to a final order could result in extended litigation and thereby frustrate the primary purpose of a s 417 enquiry which is to obtain information about the affairs of the company on an expeditious basis so that the liquidators can perform their functions and act in the best interest of the creditors and shareholders.

[35] From the orders issued by Sher J on 05 June 2026, it is evident that the provisional liquidators' powers were extended under, s 386(4)(a) and/or ss 386(4)(i) and 386(5) of the Companies Act, read with item 9 of Schedule 5 of the Companies Act 71 of 2008, to bring the said application and to exercise the powers envisaged in that order relating to the administration of the companies in liquidation.¹⁹ These orders have not been impugned and remain extant.

[36] In general, the powers conferred upon a provisional liquidator are the same powers as are enjoyed by liquidators.²⁰ In other words, a provisional liquidator appointed in terms s 368 of the Companies Act has all the powers of a liquidator, except the power to litigate in the name and on behalf of the company save in so far as the Master may have specifically curtailed such powers.²¹ Section 386(6) of the Companies Act provides that the Master may restrict the powers of a provisional liquidator. The Master may, subsequent to the appointment, relax any restriction imposed by him in terms of s 386(6) of the Act. Thus, the powers of a provisional liquidator depend substantially on the terms of his appointment under s 368 by the Master.

¹⁸ *Massyn v De Villiers N.O and Others* [2021] 3 All SA 578 (WCC) para 10 ('*Massyn*').

¹⁹ Chapter 14 of the Companies Act 61 of 1973, including s 386, continues to apply to the winding-up of insolvent companies under the Companies Act 71 2008 by virtue of s 224(3), read with item 9(1) of Schedule 5 to the Companies Act 71 of 2008.

²⁰ *Ex parte Contemporary Refrigerator (Pty) Ltd* 1966 (2) SA 227 (D) at 229.

²¹ *Ex parte Provisional Liquidators Pharmacy Holdings Ltd* 1962 (2) SA 12 (W) at 15.

[37] The provisional liquidators in *casu* have powers in terms of s 386(1)(e), which include to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors. In my view, this must include the power to apply to the Master or the court for an enquiry to be convened in terms of s 417(1). To exclude provisional liquidators from approaching the court or the Master for such an enquiry merely because their appointment is provisional would be irrational and make no sense.

[38] Significantly, their function is essentially that of a receiver *pendent lite*, i.e., to assume control and manage the administration of the property and affairs of the company pending the appointment of the liquidator.²² As Bozalek J noted in *Massyn*, I also do not understand the role of the provisional liquidator to be a passive one, i.e. merely limited to preserving the assets of the company pending the appointment of a permanent liquidator. In *Ex parte: Klopper NO: in re Sogervim SA (Pty) Ltd*,²³ Boshoff J stated:

‘When a provisional or final winding-up order is made the circumstances or the affairs of a company may be such that it is in the interest of the company and the general body of creditors *that some other person than the Master should as soon as possible take all the property into his control and custody and attend to urgent matters for the preservation of the property and the beneficial winding-up of the company.* To meet such a situation the Master has the power to appoint a provisional liquidator as soon as a provisional or final winding-up order is made and he then holds office until the appointment of a liquidator; (sec. 124 (2)). The Master, in appointing a provisional liquidator, may, under sec. 130 (4), restrict his powers. The extent to which his powers will be restricted will depend on the circumstances of each particular case.’ (emphasis added)

²² See *Henochsberg on the Companies Act* vol 1 at 790.

²³ 1971 (3) SA 791 (TPD) at 796G-797A.

[39] It is noteworthy that there is no indication that the Master limited their powers in terms of s 386(6) so as to reserve the right to apply for a s 417 and s 418 enquiry exclusively to the final liquidators. Evidently, the first to the sixth respondents would be failing in their duties were they to neglect to make use of the elaborate machinery provided by the Companies Act under which they were appointed.²⁴ Consequently, the application by the provisional liquidators to the Court for the extension of their powers to order an enquiry in terms of s 417 read with s 418 was legitimate and cannot be faulted.

[40] The provisional liquidators pointed out that they identified significant volume, in both number and value, of fund transfers apparently amongst the companies as well as other entities controlled by the applicant. They noted significant fund transfers during periods when the companies made no payment to their major creditors, notwithstanding the applicant's assurances to make such payments. In my view, the suggestion that they abused their powers is unfounded and must be rejected. I now turn to consider the second disputed issue.

Should the ex parte application documents be provided to the applicant?

[41] In these proceedings, the applicant asks the court to exercise its powers to lift confidentiality in the liquidators' s 417 application. At the hearing of this application, Mr Sievers SC, counsel for the applicant, submitted that because there is no evidence that any creditors other than Standard Bank exist, and because there is no evidence that the issue of prescription was disclosed when the *ex parte* orders were secured, the *ex parte* orders fall to be set aside. Counsel submitted that because the orders fall to be set aside, the papers giving rise to those orders should be disclosed. Absent such disclosure, the argument went, the applicant will be hampered in his rescission application, and an injustice

²⁴ *Papiyana & others v Master of the High Court & others* [2010] JOL 26559 (GSJ) para 21.

will be occasioned both towards the applicant and in the administration of justice. I respectfully disagree with this proposition.

[42] From the outset, I must emphasise that the object of the procedure in terms of s 417 is to conceal from the proposed examinee the subject matter of the examination, which information, if disclosed to him or her, might enable him or her to defeat or to stultify the process of the examination itself. As foreshadowed above, the default position is confidentiality. As Ms Reynolds, counsel for the respondents, noted, the reasons for the confidentiality have been explained as follows:

‘There is good reason for the preservation of secrecy. This has long been recognised, both here and in England. If not only the fact that an enquiry was to be held but also the reasons why such enquiry was necessary and the matters which were to be inquired into were to be made public or to be disclosed to the very people who were to be called to testify at the enquiry, because it is their dealings with the company which is to be the subject of the enquiry, it could indeed stultify not only the liquidators' task, but the enquiry itself and I would think it is self-evident that such persons should not be apprised of what has been placed before the Court in support of the application for the holding of the enquiry.’²⁵

[43] The applicant implored the court to exercise its power to revoke confidentiality in the liquidator's application and to furnish him with copies of that application to enable him to impugn that order in Part B of his application. As discussed above, a court or the Master may direct the lifting of the confidentiality veil to enable the examinee to inspect the documents giving rise to the inquiry. The court will order such disclosure if it appears that, without access to the application, the proposed examinee will or may be unfairly prejudiced in conducting his opposition to the order or in his application to have it set aside.

²⁵ *Merchant Shippers SA (Pty) Ltd v Millman* 1986 (1) 413 (C) at 418B-C.

[44] However, the proposed examinee must present evidence before the court demonstrating that he has an arguable case to which the material is relevant. The mere fact that the application was before the court or the Master and has not been viewed by the proposed examinee does not, by itself, constitute good reason to breach confidentiality. If the examinee shows good reason for requiring disclosure of the application for the order, disclosure will be ordered. However, our courts have emphasised that if, in the proper exercise of his duties, a liquidator approaches the Court with a request that a commission of inquiry be appointed on the grounds that it is necessary to his investigation into the affairs of the company, the Court will necessarily be influenced by his views.²⁶

[45] Ms Reynolds correctly pointed out, there are two interconnected reasons the court takes the approach of being largely guided by the liquidator's attitude. Firstly, liquidators have obliged to investigate the company, and secondly, they are required to carry out their duties honestly and professionally. A liquidator owes duties both to the company to ensure maximisation of asset, realisation and minimisation of liabilities to the creditors to see that they minimize their loss and receive the most advantageous dividends. Those duties must be executed with professional skill, care and diligence.²⁷ The court will therefore assume, unless there are compelling indications to the contrary, that the liquidator's assessment of what is advisable regarding the confidentiality of the inquiry has been conducted responsibly, fairly and with due diligence. To this end, King AJ, as he then was, in *Merchant Shippers SA (Pty) Ltd v Millman No and Others*(*supra*) stated:

²⁶ *Merchant Shippers SA (Pty) Ltd v Millman No and Others*, 1986 (1) SA 413 (C) at 416.

²⁷ See *Concorde Leasing Corp (Rhodesia) Ltd v Pringle-Wood NO* 1975 (4) SA 231 (R) at 234G-235A.

‘The Court will be largely guided by the attitude of the liquidator. Whether or not he is correctly designated an officer of the Court, he performs certain statutory functions, and the Court would in my view be right to assume that he was acting responsibly and fairly. The difficulties with which his task confronts him need hardly be emphasised. In the nature of things, the affairs of a company which has been placed in liquidation are often not readily diagnosed. The liquidator must strike a balance between on the one hand a cautious approach to the further expenditure of company funds and on the other a proper exercise of his function to recover in the interest of creditors monies due to the company.’²⁸

[46] The gravamen of the applicant’s case is the stay of the enquiry and the upliftment of the confidentiality veil to enable him to prepare his case in Part B of the application to rescind the order establishing the enquiries. As appears from the above discussion, before the upliftment of confidentiality is warranted, a witness, in this instance, the applicant, must place material before the Court demonstrating that he already has sufficient grounds for an arguable case to set aside the s 417 enquiry. A Court will not afford a witness whose case for setting aside is merely theoretical or speculative access to confidential material in order to establish a factual basis for such a case. The mere fact that an order in terms of s 417 has been granted on a confidential basis does not, in itself, justify the upliftment of confidentiality.

[47] In this matter, the applicant has failed to place material before this Court demonstrating that he has an arguable case to set aside the s 417 enquiry. The applicant asserts that the jurisdictional requirements of s 417 were not met because the companies were all able to pay their debts at the time the s 417 applications were made and the orders issued. Surprisingly, when the applications were made to place these companies under provisional liquidation, those applications were not opposed. Moreover, the defence that the companies were all able to pay their debts was not at all raised or placed before the court.

²⁸ At 417H-I.

[48] Furthermore, the applicant hinges his case on the grounds that the companies have no financial obligations to Standard Bank because the bank's claim has prescribed. The bank's position is that prescription was interrupted by acknowledgment of debt. In other words, the bank refutes that its claim against the companies has prescribed. Clearly, this court cannot conclude from this information that the applicant has presented an arguable case that the bank's claim has indeed prescribed.

[49] Moreover, the liquidators stated that even assuming in the applicant's favour that the bank's claims have prescribed, none of the companies are able to settle their debts during the winding up process. Most importantly, the applicant's case is premised on speculation and conjecture. The applicant asserts that if the liquidators relied on the bank's claim in the s 417 applications without disclosing that the claims are disputed, then the s 417 orders were obtained unlawfully, and this constitutes an abuse of process. As the respondents contended, this assertion is patently speculative and does not establish an arguable case that the applicant will be able to rely on non-disclosures or misrepresentations in the s 417 applications as a basis to set the orders aside.

[50] Furthermore, the applicant requested access to the s 417 applications from the duly appointed commissioner, the seventh respondent. In response, the commissioner advised the applicant clearly and unequivocally that the factors he relied upon, including the jurisdictional requirements of s 417, were before the Court when the orders were granted. As already discussed, a Court will not waive confidentiality to enable a witness to fish for a case. The applicant is evidently seeking to construct a basis for Part B of his application, and his request for access amounts to an impermissible fishing expedition.

[51] In addition, the applicant argued that the subpoenas served upon him are abusive because they are broad in their scope. This proposition, in my view, is devoid of substance. The applicant serves as the sole director of all three companies and can inherently assist the liquidators in putting together the facts regarding the companies' affairs, including the bank transfers and the alleged sales of the companies' businesses. He is the principal individual not an external party to the company.

[52] The liquidators have explained that they called for documents relating to entities beyond the companies themselves because of the multiple transfers of funds between entities and the alleged transfer of the companies' restaurant businesses. I have no reason to doubt their explanation. Consistent with the trite principle, this court will be largely guided by the views of the liquidator. The applicant's contention that the inquiry will invade his right to privacy is without merit. Given that he is the sole director of the companies and considering the matters the liquidators seek to question him about, his participation in the inquiry does not implicate his right to privacy considering the principle espoused by the Constitutional Court's decision in *Ferreira v Levin (supra)*.

[53] The applicant is called to the s 417 inquiry to account for his stewardship of the companies. In my view, the applicant, as the sole director of the three companies, should not complain about being called to account for the stewardship of his companies. Consequently, the applicant has not crossed the threshold necessary for the court to lift confidentiality and allow him access to the s 417 application.

[54] To this end, I share similar sentiments expressed by King AJ in *Merchant Shippers SA (Pty) Ltd v Millman No And Others (supra)* that, in light of the guidelines laid down over many years, one should not relax the ordinary practice, namely that the enquiry and the documents placed before the Court to justify the holding of such an enquiry are necessarily private and not open to disclosure to interested parties. Accordingly, the applicant's application for access to the s 417 applications must fail.

Should the s 417 enquiry be stayed?

[55] As detailed above, the inquiry was scheduled to begin on Thursday, 30 July and continue on 31 July 2026. The applicant sought a stay of the enquiry pending the determination of his application to set the enquiry aside in Part B of his application. To this end, the applicant sought an interim interdict pending the outcome of the Part B application. Therefore, the applicant had to establish at least a *prima facie* right to succeed in setting aside the application. The applicant also had to show an apprehension of irreparable harm if interlocutory relief is not granted. The applicant also had to show that the balance of convenience is in his favour.

[56] I do not intend to repeat the reasons I have articulated above; however, there is no basis to grant interlocutory relief. The applicant has not established any apprehension of harm if interlocutory relief is not granted. His privacy and reputation will be protected by the confidentiality of proceedings. He is entitled to legal representation at the inquiry, and the commissioner's role includes protecting witnesses, including the applicant, from abuse. The proceedings

before the commissioner will be conducted in accordance with the fundamental principles of justice.

[57] I share the view that the balance of convenience favours the liquidators. They have established all the practical arrangements necessary for the enquiries to proceed on the scheduled dates. Any delay in the commencement of the inquiry would prejudice the companies and their creditors. The companies are in provisional liquidation, and assets, including assets held by third parties, may be dissipated if the enquiry is postponed. Costs already incurred in preparing for the enquiry will be wasted. Having regard to the conspectus of all the facts placed before this Court, the applicant has not met the requirements for interim interlocutory relief, and this application must accordingly be dismissed.

Order

[58] Given all these considerations, I granted the following order:

- 58.1 The applicant's application for the stay of the commission of enquiry in terms of s 417 read with s 418 of Act 61 of 1973, as well as the request for the s 417 court application papers under case numbers 2026-125892, 2026-125893 and 2026-125894, are hereby dismissed.
- 58.2 The applicant is ordered to pay the costs of this application on a party-and-party scale, including counsel costs on scale B.

LEKHULENI JD
JUDGE OF THE HIGH
COURT

APPEARANCES

For the Applicant: Adv Sievers SC

Instructed by: Enderstein Malumbete Inc

For the first to the sixth Respondents: Adv Reynolds

Instructed by: Edward Nathan Sonnenberg Inc