THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case No: 528/98

In the matter between:

BRIAN ST CLAIR COOPER NO **1st Appellant**

BASIL NEL NO **2nd Appellant**

LESLIE COHEN NO **3rd Appellant**

OLIVER POWELL NO **th Appellant**

and

SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY
1st Respondent

JACOBUS CORNELIS STASSEN **2nd Respondent**
CS STEWART NO
3rd Respondent

Coram: SMALBERGER, VIVIER, HARMS, & ZULMAN JJA and MPATI AJA
Heard: 7 NOVEMBER 2000
Delivered: 22 NOVEMBER 2000
Subject: Sections 414(2) and 424 of the Companies Act 61 of 1973

JUDGMENT

HARMS JA:

[1] This appeal concerns the review of a ruling made by the Deputy Master of the Supreme Court (Transvaal Provincial Division) in his capacity as officer presiding at a meeting of creditors and in which he authorised the issue of a subpoena in terms of s 414 (2) of the Companies Act 61 of 1973 ("the Act"). The decision was taken on 3 February 1997 at the behest of the joint liquidators of two companies in liquidation and the witness involved is Mr JC Stassen, the chief legal adviser of the SA Mutual Life Assurance Society (the "Old Mutual"). Reviews of this kind are governed by s 151 of the Insolvency Act 24 of 1936.

[2] In the court *a quo* Roux J, on the application of the Old Mutual and Stassen (presently the first and second respondents respectively), set the subpoena aside. The Deputy Master (to whom I shall refer as "the Master" for the sake of convenience) abides the decision of the court and is at this stage the third respondent. The first and second appellants are the co-liquidators of Supreme Holdings Ltd ("Holdings") and the third and fourth appellants those of Supreme Investment Holdings (Pty) Ltd ("Investment"). They, with the leave of Roux J, appeal against his order.

[3] At a lengthy and heated hearing the Master was bombarded with arguments and documents, largely irrelevant. The subpoena requires of Stassen to testify and to produce a mass of documents. These fall into twenty-seven different classes and it seems that the court below was informed from the

bar that the documents would fill a shipping container. According to the ruling, Stassen was called upon to be examined -

"on issues relating to s 424 [of the Act] liability arising from the combined summons issued by the liquidators against Old Mutual and others . . . under case number 24748/95."

Further, in terms of the ruling -

"questions relating to negligence or delict will be allowed insofar as they may relate to s 424 liability, and will be disallowed if they are shown to be entirely irrelevant to the s 424 claims."

[4] In order to understand the ruling and its qualification, a substantial number of background facts have to be related. Holdings and Investment conducted their businesses as one and for that reason further references will be to them jointly. A major part of their business was the acceptance of money from the public by way of deposits, purportedly against the issue of secured debentures and by way of subscription for redeemable preference shares. It can be accepted that the business was conducted fraudulently and that as a result a large number of innocent members of the public have lost substantial amounts of money. More detail of the business methods can be found in *Durr v Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA). They were liquidated in November 1992.

[5] In marketing their products, the companies made use of independent brokers, often employed by other financial institutions such as banks (as in *Durr*) or insurance companies (as in the present instance). The

general pattern followed was that the companies misled the often incompetent or negligent brokers:

"Rather than documents in a form which past experience has embedded in the statutes as a requirement, brokers were edified with glossy brochures, dossiers containing laudatory but largely irrelevant press cuttings, and they were exhorted to invest at marketing conferences. The two companies' names were played down. Rather the 'Supreme Group' was put forward as disposing over the operational companies and their assets, and particularly the three quoted companies. Completely spuriously, the 'Supreme Group' was dated back to 1923, whereas Holdings had been formed in 1986 and Investment in 1989. The actual facts concerning the two companies themselves were suppressed. What was also suppressed was where the major investments were being made by the 'Supreme Group', not in the operational companies, but in a trio called Insulated Structures (Pty) Ltd ('Insulated'), Sandton Finance (Pty) Ltd ('Sandton') and Pier Investments (Pty) Ltd ('Pier'). Insulated was an intermediary financing company which was having problems with the Financial Services Board. Sandton was involved in what the witness Goldhawk called the 'loan-sharking business', lending small amounts to the man in the street at high rates, a business, according to him, 'which involves unusual collection tactics whereby letters are not necessarily used but large people knocking on the door go to collect money very often'. Pier bought repossessed properties from the participation bond company, properties that did not generate income, and put them together in property portfolios.

The broad substance was that the two companies were running an illegal bank, taking deposits from the public, and, through their intermediaries, lending to other members of the public at a rate higher than that paid to the depositors. Of course, they had no licence to conduct a bank, so that they could not openly solicit deposits from the public. Becoming a bank would have entailed rigorous regulation. Openly raising capital by offering shares or debentures would have required a prospectus with no room to quibble. That would have entailed a scrutiny which they could not bear. So it was also no good. The expedient that was devised was to use the participation bond company as a

stalking horse. It was a registered financial institution and was entitled to solicit funds. What was done, as explained by Goldhawk, was to advertise participation bonds and then to add that, by the way, secured debentures and preference shares were also on offer. That no doubt explains the 'bond' in the earlier names of the two companies . . .."

(*Durr* at 457H - 458G. Goldhawk was not a deponent in this case, but the Master was generally aware of these facts.)

[6] In *Durr* the particular broker and his employer, Absa, were held liable in delict for the damages suffered by an investor who was negligently advised to invest in Supreme debentures and preference shares. Such claims of investors have nothing to do with the winding-up of the companies and ought not to concern the liquidators. The liquidators felt duty bound to assist, for remuneration, the investors in pursuing their delictual claims against brokers and their employers. To do this an ingenious scheme was devised. Investors were asked to cede their claims to the liquidators in their capacity as trustees for a common pool. Monies recovered would fall in the pool and all members of the pool would share therein, irrespective of the success of their individual claims. The scheme of arrangement was sanctioned in terms of s 311 of the Act during May 1994.

[7] Instead of suing individual brokers or their employers, the liquidators began using a known expedient, namely the provisions of s 414 (2) and 415 of the Act, to subpoena and interrogate brokers. Their object was to exert pressure to procure settlements rather than to obtain information, and the liquidators were somewhat successful until the point was taken by a group of brokers at Newcastle that the delictual claims could not be the subject of such an inquiry. At the time a comprehensive inquiry in terms of s 417 read with s 418 had been conducted under the chairmanship of the Honourable O Galgut QC, who had submitted a full report on the manner in which the business of Supreme had been conducted and the possible liability of others, including

brokers and their employers. He found that the brokers had been misled by the companies, that they may have been negligent and that delictual claims by investors might succeed. Although fully alive to s 424 liability, the report did not even remotely suggest that possibility as far as brokers were concerned. In addition, the liquidators had been acting on a thorough overview prepared by their erstwhile counsel who has an intimate knowledge of all the facts concerning Supreme. Having considered all possible claims, he concluded that only delictual claims were available against the brokers and their employers.

[8] In order to overcome the objection raised by the Newcastle brokers and to interrupt prescription, the liquidators instituted actions against some financial institutions and the brokers in their employ who had marketed Supreme products. In the case referred to in the Master's ruling, action was instituted during October 1995 against the Old Mutual and 137 brokers who were or are in its employ claiming some R52 million in damages relating to 997 investments in the companies. The number of investors involved are slightly less because some had made more than one investment. It is clear that the liquidators have no serious intention to bring the case as a whole to trial because, as they say, many of the investors are not prepared to testify, are not helpful witnesses because they are old or unsophisticated, or gave statements that are unfavourable or are not available or reliable. It is also not feasible to consult with and call such a large number of witnesses.

[9] The claim against Old Mutual is on alternative bases: s 424 or delictual liability. The claims against the brokers are formulated similarly. Armed with this, the liquidators applied to the Master for the subpoena in order to enable them to interrogate Stassen on all the issues contained in the particulars of claim. The list of documents, for instance, has, on the face of it, little or nothing to do with s 424 liability, but that is by the way. Because the Master was of the view that the liquidators were not entitled to use the machinery of the Act to pursue the delictual claims, he issued the quoted qualification to the ruling. As Roux J said, the qualification provides but scant comfort because nearly every question posed in relation to the s 424 liability would probably be relevant to the delictual claims.

[10] The Master's authority to issue a subpoena is to be found in s 414

(2):

"The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-

(a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

(b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting."

(Underlining added.)

[11] It is for the Master to form the opinion that the proposed witness may be able to give material information concerning the company or its affairs. In the fairly lengthy reasons for his ruling the Master nowhere states that he in fact formed the opinion. Whether one can surmise that he did form the required opinion is open to doubt but the answer does not necessarily dispose of the case because of the nature of the review. Both parties accepted, as I shall do, that a court exercising its powers of review in terms of s 151 of the Insolvency Act is not restricted to those cases where some irregularity has occurred; it acts as a court of appeal and is entitled to adjudicate the matter anew (the authorities on the point have been collected in *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1991 (1) SA 648 (A) 655G - J). Another aspect which the Master failed to consider is whether the information or documents alleged to be available from Stassen or the Old

Mutual is "material", an aspect of major importance if regard is had to the number of documents that have to be produced.

[12] The Master by implication held that the delictual claims do not, in the words of s 414 (2), concern the companies or their affairs. The liquidators, in spite of a different approach before the Master, quite rightly accept the correctness of his ruling in this regard (see *Simon & Another v The Assistant Master and Others* 1964 (3) SA 715 (T); *James v Magistrate, Wynberg, and Others* 1995 (1) SA 1 (C) 16A - D). That leaves for consideration the s 424 claims.

[13] Under the provisions of the Companies Act 46 of 1926, examination of witnesses during the course of winding-up was regulated by s 155. It provided in ss (1) that the court may summon -

"any person whom the Court deems capable of giving information concerning the trade, dealings, affairs, or property of the company."

Ex parte Brivik 1950 (3) SA 790 (W) 791E - H dealt with the threshold test for exercising its powers in these terms:

"The Court orders the inquiry at its own discretion on information brought before it by any interested person. Normally it is the liquidator who would apply, but if the liquidator fails to apply there is no objection to entertaining an application by a creditor or contributory who has given notice to the liquidator to enable him to put his views before the Court. The Court is careful to see that the inquisitorial powers of the section are not used for purposes of vexation or oppression . . ., but an applicant is not required to make out a *prima facie* case that there has been misfeasance or actionable conduct of any kind. It is sufficient if the Court is satisfied that there is fair ground for suspicion . . ., and that the person proposed to be examined can probably give information about what is suspected."

Counsel accepted the applicability of this test for an examination under s 414 (2) of the current Act (cf *Katz v Colonial Realty Trust (Pty) Ltd* 1954 (4) SA 302 (W)). It hardly need be stated that the Master can only form the required opinion if he has at his disposal some basic facts which create a fair ground for suspicion.

[14] In order to hold someone liable under s 424(1)[1], the following has

[1] 1 It reads: "When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying

to be established:

(1) the business of the company was carried on
(i) recklessly,
(ii) with intent to defraud creditors (of the company or of any other person), or
(iii) for any fraudulent purpose; and
(2) the person concerned must
(a) have been a party to the carrying on of the business, and
(b) have had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on
(i) recklessly,
(ii) with intent to defraud creditors (of the company or of any other person), or
(iii) for any fraudulent purpose.

(See *Ozinsky NO v Lloyd and Others* 1995 (2) SA 915 (A) 917G - I.) The requirements under (1), it can be assumed, have been established but those under (2) are in contention.

[15] As far as the s 424 claim against Old Mutual is concerned, it founders on many rocks but the most conspicuous one is that Old Mutual was never a party to the carrying on of the business of Supreme. In order to circumnavigate the problem, the liquidators alleged in the particulars of claim that the brokers carried on the business of Supreme and that Old Mutual is vicariously liable for their actions. The validity of this point was pertinently raised by way of exception before Joffe J in the liquidators' identical claim against Nedcor Bank Ltd and its brokers (WLD case 95/24750). He held that s 424 cannot be invoked against a person who may be vicariously liable at common law for the conduct of another person and that the liquidators have failed to make out a cause of action insofar as conduct on the part of the employer is a requirement of the section. His decision conforms with *Ensor NO v Syfret's Trust and Executor Company (Natal) Ltd* 1976 (3) SA 762 (D) 766A-C and *Fisheries Development Corporation of SA Ltd v Jorgensen and Another, Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (W) 167D-G and the liquidators accept its correctness. For a reason that is not entirely clear, Joffe J did not strike out the allegation that the employer had the necessary knowledge required by s 424 but the allegation on its own has no relevance. The requisite knowledge must

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on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

be possessed by the person who conducted the business in order to attract liability.

[16] Apparently in this context, and rather unnecessarily for the purposes of his conclusion, Roux J held that s 424 does not create liability for juristic persons but only for natural persons, mainly because of the use of the term "personally liable" in the section. Counsel for the respondents did not embrace this reasoning and it is unnecessary to deal with it for purposes of this appeal. It is, however, contrary to other authority (eg *Anderson and Others v Dickson and Another NNO* 1985 (1) SA 93 (N) 110A - B).

[17] The fact that the s 424 claim against Old Mutual is ill-conceived, does not mean that Stassen cannot be called to testify and produce documents about the possible s 424 liability of the brokers. A closer look at the liquidators' case based upon this cause is therefore required. I have already described the role played by the brokers in the affairs of Supreme. They introduced members of the public to Supreme for commission and Supreme then sold its products to those persons. Does this mean that the brokers were party to the carrying on of the business of Supreme? Dealing with the meaning of that concept, Nugent J said the following in *Powertech Industries Ltd v Mayberry and Another* 1996 (2) SA 742 (W) 749D - I:

> "Those considerations aside, in my view a more fundamental reason why the plaintiff cannot succeed is that to which I have already adverted. The submissions by the plaintiff's counsel seem to assume that one may be a 'party' to the carrying on of a company's business without in some way participating in it. In my view that is not correct. To be a 'party' to the conduct of a company's business requires an association with it in a common pursuit. That is the ordinary meaning of the word as it is used in the statute. The meaning given to that sense of the word by *The Oxford English Dictionary* is 'one who takes part, participates, or is concerned in some action or affair; a participator; an accessory', conveying the idea of a person who associates with the company not in pursuit of his own ends, but in pursuit of those of the company.
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> A 'party' to the carrying on of a company's business is one who has joined with the company in a common pursuit. Generally this would include its directors and managers, all of whom are acting in common pursuit of the company's business. If the business is conducted recklessly they are liable therefor, and for good reason, as they ought not to be permitted to shield behind the limited liability accorded to the company in these circumstances.
>
> Clearly the section is aimed only at conduct which attracts liability to the company, as it is only that conduct which constitutes the mischief against which the section is aimed. The section does not extend to those who, while carrying on their own business, incidentally enable the company to carry on its business. No matter that a landlord, for example, may by letting premises to a company enable the company to carry on its business, and even enable it to do so recklessly, the landlord is not carrying on the company's business and he is not a party thereto."

I find the reasoning compelling and applicable to the case against the brokers. Counsel valiantly sought to distinguish the judgment on the ground that the facts are different but that does not affect the principle of the matter. The brokers were pursuing their own business ends and were not carrying on the

business of Supreme in any manner. No facts were placed before the Master or court which can create a suspicion to the contrary, namely that any broker carried on the business of Supreme.

[18] In addition, the Master needed fair grounds for a suspicion that Old Mutual and the brokers had knowledge of the facts from which a conclusion may properly be drawn that the business of Supreme was carried on recklessly or with an intent to defraud or with a fraudulent purpose (*Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) 673I-674A). All the facts placed before the Master point in the opposite direction. The high-water mark of the evidence placed before the court is that Old Mutual regarded investments in Supreme as carrying a high risk, that it informed its brokers of this view and that the marketing of Supreme investments was a breach of the brokers' contract with Old Mutual. The Master in his ruling relied on the fact that an allegation of knowledge had been made in the particulars of claim and that it "appear[s] to be seriously made". The history of the case, in my view, shows the opposite: the allegation was not seriously made but was made to meet the point raised by the Newcastle brokers. The liquidators did not bother to file an affidavit in the review proceedings expressing any belief in the allegation. The answering affidavit made by an insolvency administrator involved in the estates, does not

even touch remotely on the subject. The silence is deafening if regard is had to the fact that a full s 417 inquiry had been held where many brokers and someone from Old Mutual had testified, the many s 415 interrogations and the hundreds (if not thousands) of questionnaires completed by investors.

[19] It follows that the Master had no cause for making the ruling and that Roux J was correct in setting the subpoena aside on the ground that the Master had acted beyond his competence. In the light of this, the questions whether the subpoena was oppressive, vexatious or unfair (*Bernstein and Others V Bester and Others NNO* 1996 (2) SA 751 (CC) par 36) or whether it was applied for with an ulterior purpose (*Beinash v Wixley* 1997 (3) 721 (SCA), cf *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA)) do not arise.

[24] The appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

AGREE:

SMALBERGER JA
VIVIER JA
ZULMAN JA
MPATI AJA