

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON APPLICATION I.T.O. SECTION 423, COMPANIES ACT**

HC-MD-CIV-MOT-GEN-2017/00144

In the matter between:

IAN ROBERT McLAREN N.O. 1ST APPLICANT

DAVID JOHN BRUNI N.O. 2ND APPLICANT

**SOUTHERN AFRICAN DUTY FREE (NAMIBIA)
(PTY) LIMITED (In Liquidation) 3RD APPLICANT**

and

THE HONOURABLE MINISTER OF FINANCE 1ST RESPONDENT

**BENEDICT SIMATAA
(COMMISSIONER OF CUSTOMS AND EXCISE) 2ND RESPONDENT**

**UAZAPI MAENDO
(DEPUTY DIRECTOR, SUPPORT SERVICES
& ACTING COMMISSIONER CUSTOMS AND EXCISE) 3RD RESPONDENT**

**SANDRA BEUKES
(ACTING COMMISSIONER CUSTOMS AND EXCISE) 4TH RESPONDENT**

**THANDI HAMBIRA
(ACTING COMMISSIONER OF CUSTOMS
AND EXCISE) 5TH RESPONDENT**

**MR. FESTUS SHIDUTE
(CONTROLLER, OSHIKANGO) 6TH RESPONDENT**

**MR. AUGUSTINUS
(CONTROLLER, RUNDU) 7TH RESPONDENT**

**JACQUELINE GAWANAS
(CONTROL OFFICER CUSTOMS AND**

EXCISE, WINDHOEK)	8TH RESPONDENT
MR. MARTIN DUMENI	9TH RESPONDENT
MR. BENEDICT LIKANDO	10TH RESPONDENT
FIRST NATIONAL BANK OF NAMIBIA LIMITED	11TH RESPONDENT

Neutral Citation: *McLaren v Minister of Finance* (HC-MD-CIV-MOT-GEN-2017/00144) [2018] NAHCMD 101 (20 April 2018)

CORAM: MASUKU J
Heard on: 28 March 2018
Delivered: 20 April 2018

Flynote: Company Law – voluntary liquidation of a company – whether provisions of s. 423 and 424 relating to the establishment of a commission of enquiry apply – Customs and Excise Act – onus on company dealing in import and export to show that goods bought and imported into the country were subsequently exported outside the common customs area and failure to do so renders the company liable for duties and taxes.

Summary: The liquidators of a company that was voluntarily wound up brought two applications to court on an urgent basis, seeking the discovery of certain documentation allegedly in the hands of the respondents which could prove that the company in liquidation had exported goods outside the common customs area. The second application was for the court to establish a commission of enquiry in terms of the provisions of ss. 423 and 424 of the Companies Act, 2007. The respondent opposed the applications and the argued that the latter application does not apply to a company that has been wound up voluntarily but only applies to involuntary liquidation.

Held – that the provisions of the sections are applicable only to companies wound up involuntarily by creditors and where there is a suspicion of foul play,

fraud or impropriety by the managers or directors of the company that suddenly finds itself in financial ruin.

Held further – the section does not apply to companies that are wound up in voluntarily by the shareholders or members thereof.

Held - that the purpose of the sections is to call those persons who may have information regarding the property or funds belonging to the company to account and to explain whatever documents are in the possession of the company.

Held further that – the sections are designed to assist the liquidators, who normally are outsiders to the company and may not be *au fait* with the operations and documentation and processes of the company.

Held – that in the instant case, the applicants had abused their powers in moving the applications in terms of the said provisions for the reason that the applicants had, at the same time, also sought discovery of relevant documents to the question in issue which had been provided by the respondents and that the respondents had acceded to the applicants' expert to have access the respondents' system from which relevant information to the transactions could be found.

Held further – that since the applicants sought to have a dispute of fact resolved regarding whether the goods in question had been removed from the court's jurisdiction, there was a mechanism available in the rules of court, to deal with such scenarios and that ss. 423 and 424 were not designed to serve that purpose.

Held – that the onus, in terms of the Customs and Excise Act, 1998, was on the company involved in import and export to provide evidence that goods imported into the country were subsequently exported outside the common customs area, failing which customs duty would have to be paid by such entity.

The court found that the applicants had abused the procedures and that their application was not tailored for the circumstances of the case. The court therefore dismissed the application but declined to order costs *de bonis propriis* against the applicants because the issue of alleged abuse of the processes of the court was only raised in argument and did not appear in the affidavits nor in the heads of argument filed.

ORDER

1. The application for the institution of a Commission of Enquiry in terms of the provisions of Section 423 and 424 of the Companies Act, 2007 is refused with costs.
 2. The costs are ordered to be costs in the liquidation and are consequent upon the instruction of one instructing and two instructed counsel.
 3. This interlocutory application is removed from the roll and is regarded as finalised.
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RULING

MASUKU J:

Introduction

[1] The question for determination, in this application, falls within a very narrow compass. It acuminates to this: is this a proper case in which the court should authorise the appointment of a Commission of Enquiry in terms of the provisions of s. 423 and 424 of the Companies Act¹?

¹ Act No. 28 of 2007.

Background

[2] The question for determination arises in the following context: The 1st and 2nd applicants, Messrs. Ian Robert McLaren and David John Bruni, were appointed as the final liquidators in respect of the Southern African Duty Free (Namibia) (Pty) Ltd, the 3rd applicant, a company duly incorporated in terms of the company laws of this Republic. The applicant, in the course of time, was placed in liquidation in terms of the Act.

[3] In the process of winding up the 3rd applicant, the Liquidators applied to the 1st respondent, the Minister of Finance and the officers of the Customs and Excise Department, to release certain Multi-Purpose General Bonds issued by the First National Bank of Namibia Limited, the 11th respondent, as guarantors, against a fixed deposit of the 3rd applicant in favour of the Government of the Republic of Namibia.

[4] It would appear that the 3rd applicant ran a bonded warehouse situated in Oshikango. From about September 2014, the 3rd applicant, it is alleged, had no dues outstanding with the Ministry of Finance. In or about October, 2014, the 2nd applicant closed its bonded warehouse. This instigated the 3rd applicant's managing director, Mr. Luiz Marquez to write a letter to the Government respondents seeking directions on how to cancel the bonds in question.

[5] In or about 4 November 2014, the 3rd applicant's shareholders, by special resolution, resolved that the 3rd applicant be voluntarily be wound up, meaning that the winding up of the 3rd applicant, was voluntary. The applicants were appointed as the liquidators of the 3rd applicant. The 1st and 2nd applicants appear to have hit a snag in so far as their attempts to release the bonds are concerned.

[6] In particular, they allege that a question that has arisen and that requires determination, is whether or not the goods which were kept in the bonded warehouse were duly exported from Namibia to destinations reflected

in the documents; whether all the relevant documents appertaining thereto were processed and whether the duty and/or levies thereon were duly paid.

[7] The Liquidators further deposed that the Ministry of Finance refused them access to what is referred to as the Asycuda++ system, or to register them as an export user so as to enable them to verify the transactions involved, which they, as liquidators, are compelled to investigate.

[8] The Liquidators accordingly deposed that in the circumstances, they had only one option open to them in trying come to the bottom of the quandary as it were and this was to inquire in to the transactions in terms of the provisions of ss. 423 and 424 of the Act. This, it was stated, was the only viable mode by which it could be established whether the goods in question were in fact exported from Namibia and if so, then there would be no duty payable, thus allowing for the bonds to be released.

The relevant section of the Act

[9] The relevant portions of the section 423, in terms of which relief is sought by the applicants, read as follows:

'423. (1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after the winding-up order has been made, summon before the Master or the Court any director or officer of the company or person known or suspected to have in his or her 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.'

[10] I am of the view that the balance of the provisions of s. 423, have no bearing on the question for determination, including the provisions of s. 424. I will, for that reason, not quote or refer to the balance of the sections in issue.

[11] The question that has to be answered in the circumstances, relates to the approach the courts have taken towards an interpretation of the said section and the considerations that have to be taken into account regarding the decision whether or not to apply the said provisions, namely, to institute a commission of enquiry.

[12] In his submissions, Mr. Narib, for the applicants argued that the major reason why this procedure is needed is because the liquidator comes into the affairs of the company in liquidation as a stranger and needs some assistance to understand how the company found itself in financial ruin. In this regard, the court was referred to the works of Meskin *et al*, wherein they refer to *Re Rolls Razor Ltd (2) SA*.²

[13] The learned authors reason as follows:

'The process . . . is needed because of the difficulty in which the liquidator in an insolvent . . . company is necessarily placed. He usually comes in as a stranger to the affairs of the Company which has sunk into 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 are wholly innocent of any wrong doing 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 legislature has provided this extraordinary process so as to enable the requisite information to be obtained. The examinees are not in any ordinary sense witnesses, and the ordinary standards and procedures do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up.'

[14] From a reading of the above excerpt, it becomes clear that this process is not one that should be readily invoked by the court. It would appear that there must be some special circumstance that calls for that process to be invoked. I say so for the reason that the authors call it an 'extraordinary

² [1970] 1 Ch 576 at 591.

process', suggesting therefor, that it may not be readily resorted to willy-nilly and for the flimsiest of reasons.

[15] It was for this reason that the court, during the hearing of this application, referred to the s. 423 process as equivalent to engaging the 4x4 gear, when the vehicle is traversing rough and unfriendly terrain. In other words, in all other conditions, one can put to use other available mechanisms to find out whatever information is needed to place the liquidators in a position to perform their duties optimally.

[16] What can also be gleaned from the excerpt is that the process normally applies in circumstances where there has been some wrongdoing on the part of some directors of the company and which wrongdoing, misconduct or impropriety, has to do with the ruinous financial situation in which the company finds itself, thus necessitating liquidation of the outfit in question. Those who may have information about how that perilous situation came about, will then be called to give valuable information which the liquidators may use to recover what may be recovered and to explain what they can from those in the know.

[17] Finally, Mr. Narib submitted that this process should be resorted to in cases where it can be said that it is 'just and beneficial to do so, meaning that there is no *numerous clausus* of the applicable circumstances. This suggests that the court will lend its imprimatur for the process to be engaged in where it is convinced that the circumstances lend themselves to a conclusion that it is just and beneficial to do so.

[18] In his submissions, Mr Cassim repeatedly fired salvos aimed at the applicants. He made a scathing attack on the conduct of the applicants in this case and argued very strenuously too, that the applicants were on a mission to abuse the court's processes and should, for that reason, be stopped dead in their tracks. He submitted that the application made by the applicants should be dismissed with costs and that such costs should be against the liquidators *de bonis propriis*. Is he correct?

[19] In returning an answer on this issue, I find it appropriate to refer to some authorities to which the court was referred by the Government respondents in their heads of argument and from which it is appropriate that I draw some nuggets of wisdom, in addition to those authorities referred to by the applicants above.

[20] The learned author Henochberg³ suggests that this power only applies in cases where there is a compulsory winding up of a company. In this regard, the learned author opines that the sections are of no application in cases of a voluntary winding up by its members or directors. In this regard, Blackman *et al* seem to share in this view, as they say that the power is exercised in cases where there is a winding up by the court.

[21] Blackman further states that the purpose of this power is ‘. . . to enable the liquidator to determine the assets and liabilities of the company and to locate and recover them, especially in relation to transactions which may have involved misconduct of some kind, and to make decisions whether or not litigation ought to be embarked upon and, if embarked on. To make decisions in the course of litigation.’ I agree with this exposition.

[22] A reading of s. 423 (1), suggests inexorably, that it is in respect of a company that is the subject of an involuntary winding up. Secondly, the enquiry must be to summon a director or officer of the company in liquidation and who is believed to be in possession of company property or indebted to the company in liquidation, or who may give information concerning the trade, affairs or property of the company.

[23] The question for determination is whether the applicants are correct in approaching the court on this basis, given the factual matrix of the matter at hand. A helpful clue in this regard, is to be found in the founding affidavit, at para 7, titled, ‘ASPECTS TO BE INVESTIGATED AT THE PROPOSED ENQUIRY’, where the deponent states the following:

³ Henochberg on The Companies Act, 71 of 2008, p. APPI – 255.

'The aspects to be investigated in the enquiry are whether or not the goods which form the subject matter of the annexure "TCH1" to "TCH5" annexed hereto have been duly exported from Namibia to the destination(s) depicted in such forms and in particular whether the following documents were duly processed and whether the duties and/or levies thereon (if any) were paid by the SA Duty Free.'

[24] It readily appears that the nature of the issues sought to be ascertained by the proposed commission of enquiry and their scope, do not relate to the powers given expressly by the Legislature. I say so for the reason that s. 423(1) gives the court power to summon (a) a person known or suspected to have in his or her possession any property of the company; (b) believed to be indebted to the company or (c) whom the court, or the Master deems capable of giving information concerning the trade, dealing or affairs or property of the company.

[25] The last category, might, at first blush, appear to be omnibus, in its extent, and one capable of justifying the enquiry in the instant matter. I am, however, of considered the view that it is not. The said portion must be viewed in the context of the circumstances in which this section is generally used, as amplified by reference to the authors, namely if there is an involuntary winding up and there is evidence or suspicion of wrong-doing or impropriety, regarding the funds or property of the company in liquidation.

[26] In citing the case of *Re Rolls Razor*, the applicants, in their heads of argument, underlined the portion of the judgment where it was stated that, '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.' This portion must be read as one and in the proper context with the earlier portions, where the court deals with the company finding itself in financial doom and the need to interview those in management who may be guilty of misconduct or impropriety, which may be relevant to the liquidation. It is not just a mere reference to the need to discover or understand the books on its own and just for its sake. Misconduct and impropriety appear to be key

considerations in that regard and therefor the need for an explanation or discovery of the books of the company.

[27] *In casu*, it would seem that the applicants are desirous employing the provision in question to resolve, what they perceive to be a dispute of fact, namely, whether the goods reflected left this jurisdiction or not and the only way of establishing whether the goods left is by resorting to the provisions of s. 423. That hardly appears to have been the intention of the nor within the Legislative's solicitudes when it enacted this provision.

[28] In this regard, in terms of the legislative regime,⁴ the onus, it must not be forgotten, rests with the company, and in this case, the liquidators, to show that it did in fact transport the goods in question out of the jurisdiction.⁵ The course intimated by the applicants intends to summon the respondents when they do not hold any office in the company. I am accordingly of the considered view that the applicants are barking the wrong tree in this enterprise.

[29] In his argument, Mr. Cassim drew the court's attention to the first interlocutory application launched by the applicants dated 6 September 2017. In essence, the applicants sought an order reinstating or registering them as exporters on the Asycuda++ system. They also sought an order allowing their computer expert Mr. Adri Stander access to the said system situated in Windhoek or elsewhere in this Republic.

[30] The applicants sought an order for the discovery of 'all/any documents in its possession as contemplated by rule 28(1) of the Rules of Court, including but not limited to:

3.3.1 all the respondent's paper records inclusive of all originals and/or paper copies EX 1 and EX 8 documents kept at the Oshikango and/or Katwitwi border post for the period 1November 2011 to 3 November 2011;

⁴ Customs and Excise Act, 20 of 1998.

⁵ Woker Freight Services (Pty) Ltd v Commissioner for Customs and Excise and Others 2016 (2) NR 450 at 458 C-D.

3.3.2 all documents submitted by the third respondent prior to its liquidation, inclusive of but not limited to all EX 1 and/EX 8 documents submitted to the third applicant prior to its liquidation and/processed by the respondents including but not limited to the period 1 November 2011 to 30 November 2011.'

[31] As a matter of note, there appears to be an error in 3.3.1 in the first line, where reference is made to the third respondent. It is clear from reading the papers that the applicants meant to refer to the third applicant. Otherwise, the order would not make sense. I will accordingly treat that reference as made erroneously.

[32] It is important to note that the Government respondents did not in essence oppose the application in question. They, in fact agreed to most of the orders and it seems that a meeting was held by the parties to chart a way forward. In this regard, a letter was written by the Office of the Government Attorney, dated 7 February 2018, to the applicants' legal practitioners, the relevant parts of which are quoted below:

'2. As you are aware, at a meeting held at Namlex Chambers in September 2017, our clients accepted the proposal to permit your clients to view the transactions of your client on the Asycuda++ system. After the said meeting your clients should have communicated the name of an expert appointed to view the system on behalf of your clients, and to indicate a date and time when such an expert was expected to conduct the such an exercise. Up to date, our client has not received any feedback from your clients to view the transactions on the Asycuda++ system.

3. In view of the above, our instructions are that our client stands by the agreement and invites your clients to view the transactions on the Asycuda++ system.'

[33] In this regard, Mr. Cassim argued that the applicants sought an order allowing them to view the transactions on the Asycuda++ system, to which his clients agreed and that furthermore, as indicated in their answering affidavit in response to the said application, the Government respondents further agreed

to discover for the applicants' inspection, all the documents pertaining to the said matter that were in their possession.

[34] The above, notwithstanding, Mr. Cassim further argued, the applicants, on the very same day of the said application, then launched another application, which is the one under consideration, i.e. for the appointment of the commission of enquiry. His contention in this regard, was that the applicants are abusing the court processes as they sought orders simultaneously but with a cumulative effect, without taking advantage of the first application for discovery and being allowed to view the transactions on the said system.

[35] I am of the view that Mr. Cassim is correct in his submission. The applicants should, in the ordinary nature of things, have made the first application, which was in essence not opposed and allowed their expert, described in glowing terms in the application, to go through the system and see what information can be gathered to assist in their enquiries.

[36] If this inspection and discovery did not yield any fruit, it is only then, in my view, that they could have applied for the engagement of the 4x4 gear provided by the commission of enquiry route, provided that was a proper step in the event. As matters stand, it is not even clear whether the applicants have taken advantage of the agreement and have made use of the advantages the order they sought gave them. They are instead now pursuing this extraordinary route without showing that what they asked for could not assist them. I say the latter statement advisedly, as I still have to rule on whether it is in any event an appropriate one in the circumstances.

[37] It is pertinent to mention that the learned author Henochsberg mentions that such applications for the invocation of the court's powers, must not constitute an abuse of the court's procedures and I agree. An example of a case where the court found that the process was abused is in *Lok and Others v Venter N.O. and Others*⁶. I accordingly find that the application for the appointment of the commission of enquiry, in the present circumstances,

⁶ 1982 (1) SA 53 (WLD).

amounts to an abuse of the court's process and find that on the balance, this is not an appropriate case in which to invoke the powers contained in ss. 423 and 424 of the Act.

[38] I take a very dim view of the applicants' decision to launch two applications with cumulative effect, on an urgent basis on the same parties. A reasonable litigant caught in what the applicants considered a quandary, would have launched one application and applied for the relief sought in both, having made the relevant allegations in one affidavit to cover all the relief they sought. To move two separate applications on urgency and directed at the same respondents largely involving the same issue, in my view smacks of abuse of the court's processes, bombarding the respondents with different applications when one to which they could put their undivided attention, could have been lodged.

[39] Another reason that I find should disincline the court from granting the relief sought by the applicants is the very nature of the winding up of the applicant. In para [17] above, I stated that according to the learned author Henochberg, the sections in question are of application only in circumstances where there is a case of involuntary winding up of the company because the company is unable to pay its debts.

[40] It stands as a historical fact that in the instant case, the winding up of the 3rd applicant was by a special resolution of the shareholders. This clearly is not a case of an involuntary winding up. As intimated earlier, the purpose of this exercise, is to ascertain, in cases where foul play is suspected in the company ending up moribund and unable to pay its debts, and the process is geared to getting an explanation from those whose hands appear to be tainted with blood or may have useful information that may assist the liquidators in tracing the funds or the property of the company in liquidation.

[41] In this regard, Heathcote AJ dealt with the purpose for the application of the said section in *Gases and Others v The Social Security Commission and Others*:⁷ The learned Acting Judge stated the purpose as:

‘ . . . to assist the liquidators to establish where the N\$ 30 million is.’

Clearly, some foul play was suspected in that matter and the calling of those who may have had information regarding where the said amount was, made a great deal of sense.

[42] In the instant case, it is clear that the shareholders of the 3rd applicant are the ones who took the decision to wind up the company and there is no allegation of foul play. In this matter, it seems that the applicants want the respondents to be hauled before the enquiry, when there does not, from what is stated in the papers, any allegation of wrongdoing on their part. From the papers before me, they have afforded every assistance to the liquidators, by making available the documents at their disposal and access also to the Asycuda++ system. That the respondents would have to be subjected to the processes in the circumstances is in my view plainly wrong and hence reinforces the view earlier expressed that the application amounts to an abuse of the provisions in question and the processes of this court as well.

[43] What is undeniable is that the respondents want their pound of flesh as it were from the 3rd applicant and it is for the 3rd applicant, in the circumstances, to provide information that will prove that the goods that were imported into the country were actually exported outside the country and outside the common customs area. In the absence of that proof, the 3rd applicant is presumed to owe dues to the Government. To subject the respondents to that enquiry would be the high watermark of unfairness. It is also unclear from the papers what efforts the applicants have taken to trace the Managing Director of the 3rd applicant, who it is alleged, can no longer be traced.

⁷ 2005 NR 325 (HC) at 337.

[44] In dealing with this issue and the need, as deposed to by the applicants for the holding of the enquiry, the following can be gleaned from the founding affidavit filed in support of this application for the commission of enquiry:⁸

'16.9The Ministry is not willing to re-instate our access to the Asycuda++ system or to re-register us as an export user so as to enable us to verify these transactions.

16.10 As liquidators, we are compelled to investigate these transactions.

16.11 The only option to us is to enquire into these transactions as contemplated by section 423 and 424 of the 2004 Act. I verily believe that a Commission of Enquiry in terms of section 423 and 424 will in all probability determine whether the goods in question were in fact exported.'

[45] It is clear, from a reading of the above paragraphs that the depositions were made against the backdrop that the Ministry was not co-operating with the liquidators, an issue that later proved to have materially changed, as the respondents' affidavits show and the letter dated 7 February 2018, referred to above stands as a tall reflection of the yielding attitude of the respondents.

[46] It is accordingly clear that the remedies available to the applicants without the need to invoke ss. 423 and 424, if applicable at all, were not exhausted. In this regard, the court is not informed what the information given by the respondents yielded, together with the access granted them to the system. I may also mention that it was the respondents who, in the letter, were pushing the applicants to indicate when they wanted to bring the expert to access the system. It would seem the applicants lost steam for an order that was essentially not opposed but have boundless energy to take the next step of the commission of enquiry, without showing what they have done with the information placed at their disposal towards resolving what they term a dispute of fact.

⁸ Para 16.9 – 16.12.

[47] Mr Cassim, in my view, also correctly stated in his heads of argument that if, as the applicants appear to contend, there is a dispute of fact in the main application, the proper way of disposing of that dispute is not to have the commission of enquiry. This is so, he argued, because the rules of court have an in-built mechanism for resolving disputes, which were unforeseeable. In this regard, the disputed portions may be referred to oral evidence. This is a sound submission that carries favour with me and serves to render the invocation of ss. 423 and 424 inappropriate in the circumstances, considering this reason for the invocation thereof in this regard.

[48] The words uttered in *Foot N.O. v Alloyex and Others*⁹ must not be allowed to sink into oblivion in considering the provisions in question. In this regard, the court commented as follows:

‘Any enquiry made in terms of s 417 of the Companies Act is the Court’s enquiry and if the Court is satisfied that it should act in terms of s 417 or appoint a commission in terms of s 418 it is not of overriding importance who actually persuades the Court to act.’

[49] It is thus clear that this being this court’s enquiry, it should be satisfied about the necessity to appoint same and also the propriety of doing so. From the issues that have been traversed in this judgment, together with the findings thereon, I am not satisfied that this is a proper case in which the enquiry should be established.

Conclusion

[50] Having regard to the foregoing, I am of the considered view that the applicants have failed to make a case for the invocation of the said provisions in this matter. They have also dismally failed to show that the present proceedings are, in any event, appropriate to invoke in the present circumstances. Accordingly, the finding that there is an element of abuse of

⁹ 1982 (3) SA (D & LCD) 383F-G.

these provisions by the applicants, as submitted by Mr. Cassim, is in my view inescapable.

Costs

[51] In his forceful argument, Mr. Cassim urged this court to find that the applicants abused the court procedures and that for that reason, they should be mulcted with an adverse order for costs *de bonis propriis*. Mr. Narib in his counter-argument denied this and urged the court to find that the applicants did all they did in the best interest of the body of creditors of the 3rd applicant.

[52] There is no denying the fact that I may not be entirely satisfied regarding the propriety of this application and I did get the impression that there may well have been an abuse of the court's process by insisting on this process provided by ss. 423 and 424. What I have qualms about, however, is that this issue was not raised in the respondents' papers to enable the applicants to deal with it exhaustively. Neither, may I add, was it mentioned in the heads of argument. It merely cropped up for the first time in oral argument.

[53] I am of the considered view that the applicants had every right to be placed on the *qui vive* regarding the fact that this issue would be raised. This would have enabled them to prepare to adequately deal with it in argument. Such an approach would have enabled the court to deal with the matter head on, with all the parties placed on notice in this regard. I, for those reasons, decline to grant costs *de bonis propriis* against the liquidators in this matter, dissatisfied as I may be certain aspects of their handling of this matter as stated in the judgment.

[54] I do, however, send a word of caution that great circumspection must be taken in dealing with these matters and that any undue haste or improper application of the relief provided by the Act may impel the court to exercise its powers by issuing an adverse costs order *de bonis propriis*.

Disposal

[55] In the premises, I issue the following order:

1. The application for the appointment of a Commission of Enquiry in terms of section 423 read with section 424 of the Companies Act, 2004 and related relief is hereby refused with costs.
2. The costs, consequent upon the instruction of one instructing and one instructed counsel, are ordered to be costs in the liquidation of the 3rd Respondent.
3. The interlocutory application is removed from the roll and is regarded as finalised.

TS Masuku
Judge

APPEARANCES:

APPLICANTS

G Narib

instructed by Francois Erasmus & Partners

RESPONDENTS

N Cassim (assisted by S Akweenda)

instructed by Government Attorney