**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 8 March 2023

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Smith N O and Others v Master of the High Court, Free State Division, Bloemfontein & Another* (1221/2021) [2023] ZASCA 21 (8 March 2023)

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Today, the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against the decision of the Free State Division of the High Court, Bloemfontein (the high court).

The issue before the SCA was whether only the Master of the high court (the Master), and no one else, may examine witnesses subpoenaed at an enquiry convened by the Master in terms of s 417 of the Companies Act 61 of 1973 (the Act).

The appellants (the liquidators) were appointed as joint liquidators of BZM Transport (Pty) Ltd (BZM), which was liquidated on 29 August 2019 following failed business rescue proceedings. The respondent, Mr Engelbrecht, was the Chief Executive Officer of BZM before its liquidation. The liquidators complained that the respondent hindered the fulfilment of their statutory duties when he refused to: (a) hand over BZM's books, records and documents; (b) point out and hand over its assets as they appear in the asset register; (c) disclose payments allegedly made to the respondent and other related entities; and (d) provide agreements pertaining to company debtors. They successfully applied to the Master to convene an enquiry into the business affairs of BZM in terms of s 417 of the Act. The respondent was subpoenaed

to appear before the enquiry together with members of his family, who were employed by BZM.

At the enquiry, which was presided over by the Assistant Master, the liquidators and the respondent were legally represented. Before the respondent and his family members could be called for examination, his legal representative objected to the proceedings on account that 'only the Master' and 'no one else' was entitled to interrogate witnesses. The Assistant Master dismissed the contention. Consequently, the respondent applied to the high court to review and set aside the enquiry on the same basis contended before the Assistant Master.

The SCA examined the text, and confirmed the enabling nature of the provision. It held that by prefixing section 417(2)*(a)* with the word 'only' before the phrase 'the Master or the Court may examine', the respondent imposed a restrictive language not provided in the text. Sections 417 and 418 are not distinct but rather complementary provisions which must be read together. They provide for a dual method for holding the enquiry. The absence of a provision in s 417 which identifies a category of persons who may be represented and interrogate witnesses in s 417 is of no moment. The high court overlooked the effect of the 1985 amendment and the original nature of the power conferred by the section which granted the Master the same powers as that of a court. As the source of the delegation, the Master cannot delegate a function or power she does not already possess.

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

In his concurring judgment, Makgoka JA held that this interpretation of s 417 is consistent with its legislative history. Makgoka JA accepted that when s 417 was enacted it was intended that the practice as adopted in English law, namely to allow liquidators and creditors to interrogate persons summoned to a private enquiry, to apply in South Africa and considered in *S v Heller* 1969 (2) 316 (W). Even before the enactment of s 115 of the Companies Act of 1942, the practice followed in England was adopted in the then Transvaal. It is accepted that when s 417

was enacted in the repealed Companies of 1973, it was intended that the practice as adopted under English law, namely to allow liquidators and creditors to interrogate persons summoned to a private enquiry, to apply in South Africa. In *Swart* and *Garcao I*, it was accepted that in terms of s 417, the court has inherent discretion to determine who may attend the enquiry and interrogate the persons summoned to the enquiry. In *Swart*, reliance was placed on a passage in Blackman *et al* which incorrectly held that unlike a court, the Master has no inherent discretion to determine who may attend the enquiry and interrogate the witnesses such discretion. Blackman failed to take into consideration the legislative history.

The effect of the 1985 amendment is that the Master exercised the same power as exercised by the court. As to the intersection between the two provisions, *Swart* interpreted absence in s 417 similar provision as in s 418(1)*(c)* as a restriction of the interrogation to the court or the Master, to the exclusion of anyone else. The very fact that the court (or the Master after 1985) exercises inherent discretionary power to allow the liquidators to interrogate those summoned to an enquiry in terms of s 417, made it unnecessary for a legislative provision for that power to be enacted. The absence of an express legislative provision in s 418(1)*(c)* to allow the interrogation by those mentioned in the section, the commissioner would not have the same power to allow them to interrogate the summoned persons. Viewed in this light, the provision of the right in s 418(1)*(c)*, and its absence in s 417, makes perfect sense.

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