

THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

JUDGMENT

Case no: A5041/11

In the matter between:

SU-FANG HUANG

Appellant

and

TOBIAS CHRISTIAAN BESTER NO

Respondent

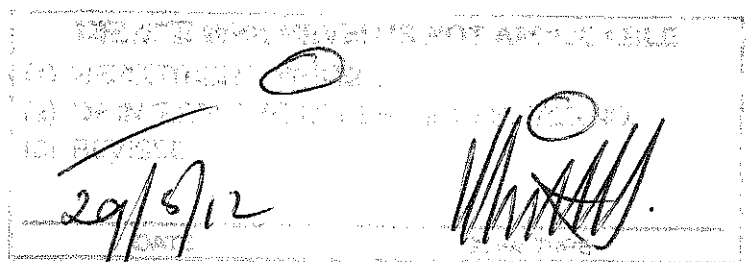
Neutral citation: *Su-Fang Huang v Tobias Bester NO* 2012 SA (GSJ)

Coram: SATCHWELL J, MAYAT J and TSHABALALA J

Heard: 25 April 2012

Delivered: May 2012

Summary: Company wound up on ground that it is 'just and equitable' so to do – enquiry into conduct of officer of the company in liquidation – section 423 of the Companies Act – court may delegate powers of enquiry in terms of section 418 of the Companies Act.



JUDGMENT

SATCHWELL J (MAYAT J and TSHABALALA J concurring)

INTRODUCTION

[1] The sole question in this appeal is whether or not an enquiry as contemplated in section 423 of the Companies Act, No 61 of 1973 ('the Act') can be delegated to a commissioner in terms of section 418 thereof. It would appear that this question has not previously been determined by our courts.

[2] The company, Derry Properties (Pty) Ltd, was wound up on the grounds of 'justice and equity' in terms of section 344(h) of the Act. The executor in the deceased estate of a 50% shareholder in Derry Properties (applicant in the court a quo and respondent in this appeal) applied for and was granted an order for an enquiry to be held before a Commissioner in terms of sections 418 and 423 of the Act for purposes of questioning the financial manager of the company (respondent in the court a quo and appellant in this appeal).¹

[3] We have not been asked to consider whether or not a case was made out for an enquiry in terms of section 423 nor have we been asked to consider the terms and conditions of the referral made by the learned judge in the court a quo.

¹ It is common cause that Huang was the financial manager and it is, *inter alia*, alleged that company monies were paid directly into the bank accounts of Huang and her daughter, that there was a lack of accounting provided to the liquidator, that Huang submitted false claims, that documents furnished by Huang were deficient, that Huang did not furnish all the documents and that there are discrepancies between income and actual funds in the company's bank account.

THE LEGISLATION

The Act

[4] The Companies Act contemplates examinations or enquiries being launched into the affairs of a company in liquidation.² The court can only order two such enquiries.. One is section 417 where ‘a court may. . . summon before. . . it’ certain persons who are suspected to be in possession of property of the company, believed to be indebted to the company or deemed to be capable of giving information concerning the affairs of the company.³ The section 417 procedure is only available where the company is being wound up because ‘it is unable to pay its debts’. Another is section 423 where ‘the court may ... enquire into the conduct’ of certain persons who are suspected of having misapplied money or property of the company or of being guilty of any breach of faith with the company.⁴

[5] However, provision is made in only one section of the Act for the powers of a court examining or enquiring into the affairs of a company in winding up to be delegated to a ‘commissioner’. Section 418 of the Act firstly provides for appointment of a commissioner and secondly it provides for referral of certain matters to such appointed commissioner.

² See also section 415.

³ The relevant portion of Section 417 reads: ‘(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’

⁴ The relevant portion of Section 423 reads ‘(1) Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promotor, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just.’

[6] Section 418 (1) reads as follows:

“(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.”

[7] The dispute is a narrow one. The liquidator maintains that the court can delegate the enquiry in terms of section 423 to a commissioner appointed in terms of section 418 whilst the financial manager maintains that such delegation cannot be effected.

Interpretation

[8] Any approach to the applicability of section 418 to the provisions of either section 417 or 423 requires section 418 to be construed on its ordinary language⁵ which language should be given its ordinary grammatical meaning.⁶

[9] Firstly, section 418 is extremely broadly worded. In subsection (1)(a) the commissioner is appointed ‘for the purpose of . . . taking evidence or holding any enquiry under this Act in connection with the winding-up of any company’ (my underlining). It is available to ‘any enquiry under this Act’ (my underlining). The adjective ‘any’ offers the most open-ended and far-reaching enumeration of ‘enquiry’ which it is possible to describe.⁷

⁵ *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA); *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 185.

⁶ *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A).

⁷ The Concise Oxford English Dictionary defines any as ‘1. one used to refer to one or some of a thing or number of things, no matter how much or how many; 2. Whichever of a specified class might be chosen.’

[10] Secondly, the only limitation upon the type or enumeration of enquiry to which a commissioner may be appointed is that it must be 'under this Act' and 'in connection with the winding up of any company'.

[11] Thirdly, not only is the appointment of a commissioner so broadly worded but, in addition, subsection (b) has limited neither its ambit nor the subject matter to the 'examination of persons' in terms of section 417 of the Act. Again, there is use of the phrase 'any enquiry under this Act' – there is neither limitation to examinations in terms of section 417 nor exclusion of other enquiries or examinations.

[12] Fourth, section 418, not only fails to confine its application to section 417 examinations, but it also fails to confine its application to the winding-up of 'a company unable to pay its debts'. The delegatory powers of section 418 appear to be available to the winding-up of 'any company' – whether able to pay its debts or otherwise.

[13] Fifth, the subject matter of the referral by the court to an appointed commissioner may comprise 'the examination of any witness or of any enquiry under this Act'. Again, the language is broadly and widely used, 'any' is a most open-ended enumeration of possibilities, the only limitation is that provided by the Act itself and the company must be in the process of 'winding-up' for reasons which are not limited to an inability to pay debts.

[14] Sixth, the personae empowered in section 423 are the same personae permitted representation in section 418. Section 423 empowers the court, on the application of a number of identified individuals, to enquire into the conduct of certain persons. Amongst those identified individuals are ‘the Master or the liquidator or any creditor or member or contributory of the company’. Subsection (1)(c) of section 418 permits representation at the ‘examination or enquiry’ of ‘the Master. . .the liquidator or any creditor, member or contributory of the company’. In other words, those persons who are entitled to apply in terms of section 423 for the court to order an enquiry are also entitled to representation at an enquiry where a commissioner has been appointed in terms of section 418. It would therefore appear that wording and/or personae from section 423 has been inserted into section 418. The wording has not come from section 417 which does not specify at whose, if any, instance the examination summons should take place.

[15] Seventh, that same perusal of subsection (1)(c) of section 418 indicates that section 418 contemplates both ‘an examination’ or ‘an enquiry’ – the one is the wording from section 417 and the other the wording from section 423.

[16] I find the provisions of section 418 on its own to be clear and unambiguous. I find the provisions of section 418 when read with sections 417 and 423 to be equally clear and unambiguous. I conclude that the wording used by the Legislature in the Statute does not indicate that the section 418 provisions for delegation of the powers of the court to a commissioner are not available to an enquiry or examination ordered in terms of section 423 of the Act.⁸

⁸ This is also the view of Hennochsberg at Vol I at 895 and Blackman Vol III at 14-493.

[17] It is well established that wording must be interpreted in the light of their context being the 'the matter of the statute, its apparent scope and purpose and, within limits, its background...'.⁹ I must have regard to the context in which the words of the section occur even though I have found the words themselves to be clear and unambiguous.¹⁰ As stated by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC) – 'the emerging trend in statutory construction is to have regard to the context in which the words occur even where the words to be construed are clear and unambiguous'.¹¹ This 'technique' is now required by the Constitution, in particular by section 39(2).¹²

[18] The procedures under both sections 417 and 423 are utilised where a company is in liquidation and there are issues which are controversial and/or untoward and require investigation. In both cases, an outsider to the company has been appointed liquidator and has to try and establish the state of affairs of the company. In the one case, the investigation involves examination of persons believed to have property of the company, be indebted to the company or capable of giving information concerning the company. In the other case, the investigation involves an enquiry into the conduct of specified individuals who are thought to have misapplied or retained money or property of the company or to be guilty of breach of trust with the company. The purpose of the investigation – examination or enquiry – in both sections is to obtain information from persons capable of giving information concerning the trade, dealings, affairs, property or assets of a company after it is wound up.

⁹ *Jaga v Dönges NO; Bhana v Dönges NO* 1950 4 SA 653 (A) 662H-663A.

¹⁰ *University of Cape Town v Cape Bar Council* 1986 4 SA 903 (A) at 914D-E; *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 1 SA 925 (A) at 943C-944B.

¹¹ Approved in *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC) para 52.

¹² See *Bato Star* supra.

[19] The comments by Megarry J in *Re Rolls Razor Ltd* (2) [1970] 1 Ch 576 regarding the position of the liquidator of a company unable to pay its debts are equally apposite where the liquidator is confronted with those issues contemplated in section 423:

'The process ... is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who were wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the Legislator has provided this extra-ordinary process so as to enable the requisite information to be obtained.'

[20] Similar, if not the same, difficulties may apply to all liquidations – whether the company was insolvent or if it was wound up on the basis of justice and equity. Clearly equally troublesome and unclear controversies are of moment in both section 417 and section 423 enquiries or examinations. By virtue of the clear wording of section 418, it is difficult to see any reason why the provisions of section 418 cannot be utilised when there is an enquiry in terms of section 423.

APPELLANT'S ARGUMENT

[21] In summary, the appellant's argument is that the power to establish a commission in terms of section 418 of the Companies Act is exclusively and solely available to a court acting in terms of section 417 of the Act and is not available to a court acting in terms of section 423 of the Act.

Section 417 and 418 are linked

[22] It is argued that the scheme of the Act clearly indicates that sections 417 and 418 form a discrete sub-chapter of the Act under the heading ‘Examination of persons in winding up’.

[23] Mr Suttner, appearing for the appellant, did not refer us to any authorities on the use of headings to sections or chapters of the statute. My reading on this topic has not been voluminous.

[24] In English courts there have been conflicting dicta as to whether a heading to a section can be referred to in order to interpret a section of an Act. In South Africa the approach has been that headings may be referred to for the purpose of determining the sense of any ‘doubtful’¹³ expression in a section of a statute. In the present case, we have not found any ambiguity or lack of clarity in the wording or intent of section 418.

[25] In what follows in this judgment it can be seen that we take the view that the headings in the Act cannot alter the clear meaning of section 418. Having regard to the clear wording of section 418, we have not found any basis upon which we should limit those words by accepting that the sub-chapter heading ‘Examination of persons in winding up’ is a restrictive heading indicative of an intention to limit the application of section 418 to section 417 examinations only. After all section 417 uses the wording ‘summons’ and ‘examination’ while section 423 uses the wording ‘enquire into’ and section 418 uses the wording ‘taking evidence’, ‘holding any enquiry’ and ‘such examination or

¹³ See *Chotabhai v Union Government* 1911 AD 24.

[30] I have already commented that there is nothing in section 423 or section 418 to exclude delegation of the court's powers to a commissioner in terms of section 418. Certainly, such delegation means that the court does not see and hear every witness or every document. But that is not an insurmountable obstacle to delegation.

[31] For instance, a judge may not want to spend hours and days sorting through company invoices, bank deposit slip or accounting journals in discussion with bookkeepers, managers or directors. This would be a situation eminently suitable for delegation to a commissioner – who may well be an expert in such area.

[32] What must at all times be remembered is that the court has a discretion whether or not the court decides to delegate powers to a commissioner. That discretion will be exercised mindful of the nature of allegations against an individual, the position occupied by the individual, the conduct which is the subject matter of the enquiry, the number of persons who would furnish information in respect of such conduct, the nature of the information to be collected, collated and analysed and the time and expertise which may be involved in such information gathering.

[33] The enquiry remains that of the court. What must always be borne in mind is that 'the commissioner obtains his authority to act as Commissioner from his appointment by the court and, in conducting the enquiry, performs what would otherwise be the court's functions on its behalf. Indeed, an enquiry

by a commissioner appointed by the court has been described as “the court's enquiry”.¹⁴

Commissioner's Report Hearsay

[34] It is argued that any report by a commissioner is hearsay and, as the opinion of a third party, would never be admissible in evidence at trial. Evidence given at a section 417 enquiry is not admissible in a trial. How much more so, it is submitted, should the information extracted by a commissioner and the opinion of a commissioner not be admissible in the trial which led to the section 423 enquiry?

[35] Of course, all examinations and enquiries delegated in terms of section 418 would have this difficulty.¹⁵ Whatever is elicited by a commissioner and whatever conclusion or opinion is reached by the commissioner cannot automatically be the finding or opinion of the Master or the court (in terms of section 417) and the court (in terms of section 423).

[36] However, there are many options open to the court in terms of both section 417 and 423 when confronted with the commissioner's report. Firstly, all parties may be in agreement on the facts uncovered by the commissioner. Secondly, the parties may even be in agreement on the inferences, conclusions drawn and opinions of the commissioner. Thirdly, the parties may be in disagreement as to part only or the whole of both the facts and the conclusions in which case the disagreement between the parties will obviously permit each

¹⁴ *Mitchell v Hodes* NO 2003 (3) SA 176 (C) para 17-18.

¹⁵ Hearsay may be the perceived problem in this instance. However, separation of issues ‘fragments a hearing’ but ‘[t]his undesirable feature is counterbalanced by the prospective advantage of a saving in costs.’ *Faiga v Body Corporate of Dumbarton Oaks* [1997] 1 All SA 367 (W) at 484.

party to advance difference submissions to a court subsequently adjudicating the issue.

[37] Whichever is the case, the court is greatly assisted in that there has been clarification of the issues and probably narrowing of the issues. Our courts are mindful to reduce delay and expense in litigation and know the advantages of referral of ‘special cases’ on agreed facts, the separation of issues whether of law or fact¹⁶ and pre-trial procedures¹⁷ – primarily in the interests of convenience – of both the parties and the courts.

[38] The idea of determining a factual issue which would then ‘give direction to the rest of the case and in particular to obviate a parcel of evidence’ or to test ‘an alleged lacuna in the plaintiff’s case or an answer to the case’ is one of the purposes of separation of issues which is ‘to determine the fate of ...one of the claims without the costs and delays of a full trial’.¹⁸ One can envisage the same benefits in the case of section 417 investigations or section 423 enquiries.

¹⁶ Rule 33 (4)(5)(6) of the Supreme Court Rules. In *Lawson v Schmidhauser Electrical CC* [2011] 2 All SA 565 (WCC), the court referred to ‘the convenient and expeditious disposal of litigation in a fair and appropriate manner.’ Convenience encompasses not only ‘the interest of the court but also that of the litigants.’ The court approved the dicta from many other judgments that one should be alert to ‘considerably shorten the proceedings and save time and costs.’ In *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA) the court was concerned to remind all courts that frequently ‘separation will result in the curtailment and expeditious disposal of litigation.’

¹⁷ A pre-trial conference conducted in terms of rule 37 affords the parties ‘an opportunity to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried’; See *RAF v Krawa* [2012] JOL 28020 (ECG) ‘... to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs’; See further *MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenger & another*; In *Lekota v Editor, Tribute Magazine* [1995] 3 All SA 271 (W) Flemming DJP said at 272 the following with regard to the benefits of a pre trial conference: ‘In broad terms the rule ... seeks to facilitate settlement discussions. Secondly, also for the sake of avoiding unnecessary costs, it requires that timeous consideration be given to a limited number of specific topics. It, thirdly, tends to protect a party against costs required to ward off an opponent who is unable to proceed to trial or is not serious about doing so. ... [and in particular] [i]t promotes the practice that a decision on the separation of issues in terms of Rule 33(4) be considered before trial costs in respect of all issues are incurred.’

¹⁸ *Rauff v Standard Bank Properties* [2002] JOL 10120 (W).

[39] Irrespective of the hearsay nature of the commissioner's report, the report of the commissioner is one to which the court is not necessarily bound. The court may proceed to hold its own enquiry. However, it may find that such enquiry is now extremely limited in that the issues have been clarified. It may also find that all that is necessary is that the commissioner attend proceedings as an expert witness.

[40] There is accordingly much to recommend delegation by the court of its powers in terms of section 423 – just as there is much to recommend delegation by the court or the Master of its powers in terms of section 417.

[41] To my mind, the difficulties envisaged by the appellant with regards to hearsay are issues of practicality rather than principle.

Master's Involvement

[42] It was further argued that, in enacting the delegatory powers of section 418, the Legislature had in mind an enquiry controlled by the Master of the High Court (as in section 417) not an enquiry where the Master is only an applicant in search of such an enquiry (as in section 418).

[43] I do not agree that references to the Master in section 418¹⁹ support the link to section 417 (where the Master may summons persons for examination), stress the disjunction with section 423 (where the Master is only an applicant

¹⁹ The Master may be represented at such enquiry whose representative may interrogate any witness; the commissioner shall report to the Master as well as the Court.

for an enquiry to be held) and therefore support the impossibility of allowing delegation of section 423 powers in terms of section 418.

[44] Firstly, all enquiries are the enquiries of the court.²⁰ Secondly, all company liquidations (whether on the grounds of insolvency or justice and equity) take place under the purview of the Master of the High Court.

Extraordinary Process of section 423 should not be expanded

[45] It is accepted that the inquisitorial procedures of both section 417 and 423 are sui generis²¹ and contain certain drastic innovations to our procedure – in particular, the introduction of inquisitorial powers and that a person can be required to testify against himself.²² It is argued that that these considerations should militate against giving extensive interpretation to section 423.

[46] To my mind, no extension or expansion of section 423 arises when one considers the question of delegation of powers in terms of section 418. Unlike *Rennnie* supra and *Lipschitz* supra there is no attempt to increase the identity or number of persons subject to these procedures.²³ Not only is there no attempt to

²⁰ See *Mitchell v Hodes* supra.

²¹ *Rennie NO v Holzman & Others* 1989(3) SA 706 AD 710H-J; *Spansteel (Pty) Ltd v Timmers and Another* 1979 (1) SA 564 (W) at 564G.

²² *Jeeva and other v Receiver of Revenue, Port Elizabeth and others* [1995] 2 All SA 178 (SE) at 185-186: 'An inquiry [to be held under sections 417 and 418 of the Companies Act] of this nature is a serious inroad into their ordinary common law rights. They are required to attend proceedings which are secret and inquisitorial in nature. They can be compelled against their will not only to attend but to give evidence on oath or affirmation; to sign a transcript of their evidence; and to answer all questions put to them, including self-incriminatory questions, under pain of being dealt with as a recalcitrant witness. One of the possible penalties is imprisonment. Their answers to self-incriminatory questions may be used against them in subsequent legal proceedings, whether criminal or civil.' In *Ferreira v Levin NO; Fryenhoek v Powell NO* 1996 (1) SA 984 (CC) at para 41 held that there is a compulsion to answer notwithstanding the possibility of self-incrimination and that this is not unconstitutional.

²³ In those cases it was sought to extend the meaning of 'manager' more widely so that persons who would not normally have been subject to these procedures could now be questioned in terms thereof.

bring more people within the ambit of this inquisitorial procedure, there is also no attempt to create or develop the inquisitorial powers of the procedure. There is no 'extensive' interpretation at all.

[47] All that is sought is that a judge, applying his or her mind judicially, may decide to delegate certain powers to a commissioner. Such delegation does not render more persons vulnerable to these 'rough and ready' procedures, does not create further inroads into the usual adversarial procedures nor deprive an individual of rights to representation. Importantly, such delegation still requires the court to retain overall control of the process and the report of the commissioner will have to be dealt with by the court in accordance with appropriate procedure and evidential rules.

CONCLUSION

[48] All that this appeal court was required to do was to determine whether or not an enquiry as contemplated in section 423 of the Act can be delegated to a commissioner in terms of section 418 thereof – as was done by the court a quo. We have not been asked to nor addressed upon the merits of the application itself nor the terms of the delegation to the commissioner.

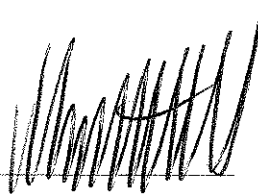
ORDER

[49] An order is made as follows:

- a. The provisions of section 418 of the Companies Act are applicable to an enquiry in terms of section 423 of the Companies Act.

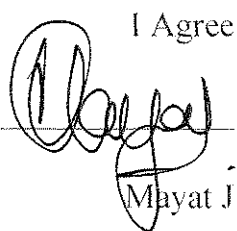
- b. The enquiry ordered by this court in terms of section 423 of the Act, at the instance of the executor in the deceased estate of Wen-Da-Tsai into the conduct of Su-Fang Huang, may be delegated to a commissioner in terms of section 418 of the Act.
- c. The appeal is accordingly dismissed.
- d. The appellant is to pay respondent's costs.

DATED AT JOHANNESBURG THIS ____ DAY OF MAY 2012




Satchwell J

I Agree



Mayat J

I agree



Tshabalala J

APPEARANCES

APPELLANT:

J Suttner SC (with him J Bitter)

Instructed by Thomson Wilks Inc,

Johannesburg

RESPONDENT:

G M Young

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