REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 679/13

In the matter between:

FIRSTRAND BANK LIMITED t/a RAND MERCHANT BANK First applicant

RMB PROPERTY HOLDCO 1 (PTY) LTD Second applicant

and

THE MASTER OF THE HIGH COURT, CAPE TOWN First respondent

THE TRUSTEES FOR THE TIME BEING
OF THE SUMMER WIND TRUST Second respondent

THE JOINT LIQUIDATORS OF THE LIGHTHOUSE
SQUARE (PTY) LTD [IN LIQUIDATION] Third respondents

JUDGMENT DELIVERED ON 11 NOVEMBER 2013

BLIGNAULT J:

[1] This is an application for the review and setting aside of a decision of the Master of the High Court, Cape Town, first respondent, to authorise a commission of enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 into the affairs of Lighthouse Square (Pty) Ltd (in liquidation) ('Lighthouse').

[2] First applicant is FirstRand Bank Limited trading as Rand Merchant Bank. Second applicant is RMB Property Holdco 1 (Pty) Ltd. It is an associated company of first applicant. Second respondent is the Summer Wind Trust ('the Trust')

represented herein by its trustees. Third respondents are the joint liquidators of Lighthouse. They abide the decision of the court. The commissioner appointed by the Master was initially cited as fourth respondent but he voluntarily relinquished his appointment.

[3] Mr Marthinus Jacobus du Preez deposed to the founding affidavit on behalf of both applicants. Prior to its liquidation Lighthouse operated as a property owning and development company. Second applicant held 50% of its shares, Whalerock Whitecaps (Pty) Ltd ('Whalerock') held 25% and the Trust 25%. Lighthouse acquired certain immovable properties in Plettenberg Bay and first applicant advanced various sums to Lighthouse to enable it to develop the properties. As applicants are associated companies I shall refer to them as applicants without attempting to distinguish between their different interests in the matter.

[4] Lighthouse was, however, unable to repay its debt to first applicant. First applicant accordingly applied for its liquidation. It was finally liquidated on 21 June 2012. The first meeting of creditors and members was held on 31 August 2012 before the magistrate at Knysna. First applicant's claim, in the amount of R14 610 719,94, was the only claim submitted to proof at this meeting.

[5] On 25 October 2012 the attorney acting for the Trust wrote to the Master asking for authority to convene an enquiry into the affairs of Lighthouse in terms of the provisions of sections 417 and 418 of the Companies Act 61 of 1973. In this letter it was submitted that one of the reasons for the enquiry was the need to establish whether any of the directors could be held liable for the demise of the company and whether the liquidators of Lighthouse have cause of action against the applicants. The letter was accompanied by an affidavit deposed to by Mr Robert

Baudinet, one of the trustees of the Trust, which set out the claims in more detail. In this letter the attorney also informed the Master that Messrs Gideon Louis Schnetler, Theunis Bosch and David Wandrag were possible witnesses to be subpoenaed. These individuals were at the relevant time employees of the first applicant and Schnetler and Bosch had been appointed as directors of Lighthouse by RMB Property Holdco. The letter also contained a recommendation as to the commissioner to be appointed.

[6] On 1 November 2012 the Master replied to the 25 October 2012 letter.He enquired why the application was urgent and why a section 415 enquiry could not be held.In response to the Master's letter the attorney acting for the Trust addressed a second letter to the Master on 6 November 2012. The letter was accompanied by a formal application for the enquiry and letters of consent from the liquidators. The attorney also informed the Master that the matter was urgent as the enquiry was scheduled for 3, 4 and 5 December 2012.

[7] On 7 November 2012 Mr Chris van Zyl, one of the liquidators of Lighthouse, wrote to the attorney for the Trust, informing him that he had come to the view that the joint liquidators should not consent to the enquiry. He provided reasons for his view which included his opinion that the Trust's purpose is seeking 'ammunition' for purposes of future litigation between it and the applicants. He also stated that if an enquiry were justified it could be conducted in terms of section 415 of the 1973 Companies Act. He said further that he could not consent to an enquiry to be run by a party who has yet to submit a claim for proof.

[8] On 16 November 2012, whilst its application to the Master was still pending, the Trust, represented by its attorney, launched an *ex parte* application in this court

for leave to convene an enquiry into the affairs of Lighthouse in terms of sections 417 and 418 of the Companies Act 62 of 1973. This application was set down for hearing on 23 November 2012. A voluminous founding affidavit was deposed to by Mr Roger Baudinet, one of the trustees of the Trust. In the affidavit he stated,*inter alia,* that he had gained the impression that Mr Chris van Zyl, one of the liquidators of Lighthouse was guarding the applicants and their employees from possible claims by Lighthouse. As a result of Van Zyl '*blackballing'*the enquiry, he said, the consent of the Master could not be obtained and the Trust had no other option but to apply to court to convene the enquiry.

[9] Applicants' attorney got sight of a copy of the court application. He wrote to the attorney for the Trust on 20 November 2012 advising him that applicants intended to intervene in the application in order to oppose it. Applicants' attorney suggested that it be postponed to be heard on the semi-urgent roll. On 23 November 2012 the attorney for the Trust, Mr Fred van der Westhuizen, sent an e-mail to applicants' attorney indicating that his client was agreeable to the proposal. A court order was consequently obtained by agreement between the parties in terms of which the application was postponed to be heard on the semi-urgent roll on 25 March 2012. A timetable was also agreed upon for the filing of further affidavits and heads of argument.

[10] On 27 November 2012 a colleague of Mr van der Westhuizen was informed telephonically by Ms Christa Vermaak, an official in the Master's office, that she had received the court application and wanted to discuss it with her. On 28 November 2012 Mr van der Westhuizen adressed a letter to the Master. It read as follows:

'We thank you for your invitation to discuss the details of the proposed inquiry (Refer to our correspondence dated 25 October 2012 and 6 November 2012.

In an effort to assist your office we hereby provide you with a few facts that need to be kept in mind when making your decision:

1. *Sec 417 – Our clients are not proven creditors in the estate at this stage due to the fact that a danger of contribution exists. It is thus impossible for our clients to proceed with this enquiry in terms of sec 415 and 416 of the Companies Act (as amended). It would be a total injustice to expect our clients to prove concurrent claims against an estate when a danger of contribution exists, just to pursue claims which the insolvent entity has, to their own detriment. Sec 417 and 418 was designed to cater for situations and circumstances like these to assist the general body of creditors.*

2. *The affidavits of Robert Frederick Baudinet makes it abundantly clear that a* Prima Facie *case exist against RMB Holdco No 1 (Pty) Ltd, a 50% shareholder of the liquidated entity. The detail of the case needs to be investigated as it is in the best interest of the general body of creditors. Two of the three liquidators support the enquiry and the third, who was supported (via requisition) by the holding company of RMB Holdco No 1,namely FirstRand Bank Limited, is doing everything in his power to prevent the investigation of the claim into the Creditors who supported him.*

3. *Reason why The Master should consent to the enquiry:*

    a. *Funding – All the funding would be provided by The Summer Wind Trust (25% shareholder of the liquidated entity).*

    b. *If successful the estate may institute action for the recovery of at least R20m which would make it possible for all creditors to recover most of their outstanding debt.*

c. *The enquiry can take place as soon as possible.*

d. *At this stage only three witnesses will be subpoenaed. We tender all the* <u>*reasonable cost*</u> *to attend the enquiry.*

e. *The enquiry would be held in* <u>*Cape Town*</u> *due to the fact that all legal representatives practice in Cape Town as well as the commissioner. This will enable all parties involved to save cost and to minimize any inconvenience.*

f. *There is* <u>*no prejudice*</u> *to the estate at all.*

g. *The insolvent estate can only* <u>*benefit*</u> *the general body of creditors.*

h. *The enquiry would serve to* <u>*benefit*</u> *the general body of creditors.*

i. <u>*Sec 417 and 418*</u> *was designed to cater for situations and circumstances like these to assist the general body of creditors.*

In summary, the request directed to the office of the Master, is well founded and supported. We hereby request the consent from the master to proceed with the Sec 417 enquiry as set out above and in our previous correspondence.'

[11] On 28 November 2012 Mr van der Westhuizen and his colleague attended a meeting at the Master's office. The outcome of the meeting was that Ms Vermaak authorised the proposed enquiry. Van der Merwe's version of the meeting appears from the Trust's answering affidavit. It reads as follows:

'16.1.1 On 27 November 2012,Ms Janell de Beer, an attorney in the employ of Honey Attorneys,…received a phone call from Mrs Crista Vermaak,

an Assistant Master, who stated that she has received the High Court application and that she wished to discuss the matter with her.

16.1.2 On 28 November 2012, Mr Fred van der Westhuysen, who is the Trust's attorney of record,drafted a letter to the Master, containing an exposition of reasons why the Master should order the enquiry. Mr Fred van der Westhuysen, accompanied by Ms de Beer attended the offices of Mrs Vermaak at 10h30 on 28 November 2012 and handed Mrs Vermaak the letter. In the discussion that followed Mrs Vermaak informed them that she had read the High Court application, that she discussed the matter with one of her seniors Mr Warno Steenkamp, and that the Master was prepared to grant the enquiry on condition that the High Court application is withdrawn. Mr Fred van der Westhuysen informed Mrs Vermaak of the opposition to the High Court application and the fact that it was postponed to 25 March 2013 with provisions of the filing of papers by the intervening parties. After Mr Fred van der Westhuysen had told Mrs Vermaak that Mr Leonard Katz of Edward Nathan Sonnenberg is acting on behalf of Rand Merchant Bank ("RMB"), the latter who wanted to intervene in the High Court application, they had a short discussion regarding the manner in which some liquidators and their attorneys approach the High Court, immediately after the liquidators provisional appointment, for an extension of powers in terms of section 386 of the Companies Act, which practice puts a lots of pressure on the Master's office.

16.1.3 Mrs Vermaak and Mr van der Westhuysen then discussed the contents of Mr van der Westhuysen letter; inter alia, the Trust's tender to pay the costs of the enquiry. At the end of this meeting Mrs Vermaak informedMr Fred van der Westhuysen and Ms Janell de Beerthat the Master's office will grant an enquiry on condition that the High Court application is withdrawn.

16.1.4 Thereafter Mr Fred van der Westhuysen and Ms Janell de Beerwent to counsel's chambers and a notice of withdrawal was prepared,

signed, served on the Applicants and filed at the High Court. Mr Fred van der Westhuysen prepared another letter to the Master andMs Janell de Beer served a copy of the withdrawal on Mrs Vermaak together with this covering letter. Ms Janell de Beer then obtained the order from the Master, which was already typed and placed on file.'

[12] A number of material facts are not in dispute. Applicants' attorney did not know of Ms Vermaak's invitation to Mr van der Westhuysen to discuss the matter with her. He did not see the letterwhich Mr van der Merwe adressed to Ms Vermaak before the meeting. He was not given any form ofnotice of the meeting held on 28 November 2012. He was not invited to attend the meeting and he was not present at the meeting. He had not been given any prior notice of thewithdrawal of the court application and the removal of it from the semi-urgent roll. He only learnt ofMs Vermaak's decision to authorise the enquiryafter it had been made.

[13] Mr du Preez proceeded in his affidavit with a brief explanation of the main grounds on which applicants are opposing the proposed authorisation of the enquiry. The Trust had commenced proceedings against Baudinet and one Frederick Arijs arising from suretyships which they had furnishedto applicants in respect of the debt owing by Lighthouse to applicants. Baudinet and one Arijs, he said,wanted to use the enquiry to obtain material which could assist them in their defences to the actionbrought agains them by applicants.

<u>The Master's reasons</u>

[14] The Master provided the record of the proceedings to court together with her reasons in terms of Rule 53. The reasons read as follows:

> *'I wish to make it clear that I did apply my mind before authorising the enquiry of sections 417 and 418 of the Companies Act.*
>
> *All my requirements were met and the applicant were of the opinion that a successful enquiry may lead to the "recovery of at least R20 000 000,00" which would be to the benefit of the general body of creditors. The enquiry will be funded by the Summer Wind Trust.'*

Mr van der Westhuizen's conduct

[15] One of the Trust's principal defences is that the Master's decision is not reviewable. Before I deal with that questionI propose to set forth my findings in regard to the conduct of Mr van der Westhuizen, the attorney for the Trust, and that of the Master in the person of Ms Vermaak. It is clear from Mr van der Westhuysen's own version that he attended the meeting with Ms Vermaak in order to motivate the holding of the enquiry. He did this in the absence of applicants' attorney and without informing him in any way of the meeting to be held.His representations to Ms Vermaak were successful ashe obtained a decision in favour of his client.

[16] It is trite law that a misrepresentation can be made by way of a positive statement (*commissio*) or by a failure to disclose material facts (*omissio*). In the present case one is dealing with the latter form of misrepresentation. There are two requirements for misrepresentation in the form of a fraudulent non-disclosure. The first is the existence of a duty to make the disclosure. See*Meskin NO v Anglo - American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W). The second is intention (*dolus*) on the part of the representor.See *LAWSA Vol 17(2)* second edition (2008) para 311. As long ago as 1880 Lord Blackburn formulated the principle as follows in *Brownlie v Campbell* (1880) 5 App Cas 925, 950:

'where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also.'

[17] In the present case I am of the opinion that Mr van der Westhuizen was under a duty to disclose his intended visit to the Master to applicants' attorney. This duty arose from the following circumstances:

(1) Both attorneys are members of the legal profession. In *Society of Advocates of Natal and Another v Merret* 1997 (4) SA 374 (NDP) at 383CD Howard JP quoted the following statement of James JP in *Ex parte Swain* 1973 (2) SA 429 (N) at 434H:

'Furthermore, it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicity on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard in this matter.'

(2) The two attorneys, acting on behalf of their clients, solemnly entered into a binding agreement as to how, where and when the dispute between the parties was to be determined. That agreement was made an order of court.

(3) The visit of Mr van der Westhuysen to the Master placed him in a position where he couldplace information and contentions before her to persuade her to grant the relief sought by him on behalf of his client. Applicant's attorney was denied the opportunity to place his contentions before the Master.

[18] As to the second requirement: There can be no doubt that Mr van der Westhuysen acted intentionally. He was fully aware of the professional duties which he owed applicants' attorney. He was fully aware of their agreement as to where, when and how the dispute was going to be resolved in court. He knew that he was acting in flagrant breach of that agreement. His letter addressed to Ms Vermaak is telling. It shows that he went to the meeting with Ms Vermaak without any intention of giving applicants' attorney any notice of the meeting. This is borne out by his accusation in the letter that applicants wereabusing the one liquidator'spowers in order to avert the holding of the inquiry. Mr van der Westhuysen then deliberately exploited the absence of applicants' attorney to obtain the Master's decision in favour of his client.

[19] Upon a consideration of Mr van der Westhuysen's conductI am of the view that his failure to disclose the facts in question to applicants' attorney, indeed amounted to a fraudulent misrepresentation. The prejudice to applicants is obvious.

[20] It is trite that the effect of fraud is far-reaching. In *Farley (Aust) Pty Ltd v J R Alexander & Sons (Qld) Pty Ltd* [1946] HCA 29; (1946) 75 CLR 487 the High Court of Australia, per Williams J, said this:

> *'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'*

[21] And in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712 one finds Lord Denning's well known remarks:

> *'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever..'*

[22] In South Africa the *'insidious'* effect of fraud permeates the entire legal system. It renders contracts voidable. It is one of the elements of delictual liability. It constitutes a crime. Fraudexcludes the effect of an ouster clause in legislation. See *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675. It also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. See *Wells v SA Alumnite* 1927 AD 69 at 72.

<u>The conduct of the Master</u>

[23] I consider next the conduct of the Master in the person of Ms Vermaak. It is regrettable that she did not provide any reasons for her decision.The giving of reasons serves many purposes. See *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) para [159]:

> *'[159] The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is*

> *reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallise the issues should litigation arise."*

[24] In the absence ofreasons one is entitled to draw inferences as to the conduct of the decision-maker. See*Dendy v University of the Witwatersrand and Others* 2005 (5) SA 357 (W) at para [53]:

> *'It is well established that the failure to give written reasons has an important bearing on the question whether the decision-maker or makers acted in good faith or had been influenced by ulterior or improper motives.*

[25] In the present case, however, it is difficult to drawspecific inferences as to Ms Vermaak's state of mind. There is not enough evidence before me to conclude that she was a party to the fraudulent aspects of Mr van der Westhuysen's conduct. It is doubtful, however, whether sheunderstood the implications of applicants' opposition to the application for the authorisation of the enquiry. An attorney in the firm of applicants' attorneys stated in an affidavit that she spoke telephonically to Ms Vermaak on 29 November 2012 and was informed by her, *inter alia*, that the background facts relating to the section 417 application and the intervention application brought before [the court] were not discussed with her. This statement was not disputed by Ms Vermaak.A plausible inference, so it seems to me, is that Ms Vermaak was so impressed by Mr van der Westhuizen's representations that she simply did not apply her mind to the question of hearing applicants' attorney before taking her decision.

[26] The result was that Mr van der Westhuizen's fraudulent conduct and Ms Vermaak's failure to apply her mind formed a dangerous combination. He exploited her attitude to achieve the result sought by him.

An outline of the law of judicial review

[27] The first question debated by counsel is whether the Master's decision to authorise the enquiry under sections 417 and 418 of the Companies Act 1973, is at all subject to review. Before I discuss the casescited in argument it might be convenientto provide a brief outline ofrecent developmentsin the law of judicial review. Prior to the advent of the Interim Constitution of the Republic of South Africa 2000 of 1993 ('the Interim Constitution') it was governed by common law principles which had evolved over many years. They are sometimes referred to as the *Shidiack* grounds of review after their statement in *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-652:

> *'There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief.'*

[28] The Interim Constitution of the Republic of South Africa 2000 of 1993 came into effect on27 April1993. Section 24 thereof provided fora right to lawful administrative action. The Constitution of the Republic of South Africa 108 of 1996 ('the Constitution') came into effect on 4 February 1997. Section 33 thereof contains a similar provision. It reads asfollows:

'33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.'

[29] The Promotion of Administrative Justice Act 3 of 2000 ('PAJA') was enacted pursuant to the provisions of section 33(3) of the Constitution. It came into effect on 30 November 2000. Section 3(1) of PAJA provides as follows:

'(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair.'

Section 3(2)of PAJA reads as follows:

'(2)(a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, *subject to subsection (4), must give a person referred to in subsection (1)-*

(a) adequate notice of the nature and purpose of the proposed administrative action;

> *(b) a reasonable opportunity to make representations;*
>
> *(c)a clear statement of the administrative action;*
>
> *(d) adequate notice of any right of review or internal appeal, where applicable; and*
>
> *(e) adequate notice of the right to request reasons in terms of section 5.*

Sub-section 6(2)of PAJA contains a lengthy list of actions that are subject to review. The list includes an action that was procedurally unfair.

[30] Under the Constitution all exercise of public power must in addition comply with the legality principle. I shall refer to this principle more fully hereunder.

The authorities cited by counsel

[31] Mr B Manca SC appeared on behalf of applicants. In support of the submission that the Master's decision is reviewable he relied in particular on the judgment of Stegmann J in *Friedland and Others v The Master and Others* 1992 (2) SA 370 (WLD). In that matter the Master authorised the holding of an enquiry in terms of sections 417 and 418 of the Companies Act 1973. Four persons whom the liquidator sought to question brought an application for the review of the Master's decision. Stegmann J recognised that a prospective examinee may validly seek to resist an order which will have the effect of subjecting him to examination in terms of an enquiry of this nature. At 379EF he said the following:

> *'To summarise, I think it may correctly be said that the grounds on which someone who has been identified as a person to be examined may validly seek to resist an order which will have the effect of subjecting him to examination under ss 417 and 418 of the Companies Act 1973 are narrow.'*

[32] Stegmann Jreferred with approval to theearlier judgment of Schreiner J in *Ex parte Liquidators Ismail Solomon & Co (Pty) Ltd* 1941 WLD 33. Schreiner J held that a person summoned to appear before an examination in this kind of enquiryhas*locus standi* to oppose the application to summon him and he should be heard on this question.

[33] Mr H M Carstens SC, assisted by Mr J D de Vries, appeared on behalf of the Trust. He submitted that the Master's decision in this case was not subject to review. He reliedfirst on the judgment of Mynhardt J in *Strauss and Others v The Master and Others* 2001 (1) SA 649 (T). The learned judge dealt with the question whether the decision of the Master to hold an enquiry in terms of section 152 of the Insolvency Act into the affairs of an insolvent (the comparable provisions under the Insolvency Act). Mynhardt J held,*inter alia,* that the Master exercised a subjective discretion but that it was subject to reviewon the common law grounds, namely that he acted '*mala fide or from ulterior motive or failed to apply his mind to the matter'.*

[34] Mr Carstens also relied on the judgment of Mbha J in *Nedbank Ltd v Master of the High Court, Witwatersrand Local Division and Others* 2009 (3) SA 403 (WLD). Mbha J held that the Master's decision to grant an application for the holding of an enquiry under section 417 of the Companies Act is not reviewable. The thrust of the judgment is found in para [36] which reads as follows:

> *[36] It is my view that, when the master gives effect to s 417, he does not act administratively and accordingly PAJA does not apply. Even if it could be argued that PAJA does apply, it can only apply to the most limited and constrained extent. I say so for the following reasons:*

[36.1] A reading of the language under ss 417 and 418 shows that these sections are purely investigative measures to facilitate the winding-up of a company. The decision to take evidence from a witness in a winding-up clearly has no potential to adversely affect the right of any person. Nothing is decided by the Commissioner under these sections. No rights or obligations are determined. Under s 418(3), a commissioner must report to the master and the court on any enquiry referred to him.

[36.2] It follows that the summoning of a witness to provide information concerning the affairs of a company is not'administrative action'. Accordingly, the procedural fairness contended for by the applicant does not arise. Alternatively, if it can be said to arise, it does not arise at the stage when the enquiry is ordered. The secrecy provisions of s 417(7) make it clear that prior notice should not and cannot be given to witnesses. Procedural fairness is, however, ensured by the right of the witness to have an attorney and/or advocate present.

[36.3] As was stated by C Hoexter in The New Constitutional and Administrative Law vol 2 p 214.

> *"the principle of fairness in particular, and the other requirements of legality in general, need not be applied identically or evenly in every case. It allows one to apply procedural justice to all administrative action while tailoring the content of that fairness to suit the particular occasion."'*

[35] Mbha J found support for his reasoning in certain*obiter*dicta of Ackermann Jin *Bernstein and Others v Bester and Others NNO*1996 (2) SA 751 (CC)on the question whether an enquiry in terms of ss 417 to 418 of the Companies Act 1973 constitutes administrative action.In that case, ss 417 and 418 of the Companies Act were attacked as an alleged violation of s 24 of the Interim Constitution. Ackermann J said,*inter alia*, the following:

‘[95] …..the issue before us is not the common law one, but the constitutional question as to whether paras (b) and (c) of s 24 of the Constitution apply to an enquiry under ss 417 and 418 of the Act. They only apply if the nature of the enquiry is characterised as being ‘administrative action' because it is only in relation to 'administrative action' that s 24 rights arise.

[96] I have a difficulty in seeing how the enquiry in question can be characterised as administrative action. It forms an intrinsic part of the liquidation of a company, in the present case the liquidation of a company unable to pay its debts. . .

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

[36] From an overview of the cases cited by counsel it thus appears that the existence ofa right to review the Master’s decision to authorise an enquiry, was in principle recognized in the *Friedland, Ismail Solomon* and *Strauss* judgments. The*Nedbank*judgment, it seems clear, was influenced by the dicta of Ackermann J in the *Bernstein* judgment. The*Bernstein*judgment must, however, be read in context. It was handed down before the enactment of PAJA and it was based on an

interpretation of the term *'administrative action'* in section 24 of the Interim Constitutionwithout any statutory definition thereof.

[37] The preceding two paragraphs,Nos [94] and [95] ,in Ackermann J's judgment in *Bernstein*,are significant. I quote them in full:

> *'[94] There is certainly an argument to be made for the proposition that enquiries conducted pursuant to the provisions of ss 417 and 418 of the Act and the performance by commissioners of their duties to report thereunder constitute administrative action within the meaning of s 24 of the Constitution. The Court of Appeal in England in [Re Pergamon Press Ltd [1971] Ch 388 (CA) ([1970] 3 All ER 535)] the Pergamon Press case a decision relied upon by Mr Marcus, held that enquiries of this kind, although merely investigative in nature, do adversely impact on the rights and interests of the witness and accordingly have to be conducted in accordance with the principles of natural justice. Lord Denning said the following in this regard:*
>
>> *'It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings: see Re Grosvenor & West End Railway Terminus Hotel Co Ltd (1897) 76 LT 337. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings: see Hearts of Oak Assurance Co Ltd v Attorney-General [1932] AC 392. They do not even decide whether there is a prima facie case, as was done in Wiseman v Borneman [1971] AC 297.*
>>
>> *But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up:*

> *see Re SBA Properties Ltd [1967] 1 WLR 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see s 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.*
>
> *Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative: see Reg v Gaming Board for Great Britain, Ex parte Benaim and Khaida [1970] 2 QB 417.'*

Sachs LJ expressed himself as follows:

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

[95] I have no quarrel with the judgment, as far as it goes. But the problem which faced the Court of Appeal in the Pergamon Press case differs from the problem confronting us. In that case the issue was whether, at common law, the inspectors conducting the enquiry had to act in

> *accordance with the principles of procedural fairness. For this reason it was unnecessary for the Pergamon Court to characterise thenature of the proceedings. On Mr Marcus' argument it is essential for us to do so, for the issue before us is not the common-law one, but the constitutional question as to whether paras (b) and (c) of s 24 of the Constitution apply to an enquiry under ss 417 and 418 of the Act. They only apply if the nature of the enquiry is characterised as being 'administrative action' because it is only in relation to 'administrative action' that s 24 rights arise.'*

[38] I am therefore of the view that I am not precluded by the authority of any of the judgments mentioned above, from considering the merits of applicants' review application in terms of PAJA or in terms of the legality principle.

Review in terms of PAJA

[39] The question whether any particular conduct is subject to review in terms of PAJA depends on the definition of *'administrative action'* in section 1 thereof. The relevant part of the definition reads as follows:

> *'In this Act, unless the context indicates otherwise-*
>
> *'administrative action' means any decision taken, or any failure to take a decision, by-*
>
> *(a) an organ of state, when-*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-'

[40] The important criterion, for present purposes, is *'adversely affects the rights of any person'*. It has been interpreted by the courts in a broad and purposive manner. See *Joseph and Others v City of Johannesburg and Others*2010 (4) SA 55 (CC) paras [41] to [43]:

'[41] Section 3(1) of PAJA provides that '(a)dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'. The structure of s 3(1) is important as it indicates the broad application of the procedural fairness provisions under PAJA. In Walele*, in considering a procedural fairness claim based on an alleged legitimate expectation, this court emphasisedthat s 3 of PAJA must be interpreted generously to give proper effect to s 33(1) of the Constitution.O'Regan J, writing for the minority, observed that '(w)e must be careful, in construing s 3(1), to bear in mind that it is the key provision in PAJA that gives effect to the right entrenched in s 33(1) of the Constitution'.*

[42] Both this court and the Supreme Court of Appeal have already expressed support, albeit obiter, for a purposive approach to the concept of 'rights' under s 3 of PAJA. In Premier, Mpumalanga *O'Regan J remarked that '(i)t may be that a broader notion of ''right'' than that used in private law may well be appropriate'. The importance of procedural fairness is well described by Hoexter:*

> *'Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'*

> *[43] In my view, proper regard to the import of the right to administrative justice in our constitutional democracy confirms the need for an interpretation of rights under s 3(1) of PAJA that makes clear that the notion of 'rights' includes not only vested private-law rights, but also legal entitlements that have their basis in the constitutional and statutory obligations of government. The preamble to PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are inter alia to 'promote an efficient administration and good governance' and to 'create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function'. These objectives give expression to the founding values in s 1 of the Constitution, namely that South Africais founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness.'*

[41] Asa proven creditor of Lighthouse,applicants possessed the legal entitlements described in the dicta in the *Pergamon Press* judgment(quoted above) which were approved by Ackermann J in *Bernstein.*Applicants have been deprived of the opportunity to exercise these rights by reason of the Master'sdecision to authorise the enquiry in their absence.

[42] The approach in the *Jacobs* judgment finds expression, *inter alia,* in the so-called application cases in which unsuccessful applicants for licences, permits, tenders and the like were held to have been entitled to take the functionary's decision on review. See De Ville *Judicial Review of Administrative Action in South Africa* (2003) 225-226.Applicants' positionas an objector to the Trust's applicationfor the holding of an enquiryis in substance no different from those of the applicants in the application cases.

[43] Counsel for the Trust submitted that applicants had to show that they would have had something to say to the Master which would have made a difference to the outcome of the process. I do not agree. In *Logbro Properties CC and Another v Bedderson NO and Others*2003 (2) SA 460(SCA) para [24] Cameron JA said this:

> *'[24] While, as Mr Marcus pointed out, it is no answer to a claim to be heard that the subject might have had little or nothing to say if such an opportunity had existed… …*
>
> *It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law 6th ed puts the matter thus at 533 - 4:*
>
> > *"'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'"*

[44] In the circumstances I am of the view that applicants' rights to procedural fairnesswere violated by the manner in which the Master, encouraged by Mr van der Westhuizen, dealt with the application for the authorisation of the enquiry.Applicantswere simply not afforded any opportunity to place their contententionsbefore Ms Vermaak despite the fact thatshe knew that they were opposing the application. She should have realised, had she thought about it, that Mr van der Westhuizen's conduct wasirregular.

The legality principle

[45] Applicants' remedies are, however, not confined to the provisions of PAJA. The Master's decision can also be reviewed in terms of the legality principle. The principle was formulated as follows in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para [56]:

> *'[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.'*

[46] It was confirmed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para [148]:

> *'[148] It does not follow, of course, that, because the President's conduct in exercising the power conferred upon him by s 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under s 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; until 30 April 1999 the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.'*

[47] In *Albutt v Centre for the Study of Violence & Reconciliation and Others* 2010 (3) SA 293 (CC)para [49] the principle was described as follows:

> *'[49] It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of s 84(2)(j), we held that, although there is no right to be pardoned, an applicant seeking pardon has a right to have his application 'considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality'. It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.*

[48] In the present case the Master's decision, orchestrated by the fraudulent conduct of Mr van der Westhuysen acting on behalf of the Trust, offended against at least three aspectsof the legality principle. The first is fairness. The question of the unfair procedural treatment of applicants was discussed above with respect to the provisions of sec 3 of PAJA. The Master's treatment of applicants' attorneywas, however, not only procedurally unfair. It was also substantively unfair insofar as the Master invited Mr van der Westhuysen to a personal consultation with the purpose of granting the application for the holding of the enquiry. Applicants' attorney was deliberately excluded from this process.

[49] The Masteralso breached the principle of rationality.By excluding applicants' attorney from the decision-making process the Master inevitably impaired the quality thereof. Rationality, as one of the aspects of the legality principle, was described as follows in*Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134 (27 September 2013) para [69]:

> *'[69] That the process by which a decision is taken – in contra-distinction to a decision on the merits of the matter under consideration – might itself be impeached for want of rationality – was affirmed in Democratic Alliance v President of the Republic of South Africa*[2013 (1) SA 248 (CC)]*, in which one of the issues was 'whether the process as well as the ultimate decision must be rational'*[para 12]*. After referring to a passage from Minister of Justice and Constitutional Development v Chonco*[2010 (4) SA 82 (CC)]*, Yacoob ADCJ said:*
>
> > *'It follows that both the process by which the decision is made and the decision itself must be rational. Albutt is authority for the same proposition….'*
>
> *And later* [para 36]:
>
> > *"'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'"*

[50] The conduct of the Master, influenced by Mr van der Westhuysen,in additionoffended against the principle of transparency. The purpose ofhis *modus operandi*was to obtain the Master's authorisation behind the back of applicants' attorney. The process and debate between him and Ms Vermaak was thus devised to take place in secrecy. Taking a decision in this manner was calculated to cause resentment on the part of applicants and to impair the respect which an important institution like the Master's Office deserves.

Conclusion

[51] I accordinglyfind that in taking the decision on 28 November 2012 to authorise a commission of enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 into the affairs of Lighthouse Square (Pty) Ltd (in liquidation), the Master breached applicants' rights to fair administrative action. The Master's decision also violated the legality principle as described above. It falls to be set aside.

[52] In the result, I give the following orders:

(1) The Master's decision, taken on 28 November 2012, to authorise a commission of enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 into the affairs of Lighthouse Square (Pty) Ltd (in liquidation), is reviewed and set aside.

(2) The Summer Wind Trust is ordered to pay applicants' costs.

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A P BLIGNAULT

Appearing for applicants	:	Adv B Manca SC
Instructed by	:	Edward Nathan Sonnenbergs Inc Letitia Field
Appearing for second respondent	:	Adv H Carstens SC Adv J de Vries
Instructed by	:	Brink de Beer and Potgieter Fred van der Westhuyzen
Date of hearing	:	10 September 2013

Date of judgment : 11 November 2013