

SOUTH AFRICA / JUDGMENT

Akoo and Others v Master of the High Court and Others (5612/11) [2012] ZAKZPHC 45 (31 July 2012) [2012] ZAKZPHC 45

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D Pillay

CASE / FILE NUMBER

5612/11

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IN THE HIGH COURT OF
SOUTH AFRICA, PIETERMARITZBURG
REPUBLIC OF SOUTH
AFRICA
Case No. 5612/11

In the matter between: M.R.O.S Akoo &
 Twenty two Others
 Applicant
 and
 The Master of the High
 Court & Thirty Seven Others
 Respondent

JUDGMENT

Heard: 25 June 2012

Delivered: 31 July 2012

D. PILLAY J

[1] This is an application for leave to appeal against my judgment in which I dismissed the application for an order in the following terms:

‘2(a) The 36th (HBZ Bank) and 37th (Rohinton Meherjina) respondents are forthwith interdicted and restrained from disclosing or furnishing to the respondents any information or documents in respect of applicants’ banking account held with the 36th respondent as set forth in the subpoena issued by the second respondent on 11 February 2011 (the subpoena) or any other subpoena subsequently issued in this regard.

The respondents are interdicted from proceeding with or participating in any enquiry or hearing in terms of section 415 or section 417 of the Companies Act 61 of 1973 or otherwise relating to the affairs of Rollco Roofing Systems (Pty) Ltd (in liquidation)

. . . .

3. Pending the final determination of the application paragraphs 2(a) and 2(b) operate as interim relief pending the decision of the first respondent relating to the expungement applications and or proceedings to be instituted by the applicant.’ (sic)
- [2] My primary reason for dismissing the application was that it was accompanied by neither the application to expunge foreshadowed in the notice of motion, nor the review anticipated in the communications between the various parties involved in this application, in particular, the discussion with the Master as evidenced in the transcript of those discussions. Those applications or, at least one of them, was a precondition for confirming the interdict granted or noted by agreement between the parties. Were the applicants aware that they had to launch at least one of those applications and to do so timeously?
- [3] The subpoenas were issued on 11 February 2011. The applicants’ attorneys Abbas Latib and Company asked Deneys Reitz attorneys for the HBZ Bank to delay their response to the subpoena. Deneys Reitz indicated to Abbas Latib and Company that having attended the interrogation before the Master they ascertained that the Master insisted on the documents being produced by subpoena at the next hearing. In view of the Master’s attitude Deneys Reitz invited Abbas Latib to

‘take whatever steps you deem necessary to interdict our client from producing the documents. You may of course also consider taking the Master on review or appearing at the next hearing and objecting each time a request is made for documents relating to one of the companies which you represent’.

That letter is dated 9 March 2011.

- [4] On 5 May 2011 the parties were assembled before the Master. Still, there was no sign of either of the applications. Mr Manickum represented the applicants or some of them. He was manifestly aware that if a review is launched the Master would be obliged to place before the reviewing authorities all the information that informed the subpoena.¹ After two hours of debate, the Master announced that claims of the respondent creditors had been proved and would remain so until they were expunged. The Master then pointed out that she had issued the subpoena about three months ago and that

‘the prudent way of dealing with such subpoena was so the people objecting, to certain documents being supplied to this proceedings,

to go to court and have certain parts of the subpoena, or the whole of the subpoena (challenged).2’ (sic)

[5] The Master also urged that if there were parts of the subpoena which were not objectionable the enquiry could proceed on those parts. She then suggested that she put the applicants on terms

‘and ask you to go to court and get that interdict, because we can not wait forever. It’s been more than a month if not more since there has been a threat of having an interdict being brought for supplying the information . . . so I can not then sit in this proceeding and deal with that issue, because it will be like I am reviewing my own decision. . . and therefore Mr Manickum your clients then have to go and bring this interdict within fourteen days so that we can know whether we can proceed with all the information, or with some of it.’3 (sic)

The above extracts from the discussion with the Master show that the applicants and Mr Manickum who represented them could have been in no doubt as to what steps they needed to take to challenge the subpoenas.

[6] The interdict was launched a month later, well over the 14 days set by the Master. Interim relief was granted or noted until the matter came before me on 30 September 2011 for final determination. At that stage there was still no sign of the applications to expunge the claims of creditors or to review the subpoenas. Realising that the applications foreshadowed in paragraph 3 of the notice of motion had still not been launched, Mr Olsen SC who appeared with Mr Manickum for the applicant proffered an amended order prayed. The amended order was to enable the applicants to institute the review proceedings. Clearly the applicants were aware that they had to launch the review proceedings as a necessary consequence of the interim interdict and that they had failed to do so.

[7] What was the explanation for the delay? The reason advanced from the bar in this application for leave to appeal for not launching the application sooner was because the applicants were engaged in discussions to avoid litigation. Even if I were to accept this explanation, such discussions had ended if not by 3 March 2011 with the correspondence from Deneys Reitz, then at least by 5 May 2011 in discussions with the Master.

[8] Mr Manickum submitted that I should have imposed the draft amended order proffered by Mr Olsen. This submission misconstrues the circumstances in which a court may of its own accord vary the order sought. In the face of vigorous, justifiable resistance from Ms Lennard for the respondents I could not impose such an order *mero motu*. Besides, the applicants had given me no reason to come to their aid. On the contrary, I could not discount the possibility that their application was a delaying tactic to prevent disclosure to the Master.

- [9] The nature of the relief sought gave the court a discretion. The final relief sought in this application was inherently of an interim nature. It could endure only until the applications to expunge and review were launched. Those applications would have incorporated further interim relief if needed. But they had to be launched to justify this urgent interlocutory application. From the time the interim relief was granted on 8 June and extended on 8 July, 26 July and 5 August 2011 the applicants launched neither the applications to expunge nor the review. By that stage any right that the applicants had to the relief had whittled down to a privilege or indulgence.
- [10] To confirm the rule would have had the effect of final relief with no hope of the further applications in sight. The notice of motion promised no date by which they would be launched. Effectively, the applicants could have avoided indefinitely the proceedings to test the validity of the subpoena and the claims of the creditors. In the meantime, the work of the Master would be frustrated. She would have been able to neither insist on compliance with the subpoena nor completion of her enquiry. The applicants' dilatoriness in launching the applications to expunge and review was the principle reason for their application failing.
- [11] Besides the adverse inferences I drew from their delay, the nature of the relief sought confirmed that the applicants were reluctant to allow the enquiry to proceed at all. In this application for leave to appeal Mr Manickum confirmed, as the Master had indicated, that there were items listed in the subpoena to which the applicants had no objection. However, the relief claimed in the Notice of Motion is to bar all the information sought via the subpoena without distinguishing the items to which the applicants had no objection. Consequently, the applicants had no valid reason to stall the enquiry altogether.
- [12] Turning to the requirements for an interdict, I did not spell out the reasons for an interim and final interdict in my judgment. However, having read the heads of argument for this application it seems I should have done so. In this application for leave to appeal Mr Manickum submitted that the applicants had merely to establish a *prima facie* and not a clear right.
- [13] The requirements for an interim interdict are the following:
- (1) A *prima facie* right on the part of the applicant;
 - (2) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;
 - (3) A balance of convenience in favour of granting the interim relief;
 - (4) The absence of any other satisfactory remedy available to the applicant.⁴

How these requirements meld together is explained as follows in *Joubert NO and others v Maranda Mining Company (Pty) Ltd and Others* [2010] 2 All SA 67 (GNP) para 26:

“The requisites for an interim interdict are well known. The applicants are obliged to show that the right which is the subject-matter of the main application which they seek to protect by means of interim relief is clear, or if not clear, is prima facie established, though open to some doubt. If the right is only prima facie established then it must be shown that there is a well-grounded apprehension of irreparable harm to the applicants if the interim relief is not granted and they ultimately succeed in establishing their right; that the balance of convenience favours the granting of interim relief; and that the applicants have no other satisfactory remedy.”

[14] The requirements for a final interdict are the following:

- (1) A clear right on the part of the applicant;
- (2) An injury actually committed or reasonably apprehended;
- (3) There is no other satisfactory remedy available to the applicant. 5

[15] The applicants held the interim remedy for the harm apprehended in their hands but they let it slip away when they failed to launch the applications to expunge or to review. Initially, the irreparable harm the applicants allegedly apprehended was that the Master issued the subpoena unlawfully by not consulting them first. I rejected this ground. In this application for leave to appeal they rely on *Nedbank Ltd v Master of the High Court* WLD 2009

- (3) SA 403 (W). They change tack to deny that the actions of the Master can be classified as administrative. For the purposes of this

judgment

it is therefore safe to assume that their complaint is no longer that the Master deprived them of just administrative action.

[16] Another ground of irreparable harm the applicants allegedly apprehended was the breach of their private financial information if the HBZ Bank disclosed its records of their accounts to the Master at the enquiry. The applicants baldly alleged that disclosure of their bank account information would be a breach of their privacy but failed to prove how such disclosure, if it did breach their privacy, was unreasonable or unjustifiable.

[17] Their challenge to the subpoena raised a constitutional issue, be it on the grounds of administrative action or privacy. As such, the applicants had to plead and prove their constitutional rights succinctly. Irrespective of whether they relied on just

administrative action or privacy, they had to prove that their right trumped the creditors' rights and the Master's duty to issue subpoenas when called upon by creditors to do so. The case the applicants presented was not pitched as a constitutional challenge. Instead, it was a muddled complaint of procedural and substantive administrative law breaches by the Master in issuing the subpoena. To rely on *Nedbank* in this application for leave to appeal because that case holds that a s 417 enquiry is not administrative,⁶ and therefore the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and its time limits do not apply, is selective if not

opportunistic. If Nedbank is correct then the applicants have no right in administrative law to challenge the subpoena and I should hold that applicants failed to show any prima facie right to the relief they sought.

- [18] As far as the privacy argument goes, any prejudice the applicants might suffer as a result of the disclosure is mitigated by s 417 (7) of the Companies Act 61 of 1973 (CA) which declares the enquiry to be private and confidential. In addition, in terms of s 65
- (1) of the Insolvency Act 24 of 1936 the presiding officer shall disallow irrelevant questions by a creditor and may disallow any question which would prolong the interrogation unnecessarily. Subsection (2) invokes the law relating to privilege to apply to a witness summoned to produce a book or document or give evidence. These qualifications that mitigate the potential prejudice of disclosure are the means by which the legislature seeks to strike the balance between the rights of creditors and the public interest on the one hand and the rights of persons prejudiced by the disclosure. The Supreme Court of Appeal struck the balance to hold that the relevance of the documents to be disclosed trumps the right to privacy.⁷ Although the applicants included Gumede in their bundle they failed to show why it did not apply to this case. Furthermore, section 417 is held to be consistent with the right to privacy.⁸ The applicants failed to prove that the statutory balance did not protect them adequately.
- [19] Whether my judgment is appealable at all is a point that neither counsel addressed. The application was interim in the sense that the applicants requested that the interdict operate pending the decision of the Master to expunge the claims of creditors or the decision of a reviewing court. As an interim order it is not appealable. If they had launched the applications to expunge or review by the time I heard the application, the need for the interdict would have fallen away. Their failure to launch those applications implies not only an intention to delay the liquidation proceedings but also possibly a lack of conviction in the merits of those applications.
- [20] The application also was final in the sense that it was for confirmation of the interim relief obtained earlier. Furthermore, the effect of the order was that the subpoenas remained in force and the enquiry in terms of ss 415 or 417 continues. If I granted the application before the applications to expunge or review were launched, the Master would have been forced to appeal against my order to set aside the subpoena before she could enforce it. In that sense too the application before me was for a final interdict. As an application for a final interdict the authorities⁹ require the applicants to establish a clear right.
- [21] I did not have to determine the validity of the subpoena finally. That is a matter for the court reviewing the subpoena or the enquiry. All I needed to be convinced of is that the Master did not act irrationally or unjustifiably in issuing the subpoenas. For instance, if she was unable to produce any information on which to found her decision to issue the subpoena or issued the subpoena with the intention of obtaining extraneous information,¹⁰ her decision would be irrational. Hence my enquiry into the circumstances precipitating the subpoena was for

the limited purpose of ensuring that the subpoena met the requirements for legality. Based on my finding that the Master had grounds for issuing the subpoena it followed that the applicants failed to establish not only a clear right but also a prima facie right to impugn the subpoenas.

- [22] In sharp contrast to the requirements for an interdict, the threshold requirements for a subpoena do not require an applicant for a subpoena to make out a prima facie case. It is sufficient to persuade the court or in this the Master that there is fair ground for suspicion that the person proposed to be examined can probably give information about what is suspected. 11
- [23] Irrespective of whether the application for the interdict before me is characterised as interim or final the applicants had to show a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, or they had to show an injury actually committed or reasonably apprehended. As I have elaborated above, the applicants failed to make out any case either in administrative law or privacy that trumps the Master's statutory duty to act on information provided by creditors as to where assets of the company in liquidation might be found. The applicants' rights, whatever they may be, have to be balanced with the creditors' rights to have the subpoena issued on their request.
- [24] The relevance of the information sought through the subpoena is obvious. It is the Master who determines relevance not the party seeking to prevent disclosure. The respondents established that there were links between accounts held by HBZ Bank for the applicants who, in their various capacities, managed or operated accounts for several entities. These links which informed the Master's decision to issue the subpoena were canvassed more fully in my initial judgment. For instance, whether Mr Aslam Akoo of Steelworld Roofing Systems CC, a business similar to Rollco in liquidation, received a salary of R6 million per annum from Rollco in liquidation must attract the interests of the latter's creditors and the scrutiny of the liquidators. Steelworld could be Rollco reincarnated. The Master acts in the public interest when conducting enquiries into the liquidation of legal entities. Her issuing the subpoena was in the execution of those responsibilities. Accordingly, the right to privacy and the private interests of the applicants must yield in favour of the public interest. This is the tenor of *Harksen v President of The Republic of South Africa And Others* 2000 (2) SA 825 (CC). *Podlas v Cohen And Bryden NNO And Others*
- [1994] 2 All SA 489 (T) makes this point succinctly in the following extract:
- 'A person who is subpoenaed to give evidence before any legally constituted tribunal empowered to subpoena witnesses, is, generally speaking, obliged to obey it. This seems to be so because he or she is called upon to perform what may be described as a public duty (*Van Aswegen v Lombard* 1965 3 SA 613 (A) 623E). Personal freedom therefore becomes subordinate to the public interests.'

- [25] Whether the application for the interdict is interim or final the absence of a satisfactory remedy is always a requirement. The alternative remedy was the applications to expunge or review which vested in the applicants themselves, and which they failed to invoke timeously. The fact that those applications have since been launched does not alter the situation as far as this application goes. If they are entitled to interim relief they would ask for it in those applications. Any interim relief sought would be attenuated by the fact that the appellants do not object to disclosure of some of the documents subpoenaed.
- [26] Any review whether brought in terms of the PAJA, s 151 of the Insolvency Act or the Uniform Rules of Court must be brought within a reasonable time.¹² An application for review failed on the mere ground that it was brought after an unreasonable and unexplained delay of 13 months.¹³ In cases of inordinate delay, the Constitutional Court (CC) has held that it is open to a court to raise the issue of the delay of its own accord.¹⁴ The applicants had a duty to explain why they not merely delayed but failed to launch the applications to expunge and review before 30 September 2011 when this application had to be determined finally. Without any such explanation the prognosis for a reviewing court entertaining a late review was bleak. Besides, if the applicants had launched the applications to expunge and review they would have demonstrated their seriousness and good faith in challenging the subpoenas and the ss 415 and 417 proceedings. These considerations influenced my findings on the prospects of success of the review, which were superficial, provisional and relevant only the extent that it was necessary to determine the interdict before me.
- [27] Ultimately, granting an interdict is at the discretion of the court. If I was wrong to dismiss the application for any reason and if the applicants' grounds of appeal have merit, granting leave to appeal is now entirely academic. The applicants have since my judgment launched applications to expunge the claims of the respondent creditors and for the review of the subpoena. If the application to expunge succeeds then everything flowing from the subpoenas will also fall away. The prospects of the applications to expunge and review being disposed of before any appeal from my judgment are great.
- [28] Mr Manickum raised several additional grounds of appeal against my judgment. None of them are relevant for the purposes of granting or refusing leave to appeal in view of my reasons above. However, one of his grounds which would have been appealable if it could alter the outcome was merits a cursory response. That ground of appeal is whether PAJA applies to the issuing of the subpoena and s 417 of the CA and the Close Corporations Act No 69 of 1984 (CCA).
- [29] Mr Manickum submitted that I 'implemented' the provisions of section 1(1) of PAJA. Relying on Nedbank above he contended that the acts of the Master in conducting an enquiry in terms of s 417 of the CA do not constitute administrative action.

When I concluded that the applicant should have instituted the review of the subpoenas within 180 days I did not implement PAJA;

implementation of PAJA fell within the remit of the reviewing court. The reference to PAJA was merely to indicate that time limits for launching the review would apply. I made the statement in passing. Even if I misdirected myself in doing so it is a peripheral issue which, if corrected on appeal, would not reverse the effect of the outcome of my judgment.

[30] As to whether PAJA applies to s 417, case law inclines towards answering the question in the negative; the enquiry is not administrative but investigative resulting not in decisions but findings to facilitate the liquidation.¹⁵ In *Nedbank Ltd v Master of the High Court* WLD 2009

(3) SA 403 (W) the learned judge of the Witwatersrand Local Division concluded that when the Master gives effect to s 417 of the Act he does not act administratively; accordingly PAJA does not apply. Citing the CC's decision in *Bernstein and Others v Bester and Others* NNO [1996] ZACC 2; 1996

(2) SA 751 (CC) para 95 and 97 he reasoned that ss 417 and 418 were purely investigative measures to facilitate the winding up of a company. Taking evidence from a witness in a winding up had no adverse effect on the right of any person. The commissioner had no powers to decide any rights or obligations but merely to report to the Master and the court. So the reasoning went.

[31] In *Bernstein* the CC analysed whether ss 417 and 418 of the CA violated s 24 of the Constitution the CC. It observed:

'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.'¹⁶

[32] The CC doubted the application of s 24(b) and (c) of the Constitution to ss 417 and 418 of the CA saying that those subsections would apply only if the nature of the enquiry is characterised as being 'administrative action'.¹⁷ The CC also had 'difficulty' in fitting (the enquiry) into the mould of administrative action saying that it could not see

'how s 24(c) of the Constitution can be applied to the enquiry, because it is hard to envisage "administrative action" taken by the commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others.'¹⁸

[33] However, the CC concluded as follows:

'It is in my view unnecessary, however in the circumstances of this case, to provide an answer to the question and to decide if s 24 or any part thereof, applies to ss 417 and 418 enquiries and whether it applies to all such enquiries, whether conducted by the Court, the Master or the commissioner. It is unnecessary, in my view, because even assuming that the enquiry constitutes administrative action, this does not assist the applicants in establishing that the provisions of ss 417 and 418 are inconsistent with s 24(b) or (c) of the constitution.'¹⁹

Nedbank's citation of the obiter in Bernstein is incomplete to the extent that it omits to refer to the ratio quoted above. Furthermore, Bernstein was decided before PAJA was promulgated. That is as far as the nature of a s 417 enquiry goes. What of the nature of the Master's decision to issue a subpoena?

[34] The learned authors of Insolvency Law opine that as an organ of State, the decisions of the Master will be subject to the provisions of PAJA since she regularly makes decisions which constitute 'administrative action' as defined in PAJA. Section 417 anticipates several acts by the Master and commissioners in performing their functions. Some acts do require decisions, for example the decision to summons a person or to issue a subpoena. Such decisions by the Master are typically administrative.²⁰ The question therefore as to what the nature is of the Master's decision to issue a subpoena in s 417 proceedings and whether PAJA applies to it has yet to be determined. For present purposes I do not need to do so. Ultimately, whatever the nature of the act, its lawfulness is what counts.²¹

Accordingly, the application for leave to appeal is dismissed with costs.

D. Pillay J

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¹Page 267 line 10-15

²Page 305

³Page 306

⁴Joubert NO and others v Maranda Mining Company (Pty) Ltd and others

[²⁰¹⁰] 2 All SA 67 (GNP) para 26; Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others 2005 (6) SA 273 para 8.

⁵Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others 2001 (3) SA 344 (N)

6Nedbank para 51-52

7Gumede and Others v Subel SC, Arnold NO and Others (2006) 3 ALL SA 411 (SCA) para 19-20

8Bernstein and Others v Bester and Others NNO [1996] ZACC 2; 1996

(2) SA 751 (CC)

9Mosii v Motseoakhumo 1954 4 All SA 111 (A); De Villiers v Soetsane 1975 1 All SA 514 (E); V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Service (Pty) Ltd and Others [2004] 2 All SA 664 (C) para 11; Starke NO and another v Schreiber and Others [2001] 1 All SA 167 (C) at 174

10Laskarides and Another v German Tyre Centre (Pty) Ltd (In Liquidation and Others NNO) 2010 (1) SA 390 (W) para 9, 12, 13

11Bestbier v Chief Magistrate, Stellenbosch and Another (2006) 2 ALL SA 598 (C) para 8-9; Cooper NO and Others v South African Mutual Life Assurance Society and Others

(2001) 1 ALL SA 355 (A)

12Gqwetha v Transkei Development Corporations Ltd and Others [2006] 3 All SA 245 (SCA); Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and Others [2005] 4 All SA 487 (SCA) para 28-29; Beweging vir Christelik-Volkseie Onderwys and others v Minister of Education and Others [2012] 2 All SA 462 (SCA)

13P G Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation) And Others [2006] ZAGPHC 48; 2006 (4) SA 535 (W) para 12

14Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another 2011

(4) SA 42 (CC) para 53-54

15PM Meskin et al Insolvency Law para 1.9 Lexis Nexis Online;

16Bernstein para 94

17Bernstein and Others v Bester and Others [1996] ZACC 2; 1996

(2) SA 751 para 95 A-B

18Bernstein para 97

19Bernstein para 99

20Bestbier above

21Le Roux and Others v The Honourable Magistrate Viana and Others [2008] 1 All SA 546 (SCA) para 1

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