THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 429/2004
Reportable

In the matter between

GUMEDE, ROBERT WELLINGTON MATANA	**First Appellant**
GIJIMA AFRIKA SMART TECHNOLOGIES (PTY) LTD	**Second Appellant**
GIJIMA INFO TECHNOLOGIES AFRICA (PTY) LTD	**Third Appellant**
and	
SUBEL SC, ARNOLD N.O	**First Respondent**
STERENBORG, JOHANNES	**Second Respondent**
ALLIMPEX INTERNATIONAL LTD	**Third Respondent**
ALLIMPEX UK LTD	**Fourth Respondent**

Coram: Mpati DP, Scott, Brand, Lewis JJA and Cachalia AJA

Heard: **9 September 2005**
Delivered: **27 September 2005**

Summary : A *ruling by a Commissioner in an enquiry under s 417 of the Companies Act 61 of 1973 that a person be required to produce documents relating to the affairs of the company under investigation is not liable to the be set aside where the commissioner had reason to believe that the documents are relevant. Relevance will prevail over the right to privacy where the document may throw light on the affairs of the company. The decision of the Johannesburg High Court refusing to set aside the ruling on review upheld.*

JUDGMENT

LEWIS JA

[1] The first respondent is a senior counsel at the Johannesburg Bar. He was appointed by the Master of the High Court (formerly Transvaal Provincial Division) to act as a commissioner in an enquiry into the affairs of a company in liquidation, Acquired Card Technologies (Pty) Ltd (ACT), convened under s 417, read with s 418, of the Companies Act 61 of 1973. In the course of the enquiry, at the instance of a creditor (the second respondent, Johannes Sterenborg), the first respondent ('the commissioner') ordered the first appellant, Robert Gumede, a director of the second and third appellants, to produce certain documents that do not belong to ACT but to the second and third appellants. The appellants applied to the High Court, Johannesburg, to set aside the ruling of the commissioner in which he refused to uphold an objection to the summons. The application was refused (by Du Toit AJ). The appeal against that decision lies with the leave of the learned acting judge. The commissioner does not oppose the appeal. (References in this judgment to 'the respondents' do not include the commissioner.)

[2] The principal issue for determination on appeal is whether the right asserted by the appellants to confidentiality in the documents in question entitles them to refuse to produce the documents to the commissioner. The appellants thus rely on the right to privacy, entrenched in the

Constitution,[1] whereas the respondents argue that the relevance of the documents to the affairs of ACT is such that rights of privacy must yield to the interests of the creditors of ACT. Some background must be traversed before these issues are considered.

Factual background

[3] Sterenborg and his wife were the sole shareholders in ACT until August 2000. Sterenborg had built up the business of ACT, which was the manufacturing of ‘smart cards’ for use in telephones, both by Telkom and by cellular telephone companies. The other respondents are companies incorporated in England but under the control of Sterenborg.

[4] In August 2000 Sterenborg and his wife sold 26 per cent of the shares in ACT to the second appellant, Gijima Afrika Smart Technologies (Pty) Ltd (GAST), of which Gumede is the executive director, for the price of R30 160 000. The balance of the shares in ACT were sold to GAST for some R2m a year later, and GAST took complete control of the business, previously run by Sterenborg, on 6 August 2001. Sterenborg and his wife sued for payment of the purchase price for the balance of the shares in ACT shortly after the second sale, in August 2001.

[1] Section 14.

[5] GAST appointed Mr G T Khaas as the day-to-day manager of ACT. Khaas was employed by the third respondent, Gijima Info Technologies Afrika (Pty) Ltd (GITA) and was made a director of GAST in August 2001 after GAST had taken control of ACT. The appellants refer to themselves loosely as the 'Gijima Group'. Gumede alleged in his founding affidavit that the Gijima Group had discovered, on taking control of ACT, that the records of ACT were in disarray, that no audit of ACT had been done and that ACT had made a substantial loss in trading. Khaas had allegedly been aware of these problems. He had, however, been suspended from his duties as an employee of the Gijima Group in October 2002 and was subsequently dismissed for misconduct in December of that year. The misconduct alleged was that Khaas had 'infiltrated and diverted confidential e-mails and other communications amongst executives, employees, customers and partners of the Gijima Group'. Khaas, alleged Gumede, had been in contact with Sterenborg and had passed information about ACT to him. An Anton Pillar order was granted against Khaas, at the instance of the Gijima Group, in May 2003 and numerous documents and computer data were seized from him. I shall return to the material that was retrieved pursuant to the order.

[6] In October 2001, shortly after GAST had taken control of ACT, Brait Merchant Bank Ltd, which was owed some R12m by ACT, applied for the winding up of ACT. The application was opposed by the Gijima Group. A provisional winding-up order was granted on 13 November 2001, and the order was made final some three months later on 27 February 2002, despite the opposition.

[7] In November 2002 Sterenborg and the other appellants applied to the Master for an order instituting an enquiry into the affairs of ACT in terms of s 417 of the Companies Act. The commissioner, in terms of the order granted, was required to report to the Master on the likelihood of the recovery of money or property of ACT, and was empowered to issue such subpoenas as 'he may in his discretion regard necessary for the proper investigation into the affairs of the company'. Each person so subpoenaed could be ordered to produce 'all of the books, documents, records and papers in their possession or custody or in their power or under their control *relating to the company or their dealings with the company, its business, books, dealings, property and affairs* and as specified in each subpoena' (my emphasis). The wording of the order echoes that of s 417(3) which provides for the production of documents 'relating to the company'.

[8] Sterenborg requested the commissioner to summon Gumede to produce a schedule of documents that had previously been seized from Khaas in terms of the Anton Pillar order. Requests to the Gijima Group's attorneys for sight of the documents had previously been refused. The summons was issued by the commissioner. The appellants objected to producing the documents. The legal adviser to the Gijima Group , Mr van der Walt, submitted an affidavit to the commissioner in which he stated that the documents requested were not '*as a whole* relevant to the affairs of ACT' (my emphasis). Sterenborg conceded, however, that he did not know what was in the documents, and a schedule listing fewer documents, but specifying categories, was then handed in as exhibit 'Z'.

[9] The documents requested in terms of 'Z' are communications with Telkom relating to a tender; a prequalification notice and award by Telkom of the tender for the manufacture and supply of phone cards; and all documents relating to the implementation of the award to GITA and GAST from October 2001.

[10] Sterenborg and Gumede by agreement submitted affidavits in support of their contentions, the former as to the relevance of the documents to ACT and the latter as to their confidentiality. Among the objections to the production of the documents made by Gumede was

that these had been illegally obtained by Khaas. The objection was not pursued before us.

The commissioner's ruling

[11] After hearing argument for the Gijima Group and the respondents, the commissioner dismissed the objection, giving reasons for his decision that the documents be produced. He stated that s 417(3) is to be read in the context of s 417(1) which provides that the Master (or a commissioner who is given the same powers) may summon any person whom he deems capable of giving information about the affairs of the company under investigation. Section 417(3), when it refers to documents 'relating to the company', must thus include documents relevant to the affairs of the company. He continued: 'In my view it would be sufficient if I believe on reasonable grounds that the documents in 'Z' are relevant to the trade, dealings, affairs or property of ACT.' Those documents, he said, impacted 'upon the enquiry whether an opportunity was available to ACT in the form of a Telkom award, and, if so, whether that opportunity was improperly diverted'.

[12] The ruling is attacked by the appellants on the basis that the commissioner erred in finding that the relevance of the documents prevailed over the claim of privacy: where a constitutional right is

infringed, they argue, a commissioner must exercise his or her powers in such a way as to avoid any infringement of the right. At the stage when a commissioner considers an objection to the production of documents, he must find 'sufficient cause' for the production of the documents. The argument derives from a reading of s 418(5)(b)(iii) which provides that any person summoned to produce documents and who fails to do so will be guilty of an offence unless he shows 'sufficient cause' for his failure. The appellants concede, however, that if the documents are relevant to the affairs of the company liquidated then the right of privacy may be limited and confidentiality may not be a ground for refusing to produce the documents.

Relevance

[13] Sterenborg, in the affidavit filed with the commissioner, averred that the documents requested were relevant because he had been informed by Khaas some time in January 2003 that Telkom had shortlisted ACT for the manufacture and supply of phone cards; after the provisional liquidation of ACT Gumede had instructed Khaas to approach Telkom to substitute GAST for ACT as the successful bidder; Khaas had altered a document to change the name of the supplier from ACT to ACT/Gijima; and the Telkom award to GAST had been made on the basis of the assessment by Telkom of ACT's manufacturing plant.

[14] The evidence thus establishes, argue the respondents, that there may have been a diversion of a corporate opportunity from ACT that could have impacted on its financial position. ACT, rather than the Gijima Group, should have been given the contract by Telkom. The appellants contend, however, that these allegations are hearsay: Khaas was available to give evidence at the enquiry but was not called, deposing instead to an affidavit that did not confirm the allegations made by Sterenborg. (Khaas' affidavit deals mainly with negotiations with cellular telephone companies.) Thus, it was argued, relevance was not established and the documents requested, which related to the affairs of the Gijima Group rather than those of ACT, were confidential. Added to this is the contention that the Gijima Group opposed the liquidation of ACT vigorously and at great cost, but that when it failed it was entitled to purchase assets of ACT and bid for the Telkom tender.

[15] However, the respondents argue that the evidence of Khaas was not necessary to establish that there was a reasonable possibility that a corporate opportunity had been diverted from ACT. There was sufficient information, apart from what Khaas had allegedly said, that led to the inference that the Telkom contract would, but for the intervention of the representatives of the Gijima Group, have been awarded to ACT. This

information was available to the commissioner before he issued the summons. Much of it appears, ironically, from the Gumede affidavit that served before the commissioner, and is annexed to his founding affidavit in the application to set aside the summons.

[16] The information of significance includes the following. Telkom had published a pre-qualification notice for the purpose of identifying potential manufacturers of smart cards in South Africa. ACT had responded to the notice by sending information to Telkom enabling it to evaluate ACT. Telkom sent a letter to ACT on 7 October 2001 advising that its representatives would visit ACT's manufacturing plant on 14 November. Khaas had acknowledged the letter on behalf of ACT, and had made arrangements for the visit. Telkom visited the ACT plant on 19 November. In March 2002, according to Gumede, GITA submitted a tender for the supply of smart cards to Telkom. Telkom awarded the tender to GAST in July 2002. There was nothing to suggest that either of GAST or GITA had been evaluated by Telkom, and indeed the Gijima group acquired the machinery required for the manufacture of the cards from ACT. It could not have manufactured the cards without the ACT machinery.

[17] All of these facts were not contested before the commissioner. There was, in my view, every reason for him to infer that ACT might have been awarded the tender had the Gijima Group not intervened. It follows that the commissioner was entitled, probably obliged, to request any document that supported the inference that there had been a diversion of a corporate opportunity from the company under investigation. There was no need for Sterenborg, as a creditor, to prove to the commissioner his allegation of the diversion: he had only to show, as the commissioner ruled, that there were reasonable grounds for believing that the documents were relevant. In my view the documents, although the property of the Gijima Group, were clearly relevant to the question whether a corporate opportunity had been diverted from ACT, and thus related to the affairs and dealings of ACT.

Confidentiality and relevance

[18] In *Bernstein & others v Bester & others NNO*[2] the Constitutional Court confirmed that ss 417 and 418 of the Companies Act do not per se infringe the right to privacy, or imperil the confidentiality of documents that the person claiming privacy seeks to protect. The sections can be read down, where necessary, so as to ensure that constitutionally entrenched rights are not unjustifiably infringed. In dealing with whether

[2] 1996 (2) SA 751 (CC).

the forced production of documents amounted to an unwarranted invasion of privacy, Ackermann J, in the judgment of the majority of the court, said:[3]

'The present attack is in the vaguest terms, namely an assertion that the privacy of witnesses is 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 s 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 s 417 or s 418 which, when properly construed in the light of s 35(2) and (3) of the Constitution, is inconsistent with such right.'

[19] In my view, the bare assertion made by the appellants that the documents were confidential does not entitle them to withhold them. And the refusal to allow the commissioner sight of the documents requested

[3] Para 64, footnotes omitted. The judgment deals with the rights entrenched under the interim Constitution but the principles remain applicable.

so that he could consider whether they were indeed relevant did not assist their case as to the invasion of the Gijima Group's privacy. I do not accept the appellants' contention that, once a constitutional right is in issue, the person seeking to infringe it must show sufficient cause why that should be done. The proper approach is to determine whether there is reason to believe that the documents requested will throw light on the affairs of the company before the winding-up. If so, their relevance will in general outweigh the right to privacy.

[20] The judgment in *Bernstein* is instructive on the justifiable limitation of the right to privacy, albeit that it dealt with the limitation provision under the interim Constitution.[4]

Ackermann J said:[5]

'Even if it could be established that, in certain circumstances, and despite a proper construction of ss 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 s 417(3) or s 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 s 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

[4] Section 33(1).
[5] Para 90, footnotes omitted.

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 ss 417(3) and 418(2) constitute a legitimate limitation of the right to personal privacy in terms of s 33 of the Constitution.' (My emphasis.)

[21] Bearing in mind the purpose of a s 417 enquiry[6] – the acquisition of information, and the recovery of assets for the benefit of creditors – the right to obtain relevant evidence as to the plight of the insolvent company must as a rule prevail over the confidentiality of documents. In *Re Rolls Razor Ltd (2)*[7] Megarry J said of the equivalent provisions in England:

'The process . . . is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of

[6] See *Bernstein* above para 16 and *Ferreira v Levin NO: Vryenhoek & others v Powell NO* 1996 (1) SA 984 (CC) paras 122-124.
[7] [1970] 1 Ch 576 at 591-592, cited in *Bernstein* para 17 and *Ferreira* para 124. See also M S Blackman, R D Jooste and G K Everingham *Commentary on the Companies Act* vol 2 14-446 ff.

relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. . . . Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained.'[8]

I agree with Du Toit AJ in the court below that 'the interests in the proper administration of the winding-up and the protection of creditors . . . outweigh any claim to privacy in the circumstances of this particular case'.

Prejudice to the Gijima Group

[22] The appellants argue also that the production of the documents would prejudice the Gijima Group's contract with Telkom. This cannot be so. The tendering process was public: Telkom is a parastatal body. The contract had already been awarded to a company that owned ACT. The argument as to prejudice to the Gijima Group thus has no merit.

Ulterior motive

[23] After the Commissioner had made his ruling, Sterenborg's attorneys disclosed that he and his wife were considering changing the action previously instituted by them against the appellants so as to claim the setting aside of the second sale of shares in ACT rather than payment of the balance of the purchase price. They asked the

[8] See also Meskin *Henochsberg on the Companies Act* Vol 1, 889.

appellants' attorneys to agree to a postponement so that they could examine the documents required to be produced in terms of the ruling in order to make their election. The appellants argue that the letter reveals the real, ulterior motive for requesting the documents listed in 'Z': to assist Sterenborg and his wife in the conduct of litigation against them. The court a quo, it is argued, should have taken this ulterior motive into account when considering the ruling made by the commissioner: it had the power to do so by virtue of the principles enunciated by Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council.*[9] Innes CJ distinguished between three classes of review: one by summons, where the plaintiff seeks to set aside a decision vitiated by serious irregularity; the second by notice of motion, where a public body is guilty of serious irregularity or illegality in the performance of a duty; and the third where a statute confers a power of review on the court. In the third kind of review, the court may 'enter upon and decide the matter *de novo* . . . [It] has the functions of a Court of appeal with the additional privileges of being able, after setting aside the decision arrived at . . . to deal with the matter upon fresh evidence . . . '.[10]

[9] 1903 TS 111.
[10] At 117. See also the discussion of this third class of review in *Nel & another NNO v The Master (ABSA Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA) paras 22 and 23.

[24] The argument that fresh evidence as to motive is a ground of review is in my view without merit. The Commissioner made the ruling on the basis that there were reasonable grounds for believing that there had been the diversion of a corporate opportunity from ACT. That in itself is a basis for examining all material relevant to the diversion. It is quite irrelevant that the same material might also constitute evidence for a different action against the purchaser, GAST. Accordingly there is no need to consider whether the ruling was reviewable pursuant to statutory provisions as envisaged by Innes CJ in *Johannesburg Consolidated Investments*.

[25] The court a quo properly considered that it was engaging in the review of the decision of the commissioner as a function of its inherent jurisdiction to intervene where there has been an improper exercise of a discretion (the second class of review referred to in *Johannesburg Consolidated Investments*). This has been the approach of the courts to decisions made by a Master or a commissioner under the Companies Act for decades,[11] and there is no reason to change the basis in this case.[12]

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[11] See for example *Receiver of Revenue, Port Elizabeth v Jeeva* 1996 (2) SA 573 (A) at 579H-J and *Leech v Farber NO* 2000 (2) SA 444 (W).

[12] The appellants also contended that the Commissioner's decision was reviewable as administrative action in terms of ss 1(b) and 6 of the Promotion of Administrative Justice Act 3 of 2000. The argument was not pursued before us, however, and it is not necessary to decide the matter.

[26] In my view, therefore, the commissioner's decision to issue the summons for the production of the documents listed in 'Z' was not irregular and the court a quo was correct in refusing to set it aside, or to grant an order declaring that the appellants were not obliged to produce the documents.

[27] The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

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C H Lewis
Judge of Appeal

Concur:
Mpati DP
Scott JA
Brand JA
Cachalia AJA