REPUBLIC OF SOUTH AFRICA

Case No: 112/97 In the

matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Appellant

and

THE MASTER OF THE HIGH COURT First Respondent
C M HATHORN NO Second Respondent
B W SMITH NO Third Respondent
PAPERLINK (PTY) LTD Fourth Respondent

CORAM : Hefer, Nienaber, Zulman, Plewman, Streicher, JJA

HEARD : 16 November 1998

DELIVERED : 27 November 1998

JUDGMENT

NIENABER JA\

NIENABER,JA:

The appellant, a commercial bank, was a major creditor of Unique Press (Pty) Ltd ("Unique"). So was the fourth respondent. Unique carried on business as printers in Cape Town. The fourth respondent was one of Unique's suppliers.

On 5 January 1994 Unique was finally liquidated. The second and third respondents were appointed as its joint liquidators. The second respondent attended to the actual administration of the estate. I shall refer to him as the liquidator. He prepared the first and final liquidation, contribution and distribution account which, in amended form and in terms of s 408(b) of the Companies Act 61 of 1973 ("the Act"), was duly confirmed by the Master (the first respondent) on 27 March 1995. On 4 April 1995 the liquidator, in accordance with the plan of distribution contained therein, made a distribution to creditors.

Soon thereafter the fourth respondent prevailed upon the Master to conduct

an examination in terms of s 415 of the Act and to issue a subpoena duces tecum in terms of s 414(2)(a) thereof. The subpoena was served on a certain Mr Chase in his representative capacity on 25 April 1995. Chase was then the commercial manager at the appellant's Claremont branch. He was summoned to appear before the Master at a meeting of creditors "so that you may be questioned with regard to matters relating to the affairs of the aforementioned company in liquidation."

The examination was scheduled for 24 May 1995. The meeting, according to a report to the court which the Master filed, was a continuation of a special meeting of creditors convened by the liquidator and held on 17 January 1995 at which the fourth respondent's claim was proved. In his report the Master stated:

> "This meeting was then adjourned to 10 May 1995 in order to afford the said creditor an opportunity to advance reasons for the proposed interrogation of certain witnesses in terms of the provisions of section 415 of Act 61 of 1973. The fourth respondent convinced me that the persons proposed to be interrogated may be able to give material information concerning the Company or its affairs and I considered it

imperative to continue with such an interrogation on 24 May 1995."

Chase duly attended the meeting presided over by the Assistant Master at which he was interrogated by the fourth respondent's attorney. The tenor of the questioning left little doubt that the fourth respondent was intent on gathering information which it proposed to use against the appellant, be it to initiate proceedings to recover assets which it, but not the liquidators, believed to be owing to Unique by the appellant, be it to fuel a contemplated but quite unrelated claim for damages based on a perceived misrepresentation made by Chase to it regarding Unique's creditworthiness.

The appellant thereupon sought legal advice and at the resumption of the enquiry on 23 August 1995 indicated that it proposed to approach the Cape Provincial Division for a declarator that the Master acted ultra virus his powers in authorising the interrogation. The meeting was adjourned to 29 September 1995

to enable the appellant to do so. On 28 September 1995 the appellant, as applicant, launched the present proceedings by way of an urgent application against the present respondents in the appeal, in which it asked for an order, alternatively, a rule nisi:

> "Declaring the convening and conducting of the enquiry into the affairs of Unique Press (Pty) Ltd (in liquidation) in terms of sections 414,415 and 416 of the Companies Act No 61 of 1973 ("the enquiry") held on 24 May 1995,23 August 1995, 29 September 1995 and to be held on 8 November 1995 or any date thereafter to be ultra vires the powers of First Respondent and consequently null and void and of no force and effect."

Notwithstanding the pending proceedings the meeting resumed the next day when the fourth respondent made application to the Master for subpoenas to be issued to Chase, once again, to another employee of the appellant, Crosson, as well as to a former employee, Snyman, to attend the adjourned meeting scheduled for 8 November 1995. The application was opposed by the appellant and the Master called for written submissions. But before the parties could comply with the

request the court on 19 October 1995 issued a rule nisi which operated as a

temporary interdict against the continuation of the meeting.

On the return day the rule was discharged. The judgment of the court a quo (Albertus AJ) is reported as Standard Bank of South Africa Ltd v The Master and Others 1997 (3) SA 178 (C). This is an appeal, with its leave, against that judgment.

The issue, starkly stated, is whether the Master was empowered to hold an enquiry and to issue subpoenas after he had approved the final liquidation and distribution account and the liquidator had made a payment to creditors in terms thereof.

The appellant contends that on a proper reading of s 415(1) of the Act the Master was no longer so empowered. The fourth respondent, on the other hand, maintains that there is nothing in the section or in any of the other provisions of the Act to prevent him from doing so. The Master, although not formally

opposing the relief sought by the appellant, supports the fourth respondent in the report which he submitted to the court. The liquidators, formally also neutral, lean the other way. They furnished the appellant with affidavits to the effect that the continuation of the enquiry would serve no commercial purpose as they had satisfied themselves that Unique was not possessed of further recoverable assets, including viable claims against the appellant.

S 415(1) of the Act reads as follows:

> "415. Examination of directors and others at meetings. - (1) The Master or officer presiding at any meeting of creditors of a company which is being wound up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414(2)(a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the

> winding-up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily."

The wording of this provision is to be contrasted with that of s 417(1) of the Act.

It provides:

> "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."

The appellant's argument can be recast, for the purpose of this judgment, as a syllogism. First premise: the phrase "a company which is being wound up" in s 415(1) implies that the winding-up process must be current, ergo, that it has not yet been completed. Second premise: the winding-up process is complete when

the liquidator makes a distribution of funds pursuant to a final liquidation and distribution account confirmed by the Master. Conclusion: an interrogation, being part of the winding-up process, which takes place after a distribution has been made, and subpoenas which are issued in respect thereof, are not sanctioned by the section and as such are a nullity.

Each step in the progression is questionable.

In the first proposition two material considerations are overlooked: One, that the words "... which is being wound up ..." in s 415(1) must not be read as a self-contained constituent; they form one part of a composite phrase, namely "... a company which is being wound up and is unable to pay its debts ...". It is a phrase which occurs elsewhere in the Act, essentially in that form (ss 340(1), 341(2), 416(l)(a)), as well as in a substantially identical form "... in the/any winding-up of a company unable to pay its debts ..." (cf ss 339,340(2)(c), 414(1), 417(1) or "... any company which is unable to pay its debts and is being wound up

..." (ss 337, 360(1)). Whatever its metamorphosis the function if the phrase remains the same: to identify the type of company (one which is in the process of being wound up and is unable to pay its debts) with which the particular section of the Act is concerned, as opposed to, and in order to differentiate it from, a company which is being wound up but is nonetheless able to pay its debts. An example would be where the winding-up of the company is voluntary and due security has been furnished for the payment of all debts or the Master has been satisfied that the company has no debts (s 350). The two situations being fundamentally different, different considerations would apply to them (cf 4 Lawsa part 3 par 104). There would be no call, for instance, to conduct an examination of directors and others at an enquiry contemplated in ss 415 or 417 where the company which is being wound up is able to meet all its commitments. Thus it was stated by the full court of the Transvaal Provincial Division (per Margo J) in Taylor and Steyn NNO v Koekemoer 1982 (1) SA 374 (T), a case concerned with

the issue at what stage the inability to pay had to manifest itself, at 377H-378A:

> "Where a company being wound up is able to pay its debts, there is no need for those of the aforesaid provisions which are designed to facilitate recovery of assets and investigations thereanent. On the other hand, where a company which is being wound up is unable to pay its debts, those provisions could be essential to a proper winding-up, whether the inability to pay existed at the commencement of the winding-up or developed during the course thereof. Those provisions are part of the machinery of the concursus creditorum, and it would be surprising indeed if they were available in the case of a company unable to pay its debts at the commencement of the winding-up, but not available where the company develops that inability through, say, the disappearance of assets the following day."

In s 415(1) the full phrase "which is being wound up and is unable to pay '

its debts" is a composite one consisting of two complementary elements. It

qualifies the type of company in respect of which a creditors' meeting can be

convened at which the Master can conduct an "examination of directors and

others". Even when it appears in truncated form (eg as in s 363A(1)) it remains

an adjectival clause. Seen in that light, as I believe it should be viewed, the phrase

does not purport to impose a timescale within which the holding of the examination contemplated in s 415 is to take place. It is descriptive of the type of company in respect of which an enquiry may be held and is not prescriptive of the time-frame within which it is to happen. Consequently the words relied on by the appellant do not, on analysis, support its conclusion. As it was stated in Tylor and Steyn NNO v Koekemoer (supra) at 379B:

> "In my opinion, therefore, the expression in s 415 (1), "a company which is being wound up and is unable to pay its debts", bears its ordinary meaning, namely a company which is unable to pay its debts at the time that the section is invoked by the liquidator or by a creditor who has proved a claim."

The second consideration which is overlooked by the appellant is this. S 415(1) is concerned purely with the minutiae of the examination and not with the timescale within which it is to be conducted, not even, as it were , in passing.

By way of contrast s 417(1) does contain the words "at any time after a winding-up order has been made". Moreover, the comparable words in s 417(1)

are "In any winding-up of a company unable to pay its debts ...". On the appellant's textual approach and in the absence of the exact phrase "which if being wound up" (my emphasis), the Master or the court would not be timebound for the summoning of the categories of persons mentioned in s 417. Yet, considering the similarity in broad purpose of the two types of enquiry (cf Trust Bank van Africa Bpk v Van der Westuizen en andere NNO 1991 (1) SA 867 (T) 869B-E; 4 Laws a par 3 par 193 read with par 220), it would be surprising, to say the least, if a time constraint is found to have been built into the one section but not the other. Both sections form an integral part of the winding-up process (cf Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation); Joos te intervening 1990 (1) SA 954 (A) 960G-J). Both are concerned with an enquiry to discover facts beneficial to creditors and to uncover activities detrimental to wrongdoers (cf Pretorius and Others v Marais and Others 1981 (1) SA 1051 (A)1062H-1064B; Anderson and Others v Dickson and Another NNO (Intermenua (Pty) Ltd

Intervening) 1985 (1) SA 93 (N) 111F-H; Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) 766C-767E; 4 Lawsa part 3, (supra)). What the legislature regards as right for the one should equally be right for the other.

The second proposition of the syllogism is equally contentious. It is of course true, as counsel for the appellant has emphasised, that the actual administration of the winding-up process rests with the liquidator (and not with the Master) and that the liquidator's primary function is the realisation and distribution of assets for the ultimate benefit of the general body of creditors (ss 386 391). But that does not necessarily mean, as contended by the appellant, that the winding-up process was complete when the liquidator made a distribution in terms of a confirmed account.

The critical question in the appeal, according to the appellant, is to determine when the winding-up process comes to an end; the corollary being that after the winding-up process had terminated the holding of an enquiry in terms of

s 415(1) would be ultra vires the powers of the Master. That question the appellant seeks to answer by reference to the functions of the liquidator.

The winding-up process comes to an end, so it is contended, when the liquidator has recovered and realised the assets of the company, applied them in satisfaction of the winding-up costs and the claims of creditors and distributed the balance; once that happens the liquidator has in effect "performed all the duties prescribed by the Act" (s 385(1)); nothing thereafter remains for the liquidator to do to satisfy the claims of creditors; and since the administration and implementation of the winding-up process vests in him (and not in the Master) it means that the winding-up process has effectually been completed when the distribution has taken place.

Cardinal to this thesis is the proposition that by the distribution of funds the liquidator has exhausted his functions and that this is the point at which the winding-up process comes to an end.

The distribution of funds forms an undoubted part, perhaps the central part, of the duties of the liquidator (cf Ward and Another v Smit and Others : In re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (A) 179G-H). S 403(1)(a) requires the liquidator to frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution and, where appropriate, of contribution. S 403(l)(b) then provides:

> "If the account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified".

(There is, as was pointed out during argument, an error - the insertion of an extra

"final" - in both the Butterworths' edition of the Statutes of the Republic of South Africa and the current loose-leaf edition of Henochsberg on the Companies Act).

Implicit in the proviso to the sub-section is the possibility of the recovery of further funds and hence the necessity of a further account "at any time", that is to say, even after a so-called final account had already been confirmed. That eventuality, a later account necessitated by subsequently discovered assets, is also mentioned in Kilroe-Dailey v Barclays National Bank Ltd 1984 (4) SA 609 (A) at 627B-D:

> "It may well happen, after the first account had been confirmed, that additional facts come to the liquidators' notice. If, as is my view, the whole account is, after confirmation final, [cfs 408(b)], the liquidator cannot re-open it. This would not preclude him from, in his later account, reducing or increasing a creditor's claim or increasing or reducing a creditor's contribution. He will probably have to make the necessary mathematical adjustments in the amounts to be paid or collected."

Such an adjustment would have to be made regardless of whether the new

assets were uncovered before or after a distribution had already been made. S 342 requires the liquidator to distribute assets, which would include subsequently discovered assets. And if that possibility fairly exists it would follow that the liquidator should be permitted to avail himself of the machinery of the Act to discover and recover such assets. Part of that machinery is of course the examination in terms of s 415 and the summoning of witnesses in terms of s 417. A liquidator would be failing in his duties under the Act if he refrains from embarking on an investigation when it would have been judicious for him to have done so (Moolman v Builders & Developers (Pty)Ltd (in provisional liquidation); Jooste intervening (supra) 960J).

The prospect of additional assets being unearthed, which must then be accommodated in a later account, shows that a so-called "final account" might in fact not be final and that an initial distribution of funds in terms thereof might in effect only be provisional (cf, in the context of the Insolvency Act 24 of 1936,

Cools v The Master and Others 1998 (4) SA 212 (C) 221C-E). In particular it demonstrates that the winding-up process may well not be complete when the first distribution is made. Consequently it cannot serve, even on the appellant's own showing, as the cut-off point for the holding of a s 415(1) interrogation.

On the appellant's approach the cut-off point must of necessity be the last payment made by the liquidator in terms of a final account confirmed by the Master. But if the law requires further payments to creditors to be made by the liquidator in terms of a supplementary account, as it clearly does, there is no reason in logic or in practice why the cut-off point should itself not be shifted to the last payment made in terms of a post-final account. Such a payment would clearly form part of the duties of the liquidator who would for that purpose continue to function after the initial payment out had been made. And if that is so any enquiry held in anticipation of further assets being recovered, as in this case, would, even on the appellant's own approach, be both timeous and regular.

It is no counter to suggest, as counsel for the appellant sought to do, that the appropriate remedy in such a case lies in an action for restitutio in integrum. That remedy is available to a creditor whose claim was overlooked, for some or other reason, in a final account (cf 4 Lawsa part 3 par 331). But one is here concerned not with a neglected creditor with a belated claim against the company in liquidation but with a potential debtor of the company.

Quite apart from the payment out of later recovered assets there are other winding-up duties and functions which the liquidator may be required to fulfil after the final account has been confirmed and implemented. So for example s 342 provides for a distribution of surplus assets among members and for the recovery of contributions where contributions are due. Ss 409 and 410 deal with the distribution of the estate, including the payment of dividends and the collection and, where appropriate, the repayment of contributions levied from contributories. There are other comparable functions on which it is not necessary to dwell.

In my view, therefore, it cannot be said that the winding-up process factually comes to an end when the assets had first been distributed by the liquidator in terms of a duly confirmed final account.

When does the winding-up process formally come to an end? Formal completion is not a concept which is referred to as such in the Act. Provisions which may conceivably have a bearing on the question are s 385 (dealing with the release of a liquidator) and s 419 (dealing with the dissolution of the company). S 385 provides that a liquidator may apply to the Master for a certificate of completion to the effect that he has "performed all the duties prescribed by this Act and complied with all the requirements of the Master". S 419 provides as follows:

> "419. Dissolution of companies and other bodies corporate. - (1) In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator.
>
> (2) The Registrar shall record the dissolution of the company and

shall publish notice thereof in the Gazette.

(3) The date of dissolution of the company shall be the date of recording referred to in subsection (2)."

Inasmuch as a copy of the s 419(1) certificate is to be sent to the liquidator it does seem to suggest that a situation is contemplated where the s 419(1) certificate may well precede the s 385(1) certificate. (Compare Bowman NO v Sacks and Others 1986 (4) SA 459 (W) at 464B-G, in which it was decided that after dissolution in terms of S 419 a liquidator no longer functions qua liquidator). Indeed, since the Master will doubtless look to the liquidator to advise him as to when the "affairs of the company have been completely wound up", it would appear as if the duties of the liquidator must of necessity extend beyond the earlier distribution of funds by him.

In mentioning a time when the affairs of a company have been "completely wound up" s 419(1) implies that there is a distinction between the moment when the affairs of a company have been wound up and when, tying up all loose ends,

they have been completely wound up. There is nothing expressly stated in the Act to signify that either moment is necessarily to coincide with the distribution of assets by the liquidator. The later of these moments (when the affairs of the company have been completely wound up) must still precede the moment when the Master, presumably acting on the advice of the liquidator, decides to issue a certificate in terms of s 419(1). There is much to be said for the view that although the affairs of a company may have been completely wound up, the company itself was thereafter still "being wound up", and that it remained in that state until finally dissolved. And if that is so, even accepting for the moment the emphasis the appellant places on the words "being wound up" in s 415(1), the Master would be within his rights to authorise an interrogation in terms of s 415, at least until he had concluded and certified that the affairs of the company had been completely wound up. Accordingly it cannot be argued, as the appellant would have it, that the Master became functus officio in respect of the holding of a s 415(1) enquiry

once a distribution of funds had been made by the liquidator.

It follows that I disagree with both the premises, and accordingly with the conclusion, of the syllogism referred to above.

In any event I believe that the appellant's approach, in accentuating the duties of the liquidator as an index of the interval within which the S 415(1) enquiry is to be held, is misdirected. The true enquiry, in my opinion, is about the powers of the Master.

There is nothing in the Act itself which links the Master's power to authorise an examination in terms of s 415(1) to the moment when a distribution of funds in terms of a confirmed final account had been made or to the precise moment when the winding-up process is believed to have come to an end. Any such curtailment in the powers of the Master, if it exists, is therefore to be inferred from the wording of various texts in the Act taken in conjunction with the purpose of the provision. The purpose of s 415(1) in conjunction with that of s 417 has been

mentioned earlier. The appellant's approach implies that the Master becomes

functus officio in respect of the holding of an enquiry when the liquidator makes a distribution in terms of the liquidation and distribution account. The Master's powers are thus posited on the liquidator's actions. The incongruity of that position is illustrated by the facts of this case. In this case, as it happens, the liquidator made the payment after he had been notified that the fourth respondent intended to pursue an enquiry in terms of the relevant sections of the Act. No doubt because the liquidator firmly believed that no purpose would be served by the proposed enquiry, he continued with the winding-up process, obtained confirmation of the account and effected a distribution of assets. On the appellant's approach the liquidator was thus able, assisted by the fourth respondent's failure to object to the account, to deprive the Master of his statutory power to authorise the holding of an enquiry. The sections relied on by the appellant and debated in this court do not in my opinion justify such an extreme

position. The real question is whether there is anything in the Act to prevent the Master from conducting an enquiry in terms of s 415(1) after a distribution of funds had been made by the liquidator. That question, for the reasons stated above, must be answered in the negative.

The appeal is dismissed with costs.

P M NIENABER JUDGE OF APPEAL Concur: Hefer JA
Zulman JA
Plewman JA
Streicher JA