



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 1221/2021

In the matter between:

ELRICH RUWAYNE SMITH N O

FIRST APPELLANT

KAREN FORTEIN N O

SECOND APPELLANT

MPOYANA LAZARUS LEDWABA N O

THIRD APPELLANT

(In their capacity as joint liquidators of

BZM Transport (Pty) Ltd (in liquidation)

Master's ref: B20/2019)

and

MASTER OF THE HIGH COURT

FREE STATE DIVISION, BLOEMFONTEIN

FIRST RESPONDENT

WILHELM FREDERIK ENGELBRECHT
RESPONDENT

SECOND

Neutral Citation: *Smith N O and Others v Master of the High Court, Free State Division, Bloemfontein and Another* (1221/2021)

[2023] ZASCA 21 (8 March 2023)

Coram: MAKGOKA, NICHOLLS and CARELSE JJA and MJALI and SIWENDU AJJA

Heard: 21 November 2022

Delivered: 8 March 2023

Summary: Company law — Companies Act 61 of 1973 — company in liquidation — enquiry under s 417 — whether only the Master may examine witnesses at such enquiry.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mbhele ADJP and Van Zyl J, sitting as court of first instance):

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel.
- 2 The order of the high court is set aside and replaced with the following order:
The application is dismissed with costs.

JUDGMENT

Siwendu AJA (Makgoka, Nicholls and Carelse JJA and Mjali AJA concurring):

[1] This appeal concerns the interpretation of s 417 of the Companies Act 61 of 1973¹ (the Act). More particularly, it concerns the question of who may interrogate witnesses summoned to appear at an enquiry convened by the Master of the high court (the Master) in terms of the section. The principal question is whether *only* the Master, and *no one else*, may examine such witnesses as is contended by the second respondent.

¹ Schedule 5, Items 9(1) to (3) of the Companies Act 71 of 2008 states that Chapter 14 of the old Companies Act 61 of 1973 dealing with winding up and liquidation of companies continues to apply. See also *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* [2019] ZASCA 152; 2020 (2) SA 93 (SCA); [2020] 1 All SA 64 (SCA) para 23.

[2] When a company is placed in liquidation,² the Act authorises the court or the Master — at their own volition or on application by a liquidator, a creditor, a member or a party with an interest in the matter — to conduct a private enquiry to obtain information about the affairs, conduct of business and trade dealings of the company in terms of s 417 of the Act.

[3] The appellants (the liquidators) were appointed as joint liquidators of BZM Transport (Pty) Ltd (BZM), which was liquidated on 29 August 2019 following failed business rescue proceedings. Mr Engelbrecht, was the Chief Executive Officer of BZM before its liquidation.

[4] The liquidators complained that Mr Engelbrecht hindered the fulfilment of their statutory duties³ when he refused to: (a) hand over BZM's books, records and documents; (b) point out and hand over its assets as they appear in the asset register; (c) disclose payments allegedly made to him and other related entities; and (d) provide agreements pertaining to company debtors. They successfully applied to the Master to convene an enquiry into the business affairs of BZM in terms of s 417 of the Act. Mr Engelbrecht was summoned to appear before the enquiry together with members of his family, who were employed by BZM.

[5] At the enquiry, which was presided over by the Assistant Master, Mr Engelbrecht and the liquidators were legally represented. Before Mr Engelbrecht and his family members could be called for examination, his legal representative objected to the proceedings on account that 'only the Master' and 'no one else' was entitled to interrogate witnesses. The Assistant Master

² Section 388 of the Companies Act 61 of 1973 applies to enquiries arising from a voluntary liquidation, while s 417 relates to a company in an involuntary liquidation on account of an inability to pay its debts. An application for an enquiry is not confined to the named parties, as any person may apply for such an examination in terms of s 417(6).

³ The duties of a liquidator are found in ss 391 to 410 of the Act.

dismissed the contention. Consequently, Mr Engelbrecht applied to the high court to review and set aside the enquiry on the same basis contended before the Assistant Master.

[6] Section 417, in relevant parts, states:

‘(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.

(2)(a) The Master or the Court may examine any person summoned under subsection (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.’

Section 417 must be read with s 418 titled ‘Examination by commissioners’, which, in relevant parts, provides:

‘(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.

...

(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.’

[7] The Free State Division of the High Court, Bloemfontein (the high court), agreed with Mr Engelbrecht, reviewed the enquiry and set it aside. After holding that the enquiry was null and void *ab initio*, the high court struck out the record of the proceedings. The appeal is with the leave of the high court. The Master did not participate in the appeal.

[8] The high court considered three decisions dealing with s 417, namely *Swart v Master of the High Court and Others*⁴ (*Swart*); *Garcao v Majiedt N O and Others*⁵ (*Garcao I*); and *Garcao v The Master of the Northern Cape High Court, Kimberley and Others* (*Garcao II*).⁶ Citing Blackman, Jooste & Everingham (Blackman).⁷The court in *Swart* held that ‘. . . s 417(2)(a) empowers *only* the court or the Master to examine persons summoned before it or him.’⁸ (My emphasis.) The conclusion is premised on a distinction drawn between ss 417 and 418 as well as the opinion by the authors that, unlike a court, the Master lacks inherent discretion to determine who may attend and interrogate witnesses.

[9] The high court also relied on the remarks made in *Garcao I* where, in relation to the enquiry under consideration, the liquidators were represented by attorneys who had examined the witnesses. The allegation was that the Assistant Master, presided over the proceedings but did not examine witnesses. While in

⁴ *Swart and Others v Master of the High Court and Others* 2012 (4) SA 219 (GNP) (*Swart*).

⁵ *Garcao v Majiedt N O and Others* [2013] ZANHC 20 (*Garcao I*).

⁶ *Garcao v Master of the Northern Cape High Court, Kimberley and Others* [2015] ZANHC 10 (*Garcao II*). The Court does not have the benefit of the high court’s reasoning in the main judgment. It was provided with the judgment in respect of the application for leave to appeal. The main judgment appears not to have been reported.

⁷ MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* (2) 2005 at 14-448.

⁸ *Swart* at 221H.

that case, the court correctly observed that a commissioner who conducts an enquiry under s 418 has the same powers of examination as the court or Master appointing him or her, it nevertheless concluded that s 417(2)(a) appears to confine the task of examining witnesses to the court or the Master *only*. It reached the same conclusion as the court in *Swart*, and held that the Master has no inherent discretion to determine who may attend and interrogate witnesses.⁹ In *Garcao II* the court did not follow the decisions in *Swart* and *Garcao I*. Thus, there are conflicting decisions on the interpretation of the section.

[10] The contention by the liquidators is based on the language employed and the history of the section. They submit that the use of the word ‘may’ signals the directory rather than a peremptory nature of the section, accordingly, the Master or the court has a discretion on how to conduct the proceedings. They contend that, s 417 in some material respects mirror s 155 of the repealed Companies Act 46 of 1926 (the old Act),¹⁰ the predecessor to the Act and s 155 of the old Act was considered in *R v Herholdt and Others (Herholdt)*.¹¹

[11] Mr Engelbrecht on the other hand relied on the decision in *Swart* and contended that ss 417 and 418 are distinct provisions under which an enquiry may be conducted. He contends that the Master did not delegate her authority to a commissioner as would have been the case had the enquiry been convened under s 418. He placed emphasis on the fact that the subpoena summoning him to the enquiry was issued under s 417. The thrust of the proposition advanced on his behalf is that, absent a reference to s 418 in the subpoena, which would

⁹ *Garcao I* fn 6 above para 22.5.

¹⁰ Section 155(1) of the Companies Act 46 of 1926 states that ‘the Court may, after it has made a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company’. Section 155(2) states, ‘The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them and he may be required to answer any question put to him on 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.’

¹¹ *R v Herholdt and Others* 1957 (3) SA 236 (A); [1957] 3 All SA 105 (A) at 116-117.

permit the interrogation by the liquidators, it was impermissible for the Assistant Master to allow the questioning of witnesses by the liquidators.

[12] The proposition by counsel for the liquidators that this court must have regard to the peremptory rather than the directory nature of the provision is not entirely correct and must be tempered by the finding in *African Christian Democratic Party v Electoral Commission and Others*.¹² There, it was held that a narrowly textual and legalistic approach to interpretation is to be avoided. The adoption of a purposive approach in our law rendered obsolete all previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision.¹³ It was also contended on behalf of the liquidators that a similar interpretation to that advanced by Mr Engelbrecht was rejected by Fagan CJ in *Herholdt*. This overstates the obiter remarks made in *Herholdt*. Those observations were made in the context of an enquiry conducted in terms of s 194 of the old Act, the forerunner to s 418. They predate the Companies Amendment Act 29 of 1985, which extended the power to conduct enquiries under the section to the Master. The effect of the amendment meant that an enquiry convened under s 417 would be either that of the court or the Master.¹⁴ It is necessary that we should consider the provision squarely, commencing with the language employed; the context in which the provision appears; and its apparent purpose and practical effect, all of which must be examined objectively.¹⁵

¹² *African Democratic Christian Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC).

¹³ *Ibid* para 25, citing from *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA); [2002] 2 All SA 482 (A) para 13.

¹⁴ *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) (*Bernstein*) para 35 confirms the decision in *Van der Berg v Schulte* 1990 (1) SA 500 at 509E that in an enquiry convened by the Master in terms of s 417, there may be no need for intervention by a Court at all. The power conferred to the Master in terms of s 418(3) to delegate the enquiry to a Magistrate or a Commissioner means the Master acts independently. The Magistrate or the Commissioner report to the Master.

¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

[13] There is no dispute that while s 417 confers upon the court or the Master the power to conduct the enquiry, s 418 permits a delegation to conduct the enquiry as a whole or in part, either to a magistrate or a commissioner.¹⁶ It is also correct that when the two sections are juxtaposed with one another, s 417 (2)(a) provides that the Master ‘may examine any person’ before him or her but does not prescribe *who else* may examine such persons. In contrast, s 418(1)(c) expressly identifies a category of people who may be represented and interrogate witnesses thereat. As I understand the submission by Mr Engelbrecht, it is premised on the fact that s 418(1)(c) specifically provides for the interrogation of witnesses by or on behalf of liquidators, creditors and contributories while a similar provision is absent in s 417.

[14] An examination of the text of the section demonstrates its enabling nature. Its context and history were considered by the Constitutional Court in *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others*¹⁷ and *Bernstein and Others v Bester and Others NNO*¹⁸ (*Bernstein*). These decisions stress the importance, public utility and purpose of the provisions. Dealing with this purpose, the Court in *Bernstein* emphasised that:

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

(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.

...

¹⁶ Section 418(2) imports the same powers held by the Master to a Magistrate or a Commissioner.

¹⁷ *Ferreira v Levin N O and Others; Vryenhoek and Others v Powell N O and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

¹⁸ *Bernstein* fn 14 above para 16. See also *Meskin et al Insolvency Law* para 8.5.2, where it is noted that save for part of s 417(2)(b), all provisions of ss 417 and 418 were not found to be constitutionally invalid.

(g) . . . In these circumstances it is in the interest of creditors and the public generally to compel such persons to assist.’¹⁹

In sum: the sections are designed to ensure that those responsible for mismanagement of the affairs of a company like BZM are compelled to provide the necessary information to enable the liquidators to fulfil their statutory duty and recover assets in the interests of creditors and the public.

[15] By prefixing s 417(2)(a) with the word ‘only’ before the phrase ‘the Master or the Court may examine’, Mr Engelbrecht imposes restrictive language not provided in the text. Furthermore, it cannot be said that the phrase, ‘summoned before him’ indicates that *only* the Master may interrogate a witness or that the expression has a bearing on the nature or the conduct of the enquiry. The contention by Mr Engelbrecht is untenable.

[16] Contrary to the submission made on behalf of Mr Engelbrecht, and the court’s finding in *Swart*, ss 417 and 418 are not distinct but rather complementary provisions. They provide for a dual method for holding the enquiry and are to be read together.²⁰ An important prism overlooked by the high court is the effect of the 1985 amendment and the original nature of the power conferred by the section, which granted the Master the same powers as that of a court. The proceedings over which the Master presides are quasi-judicial in nature. He or she determines which witnesses should be called, the manner in which evidence will be received and how to conduct the enquiry.²¹

[17] The absence of a corresponding provision which identifies a category of persons who may be represented and interrogate witnesses in s 417 is of no moment. In my view, its presence in s 418 is consistent with the legislative

¹⁹ *Bernstein* fn 14 above para 16.

²⁰ *Bernstein* comprehensively discusses the import and significance of the enquiries conducted in terms of ss 417 and 418.

²¹ Section 417(2)(a) of the Act.

intention to define the parameters of the delegation whenever an enquiry is delegated by the Master to an external party. As the source of the delegation, the Master cannot delegate a function or power she does not already possess. An absurdity would result if s 418(c) were interpreted to limit the original powers and functions of the Master. In holding that *only* the court but not the Master has inherent discretion to determine who may attend the enquiry and interrogate witnesses, the high court and the courts in *Swart* and *Garcao I* erred.

[18] There can be no doubt that whenever a s 417 enquiry is called for, the liquidators, the court or the Master will be strangers to some of the intricate operations and affairs of the company in liquidation. Depending on the circumstances of each case, the information may lie in the exclusive domain of a creditor or some other party with an interest in the matter. Practically, it makes logical sense that the party in possession of the relevant information is best placed to interrogate a particular witness. To say that *only* the Master may interrogate witnesses because it is not explicitly provided for in s 417 is inconsistent with its purpose and would stultify the provision and the objectives confirmed in *Bernstein*.

[19] The high court and the courts in *Swart* and *Garcao I* misconstrued the section and thus erred. The appeal must succeed. Given the importance of the matter and the question of law involved, I am of the view that costs of two counsel are warranted.

Order

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

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

The application is dismissed with costs.

N T Y SIWENDU
ACTING JUDGE OF APPEAL

Makgoka JA (Nicholls and Carelse JJA and Mjali and Siwendu AJJA concurring):

[21] I concur in the order of the judgment of Siwendu AJA and the reasoning underpinning it. In addition, I set out the legislative history of ss 417 and 418, which I posit, induces an easy discernment of the ‘intention of the Legislature’²² when the provisions were enacted. In *Santam Ltd v Taylor*,²³ the court interpreted s 22(1)(bb) of the Compulsory Motor Vehicle Insurance Act 56 of 1972, by having regard to the historical perspective of the legislation, and found that an examination of the historical background left no doubt as to what had been intended by the Legislature. In my view this is the case here. In *Natal*

²² I use the phrase ‘the intention of the Legislature’ guardedly and simply for lack of better expression, for, as explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 21:

‘Critics of the expression ‘the intention of the legislature’ are not saying that the law-maker does not exist or that those responsible for making a particular law do not have a broad purpose that is encapsulated in the language of the law. The stress placed in modern statutory construction on the purpose of the statute and identifying the mischief at which it is aimed should dispel such a notion. The criticism is that there is no such thing as the intention of the legislature in relation to the meaning of specific provisions in a statute, particularly as they may fall to be interpreted in circumstances that were not present to the minds of those involved in their preparation. Accordingly to characterise the task of interpretation as a search for such an ephemeral and possibly chimerical meaning is unrealistic and misleading.’

²³ *Santam Insurance Ltd v Taylor* 1985 (1) SA 514 (A) at 526I-527 (C).

*Joint Municipal Pension Fund v Endumeni Municipality*²⁴ (*Endumeni*), this Court identified ‘the material known to those responsible for enactment of the provision’, one of the factors that might aid in the interpretative exercise. This too, is apposite in this case.

[22] The predecessor to s 417, s 155 of the Companies Act 46 of 1926 (the old Companies Act), has its provenance in s 115 of the English Companies Act of 1862 (the English Act). The history and purpose of s 115 of the English Act, as well as the nature of the proceedings thereunder were considered in *S v Heller* (*Heller*).²⁵ One of the old English cases referred to in that case is *Learoyd v Halifax Joint Stock Banking Co.* (1893) 1 Ch.D.686, where Stirling J explained how s 115 of the English Companies Act and its predecessors were applied:

‘The client, then, in this case, having the power of obtaining information conferred upon him by the 27th section of the Act of 1883 (i.e. Bankruptcy Act) goes to his solicitor and asks for his advice. The solicitor says: ‘You have the power of getting information which I advise you to avail yourself of, so that I may have the means of advising you.’ *The trustee then takes out a summons, and gets leave to examine certain persons named. His solicitor personally conducts the examination and gets a transcript of the proceedings.*’ (Emphasis added.)

[23] In *Herholdt*,²⁶ reference was made to another old English case, *In re Silkstone and Dodworth Coal and Iron Company, Whitworth’s case* (1881) 19 Ch. D. 118 (C.A.), where Jessel M.R. is quoted as follows regarding s 115 (at 120-1):

‘As I understand the 115th section of the Companies Act, 1862, it gives the Judge discretion both as to the extent of the examination and as to the occasions on which it will be ordered, and also as to the persons who are to conduct it. Now, considering that the object for which the examination is ordered, is discovery, it is the better and the usual course to entrust the

²⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 18; *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165; 2019 (5) SA 1 (CC) para 29.

²⁵ *S v Heller* 1969 (2) SA 361 (W) at 363A-364J.

²⁶ *Herholdt* at 251A-D.

examination to the official liquidator, who is under the control of the Court, and represents the whole company, creditors, and contributories.’

[24] From this it is clear that English Judges were never themselves constrained to conduct the interrogation of persons summoned to the enquiry, despite the wording of the section. They always maintained the discretion in respect of the manner in which the interrogations were to be conducted, including who may interrogate those summoned to appear at the enquiry – be it liquidators or creditors. It appears that even before the enactment of s 115 of the Companies Act of 1942, the practice followed in England was adopted in the Transvaal.²⁷

[25] Consistent with the practice in England, in *Heller*, depositions at an enquiry held in terms of s 155 were obtained by the liquidator. The court emphasised that the object of the enquiry was to enable the liquidator to obtain information in order to decide what course to take on behalf of the company, either contemplated or pending.

[26] In *Herholdt* the court authorised an enquiry in terms of s 155, read with s 194 of the old Companies Act of 1926 (respectively the fore-runners to ss 417 and 418), and appointed a commissioner in terms of s 194 to conduct the enquiry. The liquidator was represented by counsel who interrogated the persons summoned in terms of s 194. The appeal was against the conviction in a criminal trial which took place subsequent to the enquiry. One of the contentions on appeal was that answers given at the enquiry under s 155 were inadmissible in a subsequent criminal trial because they were given in response to questions by counsel for the liquidator and not by the commissioner.

²⁷ See for example, *Ex Parte Liquidators of Argue & Co. Ltd* 1920 TPD 200, where the full bench considered a similar provision – s 151 of the Transvaal Companies Act 31 of 1909.

[27] The appellants in *Herholdt* raised an argument similar to the one asserted by the respondent in the present case, ie when the enquiry was one held under s 155 no one other than the court had the right to examine witnesses, and that it was an irregularity for the commissioner to allow questions to be put by counsel for the liquidator. Because the enquiry in that matter was held in terms of s 155 of the Companies Act, read with s 194 (the fore-runner to s 418) in terms of which a commissioner had been appointed, the court found it unnecessary ‘to try to define the extent of the court’s powers under sec. 155. . .’. However, Fagan CJ, in an *obiter dictum*, was sceptical of the submission that when an enquiry was held under s 155 (the fore-runner to s 417), no one other than the court had the right to examine witnesses.

[28] It can be accepted that when s 417 was enacted in the repealed Companies Act of 1973, it was intended that the practice as adopted in English law, namely, to allow liquidators and creditors to interrogate persons summoned to a private enquiry, to apply in South Africa. Therefore, where the court authorises such an enquiry, it is not obliged by the wording of s 417(2) to conduct the interrogation itself. In its discretion, when granting an order for the enquiry, the court would no doubt give directions as to how the enquiry was to be conducted, including the manner in which those summoned are to be interrogated.

[29] The power to examine those summoned to the enquiry under the old s 155 and later under s 417, was originally reserved for the court. However, this changed in 1985 when that power was extended to the Master pursuant to the Companies Amendment Act 29 of 1985. Thus, the effect of the 1985 amendment is that the enquiry which hitherto was presided over by the court, can now be presided over by either the court or the Master, depending to whom the application for an enquiry was made. When granting the request to convene

the enquiry, the court or the Master can either require the person summoned to respond to interrogatories, which would be drawn up by the liquidator or a creditor who sought the enquiry, or orally. In the latter event the court or the Master may, in their discretion, direct the liquidator or a creditor, or their representatives, to interrogate the persons so summoned.

[30] I comment briefly on the reasoning in *Swart and Garcao I*. As a preface, I consider the central flaw in these decisions to be that, both placed a literal construction on the wording of s 417. On its plain and literal reading, the provision mentions only the court and the Master as having the power to interrogate those summoned to the enquiry in terms of s 417. But, as stated in *Cool Ideas 1186 CC v Hubbard*, the words in a statute can only be given their ordinary grammatical meaning, if that would not result in an absurdity.²⁸ As correctly pointed out in the first judgment, a literal construction of the provision, without considering its purpose, would result in an absurdity.

[31] All statutory provisions must be interpreted to avoid absurdity. This is subject to three interrelated riders, namely that: (a) statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution.²⁹ One must therefore, on the basis of *Endumeni*, consider among others, the context in which the interrogation of those summoned in terms of s 417, appears in the section.³⁰

[32] Unfortunately, in both *Swart and Garcao I*, these fundamental interpretive prescripts were not heeded. In both, it was accepted that in terms of s 417, the court has inherent discretion to determine who may attend the enquiry

²⁸ Ibid para 28.

²⁹ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (8) BCLR 869; 2014 (4) SA 474 (CC) para 28.

³⁰ Ibid para 18.

and interrogate the persons summoned to the enquiry. But both held that the Master has no such discretion. In *Swart*, reliance was placed on the following passage in *Blackman et al*³¹ (*Blackman*) for that proposition:

‘Section 417(2)(a) empowers only the court or the Master to examine persons summoned before it or him. Section 418(2) provides that a commissioner has the same powers of examining witnesses as the court which or the Master who appointed him. In the case of an enquiry held by the court [in terms of s 417], the court has an inherent discretion to determine who may attend the enquiry and interrogate the witnesses. *But the Master has no inherent powers . . .*’³² (Emphasis added.)

[33] I disagree with the above proposition. I have already alluded to the 1985 amendment in terms of which the power to examine witnesses (originally reserved for the court), was extended to the Master. There is nothing in the amendment to suggest that the power extended to the Master was supposed to be any different to that which had, up to the point of the 1985 amendment, been exercised by the court. This includes the power to permit the liquidator or a creditor to conduct the interrogation to the extent that the Master regards as appropriate. As mentioned already, the effect of the amendment is that the Master exercised the same power as hitherto exercised by the court. Viewed in this light, the reasoning in both *Swart* and *Garcao I* does not bear scrutiny.

[34] This brings me to a related aspect concerning the intersection between ss 417 and 418 insofar as the right of liquidators, creditors and contributories to interrogate persons summoned at the enquiry, is concerned. To recap, s 418(1) (c) reads as follows:

‘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

³¹ MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act (2) 2005*.

³² *Ibid* 14-480.

witness: Provided that a commissioner shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.’

[35] There is no such corresponding right in s 417. *Swart* interpreted this as an indication that the legislature had intended its absence in s 417 to restrict the interrogation to the court or the Master, to the exclusion of anyone else. For this conclusion, reliance was placed upon the following commentary in Blackman:

‘Although an enquiry under s 417 that is referred to a commission remains a s 417 enquiry, it becomes subject also to provisions of s 418. One significant change that this brings about is that, while s 417 empowers only the court or the Master to examine persons summoned before it or him (s 417(2)(a)), s 418(1)(c) entitles the liquidator or any creditor, member or contributory of the company at an examination or enquiry before a commissioner, to be represented by an attorney, with or without counsel, who may interrogate any witness. The Court has, of course, an inherent discretion to determine who may attend and interrogate witnesses at an enquiry conducted by it. But no one is entitled to attend or interrogate as of right.’³³

[36] With respect, this passage misses an important point. The very fact that the court (or the Master after 1985) exercises inherent discretionary power to allow the liquidators to interrogate those summoned to an enquiry in terms of s 417, made it unnecessary for a legislative provision. In other words, there was no need to statutorily give the court or the Master the power they both already had. On the other hand, a commissioner appointed in terms of s 418 has no such inherent discretionary power because he or she is a delegatee. As explained in *Van der Berg v Schulte*:³⁴

‘His is a statutory appointment. He can only be appointed by the Master or the Court under s 418 and he therefore derives his powers solely from the provisions of that section. He has no inherent or common law powers. He does not sit in a judicial capacity.’³⁵

³³ Blackman fn 27 at 14-448.

³⁴ *Van der Berg v Schulte* 1990 (1) SA 500 (C).

³⁵ Fn 30 above at 502.

[37] Thus, in the absence of an express legislative provision in s 418(1)(c) to allow the interrogation by those mentioned in the section, the commissioner would not have the same power. Viewed in this light, the provision of the right in s 418(1)(c), and its absence in s 417, makes perfect sense. What is more, the commentary in *Blackman* fails to take into consideration: (a) the legislative history of s 417 and the cases referred to in *Heller* and *Herholdt*; and (b) the purpose of ss 417 and 418 as articulated by the Constitutional Court in *Bernstein*.

[38] From a practical point of view, it is quite understandable why a court itself or the Master himself or herself would not conduct the interrogation. As explained in *Venter v Williams*,³⁶ ordinarily the court (or the Master after 1985) would not have knowledge of the facts of the matter unless these were provided by the liquidator, with or without the assistance of creditors. The case where the court or Master conducts an enquiry without a commissioner, as was the position in the present case, is indeed a rare one. In practice, the Master invariably appoints a commissioner in terms of s 418 to conduct the enquiry, usually senior counsel or a retired Judge. But that does not detract from the fact that, on the proper construction of s 417, the Master is entitled to preside over the enquiry in terms of s 417 and allow those summoned to the enquiry to be interrogated by, or on behalf of, liquidators or creditors.

[39] For these additional reasons, I concur in the order of the first judgment upholding the appeal.

³⁶ *Venter v Williams and Another* 1982 (2) SA 310 (N) at 11.

T MAKGOKA
JUDGE OF APPEAL

Appearances

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For the respondent: C J Hendriks
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