THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 324/09

In the matter between:

R MILLER	First Appellant
A I SURMANY	Second Appellant
R M KGOSANA	Third Appellant
B K MAMOSEBA	Fourth Appellant
N Y SERITI	Fifth Appellant

and

NAFCOC INVESTMENT HOLDING COMPANY LTD	First Respondent
M LEAF	Second Respondent
L BAYA	Third Respondent
T SAUL	Fourth Respondent
K H HLONGWANE	Fifth Respondent

Neutral citation: *R Miller v Nafcoc Investment Holding Company* (324/09) [2010] ZASCA 25 (25 March 2010).

Coram: CLOETE, MHLANTLA, SHONGWE JJA, GRIESEL

et MAJIEDT AJJA

Heard: **9 March 2010**

Delivered: **25 March 2010**

Summary: Companies Act 61 of 1973; ss 417 and 418: Master in ordering enquiry does not have to act on an application by a limited category of persons, or any application at all; it is competent and sensible for the Master to delegate to the Commissioner the decision as to who may attend the enquiry or have access to the record; s 73: effect of deregistration of

company; liquidators: power of liquidators to delegate responsibility to third persons.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Snyders J sitting as court of first instance):

1. The appeal succeeds with costs, including the costs of senior counsel.
2. The order made by the court a quo is set aside and the following order substituted:

'The application is dismissed with costs, including the costs of the urgent application; and the costs of senior and junior counsel where such were employed, and of senior counsel where senior counsel alone was employed, shall be allowed at all stages of the proceedings.'

3. The cross-appeal is dismissed with costs, including the costs of senior counsel.

JUDGMENT

CLOETE JA (MHLANTLA, SHONGWE JJA, GRIESEL et MAJIEDT AJJA concurring):

[1] On 23 May 2006 a company known as Serveco (Pty) Ltd was finally liquidated at the suit of its major shareholder Nafcoc Investment Holding Company Ltd. Nafcoc and four individuals, each of whom was at some time a director or employee of Serveco or Nafcoc or both (and to whom I shall refer as 'the individual applicants'), brought urgent proceedings in the South Gauteng High Court, Johannesburg. The second to fourth respondents in that application were the joint liquidators of Serveco (to whom I shall refer as such) and the first respondent, Mr Miller, was a professional liquidator who acted on behalf of the joint liquidators. His authority to do so, as well as the joint liquidators' ability to confer such authority on him, are in dispute.

[2] The relief sought by the individual applicants was aimed at preventing their examination and that of their attorney, and also preventing the attendance of Miller, at an enquiry into the affairs of Serveco authorised by the Master in terms of ss 417 and 418 of the Companies Act 61 of 1973. The application to the Master for the enquiry had been made ex parte by Miller acting on behalf of the joint liquidators and the Master made the order on 27 March 2008. In terms of the order an attorney, Ms Rene Bekker, was appointed as the Commissioner in terms of s 418 of the Companies Act. (The Master and the Commissioner were respondents a quo but took no part in those proceedings or this appeal.)

[3] The enquiry was due to resume on 29 August and continue on 3 November 2008 and the individual applicants and their attorney (who was required to bring documents) were given notices to attend. On 26 August 2008 and by consent Mokgoatlheng J granted an interim order which inter alia reserved the costs of the urgent application for determination by the court hearing the application for final relief; prescribed time periods for the review of the Master's decision to order the enquiry and the Commissioner's decision to issue notices requiring the attendance of the individual applicants and their attorney at the enquiry; put the parties on terms to deliver further affidavits, and recorded that the enquiry convened by the Commissioner for 29 August and 3 November 2008 would not take place.

[4] The matter came before Snyders J on 13 November 2008. Judgment was reserved. On 8 December of the same year the learned judge made an order:

1. Setting aside the decision of the Master and the Commissioner:

(a) to convene the enquiry;

(b) to continue or permit the continuation of the enquiry; and

(c) to issue the notices served on the individual applicants and their attorney to attend the enquiry on 29 August and 3 November; and

2. Interdicting Miller from access to the enquiry, the record thereof and any inspection thereof 'in breach of s 417(7) of the Companies Act'.

Miller and each of the joint liquidators were ordered jointly and severally to pay the costs of the application and the costs incurred in the enquiry out of their own pockets. Those parties now appeal to this court against the whole of the order made by Snyders J, and Nafcoc and the individual applicants cross-appeal for the costs of two counsel in the court a quo. Both sides obtained the leave of the court a quo (granted by Blieden J).

[5] On appeal counsel representing the applicants sought to justify para 1(a) of the order of the court a quo and to impugn the decision of the Master to order the enquiry into the affairs of Serveco, primarily on the basis that there had been material non-disclosures by Miller in his ex parte application.[1] Three arguments were advanced. First, it was submitted that Miller had not disclosed that a previous enquiry had been authorised by the Master on 7 June 2006 and that that enquiry had not yet been finalised or alternatively, that Miller had not given reasons to the Master justifying the necessity for a second enquiry when the earlier enquiry had not concluded. Second, it was submitted that Miller had not disclosed that Serveco was about to be deregistered. Third, it was submitted that Miller had not disclosed that the joint liquidators had authorised him to bring the application and to conduct the enquiry on their behalf.

[6] The first submission is patently untenable. Miller said in the answering affidavit delivered on behalf of the joint liquidators and himself:

'In any event for purposes of the second enquiry the grounds on which the joint liquidators wished to hold an enquiry into the affairs of Serveco were disclosed to the Master in the application by the joint liquidators, represented by me, to the Master on 27 March 2008. One of these grounds was the very fact of the first enquiry and the First Applicant's conduct in relation thereto.

. . .

It was disclosed to the Master in the joint liquidators' application that there had been a previous commission of enquiry also ordered by the Master under Advocate Slomowitz SC.

. . .

[1] See eg *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-350C; *NDPP v Basson* 2002 (1) SA 419 (SCA) para 21.

I admit that the existence of the first commission of enquiry is material to the decision by the Master whether to convene a second one. The existence of the first commission of enquiry was disclosed to the Master in the application and indeed, as I have suggested above, the manner in which the first commission of enquiry was conducted and then left for dead by the first applicant and its attorneys was an important element of the motivation to the Master to grant leave to convene the second enquiry.'

[7] The Master filed two reports and refused to divulge his reasons for granting the order at issue in the appeal. The appellants were specifically authorised by the order of Mokgoatlheng J to launch an application for appropriate relief if they were of the view that such records which might be filed by the Master and the Commissioner pursuant to the review application in terms of Uniform Rule of Court 53 were 'incomplete, deficient or in any other manner not satisfactory in law'. They did not do so. In the circumstances I find the remarks of James AJP in *Foot NO v Alloyex (Pty) Ltd & others*[2] apposite, and I respectfully adopt them:

'It was also argued that it was impossible to ascertain why the appointment of the commissioner was made, or whether the commissioner's investigations were of any value to the ordinary shareholders because of the veil of secrecy imposed by Thirion J's order, and that at the very least I should, at this stage, allow the respondents to peruse the reports (and even consider the voluminous records of the evidence before the commissioner) to see whether the company's creditors had received any advantage from the efforts of the commissioner, and should delay the case until this opportunity was afforded to them. I have no sympathy with this submission. Although the commission was a secret commission and the contents of the application and the terms of the order of Court were not to be disclosed without the leave of the Court (and the evidence and the record of evidence was not to be disclosed without the leave of the Court or the commission) there is no suggestion that any attempt by the respondents (or anyone else for that matter) has to this date been made to obtain such leave. It is true that there were provisions laid down regarding secrecy but, if a proper case had been made for the lifting of the veil, I have no doubt that it would have been lifted. Although the grant of the order was secret it must have been clear to anyone concerned in this matter, and particularly for those summoned to give evidence before the commissioner, that an order had been made and, if any of them

[2] 1982 (3) SA 378 (D) at 382B-G.

had grounds for believing that justice might be denied unless they were allowed to peruse the application for the order and the reports, they should have applied for leave to peruse them.'

Had there been any doubt whether the disclosures which Miller said he had made to the Master, had in fact been made, the court seized with the application could have preserved the secrecy of the proceedings by itself looking at the application to the Master.

[8] The second submission is equally without merit. Miller said in the answering affidavit, and there is no reason to doubt his assertion, that he and the joint liquidators only became aware of the pending deregistration of Serveco on 15 August 2008 ─ ie well after 27 March 2008 when the Master ordered the enquiry. Miller obviously could not disclose what he did not know.

[9] The third submission is not maintainable in fact or in law. As a matter of fact, Miller annexed to his application to the Master a power of attorney authorising him to bring the application which was signed by each of the joint liquidators. A copy of the power of attorney was annexed to the answering affidavit. And as a matter of law, the Master did not have to act on the application of the liquidators or, indeed, pursuant to any application; and whether or not Miller was authorised by the liquidators to make the application, is accordingly irrelevant. Section 417(1) of the Companies Act reads:

'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 section does not envisage an application, much less an application from a limited category of persons ─ which is eminently sensible for otherwise the Master would be unable to act unless he was given information from specified persons.[3] The submission that Miller had not disclosed to the Master that he

[3] *Venter v Williams* 1982 (2) SA 310 (N) at 313-4; *Lok v Venter* NO 1982 (1) SA 53 (W) at 58; *Foot NO v Alloyex (Pty) Ltd* above, n 2, at 383-4.

had been authorised by the liquidators to conduct the enquiry on their behalf need not be considered as it was not raised in the papers. I shall deal later in this judgment with the question whether it was competent for the liquidators to have given this authority to Miller.

[10] I therefore conclude that there was no basis for the order given by the court a quo setting aside the decision of the Master to convene the enquiry. I refuse to consider the submission based on s 386 of the Companies Act[4] that because the liquidators did not have authority to apply for an enquiry, they could not validly have authorised Miller to do so. This point was also not raised in the papers ─ perhaps because there is authority in the high court[5] that it is not open for persons in the position of the applicants to attack the validity of the enquiry proceedings initiated by the liquidator. It is unnecessary to consider the legal position as the applicants laid no factual foundation for the argument.

[11] I turn to consider whether there was a basis for the order setting aside the decision of the Commissioner to continue or commit the continuation of the enquiry. Serveco was deregistered on 25 April 2008. The deregistration was effected by an official in the Companies and Intellectual Property Registration Office (CIPRO), purporting to act in terms of s 73 of the Companies Act and on behalf of the Registrar of Companies. Deregistration was incompetent in as much as Serveco had been wound-up on 23 May 2006 ─ a fact which was pointed out to the official in a letter before Serveco was deregistered ─ and the consequence of a winding-up is not deregistration but a dissolution in terms of s 419 of the Companies Act, subsec (1) of which provides:

'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.'

Deregistration, on the other hand, puts an end to the existence of the company. Its corporate personality ends in the same way that a natural

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[4] Which deals with the powers of liquidators.
[5] *Lok* above, n 3, at 55H-57E.

person ceases to exist on death. Once there has been deregistration there is obviously no purpose in a corporate post mortem and no-one would have the authority to conduct one. Serveco was restored to the register on 10 August 2008 pursuant to an order of the Johannesburg High Court made on 4 November 2008, after a rule *nisi* had been issued, published in newspapers and the Government Gazette and served on *inter alios* the applicants, requiring all interested persons to show cause why this should not be done.

[12] The notices requiring the attendance of the individual applicants and their attorney before the Commissioner were authorised by the Commissioner whilst Serveco was deregistered. They were therefore void for that reason. (I should mention that the Commissioner was unaware of the deregistration.) But Serveco was restored to the register on 10 August 2008, before the application for final relief came before the court a quo on 13 November of the same year. I do not propose analysing what effect in law the restoration of the company to the register had on the notices served on the individual applicants.[6] That would be an academic exercise as new notices will have to be served on them if they are to be required to attend the enquiry. It was accordingly unnecessary for the court a quo to set the notices aside as it did in para 1(c) of its order; and once Serveco had been restored to the register, there was no basis for the order setting aside the decision of the Commissioner (or the Master) to continue or permit the continuation of the enquiry. I reject the submission on behalf of the applicants that the authority of the joint liquidators, the Master and the Commissioner ─ all of which was conferred before the deregistration ─ did not survive the deregistration for the simple reason that all such authority was conferred before Serveco was deregistered, and there is no warrant for holding that events that occurred before that event are in any way affected by it.

[13] I shall now deal with the interdict against Miller contained in para 2 of the order of the court a quo, which precludes him from attending the enquiry and access to the record thereof. Section 417(7) of the Companies Act provides:

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[6] Cf *Tyman's v Craven* [1952] 2 QBD 100 (CA).

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

The submission on behalf of the applicants was that the interdict was justified because Miller did not have the permission of the Master to perform any of the acts he was interdicted from performing. The answer to this, it seems to me, flows from the provisions of s 418(1)(b) of the Companies Act which provides:

'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.'

In the present matter, the Master referred the whole enquiry to the Commissioner. The order made contains the following paragraph:

'The contents of this application and the evidence to be taken at the commission be kept confidential and private and not be disclosed without the prior leave of the Commissioner or the High Court or the Master having first been had and obtained.'

The power thus conferred was in my view sufficiently wide to authorise the Commissioner to allow Miller to attend the enquiry and to have access to the record. The Commissioner impliedly exercised the power, well knowing (as appears from the record of the enquiry) that Miller was not one of the joint liquidators, by permitting him to be present at the enquiry. It seems to me not only competent but eminently sensible for the Master, having decided to invoke s 418 and appoint a Commissioner, to delegate to the Commissioner the power of deciding who might be allowed to attend the hearing and have access to the record. Indeed, in such a case I would find it extraordinary if for example every time an attorney wished to have a candidate attorney present, or the liquidators wished to be advised by an accountant or other expert whilst a witness was being examined, that permission for either to attend the enquiry would have to be sought from the Master or the court.

[14] It will be convenient now to deal with an argument which is related to the argument I have just dealt with and which was also advanced on behalf of the applicants. The submission was that it was incompetent in law for the liquidators to delegate the conduct of the enquiry to Miller. Reliance was based inter alia on the following statement by Innes CJ (Bristowe and

Curlewis JJ concurring) in *Goldseller v Hill*[7] (in regard to joint trustees in insolvency):

'They are in law only one *persona*. They jointly represent the estate, and together they are the channel through which the estate can sue or be sued, and the proper persons to investigate all its affairs.'

But there is nothing in that statement to suggest that the liquidators cannot have assistance in such an investigation or, put conversely, that all acts relative to the investigation have to be performed by the liquidators themselves. A useful judgment in the present context is *Allan v Erlank's Trustee.*[8] In that matter Bristow J held:

'But all the trustee was appointed to do, all his powers and discretions, the supervision and management of the liquidation — all that is left to Rossouw [an attorney]. It seems to me, therefore, that the power of attorney is a general delegation of Hopwood's powers as trustee; and whether or not the maxim *delegatus non potest delegare* applies under our law to the same extent as it applies in the law of England — I think it probably does not — it is inconceivable to my mind that the Insolvency Law intended that a person appointed as trustee should be at liberty to delegate his powers to a third person. When creditors choose a trustee they choose a person whom they can rely upon and trust, and the trustee by accepting his office binds himself to apply his mind to bring his discretion to bear upon the various points which arise in the course of his trusteeship. Ministerial acts he can delegate, but not matters of discretion.'

[15] Miller said in the answering affidavit:

'I have practiced continuously as a liquidator for more than 15 years. My business partner, the Second Respondent, has practiced continuously as a liquidator for more than 12 years. Mr Christensen has practiced continuously as a liquidator for more than 15 years. We all confirm that it is common practice for the administration of the day to day affairs of a company in liquidation to be dealt with by a person who is not necessarily one of the joint liquidators, but a colleague of one of the joint liquidators in the legal entity used by that joint liquidator for the purposes of liquidating companies.

. . .

[7] 1908 TS 822 at 827.
[8] 1908 TS 1187 at 1193.

Those matters in the winding up pertaining to a forensic investigation which was conducted into the affairs of Serveco and to the application to the Master of the High Court Johannesburg for leave to convene the insolvency enquiry and the insolvency enquiry itself, have been handled by me. I have done so as a co-member in RMG Trust CC and business partner of the Second Respondent.

There is nothing whatsoever unusual or improper in the division of labour I have referred to above, which was agreed upon by the joint liquidators, shortly after they were appointed by the Master.'

Miller also claimed to have the following authority from the joint liquidators in terms of the power of attorney:[9]

'[To] attend on our behalf and represent us at all hearings of the insolvency enquiry into the affairs of the company, in respect of which we sought and obtained in our capacities as joint liquidators of the company an order from the Master of the High Court Johannesburg on 27 March 2008 granting leave to convene such enquiry, to gain access to all documents in the enquiry for the purposes of so representing us, and to furnish instructions on our behalf to our attorneys of record in that enquiry, Messers Knowles Husain Lindsay Inc.'

The applicants described this provision as having 'breathtaking scope'.

[16] I am not satisfied on the papers as they stand that the joint liquidators have done anything more in this case than delegate to Miller ministerial acts, ie acts that he is required to perform as their subordinate agent; or, put conversely, I am unable to find that the joint liquidators have delegated to Miller matters of discretion that their office requires them to exercise both jointly and personally. The papers do not show that Miller has taken over the liquidation of the company (or, for that matter, the running of the enquiry) to the exclusion of the joint liquidators, as was the position in *Allan* and in *Smith & Co & others v Van Rensburg*[10] where Curlewis J stated (of delegation of a trustee's powers):

'If these facts are correct ─ and, generally speaking, I take them to be correct ─ the respondent was in effect merely a dummy trustee. He was not, and did not intend to act the part of, a trustee, but allowed himself to be nominated through the instrumentality of Bekker and Bekker [a firm of attorneys], and then divested himself

[9] The power of attorney annexed to the answering affidavit has been signed by only two of the joint trustees.
[10] 1913 TPD 28 at 35.

of all his functions as trustees by handing over to Bekker and Bekker the complete management and control of the estate.'

[17] I accordingly conclude that there was no legitimate basis for the court a quo to have granted the interdict against Miller. That brings me to the question of costs.

[18] It was submitted on behalf of the applicants that they should at least be awarded the costs in the court a quo of the urgent part of the application. On the one hand, they and their attorney were faced with notices requiring them to attend an enquiry on 29 August and 3 November under pain of possible criminal sanction. On the other hand, Miller and the joint liquidators only became aware of the deregistration of Serveco on Friday 15 August; and after the application was served on them on 19 August, they gave an undertaking within three days (on 22 August) that the enquiry would not proceed on 29 August. They also consented to the order given by Mokgoatlheng J on 26 August which recorded that the enquiry would not proceed on 29 August or 3 November. Furthermore, neither Miller nor the joint liquidators were responsible for the deregistration of Serveco which was the basis for the invalidity of the notices, nor were they remiss in not preventing it. In the circumstances, I consider that it would be fair to make the costs of the urgent application costs in the cause of the main application.

[19] Before making the order I should mention that counsel representing Miller and the joint liquidators indicated that the taxing master requires an order authorising the costs of senior counsel if such costs are to be allowed on taxation. No submission to the contrary was made on behalf of the applicants. This is accordingly not a proper case to examine the practice of the taxing master, and I express no opinion on it either way.

[20] The following order is made:

1. The appeal succeeds with costs, including the costs of senior counsel.
2. The order made by the court a quo is set aside and the following order substituted:

'The application is dismissed with costs, including the costs of the urgent application; and the costs of senior and junior counsel where such were employed, and of senior counsel where senior counsel alone was employed, shall be allowed at all stages of the proceedings.'

3. The cross-appeal is dismissed with costs, including the costs of senior counsel.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	A Subel SC Instructed by Knowles Husain Lindsay Inc, Johannesburg; McIntyre & Van der Post, Bloemfontein
RESPONDENTS:	J Suttner SC (with him Ms P M Cirone) Instructed by Werksmans Inc, Johannesburg; Matsepes Attorneys, Bloemfontein