Republic of South Africa

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

Case number: 2488/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 10 May 2017
Judgment: 22 May 2017

In the matter between:

BRAAM SWART	First Applicant
AND SIX OTHERS	Second to Seventh Applicants
and	
MAGISTRATE A FOURIE	First Respondent
AND SEVEN OTHERS	Second to Eighth Respondents

JUDGMENT

BINNS-WARD J:

[1] The applicants in this matter were subpoenaed, in terms of s 414 of the Companies Act 61 of 1973 ('the Act'), to appear for examination at a creditors' meeting of Silver Falcon Trading 84 CC (in liquidation). They were also required by the subpoenas to produce various categories of documentation.

[2] The meeting in question had been scheduled to take place on 13 February 2017, but the applicants applied for and obtained an interdict prohibiting their examination pending the determination of the current application. Costs in the interim interdict proceedings were stood over for determination in the current proceedings.

[3] The applicants seek two things in these proceedings. Firstly, to have the subpoenas set aside. In this regard they seek the setting aside, not only of the subpoenas served on themselves, but also those served on the fourth and fifth respondents.[1] The fourth respondent was the corporation in liquidation's banker and is also the bank at which the first to fourth applicants hold other banking accounts. The fifth respondent is an individual who purchased a restaurant business from another close corporation of which the first and second applicants hold the controlling interest. Secondly, and, in a sense, more fundamentally, the applicants seek to have any examination to which they might nevertheless be subject in terms of s 415 of the Act stayed for so long as the liquidators of the corporation are represented by the same legal representatives as those that currently also represent the petitioning creditor.[2] The first head of relief bears on an alleged failure by the first respondent to have exercised his authority in the manner required by the Act. The second head of relief is related to how the applicants apprehend the examination process might be used for improper purposes. The first goes to what has already happened, and the second to what it is feared could happen.

[4] The first head of relief is sought on two principal footings: that the presiding officer (a magistrate), who has been joined as the first respondent in the proceedings, issued the subpoenas – which had been drafted by the liquidators' attorneys – without proper cause and without having applied his mind; and that they were in any event overbroad.

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[1] In a draft order handed in during the applicants' counsel's argument the relief sought was extended to include the setting aside of the subpoenas served on the sixth and seventh respondents.

[2] The second head of relief was claimed in terms of paragraph 3 of the notice of motion, Counsel for the applicants indicated at the commencement of their argument, however, that they considered the relief framed there to have been too widely stated. In a draft order that they put in it was reformulated as follows: '[that t]*he interrogation in the insolvency of Silver Falcon not proceed for as long as the liquidators are represented by the current or, should they cease to act for it, past attorneys and counsel of Bella Rosa Investment Holdings (Pty) Ltd.*'.

The second head of relief

[5] It is convenient to deal first with the second head of relief. The application for that relief is founded on the contention that, in seeking to procure the examinations on the basis adumbrated in the subpoenas, the liquidators acted pursuant to the dictates of the petitioning creditor and its attorneys, rather than upon an independent and impartial assessment by themselves of the appropriate means to discharge their statutory duties. It is alleged that the liquidators have thereby made themselves a mere instrument of the petitioning creditor. The applicants aver that in the circumstances they apprehend that, for so long as the liquidators are represented by the petitioning creditor's attorneys, any interrogation in terms of ss 414 and 415 will be misused to harass and oppress them in furtherance of the hostility and animosity that Mr Lambertus van Zyl (the moving spirit behind Bella Rosa Investment Holdings (Pty) Ltd, the petitioning creditor) and his representatives have allegedly shown towards the applicants in the course of the winding-up and related pending litigation. The applicants also contend that while the liquidators use the services of the petitioning creditor's attorneys any examinations that take place under the statutory provisions are likely to be used to improperly further the petitioning creditor's position in respect of the other litigation.

[6] The business of the corporation was a restaurant. The restaurant was operated from premises leased from Bella Rosa.

[7] To contextualise the applicants' allegations about the other litigation it should be recorded that the compulsory winding up of the corporation was ordered pursuant to an application by Bella Rosa, in terms of s 344(f) of the Act, read with the relevant cross-referencing provisions of the Close Corporations Act 69 of 1984. The application for the liquidation of the corporation arose out of its failure to pay the rent claimed in terms of the lease. The rental fell to be calculated with reference to the square meterage of the leased area measured in terms of 'the SAPOA method'. The corporation opposed Bella Rosa's application for a provisional winding-up order on the grounds that it disputed the measurement of the leased area and, consequently, also the extent of its alleged liability in respect of rent. The court found, however, that the corporation had failed to show that Bella Rosa's claim was disputed bona fide and on reasonable grounds, and placed it in provisional liquidation. At some stage prior to the bringing of the liquidation proceedings the corporation had instituted an

action for a declaratory order that Bella Rosa had over-recovered rent from it on the basis of a misrepresentation of the extent of the leased premises and for repayment of the amount so over-recovered. Those proceedings, which were not prosecuted with perceptible vigour, were still pending when the winding-up intervened.

[8] Furthermore, the members of the corporation (the first to fourth applicants in the current application) had bound themselves in favour of Bella Rosa as sureties for, and co-principal debtors with, the corporation in respect of the latter's liability for rent under the lease. Also pending is an action by Bella Rosa against the first to fourth applicants for payment of the amount of rental in which the corporation was alleged to be in arrears. The action is being defended on the same grounds as those on which the aforementioned action by the corporation for declaratory relief was instituted.

[9] It also bears mention, by way of background, that Bella Rosa had, prior to the institution of the winding-up proceedings, applied for and obtained an order evicting the corporation from the leased premises. It was alleged that the corporation's right to occupy the premises had been ended upon the cancellation of the lease by Bella Rosa because the rent had not been paid. The court (per Ndita J) also granted an order perfecting the landlord's tacit hypothec. Notwithstanding its characterisation of the institution of the ejectment application as a repudiation of the lease, which it said it had accepted, the corporation remained in occupation of the premises and applied for leave to appeal against the orders granted against it.

[10] The application for leave to appeal came up for hearing more than nine months after the orders against the corporation were made. The delay was as a result of the indisposition due to ill health of the judge who had made the orders. Leave to appeal against the eviction order was refused on the grounds that the proposed appeal enjoyed no prospects of success in the face of the corporation's acceptance of what it considered to have been Bella Rosa's repudiation of the lease. Leave to appeal was granted, however, against the order perfecting the hypothec; see *Bella Rosa Investment Holdings v Silver Falcon Trading 84 CC* [2016] ZAWCHC 91 (28 July 2016). The leave so granted was subject to a condition requiring the corporation to furnish Bella Rosa with security in the sum of R125 000. The prosecution of the appeal is also a pending matter. And the position concerning the amount of R125 000

that was paid by the corporation's attorneys to Bella Rosa's attorneys by way of security in lieu of the hypothec appears to be contentious in the winding-up.

[11] Bella Rosa is, or was, represented in all of the aforementioned proceedings, and continues to be represented in the winding-up process, by the same set of legal representatives. The corporation and its members have also been represented in all the matters by the same firm of attorneys, of which a certain Mr Jacques Theron is the proprietary practitioner. Bella Rosa's legal representatives are the same persons as those engaged by the liquidators in opposing the current application and for the purposes of the intended interrogation.

[12] The applicants have alleged that the affidavits in some of the other litigation that I have described were characterised by '*a remarkable display of aggressive, vexatious drafting, motivated by what is a clearly-held antipathy towards the members and Theron held not only by Van Zyl, but by those preparing the affidavits*'. The applicants' counsel listed 55 instances of the allegedly 'aggressive, vexatious drafting' in their heads of argument. It is unnecessary to recite them. Suffice it to observe that whilst the inclusion of many of them might be regarded, from an objective perspective, as reflecting varying degrees of oversensitivity, it would nevertheless be fair to allow that it is evident that Bella Rosa and its legal representatives adopted a conspicuously robust and no holds barred approach to the litigation.

[13] The applicants' heads of argument also identified 11 passages in the various sets of papers delivered by Bella Rosa containing explicit accusations of dishonest and unprofessional conduct by Theron. It has not been necessary to best of my knowledge for any court to pronounce on these allegations, and I am not called upon to do so in these proceedings, but their very existence does bear out the applicants' contention that the proceedings have been marked by an exceptional degree of animosity and extraordinary ad hominem recriminations.

[14] The applicants also drew attention to the circumstances in which the ejectment order was executed after the application for leave to appeal against it had been refused. The ejectment was carried out by the sheriff, acting on the instructions of Bella Rosa's attorneys, on the very day that the application was refused. It was effected while the restaurant was serving the evening meal to its customers. It

appears that it was attended by a heated confrontation at the scene between the respective attorneys of Bella Rosa and the corporation. So confrontational was the event that the police were called upon to assist in the eviction. I am neither called upon, nor indeed in a position, to determine the rights and wrongs concerning the contentious and contested events attending the eviction, but it must also be allowed, I think, that the circumstances in which it was effected demonstrated notable animus by Van Zyl and/or Bella Rosa's attorneys against the members of the corporation.

[15] Attorney Theron is the fifth applicant. He was also subpoenaed to appear for examination; as was the external accountant to his firm, who is the sixth applicant. The seventh applicant was a former chef at the restaurant. He was subpoenaed in error. The intention was to subpoena a person with a similar name who had been the front of house manager.

[16] Having described the factual backdrop it is time now to look at the statutory context in which the impugned subpoenas were issued.

[17] Section 414 of the Act provides:

Duty of directors and officers to attend meetings

(1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-

(a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorised him in writing to absent himself from that meeting;

(b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.

(2) The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-

(a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

(b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is

> referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.
>
> (3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

[18] As mentioned, the first to fourth applicants are the erstwhile members of the corporation. They are thus obliged in any event to attend the meeting if required by the liquidator in writing to do so, and to submit to interrogation, if so required, 'concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the co[rporation]'; see s 414(1). The subpoenas that have been served on them, however, also require them (in terms of s 414(2)) to produce an extensive range of documentation, and thereby impose upon them additional obligations going beyond those provided in terms of s 414(1) of the Act.

[19] The members of the corporation do not suggest that they may not be legitimately examined in terms of the provisions; their challenge is founded on their apprehension that the examination on the basis of the issued subpoenas and in circumstances in which the liquidators have engaged Bella Rosa's legal representatives for the purpose would be unfair, vexatious and oppressive. In the context of the liquidators allegedly having been unable thus far to obtain from the members a coherent set of accounting records in respect of the corporation of the nature required in terms of s 56 of the Close Corporations Act, the liquidators unarguably have a basis to pursue an examination. Such an examination might also be justified to explore any difference between the state of affairs of the corporation found by the liquidators upon assuming office and that described by the members in the answering papers in the winding-up proceedings. I refer to these matters in passing, not to suggest by mentioning them that they are the only matters that the liquidators could consider worthy of investigation.

[20] Section 415 of the Act provides insofar as currently relevant:

> **Examination of directors and others at meetings**
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> (1) The Master or officer presiding at any meeting of creditors of a company which is being wound-up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414 (2) *(a)*, and the Master or such officer and any liquidator of the company and any

creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding-up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(2) In connection with the production of any book or document in compliance with a subpoena issued under section 414 (2) *(b)* or the interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness subpoenaed to produce a book or document or give evidence in a magistrate's court shall apply: Provided that a banker at whose bank the company concerned keeps or at any time kept an account, shall be obliged, if subpoenaed to do so under section 414 (2) *(b)*, to produce-

(a) any cheque in his possession which was drawn by the company within one year before the commencement of the winding-up; or

(b) if any cheque so drawn is not available, any record of the payment, the date of payment and the amount of the cheque which may be available to him, or a copy of such record, and shall, if called upon to do so, give any other information available to him in connection with any such cheque or the account of the company.

(3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or officer presiding at such meeting: Provided that the Master or officer presiding at such meeting may only oblige the person in question to so answer after the Master or officer presiding at such meeting has consulted with the Director of Public Prosecutions who has jurisdiction.

(4) The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section, has made to the liquidator or his agent a statement which has been reduced to writing, or has delivered a statement in writing to the liquidator or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and, if then adhered to by him, shall be deemed to be evidence given under this section.

(5) ...

(6) Any person called upon to give evidence under this section may be represented at his interrogation by an attorney with or without counsel.

(7) …

[21] The statutory provisions are intended to assist liquidators and creditors in effectively achieving the objects of a compulsory winding-up of a corporation that is unable to pay its debts – the identification and realisation of the corporation's assets for the redemption of its liabilities in accordance with the rules of insolvency, and the reporting by the liquidator of the cause(s) of its failure and any delinquencies on the part of its management that might have played a part. The effective achievement of those objects is obviously in the interests of the creditors and also in the public interest.[3] Provision for enquiries of this nature has a long pedigree and it is mirrored in the statutory regimes of other countries to whose law comparative reference is commonly made in our company law.[4] It will be noted from the text quoted in the preceding paragraph that s 415 contains a number of inbuilt protections for examinees.

[22] Speaking of enquiries in terms of ss 417 and 418 of the Act, Ackermann J observed in *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449, at para. 16 (e)-(k), that –

(e) It is only by conducting such enquiries that liquidators can:

(i) determine what the assets and who the creditors and contributories of the company are;

(ii) properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.

(f) 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.

(g) Not infrequently the very persons who are responsible for the mismanagement of and depredations on the company are the only persons who have knowledge of the workings of the company prior to liquidation (such as directors, other officers and certain outsiders working in collaboration with the former) and are, for this very reason, reluctant to assist the

[3] For a more detailed statement of the duties of liquidators and the objects of such enquiries or interrogations see *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1996 1 BCLR 1 (CC) at paras. 122-124 and *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449, at paras. 15-16. (There is no difference for relevant purposes between ss 414 and 415 and ss 417 and 418, respectively, of the Act.)

[4] See *Ferreira* supra, at paras. 115-120 and *Roering NO and Another v Mahlangu and Others* 2016 (5) SA 455 (SCA), at para 20 and note 5.

liquidator voluntarily. In these circumstances it is in the interest of creditors and the public generally to compel such persons to assist.

(h) The interrogation is essential to enable the liquidator, who most frequently comes into the company with no previous and finds that the company's records are missing or defective, to get sufficient information to reconstitute the state of knowledge that the company should possess; such information is not limited to documents because it is almost inevitable that there will be transactions which are difficult to discover or understand from the written materials of the company alone.

(i) The liquidator must, in such circumstances, be enabled to put the affairs of the company in order and to carry out the liquidation in all its varying aspects.

(j) The interrogation may be necessary in order to enable the liquidator, who thinks that he may be under a duty to recover something from an officer or employee of a company, or even from an outsider concerned with the company's affairs, to discover as swiftly, easily and inexpensively as possible the facts surrounding any such possible claim.

(k) There is a responsibility on those who use companies to raise money from the public and to conduct business on the basis of limited liability to account to shareholders and creditors for the failure of the business, if the company goes insolvent. Giving evidence at a s 417 enquiry is part of this responsibility. This responsibility is not limited to officers of the company, in the strict sense, but extends also to the auditors of the company.

Those observations hold equally true in respect of enquiries under ss 414-415.

[23] The Constitutional Court's judgments in *Bernstein*, especially that of Ackermann J, afford a comprehensive and learned consideration of the nature and purpose of insolvency enquiries under the Act. The Court was seized of a challenge to the constitutionality of ss 417 and 418. The challenge was advanced on the grounds that the intrusive and potentially draconian effect of the provisions on persons required to submit to interrogation under them were incompatible with various fundamental rights enshrined in the Bill of Rights[5] to a degree that was unjustifiable in a free and democratic society. The challengers were the partners and certain employees of an accounting firm that had been the auditors of the liquidated company. It had become apparent that, notwithstanding the willing and extensive co-operation that the firm had given to the liquidators in the aftermath of the company's failure, the liquidators intended to use the enquiry in part to investigate the viability of holding the auditors liable in negligence and pursuing them for damages. The rights that the challengers alleged were infringed by the provisions were (a) the right to freedom and security of the person, (b) the right to personal privacy, in particular not

[5] Under the Interim Constitution (Act 200 of 1993).

to be subject to seizure of private possessions or the violation of private communications, (c) the right to procedurally fair administrative action, and (d) the right against self-incrimination.[6] The challengers also argued that '[i]nsofar as the mechanism permits the liquidator and the creditors of the company in liquidation to gain an unfair advantage over their adversaries in civil litigation that they would not have enjoyed but for the liquidation of the company, it violates (i) an implied constitutional right to fairness in civil litigation, and (ii) the guarantee of equality.[7]

[24] Save to the extent that the challenge had already been vindicated in the court's earlier judgment in *Ferreira* supra,[8] the provisions were held otherwise not to be incompatible with the Interim Constitution. It is not necessary to go into the detail of the court's reasons for dismissing the challenges.[9] It is enough for present purposes to note that the decision was made in the context of a sensitive consideration of the adversely intrusive and taxing effects that the provisions potentially can have on examinees. The context makes especially significant the Constitutional Court's acknowledgment in several passages in *Bernstein* that, subject to effective controls against their abusive use, the far-reaching effects of the provisions are justified in the public interest and accordingly have to be borne with stoicism by those upon whom they are properly brought to bear.

[25] A proportionate approach is indicated, the more obvious and important the need for investigation in the peculiar circumstances, the more rigorously the provisions can fairly and legitimately be applied.[10] The potential scope for such an enquiry 'is extremely wide'.[11] The Constitutional Court in *Bester* was keenly conscious, however, of the susceptibility of the provisions to be used oppressively and vexatiously for inappropriate or ulterior purposes. The Court, moreover, confirmed

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[6] The allegedly infringing effect on the right against self-incrimination had effectively already been determined in *Ferreira* supra, which had been decided shortly before judgment in *Bernstein* was delivered.

[7] See *Bernstein* para. 12.

[8] Note 3 above.

[9] The challenge that was sustained in *Ferreira* has subsequently been addressed by remediating amendments to ss 415(3) and 415(5) and 417(2)(b) and (c) of the Act.

[10] See, for example, *Bernstein* at paras. 24-25. The judgment in *Bernstein* appears to call into question the assertion by Galgut AJA in *Pretorius v Marais* 1981 (1) SA 1051 (A) that the fact that the information sought might easily be obtained by alternative, less intrusive, means does not affect the legitimacy of a decision to require a witness by subpoena to submit to an examination.

[11] *Roering* supra, at para. 21, and *Pretorius v Marais* supra, at 1063-1065A.

the power and duty of the High Court to intervene in appropriate cases to prevent the abusive application of the examination procedures; the judgment of this court (per Thring J) in *James v Magistrate, Wynberg, and Others* 1995 (1) SA 1 (C) was cited as an example of this type of judicial supervision.[12] It has been observed in this connection that '[t]he more difficult issue lies in determining what constitutes an abuse'.[13] Plainly, the determination will depend on the peculiar circumstances of the given case. It is unlikely to be an abuse if it is apparent that the examination is being used for the purposes contemplated by the statutory provisions.[14]

[26] In *Bernstein*, the Constitutional Court refrained from prescribing how the protocols for judicial supervision should operate. That was matter that it was considered appropriate to leave to the then Supreme Court (which comprised what are now the High Court and the Supreme Court of Appeal) to develop. It is clear from the appeal court jurisprudence to which I shall come presently that the 'quasi-judicial' role of the Master, presiding officer, or commissioner, as the case might be, is regarded as the examinee's primary protection against the abusive, vexatious or oppressive use of the interrogation procedures. It is when that resource of primary protection against abuse fails or when it is shown that it would probably prove to be inadequate that it is appropriate for the court to intervene.

[27] Mr *Woodland* SC, who (together with Mr *Brink*) appeared for the applicants, submitted that the present case was closely comparable to that in *James* supra, which they argued this court should follow; so it is appropriate to dwell on it.

[28] *James* concerned an application by the sole member of a close corporation in liquidation to stay his interrogation at a meeting convened by the liquidator in terms of s 386(1)(d) of the Act. The interrogation was to be funded by the corporation's sole proved creditor, which had been the insurer of a large consignment of books that had been destroyed in a fire at the corporation's premises.

[29] Prior to its liquidation, which had been at the instance of the insurer, the corporation had instituted action against the insurer to enforce payment of its insurance claim. In its plea in the action the insurer had alleged that the fire had been

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[12] *Bernstein* in para. 35.

[13] *Roering* supra, at para. 34.

[14] *Roering* supra, at para. 37.

caused intentionally by the applicant, or by someone acting on his instructions. The insurer prayed for the dismissal of the action with costs on the scale as between attorney and own client. The action had been dismissed after the corporation had failed to comply with an order requiring it to provide security for the insurer's costs in the action. The costs of the action were stood over for later determination. It was common ground that the insurer had incurred attorney and own client costs in a very substantial amount.[15] Prescription not having run, it was still open to the corporation or its liquidator to pursue the insurance claim in fresh proceedings if so advised.

[30] After assuming office, the liquidator received notice from the defendant-insurer that he had been substituted, in terms of rule 15(2), as plaintiff in the action, in which it will be recalled the only undetermined issue was that of costs. The liquidator thereupon promptly gave notice to the insurer of his willingness to consent to an order in favour of the defendant-insurer in respect of the reserved costs; and, moreover, on the most punitive scale on which they had been sought. He did so without any consultation with the member, or the attorneys who had represented the corporation in the action against the insurer. Furthermore, the liquidator was availing of the services of the attorneys who had represented the insurer in the action and in the winding proceedings.

[31] An argument by the liquidator's counsel in *James* that the statutory role of the presiding officer – in that case also a magistrate – was sufficient safeguard against any possible infringement of the examinee's right not to have the examination process used to harass or oppress him did not find favour with the court. It allowed that he had been entitled to the interdictory relief because he had a reasonable perception, on the grounds of the background features that I have outlined, that the liquidator was biased against him. The court considered that the existence of such bias, whether real or only reasonably perceived, was fundamentally inconsistent with a principle that liquidators should be seen to act independently in the interests of both the members and the creditors of the corporation in liquidation. In characterising the impartiality and independence required of liquidators, the court placed considerable stock on the Australian jurisprudence to which the member's counsel had directed attention - in

[15] The insurer had procured evidence on commission from expert witnesses in Europe for the purposes of the trial of the action.

particular the judgment in *Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24, upon which the applicants' counsel in the current matter also placed reliance.[16]

[32] Our courts have confirmed the importance of independence and impartiality by liquidators in the discharge of their duties in other judgments; see, for example, *Standard Bank of South Africa v The Master of the High Court and Others* 2010 (4) SA 405 (SCA), at para. 1. The principle is that liquidators should not, because their fiduciary relationship to the corporation in liquidation, the body of creditors as a whole and the body of members or contributors, ever be in a position in which their personal interests do, or could, put them in conflict with their fiduciary duties. But the notion that actual or perceived bias by a liquidator against a member was sufficient ground to disqualify him or her from interrogating the member was trenchantly rejected by the appeal court in *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A).

[33] In *Jeeva*, it was held by the late Appellate Division (per Harms JA) that *'... the fact that a liquidator has fiduciary duties towards, say, creditors does not mean that he can always be evenhanded. He is obliged, should the occasion arise, to dispute a creditor's claim or to impeach a transaction between a creditor and the company. I do not accept as a general proposition that in such circumstances the relevant creditor can object to an examination or litigation on the ground of the liquidator's perceived bias.*'[17] (It is, of course, equally, if not more, conceivable that a liquidator might have cause to take up an adversarial position against a shareholder or director in a compulsory liquidation.) Further in the judgment it was stated:

> It appears to me that the true nature of the s 418 inquiry was misconceived by both Courts. The Commissioner, against whom no complaint has been laid, is the person who conducts the inquiry. It is he who has to act in a quasi-judicial capacity. He has the main duty to examine the witnesses. He has to regulate and control the interrogation. Should he fail in his duty to

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[16] The applicants' counsel stressed the following passage from the judgment of Street J in *Allebart*, at p.28F-G:
The present windings up must not be permitted to become debased into a pursuit of the personal conflicts between Mr Armstrong [the petitioning creditor] *and Mr Barton* [the sole member and director of the company in liquidation]. *Nor must they be permitted to present the appearance of having become debased in this way. The official liquidator is an officer of the Court, and it is his duty to ensure that he does not permit the processes of these windings up to be diverted or to appear to be diverted into an exercise of the gratification of personal animosities existing between the individuals concerned.*

[17] *Jeeva*, at 579F-G.

> apply the procedural fairness appropriate to this forum, an aggrieved party may approach the Court for suitable relief (*Schulte v Van der Berg and Others NNO* 1991 (3) SA 717 (C)).
>
> Contrary to what Thring J held, the position of the liquidator is quite different. He, in this context, acts in neither an administrative nor quasi-judicial capacity. He is not in a position of authority vis-à-vis the witness. He does not determine or affect any of his rights. He simply represents the company in liquidation at the inquiry. He is, or may be, an adversary of the witness. As adversary he can have no higher duty towards his opponent than any other litigant has. The authorities relied upon by Thring J (at 14I) deal with the position of a presiding officer and not with someone in the position of a liquidator.
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> As noted, a creditor is also entitled to interrogate any witness at the inquiry. The creditor may be biased or unbiased. He may join forces with another creditor. Acrimony between creditor and witness may exist. The witness will nevertheless have to answer all relevant questions. I fail to see why, in similar circumstances, the liquidator may not proceed with the examination because of a similar acrimony or bias. The liquidator has to comply with the lawful instructions of the body of creditors. The fact that there is one creditor only does not affect his duty.

Although the court was treating of an enquiry in terms of s 418, the position also holds true in respect of enquiries in terms of s 415.

[34] The incidence of the responsibility to prevent the abusive use of the examination procedures under the Act being upon the commissioner, Master or presiding officer, as the case might be, *not* on the liquidator, was reiterated in the judgment of Supreme Court of Appeal in *Roering* supra (per Wallis JA). In *Roering*, the appeal court confirmed that in a case, such as the present in respect of the first head of relief claimed by the applicants, where it is alleged that the issuance of the summons or subpoena was improper, it is the decision of the presiding officer to issue it that is the appropriate target to be challenged, *not* the motives of the liquidators in procuring it.[18] The court also held that where it is alleged that the examination will be used for an improper or impermissible purpose 'the primary issue is whether the commissioner [in this case the presiding officer] would permit that'.[19] In the current matter, there has been no suggestion that the presiding officer would not - especially if called upon by the examinee or his or her legal representative - exercise his powers to prevent any abuse by the liquidators or Bella Rosa. In this connection it was

[18] *Roering*, at para. 51.

[19] *Roering*, at para. 53.

pointed out in *Roering* [20] that '[o]*f 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 perspective that the commissioner will not discharge their duties properly and prevent abuse from occurring*'. This was no doubt what counsel for the liquidators, Mr *Ferreira*, had in mind when he submitted that the application in respect of the second head of relief[21] was 'premature'.

[35] The applicants' counsel suggested that the extent to which the judgment in *James* had been disapproved by the appeal court was confined only to the question of whether a liquidator was disqualified from examining a member under the provisions when it was reasonably perceived that he was biased against the witness. I do not agree. The judgment does indeed remain authoritative in respect of the principle that the courts will intervene, when appropriate, to prevent an abuse of the provisions. But insofar as the issues in the current matter are concerned, the decisions in *Jeeva* and *Roering* clearly held, expressly or by necessary implication, that the judgment of this court in *James* had proceeded on a fundamentally misconceived conception of the role of a liquidator in the statutory enquiry proceedings under ss 415 and 418 of the Act. The appeal court judgments in these two cases have made it clear that the applicants should first seek protection, if it is needed, against an abusive examination from the presiding officer

[36] The applicants' counsel's reliance on *Allebart* supra - which, as mentioned, was notably influential in Thring J's reasoning in *James* – calls to mind the frequently voiced caveats about the dangers of the undiscriminating application of foreign jurisprudence. [22] The role of the 'official liquidator' in *Allebart* arose for consideration in the context of a contemplated private examination in terms of s 249

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[20] At para. 53.

[21] The nature of, and basis for, the second head of relief is described in paragraphs [2] and [5] above.

[22] Cf. e.g. *Bernstein* supra, at para. 133 (per Kriegler J) and *Roering* supra, at para. 49, where Wallis JA cautioned that '*too facile a reading of foreign legal material is to be eschewed, because, when removed from their own environment, they may mislead*'.

of the long since redundant New South Wales Companies Act 71 of 1961.[23] Winding-up proceedings under the NSW Act were conducted by or under the auspices of the Supreme Court of New South Wales under its equitable jurisdiction. An 'official liquidator' was a functionary appointed in terms of s 11 of the Act, not as in South Africa on an ad hoc basis for the winding-up of a particular company, but as one of a standing panel of appointees chosen by the Minister from the ranks of 'registered liquidators' '*for the purpose of conducting proceedings in winding up companies and assisting the Court therein*'. It was in that context that, unlike in South Africa, where it is generally accepted that a liquidator is not properly classified as an 'officer of the court',[24] that the 'official liquidator' was considered to be an officer of the court. His duties entailed, to some extent, carrying out the court's functions. The extent to which this appears to have reflected an official liquidator's position as a manifestation of the court itself is to be gathered by the reference in *Allebart* to what seems to have been a well-established convention in New South Wales that the liquidator's reasons for seeking a private examination in terms of s 249 of the NSW Act were regarded as 'confidential', in the sense of being kept private between the liquidator and the court.[25]

[37] According to the tenor of its provisions, enquiries under s 249 of the NSW Companies Act were initiated by the court, not by the liquidator.[26] In motivating for the conduct of such an enquiry the liquidator therefore acted in a sense as an agent of the court charged with the conduct of the enquiry. It seems that the close association

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[23] The NSW Act was formally declared 'redundant' in terms of the Statute Law (Miscellaneous Provisions) Act 2008 No 62. I assume that the redundancy set in upon the commencement of the Corporations Act, 2001 (Cth), which operates in all the states of Australia pursuant to intergovernmental agreements.

[24] See *Jeeva* supra, at 579C-E.

[25] *Allebar*t at p. 30B-E.

[26] Section 249(1)-(3) of the NSW Act provided:

(1) The Court may summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.
(2) The Court may examine him on oath concerning the matters mentioned in subsection (1) of this section either by word of mouth or on written interrogatories and may reduce his answers to writing and require him to sign them, and any writing so signed may be used in evidence in any legal proceedings against him.
(3) The Court may require him to produce any books and papers in his custody or power relating to the company, but where he claims any lien on books or papers the production shall be without prejudice to that lien, and the Court shall have jurisdiction to determine all questions relating to that lien.
(4) ...

of the official liquidator with the identity of the court itself formed the basis of a requirement that he be seen to be impartial and above the fray.[27] As the decisions in *Jeeva* and *Roering* confirm, the local environment is materially distinguishable.

[38] Even in *Allebart*, the engagement by the official liquidator of the same attorneys as those who acted for the petitioning creditor was, of itself, regarded as 'innocuous and, indeed, commonplace'.[28] I have had occasion twice recently to consider the propriety in the local context of liquidators using the services of the petitioning creditor's attorneys; see *Ex p. Steenkamp and others NNO* (WCC case no. 19265/13), reported on SAFLII sub nom. *Steenkamp N.O and others v Liquidators of Monoceros Trading 111 CC* (19265/13) [2014] ZAWCHC 82 (10 January 2014), and *Trustees for the Time Being of the Bermack Trust (IT 1730/1996) and Another v Patel NO and Another* [2014] ZAWCHC 105, at paras. 72-81.

[39] The determinative question is usually whether such engagement would result in the attorneys having a conflict of interest; but, depending on the circumstances, there may be wider considerations. I summed up what I perceive to be the position in this regard at para. 73 in *Bermack Trust*. After referring to the judgment in *Steenkamp*, I said -

> … In that judgment I held that there was nothing inherently untoward about such an engagement. I noted that whether a conflict of interest presents in any matter is dependent on the facts. If, on an analysis of the facts, the interests of the petitioning creditor and those of the liquidator correspond with each other, there will ordinarily be no conflict of interest. On the contrary, there will often be much to be said in favour of the employment of the petitioning creditor's attorneys because they may be steeped in the complexities of the issues with which the liquidator will have to engage, and it would be unduly costly and time consuming in such circumstances to appoint other attorneys with no prior involvement to qualify themselves afresh. The fact that the liquidator may, as in the current matter, adopt a position adverse to the position of one or more of the other creditors does not, without more, derogate from the conclusion just stated. It is in the nature of a liquidator's responsibilities to interrogate creditors' claims and in that context he may have to adopt an adversarial position; cf. *Receiver of Revenue, Port Elizabeth v Jeeva And Others; Klerck And Others NNO v Jeeva and Others* [1996] ZASCA 5; 1996 (2) SA 573 (A). The position would obviously be different

[27] A public examination in terms of s 250 of the NSW Act, by contrast, occurred only after the liquidator had taken a position and reported to the court that in his opinion a fraud had been committed or material facts had been concealed. In other words, such an examination would take place only after the liquidator had taken a position, prima facie at least, adverse to potential examinees.

[28] *Allebart*, at p. 29D.

> if the attorney had also previously acted for the creditor against whom an adverse position was adopted and, in that connection, had been made privy to any relevant confidential information of that creditor. There is also a duty on legal practitioners to be ever astute to the possibility of a conflict of interest not identified at the outset of their engagement subsequently presenting itself, in which case, of course, they are bound to withdraw. In a context like the present, liquidators too are bound to exercise their independence in giving and overseeing the carrying out of instructions to attorneys who act also for one or more of the creditors in the winding-up. It may be necessary or prudent in a given case that separate attorneys be employed to deal with certain questions that may arise in the liquidation. In that manner conflict situations may be managed and grounds for perceptions of partiality avoided.

(The reference to partiality in the context of *Bermack Trust* concerned allegations in that case that one of the liquidators was seen as having aligned himself with the interests of one creditor - whose attorneys were also employed by the liquidators - against those of another creditor whose interests were in conflict with those of the first creditor. In that case the other creditor had applied to the Master in terms of s 379(1) of the Act for the removal of the liquidators.)

[40] In the current matter it seems to me that the liquidators' position in respect of whether or not to pursue the pending action by the corporation against Bella Rosa is not something on which they should be dependent upon advice from their current attorneys. The merits of that case seem to depend on an objectively determinable question; the physical extent of the let premises determined according to the SAPOA method. That is a matter of measurement, which is not something one would expect that they would engage attorneys or counsel to determine. Bella Rosa's claim against the sureties seems to turn on exactly the same point. I therefore do not see that it is a matter that is likely to give rise to a conflict of interest situation at an enquiry in terms of s 415 of the Companies Act. But, if the unexpected happens, the liquidators and the legal representatives will have to deal with the situation. Their failure to do so appropriately would expose the liquidators to proceedings to remove them from office and the legal representatives to a finding of professional misconduct.

[41] In the current case the applicants have not attempted to show any conflict of interest that would disqualify the petitioning creditor's attorneys from accepting instructions from the liquidators. They do not suggest that the liquidators should be barred from using the services of the same legal representatives as Bella Rosa. Their complaint is confined to the allegation that the engagement by the liquidators of those

legal representatives has and will probably continue to cause an abuse of the interrogation process.

[42] It should be clear from the jurisprudence that has been canvassed so far that the applicants have misconceived their remedy. They have not taken up the issue of any abuse of the process with the presiding officer. They have also not shown that the presiding officer would not appropriately acquit himself of his responsibilities should they do so. The relief that has been sought has also not been framed as it should have been had the suggestion been that anything about the liquidators' conduct disqualified them from continuing in office as such.[29] The application for the second head of relief, whether in terms of paragraph 3 of the notice of motion, or paragraph 2 of the draft order handed up by the applicants counsel during argument, will therefore be dismissed.

The first head of relief

[43] It is not necessary to devote extensive discussion to the first head of relief. There is no doubt in my view that the subpoenas are overbroad. The extent of their over-breadth and the first respondent's failure to offer an explanation for it have persuaded me that the applicants have succeeded in showing on a balance of probabilities that the first respondent did not apply his mind, at least sufficiently, to whether they should have been issued in that form.

[44] There is nothing in the statutory framework that prescribes the manner in which the issuance of such subpoenas is to be procured. The established practice is that the presiding officer issues subpoenas if, upon the facts available, they ought prima facie to be issued; see *Cooper and Others NNO v SA Mutual Life Assurance Society and Others* 2001 (1) SA 967 (SCA), at 974-5. The presiding officer is required to apply his or her mind in order to determine whether the threshold of information necessary to justify issuing the subpoenas has been crossed. As observed in *Henochsberg*,[30] '[i]n practice, the presiding officer ordinarily issues the subpoena on the liquidator's written request'. I think there is sound reason for the practice. Apart from any other consideration, a written record promotes transparency and

[29] A matter, in my view, that should ordinarily first be raised with the Master before an approach is made to the court.

[30] Meskin, *Henochsberg on the Companies Act* (LexisNexis, looseleaf service) vol. 1 [Issue 26], at p.873.

accountability. There was no written request in the current matter. The evidence is that the subpoenas were issued by the presiding officer upon the oral request of a member of the firm of attorneys representing the liquidators and Bella Rosa.

[45] The attorney concerned averred that he approached the presiding officer with an oral request to issue the subpoenas. He testified that Bella Rosa's claim form, attached to which was 'a summary of facts and the background to Bella Rosa's claim' had been in the file before the first respondent. He said that he 'properly explained the background and reasons for the issuing of the various subpoenas'. He stated that he had '*inter alia* explained to [the first respondent] …(i) the reason why Silver Falcon was wound up; (ii) that Silver Falcon seemingly has no assets of real value; (iii) that after inspection of Silver Falcon's bank statements, it seemed that its income had not been retained, and had most likely been distributed to members, but that no record of such distribution had been found to date; (iv) Silver Falcon had no real or proper accounting records [and] (v) that it may be that Silver Falcon and its members had contravened the Close Corporations Act'. These superficially recounted factors could, as acknowledged earlier in this judgment, have afforded the first respondent sufficient reason to issue at least some of the subpoenas. But they do not explain why the subpoenas should have been formulated in the manner that they were.

[46] They do not, for example, explain why the members should have been required to produce 'all documentation, correspondence and information including but not limited to bank statements, management accounts and financial statements, applications for credit facilities and/or applications for overdraft facilities, asset financing, applications for mortgage bonds, salary receipt documentation, loan payment account, payment receipt documentation, invoices received from attorneys and advocates and any other documents of whatsoever nature, relating to the income, expenditure, asset and liabilities of' not only the corporation in liquidation, but also of 12 other businesses or corporate entities. They also do not explain why the fifth applicant should be required to produce 'all accounts, invoices, advocates' invoices' rendered to such other businesses or entities. The subpoena served on the corporation's bank requires it, amongst other things, to produce bank statements for ten identified banking accounts, of which only one was operated by the corporation. There is nothing to indicate that the first respondent was, or could have been satisfied

that production of this information, which on the face of it is extremely wide, was potentially of relevance in the enquiry.

[47] The first respondent did not make an affidavit. He wrote a letter, which was clearly for the purpose of being introduced as a form of report to this court. The applicants' counsel sought to make something of the absence of an affidavit by the first respondent. Their position in that respect was misconceived. It is not ordinarily expected of someone in the position of the presiding officer to make an affidavit in proceedings of this nature. The convention is that he or she puts in a report for the assistance of the court. As it was, the presiding officer's letter, insofar as it was material, did no more than confirm the content of the liquidators' attorneys' affidavit that I have just related.

[48] The liquidators' counsel submitted that in the event that it should be found, as it has been, that the subpoenas were overbroad, this court should trim them down instead of setting them aside. That course does not commend itself to me. Apart from the fact that fresh subpoenas will in any event be required because the currency of the summonses that were served has expired by reason of the passage of time, it seems to me, more importantly, that the first respondent's decision to issue them was legally invalid and that they are consequently void. It would be inappropriate in the circumstances for this court to in effect validate them, even if only partially. If the liquidators wish to procure the lawful issue of fresh subpoenas, they must go about it in the proper manner upon a properly motivated written request to the first respondent, who must apply his mind conscientiously to the request before acceding to it, whether in part or in full. The application for the first head of relief will therefore be granted.

Costs

[49] Both sides have been substantially successful in these proceedings. The applicants have succeeded in having the subpoenas set aside. And the liquidators have successfully resisted the application to stay any examination of the first to sixth applicants for so long as they are represented by the legal representatives who currently also act for Bella Rosa. It would be difficult to treat the separate heads of relief discretely for taxation purposes. In the circumstances it seems to me that justice would be done were each party to bear its own costs. However, the setting aside of

the subpoenas entitles the applicants to the costs of the application for interim interdictory relief. In my judgment the application for interim relief was not of the character that would justify burdening the losing party with the costs of two counsel.

[50] The following order is made:

1. The subpoenas issued by the first respondent in terms of s 414 of the Companies Act 61 of 1973, attached to the first applicant's founding affidavit, *jurat* 9 February 2017, requiring the applicants and the fourth to seventh respondents to appear before the first respondent for the purpose of interrogation concerning matters relating to Silver Falcon Trading 84 CC (in liq.) or its business or affairs are hereby set aside.
2. Save as provided in paragraph 1 of this order, the application is otherwise dismissed.
3. Save as provided in terms of paragraph 4, the parties shall bear their own costs in the application proceedings.
4. The second and third respondents shall pay the applicants' costs of suit in the interim interdict application that were reserved for later determination in terms of the judgment of this court dated 13 February 2017 (per Holderness AJ).

A.G. BINNS-WARD
Judge of the High Court