IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 23/95

In the matter of

Harold Bernstein and Others Applicants

v

L. Von Wielligh Bester NO and Others Respondents

Heard on: 19 September 1995

Delivered on: 27 March 1996

JUDGMENT

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[1] **ACKERMANN J:**

The issues

The case before us is a referral pursuant to the provisions of section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution") and arose from a dispute between Mr Bernstein and other partners and employees of Kessel Feinstein, a partnership of chartered accountants ("the applicants") and Mr Bester and

other liquidators of Tollgate Holdings Limited ("the respondents"). The essence of the dispute between the parties is whether the respondents are precluded by the Constitution from continuing with the examination of the applicants in terms of sections 417 and 418 of the Companies Act 61 of 1973 (as amended) ("the Act"). The parties agreed before Fagan DJP in the Cape Provincial Division of the Supreme Court to have the issue whether these sections of the Act are inconsistent with the Constitution referred to this Court. On 28 April 1995 Fagan DJP granted a referral order "by agreement" as follows:

> 1. The issue whether sections 417 and 418 of the Companies Act, 61 of 1973 (as amended) are inconsistent with the Constitution of South Africa Act, 200 of 1993, and are consequently invalid and of no force and effect is referred to the Constitutional Court for determination, in terms of section 102(1) of the Constitution.
>
> 2. The agreed material facts relevant to such determination are those set out in annexure 'X' hereto.
>
> 3. The costs of such referral shall be costs in the proceedings in the Constitutional Court.
>
> 4. Pending the determination of the above proceedings, the application and all other issues are to stand over.

[2] Section 102(1) of the Constitution does not empower a Provincial or Local Division of the Supreme Court to refer a matter by agreement to the Constitutional Court, but only when the requirements set forth in the subsection are met. I am not suggesting that in the present case Fagan DJP in fact referred the matter simply by agreement without applying his mind to these requirements. It is clear from the reasons furnished by the learned

Deputy Judge President pursuant to the provisions of Constitutional Court Rule 22(2) and (3)(a) that he did so apply his mind and, therefore, the presence of the words "by agreement" in the referral order is perhaps unfortunate. The impression should be avoided that referrals can take place simply because parties have agreed thereto. In certain referrals to this Court, the conclusion is difficult to avoid that this is in fact what has happened. Problems which had arisen in connection with such referrals were commented on in *S v Vermaas, S v Du Plessis*[1] and in *Ferreira v Levin*[2] this Court pointed out that the power and the duty to refer only arises when three conditions are fulfilled:

(a) there is an issue in the matter before the court in question which may be decisive for the case;

(b) such issue falls within the exclusive jurisdiction of the Constitutional Court; and

(c) the court in question considers it to be in the interests of justice to refer such issue

[1] 1995 3 SA 292 (CC); 1995 7 BCLR 851 (CC) paras 7 - 12.

[2] *Ferreira v Levin NO and Others*, *Vryenhoek and Others v Powell NO and Others* 1996 1 BCLR 1 (CC) paras 6 - 8.

to the Constitutional Court.

This Court has further held that it is implicit in section 102(1) that there should be a reasonable prospect that the relevant law or provision will be held to be invalid and while this is a *sine qua non* of a referral it is not in itself a sufficient ground, because it is not always in the interest of justice to make a referral as soon as the relevant issue has been raised.[3] I hasten to point out that when Fagan DJP made the referral in the present matter the judgments in the above cases had not yet been delivered. In the present referral these conditions are all fulfilled and the referral is a proper one in terms of section 102(1), despite purporting to be by agreement. While Provincial and Local Divisions might initially have been hesitant to grapple with the implications and application of the new Constitution and might have preferred to refer constitutional issues to this Court, it must be stressed that, for the proper development of our law under the Constitution, it is essential that these courts and indeed all other courts empowered to do so, play their full role in developing our post-constitutional law. It would greatly assist the task of the Provincial and Local Divisions of the Supreme Court, and in so doing ultimately the task

[3] *S v Mhlungu* 1995 3 SA 867 (CC); 1995 7 BCLR 793 (CC) para 59 and *Ferreira v Levin* supra note 2 para 7.

of this Court, if counsel were called upon to justify rigorously why it was contended that the particular provision of the Constitution relied upon renders the law or provision in question invalid and why it is necessary or advisable to refer the issue in question to the Constitutional Court at that particular juncture. This would lead to narrower and more closely focused referrals and enable the Provincial and Local Divisions to furnish more comprehensive reasons for any particular referral which would in turn assist the task of this Court and the development of our constitutional jurisprudence. Such an approach would also decrease the risk of wrong referrals and avoid the unsatisfactory expedient in such cases of having to try to invoke, at the last moment, in a forced manner and in unsatisfactory circumstances, the direct access procedure provided for in Constitutional Court Rule 17.

[3] Sections 417 and 418 of the Act provide as follows:

> 417. **Summoning and examination of persons as to affairs of company -**
>
> (1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.
>
> (1A) Any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.
>
> (2A)(a) The Master or the Court may examine any person summoned under sub-section (1) on oath or affirmation concerning any matter referred

to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.

(3) The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

(4) If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.

(5) Any person summoned by the Master under subsection (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.

(6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.

(7) Any examination or enquiry under this section or section 418 and any application therefore shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise.

418. **Examination by Commissioners -**

(1)(a) Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a Commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company.

(b) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such Commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order.

(c) The Master, if he has not himself been appointed under paragraph (a), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness: provided that a Commissioner shall disallow any question

which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(d) The provisions of section 417 (1A), (2)(b) and (5) shall apply *mutatis mutandis* in respect of such an examination or enquiry.

(2) A Commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the Commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.

(3) If a Commissioner -

(a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or
(b) has been appointed by the Court, he shall, in such manner as the Court may direct, report to the Master and the Court, on any examination or enquiry referred to him.

(4) Any witness who has given evidence before the Master or the Court under section 417 or before a Commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.

(5) Any person who -

(a) has been duly summoned under this section by a Commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons;
or
(b) has been duly summoned under section 417 (1) by the Master or under this section by a Commissioner who is not a magistrate and who-

(i) fails, without sufficient cause, to remain in attendance until excused by the Master or such Commissioner, as the case may be, from further attendance;
(ii) refuses to be sworn or to affirm as a witness; or
(iii) fails, without sufficient cause -

(aa) to answer fully and satisfactorily any question lawfully put to him in terms of section 417 (2) or this section; or
(bb) to produce books or papers in his custody or under his control which he was required to produce in terms of section 417 (3) or this section,

shall be guilty of an offence.

[4] In *Ferreira v Levin* this Court considered the constitutional validity of section 417(2)(b) of the Act and declared the provisions of section 417(2)(b) to be invalid,

> *to the extent only* that the words 'and any answer given to any such question may thereafter be used in evidence against him' in section 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions or answers or a failure to answer lawful questions fully and satisfactorily.[4]

This disposes of an important part of the applicants' argument, but inasmuch as the attack in this case went broader than in *Ferreira v Levin* and sought the striking down of sections 417 and 418 in their entirety a number of additional grounds of invalidity have to be considered.

[5] As appears from the order of Fagan DJP the parties also agreed upon certain facts as being relevant to the enquiry into the constitutional validity of sections 417 and 418 of the Companies Act. For present purposes the following are the salient agreed facts.

[4]Supra note 2 at para 157.

[6] Tollgate Holdings Ltd ("the company") was a public investment company listed on both the Johannesburg and London Stock Exchanges. The company was placed under final liquidation on 13 January 1993. This led to one of the largest corporate collapses in South African history as the principal subsidiary companies, indeed most companies forming part of the Tollgate Group (the company and its subsidiaries), were also placed under provisional winding-up orders by the Cape Provincial Division of the Supreme Court. The collapse of the Tollgate Group left unpaid debts to creditors of almost R400 million. The market capitalization of Tollgate Holdings at December 1991 was R222 million comprising 40.5 million shares of R5.50 each. These shares are now worthless.

[7] The demise of the company seems to have started in February 1988 when the Duros Group Limited, of which Messrs M Key and G Mackintosh were controlling members and directors, acquired control over the Tollgate Group. For the roughly 140 years before the take-over the company was essentially owned and controlled by a Cape Town family. The first published financial statements of the Tollgate Group after the take-over indicated a loss of R45 million for the 18 month period ending 31 December 1989. At this stage Mr J Claasen held the position of chairman of the Duros Group and had become its largest single shareholder. Mr H Diedericks was also a director of the Duros Group as well as managing director and chief executive of Tollgate Holdings. Shortly

afterwards, in March of 1990, the Duros Group was in turn acquired by a consortium led by Messrs J Askin and H Bierman and including Messrs Key and Mackintosh. On 21 January 1991 the Duros Group changed its name to Tollgate Holdings Ltd, with the company originally bearing that name also changing its name. Tollgate Holdings was controlled by this consortium until it was placed under provisional liquidation in December 1992. Warrants for the arrest of both Messrs Askin and Mackintosh have been issued in connection with charges of fraud and theft and Mr Key is presently facing various criminal charges relating to the collapse of the Tollgate Group. The respondents are satisfied that both Messrs Diedericks and Claasen are indebted to the liquidators of the Tollgate Group for substantial sums arising from unlawful acts. An application for the sequestration of Mr Diedericks' estate has been made and a settlement was reached between Mr Claasen and the liquidators of Tollgate Holdings.

[8] Kessel Feinstein were the auditors of the Duros Group when it acquired control of Tollgate Holdings in February 1988, but only became the main auditors of the Tollgate Group after the Askin-led consortium took control in 1990. As the auditors of the Tollgate Group, Kessel Feinstein certified, without qualification, that the consolidated annual financial statement of the Tollgate Holdings and its subsidiary companies fairly presented the financial affairs of the group for the years ended 1990 and 1991.

Investigations have satisfied the respondents that large scale irregularities by the directors and other officials of the Tollgate Group had taken place prior to the group's collapse causing losses of a very substantial nature to the group.

[9] In March 1993, shortly after Tollgate Holdings was placed under final liquidation and following an application by the liquidators of Tollgate Holdings and other companies in the Tollgate Group, the Cape Provincial Division of the Supreme Court ordered that a commission of enquiry be held into the affairs of certain companies in the group. Adv *B Hobermann* SC, of the Cape Bar, was appointed commissioner. The Commission has been in session ever since and some 55 witnesses have thus far appeared before the Commission. The respondents are satisfied by the evidence that the affairs of the Tollgate Group were mismanaged and manipulated by certain directors under two successive corporate administrations. During May of 1993 the commissioner issued summonses requiring Messrs H Bernstein, R Klotz and D Nicola (the first to third applicants) to appear before him and to produce documentation in terms of sections 417 and 418 of the Companies Act. Prior to the commencement of Mr Bernstein's examination, the respondents' attorneys sent the applicants' attorneys a memorandum with a list of issues which were anticipated to be canvassed with the Kessel Feinstein witnesses. However, the respondents did not inform the applicants that they considered Kessel Feinstein to be

civilly liable in consequence of the manner in which the firm had performed its professional duties as auditors for the companies in the Tollgate Group, or that the examination would be aimed at gathering evidence to support such a claim against Kessel Feinstein. A material object in the examination of Mr Bernstein turned out to be an exploration of this potential liability. This was done by calling for explanations and interrogating Mr Bernstein with a view to obtaining concessions and admissions concerning the applicants' alleged negligence in the performance of their duties. On the third day of Mr Bernstein's examination his legal representatives objected to the constitutionality of the proceedings. The examination was then deferred by agreement.

[10] On 31 March 1995 the applicants approached the Cape Provincial Division of the Supreme Court seeking relief by way of notice of motion. The applicants sought to rescind the order given by the Supreme Court two years earlier for the holding of the enquiry to the extent that it authorised the partners and employees of Kessel Feinstein to be summoned before the Commission pursuant to section 417 and 418 of the Companies Act. The applicants further sought, upon such rescission, an order to set aside the summonses served on Mr Bernstein and other partners and employees of Kessel Feinstein and an order to interdict the respondents and the commissioner, Adv *Hobermann* SC, from using or disposing of or in any way disclosing to others any

evidence given or documents obtained from the applicants. In the alternative the applicants sought an order interdicting the respondents from proceeding with the examination of Messrs Bernstein, Klotz and Nicola (the first to third applicants) or any partners or employees of Kessel Feinstein, an order interdicting the respondents or the commissioner from using or in any way disposing of or disclosing to others evidence given or documents obtained from the applicants and, with a view to these prayers, an order referring to the Constitutional Court pursuant to section 102(1) of the Constitution the issue whether or not sections 417 and 418 of the Companies Act are inconsistent with the Constitution or whether the manner in which the rights and powers conferred by these sections have been exercised, violates the applicants' fundamental rights. Finally, the applicants sought an interim interdict to prevent the respondents from proceeding with the examination of the Kessel Feinstein partners or employees, pending the final determination of the relief sought.

[11] The parties then agreed that the Cape Provincial Division of the Supreme Court should refer the issue whether sections 417 and 418 of the Companies Act are consistent with the Constitution to the Constitutional Court in terms of section 102(1) of the Constitution. This agreement resulted in the order of Fagan DJP referred to above.

[12] The applicants have attacked the constitutionality of sections 417 and 418 of the Act on four different bases, contending that they are wholly or in part inconsistent with various rights in Chapter 3 of the Constitution and that such violations cannot be justified in terms of section 33(1) of the Constitution or cured by interpretation in terms of sections 35(2) or 35(3). The attack is advanced on the following grounds:

1. The whole mechanism created under sections 417 and 418 violates a cluster of inter-related and overlapping constitutional rights, namely,

   (a) the right to freedom and security of the person (section 11(1));

   (b) the general right to personal privacy (section 13);

   (c) the particular aspect of the right to personal privacy not to be subject to seizure of private possessions or the violation of private communications.

2. The mechanism violates section 24 in that it permits an administrative interrogation in violation of the provisions of that section.

3. Insofar as section 417(2)(b) deprives witnesses of their privilege against self-incrimination and renders their self-incriminating evidence admissible against them in subsequent criminal proceedings, it violates both the general as well as particular rights to a fair trial in terms of section 25(3).

4. Insofar 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:

(a) an implied constitutional right to fairness in civil litigation, and,

(b) the guarantee of equality in terms of section 8.

[13] The third basis of unconstitutionality has, in effect, already been decided in the applicants' favour (at least partially) in *Ferreira v Levin* where this Court declared section 417(2)(b) to be inconsistent with the Constitution to the extent indicated in paragraph 4 above. Two of the judges found that the provision was unconstitutional because of its inconsistency with section 11(1) of the Constitution[5] and eight of the judges found it unconstitutional because of its inconsistency with section 25(3) of the Constitution.[6]

[5]Id per Ackermann J para 127 and Sachs J paras 245, 249, 261, 269.

[6]Id per Chaskalson P paras 168, 186 (Mahomed DP, Didcott J, Langa J, Madala J and Trengove J concurring), Mokgoro J para 208 and O'Regan J para 244.

[14] Before dealing with the remaining bases of the attack on the constitutionality of the sections of the Act in question, it is necessary to examine the legislative setting in which the attack must be evaluated, the purpose of the enquiries and the examination of persons provided for in sections 417 and 418 of the Act and the extent of the control, both constitutional and non-constitutional, which the commissioner and the Provincial and Local Divisions are competent to exercise over the conduct of such enquiries and examinations. Many of these matters were extensively dealt with in *Ferreira v Levin* and it is unnecessary to traverse the same ground here. What follows is a summary of the conclusions reached in *Ferreira v Levin*.[7]

[15] Some of the major statutory duties of the liquidator in any winding up are:-

(a) to proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable;

(b) to give the Master such information and generally such aid as may be requisite for enabling that officer to perform his or her duties under the Act;

(c) to examine the affairs and transactions of the company before its winding-up in

[7]Id paras 122 to 124.

order to ascertain -

(i) whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of the Act or have committed or appear to have committed any other offence; and

(ii) in respect of any of the persons referred to in subparagraph (i), whether there are or appear to be any grounds for an order by the court under section 219 of the Act disqualifying a director from office as such;

(d) except in the case of a member's voluntary winding-up, to report to the general meeting of creditors and contributories of the company the causes of the company's failure, if it has failed;

(e) if the liquidator's report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the grounds mentioned in (c) above, the Master must transmit a copy of the report to the attorney-general.[8]

[8]Id para 122.

[16] The enquiry under sections 417 and 418 has many objectives.

(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.

(d) This is as much one of their functions as reducing the assets of the company into their possession and dealing with them in the prescribed manner, and is an ancillary power in order to recover properly the company's assets.

(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 depradations 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 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 knowledge 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.[9]

(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 section 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.[10]

[9]Id paras 123 - 124.

[10]Id para 151.

[17] Courts in many foreign jurisdictions have recognised the (potentially) oppressive nature of a section 417 type enquiry, while at the same time pointing out that there is a need for a speedy process through which the liquidator is enabled to obtain the necessary information about the company's affairs and dealings, and to trace the whereabouts of assets and possibly recover some assets for the financial benefit of creditors. Courts normally exercise control over the enquiry in two ways. First, courts have scrutinised applications to hold the enquiry. It has been held that an application for a private examination ought not to be granted if it would be oppressive, vexatious or unfair[11]. Second, courts have intervened to prevent the oppressive or unfair conduct of proceedings in the enquiry itself.

[18] More than a century ago the Court of Appeal in England came to the assistance of an examinee and held that, in the circumstances of the case, he could not be summoned to be examined and was not obliged to answer questions. In *In re North Australian Territory Company* Bowen LJ, commenting on the powers under section 115 of the Companies Act 1862, gave the following warning:

> It is an extraordinary power; it is a power of an inquisitorial kind which enables the Court to direct to be examined - not merely before itself, but before the examiner appointed by the Court - some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity

[11] *Re Rolls Razor Ltd (No. 2)* [1970]1 Ch 576 at 592 C.

> against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice where it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information.[12]

[19] In *Cloverbay Ltd (joint administrators) v Bank of Credit and Commerce International S.A.* the Court of Appeal outlined the following criteria for the exercise of the court's discretion whether to order an examination:

[12](1890) 45 Ch 87 at 93.

> It is clear that in exercising the discretion the court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to any assessment of whether or not there is a cause of action and the degree of oppression is small (for example in the case of ordering the premature discovery of documents) the balance will manifestly come down in favour of making the order. Conversely, if the liquidator is seeking merely to dot the i's and cross the t's of a fairly clear claim by examining the proposed defendant to discover his defence, the balance would come down against making the order. Of course, few cases will be so clear: it will be for the judge in each case to reach his own conclusion.[13]

[13][1991] Ch 90 at 102a. See also *British and Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)* [1992] 4 All ER 876 (HL). In this case the House of Lords held at 886G-H that, having regard to the size of the financial crash, the possible oppression of the examinees did not outweigh the needs of the company's administrators, which were held to be reasonable under the circumstances.

[20] The court went on in *Cloverbay* to mention a number of considerations which should specifically be taken into account in exercising the discretion. The first consideration is that the purpose of the provisions is to enable the liquidator to reconstitute the state of knowledge of the company in order to make informed decisions. The purpose is not to place the company in a stronger position in civil litigation than it would have enjoyed in the absence of liquidation. Second, the appropriate standard is not to require proof of the absolute need for information before an order for examination will be granted, but proof of the reasonable requirement of the information. Third, the case for examination is usually much stronger against officers or former officers of the company, who owe the company a fiduciary duty, than it is against third parties. Fourth, an order for oral examination is much more likely to operate oppressively against an examinee than an order for the production of documents.[14] The court is also likely to treat an application for a holding of a section 417 enquiry from an office holder, such as the liquidator, with

[14] *Cloverbay id* at 102D - 103E.

more sympathy than it would treat a similar request from a contributor[15].

[15] *Re Embassy Art Products Ltd* [1987] 3 BCC 292. See also H Rajak (ed) *Company Liquidations* (1988) 306-7.

[21] In *British and Commonwealth Holdings plc (joint administrators) v Spicer*[16] the House of Lords had occasion to comment on the approach laid down in the *Cloverbay* case. Hoffmann J had construed the judgment of Browne-Wilkinson V-C in *Cloverbay* as restricting the availability of an order under section 236 to enable a liquidator or an administrator "to get sufficient information to reconstitute the state of knowledge that the company should possess".[17] The House of Lords did not consider that "reading the judgment [in *Cloverbay*] overall such a limitation to 'reconstituting the company's knowledge' was intended to be laid down in the *Cloverbay* case" and in any event did not think that such a limitation existed.[18]

[22] In this connection Lord Slynn also referred with approval to the following observations of Jessel MR in *Re Gold Co* (1879) 12 Ch D 77 at 85 in a case under section 115 of the Companies Act 1862:

> ... the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees, in bankruptcy to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in

[16]Supra note 13. The appellants in the case were the auditors of a company ("Atlantic") that had been placed under administration. A very wide order to produce books, papers and other records had been issued against the appellants by the registrar pursuant to section 236(2) of the Insolvency Act 1986. On an application by the appellants Hoffmann J discharged the registrar's order. The Court of Appeal (Ralph Gibson and Woolf LJJ (Norse LJ dissenting)) allowed the appeal and restored the order of the registrar (see [1992] 2 All ER 801, [1992] Ch 342). On a further appeal, the House of Lords affirmed the decision of the Court of Appeal.

[17]Id 880g.

[18]Id 883a per Lord Slynn, who delivered the opinion of the House.

> bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed.[19]

The following remarks of Chitty J in *Re Imperial Continental Water Corp* (1886) 33 Ch D 314 at 316 were also quoted with approval:

> Those extensive powers are conferred upon the Court for the beneficial winding-up of the company, for sometimes it happens that the liquidator is unable to obtain from unwilling persons the information which he requires.[20]

[23] It was also pointed out by Lord Slynn that an application such as the one in question was not necessarily unreasonable:

[19]Id 883d - e.

[20]Id 883f.

> because it is inconvenient for the addressee of the application or causes him a lot of work or may make him vulnerable to future claims, or is addressed to a person who is not an officer or employee of or a contractor with the company in administration, but all these will be relevant factors, together no doubt with many others.[21]

The extent and complexity of the company's failure is not an irrelevant consideration. In this regard Lord Slynn said the following:

> This may well be an exceptional order. The size of the financial crash, however, gives rise to an exceptional case. Creditors and investors stood to lose vast sums. It was the administrator's task to investigate 'what was the true financial position of Atlantic at the time of its acquisition and, if it was different from the way it was represented, how and why the truth was concealed' (see [1992] BCLC 314 at 317 per Hoffmann J). They need in this very complex situation to check the accuracy of the various financial documents and to know not only what representations were made but how accurate they were.[22]

The following remarks of Hoffmann J in *Re JT Rhodes Ltd* are also apposite to the present case:

> The Victorian cases on ... [the English equivalent of section 417] contain emotive language which invokes the images of the Inquisition and the Court of Star Chamber. This language was used against the background of a company law which required very little public disclosure and placed a much higher value than today on the protection of the privacy of business transactions and a lower value on the protection of creditors and shareholders. Today we have no difficulty with the proposition that persons who have had what was perhaps no more than the misfortune to be involved in the affairs of an insolvent company owe a public duty to assist the liquidator to investigate the affairs of that company in the interests of the creditors.[23]

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[21]Id 885e.

[22]Id 886g - h.

[23][1987] BCLC 77 at 80.

[24] Moreover, judicial control over the manner in which the examination is conducted complements the control which the court exercises over whether the examination should take place in the first place. Courts have long recognised that the examination is open to abuse and that the proceedings ought to be watched carefully.[24] It has been held that the judiciary is to ensure that the "examination is not made an instrument of oppression, injustice or of needless injury to the individual".[25] In one Australian case, *Mortimer v Brown*,[26] the court held that even though a witness could rarely be excused from

[24]*In re London and Northern Bank Limited* [1902] 2 Ch 73 at 82; *In Re Imperial Continental Water Corporation* (1886) 33 Ch D 314 at 318 - 319; *In Re British Building Stone Company Ltd* [1908] 2 Ch 450 at 454; *Re Rolls Razor Ltd (No 2)* [1969] 3 All ER 1386 at 1397; *Re Kimberley Carpet Mills (Aust) Pty Ltd (in liq)* (1979) 4 (Australian Company Law Reports) 50 at 52.

[25]Per Barwick CJ in *Rees v Kratzmann* [1966] ALR 3. Much earlier, in *Re London & Globe Finance Co.* [1902] (Weekly Notes) 16, the court held that it will disallow questions which were put merely for the purpose of satisfying personal spite or vindictiveness, and not bona fide for the benefit of creditors, contributories or the public.

[26][1972] ALR 723.

answering a question on the basis that an answer might incriminate him, there may be questions so remotely relevant that the harm done to the individual in compelling him to answer outweighs any benefit that the answer may afford.

[25] As Mr *Gauntlett*, on behalf of the respondents, pointed out, the courts in England have, in determining the permissible bounds of investigation by liquidators or administrators under section 236 of the 1986 Insolvency Act, been influenced by the recent pattern of massive and unparalleled corporate collapses and the heavy duty which this places on the liquidators to unravel the complex affairs of companies which often form part of large groups or conglomerates with extensive cross-border activities. As appears from the discussion in paragraphs 17 - 24 above, the courts have responded with a flexible approach in which the reasonable requirements of liquidators in carrying out their duties are carefully balanced against the hardship which the order might cause to the person concerned. The scale of the financial collapse may well give rise to an exceptional case which shifts the balance in favour of the liquidator.[27]

[27]See the passages from Lord Slynn's speech in the *Spicer and Oppenheim* case quoted in paragraph 23 above.

[26] In *Bishopsgate Investment Management Ltd v Maxwell*[28] the Court of Appeal held that a director was not entitled to rely on the privilege against self-incrimination in refusing to answer questions put to him under sections 235 and 236 of the Insolvency Act 1986. In the course of his judgment Dillon LJ stressed that this was justified by the public policy considerations that the law should be able to deal adequately with dishonesty or malpractice on the part of company directors:

[28][1992] 2 All ER 856 (CA).

> It is plain to my mind - and not least from the Cork Report - that part of the mischief in the old law before the Insolvency Act 1985 was the apparent inability of the law to deal adequately with dishonesty or malpractice on the part of bankrupts or company directors. (I take the words gratefully from the judgment of Vinelott J.[29]) That was a matter of public concern, and there is a public interest in putting it right. As steps to that end, Parliament has, by the 1986 Act, greatly extended the investigative powers available to office-holders, with the assistance of the court, and has expressly placed the officers of the company, and others listed in s 235(3), under a duty to assist the office-holder. That is a direct parallel of the duty owed by a bankrupt which is relied on by Lord Eldon LC in *Ex P Cossets, re Warrell* (1820) Buck 531 for his conclusion that the bankrupt could not rely on the privilege against self-incrimination so as to refuse to answer questions put to him in his bankruptcy.
>
> A company cannot act except by individuals, and, in the particular field of law with which the Bishopsgate appeals are concerned, it is illogical that the directors of a company should be entitled to rely on the privilege against self-incrimination on a private examination under s 236, whereas the individual insolvent is not so entitled on a private examination under s 366.[30]

[27] In *Re Arrows Ltd (No 4) Hamilton v Naviede*[31] the public interest in successfully pursuing and recovering the fruits of company fraud was highlighted. Lord Browne-Wilkinson commented as follows:

> The inevitable effect of a witness in civil proceedings claiming the privilege against self-incrimination is to deprive the opposite party and the court of evidence relevant to the dispute under consideration. Until recently, this has not given rise to much litigation. But the recent upsurge of financial fraud, particularly in relation to companies, has raised in an acute form the conflict between the witness's basic right to rely on the privilege on the one hand and the public interest in successfully pursuing and recovering the fruits of such fraud.
>
> Thus in relation to claims for Mareva injunctions and Anton Piller orders, the defendant relies on the privilege to refuse disclosure or discovery of documents which would

[29]Dillon LJ was referring to the judgment of Vinelott J in *Re Jeffrey S Levitt Ltd* [1992] 2 All ER 509.

[30]Id 876d - j.

[31][1994] 3 All ER 814 (HL).

> enable the assets to be traced. He is entitled to claim the privilege ... . The serious consequences flowing from a successful claim to the privilege has lead Parliament in certain cases to override the privilege but to substitute an alternative protection ... .
>
> The primary purpose of an inspection under s 432 of the Companies Act 1985 or an examination by liquidators under s 236 of the 1986 Act is to enable the true facts to be elicited from those who know them. Frequently it is suspected fraud which has given rise to the investigation or examination. If witnesses in such proceedings were able to rely on the privilege against self-incrimination, the whole investigation could be frustrated by a refusal to answer sensitive questions. Although the statutes establishing such inquisitorial rights for the purpose of discovering the true facts about the conduct of a company are silent on the question whether the privilege is to apply, the courts have been ready in recent years to hold that Parliament has impliedly overridden the ancient privilege against self-incrimination... .
>
> This recent erosion of the privilege against self-incrimination in the interests of aiding the tracing and recovery of property extracted from companies by fraud is taken one stage further in this case.[32]

In even more trenchant terms Lord Nolan said the following in the same case:

> The type of fraud which lead to the passing of the Criminal Justice Act 1987 is an exceptionally pernicious form of crime, and those who commit it tend to be as devious as they are wicked. It is not in the least surprising or regrettable that Parliament should have entrusted the Serious Fraud Office with the power to call upon a suspected person to come into the open, and to disclose information which may incriminate him.[33]

[28] Because South African and Australian company law share a common ancestry it is instructive to consider the approach of the Australian courts to comparable problems arising out of Australian companies legislation which make provision for the examination by a liquidator or administrator of persons who have knowledge of the affairs of a

[32]Id 821d - 822c.

[33]Id 834h.

company.

[29] The comparable Australian legislation is the Corporations Amendment Act, 1990. It has features which are similar to the mechanism created by sections 417 and 418 of the South African Act. Examination provisions are embodied, *inter alia* in sections 596 and 597. Section 597(12)[34] excludes the privilege against self-incrimination and section 597(12)(A) provides only a direct use immunity. Express provision is made for the use of the examination record against the examinee in civil proceedings.[35]

[30] The judicial development of Australian law relating to examinations is also to be seen in the context of the large corporate collapses in that country and a growing view that directors and others concerned with the management and affairs of a failed company owe a duty of accounting to creditors and shareholders. In *Spedly Securities v Bond*

[34]Which reads as follows: "A person is not excused from answering a question put to the person at an examination ... on the ground that the answer might tend to incriminate the person or make the person liable to a penalty."

[35]Sections 597(13) and 597(14).

Corporation Holdings Ltd[36] Rogers CJ said the following:

[36] 1 ACSR (1990) 726 (Supreme Court of New South Wales - Commercial Division).

> I can see considerable justification for an argument that, in particular, directors, but also others, concerned with the management and affairs of a failed company owe a duty to creditors and shareholders to provide a candid, full and truthful account of their stewardship. This question was not debated, but I would ask why, with the number and magnitude of company collapses we are seeing daily, the generally uninformative statement of affairs should be all that is required to be provided? Has the time come when it should be an implied contractual term in the appointment of directors and executives of public companies that in the event of the company going into liquidation they should provide, within a limited time, a full and proper account of such matters as are customarily extracted, at considerable expense to the creditors, in the course of s 541 examinations?[37]

In *Lombard Nash International Pty Ltd v Berentsen*[38] Bryson J, after quoting with approval from the passage just quoted, added the following:

> In my view there is such a duty and as well as being owed to creditors and shareholders it is owed to the whole community which has an interest, not only in attaining civil justice in particular pieces of litigation, but also in the emergence to public knowledge of information relating to the affairs of companies which fail although clothed in privileges by the law, including the limited liability of their members.
>
> * * *
>
> In relation to litigation between companies in liquidation and their former officers there is another significant matter, that is, that the company has no mind or brain but its officers, nowhere to resort to for knowledge in human minds but to them, or to whatever records they may have left behind; that the company in a fair sense ought to be thought of as the owner of the knowledge in their minds, which should not be available solely to such persons to the exclusion of the company merely because they are engaged in litigation with the company.[39]

[31] The Australian High Court has held that one of the important public purposes that the examination procedure under the Corporations Act is designed to serve is to enable liquidators to gather information which will assist them in the winding-up; that involves

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[37]Id 738.

[38]3 ACSR (1990) 343 (Supreme Court of New South Wales - Equity Division).

[39]Id 346.

protecting the interests of creditors.[40]

[40] *Hamilton v Oades* (1988) 15 ACLR 123 (HC) 128.

[32] The Australian courts draw no distinction in principle between the stages at which the liquidator is entitled to seek information; whether it is sought in relation to proceedings merely contemplated or proceedings which the liquidator has definitely decided to commence. The relevance of the commencement of litigation or a decision to embark upon it is that it "requires the court to approach the assessment of the liquidator's purpose with greater caution."[41]

In *Hamilton v Oades*[42] Mason CJ pointed out that the very purpose of the section was to create a system of discovery which may cause defences to be disclosed and that to hold otherwise would, adopting the language of Kitto J in *Mortimer v Brown*,[43] "render the provision relatively valueless in the very cases which call most loudly for investigation."

[33] In *The Duke Group Ltd v Arthur Young (Reg) & Anor* Perry J, dealing with analogous examinations under section 541 of the Companies (South Australia) Code, pointed out

[41] *Re Rothwells Ltd (Prov Liq Apptd)* (1989) 15 ACLR 168 (Supreme Court of Western Australia) 181 and see also *Hamilton v Oades* supra note 40 at 129.

[42] Supra note 40 at 129.

[43] (1970) 122 CLR 493 at 496.

that these examinations:

> are designed to enable interested parties to elicit the facts concerning, among other things, the circumstances giving rise to the liquidation of a company, in order to provide a proper basis for consideration of other consequential legal remedies which thereafter may be sought.[44]

And in *Hong Kong Bank of Australia and Others v Murphy and Others*[45] Gleason CJ pointed out that:

> [w]hile the court would not permit a liquidator, or other eligible person, to abuse its process by using an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial procedures, such as discovery or inspection, on the other hand, the possibility that a forensic advantage will be gained does not mean that the making of an order will not advance a purpose intended to be secured by the legislation.[46]

The liquidator is entitled to obtain information, not only to ascertain whether she/he has a cause of action, but also in order to assess whether the case is sufficiently strong to justify spending the creditors' money in pursuit of it, and, conversely, whether there is an adequate defence to a claim against the company.[47]

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[44](1991) 9 ACLC 49 (Supreme Court of South Australia) 53.

[45](1992) 8 ACSR 736 (Supreme Court of New South Wales - Court of Appeal).

[46]Id 742.

[47]*Re Spedley Securities Ltd: Ex Parte Potts & Gardiner* (1990) 2 ACSR 152 (Supreme Court of New South Wales) 155 - 156.

[34] The courts in Australia will come to the assistance of an examinee to ensure that the provisions of the statute compelling the testimony are not used for purposes of oppression or vexation and will use their powers to control and supervise examinations and to prevent injustice.[48] This power is not restricted to defined and closed categories.[49] It is important to note, in the context of the present case, that in relation to an examination under section 597(3) of the Australian corporations law, it has been held that an examination of a company's auditor was permissible even though it could lead to the institution of proceedings against the auditor as a consequence of information thus obtained.[50] The powers in section 597 may be used to enable a creditor to sue a stranger to a company, that is, a person who is neither an officer nor an employee.[51]

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[48]See, for example, *Hamilton v Oades* supra note 40 at 129 - 130, 131 - 133 and *Spedley Securities Ltd v Bond Corporation Holdings Ltd* supra note 36 at 732 - 737.

[49]*Hamilton v Oades* supra note 40 at 132.

[50]*Whelan v Australian Securities Commission* (1993) 12 ACSR 239 (Federal Court of Australia) 255 lines 30 - 45.

[51]*Douglas-Brown (The official liquidator of Woomera Holdings Pty Ltd) (rec and mgr apptd) v Furzer* (1994) 13 ACSR 184 (Supreme Court of Western Australia) 191 - 193 where the Australian and English authorities

are reviewed.

[35] In South Africa the control which courts normally exercise over the application for the holding of the enquiry has been effected by the amendment of the Companies Act in 1985. Earlier, judges in several divisions of the Supreme Court pointed out that the section 417 enquiry is "the Court's enquiry".[52] Since the amendment, however, the court does not necessarily entertain the application for the holding of the enquiry. As explained in *Van der Berg v Schulte*:

> While it may have been correct to describe the enquiry as the Court's enquiry prior to the amendment to the Act in 1985 I am of the view that this is not the case where the inquiry is ordered by the Master. Prior to the amendment an application for an inquiry had to be made to the Court. That is no longer necessary. ...The Court may not come into the picture at all where the Master acts in terms of s 417. This is made quite clear by the provisions of s 418 (3) which provide that if a Commissioner has been appointed by the Master he must report to the Master and not the Court. ... The Legislature has made a clear distinction between an inquiry ordered by the Master on the one hand and one ordered by the Court on the other and even if the Master be regarded as an officer of the Court, he is, in my view, in an inquiry ordered by him and in which he appoints a Commissioner to conduct it on his behalf, acting independently of the Court.[53]

[52] See *Lok and Others v Venter NO and Others* 1982 1 SA 53 (W) 58A; *Venter v Williams and Another* 1982 2 SA 310 (N) 313E; *Foot NO v Alloyex (Pty) Ltd* 1982 3 SA 378 (D & CLD) 383F.

[53] 1990 1 SA 500 (C) 509B.

It is important to point out, however, that *Van der Berg*'s case was concerned with the question whether a commissioner, who is not a magistrate, has any power apart from that contained in section 418(5) of the Act to deal with a recalcitrant witness. The court held that he did not and, further, that the court's powers to deal with such recalcitrant witness other than on the basis of contempt *in facie curiae* were to be found in sections 30 and 31 of the Supreme Court Act. The latter sections are only applicable to "civil proceedings" and not to the type of enquiry envisaged by sections 417 and 418 of the Companies Act. It was therefore not for the court to deal with such recalcitrant witnesses. The judgment is not authority for the proposition that, merely because the master of the Supreme Court orders such an enquiry, the Supreme Court loses its power to prevent oppressive or otherwise improper enquiries being instituted or to prevent enquiries from being conducted in an oppressive or otherwise improper manner. This cannot be the consequence of the amendment.[54] Whether the order is made by the master or by a judge, it is still an order issuing from the Supreme Court.[55] Our Supreme Courts have over

[54]See the remarks of Heher J in the Full Bench judgment in *Ferreira v Levin NO & Others*, 1995 2 SA 813 (W) 843G; *Friedland & Others v The Master & Others* 1992 2 SA 370 (W) 379; *Botha v Strydom & Others* 1992 2 SA 155 (N) 159 and Meskin et al *Henochsberg on the Companies Act* Vol I 890.

[55]See *Re Rolls Razor Ltd. (No. 2)* supra note 24 at 1395(i) per Megarry J:

> "One must remember, too, that what is made is an order of the High Court; and in that court the judge and the registrar both hold office. A litigant who moves from one to the other remains within the court. He is not moving to a different court, as he would be if he went to the Court of Appeal. What the order of the High Court is to be in any case is to be determined by the officer of the court who exercises the jurisdiction of the court."

many years taken the view, based on the English and other authorities, that they have the power to prevent section 417 type enquiries which would result in oppression[56] or intervene where enquiries are conducted in an oppressive or vexatious manner[57] or result in hardship to the examinee or where unusual, special or exceptional circumstances are present.[58] In *James v Magistrate Wynberg and Others*[59] Thring J, relying *inter alia* on the relevant English and Australian authorities, pointed to various ways in which an examinee could be improperly interrogated in terms of section 415 of the Act and in respect whereof a Court would have the power to intervene:

> An examinee might be improperly interrogated by a creditor for the purpose of investigating an issue which did not relate to the winding-up or to the financial interests of the creditors of the company in liquidation, but solely for the improper purpose of obtaining ammunition for use by that particular creditor in litigation which the creditor proposed to bring against the examinee. See *Simon*'s case *supra* at 718C-H, *Anderson and Others v Dickson and Another NNO (Intermenua (Pty) Ltd Intervening)* 1985 (1) SA 93 (N) at 111F - H, and the *Hugh J Roberts* case *supra*.
>
> In short, an examinee might be compelled to submit to an examination which was oppressive or vexatious, inasmuch as the proceedings might be 'seriously and unfairly burdensome, prejudicial and damaging' or 'productive of serious and unjustified trouble and harassment' (*Spedley Securities Ltd (in liq) v Bond Corporation Holdings Ltd* (*supra* at 732, 733)). Where this may happen, the Court has a discretion to intervene to prevent it: see *Re Imperial Continental Water Corporation* (1886) 33 ChD 314 (CA) at 320-1.[60]

Although these remarks were made in the context of an enquiry held in terms of section

[56] *Ex Parte Liquidators Ismail Suliman & Co (Pty) Ltd* 1941 WLD 33 34.

[57] *Ex Parte Brivik* 1950 3 SA 790 (W) 791G.

[58] *Friedland*'s case supra note 54 at 379D-H.

[59] 1995 1 SA 1 (C).

415 of the Act, there is no reason why the court's approach should be any different in regard to a section 417 enquiry.

[36] The purpose of this brief survey is not to lay down or develop the legal principles which the Supreme Court in this country should apply in controlling section 417 enquiries. It is not the function of this Court, but that of the Supreme Court, to do so. The purpose is to point out that the Supreme Court has the power to prevent the oppressive, vexatious and unfair use of section 417 proceedings, for it is against the background of such power that the applicants' remaining attack on the unconstitutionality of sections 417 and 418 of the Act must be considered.

[37] As a prelude to the first basis of attack Mr *Marcus*, on behalf of the applicants, analysed in his written argument the nature and effect of the section 417 and 418 mechanisms as applied to the conduct of the enquiry in the present case, highlighting the secret nature of the enquiry, the examinee’s lack of information and general inability to prepare for the interrogation. Before analysing these criticisms further it must be pointed out that, for

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[60]Id 16C-E.

purposes of the present case, the section 417 and 418 mechanisms must be evaluated in the light of this Court's judgment in *Ferreira v Levin* and in particular paragraph 2 of its order to the effect that:

> As from the date of this order, no incriminating answer given pursuant to the provisions of section 417(2)(b) of the Companies Act on or after 27 April 1994 shall be used against the person who gave such answer, in criminal proceedings against such person, other than proceedings excepted in 1. above.[61]

[38] Mr *Marcus* pointed to the fact that the mechanisms constituted an extraordinary and secret mode of obtaining information. The examinee is not entitled as of right to know what the topics of interrogation will be, whose conduct is to be the focus of interrogation, whether allegations or suspicions of civil or criminal liability are to be investigated and if so, what they are. The examinee is not entitled as of right to access to evidence or exhibits of the Commission and often enters the witness stand wholly unprepared for interrogation.

[61] Supra note 2 para 157.

[39] Inasmuch as the subject matter of the enquiry is the affairs of the company taken in the very widest sense,[62] the examinee may be interrogated on a very wide range of matters and may be compelled to disclose any of his books or papers, however confidential or incriminating they might be. The mechanism is available, not only against the directors, officers, employees or agents of the failed company and against those suspected of being responsible for its failure, but also against innocent third parties whose "misfortune" it is to know something about the trade, dealings, affairs or property of the company.

[62] *Yiannoulis v Grobler and Others* 1963 1 SA 599 (T) 601C-D as approved in *Pretorius and Others v Marais and Others* 1981 1 SA 1051 (A) 1063A.

[40] Relying on decisions such as *Cloverbay*[63] and *Spicer & Oppenheim*, [64] Mr *Marcus* submitted that, whereas English courts generally do not permit a liquidator to invoke this mechanism when a firm decision has been taken to institute proceedings or once they are pending, the position in South Africa[65] is that a person who might be a witness in a pending civil trial relating to the subject-matter of the proposed interrogation is not exempt from interrogation and that the interrogation might even be conducted at a very late stage in the proceedings when the trial was ripe for hearing. The distinction is not, in my view, as marked as Mr *Marcus* suggested. In *Re Castle New Homes Ltd*[66] Slade J, in dealing with the exercise of a court's discretion to order an examination and with the balancing of the requirements of the liquidator or administrator to obtain information on the one hand against the possible oppression to the person sought to be examined on the other, had stated a rather more detailed rule to the effect, *inter alia*, that

> [i]f the evidence shows that the purpose of a liquidator in seeking the examination is to achieve an advantage beyond that available to the ordinary litigant, in litigation which he has already commenced or which he has definitely decided to commence, the predisposition of the court may well be to refuse an immediate order for examination, unless the liquidator can show special grounds to the contrary.[67]

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[63]Supra note 13 .

[64]Supra note 13.

[65]*Levin v Ensor NO & Others* 1975 2 SA 118 (D) 121; *Corporate Finance Ltd & Another v Liquidator Two Plus (Pvt) Ltd (in liq) & Another* 1978 4 SA 42 (R) 45; *Pretorius v Marais* 1981 1 SA 1051 (A) 1063G-H and *Anderson v Dickson* 1985 1 SA 93 (N) 112A-C.

[66][1979] 2 All ER 775.

[67]Id 789a.

In *Cloverbay*,[68] Browne-Wilkinson V-C, commenting on the importance attached by Slade J to the question whether or not the applicant had reached a firm decision to sue, said the following:

[68]Supra note 13.

> The more information there is as to the facts and possible defences to a claim the better informed will be any decision and the greater the likelihood of such decision being correct. It is the function of a liquidator or administrator to do his best for the creditors. True he is an officer of the court and must not act in any improper way but, like the judge, I can see nothing improper in a liquidator or administrator seeking to obtain as much information as possible before committing himself to proceedings. Moreover a test based on the subjective state of mind of the liquidator or administrator inevitably leads to undesirable disputes of fact, such as have arisen in this case, as to what is his state of mind. In my judgment therefore the test propounded in *Re Castle New Homes Ltd* [1979] 1 WLR 1075 has not proved to be satisfactory and should not in future be applied. Nor do I think that there is any other simple test that can be substituted. The words of the Insolvency Act 1986 do not fetter the court's discretion in any way. Circumstances may vary infinitely. It is clear that in exercising the discretion the court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other.[69]

This approach was confirmed in the *Spicer & Oppenheim* case.[70]

[41] It was also pointed out in argument that the liquidator had the additional benefit of the transcript of the interrogation which could be used as evidence against and for purposes of cross-examining the examinee in a subsequent criminal or civil trial. This submission must of course now be read subject to the judgment in *Ferreira v Levin*[71] as must the submission regarding the duty imposed on a liquidator by section 400(1) of the Companies Act to ascertain whether the company's directors and officers have been

[69]Id 101H - 102A.

[70]Supra note 13 at 882d - e.

[71]Supra note 2.

guilty of any criminal offence.

[42] In regard to the particular circumstances of the present case (as embodied in the agreed statement of facts) Mr *Marcus* highlighted a number of features. Since December 1992 the applicants have co-operated fully with and rendered assistance to the liquidators and their attorneys and the investigating accountants. The applicants have furnished them with all their working papers and such explanations and further information as they required. At no stage prior to the commencement of Mr Bernstein's examination on 2 August 1994 (the first of the applicant's to be examined) did the respondents inform the applicants that they considered Kessel Feinstein to be civilly liable in consequence of the manner in which the firm had performed its professional duties as auditors of the companies in the Tollgate Group or that the examination would be aimed *inter alia* at gathering evidence to support a possible claim against Kessel Feinstein. The liquidators addressed a memorandum to the applicants of issues which would be canvassed in their interrogation. Although they were warned that the list was not exhaustive, there was no intimation from the liquidators that the civil liability of Kessel Feinstein would in any way be canvassed. Yet the liquidators had, prior to Mr Bernstein's examination, instructed their investigative accountants to conduct an investigation into the potential liability of Kessel Feinstein and had decided that one of the objects of the interrogation

was to explore their potential liability and to obtain concessions and admissions concerning their alleged negligence in the performance of their duties. When Mr Bernstein came to be questioned, his interrogation was indeed designed to elicit concessions and admissions regarding his and the firm's civil liability. The liquidators were assisted in the interrogation by the very attorneys and investigative accountants with whom the applicants had so closely co-operated since 1992. As a result of rulings by the commissioner which deny Mr Bernstein access to his legal representatives during his interrogation and to documentation relevant to his interrogation, it is contended that the applicants could not meaningfully prepare or have the benefit of legal advice on the surprise attack on themselves.

[43] The mechanism of sections 417 and 418 and its employment in the present case was accordingly characterised by the applicants as one whereby innocent outsiders, who played no part in the management of the company or its demise, are forced to go to a place where they do not want to be; are forced to give evidence by their own oral testimony and by the production of documents by which they incriminate themselves and which can then be used to vest them with civil or criminal liability; are forced to reveal confidential information that they want to keep private; are forced to produce their private books and documents, that they want to keep confidential; are forced to do so

without being heard on the decision to subject them to the mechanism; are forced to do so in circumstances which render meaningful and effective legal representation all but impossible; and are exposed to criminal conviction or civil liability on their own evidence extracted under legal compulsion in a process devoid of the normal checks and balances built into criminal or civil litigation.

[44] It was against this general background that Mr *Marcus* submitted that the whole mechanism of sections 417 and 418 violates the cluster of rights comprising the right to freedom and security of the person in terms of section 11(1); the right to personal privacy in terms of section 13; and the right not to be subject to the seizure of private possessions or the violation of private communications, as a component of the right to personal privacy in terms of section 13.

The attack based on section 11(1)

[45] It is to be borne in mind that the applicants' third basis of attack is focused on section 417(2)(b) of the Act and its inconsistency with the fair criminal trial rights embodied in section 25(3) of the Constitution. The present attack based on section 11(1) is

accordingly a much narrower attack than the section 11(1) attack in *Ferreira v Levin*,[72] for in that case the section 11(1) attack was also directed at section 417(2)(b) and in particular the ouster of the privilege against self-incrimination. Moreover, the present attack must be considered in the light of the effect which the judgment and order in *Ferreira v Levin* has on the mechanism of sections 417 and 418, namely that answers which tend to incriminate the examinee may not be used against the examinee in subsequent criminal proceedings (except in those special cases exempted in the order and which are not relevant to the present proceedings).

[72]Supra note 2.

[46] Mr *Marcus*' attack based on section 11(1) (and indeed his attack based on the other provisions of the Constitution) ignores the fact that the provisions of sections 417 and 418 are not, in their application, completely open-ended. As already indicated, the courts in this country have (as have the courts in other countries) developed a considerable body of case law the design of which is to prevent the mechanism of sections 417 and 418 (and the mechanisms of comparable statutory provisions in foreign jurisdictions) being used oppressively, vexatiously or unfairly towards the examinee. I have no doubt that our Supreme Courts will continue to develop that body of law having due regard to the spirit, purport and objects of the Constitution's chapter of fundamental rights.[73] It is accordingly not open to argue that, because the provisions of sections 417 and 418 are general in terms and contain no express limitations as to their application, the constitutionality of these sections is to be adjudicated on the basis that they permit anything which is not expressly excluded. It is trite law that a statutory power may only be used for a valid statutory purpose.[74] The constitutionality of sections 417 and 418 must therefore be assessed in the light of the control which the Supreme Court exercises over their implementation.

[73]Section 35(3) of the Constitution.

[74]See for example, *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 2 SA 984 (A) 996 - 1000.

[47] A large number of Mr *Marcus*' complaints (particularly in regard to Mr Bernstein's actual examination and the circumstances surrounding it, the alleged trap that was laid for him, his inability to prepare and the various other limitations to which he was subjected) relate to the manner in which the examination was conducted by the Commissioner and not to any provision in the sections of the Act under attack. There is nothing in the sections which mandates that the examination be conducted in this way. In respect of all these complaints the applicants' correct remedy was to approach the Supreme Court for relief on the basis that the examination was being conducted in an oppressive, vexatious or unfair manner. I deliberately refrain from expressing any view as to the validity of any of the complaints on this score. The only point I make is that the Supreme Court has jurisdiction to deal with complaints of this nature. It is a jurisdiction which (on the facts and circumstances of this case and in relation to these specific complaints) should first have been exhausted before any approach was made to this Court. It is unnecessary for purposes of this case to express any view as to how this Court would deal with an ultimate complaint that the Supreme Court's interpretation of a statute or its enunciation or development of the common law is unconstitutional.

[48] There is accordingly little left of the attack based on section 11(1) of the Constitution to

deal with. In *Ferreira v Levin*,[75] it was only myself and Sachs J who based our judgments on an infringement of section 11(1).[76] The President and five members of the Court decided the case on the basis of an infringement of section 25(3) but also disagreed with my broad construction of the section 11(1) residual right to freedom.[77] They expressed the view that the "primary, though not necessarily the only, purpose of section 11(1) of the Constitution is to ensure that the physical integrity of every person is protected",[78] but added that they could "see no objection to accepting provisionally that section 11(1) is not confined to the protection of physical integrity and that in a proper case it may be relied upon to support a fundamental freedom that is not otherwise protected adequately under Chapter 3."[79]

[49] The order in *Ferreira v Levin*, and the view of the majority who found section 417(2)(b) of the Act to be inconsistent with section 25(3) of the Constitution, does not assist the

[75]Supra note 2.

[76]Id paras 90 and 245 respectively, although we disagreed as to the ambit of the section 11(1) residual right to freedom.

[77]Id per Chaskalson P (Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ, concurring) paras 169 to 185. O'Regan J, para 244, decided the case with the majority on the basis of an infringement of section 25(3), but expressed no view on the correct interpretation of section 11(1).

[78]Id per Chaskalson P (the other members of the Court as supra concurring) para 170.

[79]Id per Chaskalson P para 185. Mokgoro J (with the majority) decided the case para 208, on the basis of an infringement of section 25(3) but was of the view, at para 209, that "freedom" in section 25(3) was limited to "freedom in the sense of physical integrity".

applicants in their broader attack on sections 417 and 418 which goes beyond an objection to the use of self-incriminating answers in subsequent criminal proceedings against the examinee. It is an attack based, in the first instance, on the section 11(1) freedom rights.

[50] It is unnecessary to elaborate any further on what I have already said concerning the objectives sought to be achieved by the mechanism embodied in sections 417 and 418. They are all very important public policy objectives. I would endorse the following observation of Windeyer J in *Rees v Kratzmann*,[80] as quoted with approval by Mason CJ in *Hamilton v Oades*:

> The honest conduct of the affairs of companies is a matter of great public concern today.[81]

This is particularly the case in South Africa at present. Such honest conduct cannot be ensured unless dishonest conduct, when it occurs, is exposed and punished and ill-gotten gains restored to the company. Such exposure cannot, in its turn, effectively take place unless the affairs of companies which fail are thoroughly investigated and reconstructed, an objective which is difficult, and often impossible, to achieve without the full co-

[80](1965) 114 CLR 63 at 80.

[81]Supra note 40 at 127.

operation of the directors, office bearers and auditors of the company who are, after all, the brains, eyes and ears of the company. On the obligations resting on such persons, I said the following in *Ferreira v Levin*:

> Companies are used to raise money from the public and to conduct business on the basis of limited liability. There are obvious advantages to doing so. But there are responsibilities which go with it. Part of the responsibility is to account to shareholders for the way in which the company conducts its affairs and, if the company goes insolvent, to account to shareholders and creditors for the failure of the business. These responsibilities are well known to all who participate in the running of public companies. ... Although it has been held that an auditor is not an officer of the company within the meaning of that expression in section 184(1) of the 1926 Act (corresponding to section 423(1) of the present Act) and it has been suggested that there is no basis for regarding an auditor as being an officer of the company for any purpose of the Act, in my view the same public policy considerations apply to the use of derivative evidence of an auditor of the company compelled to testify under section 417(2)(b) of the Act. The auditor has, *inter alia*, many statutory duties under the Companies Act and the Public Accountants' and Auditors Act, the purpose of which duties is, *inter alia*, to protect shareholders and creditors. The knowledge and expertise of the auditor is of particular importance in reconstructing the affairs of the company in liquidation and in achieving the other aims of the section 417 enquiry. An auditor is not obliged to become the auditor of a particular company nor to discharge the attendant duties without remuneration. In accepting appointment as an auditor of any particular company the auditor is aware of these duties.[82]

It is clear from the authorities cited earlier in this judgment[83] that there are occasions when these mechanisms are essential in order to obtain information from complete outsiders. The examinee in the section 417 enquiry is not so differently situated from

[82]Supra note 2 para 151 (footnotes omitted).

[83]Supra paras 16 (j), 19 - 23, 26 - 27, 32 - 34.

witnesses in any other proceedings, especially in the light of this Court's judgment in *Ferreira v Levin*, which in effect established a direct use immunity in criminal proceedings in respect of self-incriminating testimony.

[51] Against this background I proceed to deal with the attack based on section 11(1) of the Constitution. I do so on the basis of the views expressed by the majority of the Court in *Ferreira v Levin* on the construction of section 11(1), referred to in para 48 above. No good purpose would be served, so soon after that judgment, by repeating my arguments for giving section 11(1) a wider construction. The obligation to respond to a subpoena and to be present at the appointed time and place would not, on the majority view, compromise the physical integrity of the subpoenaed witness. In all democratic societies the state has the duty to establish independent tribunals for the resolution of civil disputes and the prosecution of persons charged with having committed crimes. In a constitutional state that obligation is of fundamental importance and it is clearly recognised as such in our constitution. Our Constitution is the supreme law of the land and makes provision in Chapter 7 for the judicial authority to vest in the courts. The use of subpoenas to require witnesses to attend courts, to produce documents and where necessary to give evidence is essential to the functioning of the court system. It is no doubt possible for the rule governing the issuing of subpoenas to be misused. The courts have the power to set aside

subpoenas which have been issued for an improper purpose, or which are vexatious in other respects, but in its practical application that power is limited, and the possibility of the process of the court being abused in particular cases cannot be excluded.[84]

[52] The fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse, does not mean that the power should, for this reason, be characterised as infringing section 11(1) of the Constitution. The law does not sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena. Absent such proof it is the duty of persons who are subpoenaed to co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so. The fact that the present case is concerned with enquiries under sections 417 and 418 of the Companies Act, and not with a trial, does not affect the characterisation of the obligation to honour a subpoena to attend the enquiry. It is a civic obligation recognised in all open and democratic societies and not an invasion of freedom.

[84] *Sher & Others v Sadowitz* 1970 1 SA 193 (C) 195; *S v Matisonn* 1981 3 SA 302 (A) 313.

[53] Witnesses who ignore subpoenas or who refuse to answer questions put to them may be subjected to the sanction of imprisonment. That is true of all persons who contravene legislation that has been lawfully passed. The execution of the sanction implicates the physical integrity of the person who is imprisoned for the breach of the law. Section 11(1), which pointedly refers to detention without trial, does not include within its scope imprisonment consequent upon the sentence of a court. Legislation invariably makes provision for sanctions, including the possibility of imprisonment, and it could never have been the intention of the framers of the Constitution to require all laws which contain such a sanction to meet the test of necessity prescribed by section 33(1) for any limitation of a section 11(1) right.

[54] It is perfectly clear that the sanction of imprisonment properly imposed by a court in respect of legislation which is otherwise constitutional, is justifiable in an open and democratic society. Sanctions are necessary to make legislation effective, for without them laws could be broken with impunity. Thus, even if section 11(1) was to be construed as applying to a statutory provision authorising a court to impose a sentence of imprisonment upon a person convicted of contravening the law, such a provision would almost always be justifiable under section 33. There may be cases in which the sanction

authorised or required by the statute is out of proportion to the offence. But even then it is doubtful whether section 11(1) would be implicated. Such cases would more properly be dealt with under section 11(2) of the Constitution, which is concerned with excessive punishments, than under Section 11(1). That question does not, however, arise in the present case.

[55] The sanction of imprisonment for ignoring, or failing without sufficient cause to give effect to a subpoena issued under section 417 or 418 of the Companies Act, is a reasonable and necessary sanction. So too is the power to cause a person in breach of such a subpoena to be arrested and brought before the Master or other person appointed to conduct the enquiry. Imprisonment follows in accordance with the normal procedural safeguards, therefore neither section 11(1) nor section 25 is impaired; and it is not a sanction which is disproportionate to the offence, therefore sections 11(1) and 11(2) are not impaired. The sanctions are necessary to enforce the legislation, and in so far as they have to comply with Section 11(1) read with Section 33, they clearly do so. The same conclusion, regarding justification under section 33(1), would be reached on the broad interpretation I placed on the right to freedom under section 11(1) in *Ferreira v Levin.* The mechanism provided by sections 417 and 418 is absolutely essential, and therefore necessary, to achieve these important public policy objectives. They cannot be achieved

in any other way which would impinge less on an examinee's right of freedom, particularly when regard is had to the Supreme Court's power to control an examination and prevent it from being vexatious, oppressive or unfair. The limitation of the examinee's right of freedom is also clearly reasonable and justifiable in an open and democratic society based on freedom and equality. The duty to testify is well recognised in such societies whether it be in the context of a criminal or civil trial or in investigatory proceedings such as inquests or bankruptcy enquiries. (On the approach favoured by me in *Ferreira v Levin* I would have found that the statutory compulsion to obey a subpoena infringed section 11(1) but that this was a limitation manifestly justified under section 33(1)).

The attack based on the section 13 right to personal privacy and the right not to be subject to the seizure of private possessions or the violation of private communications

[56] As part of their attack on the constitutionality of section 417 and 418 of the Act the applicants submit that "a witness's privacy is clearly invaded when he is forced to disclose his books and documents that he wants to keep confidential and to reveal information that he wants to keep to himself." In addition, the applicants contend that the "compulsory production of documents under section 417(3) constitute a 'seizure' within the meaning of the right not to be subject to the 'seizure of private possessions' in terms

of section 13 of the Constitution." These are different attacks and will be dealt with separately.

[57] Section 13 of the Constitution entrenches the right to privacy as follows:

> Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

[58] A distinction must be drawn between the compulsion to respond to a subpoena and the compulsion to answer particular questions at a section 417 enquiry in consequence of responding to the subpoena. The mere compulsion to be physically present at a particular place at a particular time in response to a subpoena cannot in itself be regarded as an intrusion on a person's privacy, however widely that concept is defined. It could be examined in relation to concepts such as freedom or perhaps even dignity, but it cannot notionally be categorised as interfering with one's privacy. It may of course be that, in particular circumstances, the disclosure of the person's identity might constitute a breach of the right to privacy, but that does not arise in this case. It is the compulsion to respond to particular questions about oneself and one's activities, for example, which could lead to an infringement of one's right to personal privacy. Before this stage is reached a

person's privacy is not compromised.

[59] Before considering whether and to what extent the answering of particular questions at a section 417 enquiry could constitute an infringement of an examinee's section 13 right to personal privacy, it is essential to consider and analyse the source of such compulsion. This must be done, however, in the light of two relevant and interrelated provisions of the Constitution. Section 35(2) provides for the "reading down"[85] of a statute[86] in the following terms-

> No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.[87]

Section 35(3) moreover provides that in the interpretation of any statute[88] and the

[85]See Hogg *Constitutional Law of Canada* 3 ed para 15.7.

[86]Although the word "law" is used in the subsection it is clear from the use of the word "wet" in the Afrikaans text that a statutory provision is intended.

[87]The formulation of this subsection bears a close resemblance to the rule of construction adopted by the United States Supreme Court as formulated by Justice Brandeis in *Ashwander et al v Tennessee Valley Authority et al* 297 US 288 (1936) 346 as the seventh principle enunciated in that case. An analogous rule is employed in Canada. See Hogg id footnote 20 supra. A similar rule of construction, known as *verfassungskonforme Auslegung* is employed by the German Federal Constitutional Court. Where it is reasonably possible to do so the statute will be construed so as to save it from unconstitutionality but not where this would distort its meaning. See BverGE 2, 266 (282); BverGE 18, 97 (111); BverGE 53, 135 (147) and, generally, v Mangoldt, Klein, Starck *Das Bonner Grungesetz* 3ed Art.3 Rdnr.205 *et seq*. According to Benda, Maihofer, Vogel *Handbuch des Verfassungsrechts* 2ed 34 Rdnr. 53 other European constitutional courts also apply a similar principle.

[88]Supra note 73.

application and development of the common law "a court shall have due regard to the spirit, purport and objects of this Chapter." One of the objects of Chapter 3, apart from entrenching the fundamental rights it does, is to ensure through section 7(4) that any person whose Chapter 3 rights are infringed or threatened with infringement will have an "appropriate" remedy, without specifying or limiting the nature of such remedy.

[60] I return to the significance of the source of the compulsion to answer specific questions at the section 417 enquiry. Section 417(2)(b), before it was declared invalid to the extent indicated in the order of this Court in *Ferreira v Levin,* in express and unequivocal terms compelled an examinee to answer a question even though this might tend to incriminate the examinee and further provided that such incriminating answer could be used thereafter in evidence against the examinee, *inter alia* in criminal proceedings. On the clear wording the provision could simply not be read down so as not to exceed the examinee's Chapter 3 rights. Accordingly, the court could not avoid declaring the provision in question invalid to the extent indicated in its order. There is no other provision in section 417 or 418, or for that matter in any other provision of the Act which expressly or by necessary implication, compels the examinee to answer a specific question which, if answered, would threaten any of the examinee's Chapter 3 rights. It must in my view follow from this that the provisions of sections 417 and 418 can and

must be construed in such a way that an examinee is not compelled to answer a question which would result in the unjustified infringement of any of the examinee's Chapter 3 rights. Fidelity to section 35(2) of the Constitution requires such a construction and fidelity to section 35(3) read with section 7(4) of the Constitution requires an appropriate remedy; in the present case that the examinee should not be compelled to answer a question which would result in the infringement of a Chapter 3 right.

[61] In this context the provisions of section 418(5)(b)(iii)(aa) of the Act are important. The subparagraph in question provides that a person who, having been duly summoned under section 417 or 418 to the examination-

> fails, *without sufficient cause* ... to answer fully and satisfactorily any question *lawfully* put to him in terms of section 417(2) or this section ... shall be guilty of an offence. (emphasis supplied)

Nothing could be clearer, in my view, than this. If the answer to any question put at such examination would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute "sufficient cause", for purposes of the above provision, for refusing to answer the question unless such right of the examinee has been limited in a way which passes section 33(1) scrutiny. By the same token the question itself would not be one "lawfully put" and the examinee would not, in terms of this very provision, be obliged to answer it. The answer to this leg of Mr *Marcus*' argument is that there is, on a

proper construction of these sections, and in the light of this Court's order in *Ferreira v Levin*, no provision in section 417 or 418 of the Act which is inconsistent with the examinee's right to privacy in terms of section 13 of the Constitution now under consideration.

[62] The Constitution has in principle brought about a fundamental change to the way in which the evidential privileges of a witness or those of an examinee at any statutory enquiry (for purposes of the present case it is unnecessary to go further than this) should be approached. It is not, however, in the first instance, the task of this Court to determine what effect such approach will have on the law of evidence relating to privilege, save in those cases (of which section 417(2)(b) is an example) where there is an explicit statutory provision which cannot be read down as required by section 35(2) of the Constitution.

[63] In the case of common law privilege which has not been limited by statute it is the function of all the courts who are empowered to do so, and in particular that of the Supreme Court, in execution of the duty imposed on them by section 35(3) of the Constitution to "have due regard to the spirit, purport and objects of" Chapter 3 in the "development of the common law" of privilege. Such development can consist of the extension or the limitation of a privilege.

[64] The present attack is in the vaguest terms, namely, an assertion that the privacy of witnesses are invaded when they are forced to disclose their books and documents that they want to keep confidential and to reveal information that they want to keep to themselves. No real information is furnished as to the nature or content of the documents or information in respect whereof the claim to privacy is being made. In the present context a claim to privacy can surely only be founded on the content of the information which the examinee is being forced to disclose, not on his desire not to disclose it. It is simply not possible to pronounce on the issue of privacy unless the content of the document or information in respect whereof privacy is claimed is disclosed. Under these circumstances it would be most inadvisable, if not in fact impossible, to give a detailed exposition on the constitutional right to privacy at section 417 proceedings, quite apart from the fact that I am of the view that this is, in the first instance, an exercise which the Supreme Courts ought to work out on a case to case basis. It is sufficient for the disposition of this part of the case to repeat that there is no provision in section 417 or section 418 which, when properly construed in the light of section 35(2) and (3) of the Constitution, is inconsistent with such right.

[65] The aforegoing conclusion renders it unnecessary, strictly speaking, to consider whether the compulsion to answer the questions which the applicants complain of do infringe

their constitutional right to privacy. It would nonetheless be appropriate, I believe, to venture some preliminary observations on the scope of this right. The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate.[89] The scope of privacy has been closely related to the concept of identity and it has been stated that "rights, like the right to privacy, are not based on a notion of the

[89]Scholars such as Dionisopoulos and Ducat, *The Right to Privacy* (West Publishing Co) (1976) as referred to in Barker *Civil Liberties and the Constitution 6 ed 577* and following, have suggested three cores to the concept. The first constitutes the "place-oriented conceptions of privacy" defining the right in spacial terms, of which *Olmstead v US* 277 US 438 (1928) would be an illustration. The second the "person-oriented conceptions of privacy", where the emphasis is shifted from place or property to the person involved (See *Schmerber v California* 384 US 757 (1966)). The third concept has to do with how the "right inheres in certain relationships" such as the marriage relationship but not necessarily others (See *Griswold v Connecticut* 381 US 479 (1965)).

unencumbered self, but on the notion of what is necessary to have one's own autonomous identity".[90]

[90]Rainer Forst formulated this statement in reaction to Michael J. Sandel's communitarian critique of the "liberal self": firstly, liberalism is said to rely on the concept of the atomistic self, individualised prior to communal relations and constitutive goods and, secondly, to subsume this individual under universalist and individualistic notions of "right" that, despite their intention, destroy the real individuality of a communal being, rendering the "unencumbered self" to become the disempowered citizen of the modern state. (See: Rainer Frost "How not to speak about identity: the concept of the person in a theory of justice." in *Philosophy and Social Criticism* 1992 Vol 18 No1 and M. Sandel "The Procedural Republic and the Unencumbered Self." in *Political Theory* 1984 Vol 12 No 1).

[66] In expanding upon this notion Forst[91] acknowledges that communal bonds are not to be substituted with abstract relations, but argues beyond this for a multi-levelled recognition of identity. Besides the concrete and abstract realms, this thirdly also pertains to societal membership[92] and fourthly to the community of humanity[93] itself

[67] The relevance of such an integrated approach to the interpretation of the right to privacy

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[91]Id.

[92]Id. This is, according to Forst, the third level of political discourse between citizens, where concrete difference and common equality are reconciled, and requires an acceptance of one's obligations towards the right of every member of the polity not to be excluded.

[93]Id. Forst points out that this community is spoken of by both Kant and Mead, and demands mutual respect as a universal moral duty towards persons as *moral persons*. Without this notion of the moral person fundamental rights are meaningless, just as they are meaningless if not institutionalized and secured within a political community. Fundamental rights, although originating on the level of morality, need to be sustained on the level of political discourse and has implications for both the concrete and the abstract self.

is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

[68] In South African common law the "right to privacy is recognised as an independent personality right which the courts have included within the concept of *dignitas"*.[94] "Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal

[94]Neethling Potgieter and Visser *Law of Delict* 2 ed. 333. See also *O'Keeffe v Argus Printing and Publishing Co Ltd*1954 3 SA 244 (C) 247F-249D and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) 455H-456H.

affairs in this state".[95] In *Financial Mail (Pty) Ltd v Sage Holdings Ltd*[96] it was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged "in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court".[97]

[95]Neethling supra note 15 at 333. This approach accords with that followed by the US Supreme Court in *US v Dionisio* 410 US 1 (1975) 14 and *US v Mara* 410 US 19 (1973) 21 and, where the court held that a person had no reasonable expectation of privacy with respect to physical characteristics which he/she exposes to the public on a daily basis.

[96]1993 2 SA 451 (A) 462F.

[97]Id 462G.

[69] Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence,[98] the reading of private documents,[99] listening in to private conversations,[100] the shadowing of a person,[101] the disclosure of private facts which have been acquired by a wrongful act of intrusion,[102] and the disclosure of private facts contrary to the existence of a confidential relationship.[103]

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[98] *S v I* 1976 1 SA 781 (RA); *S v Boshoff* 1981 1 SA 393 (T) 396.

[99] *Reid-Daly v Hickman* 1981 2 SA 315 (ZA) 323.

[100] S v A 1971 2 SA 293 (T); *Financial Mail* supra note 96 at 463.

[101] *Epstein v Epstein* 1906 TH 87.

[102] Such as the publishing of information obtained from illegally tapping telephone conversations; *Financial Mail* supra note 96 at 463. See also Neethling *Persoonlikheidsreg* 223.

[103] Neethling *Persoonlikheidsreg* 234-238; Neethling Potgieter and Visser *Law of Delict* 334.

These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities.

[70] In *S v Naudé*[104] Corbett JA said with regard to the inquisitorial power of a commission of inquiry that the exercise thereof "makes an important inroad upon the right of the individual to 'the tranquil enjoyment of his peace of mind'... and such privacy as the law allows him". The learned judge of appeal defined the risk inherent in such proceedings as that of "having aspects of [one's] *private* [life] exposed"[105] (emphasis added). It is clear that these dicta do not provide any authority for the notion that the right to privacy extends beyond the private sphere of an individual's existence. By qualifying the right as "such privacy *as the law allows him*" (emphasis added), Corbett JA acknowledges that the law as it stands embodies a quantification of diverse interests, ranging from that of the individual, to those of his fellow community members. Such an interpretation would accord with the conceptual analysis advanced *supra.* Such an approach is also supported by *O'Keeffe*'s case.[106]

[104]1975 1 SA 681 (A) 704A-B.

[105]Id 704D.

[106]Supra note 94 at 249C-D where Watermeyer AJ followed the American approach which proscribes invasions of privacy which can *reasonably* be considered offensive to persons of ordinary sensibilities. This case

Similarly the statement of Macdonald JA in *R v Parker*[107] that "[t]he procedure laid down in section 102 is exceptional ... and constitutes an inroad into the right of privacy possessed by every member of the public", should be read in the light of his subsequent statement qualifying the scope thereof to the "reasonable and proper limits of privacy".[108]

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concerned the unauthorised publication of a person's photograph; this has been classified as a wrongful invasion of privacy in terms of the Nordic Conference on the Right to Respect for Privacy of 1967.

[107]1966 2 SA 57 (RA) 58D-E.

[108]Id 58H.

[71] Caution must be exercised when attempting to project common law principles onto the interpretation of fundamental rights and their limitation; it is important to keep in mind that at common law the determination of whether an invasion of privacy has taken place constitutes a single enquiry, including an assessment of its unlawfulness. As in the case of other *iniuriae* the presence of a ground of justification excludes the wrongfulness of an invasion of privacy.[109] In constitutional adjudication under the Constitution, by contrast, a two-stage approach must be employed in deciding constitutionality of a statute.

[109] Neethling *Persoonlikheidsreg* 247 et seq. It is also significant that public interest in information plays a role in determining whether the publication of private facts by the media is justified. *Financial Mail (Pty) Ltd v Sage Holdings (Pty) Ltd* supra note 96 at 462-463.

[72] Article 8(1) of the European Convention on Human Rights provides that "everyone has the right to respect for his private and family life, his home and his correspondence". This right is limited by article 8(2) on the basis that interference may only occur in accordance with the law, and must be necessary in a democratic society. It is difficult to distinguish clearly between the right to private life on the one hand, and the rights belonging to the private sphere on the other. The commission has however held that such a clear delimitation was unnecessary since a complaint concerning violation of the private sphere could be based on the provision as a whole. The difficulty that remains is the determination of the scope of "the provision as a whole" or as it is commonly called "the right to privacy".[110]

[73] Use of this term has not been unproblematic, since in terms of a resolution of the consultative Assembly of the Council of Europe this right has been defined as follows:

> The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.

[110] Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed0 (1990) 368.

And in the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967 the following additional elements of the right to privacy are listed: the prohibition to use a person's name, identity or photograph without his/her consent, the prohibition to spy on a person, respect for correspondence and the *prohibition to disclose official information*. The Commission has connected the right to privacy of Article 8 also with the right to freedom of expression of Article 10 by stating that "the concept of privacy in Article 8 also includes, to a certain extent, the right to establish and maintain relations with other human beings for the fulfilment of one's personality.[111] This expansion of the concept by the European Commission is strongly reminiscent of Forst's explanation, *supra*, as to his use of the concept of "identity", namely that it refers to the ability of a person to relate to him or herself and to be able to relate to others in a meaningful way.

[111]Appl. 8962/80, *X and Y v Belgium, D & R* 28 (1982), p 112 (124); see also Van Dijk 369.

[74] In *Fayed v the United Kingdom* [112] the investigation into the affairs of a public company and the subsequent publication of the Inspectors' report by the Secretary of State for Trade and Industry in terms of sections 432(2) and 437(3) of the English Companies Act, was considered by the European Court of Human Rights in the light of articles 6(1) and 8 of the European Convention. Article 6(1) embodies the right to a fair and public hearing, while article 8 guarantees the right to respect for private life. The final report of the Inspectors, containing findings to the effect that the Fayeds had made dishonest representations in the course of a takeover bid and in the investigation itself, was widely reported in the communication media. The Fayeds were never prosecuted. One of the claims brought to the European Court by the applicants was that publication of the Inspectors' report had unjustifiably interfered with their honour and reputation, protected as part of their right to respect for private life under article 8 of the Convention. Although not directly in point, the judgment of the court dismissing the complaint contains instructive dicta on privacy and public policy. The court gave little attention to whether there had been a facial infringement of any of the rights and proceeded almost directly to the second leg of the enquiry, and, holding that the result would be the same regardless of whether the complaint was construed as an infringement of article 6(1) or

[112]Series A. No 294 B; Application No 17101/90; (1994) 18 EHRR 393.

the article 8 right to privacy, tested the legitimacy and proportionality of the infringement. In this context the court found that:-

> [t]he underlying aim of this system is clearly the furtherance of the public interest in the proper conduct of the affairs of public companies whose owners benefit from limited liability ... The system contributes to safeguarding the interests of various parties concerned in the affairs of public companies such as investors, shareholders, especially small shareholders, creditors, customers, trading partners and employees, as well as ensuring the structures.[113]

Regarding the right to a good reputation, the Court remarked that :

> The individual's interest in full protection of his or her reputation" must, to varying extents, "yield to the requirements of the community's interest in independent investigation of the affairs of large public companies.[114]

and, more pertinently for present purposes, that:

[113]Id para 69.

[114]Id para 81.

> ... the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals ... Persons, such as the applicants, who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest ... . [115]

As will be seen in the following paragraphs, this echoes to some extent the approach of the US courts in determining the existence of a "reasonable expectation of privacy", but it must of course be noted that the above comment was in regard to the limitation and not the scope of the right in question.

[115] Id para 75.

[75] The question corresponding to determining the "scope of the right to privacy" in United States constitutional inquiry, is whether a search or seizure has occurred. The US Supreme Court has defined "search" to mean a "governmental invasion of a person's privacy" and it has constructed a two part test to determine whether such an invasion has occurred. The party seeking suppression of the evidence must establish both that he or she has a *subjective expectation* of privacy and that the society has recognized that expectation as *objectively reasonable*. In determining whether the individual has lost his/her legitimate expectation of privacy, the court will consider such factors as whether the item was exposed to the public, abandoned, or obtained by consent.[116] It must of course be remembered that the American constitutional interpretative approach poses only a single inquiry, and does not follow the two-stage approach of Canada and South Africa. Nevertheless it seems to be a sensible approach to say that the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.

[76] The Canadian Charter of Rights and Freedoms does not specifically provide for the protection of personal privacy. As in the United States the issue arises in connection with

[116]See *Katz v US* 389 US 347 (1967) 361, *Abel v US* 362 US 217 (1960) 241.

the protection of persons against unreasonable search and seizure, which in Canada is afforded by section 8 of the Charter. In defining the scope of this protection the Canadian Courts have adopted an approach similar to that followed in United States jurisprudence. In *McKinley Transport Ltd et al v The Queen*[117] Wilson J quoted with approval the following exposition of Dickson J in *Hunter et al v Southam Inc*:[118]

> The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as freedom from 'unreasonable' search or seizure, or positively as an entitlement to a 'reasonable' expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest to be left alone by government must give way to government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

[117][1990] 68 D.L.R. (4th) 568 at 578.

[118][1984] 11 D.L.R. (4th) 641 at 652-3.

Wilson J pointed out[119] that one of the purposes underlying the section 8 right is the "protection of the individual's reasonable expectation of privacy." Since an enquiry into privacy constitutes an important component in determining the scope of an unreasonable search or seizure, the courts have had to develop a test to determine the scope and content of the right to privacy. The "reasonable expectation of privacy" test comprises two questions. Firstly there must at least be a subjective expectation of privacy[120] and, secondly, the expectation must be recognized as reasonable by society.[121]

[119]In *McKinley* supra note 119 at 578 a-c.

[120]*R v Wong* (1987) 41 CCC (3d) 163 OntCA.

[121]James A Fontana *The Law of Search and Seizure in Canada* 3 ed (1992) 19.

[77] The German Basic Law does not in express terms entrench a general right to privacy although isolated aspects of privacy are protected in, for example, Art 4 (freedom of belief), Art 10 (protection of postal communications) and Art 13 (inviolability of the home). The protection of a general right to privacy has been developed by the Federal Constitutional Court (FCC) on a case to case basis.[122] It has held that the constitutional obligation to respect the sphere of intimacy of individuals is based on the right to the unfettered development of personality embodied in Art 2(1) of the Basic Law[123] and in determining the content and ambit of this fundamental right, regard must be had to the inviolability of dignity in terms of Art 1(1), which must be respected and protected by the judicial system.[124] Privacy is also protected out of respect for dignity and this linking up of Art 2(1) and Art 1 results in the limitation provisions of Art 2(1) being applied more strictly in the case of infringement of the right to privacy.[125] A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority.[126] So much so that, in

[122]Von Münch/Kunig *Grundgesetz-Kommentar* (4aufl) Band 1, Art 1 Rn 10; Art 2 Rn 30-31.

[123]See also *Ferreira v Levin* supra note 2 paras 84-85.

[124]BVerfGE 27, 344[350].

[125]Von Münch/Kunig supra note 122, Art 1 Rn 10.

[126]BVerfGE 54, 148[153]; BVerfGE 6, 32[41].

regard to this most intimate core of privacy, no justifiable limitation thereof can take place.[127] But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.[128]

[78] In BVerfGE 34, 238 the FCC was concerned with the objection to the admissibility of secretly made tape recordings indicating that the complainant was guilty of fraud and tax evasion. While upholding the objection, the FCC pointed out that there were circumstances in which a tape recording made without the knowledge of the speaker would fall outside the area of protection afforded by Art 2(1) read with Art 1(1) -

[127]BVerfGE 27, 344[351]; BVerfGE 34, 238[245]; BVerfGE 80, 367[373].

[128]BVerfGE 6, 389[433].

> Because in these cases it is the general consensus that the right to one's own words no longer enters the question. For example, insofar as it has become common practice in commercial dealings to keep a record of telephone messages, orders or stock-exchange reports by means of a tape recording, the right of the speaker to the unfettered development of the personality will, generally speaking, not be affected. In communications of this sort the objective content of the statement is so much in the foreground that the personality of the speaker is almost completely obscured by it and the spoken word thereby loses its private character.[129]

[129] At 247: "...weil in diesen Faellen nach allgemeiner Auffassung von einem Recht am eigenen Wort nicht mehr die Rede sein kann. Soweit es z. B. im geschaeftlichen Verkehr ueblich geworden ist, fernmuendliche Durchsagen, Bestellungen oder Boersennachrichten mittels eines Tonabnehmers festzuhalten, ist in aller Regel das Recht auf freie Entfaltung der Persoenlichkeit des Sprechers noch nicht betroffen. Bei derartigen Mitteilungen steht der objektive Gehalt des Gesagten so sehr im Vordergrund, dass die Persoenlichkeit des Sprechenden nahezu vollends dahinter zuruecktritt und das gesprochene Wort damit seinen privaten Charakter einbuesst."

In principle this approach resembles the "reasonable expectation of privacy" test, referred to above. In German law when insolvents[130] are examined on the causes of their insolvency, they are obliged to answer all questions put, even though the questions might tend to incriminate them, but the FCC has however, in its judgments, crafted a use immunity in respect of such answers if they are sought to be used against insolvents in subsequent criminal proceedings against them.[131] The justification for the compulsion is instructive. The nature and extent of the Art 2(1) right "also depends on whether and to what extent other people depend on the information provided by the person in question; in particular whether the information belongs to a sphere of duties which the person in question has taken up voluntarily."[132] The insolvent is regarded as having specific duties

[130]The German law treats the insolvency of persons and the liquidation of companies in the same way. German insolvency law is governed by the Konkursordnung. The equivalent of section 417 is §75 of the Konkursordnung. Apart from the special provisions in §207 ff of the Konkursordnung, all provisions, including §75 apply both to natural and to juristic persons. (See G. Robbers *Einführung in das deutsche Recht* 275).

[131]BVerfGE 56, 37[49-51].

[132]Id 42: "auch davon abhaengen, ob und inwieweit andere auf die Information der Auskunftsperson angewiesen sind, ob insbesondere die Auskunft Teil eines durch eigenen Willensentschluss uebernommenen Pflichtenkreises ist."

towards the creditors, who have been harmed by his actions;[133] there are not only state or public interests at stake but those of third parties, who have suffered damage and demand information.[134]

[79] The German, European and American approach seems to accord with the analysis attempted above, namely that the nature of privacy implicated by the "right to privacy" relates only to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience. The two-stage approach requires, as the first step, a definition of the scope of the relevant right. At this stage already, in defining the right to privacy, it is necessary to recognise that the content of the right is crystallized by mutual limitation. Its scope is already delimited by the rights of the community as a whole (including its members).

[133]Id 48.

[134]Id 50.

[80] The facts operative in the present case concern neither the invasion of private living space, nor any specific protected relationship. Against the background of the approach alluded to above, the relevant core to be considered appears to be the one defining privacy as inhering in the person, suggested above.[135]

[81] The present judgment has been at pains to point out, in the light of *Ferreira v Levin*, that directors, officers of the company generally, auditors of the company and certain outsiders, have a duty to assist a section 417 enquiry achieve its objects. This duty has been voluntarily assumed by such persons entering into their respective relationships with the company.

[82] Section 417(2) permits interrogation concerning any matter referred to in section 417(1). The latter section refers to "any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the court deems capable of giving information concerning the trade, dealings, affairs or property of the company." In

[135]See note 89 above.

effect the section permits questions to be asked in connection with property, claims or the "trade, dealings, affairs or property of the company". The scope of the interrogation in terms of section 417(2) of the Act must, however, be informed by the purpose of the enquiry. In so far as the purpose is concerned with the discovery of information which may be to the financial benefit of the company and relates to the proper winding-up of the company, as more fully analysed above, the scope of the questioning is limited to this purpose.

[83] Although the phrase "information concerning the ... affairs ... of the company" appears to be quite broad facially, it must be construed in conformity with the aforementioned purpose of the enquiry. It is difficult to see how any information which an individual possesses which is relevant to the purpose of the enquiry can truly be said to be private. One is after all concerned here with the affairs of an artificial person with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities. In the words of Rogers CJ in *Spedly Securities v Bond Corporation Holdings Ltd* directors and others concerned with the management and affairs of a failed company (in which category of persons I would certainly include the auditors) "owe a duty to creditors and shareholders to provide a candid, full and truthful

account of their stewardship."[136] This duty arises from the very fact that the company has no mental or sensory capacities of its own.

[84] In this regard I find the following observation of Bryson J in *Lombard Nash International Pty Ltd v Berentsen*, when made in relation to precisely this corporate deficiency, acute, sound and relevant:

> the company in a fair sense ought to be thought of as the owner of the knowledge in their [the officers' of the company] minds.[137]

If that is so, and I agree that it is for purposes of present analysis, then it can hardly be said that the knowledge of the director, official or auditor bearing relevantly on the affairs of the company that has failed can be said to fall within such person's domain of personal privacy. I would hold the same in relation to a mere debtor or creditor of the company. If such knowledge is relevant, it is relevant because of some legal relationship between such person and the company, which can hardly be said to be private.

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[136]Supra note 36 at 738 and see also para [30] supra.

[137]Supra note 38 at 346.

[85] The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute, will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere, cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exists. Nor would such an expectation be recognised by society as objectively reasonable. This applies also to the auditors and the debtors of the company. On the facts of this case the conclusion seems to be unavoidable that no threat to or infringement of any of the applicants' right to privacy as protected by section 13 of the Constitution has been established. The application of the Constitution to the issue of "sufficient cause" in the present context would operate as follows. The first part of the enquiry is whether answering the particular question would infringe the applicant's right to privacy. If it would, this would constitute "sufficient cause" for declining to answer the question unless the section 418(5)(b)(iii)(aa) compulsion to answer the question would, in all the circumstances, constitute a limitation on the right to privacy which is justified under

section 33(1) of the Constitution

[86] The applicants further contended that the compulsion to produce documents in terms of section 417(3) of the Act constitutes a "seizure of private possessions" within the meaning of section 13 of the Constitution. For the sake of convenience section 417(3) of the Act is repeated here:

> The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.

[87] Reference should in this regard also be made to subparagraph 418(5)(b)(iii)(bb), which provides that any person who has been duly summoned under section 417 or 418 to an enquiry and who:-

> Fails, without *sufficient cause* ... to produce books or papers in his custody or under his control which he was required to produce in terms of section 417(3) or this section, shall be guilty of an offence. (Emphasis added)

[88] It seems to me that this part of the argument must be disposed of in exactly the same way as the previous argument based on the general right to personal freedom in section 13. Sections 417 and 418, and in particular subparagraph 418(5)(b)(iii)(bb), are capable of

being read down, and must be read down, in such a way that they do not compel a person to produce books or papers which would result in an infringement of such person's section 13 right "not to be subject to ... the seizure of private possessions...". Similarly, nothing could be clearer, in my view, than that if the production of any book or paper would infringe the producer's right not to be subject to the seizure of private possessions, this would, for purposes of the above provision, constitute "sufficient cause" for refusing to produce such books or papers unless such right of the producer is subject to limitation under section 33(1) of the Constitution. In this regard it is also in my opinion the task of the Supreme Court, in the first instance, to develop the concept of the right not be subject to the seizure of private possessions, its content and limits.

[89] A few general observations may not, however, be out of place. In the normal course, the section would hardly be used to compel examinees to produce "private possessions" since such possessions would hardly relate to company affairs. But, in so far as private books and papers might relate to the company, the section is open to an interpretation which would permit the Master or the court to compel the production of such documents. The compulsion to produce such private documentation would also constitute a "seizure" within the meaning of section 13 of the Constitution. As pointed out by some of the Canadian judges referred to below, no sound distinction can be made in theory or

practice between compelling a person to produce documentation and the physical removal of such documentation from a person. Again the infringement of section 13 would result as an incidental effect rather than the purpose of employing sections 417 and 418. Moreover, examinees could also approach the courts to control oppressive, vexatious or unfair use of the section. It is likewise difficult to see how a document which was truly relevant to the matters legitimately being examined, could be said to be a private document.

[90] Even if it could be established that, in certain circumstances, and despite a proper construction of sections 417 and 418 of the Act and proper control of their implementation by the Supreme Court, the production of private possessions or private communications could be compelled under section 417(3) or 418(2) of the Act, and in particular that they were relevant to the enquiry and the achievement of its objects, in the sense that I have outlined in this judgment, such production would clearly be justifiable in terms of section 33 of the Constitution. In South Africa, the right not to be subjected to seizure of private possessions forms part of every person's right to personal privacy. The right against seizure must therefore be interpreted in the light of the general right to personal privacy. So much is also clear from the qualification of the right, ie the right against seizure of *private* possessions. I have repeatedly emphasised that privacy

concerns are only remotely implicated through the use of the enquiry. The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributors' financial interests in the recovery of company assets must be weighed against this, peripheral, infringement of the right not to be subjected to seizure of private possessions. Seen in this light, I have no doubt that sections 417(3) and 418(2) constitute a legitimate limitation of the right to personal privacy in terms of section 33 of the Constitution.

[91] The US Supreme Court has held that corporate officers cannot invoke the protection which the Fourth Amendment affords against searches and seizures. In *Hale v Henkel* the Court stated:

> Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so longs as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.[138]

The Court also held as follows:

[138]201 US 43 (1906) 74-5; See also *US v White* 322 US 694 (1944) 698.

> We think it quite clear that the search and seizure of the Fourth Amendment was not intended to interfere with the power of the court to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence.[139]

[92] It is, as already indicated, notionally possible that under sections 417(3) and 418(2) of the South African Companies Act the production of documents which are not company documents or records in the strict sense might be compelled. Nevertheless, provided the documents were relevant to any legitimate enquiry under section 417, their compelled production would be justified for the very same reason that the compelled answers to similarly relevant questions would be justified. Sections 417 and 418 of the Act are accordingly not inconsistent with any of the section 13 rights.

The alleged violation of section 24 of the Constitution

[93] Section 24 of the Constitution reads:

> Every person shall have the right to -
>
> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
>
> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
>
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
>
> (d) administrative action which is justifiable in relation to the reasons given for it

[139]Id 73. See also *White* supra note 138 at 698. Special problems of privacy may be presented by subpoena of a personal diary. See *Fisher et al v United States et al* 425 US 391 1976) at 401 note 7.

where any of his or her rights is affected or threatened

It was submitted in this regard that the whole mechanism set up by sections 417 and 418 of the Act violates section 24 in that it permits an inquiry in violation of paragraphs (b) and (c) of section 24. Both paragraphs are triggered when someone's "rights" are "affected" by "administrative action". Paragraph (b) is also triggered whenever someone's "rights" are "threatened" or "legitimate expectations" are "affected or threatened". Paragraph (c) is also triggered whenever someone's "interests" are "affected".

[94] There is certainly an argument to be made for the proposition that enquiries conducted pursuant to the provisions of sections 417 and 418 of the Act and the performance by Commissioners of their duties to report thereunder constitute administrative action within the meaning of section 24 of the Constitution. The Court of Appeal in England in the *Pergamon Press* case[140] a decision relied upon by Mr *Marcus*, held that enquiries of this kind, although merely investigative in nature, do adversely impact on the rights and interests of the witness and accordingly have to be conducted in accordance with the principles of natural justice. Lord Denning said the following in this regard:

[140] *Re Pergamon Press Ltd* [1971] Ch 388 (CA).

> It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see *Re Grosvenor & West End Railway Terminus Hotel Co Ltd* (1897) 76 LT 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see *Hearts of Oak Assurance Co Ltd v Attorney-General* [1932] A.C. 392. They do not even decide whether there is a prima facie case, as was done in *Wiseman v Borneman* [1971] A.C. 297.
>
> But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up: see *Re SBA Properties Ltd* [1967] 1 WLR 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see section 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large.
>
> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see *Reg. v Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 QB 417.[141]

Sachs LJ expressed himself as follows:

[141]Id 399D - H.

> The nature of the proceeding, the purposes for which the reports may be used, the matter which may be found in them and the extent of the publication being respectively as described, it seems to me, as well as to Lord Denning MR, very clear that in the conduct of the proceedings there must be displayed that measure of natural justice which Lord Reid in *Ridge v Baldwin* [1964] AC 40 at 65, described as 'insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances. . . .' To come to that conclusion it is, as recent decisions have shown, not necessary to label the proceedings 'judicial,' 'quasi-judicial,' 'administrative' or 'investigatory': it is the characteristics of the proceeding that matter, not the precise compartment or compartments into which it falls - and one of the principal characteristics of the proceedings under consideration is to be found in the inspectors' duty, in their statutory fact-finding capacity, to produce a report which may be made public and may thus cause severe injury to an individual by its findings.[142]

[95] I have no quarrel with the judgment, as far as it goes. But the problem which faced the Court of Appeal in the *Pergamon Press* case differs from the problem confronting us. In that case the issue was whether, at common law, the inspectors conducting the enquiry had to act in accordance with the principles of procedural fairness. For this reason it was unnecessary for the *Pergamon* court to characterize the nature of the proceedings. On Mr *Marcus*' argument it is essential for us to do so, for the issue before us is not the common law one, but the constitutional question as to whether paragraphs (b) and (c) of section 24 of the Constitution apply to an enquiry under sections 417 and 418 of the Act. They only apply if the nature of the enquiry is characterized as being "administrative action" because it is only in relation to "administrative action" that section 24 rights arise.

[142]Id 402G - 403A.

[96] I have difficulty in seeing how the enquiry in question can be characterized as administrative action. It forms an intrinsic part of the liquidation of a company, in the present case the liquidation of a company unable to pay its debts. Cilliers, Benade et al succinctly describe the role of winding-up or liquidation as follows:

> The existence of a company as a separate legal entity, which commences upon its incorporation, is terminated by dissolution of the company. In the course of its existence, however short, the company may have acquired rights and incurred liabilities which have to be dealt with before the company's existence can be terminated by dissolution. The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to their order of preference and then by distributing the residue (if any) among the shareholders of the company in accordance with their rights, is known as the winding-up or liquidation of the company.[143] (Footnotes omitted)

In *Woodley v Guardian Assurance Co of SA Ltd*[144] Colman J, commenting on the similarity between insolvency and liquidation, said the following:

> I would go further and suggest that it is socially desirable that, as far as is practicable, all the consequences of the liquidation of an insolvent company should be similar to those [of] the insolvency of an individual ... The winding-up of a company unable to pay its debts is something closely akin to the winding-up of the estate of an insolvent

[143] *Corporate Law* 2 ed at 28.01.

[144] 1976 1 SA 758 (W).

individual.[145]

[97] The enquiry in question is an integral part of the liquidation process pursuant to a court order and in particular that part of the process aimed at ascertaining and realising assets of the company. Creditors have an interest in their claims being paid and the enquiry can thus at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have some difficulty in seeing how section 24(c) of the Constitution can be applied to the enquiry, because it is hard to envisage an "administrative action" taken by the Commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others.

[98] Section 7(1) of the Constitution provides that Chapter 3 (and thus also section 24) binds "all legislative and executive organs of state at all levels of government". I again have difficulty in seeing how a commissioner, appointed to conduct a section 417 enquiry, can be described as an executive organ of state. This observation does not, and is not

[145]Id 763E-F.

intended to, anticipate the issue of the so-called "horizontal" application of Chapter 3 in legal proceedings between individuals, an issue which is currently under consideration by this Court.

[99] It is in my view unnecessary, however, in the circumstances of this case, to provide an answer to the question and to decide whether section 24, or any part thereof, applies to section 417 and 418 enquiries and whether it applies to all such enquiries, whether conducted by the court, the Master or the commissioner.[146] It is unnecessary, in my view, because even assuming that the enquiry constitutes administrative action, this does not assist the applicants in establishing that the provisions of sections 417 and 418 are inconsistent with section 24(b) or (c) of the Constitution.

[100] The applicants say they are entitled to procedural fairness in terms of section 24(b) of the Constitution. Assuming that to be so, I can see nothing in any of the provisions of section 417 or 418 which is inconsistent (either expressly or by implication) with such claim. If the applicants are entitled to procedural fairness and were not accorded such fairness by the commissioner, their remedy was to enforce this claim through the ordinary courts.

[146]It is accordingly unnecessary to consider the correctness of the view expressed in *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SE) 443I where Jones J held that an enquiry under sections 417 and 418 constituted administrative action for purposes of section 24 of the Constitution.

[101] The applicants also contend that they should at least have been afforded:-

(a) disclosure in terms of sections 24(b) and (c) of the reasons why they were being summonsed, to have enabled them to make meaningful representations to the court, the Master or the Commissioner to dispense with their evidence or to test the decision to summons them by appeal or review, if need be; and

(b) disclosure in terms of section 24(b) of the information required from them, to enable them to avoid interrogation by furnishing the requested information, requested, or to prepare for their interrogation, if need be.

Once again I see nothing in the provisions of section 417 or 418 which stands in the way of this claim (assuming the applicants to be entitled to this demand) which they could not have sought to enforce through the ordinary courts. The position, as I see it, is simply this: there is nothing in these sections which is inconsistent with sections 24(b) or (c) of the Constitution or the applicants' claims. If applicants have a remedy, and I express no opinion on that question, it lies along another course and in other courts; it does not lie in striking down these sections in this Court.

The attack based on the right to fairness in civil litigation

[102] The applicants contend that the mechanism under section 417 and particularly the second

part of section 417(2)(b), violates the Constitution to the extent that it enables the liquidator and creditors of a company in liquidation, to gain an unfair advantage over their adversaries in civil litigation, in violation of an implied constitutional right to fairness in civil litigation.

[103] The appellants' argument proceeds as follows. The right of access to the courts is constitutionally entrenched. In terms of section 22 of the Constitution, every person has the right "to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum." Where an infringement of or threat to any entrenched right is alleged, the victim is moreover entitled in terms of section 7(4)(a) "to apply to a competent court of law for appropriate relief ...". These provisions do not expressly provide for a fair trial, but imply it. The right of access to court cannot mean simply the right to formally engage in a judicial process, however unfair it might be. In order to have substance and be meaningful, the right of access to court must imply the right of access to a fair judicial process. Because the parties in civil litigation usually seek to enforce claims for payment of money or delivery of some other form of property, the civil judicial process is used to deprive an adversary of property despite its protection by section 28 of the Constitution. Other civil claims requiring the defendant to do or

refrain from doing something will invariably bring into play other constitutionally entrenched rights. Consequently, because civil litigation is almost invariably directed at intrusion upon the parties' constitutionally protected rights, they are entitled to demand that the process by which it is done, be procedurally fair. If not, the deprivation of the entrenched right is unconstitutional. The need for civil judicial process to be fair is emphasised by the Constitution's insistence that the judiciary be independent and impartial,[147] the prescribed oath of office,[148] and the endorsement by the General Assembly of the United Nations of the principle that the judiciary should be independent and impartial.[149]

[104] These submissions seem to rest on the far-reaching assumption (to which, perhaps not surprisingly, no argument was addressed) that all the rights entrenched in the Constitution operate directly and immediately on all legal relationships between private individuals. This is certainly not the case in which to pronounce on this contention. I shall assume, purely hypothetically, in the applicants' favour, that this assumption is

[147]Sections 96(2) and 99(5)(d) of the Constitution.

[148]In schedule 3 to the Constitution which requires a commitment from judges to "administer justice to all persons alike without fear, favour or prejudice".

[149]By resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, the UN endorsed the Basic Principles on the Independence of the Judiciary as adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985.

sound.

[105] The applicants' attack in this regard fails to address the really crucial issue, namely, whether the Constitution has constitutionalised civil procedure, wholly or in part. No-one would dispute that civil procedure ought to aim at fairness between contending parties. That is, however, not the issue. The question is whether the Constitution enacts such a norm as an entrenched right. Over the years our courts "have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands".[150] It must be necessary in order "to realise the ostensible legislative intention or to make the Act workable".[151] It is also necessary to bear in mind that we are not construing a Constitution which was framed centuries ago, but one which came into force on 27 April 1994. The Constitution as a whole and section 22 in particular, appears to be workable and to realise the ostensible legislative intention, without the implication the appellants seek to rely upon. When section 22 is read with section 96(2), which provides that "[t]he judiciary shall be independent, impartial and subject only to this Constitution

[150] *Rennie NO v Gordon NNO* 1988 1 SA 1 (A) 21E per Corbett JA.

[151] *Palvie v Motale Bus Service (Pty) Ltd* 1993 4 SA 742 (A) 749C per Howie AJA.

and the law", the purpose of section 22 seems to be clear. It is to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the "regstaatidee", for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into "courts". One recent notorious example of this was the High Court of Parliament Act.[152] By constitutionalising the requirements of independence and impartiality the section places the nature of the courts or other adjudicating fora beyond debate and avoids the dangers alluded to by Van

[152]See *Minister of the Interior v Harris* 1952 4 SA 769 (A). Another example is the Soviet Constitution of 1977 which enacted a wide panoply of individual rights but which made wholly inadequate provision for their enforcement through independent courts. See Henkin *The Rights of Man Today* 66 - 70.

den Heever JA in the *Harris* case.[153]

[153]Id 792A-C where the learned Judge of Appeal said the following:

> "From the second preamble to the South Africa Act it is clear that the authors of our constitution had in mind the doctrine of the *tria politica* and the existence of some judicial power to enforce the constitutional guarantees. That seems to follow by necessary intendment. But I do not think the further inference is justified that they had in contemplation that the judicial power had for ever to be exercised by Courts constituted in a manner which satisfies certain criteria to the end that the independence, competence and justness of these tribunals be manifest and secured. I do not think they intended that Courts should always be of the kind to which they were accustomed. We have had many kinds of Courts; we have had trial by battle, by fire and by flood. We have heard of modern 'people's Courts', in which the standard of justice was perhaps no higher than in the *judicium ferri candentis* of the Lombards (Gengler, *Germanische R-Denkmäler*, p. 759)."

[106] A provision cannot ordinarily be implied if all the surrounding circumstances point to the fact that it was deliberately omitted. That the framers of the Constitution were alert to issues of constitutionalising rules of procedural law and justice is evident from the detailed criminal fair trial provisions in section 25(3). The internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights instruments. Section 6 of the European Convention on Human Rights explicitly confers the right to a fair and public hearing, not only in a criminal trial, but also in regard to the determination of civil rights and obligations.[154] Nearer home, article 12(1)(a) of the Namibian Constitution expressly provides that "[i]n the determination of their civil rights and obligations ... all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law ...". In these circumstances an argument could be made out that the framers deliberately elected not to constitutionalise the right to a fair civil trial. It is, however, unnecessary for purposes of deciding the present case to decide this issue. The only complaint that the applicants have raised on the fair trial issue is that the provisions of sections 417 and 418 result in their being treated unequally in respect of subsequent litigation between themselves and the company. This in

[154]The principle of "equality of arms", implicit in the right to a fair trial, has not been applied to situations such as the one we are considering in the case before us. See, in this regard, Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed (1990) 319 and *Dombo Beheer BV v Netherlands* 18

substance raises an equality issue which is best dealt with as such.

The attack based on the right to equality in terms of section 8

[107] The applicants submit that the mechanism under section 417 of the Act, and in particular, that part of section 417(2)(b) which provides that any answer given to any question at an enquiry may thereafter be used against the examinee, violates the Constitution to the extent that it enables the liquidator and creditors of a company in liquidation, to gain an unfair advantage over their adversaries in civil litigation in violation of the right to equality in terms of section 8.

EHRR 213.

[108] In *Ferreira v Levin*[155] the abovementioned part of section 417(2)(b) was declared invalid to the extent that it provided that an incriminatory answer could be used in criminal proceedings against the examinee,[156] but the constitutionality of the use of such answer in civil proceedings against the examinee was left open.[157]

[109] It was submitted on behalf of the applicants that sections 417 and 418 of the Act permit the liquidator and creditors of the company in liquidation to invoke the inquiry mechanism with a view to civil litigation which is contemplated or even pending and that they are entitled to do so in order to decide whether to institute or continue with the litigation. Thus far the submission is unexceptionable.

[110] It continues, however, by propounding that the impugned sections enable the liquidator

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[155]Supra note 2.

[156]Id para 157.

[157]Id para 154.

and creditors to get a complete preview of their opponent's case and to ensnare the latter's witnesses in a procedure devoid of the normal mechanisms designed to identify and define issues, prepare for trial and receive meaningful legal advice on all stages of the process. In this way, so the argument continues, the liquidator and creditors are afforded an overwhelming advantage in civil litigation, that they would never have enjoyed but for the company's liquidation, which inequality offends section 8 of the Constitution.

[111] I would, by way of preliminary observation, point out once again that the latter part of the submission ignores the supervisory roll of the Supreme Court to ensure that the examination is not conducted oppressively, vexatiously or unfairly to which I have made reference more than once in this judgment.

[112] Nevertheless it is true to say that liquidators are by means of this mechanism, entitled to examine their opponents in civil litigation (actual or prospective) or their opponents' witnesses or recalcitrant potential witnesses and to obtain discovery of documents from such persons at a time and in a way not open to their opponents or prospective opponents. The question is whether this consequence offends section 8 of the Constitution.

[113] In my opinion the enquiry is concerned with investigating whether the "right to equality before the law" in section 8(1) is compromised by the statutory mechanisms in question. Adopting an approach similar to that of Didcott J in giving judgment for this Court in *S v Ntuli*,[158] I consider it unnecessary for present purposes to consider the question whether subsections (1) and (2) of section 8 embody separate rights, or to look at the prohibition against unfair discrimination which subsection (2) pronounces or to consider whether the latter is an independent provision or a corollary or concretization of the former. I also consider it unnecessary to consider the relationship between the right to equality before the law and the right to equal protection of the law in section 8(1).

[114] No example, foreign or otherwise, was cited to us where, by way of legislation or judicial pronouncement, the use in civil proceedings of compelled testimony in interrogation proceedings analogous to those under sections 417 and 418 of the Act, has been prohibited.

[158]Case CCT 17/95 of 8 December 1995 para 18.

[115] At English common law the privilege against self-incrimination does not protect witnesses from answering questions which might have the effect of exposing them to civil liability.[159] The privilege against self-incrimination has been specifically abrogated in bankruptcy proceedings by rule 6.175 of the Insolvency Rules 1986 which provides that at public examinations the bankrupt is required to answer all questions put by the court or which the court allowed to be put and, by virtue of section 433 of the Insolvency Act 1986, the written record of a bankrupt's public examination could then be used in evidence in any proceedings against him.[160]

[116] In Australia the possible liability of accountants to the company based on the negligent preparation of a financial report has been held to be a legitimate subject of the enquiry and there is no objection in principle to the use of section 597 of the Australian Corporations Law to obtain information to be used in litigation proposed or even

[159] *Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No 235 (No 2)* [1977] 3 All ER 717 (CA) at 721c - h. See also *Blunt v Park Lane Hotel Limited and Another* [1942] 2 KB 253 and *Halsbury's Laws of England* 4 ed (1976) Vol 17 para 240.

[160] See *R v Kansal* [1992] 3 All ER 844 (CA) 850a - f. See also Schmitthoff (ed) *Palmer's Company Law* vol 2 15222 to 15222/1.

pending.[161]

[161]Supra note 50 at 255 - 256.

[117] In Canada questions concerning the use of forced testimony in civil proceedings do not really arise. The reason for this is that the privilege against self-incrimination has been comprehensively replaced in that country with a use immunity. There is indeed very little room for reliance on the privilege against self-incrimination at all in Canada. Section 5(1) of the *Canada Evidence Act*[162] makes it very clear that "no witness shall be excused from answering any question on the ground that the answer may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or any person." In exchange, a use immunity in respect of criminal proceedings is granted by section 5(2). Section 13 of the Charter, similarly, only confers a use immunity in relation to "other proceedings" where there is a possibility of incrimination, ie proceedings with penal consequences.[163]

[118] The position seems to be the same in the United States at least in so far as a use immunity is conferred on examinees. That is, the use immunity merely protects the examinee from

[162]R.S.C. 1985, c. C-5.

[163]Hogg *Constitutional Law of Canada* 3 ed (1992) 1142.

use and derivative use in subsequent criminal proceedings. United States Bankruptcy matters are regulated by the Bankruptcy Reform Act of 1978. The Federal Rules of Bankruptcy Procedure, Rule 2004 provides for the examination of persons with information relating to a bankruptcy. The scope of the examination is extremely broad and wide-ranging. The Fifth Amendment privilege applies in respect of the examination, but section 6003 of Title 18 of the United States Code provides that a court may issue an order compelling a witness to testify even when the Fifth Amendment privilege against self-incrimination is claimed. Part V of Title 18 governs the granting of immunity to witnesses before Federal tribunals, including administrative and some independent federal agencies. Section 6002 then provides for immunity from prosecution in the following way:

> ... the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used *against the witness in a criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Emphasis added)

[119] The constitutionality of Title 18 of the US Code was clearly established by the Supreme Court in *Kastigar et al v United States*.[164] The court, in considering the constitutionality of the Organized Crime Control Act of 1970, of which part V of Title 18 is a part, held

that the government may compel testimony from a witness who invokes the Fifth Amendment by conferring on the witness use and derivative use immunity in criminal proceedings only.

[120] There is accordingly no indication that the use of compelled testimony in civil proceedings is prohibited or held to be unconstitutional in other open and democratic societies based on freedom and equality.

[121] Turning them to principle and the application of section 8(1) of the Constitution, I fail to see how the applicants' submission can be sustained. As I have endeavoured to show in this judgment, the very purpose of the proceedings under sections 417 and 418 of the Act is in order to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it cannot get from its erstwhile "brain" and other "sensory organs" or other persons who have a public duty to furnish such information but are unwilling or reluctant to do so fully and frankly. I remain alive to the thrust of the applicants' argument that, as erstwhile auditors of the company, they co-operated fully

[164]406 US 441 (1972) 453.

and were at all times prepared to co-operate fully with the liquidators and their legal and other advisors to supply all relevant information required. If in the light hereof it was oppressive, or vexatious or unfair to summons or interrogate the applicants in the way they were summoned or interrogated, their remedy was, as I have repeatedly stated, to approach the Supreme Court. Their alleged harassment and unfair treatment would not be in consequence of the substantive content of the provisions of sections 417 and 418 of the Act, but the result of their improper application.

[122] As I see the matter, neither the purpose nor the effect of sections 417 or 418, is to place the company in a better position than its debtors or creditors. The purpose is the opposite, namely to place the company in liquidation (because of its resulting disabilities) on such a footing that it can litigate on equal terms with its debtors and creditors. Sections 417 and 418 do not result in the applicants' being denied the section 8(1) right to equality or the equal protection of the law or the section 8(2) right not to be unfairly discriminated against. These sections are not inconsistent with section 8 and accordingly the applicants' attack on this ground cannot succeed.

[123] The applicants' discrete and narrow challenge of section 417(2)(b) on the basis that it authorises the use of compelled self-incriminating testimony at the enquiry in subsequent

criminal proceedings against the examinee would, in the light of the judgment in *Ferreira v Levin*, have been successful to the extent found and ordered in that judgment. No point would be served by repeating that order.

Costs

[124] As far as the question of costs is concerned the applicant is not, for the same reasons mentioned in *Ferreira v Levin (No 2)*,[165] substantially successful, for the extent to which section 417(2)(b) of the Act is unconstitutional does not achieve anything for the applicant in his dispute with the respondents, for he is obliged to answer all questions otherwise lawfully put to him even if the answers thereto might tend to incriminate him. The respondents, it is true, have successfully opposed all other grounds of attack on the constitutionality of sections 417 and 418 of the Act. But in this case too, the respondents did nothing to oppose the referral of the other issues to this Court; in fact they consented to the referral. Had the matter been opposed and full argument addressed to Fagan DJP, the other issues might not have been referred.[166] Under these circumstances justice and fairness would also best be served in this case if all the parties were to pay their own costs.

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[165] *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others (No 2)* CCT 5/95, the judgment on costs delivered on 19 March 1996, paras 5 and 7.

[166] *Ferreira v Levin (No2)* supra note 2 para 10.

The order

[125] In the result, the following order is made:

1. Save to the extent that the provisions of section 417(2)(b) of the Companies Act 61 of 1973 (as amended) were declared to be invalid by this Court's order of 6 December 1995 in *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* (CCT 5/95), the provisions of sections 417 and 418 of the Companies Act are declared to be not inconsistent with the Constitution of the Republic of South Africa Act, 200 of 1993 (as amended).

2. All the parties are to pay their own costs.

Chaskalson P, Mahomed DP, Madala J, Langa J, Mokgoro J, Ngoepe AJ and Sachs J concur in the above judgment of Ackermann J.

[126] **KRIEGLER J**: I have had the privilege of studying the learned and comprehensive judgment prepared in this matter by my colleague Ackermann J. I concur in the order as formulated by him; I also subscribe to his rejection of each of the lines of attack on the

constitutional validity of the sections in question.[1] Although I am in substantial agreement with my colleague, I do wish to reserve my position in respect of those parts of his reasoning which I specify below.

[127] **AD paragraphs [17] to [34]**

[1]Sections 417 and 418 of the Companies Act 61 of 1973, henceforth referred to as "the sections".

The differences between our Companies Act and those of the countries reviewed are so material that I prefer to seek no guidance in those quarters.[2] In any event Ackermann J expresses views (in paragraphs [46] and [47] of his judgment) regarding the power and duty of the Supreme Court, at common law and now under Chapter 3 of the Constitution, which in my respectful view are dispositive. Consequently I prefer to base my concurrence solely on the reasoning contained in paragraphs [46] and [47].

[128] **The attack based on section 11(1) of the Constitution**

[2]I have in mind particularly that the sections were amended (by sections 9 and 10 of Act 29 of 1985) so as to afford the Master extensive powers in relation to examinations.

In *Ferreira v Levin*[3] there was a difference of opinion as between my colleagues regarding the content and scope of "the right to freedom and security of the person" contained in section 11(1) of the Constitution, as also regarding its applicability to section 417(2)(b) of the Companies Act. The line I took rendered it unnecessary to participate in that debate. The issue arises again in the present case, Ackermann J accepting, albeit for the time being, the majority view in *Ferreira v Levin*. My colleague O'Regan J, who had reserved her position in relation to the purview of section 11(1) in that case, has now prepared a judgment in the instant case making plain why, and to what extent, her perception of the particular part of section 11(1) differs from that of the majority in *Ferreira v Levin*. I adhere to the view I expressed in that case.[4] "It is only if and when the production of evidence obtained pursuant to a section 417 enquiry jeopardizes the fairness of the trial that the Constitution can be invoked." That however, does not stand in the way of my endorsing what Ackermann J says in paragraphs [51] to [55] of his judgment in this case. Whatever the scope and content of section 11(1) may be, and whatever my view on the standing of an examinee under section 417 to invoke constitutional protection under section 25(3), I concur with the reasoning and conclusion of Ackermann J in relation to the argument advanced on behalf of the applicants under the rubric of section 11(1).

[129] **The attack based on section 13 of the Constitution**

Ackermann J deals with this topic in paragraphs [56] to [92] of his judgment. He

[3] *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC).

[4] In paragraph [195].

commences with a discussion of the impact of sections 35(2) and 35(3) of the Constitution on the proper interpretation and application of the sections. This leads him to the conclusion (in paragraph [64] of the judgment) that "there is no provision in section 417 or section 418 which, when properly construed in the light of sections 35(2) and (3) of the Constitution, is inconsistent with such right". I agree with that conclusion and with the reasoning on which it is based. I also agree with the extension of that reasoning (in paragraph [92] of the judgment) to the compulsory production of documents relevant to a legitimate enquiry under section 417.

[130] In paragraphs [65] to [97], however, my colleague conducts an investigation of privacy, a concept which he aptly calls "amorphous and elusive". In the course thereof he also considers the related question, equally vexing, of seizure of private possessions. I have no doubt that the research and analysis he has done will in due course prove invaluable, but at this juncture I do not consider it necessary to accompany him. And considering it unnecessary, it is necessary that I do not do so. I am content to rest with the conclusion founded on a proper reading of the sections in the light of the provisions of sections 35(2) and (3) of the Constitution.

[131] **The attack based on section 24 of the Constitution**

My learned colleague addresses this topic in paragraphs [93] to [101] of his judgment, concluding that there is nothing in the sections which is inconsistent with the protection of procedural fairness contained in sections 24(b) or (c) of the Constitution. I agree with that conclusion and with the foundational reasons set out in paragraphs [100] and [101]

of the judgment. Properly applied, the mechanism of the sections should entail no unfairness; if its improper application threatens to do so, the Supreme Court can intervene prophylactically. I would, however, prefer not to endorse the doubts expressed by Ackermann J (in paragraphs [96] to [98] of his judgment) on the question whether an enquiry under the sections is "administrative action" as contemplated by section 24 of the Constitution. Nor do I wish to commit myself to agreeing, if only with a doubt, as to whether a commissioner appointed under section 417 is an executive organ of state. My esteemed colleague's misgivings may be well founded, but I wish to reserve my judgment on the two points for the day when either may be decisive.

[132] **The attack based on section 8 of the Constitution**

With regard to this aspect of the case (dealt with in paragraphs [107] to [122] of the judgment of Ackermann J) my approach is much the same as it was regarding the section 11(1) attack. I agree with the conclusion; I agree with the identification and logical analysis of the principle involved (in paragraphs [121] and [122]) but prefer to express no view on the possible lessons to be learnt from other jurisdictions. That I do, not because of a disregard for section 35(1) of the Constitution, nor in a spirit of parochialism. My reason is twofold. First, because the subtleties of foreign jurisdictions, their practices and terminology require more intensive study than I have been able to conduct. Even on a superficial view, there seem to me to be differences of such substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems. For the present I cannot claim that degree of proficiency. In any

event the logical analysis by Ackermann J of the interaction between the sections and the constitutional provisions sought in aid is really dispositive of the claim.

[133] The second reason is that I wish to discourage the frequent - and, I suspect, often facile - resort to foreign "authorities". Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision. The prescripts of section 35(1) of the Constitution are also clear: where applicable, public international law in the field of human rights must be considered, and regard may be had to comparable foreign case law. But that is a far cry from blithe adoption of alien concepts or inapposite precedents. My colleague has been at pains to discern the principles applied by comparable courts in foreign jurisdictions, to establish whether they can be applied here and, if so, to what extent and subject to what modifications. That is what section 35(1) of the Constitution enjoins and sound comparative law study dictates. It is merely because I have not independently verified the exercise, that I refrain from concurring.

Didcott J concurs in the above judgment of Kriegler J.

[134] **O'REGAN J:** I have had the opportunity of reading the judgment of Ackermann J. I concur in the order that he proposes for the reasons given in this judgment. The facts in this case are set out in the judgment of Ackermann J.

[135] The applicants challenge sections 417 and 418 on the grounds that the procedure authorised by those provisions violates the right to freedom and security of the person (section 11(1)); the right to personal privacy (section 13); the right to administrative justice (section 24); an implied right to fairness in civil litigation and the equality guarantee (section 8). This judgment is concerned, in the main, with the challenge based on section 11(1).

[136] The applicants pointed to the following aspects of sections 417 and 418 examinations which they argued render such examinations unconstitutional. Witnesses before such enquiries may be

- forced to go to a place where they do not want to be;
- forced to produce private books and documents that they want to keep confidential;
- forced to reveal confidential information that they want to keep private;
- forced to give evidence by the production of documents and by their own oral testimony, by which they incriminate themselves, and which can then be used to vest them with civil liability;
- forced to do so without being heard on the decision which subjected them to the mechanism;

- forced to do so in circumstances which render meaningful and effective legal representation all but impossible; and
- exposed to civil liability on their own evidence, extracted under legal compulsion in a process devoid of the normal checks and balances built into litigation.

[137] Section 417 of the Act has already been the subject of constitutional challenge before this court. In *Ferreira v Levin NO and Others* 1996 1 BCLR 1 (CC), this court held that the provisions of section 417(2)(b) of the Act were invalid to the extent that the words

> `and any answer given to any such question may thereafter be used in evidence against him' in section 417(2)(b) apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily. (At para 157.)

[138] The applicants argued that the obligation placed upon witnesses to go to an enquiry and give evidence and produce documents at that enquiry against their will, which may result in exposing those witnesses to civil liability, was in breach of section 11(1) of the Constitution. Section 11(1) of the Constitution provides that:

> Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

[139] In *Ferreira v Levin NO and Others* 1996 1 BCLR 1 (CC), two judges of this court held that the portion of section 417(2)(b) which provided that incriminating evidence given by a witness at a section 417 enquiry would be admissible in a subsequent prosecution of such witness was in breach of section 11(1). Ackermann J held that freedom as

entrenched in section 11(1) should be interpreted as follows:

> Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others. (At para 49.)

Later in the judgment he states that:

> Even though the freedom rights in section 11(1) are residual freedom rights, there is no justification for not giving these residual freedom rights the broad and generous interpretation I have suggested. They constitute the residual rights of individuals (where such or similar rights are not protected elsewhere in Chapter 3) not to have 'obstacles to possible choices and activities' placed in their way by (for present purposes we need not, as already indicated, go any further) the State. (At para 69.)

Ackermann J held that the challenged portion of section 417(2)(b) restricted the choices available to witnesses at a section 417 enquiry in breach of section 11(1). Such limitation he found not to be justifiable in terms of section 33.

[140] Sachs J agreed that the challenged portion of section 417(2)(b) offended against section 11(1) of the Constitution although he approached section 11(1) somewhat differently to Ackermann J:

> The words of section 11 should then be construed in such a manner as to provide constitutionally defensible space against invasions of freedom of a kind analogous in character and intensity to the imposition of physical restraint. Legal traditions, both positive and negative, would help to define what this analogous or penumbral area would include: legal institutions developed and applied in the past with a view to curtailing abusive State action, would readily fit; similarly, negative memories of past oppressive State behaviour in our country and elsewhere, would help define whether or not a freedom issue is being raised. The first step is to establish the existence of what is a real or substantial invasion of freedom, and not a normal regulatory act; only when this is done should the need to justify the infringement arise. Once a substantial breach of this kind has been shown to exist, however, the scrutiny for justification required by section 33(1) can be truly stringent. (At para 257.)

Like Ackermann J, Sachs J held that the challenged portion of section 417(2)(b) constituted an unjustifiable infringement of section 11.

[141] Eight members of the court, however, held that the challenged portion of section 417(2)(b) was in breach of section 25(3), the right to a fair trial, in that it permitted the admission of self incriminating evidence given by a witness at a section 417 enquiry at a subsequent criminal trial. Seven members of the court held that the provision was not in breach of section 11(1). Chaskalson P, speaking for the majority, took a narrower view of section 11(1) than that adopted by Ackermann J and Sachs J. This narrow view was premised upon the level of justification stipulated for section 11(1) by section 33 of the Constitution. Chaskalson P stated:

> In terms of our Constitution we are enjoined to protect the freedom guaranteed by section 11(1) against all governmental action that cannot be justified as being necessary. If we define freedom in the context of section 11(1) in sweeping terms we will be called upon to scrutinise every infringement of freedom in this broad sense as being 'necessary'. We cannot regulate this power by mechanisms of different levels of scrutiny as the courts of the United States do, nor can we control it through the application of the principle that freedom is subject to laws that are consistent with the principles of 'fundamental justice', as the Canadian courts do. (At para 181.)

Later in his judgment he held:

> This does not mean that we must necessarily confine the application of section 11(1) to the protection of physical integrity. Freedom involves much more than that, and we should not hesitate to say so if the occasion demands it. But, because of the detailed provisions of chapter 3, such occasions are likely to be rare. If despite the detailed provisions of Chapter 3 a freedom of a fundamental nature which calls for protection is identified, and if it cannot find adequate protection under any of the other provisions in Chapter 3, there may be a reason to look to section 11(1) to protect such a right. But to secure such protection, the otherwise unprotected freedom should at least be fundamental and of a character appropriate to the strict scrutiny to which all limitations of section 11 are subjected. (At para 184.)

[142] Mokgoro J also did not accept the approach adopted by Ackermann J. She stated:

> Attributing so broad a meaning to "freedom" in this section, has the effect of extending it too far beyond the perimeters of physical integrity. That "freedom" in section 11(1) means freedom in the sense

> of physical integrity emerges from the plain meaning of the text and not from the narrowing of an all-embracing freedom right. This, however, does not mean that section 11(1) cannot be given a broad meaning sufficient to provide protection to an unenumerated right akin to freedom of the person, within the context of the rest of Chapter 3. (At para 209.)

She supported the approach taken by Chaskalson P, subject to the reservations that, in her view, section 11(1) should be restricted to physical integrity (at para 210) and that the section could not generally be interpreted to give protection to unenumerated freedom rights (at para 212). Like the majority of the court, I considered section 417(2)(b) to be in breach of section 25(3). I expressed no view as to whether section 417(2)(b) was in breach of section 11(1) (at para 244.)

[143] In this case, it is necessary to determine whether sections 417 and 418 are in breach of section 11(1). Ackermann J, writing for the majority, has for the purposes of this case, based his reasoning to a large extent on the approach approved by the majority in *Ferreira*'s case. My approach to section 11(1) is different to that adopted by the majority in *Ferreira's* case.

[144] Section 11(1) protects the freedom and security of the person and specifically provides that no person may be detained without trial. The specific prohibition of detention without trial reminds us of the government's frequent violation of individual freedom in the years of apartheid. There were many statutes passed by the former government which authorised detention without trial. Those statutes were extensively used and substantial

numbers of people were detained without trial. Fundamental to the new Constitution, then, is a rejection of such deprivation of freedom. However, section 11(1) cannot be confined to the terms of the specific prohibition of detention without trial. The section has a greater ambit.

[145] In my view, freedom has two inter-related constitutional aspects: the first is a procedural aspect which requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitutional aspect of freedom lies in a recognition that, in certain circumstances, even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional, because the grounds upon which freedom has been curtailed are unacceptable.

[146] Both these aspects of freedom find recognition in clauses of the Constitution other than section 11(1). To that extent, section 11(1) is a residual clause. Section 25 is the principal provision in chapter 3 that requires procedural fairness when a person is deprived of physical freedom. It contains detailed rules which must be followed to protect the rights of persons who have been detained, arrested or charged. Section 11(1), which contains no detailed procedures or rules, other than the prohibition of detention without trial, is supplementary to section 25. In cases where people are deprived of physical freedom in circumstances not directly governed by section 25, section 11(1) will require that fair procedures be followed, as was held in *Coetzee v Government of the Republic of*

South Africa 1995 4 SA 631 (CC); 1996 1 BCLR 1 (CC). Of course, the nature of the fair process required in each case will depend on a variety of factors including the ground upon which the deprivation of freedom is based.

[147] Similarly, the other aspect of freedom finds express recognition in specific rights clauses such as expression (section 15), assembly (section 16), association (section 17), religion (section 14) and others. Section 11(1), however, will protect a residual arena of freedom. I do not believe that this residual scope of the right should be interpreted as broadly and generously as possible. To this extent I disagree, respectfully, with Ackermann J. I also disagree, respectfully, with Mokgoro J that the right to freedom in section 11(1) should be limited to physical freedom. It is likely, given the clear entrenchment of freedoms such as expression, belief and association, that the residual scope of section 11(1) will largely concern physical freedom, but I am unconvinced that it should be limited to physical freedom.

[148] In my view, a purposive interpretation of this right would focus on the general interpretation provision in chapter 3 - section 35(1). Section 35(1) states:

> In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality ...'.

In interpreting the scope of section 11(1), it will be necessary to identify the values which underpin an open and democratic society based on freedom and equality. In undertaking that exercise, I agree with Ackermann J[1] and Sachs J [2] that section 11(1) needs to be

[1] *Ferreira v Levin NO and others* 1996 1 BCLR 1 (CC) at paragraphs 47 - 51.

[2] *Coetzee v Government of Republic of South Africa* 1996 1 SA 631 (CC); 1995 10 BCLR 1382 (CC) at paragraph 43.

understood in the context of the fundamental commitment to dignity expressed in our Constitution in section 10. Our Constitution represents an emphatic rejection of a past in which human dignity was denied repeatedly by an authoritarian and racist government. The Constitution commits our society to a transition to a new society based on principles of democracy, freedom and equality. The recognition of the value of human beings is a cardinal principle of the Constitution and one which will inform the interpretation of many of the specific rights in the Constitution.

[149] However, the rights in chapter 3 need to be interpreted in the understanding too that a democratic society based on freedom and equality remains an aspiration. The freedom and equality which the Constitution values has not yet been realised for all South Africans. An enduring legacy of the past is profound inequality. The poverty in which many of our citizens live materially compromises their enjoyment of rights of freedom and equality. There is much to be done, by the state and citizens, to ensure that the entrenched rights have meaning in the lives of all South Africans.

[150] In my view, the democratic society contemplated by the Constitution is not one in which freedom would be interpreted as licence, in the sense that any invasion of the capacity of an individual to act is necessarily and inevitably a breach of that person's constitutionally entrenched freedom.[3] Such a conception of freedom fails to recognise that human beings live within a society and are dependent upon one another. The conception of freedom underlying the Constitution must embrace that interdependence without denying the

[3] See R M Dworkin *Taking Rights Seriously* (1977) 262 -3.

value of individual autonomy. It must recognise the important role that the state, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms. The preamble to the Constitution states:

> Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

[151] It acknowledges the need to develop a new society in which all citizens can exercise their fundamental rights and freedoms. We know that this will not be an easy task. The interpretation of the rights in chapter 3 must be in sympathy with that undertaking. Accordingly, I agree with the following statement of Sachs J in *Ferreira's* case:

> The reality is that meaningful personal interventions and abstinences in modern society depend not only on the State refraining from interfering with individual choice, but on the State helping to create conditions within which individuals can effectively make such choices. Freedom and personal security are thus achieved both by protecting human autonomy on the one hand, and by acknowledging human interdependence on the other. (At para 251.)

It does not seem to me that this approach will render all regulatory laws or criminal prohibitions subject to constitutional challenge in terms of section 11(1). A purposive approach to section 11(1) recognises that it is aimed not at rendering constitutionally suspect all criminal prohibitions or governmental regulation. Our society, as all others in the late twentieth century, clearly requires government regulation in many areas of social life. It requires a criminal justice system based on the prohibition of criminal conduct. The need for effective government which can facilitate the achievement of autonomy and equality is implicit within the constitutional framework. Only when it can be shown that freedom has been limited in a manner hostile to the values of our Constitution will a

breach of section 11(1) be established.

[152] The approach to the interpretation of section 11(1) that I have proposed may not necessarily produce a different result to the construction proposed by Ackermann J in *Ferreira's* case, although it seems clear that Ackermann J takes a broader view of the scope of section 11(1) than I do. Nor will my approach necessarily produce a different result to that proposed by Chaskalson P and adopted by the majority in *Ferreira's* case and this case. In this case, it does not.

[153] The applicants argue that sections 417 and 418 are in breach of section 11(1) for several reasons. First, they state that witnesses may be compelled to attend and give evidence at an enquiry without being given an opportunity to be heard on the question of whether they should be coerced in this way. This challenge to the provision is a challenge addressed to procedural fairness. In my view, it cannot be said that it is a necessary requirement of an obligation to give evidence that a potential witness first be given an opportunity to state why he or she should not be compelled to give evidence. If it becomes clear in the course of the witness's evidence that he or she knows nothing of the affairs of the company, no further questions will be put. Or, if it is established that a witness has a sufficient excuse not to answer the questions, as contemplated by section 418, then he or she will be under no obligation to answer the questions. Similarly, if it is clear that the purpose of calling the witness was abusive or oppressive, then appropriate relief can be sought from the Supreme Court. Ackermann J has set out in great detail the jurisprudence of, in particular, the United Kingdom and Australia, in regard to the

obligation upon judges in those countries to prevent an abuse of procedures similar to the procedure governed by sections 417 and 418. I am not convinced that this jurisprudence is directly relevant in the light of the differences between the statutory provisions upon which that jurisprudence is based and our own. Nevertheless, there can be little doubt that the Supreme Court may grant relief to prevent the abuse of the procedures provided for in sections 417 and 418. Accordingly, there can be no doubt that there are adequate safeguards in our own legal system to protect witnesses. Beyond these safeguards, the argument that section 11(1) requires notice and an opportunity to be heard prior to the giving of evidence cannot be supported.

[154] The second ground upon which the applicants base their section 11(1) argument is that sections 417 and 418 impose an obligation upon witnesses to attend enquiries and to answer questions and disclose documents to that enquiry. I cannot accept that a subpoena which requires compliance in terms of these provisions can be said to be a breach of freedom as contemplated by section 11(1). All modern societies require the assistance of members of the community in facilitating the administration of justice. Inevitably the obligations thus placed on witnesses can be inconvenient and, at times, unpleasant. In certain circumstances, giving evidence to a court or commission may even put the witness at the risk of some disadvantage, such as civil liability. The overwhelming interest of society is, however, that citizens nevertheless co-operate to ensure that the administration of justice is not prevented. Such an interest is clearly present in the context of section 417 enquiries as well. In this case, it seems to me that the applicants have failed to show that section 417 and 418 are in breach of section 11(1).

[155] The applicants also base their objections to sections 417 and 418 on the right to privacy in section 13 and on an implied right to a fair civil trial and the right to equality in section 8. For the reasons given by Ackermann J, I consider that the applicants have not established that sections 417 and 418 are in breach of any of these constitutional provisions. Finally, the applicants argued that sections 417 and 418 are in breach of section 24 of the Constitution which is concerned with administrative justice. I agree with Ackermann J that the applicants have not shown sections 417 and 418 to be in breach of section 24 of the Constitution. He expresses considerable doubts as to whether an enquiry in terms of sections 417 and 418 is administrative action as contemplated by the Constitution. It is not necessary for the purposes of the case to decide this question, however, and I prefer to express no view at all upon it.

[156] For the above reasons, I concur in the order proposed by Ackermann J.

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