IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, GQEBERHA)

In the matter between: Case No: 1214/2021

CAREL FREDERICK BENJAMIN DU PREEZ First Applicant

I' ANDRE SWANEPOEL Second Applicant

AND

HANTLE INFRA PLANNING (PTY) LTD First

Respondent

ANDRE VAN HEERDEN N O Second Respondent

SUNE SMITH N O Third Respondent

RENE BEKKER N O Fourth Respondent

THE MASTER OF THE HIGH COURT Fifth Respondent

JUDGMENT

GOOSEN J:

[1] The applicants seek leave to appeal against the whole of the judgment, dated 14 April 2022, dismissing their application for relief in Part A of their application. The application is opposed by the first respondent, Hantle Infra Planning (Pty) Ltd (hereafter Hantle Planning) and second and third respondents, the joint liquidators (hereafter the liquidators) of Retro Reflective (Pty) Ltd (hereafter Retro Reflective).

[2] The applicants rely upon several grounds of appeal. They may, for ease of consideration, be grouped under main headings. The first relates to the degree of emphasis or reliance upon certain authorities and/or the failure to consider the effect of judgments in this division which tend to support the granting of the relief sought. These, it was suggested, establish compelling reasons to grant leave to appeal.

[3] The second concerns the failure to give due weight to the rights of the applicants to challenge a court order obtained in their absence and which is adverse to their interests. In this respect the finding that the challenge is speculative; that it is capable of being prosecuted without access to the original founding papers; and that the effect of access would undermine or stultify the purpose of the inquiry, are challenged.

[4] It is, however, appropriate to begin first with what was framed as a broad or overarching basis upon which to grant leave, namely the importance of the matter at the level of principle. In terms of s 17 (1) (a) (ii) of the Superior Court Act[1] a court may, in the alternative to finding a reasonable prospect of success, grant leave if it is of the opinion that –

[1] Act No. 10 of 2013.

> "(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

[5] Mr Buchanan SC, for the applicants, submitted that this is such a case. He argued that the issue at hand concerned access to what is in essence a public document – court process – upon which a court order was obtained which adversely affects the rights of the applicants. This, he submitted, required a careful balancing of rights within the context of fundamental rights of access to information guaranteed by the Constitution. It was not a matter in which the constitutionality of s 417 or s 418 of the Companies Act was in issue. In this sense the judgments of ***Ferreira v Levin NO and Others***[2] and ***Bernstein***[3] were of limited assistance. So too the judgments endorsing the non-disclosure of material documents used in support of an order authorizing a s 417 inquiry. Broader questions of principles were at issue which required consideration by a higher court on appeal.

[6] Mr Du Toit, for Hantle Planning, submitted that the case raised no significant matter of principle and that no compelling reasons exist for granting leave to appeal on that basis. He argued that the grounds upon which leave was sought established no reasonable prospect of success and that leave should therefore be refused. Mr Bester, for the liquidators, endorsed the argument. He submitted, in addition, that the essential principles are settled. The applicants had failed to establish a basis for the order they sought, even assuming that they enjoyed *locus standi* as witnesses, to challenge the lawfulness of the inquiry. Their challenge was speculative and could

[2] Ferreira v Levin No and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC).
[3] Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC).

be advanced in the proceedings envisaged in Part B of the application. To permit an appeal on the broader 'interests of justice' basis would undermine the purpose of the inquiry.

[7] The argument founded on the basis of s 17 (1) (a) (ii) of the Superior Court Act relied upon both compelling reasons or circumstances, and the existence of conflicting judgments. I shall deal with the latter contention before addressing the existence of compelling reasons.

[8] Mr Buchanan submitted that the judgment in ***Leech and Others v Farber NO and Others***[4] to which reference was made in the judgment, is in conflict with the judgment of Jones J, in this Division, in ***Jeeva and Others v Received of Revenue, Port Elizabeth and Others***[5].

[9] It is indeed the case that Nugent J (as he then was) in ***Leech***[6] did not support the reasoning adopted by Jones J in ***Jeeva***. There is therefore, at face value, a conflict between the two judgments. The conflict is, however, of no relevance to the decision in this matter nor does the conflict establish a compelling reason why this case ought to be considered by a higher court.

[10] There are three reasons for coming to this view. Firstly, reference to ***Leech*** was made to underscore the point that a prospective witness does not enjoy an unfettered right of access to information prior to interrogation, i.e. even at the stage when their interests are directly impinged. As stated by Nugent J this would be entirely inconsistent with the purpose of the enquiry.

[4] 2000 (2) SA 444 (W).
[5] 1995 (2) SA 433 (SE).
[6] *Supra* at 453E-H.

[11] Secondly, both ***Leech*** and ***Jeeva*** concerned access to information sought by a witness prior to interrogation. The purpose was to enable witnesses to deal with evidentiary material with which they may be challenged at the enquiry. That is not the case in the present matter.

[12] In the ***Jeeva*** matter witnesses who were to be interrogated at an inquiry sought access to information in the possession of a creditor, the Receiver of Revenue, who was to lead the interrogation. The application was brought on the basis of s 23 of the Interim Constitution[7]. The court interpreted s 23 and applied it in the context of such inquiry. It characterized the inquiry as *quasi*-judicial administrative action and held that a witness was entitled to the information by reason of the right of equality.

[13] The court reasoned as follows[8]:

> "A commission of inquiry authorised by the Master of Supreme Court and held under the machinery of the Companies Act is administrative action against the applicants which in this case has a material bearing upon their rights and interests. It is quasi-judicial in nature. The applicants are accordingly entitled to administrative action which is lawful, justifiable and both substantially and procedurally fair. Because they must submit to interrogation, they are entitled to prepare themselves to deal with the subject-matter of the inquiry. They are entitled to equality before the law, which, in my view, includes equal access to the information held by the interrogator, especially if the interrogator is directly or indirectly an organ of State. The inquiry concerns the management of the companies over a period of many years. Much of the relevant information

[7] Act 200 of 1993. Section 23 dealt with the right of access to information.
[8] Jeeva (*supra*) at 443I-444D.

which will form the subject of the interrogation deals with company affairs going back over the years. Some of it is contained in documents seized by the Receiver of Revenue in 1990. The applicants have not had sight of those documents since then. They cannot be treated fairly and equally at this interrogation if they do not have sight of these and other relevant documents before the hearing. It is correct, as Mr Buchanan points out, that it is purely coincidental that the information is in the hands of a creditor who is also a State official, and that if the petitioning creditor had been a private person who has proved a claim as an ordinary creditor arising out of an ordinary commercial transaction the applicants would not have had a constitutional right of access to the information. But this is not an answer to a claim to information as of right, once it is established that that right is guaranteed by the Constitution. An ordinary creditor would not in any event have had statutory powers to search for and seize the documents in the first place."

[14] In the ***Leech*** matter Nugent J made specific reference to the latter portion of the above dictum, and held[9]:

"Although reference was made to the right to fair administrative action, it seems from the passage above that the real grounds upon which the learned Judge considered the documents should be disclosed was to ensure equality between examiner and examinee. I regret that I am unable to subscribe to the view that the right to equality requires the examiner and the examinee to be placed in the same position."

[9] Leech (*supra*) at 453F-G

[15] This is the ambit of the conflict in the decisions. It concerns the ambit of and the application of the right to equality in the context of a request for access to information in a s 417 inquiry. This does not arise in the present matter.

[16] It is apposite to point out that even insofar as a more general 'equality of arms' contention within such inquiries is concerned, some doubt has been cast on the approach favoured by Jones J in ***Jeeva***. In ***Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others NNO v Jeeva and Others***[10], which did not relate to the ***Jeeva*** matter but which dealt with a related application, the Appellate Division (as it then was) held that a liquidator or creditor does not, in an inquiry, act in a quasi-judicial capacity vis-à-vis the examinee.[11] Notions of fairness, *inter se*, do not arise. A liquidator or creditor may be biased or adversarial.

[17] In similar vein, the premise upon which Jones J proceeded in both the ***Jeeva*** judgment and in the judgment which was the subject of the appeal before the Appellate Division, namely that inquiries of this kind are Draconian, has not been endorsed.[12] It is, however, not necessary to enter the lists on the conflict in the authorities. It is, as I have said, not relevant in the present matter since we are not here dealing with disclosure of information or evidence in possession of an examiner who is to confront an examinee.

[18] The third reason for finding that no compelling circumstances warrant consideration of this matter on appeal concerns the fact that no general principle is engaged. All of the authorities, referred to in the main judgment, indicate that it is

[10] 1996 (2) SA 573 (A).
[11] In Bernstein (*supra*) Ackermann J expressed some doubt that an inquiry in terms of s 417 constitutes administrative action (see para 96 – 97).
[12] See Receiver of Revenue, Port Elizabeth at 578.

within the power of a court to relax the confidentiality provision or to grant access to information or documents upon an application which is properly motivated. This is so because it falls within the jurisdiction of the High Court to protect an examinee from oppression or hardship in such inquiry.

[19] The decision to do so is one which will be based on in the facts of the case. The starting point is that the process of investigation occurs confidentially and without disclosure. This is fundamentally required in order to achieve the objects and purpose of the inquiry.

[20] The judgment in ***Jeeva*** does not establish a general principle (even if in circumstances of jurisprudential conflict) to different effect. The constitutionality – and thus the general principles to be applied – of the inquiry regime is settled.[13] There is therefore no compelling reason to have this question considered afresh.

[21] Mr Buchanan submitted that the novelty lies therein that the question of confidentiality and access to the founding court papers has not pertinently been considered in the light of the right of access to information. Certainly there appears to be no authority directly in point. Novelty alone, however, would not be a compelling reason to grant leave to appeal. It would still be necessary to consider whether, in the circumstances of this case, there exists a reasonable prospect that a court of appeal would set aside the order against which the appeal is prosecuted.

[22] It is with this in mind that I turn to consider the further grounds upon which leave to appeal is sought. It was submitted that the finding that the applicant's challenge to the lawfulness of the order, on the basis of material non-disclosures,

[13] See Ferreira v Levin NO (*supra*) and Bernstein (*supra*).

was speculative was made in error. The applicants concede, however, that, in the absence of disclosure of the founding papers, the allegation is necessarily speculative. I am unable to discern on what basis the finding can be said to be made 'in error'. The averment is based solely upon the fact that the respondents did not disclose certain facts in unrelated litigation against the applicants. That is no basis to infer that they also failed to disclose a material fact in the application for institution of an inquiry pursuant to the liquidation of Retro Reflective. There is no prospect that another court would come to a different conclusion in this regard.

[23] The applicants further rely upon a failure to give due recognition to their *locus standi* to challenge an unlawful inquiry and a finding that the *locus standi* is limited to a right to challenge <u>before</u> the order is granted.

[24] The question of the applicants' locus standi and their interest in challenging the lawfulness of the order authorizing the inquiry was closely related to the grounds upon which they sought to advance that challenge. It was addressed in some detail in argument and the judgment deals with the argument. It notes the limited legal interest accorded to prospective examinees and the generally recognised right to challenge an interrogation on the grounds of oppression or undue hardship. This portion of the judgment, however, concluded as follows:

> "[28] In my view, it is doubtful that the applicants enjoy the broad legal standing they seek to assert in relation to the setting aside of the enquiry *in toto.* That, however, is a matter which will no doubt be considered in the proceedings the applicants intend to pursue in Part B of the notice of motion. I accordingly make no finding in relation thereto.

> [29] Assuming that they are parties who could seek access to the papers, the question remains whether such access ought to be granted. In this regard a court will be guided, in large measure, by the views expressed by the liquidators."

[25] In the light of this I fail to understand on what basis it is said that undue weight was attached to the applicants' standing or that an adverse finding was made. On the contrary, it was assumed in favour of the applicants that their standing presented no impediment to them pursuing the relief.

[26] A further ground concerns the approach to views expressed by the liquidators. It was argued that undue weight was attached to these views. A court faced with an application such as this is obliged to consider the views of the liquidator and, in particular, to consider whether the disclosure would stultify the achievement of the objects or purposes of the inquiry. In this instance the liquidators were unequivocal in regard to the effect that disclosure would have. Their views were set out in detail in the opposing affidavits.

[27] It must be borne in mind that a charge of attaching 'undue weight' is, inevitably, a subjective assessment of degree. The true question is whether a factor was considered as overriding or determinative without regard to other factors. The judgment indicates that regard was had to various factors and that a balancing exercise was undertaken. In these circumstances, I am not persuaded that there is a reasonable prospect that another court would interfere on the basis that it might have weighed the factors differently.

[28] Taking all of the above into consideration I have come to the conclusion that leave to appeal ought to be refused. I therefore make the following order:

The application for leave to appeal is dismissed with costs.

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G.G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicants	*:*	*Adv R.G. Buchanan SC*
Instructed by	*:*	*RHK Attorneys c/o BLC Attorneys, Gqeberha*
Obo the 1st Respondent	*:*	*Adv P Du Toit*
Instructed by	*:*	*Joubert Galpin & Searle, Gqeberha*
Obo the 2nd and 3rd Respondents:		*Besters Attorneys, Gqeberha*
Heard	*:*	*16 May 2022*
Delivered	*:*	*24 May 2022*