IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

In the matter between:-	Case No. 1214/2021
CAREL FREDERICK BENJAMIN DU PREEZ	First Applicant
ANDRE SWANEPOEL	Second Applicant
and	
HANTLE INFRA PLANNING (PTY) LTD	First Respondent
ANDRE VAN HEERDEN N.O.	Second Respondent
SUNE SMIT N.O.	Third Respondent
RENE BEKKER N.O.	Fourth Respondent
MASTER OF THE HIGH COURT PORT ELIZABETH	Fifth Respondent

In the matter between:-	Case No. 1303/2021
PIETER PRETORIUS	First Applicant
RIANA PRETORIUS	Second Applicant
CAREL FREDERICK BENJAMIN DU PREEZ	Third Applicant
ANDRE SWANEPOEL	Fourth Applicant
and	
HANTLE INFRA PLANNING (PTY) LTD	First Respondent
ANDRE VAN HEERDEN N.O.	Second Respondent
SUNE SMIT N.O.	Third Respondent
RENE BEKKER N.O.	Fourth Respondent
MASTER OF THE HIGH COURT PORT ELIZABETH	Fifth Respondent

JUDGMENT

BANDS AJ:

[1] Two applications serve before me.

[2] Both applications have their genesis in an order of this court, granted *ex parte*, on 8 December 2020, under case number 3000/2020, authorising an

enquiry into the affairs of Retro Reflective (Pty) Ltd ("*the company*") in terms of section 417 and 418 of the Companies Act 61 of 1973 ("*the Act*").

[3] The applicants, in the application under case number 1214/2021, seek an order that the application under case number 3000/2020 be re-enrolled; and that the order granted on 8 December 2020 be declared unlawful and void *ab initio* and be set aside. The only issue which remains for determination in the application under case number 1303/2021, to which I return later in this judgment, is that of costs.

[4] A summary of the litigation between the parties relevant to the applications before me is set out succinctly in the judgment of Goosen J, who was called upon to determine an issue relevant to part A of the application, under case number 1214/2021, which I have had the benefit of reading. To facilitate the narrative of the respective judgments herein, I shall give a recount of the common cause facts leading up to the present disputes.

Background to the litigation between the parties

[5] It is perhaps prudent at this stage to record that the applicants under case number 1214/2021, whilst sharing the names of the third and fourth applicants under case number 1303/2021, are not the same litigants.

[6] The applicants under case number 1214/2021 were the founding directors of the company. They resigned as directors at the end of June 2018, when the

company was sold to one Phumla Cynthia Mkhontwana. At the time of the sale, the company was indebted to Hantle Infra Planning Pty Ltd (the first respondent in both applications, herein after referred to as "*Hantle*"), which indebtedness was secured by way of personal suretyship agreements signed by the said applicants. The company went into voluntary liquidation in November 2018. The second and third respondents, in both applications, were appointed as the joint liquidators of the company.

[7] During July 2020, Hantle brought an Anton Pillar application, under case number 1354/2020, against *inter alia,* the company; the respective applicants, in the applications before me; and various other parties. The order obtained *ex parte* was ultimately challenged and set aside on 10 December 2020.

[8] Running parallel to those proceedings, Hantle, on 8 December 2020, approached the court under case number 3000/2020, for leave to hold an enquiry in terms of section 417 and 418 of the Act, to which I have referred. In terms of the order, the fourth respondent in the applications before me (to whom I shall refer as "*the fourth respondent*") was appointed as the commissioner, her powers having been circumscribed by the court.

[9] The fourth respondent, in the exercise of her duties, issued subpoenas *duces tecum*, which were served on the respective applicants, requiring their attendance at the enquiry scheduled for 17, 18 and 19 May 2021. Following service of the subpoenas, the applicants under case number 1214/2021

requested that the enquiry be postponed on the basis that they would be seeking to set aside the *ex parte* order, authorising the enquiry. I return to the basis for their challenge, which forms the subject matter of the application before me, under case number 1214/2021. When the undertaking was not forthcoming, the application was issued on 10 May 2021, seeking relief in two parts, part A and part B.

[10] In part A of the notice of motion, the applicants sought interim relief, pending the outcome of part B, staying the subpoenas, and postponing the enquiry *sine die.* They also sought an order for access to the papers filed in support of the *ex parte* order granted on 8 December 2020. It was this latter aspect, which Goosen J was called upon to determine. In part B of the notice of motion, with which I am currently seized, and to which I have intimated, the applicants sought the re-enrolment of the proceedings under case number 3000/2020 and the setting aside of the order granted therein.

[11] On 14 May 2021, the application under case number 1214/2021 served before Makaula J and an order was granted, *inter alia*, staying the subpoenas and postponing the enquiry, in respect of those applicants only, pending the outcome of the relief sought in part B.

[12] The applicants, under case number 1303/2021, having become aware of the proceedings under case number 1214/2021, and the subsequent order granted by Makaula J on 14 May 2021, similarly sought a postponement of the enquiry insofar as it pertained to them, the rationale being that they

would be "*subjected to an interrogation by virtue of the Ex Parte order*", which may subsequently be set aside, and that in such circumstances, they would "*have no recourse for [their] rights being infringed by virtue of an unlawfully convened enquiry.*" The request was denied.

[13] On Monday, 17 May 2021, the applicants, under case number 1303/2021, presented themselves at the enquiry and, through their legal representative, made an application for the postponement of the proceedings. At 16h50 on the same day, the fourth respondent circulated her ruling to the parties in which she refused the application. Notwithstanding the ruling, the applicants, under case number 1303/2021 refused to present themselves at the enquiry on 18 May 2021 for the purposes of their examination. Instead, the applicants launched the proceedings under case number 1303/2021 at approximately 16h00 on 18 May 2021, seeking an order staying the subpoenas issued against them and postponing the enquiry, in so far as it pertained to them, *sine die*, pending the outcome of the relief sought in part B of the application under case number 1214/2021.

[14] At the time that the application had been issued, the fourth respondent had already postponed the enquiry, given the non-attendance of the applicants under case number 1303/2021, rendering the application moot. This the applicants only became aware of upon the filing of the respondents' answering affidavit. Accordingly, it is only the costs of the application which fall to be determined by me. I return to the adequacy of the relief sought under case number 1303/2021 later in this judgment.

[15] After the filing of further papers, and the hearing of oral argument on behalf of the parties, the relief sought in part A of the application, under case number 1214/2021, insofar as the applicants sought access to the papers filed in the proceedings, under case number 3000/2020, was dismissed by Goosen J, on 14 April 2022. The applicants thereafter sought leave to appeal the order, which application was refused on 16 May 2022. Accordingly, such order stands.

[16] I now turn to consider the applications before me.

Application under case number 1214/2021

[17] The applicants challenge to the order authorising the enquiry, granted on 8 December 2020, was initially based on two broad grounds.

[18] Firstly, the applicants believed that Hantle, as the applicant under case number 3000/2020, may have failed to disclose material facts, which if disclosed, would have influenced the granting of the order. Secondly, that the powers conferred upon the fourth respondent, by the order, are extra-ordinarily wide, all-encompassing, potentially oppressive and are open to abuse.

[19] In light of the order granted by Goosen J, in respect of the non-disclosure challenge, the applicants, in the present proceedings, persist only with their challenge regarding the terms of the order itself.

[20] I do not intend dealing with the terms of the order because it is not necessary on account of the view that I take of the matter.

[21] It was submitted in argument, on behalf of the applicants, that two questions fell to be determined by me. Firstly, whether the applicants had the necessary *locus standi* to challenge the order of court; and secondly, should I find in favour of the first question; that I consider the merits of the applicants' challenge to the content of the order itself.

[22] The Supreme Court of Appeal, in *Smith N O and Others v Master of the High Court, Free State Division, Bloemfontein and Another*[1] recently had an occasion to examine the text of sections 417 and 418 of the Act. The court, at paragraph [14] of the judgment, stated as follows, regarding the purpose of the provisions:

"*An examination of the text of the section demonstrates its enabling nature. Its context and history were considered by the Constitutional Court in Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others and Berstein and Others v Bester and Others NNO (Bernstein). These decisions stress the importance, public utility and purpose of the provisions. Dealing with this purpose, the Court in Bernstein emphasised that:*

'The enquiry under sections 417 and 418 has many objectives.

[1] (1221/2021) [2023] ZASCA 21 (8 March 2023).

(a) It is undoubtedly meant to assist liquidators in discharging these abovementioned duties so that they can determine the most advantageous course to adopt in regard to the liquidation of the company.
(b) In particular it is aimed at achieving the primary goal of liquidators, namely to determine what the assets and liabilities of the company are, to recover the assets and to pay the liabilities and to do so in a way which will best serve the interests of the company's creditors.
(c) Liquidators have a duty to enquire into the company's affairs.
. . .
(g) . . . In these circumstances it is in the interest of creditors and the public generally to compel such persons to assist.""

[23] The second and third respondent liquidators, make common cause with the first respondent herein, and oppose the relief sought by the applicants.

[24] The applicants, as former directors of the company, accept that at the time that the application was made by Hantle, they were at best, prospective witnesses possessed of knowledge or information, which may be required for the proper winding-up of the company. At that stage, they had no right to be joined in the proceedings, unless such proceedings had come to their attention fortuitously.

[25] As stated in *Friedland and Others v The Master and Others*:[2]

"*… the prospective examinee has no right to receive prior notice of the fact that the liquidator is to approach the Master (or the Court) to exercise the discretionary power to order an examination or enquiry under ss 417 and 418, and to summon, or to authorise a commissioner to summon, the prospective examinee to attend. It is only if the prospective examinee should happen to hear in advance, before that power has been exercised by the Master (or the Court), that he can claim any sort*

[2] 1992 (2) SA 370 (WLD) at 376C-E.

of right to be heard. That serious limitation indicates that the situation of the prospective examinee is not one in which he enjoys the full extent of the rights usually understood as being accorded when the maxim audi alteram partem applies."

[26] Accordingly, a potential witness who becomes aware of an application for an enquiry, *prior* to the granting of the order, has *locus standi* to oppose such application. Having said that, the grounds upon which he or she may validly seek to resist such an order, the effect of which will be to subject him or her to examination under sections 417 and 418 of the Act, are narrow and extend to questions of jurisdiction; hardship or oppression; or possibly to unusual or exceptional circumstances, which it may seem appropriate to entertain.[3]

[27] As correctly emphasised by Goosen J, a prospective witness has a limited interest in the legal proceedings, in terms of which such an enquiry is to be authorised. However, where a witness has been summoned to appear at an enquiry, it is open to such witness to challenge the subpoena, on the basis that the compulsion to appear and be subjected to interrogation will cause undue hardship or oppression.[4]

[28] Reliance by the applicants on the dictum of Blackwell J in *Power N.O. v Bieber and Others*[5], as authority for the granting of the relief sought in part B, is of no assistance. In *Power N.O.*, the court, in an application brought by

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[3] *Friedland and Others v The Master and Others* (supra) at page 379.

See also: *Ex Parte Liquidators Ismail Suliman & Co. (Pty.) Ltd* 1941 WLD 33.

[4] *Botha v Strydom and Others* 1992 (2) SA 155 (N) 160C-H.

[5] 1995 (1) SA 497 (WLD).

the *liquidator*, on facts dissimilar to the present proceedings, set aside an order authorising an enquiry on the ground that it constituted an abuse of the process of the court. *Power N.O.* is not authority for the proposition that a witness, who has been summoned to be examined at an enquiry, has the necessary *locus standi* to seek that an order authorising such enquiry be set aside *ut totum*. Insofar as Blackwell J suggested, *obiter*, with reference to *Ex Parte Liquidators Ismail Suliman & Co. (Pty.) Ltd* (supra), that an aggrieved examinee could be heard to oppose the examination, such comment was qualified. The opposition envisaged was in relation to such witness only, and not in relation to the proceedings as a whole.

[29] I am accordingly not satisfied that the applicants have established the necessary *locus standi* to seek an order declaring the order issued on 8 December 2020, under case number 3000/2020, unlawful and void *ab initio*.

[30] Two further aspects, which arose in argument, require comment.

[31] The applicants, having had no right to be joined in the proceedings under case number 3000/2020, are not parties to the proceedings which they seek to re-enrol, nor are they parties against whom the order was granted, *ex parte*. In argument, the proceedings under part B were likened to an application for reconsideration in terms of Rule 6(12)(c) of the Uniform Rules of Court, akin to those which served before Van Zyl DJP in the Anton Pillar application. I disagree. In terms of Rule 6(12)(c) of the Uniform Rules of Court, a person *against whom an order was granted* in his absence in an

urgent application may by notice set down the matter for reconsideration of the order. This is distinguishable from the facts at hand. Rule 6(12)(c) finds no application in the present proceedings.

[32] Reliance was further placed on Rule 6(4)(b), which provides that any person having an interest which may be effected by a decision on an application being brought *ex parte,* may deliver notice of an application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he desires to be heard, whereupon the registrar shall set such application down for hearing at the same time as the application first mentioned. Put differently, this sub-rule caters for a situation where an *ex parte* application comes to the attention of an interested party, fortuitously, prior to it being heard, and grants such a party the right to seek leave to intervene in the proceedings. By the time that the applicants launched the present proceedings, the proverbial horse had already bolted.

[33] In light of what I have set out above, the application, insofar as it concerns the relief set out in part B of the notice of motion, under case number 1214/2021, must fail. I see no reason why costs should not follow the result. I however do not agree that the costs of two counsel were warranted in this case.

Application under case number 1303/2021

[34] It was submitted on behalf of the applicants that the costs of the application, under case number 1303/2021, ought to follow the result in the application under case number 1214/2021; alternatively, that the costs should be significantly influenced by the outcome of the latter proceedings.

[35] In light of my finding, dismissing the relief sought in part B of the application under case number 1214/2021, I am in agreement with Mr Buchanan SC.

[36] I am in any event of the view that the relief sought in the application, under case number 1303/2021, was ill conceived from the outset. As previously stated, at the time that the application was launched, the fourth respondent, who had been seized with an application for the postponement of the enquiry, had already delivered her ruling refusing such request. In the absence of an order setting aside the fourth respondent's ruling, it exists in fact and has legal consequences that cannot be overlooked.[6]

[37] Accordingly, the remedy available to the applicants at that stage, had they wished to challenge the ruling of the fourth respondent, was to bring an application to have it reviewed and set aside, which the applicants failed to do.

[38] Similarly, there is no reason to depart from the usual cost order herein. I refer to my previous comment in respect of the costs of two counsel, which comment is equally applicable herein.

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[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 622 SCA.

[39] In the result, the following orders shall issue:

Application under case number: 1214/2021

The relief sought in part B of the application is dismissed with costs.

Application under case number: 1303/2021

The applicants are ordered to pay the costs of the application, jointly and severally, the one paying, the other to be absolved.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances (in respect of both applications):

For the Applicants:	Adv. R.G. Buchanan SC
Instructed by:	RHK Attorneys
For the first respondent:	Mr Van Zyl, together with Adv P du Toit
Instructed by:	Van Zyl Rudd Inc. Attorneys
For the second and third respondents:	Mr Bester
Instructed by:	Bester Attorneys

Coram: Bands AJ

Date heard: 1 December 2022

Delivered: 4 April 2023
