
**REPORTABLE**

CASE NO: SA 49/2019

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

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| **DAVID JOHN BRUNI N.O.** | **First Appellant** |
| **IAN ROBERT McLAREN N.O.** | **Second Appellant** |
| **SOUTHERN AFRICAN DUTY FREE (NAMIBIA) (PTY) LTD** | **Third Appellant** |
| and | |
| **MINISTER OF FINANCE** | **First Respondent** |
| **BEVAN SIMATAA (COMMISSIONER OF CUSTOMS AND EXCISE)** | **Second Respondent** |
| **UAZAPI MAENDO (DEPUTY DIRECTOR, SUPPORT SERVICES AND ACTING COMMISSIONER CUSTOMS AND EXCISE)** | **Third Respondent** |
| **SUSAN BEUKES (ACTING COMMISSIONER OF CUSTOMS AND EXCISE)** | **Fourth Respondent** |
| **THANDI TILYA HAMBIRA (ACTING COMMISSIONER OF CUSTOMS AND EXCISE)** | **Fifth Respondent** |
| **FESTUS SHIDUTE (CONTROLLER, OSHIKANGO)** | **Sixth Respondent** |
| **PHILIP CHISEKE AUGUSTINUS (CONTROLLER, RUNDU)** | **Seventh Respondent** |
| **JACQUELINE GAWANAS (CONTROL OFFICER, CUSTOMS AND EXCISE, WINDHOEK)** | **Eighth Respondent** |

**MARTIN DUMENI** **Ninth Respondent**

**BENEDICT LIKANDO** **Tenth Respondent**

**FIRST NATIONAL BANK OF NAMIBIA** **Eleventh Respondent**

**Coram:** SHIVUTE CJ, SMUTS JA and FRANK AJA

**Heard:** **9 April 2021**

**Delivered:** **11 June 2021**

**Summary:** The first and second appellants were duly appointed liquidators of the third appellant, a company under liquidation. The company under liquidation operated a bonded warehouse at Oshikango. Prior to its demise the company was registered as an exporter on the Customs and Excise's Asycuda++ computerised system. First National Bank, the bank where the company held an account, had issued multi-purpose general bonds in favour of the Government amounting to N$1 450 000 against the fixed deposit belonging to the company held at First National Bank valued at N$1,6 million. The fixed deposit was an asset of the company. The company's warehouse was inspected and the report issued following the inspection indicated that the company owed no customs duty, excise duty, Valued Added Tax or any other charges to the Ministry of Finance. The report recommended the closure of the warehouse as requested by the company's directors after the company ceased to carry on business.

The liquidators informed Customs and Excise that the company had been liquidated and requested the release of the bonds. Customs and Excise did not initially react to the correspondence sent to them by the liquidators and/or on their behalf. At one of the meetings, the liquidators were informed that an investigation was to be carried out to ascertain if there was liability under the bonds. The investigations were not completed despite several requests by the liquidators to finalise them. Ultimately, the liquidators brought an application in the High Court seeking an order declaring that the liability of the bank in terms of the multi-

purpose bonds had lapsed and also sought an order directing the bank to release to the liquidators the company's fixed deposit.

The respondents opposed the application and contended that the company owed Customs and Excise an amount of N$2 098 251,62 arising from goods that were supposed to have been exported from Namibia through Katwitwi Border Post and whose documents were not processed by the Ministry's Asycuda++ system. The respondents demanded that the appellants prove that the goods were exported or that the exports were cancelled, failing which the Minister would be entitled to deduct from the bonds an amount allegedly owed to it by the company.

The appellants maintained that as newcomers to the affairs of the company, they were unable to verify whether the goods had left Namibia or whether at all the company in fact owed the Fiscus money. The appellants subsequently brought multiple applications in the High Court together with an application for the appointment of a Commission of Enquiry 'as envisaged in section 423 read with section 424 of the Companies Act, 2004'.

The respondents subsequently agreed, amongst others, to provide to the appellants copies of the documents discovered by them and to allow the appellants and their expert viewing access to the Asycuda++ system. The hearing of the application to convene a commission of enquiry proceeded and on 20 April 2018 the High Court dismissed the application, holding, inter alia, that the commission of enquiry was not a process that should be readily invoked by a court, because such a procedure is extraordinary; that the procedure was normally invoked in circumstances where there had been wrong-doing on the part of the directors of the company under liquidation; that the procedure was available in situations where there had been a compulsory winding-up and where there had been evidence of wrong-doing towards the company property; that it was wrong to seek to summon the respondents who did not hold office in the company, and that it was an abuse to try to subject the respondents to an enquiry when the appellants had not exhausted the remedies available to them.

On appeal, this court had to determine whether the enquiry of the kind under consideration was available in the first place only in instances of a compulsory winding up and secondly as a process that may be resorted to in instances of impropriety or misconduct on the part of directors or officers of the company in liquidation?

*Held,* that the High Court's approach to a section 424 enquiry was erroneous as the enquiry may be ordered for a variety of diverse purposes and not only in instances of wrong-doing.

*Held,* that the enquiry was not confined to directors and officers of the company in liquidation. Third parties who know something about the trade, dealings, affairs or property of the company may also be summoned for examination or enquiry.

*Held,* that courts should be astute to ensuring that findings of abuse were not readily made in applications for convening commissions of enquiry as there were in-built mechanisms in the applications to control the possible abuse of the enquiry procedure. The overall consideration should always be whether the enquiry was being used for a purpose contemplated in the Act.

*Held,* that the reasons advanced by the appellants conduced to the purpose set out in the Act.

*Held,* that the facts pleaded by the appellants amply demonstrated that the provisions of sections 394 read with section 424 were of application.

*Held,* that as newcomers to the affairs of the company under liquidation, the appellants were entitled to a commission to establish if they should pursue or defend the claim relating to the recovery of the company's asset.

Appeal allowed and an order directing a commission of enquiry granted.

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**APPEAL JUDGMENT**

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SHIVUTE CJ (SMUTS JA AND FRANK AJA) concurring:

Introduction

[1] This appeal raises an important question of law in our jurisprudence regarding the proper approach to an application for an examination or enquiry envisaged under s 423 and s 424 of the Companies Act 28 of 2004 (the Act). The first and second appellants were duly appointed liquidators of the third appellant, a company under liquidation, with all powers given to a liquidator in a winding-up by the court. The company was placed in a creditors' voluntary winding-up by a special resolution of its members. The eleventh respondent, First National Bank of Namibia, played no part in the proceedings in the High Court or in this court. Therefore, reference in this judgment to 'the respondents' is essentially reference to the other respondents other than First National Bank. The appeal has a long and chequered history which requires detailed traversing in order to provide context to the factual matrix and to the decision regarding trends and approaches adopted by courts with comparable legislative frameworks towards the interpretation of ss 423 and 424 of the Act. It has therefore become necessary to present the detailed factual background of the matter in the next part of the judgment.

Background

[2] The third appellant, the company under liquidation (the company) operated a bonded warehouse in Oshikango, in the north of the country, before it was wound-up on 4 November 2014. Prior to its demise, the company was registered as an exporter user on the Customs and Excise's Asycuda++ computerised system. To financially support its business operations, the company held a fixed deposit account at First National Bank (the bank). The bank in turn had issued multi-purpose general bonds in favour of the Government of the Republic of Namibia amounting to N$1 450 000 between 18 August 2004 and 30 September 2005. The issuance of the bonds against the fixed deposit formed the subject matter of an earlier application involving the parties. This application will henceforth be referred to as the main application, to distinguish it from other multiple applications launched by the appellants during the currency of the dispute between the parties.

[3] The express terms of the bonds were that the company's obligations towards Government would be void if it 'shall, to the satisfaction of the Director of Customs and Excise, observe the Customs and Excise laws of the Republic of Namibia governing [its] business and if all the goods which are deposited in the company's warehouses shall be either duly exported or the full duties and taxes due and payable on the importation of such goods, or of such part thereof as shall not have been exported aforesaid, be paid to the Controller of Customs at the Port of Oshakati according to the first account taken of such goods upon the landing of the same'. The total value of the fixed deposit stood at N$1, 6 million by 7 October 2009. Since September 2014, the fixed deposit remained an asset of the company. After the company ceased to carry on its business, its Managing

Director requested Customs and Excise at Oshikango Border Post to assist the company to close its bonded warehouse with a view to releasing the bonded status of its fixed deposit.

[4] An inspection of the company's Oshikango warehouse was conducted on 29 October 2014. The team of inspectors that conducted the inspection compiled a report that showed that the company owed no customs duty, excise duty, Value Added Tax or any other charges to the Ministry of Finance (the Ministry) under which Customs and Excise resorts and that its warehouse was empty. As there were no surpluses or shortages, so the report concluded, the closure of the warehouse was recommended. The report did not contain any objection to the release of the bond guarantees. On 4 November 2014, as earlier alluded to, the company's members, by special resolution, placed the company in a creditors' voluntary winding-up. This resolution was registered by the Registrar of Companies on 24 February 2015. The Master of the High Court appointed, on 16 March 2015, the first and second appellants as final liquidators of the company.

[5] On 14 October 2015, the liquidators informed the controller of customs for Oshikango, through an email, that the company had been liquidated and requested the controller to release the bonds. They also undertook to pay Customs and Excise any amount owed to it. The email by the liquidators went unanswered, starting a concerning pattern of ignoring correspondence or of at least not acknowledging receipt of same. An agent appointed by the liquidators to assist in the release of the bonds, in an email dated 28 July 2016, reminded the Commissioner of Customs and Excise (the Commissioner), the head of Customs

and Excise, that ten months since the liquidators requested the Commissioner to release the bonds had elapsed. A meeting was convened on 10 August 2016 between the agent, the Commissioner and other officials. The agent was informed in that meeting that an investigation was to be conducted to determine whether or not any liability remained under the bonds issued to the company and that the process would be completed as soon as it was practicably possible. On 17 August 2016, the agent addressed a letter to the Commissioner in which he again requested the investigation to be completed as soon as possible. For the first time on 19 August 2016, the Commissioner responded to the liquidators' email of 14 October 2015. The Commissioner undertook to complete the investigation by 26 August 2016.

[6] By 30 August 2016, the investigation had not been completed, so the agent addressed a letter of that date to a control officer in the Windhoek Customs and Excise office requesting her to advise on the result of the investigation. This letter was not responded to. The agent addressed a further letter dated, 13 September 2016, to the Commissioner and the control officer. The agent referred to the undertaking to complete the investigation by 26 August 2016 and recorded that the liquidators were under pressure to finalise the winding-up and also requested the urgent finalisation of the investigation. Although a further meeting was convened between the agent and the Acting Commissioner, followed by letters dated 5 December 2016, 7 December 2016, 12 December 2016, 13 December 2016, 15 December 2016 and 9 January 2017, the respondents did not address the agent's requests. On 15 January 2017, the first appellant was referred by one official in the Ministry to another official in the same Ministry for a follow up.

[7] On 13 February 2017, the agent wrote another letter wherein he referred to his previous request for a meeting and noted that he had not received any response and requested an urgent meeting with the addressee. He received no reply. On 23 February 2017, the appellants' legal practitioners of record addressed a final letter of demand to the Acting Commissioner of Customs and Excise in which they essentially noted the history of the matter and demanded the release of the bonds within seven days. The appellants' legal practitioners did not receive a response either.

[8] On 3 May 2017 the appellants applied to the High Court for an order, in the first place, declaring that by virtue of a certification dated 29 October 2014, the liability of the bank in terms of the multi-purpose bonds issued by the bank in favour of the Government against the security provided by a fixed deposit of the third appellant, and in terms whereof the bank, as guarantor, undertook to be lawfully and truly indebted and held firmly bound unto the Government for payment, on demand, of the amounts stated in the bonds, became null and void. Lastly, they beseeched the court to direct the bank to release to the liquidators the company's fixed deposit. They also sought certain alternative relief.

[9] The respondents opposed the main application and filed answering papers. They contended in essence that upon the completion of the Customs and Excise Warehouse Inspection report, such report had to be submitted to a division within Customs and Excise for verification of any outstanding duty and tax. The respondents discovered five 'Single Administrative Documents', known as 'SAD

500', for goods removed from the company's bonded warehouse in Oshikango which goods were supposed to have left Namibia at the Katwitwi Border Post and the documents of which were not finalised according to the Ministry's Asycuda++ system. The respondents therefore demanded that the appellants provide proof of export of the goods or proof of cancellation of the exports, failing which the Minister of Finance would be entitled to deduct amounts totalling N$2 098 251,62 from the respective bonds. Why the alleged outstanding duties and taxes were only discovered two and a half years subsequent to the report by the inspectors which found there were no duties and taxes outstanding is not explained at all.

[10] The appellants maintained that they were unable to verify whether the goods left Namibia. They were also unable to verify if the company in liquidation owed the Fiscus duties totalling N$2 098 251,62 as alleged by the respondents. The respondents on their part could not verify if, and they had no proof that, the goods were exported. Instead, they insisted that the liquidators should prove that the goods were in fact exported via Katwitwi Border Post. They also asserted that although the company had no goods in its Oshikango warehouse since September 2014, a physical system verification still had to be done in Windhoek. They also informed the appellants that the company had two bonded warehouses in Rundu and that the appellants should have requested for a cancellation of those two bonded warehouses as well. The respondents relied on s 3(2)*(b)* of the Customs and Excise Act 20 of 1998 for the contention that the officials in the north who inspected the company's warehouse at Oshikango and stated that the company owed no taxes did not decide thereon. On the contrary, so the contention went, the

officials made a mere recommendation which was ultimately withdrawn by the Commissioner on 19 August 2019.

[11] The appellants counter-argued that they did not know who worked or was stationed at Katwitwi at the time the goods were supposed to have been exported. They also contended that the transactions relating to the alleged export of the goods must have been fed into the Asycuda++ system by an official of the Ministry. They argued that as a direct result of the respondents' demand for proof of export of the goods, which proof the appellants - as newcomers to the company's affairs did not have and could not have had – the appellants were unable to deliver replying papers in the main application. They also contended that their plight was exacerbated by the fact that the respondents did not accept, as they should have allegedly done, that the officials at the Ministry's Oshikango office who determined that the company did not owe taxes and duties to the Fiscus were *functus officio* as far as that decision was concerned.

[12] The appellants' legal practitioners requested in writing on 30 August 2017 that the liquidators be registered as users on the Asycuda++ system; that they be granted the same rights as the company had prior to its liquidation; and that their named forensic computer expert be granted access to the server of the Asycuda++ system. On 30 August 2017, these requests were rejected by the respondents. The respondents' legal practitioner of record maintained that as the company was no longer registered as an exporter, the liquidators could not be allowed access to the Asycuda++ system. The appellants were also paradoxically but correctly, it would appear, informed that as the proceedings were not a review application, the

respondents were under no obligation to make any documents or records available to them.

[13] It was against this background that the appellants, on 5 September 2017, brought an application for condonation for the failure to file their replying affidavit within the stipulated time; for the extension of time within which to file their replying papers; for the reinstatement and/or registration of the first and second appellants - as liquidators of the company - as exporters - on the Asycuda++ system to enable them to have full access to transactions logged onto such system by the company; for access by their expert to the Asycuda++ system, and for the discovery of certain documents.

[14] Simultaneous with the application for condonation and specific discovery, the appellants also launched an application for the appointment of a commission of enquiry ‘as envisaged in section 423 read with section 424 of the Companies Act, 2004’. They accordingly sought an order in terms of which a particular legal practitioner was appointed as a commissioner with the power to summon former directors of the company as well as officials in the Directorate of Customs and Excise who appear ‘to be capable of giving information concerning their knowledge of or dealings and associations with the business, trade, property and affairs of [the company],’ including documents relating to enumerated transactions. Both applications were opposed by some of the respondents. But in light of the consideration that the appellants sought a costs order against all the relevant respondents, they persisted with the citation of the respondents as they appear on the original papers.

[15] The appellants argued that both applications were of critical importance: In terms of the rules of the High Court, the appellants had no right to ask for the cross-examination of persons who did not depose to affidavits on behalf of the Minister in the main application.[1] Moreover, so the argument went, the appellants intended to call the company's erstwhile Managing Director who reportedly disappeared after he was allegedly given an assignment by the liquidators to trace the documents relating to the impugned exports.

The agreement of 18 September 2017

[16] Subsequent to the launch of the two applications referred to above, the parties on 18 September 2017 reached an agreement in terms of which the respondents undertook: to no longer oppose the condonation sought by the appellants; to no longer oppose the discovery of the specific documents; to provide to the appellants copies of the documents discovered by them on or before 29 September 2017, and to allow the appellants and their expert viewing access to the Asycuda++ system.

[17] It is apparent from the agreement of 18 September 2017 that the respondents conceded all the relief sought in the application for condonation, save that they refused to register the appellants as users of the Asycuda++ system and to allow the appellants' expert access to log files[2] in the system. The respondents,

[1] A submission that is clearly wrong. See, for example, *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) 388 (W), *Rosen v Barclays National Bank Ltd* 1984 (3) 974 (W) and *Alpine Caterers Namibia (Pty) Ltd v Owen & others* 1991 NR 310 (HC).

[2] 'Log File' is defined in *The Cambridge Dictionary* https://dictionary.cambridge.org (Accessed 28 May 2021) as 'a computer file that contains a record of all actions that have been done on a computer, a website, etc.' The Collins English Dictionary likewise defines a Log File as 'a file that records all the activity that has occurred on a system'.

however, persisted with their opposition to the establishment of a commission of enquiry. In respect of the opposed relief, therefore, the appellants did not appear to have had an option other than to proceed to court.

Court order dated 8 November 2017

[18] On 8 September 2017, the High Court, presided over by another judge, made an order staying 'the main application and all other interlocutory applications in this matter pending the outcome of the application to set up a commission of enquiry as contemplated in sections 423 and 424 of the Companies Act, 2004'. The appellants argued that this ruling was not appealable, not even with leave. As noted above, they also maintained that the only option open to them was to proceed with the application to establish the commission of enquiry.

[19] The hearing of the application for leave to convene a commission of enquiry proceeded and on 20 April 2018 the court *a quo* delivered its judgment and issued an order refusing - with costs - the application. It is this judgment and order that the appellants have now appealed against.

High Court's approach

[20] The High Court formulated the question for decision by it as follows: '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 Act?' It then quoted s 423 as the section 'in terms of which relief is sought by the applicants' and stated that s 424 had no bearing on the question for determination and that for that reason the court would not 'quote or refer to the

balance of the sections in issue'. In considering the appellants' argument that the underlying consideration for the convening of a commission of enquiry was to assist liquidators who come into the affairs of the company in liquidation as strangers, the court *a quo* reasoned first, with reference to the work of the learned authors Meskin *et al* that the enquiry process was not one that should be readily invoked by a court. Instead, there ought to be 'some special circumstances' that call for the invocation of the process. This, according to the court *a quo* was so, because the authors call the enquiry an extraordinary procedure. Secondly, the court found that the process was normally invoked in circumstances where there had been wrong doing on the part of directors of the company under liquidation, which had impacted 'the ruinous financial' situation the company found itself in. The court also quoted counsel who argued the application on behalf of the appellants as having submitted that the process may be resorted to in cases where it can be said that it was 'just and beneficial' to do so.

[21] The court agreed with the respondents' submission that the appellants had resorted to the provisions of s 423 read with s 424 to resolve what they perceived to be a dispute of fact, namely whether the goods were in fact exported from Namibia. The court remarked that the intention of the Legislature in enacting the sections in question could not have been to facilitate a resolution of disputes of fact. Thirdly, relying on the views expressed in Henochberg[3] and Blackman[4], the court reasoned that the power to appoint a commission applied in cases where there had been a compulsory and not a voluntary winding up of a company and in the circumstances where there was evidence or suspicion of wrong-doing or

[3] *Henochsberg on the Companies* Act 71 of 2008 (Henochsberg).
[4] *Commentary on the Companies Act* Blackman *et al* Vol 3 [Revision Service 2, 2005] (Blackman).

impropriety towards the property of the company in liquidation. According to the court *a quo*, the purpose of the enquiry 'must be to summon a director or officer of the company in liquidation 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'. The court observed furthermore that the purpose for the institution of a commission was not merely to discover or understand the books of the company in liquidation. On the contrary, 'misconduct and impropriety are key considerations' in deciding whether or not to appoint a commission.

[22] The court *a quo* continued to find that as the appellants bore the onus to prove that the goods had been exported from the country, they were thus 'barking up the wrong tree' to seek to examine the respondents who did not hold office in the company. As to the proposed examination of the company's erstwhile Managing Director, the court held that relief could not be granted for this purpose either as the appellants had not demonstrated what efforts, if any, had been made to trace him. In any event, so the court held, as the relief sought in the earlier applications for condonation and discovery was largely conceded by the respondents, to seek to subject the respondents to an enquiry in circumstances where it had not been shown that the appellants had exhausted the remedies available to them - short of the appointment of a commissioner - constituted an abuse of the court process.

[23] The court concluded that it was not satisfied that a proper case had been made out for the appointment of a commission of enquiry and so it dismissed the application with costs.

The Law

*Legislative scheme*

[24] Section 423 of the Act deals with the examination or enquiry relating to a company under a compulsory winding-up.[5] The permissible scope of the enquiry is set out in subsection (1) of the section, which provides in essence that in any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after the making of a winding-up order, summon 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* (emphasis added). Any person so summoned may be represented at the enquiry by a legal practitioner.[6]

[25] Section 424 of the Act headed 'Examination by Commissioners' provides in subsection (1) that every magistrate and every other person appointed by the Master or the Court is a commissioner for the purpose of taking evidence or holding an enquiry in connection with the winding-up of any company. The Master or the Court may refer the whole or any part of the examination of *any witness* or of *any enquiry* to a commissioner[7] (added emphasis). The liquidator or any

[5] *South African Philips (Pty) Ltd & others v The Master & others* 2000 (2) SA 841 (N) at 844C. See also Henochsberg at APPI – 255.
[6] Section 423(2).
[7] Section 424(2).

creditor, member or contributory of the company may be represented at an examination or enquiry by a legal practitioner.[8] A person who applies for an examination or enquiry either under s 423 or s 424 is liable for the payment of the costs and incidental expenses, unless the Master or the Court directs that the whole or any part of the costs and expenses must be paid out of the assets of the company concerned.[9] An examination or enquiry under s 423 or s 424 is private and confidential, unless the Master or the Court directs otherwise.[10]

*Nature of enquiry*

[26] Section 424 was described as a provision that in effect empowers the Court to delegate its powers of examination under s 423 to a commissioner.[11] As the Court in practice does not ordinarily undertake the examination itself, it often directs that a commission of enquiry under a commissioner appointed by it be held to examine witnesses.[12] The examination is usually, but not exclusively done at the instance of the liquidator, to assist the liquidator to obtain the requisite information.[13] It is not a proceeding in the nature of a litigious proceeding between parties.[14] Therefore, the ordinary standards of procedure do not apply.[15] The section does not determine rights or impose obligations except the obligation to attend the examination.[16]

*Voluntary winding-up*

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[8] Section 424(3).
[9] Section 423(7)
[10] Section 423(8)
[11] Henochsberg, Issue 14 APPI – 256 Vol 2
[12] *Ibid*.
[13] Blackman, 14-449.
[14] *Re Rolls Razor Ltd (No 2*) [1970] 1 Ch 576 at 592.
[15] *Van der Berg v Schulte* 1990 (1) SA 500 (C) at 506.
[16] Blackman, 14-449.

[27] In an instance of a voluntary winding-up of a company under liquidation, there are at least two ways of procuring a s 424 enquiry. The first is to convert the process into a winding-up by the Court in terms of s 351(1)(*f*), and the other is to make application to Court for leave to convene an enquiry under s 394.[17] Section 351(1)(*f*) provides as follows:

> 'An application to the Court for the winding-up of a company, may subject to this section, be made-
>
> (f) in the case of any company being wound-up voluntarily, by the Master or any creditor or member of that company; or. . .'

[28] Section 394 on the other hand reads:

> '(1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.
>
> (2) In determining an application made under subsection (1), the Court may, if satisfied that the determination of any question or the exercise of any power will be just and equitable, accede wholly or partly to the application on terms and conditions which it may determine, or make any other appropriate order on the application.'

[29] It is important to draw the distinction between the relevant section in which to apply for leave to convene a commission of enquiry depending on whether the company in liquidation is being wound up voluntarily or is under compulsory wind-up to avoid the pitfall the appellants seemingly find themselves in by neglecting to

[17] *Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg & others* 2002 (5) SA 239 (SCA0 para 4.

distinguish the two scenarios. They instead brought the application to appoint a commission of enquiry 'in terms of section 423 read with section 424'. This apparent conflation or confusion is a matter for further comment and analysis later in the judgment. It is also necessary for completeness to mention that in the case of allegations of delinquency on the part of directors and others, the relevant section of the Act to apply for the appointment of a commission of enquiry is s 429, read with s 424.

*Duties of liquidators in winding-up*

[30] Prior to discussing the purpose of the enquiry, it is necessary to first present some of the major statutory duties of a liquidator in any winding-up. These duties were discussed, amongst others, by the South African Constitutional Court in *Ferreira v Levin*[18]. They were distilled from the various sections of the now repealed South African Companies Act 61 of 1973[19] by Ackermann J. The South African Companies Act and our Companies Act share a common ancestry, given the fact that Act 61 of 1973 applied in Namibia prior to the Act coming into operation and so much so that most of the provisions in the respective Companies Acts are virtually identical. Therefore, South African cases on the duties of liquidators and the objectives of the enquiry are of persuasive (though of course not binding) authority to our courts.

[31] Ackermann J's discussion of the duties of the liquidator may be summarised as follows: The liquidator is under a statutory duty to proceed

[18] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) at 1057G - 1058A-C.
[19] Repealed and replaced in part by the Companies Act 71 of 2008.

forthwith to recover and reduce into possession all the assets and property of the company, whether movable or immovable; to give the Master information and assistance as may be required to enable the Master to perform his or her duties under the Act; to examine the affairs and transactions of the company before its winding-up in order to ascertain whether any of the directors and officers or past directors and officers of the company have contravened or appear to have contravened any provision of the Act or have committed or appear to have committed any other offence and whether there are or there appear to be any grounds for an order disqualifying any such persons from holding office as director; and in the case of a compulsory winding-up, to report to the general meeting of creditors and contributories of the company the causes of the company's failure, if it has failed.

*Purpose for the enquiry*

[32] Turning now to the purpose of the enquiry, the primary purpose for an examination or enquiry under s 423 or s 424 is undoubtedly for the Court or Master to assist liquidators to perform the above statutory duties to the creditors of companies in liquidation 'so that they may determine the most advantageous course to adopt in regard to the liquidation of the company'.[20] As pointed out by Ackermann J in *Ferreira v Levin*:

> 'It happens not infrequently that the liquidation of a company is the result of mismanagement, indeed mismanagement involving fraud and theft on the part of the directors and other officers of the company. Such persons are the only eyes, ears and brains of the company and often the only persons who have knowledge

[20] *Ibid*, para 123 quoting with approval the dictum in *Western Bank Ltd v Thorne NO & others* 1973 (3) SA 661 (C) at 666F.

> of the workings of the company prior to liquidation. They are often, because of their part in the mismanagement, fraud and theft, reluctant to assist the liquidators voluntarily in the discharge of their duties This on occasion also applies to outsiders who, for reasons of their own, are reluctant to assist the liquidator voluntarily. That it is necessary, in the interest of creditors and indeed the wider public interest, to compel them to assist, is widely recognised.'[21]

[33] The enquiry under s 423 or s 424 serves many purposes. These were summarised by Ackermann J in *Bernstein v Bester*.[22] First, the enquiry serves to assist liquidators to achieve their primary goal, namely that of determining what the assets and liabilities of the company under liquidation are. Secondly, as the liquidators many a times come into the company with no previous knowledge of the company's affairs, they may find that the company's records are missing or defective. The enquiry may thus assist them to get sufficient information to reconstitute the state of knowledge that the company should possess. However, such information is not limited to obtaining documents, because it is almost inevitable that there would be transactions which are difficult to discover or understand from the written materials of the company. In such circumstances, the liquidator must be enabled to put the affairs of the company in order and to carry out the liquidation in all its varying aspects.

[34] The enquiry may also assist the liquidator to recover the assets of the company in liquidation and to pay the liabilities in a way that will best serve the interests of the company's creditors. It is only by conducting such enquiries that liquidators can properly investigate doubtful claims against outsiders or against the company before pursuing them. Interrogation may be necessary in order to enable

[21] Para 124.
[22] *Bernstein & others v Bester & others NNO* 1996 (2) SA 751 (CC).

the liquidator, who thinks that he or she may be under a duty to recover something from an officer or employee of a company, or even from an outsider concerned with the company's affairs to discover as swiftly, easily and inexpensively as possible the facts surrounding any such possible claims.[23] The enquiry is available not only against the directors and officers of the company, but also against innocent third parties whose 'misfortune' it is to know something about the trade, dealings, affairs or property of the company under liquidation.[24]

Analysis of the judgment *a quo*

[35] It is plain from what has been said above that while evidence or suspicion of wrong doing on the part of directors and other officers of the company in liquidation may often give rise to the convening of an enquiry, such consideration is not the only purpose for which an enquiry or examination may be ordered. Indeed, as earlier noted, an enquiry may be conducted for a variety of diverse reasons, including for the purpose of investigating doubtful claims against outsiders or against the company in liquidation to enable the liquidator to determine whether or not to pursue or defend the claims. There can also be no doubt from ss 351(1)(*f*) and 394 that an enquiry may also be ordered in the case of a voluntary winding-up. It follows that the court below erred in its approach by holding, without qualification, that the enquiry of the kind under consideration is available in the first place in instances of a compulsory winding up and secondly in its characterisation of the enquiry as a process that may be resorted to in instances of impropriety or misconduct on the part of directors or officers of the company in liquidation.

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[23] *Ibid*. para [16].
[24] *Ibid* para 39.

[36] The approach by the court *a quo* to the matter as if ss 423 and 424 provide for one and the same enquiry is also erroneous. It is also clear from what has been discussed above that third parties who know something about the trade, dealings, affairs or property of the company may also be summoned for examination under the relevant sections. The enquiry is thus not confined to directors and officers of the company in liquidation as the court *a quo* seemed to have implied.

[37] The characterisation of the enquiry as an 'extraordinary procedure' by the authors referenced by the court *a quo* means no more that the procedure is unusual or that it is not your typical every day type of procedure. The description was not intended and should not be understood to mean that the procedure should not be resorted to in appropriate cases.

[38] The court *a quo* also found, as previously noted, that the appellants' application to convene an enquiry was an abuse. This finding was premised on the reasoning that the matters the appellants sought leave to have enquired into had already been addressed in the application for condonation and in the agreement conceding the relief regarding discovery and access to the Assycuda++ system. I am persuaded that the court *a quo*'s finding on this score is also erroneous for the following reasons. As was observed by Ackermann J in *Bernstein v Bester*:

> 'Courts in many jurisdictions have recognised the potential oppressive nature of a s [423] type of enquiry, while at the same time pointing out that there is a need for a speedy process through which the liquidator is enabled to obtain the necessary

> information about the company's affairs and dealings, and to trace the whereabouts of assets and possibly recover some assets for the financial benefit of creditors.'[25]

[39] Ackermann J proceeded to explain that the enquiry is not a free-for-all and unrestrained exercise. On the contrary, courts exercise control over it in two ways. First, because of the potential for abuse, courts carefully scrutinise applications to hold the enquiry to ensure that a balance is struck between the potential hardship which the order may cause to the affected person(s) and the need for liquidators to execute their statutory duties.[26] Thus, an application for a private examination should not be granted if it would be oppressive, vexatious or unfair.[27] Secondly, there is judicial control over the manner in which the examination or enquiry is conducted. Courts have the power to intervene to prevent the oppressive or unfair conduct of proceedings in the enquiry itself. The Constitutional Court of South Africa in *Bernstein v Bester* referred to Australian cases as a helpful guide to the approach to be adopted by that country's courts in allegations of abuse of court process in applications for enquiry. It quoted with approval the following statement by Gleason CJ in *Hong Kong Bank of Australia v Murphy*:[28]

> '(w)hile the Courts would not permit a liquidator, or other eligible person to abuse its process by using an examination solely for the purpose of obtaining a forensic advantage not available from ordinary pre-trial procedures, such as discovery or inspection, on the other hand, the possibility that a forensic advantage will be gained does not mean that the making of an order will not advance a purpose to be secured by legislation.'

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[25] Para 17.
[26] Para 25.
[27] Para 17.
[28] *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 519.

[40] What constitutes an improper 'forensic advantage', says Wallis JA, will depend on the circumstances of each case,[29] 'but the fundamental issue in determining whether there is abuse is whether the enquiry is being used for a purpose not contemplated by the Act'.[30] Wallis JA quoted with approval the passage from the English case *Re Excel Finance Corporation Ltd*[31] wherein the court expressed itself on the question whether a particular conduct constituted an abuse as follows:

> 'Whether there will be, in a particular case, a use of the process or an abuse of it will depend upon purpose rather than result. The consequence of an examination may well be that the examiner has conducted a "dress rehearsal" of cross-examination which may take place at a subsequent trial. The fact that the trial has commenced, or is contemplated, may throw light upon the purpose. But merely because other proceedings had been commenced, or are contemplated, would not involve, of itself, an abuse of process.'[32]

[41] One of the contentions made in the *Roering* case was that the summoning of an appellant in that case as a witness before a commissioner was calculated to solicit information that would bolster a party's civil case against the party the witness was affiliated to and that such process would be an abuse of the court process. Roundly rejecting the submission, Wallis JA commented thereon in the following ringing terms:

> 'Once it is accepted that a permissible purpose in causing a witness to be summoned to an enquiry is to enable the liquidator to make an informed

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[29] In *Leigh William Roering NO & another v Qedani Mahlangu & others* (581/2015) [2016] ZASCA 79 (30 May 2016), para 36 (the *Roeling* case).
[30] Para 37.
[31] *Re Excel Finance Corporation Ltd John Frederick Worthley v Richard Antony Fountayne England* [1994] FCA 1251; (1994) 14 ALR 281.
[32] Para 77.

> assessment of the merits of a potential claim or defence to a claim, it must follow that the fact that the individual concerned is a potential witness in other civil litigation, actual or contemplated, is neutral in determining whether the summons is an abuse. Something more must be identified as constituting the abuse. It is inherent in the process of such an enquiry that there is a possibility that the examination of the witness will be advantageous in future litigation. . . .Provided the underlying purpose remains the proper one of assessing the merits of a claim or defence on an informed basis, if [some] advantages accrue to the liquidator along the way they are not illegitimate.'

[42] Wallis JA also brought into equation an important public policy consideration, which many jurisdictions have long recognised,[33] why a court should not readily infer abuse in an application to convene an enquiry. That is that modern societies are confronted by the phenomenon of corporate collapses, especially in instances where such collapses have had broader social impact on the lives of employees and vulnerable investors. A readily dismissal of the application for an enquiry on the basis of an abuse may well have deleterious effect on the affected class of persons. Those who set up these corporations or manage them should be hauled before a commission when things go wrong, to explain what happened to investors' funds and to enable liquidators to recover the assets of the company in liquidation in the interest of creditors.

[43] I am aware that there had not been allegations of this type made in the present appeal but as a general proposition, our courts should remain astute to ensuring that this public imperative, in appropriate cases, is not defeated through the readily findings of abuse. As earlier noted, allegations of abuse can appropriately be dealt with through court interventions, if a party is so advised or

[33] See, for example, the discussion of the approaches by English and Australian courts in this respect in *Bernstein v Bester*, paras 25 - 34.

minded. The overall consideration should always be whether the intended enquiry seeks to achieve a purpose contemplated by the Act.

[44] In this particular case, the appellants contended that they were compelled to make application for leave to convene a commission of enquiry, because as newcomers to the affairs of the company, they did not possess the necessary documents and/or knowledge concerning the transactions they were required to prove. They asserted that the Asycuda++ system did in fact provide for two separate functionalities, namely documents submitted by the exporter and documents processed by the Ministry. The five SA 500 documents in question in this matter constituted paper files and were in all probabilities kept at the Katwitwi Border Post. The documents required by the Ministry may be in possession or under the control of the respondents. Moreover, if the erstwhile Managing Director of the company is subpoenaed to testify before the commission he may be able to provide the documents to the appellants or at the very least tell the liquidators which entity was used to transport the goods. In any event, so the appellants averred, an expert may be able to locate the documentation in question on the Asycuda++ system if full access (including access to the log files) as a user thereof was granted. Furthermore, the authors of the inspection report submitted by the controller at Oshikango may be able to provide concrete proof of the matters stated in that report. None of these assertions has been denied or contradicted by the respondents.

[45] The respondents' contentions were rather that an enquiry was inappropriate, because the company was voluntarily wound up by its creditors.

They also argued that the enquiry was undesirable, because the respondents had agreed to grant the appellants viewing rights on the Asycuda++ system and discovery was done as requested. It was contended furthermore that all the issues intended to be probed at the enquiry had already been addressed in the two earlier applications. At the hearing of the application, the respondents took the new point - entirely off the papers - that the appellants' application was an abuse. As seen above, this point became a central plank in the court *a quo's* reasoning and findings.

[46] There can be no doubt that the reasons advanced by the appellants for the convening of an enquiry, understood in the context of the factual matrix narrated above, conduce to the purpose set out in the Act. The persons who the liquidators seek to be summoned are persons deemed, in the language of s 424, 'capable of giving information concerning the trade, dealings, affairs or property of the company'. They include a former director of the company who is alleged to have disappeared, an important consideration that the court *a quo* appears to have overlooked. Moreover, as third parties whose 'misfortune' is to know something about the property of the company, some of the persons sought to be summoned are capable of giving information concerning the impugned documents. I am persuaded that the envisaged commission of enquiry falls squarely within the purpose contemplated by the Act and does not amount to a fishing expedition or an abuse.

[47] It is clear from the preceding discussion that the High Court premised the exercise of its discretion declining the application for the appointment of a

commission of enquiry on a wrong approach, which means that such discretion was not exercised judicially. Therefore, this court is at large to consider the application afresh even though the decision of the court *a quo* is based on the exercise of a discretion. It does not, however, necessarily follow on the basis of this finding that the appeal should succeed. Whether the appeal succeeds depends on a further consideration mentioned earlier in this judgment, which I undertook to comment on and analyse, and it is to this aspect of the judgment that I now turn.

Disavowal of possible reliance on alternative bases

[48] The competence to make application for an enquiry 'in terms of sections 423 and 424' of the Act was squarely put in issue by the respondents in paras 6.2, 6.3 and 6.4 of the answering affidavit. This was done on three bases. First, it was contended in para 6.2 that 'the enquiry contemplated by sections 423 and 424 of the Companies Act [was] not intended for the interrogation contemplated by the applicants. The shareholders of the applicant decided that [the company] be wound up voluntarily by its creditors'. Secondly, it was argued in para 6.3 that it was not necessary or desirable to subject the officials of the Ministry to a commission of enquiry as the respondents had undertaken to 'grant the applicants viewing access to the Asycuda++ system and discovery in terms of Rule 28'. Thirdly, it was asserted in para 6.4 that the issues sought to be canvassed with the officials of the Ministry during the enquiry had 'already been canvassed through the two applications instituted by the applicants, namely the main application, the application for condonation and applications to compel discovery as well as for access to the Asycuda++ system'.

[49] The appellants' answer to the above assertions was perplexing to say the least. In the first place, it was contended that:

> 'In as much the enquiry is envisaged to establish the factual position of and concerning the security bonds, directly linked to the fixed deposit account(s) of the company in liquidation, it directly concerns the tracing and recovery of assets of the company in liquidation. The procedure is clearly appropriate and applicable.'

However, the sub-paragraph following the one quoted above somewhat muddied what appears to be clear waters when it was stated in the same vein that:

> 'Moreover, the complaint raised in 6.2 and 6.3 is not only irrelevant, it is entirely inappropriate.'

[50] The question that arises is whether the dismissal of the respondents' contention as 'irrelevant' and 'entirely inappropriate' amounts to a fatal implied abandonment of reliance on any other basis, including the alternative basis. In this court, counsel for the appellants urged us to substitute 's 423' referenced in the notice of motion for s 394, arguing that although it would have been ideal to refer to s 394 in the application, the facts as stated by the appellants, amply support the invocation of the section by this court. With reference to *Swarts v Heine,*[34] counsel argued that the court should not put form before substance. He submitted that the purpose of the application had been set out in the founding papers. Therefore, the reference to the incorrect section or even the failure to allege that it would be 'just and beneficial' to grant the order appointing a commissioner should not preclude

[34] *Swarts v Heine & others* (192/2015) [2016] ZASCA 16 (14 March 2016).

the court from invoking the section if a case had been made out that it would be just and beneficial to convene a commission. Counsel for the respondents on the other hand argued that the application was brought under a wrong section and that no case had been made out on papers for the invocation of s 394.

[51] It would appear that whether or not an application for the convening of a commission of enquiry in a voluntary winding-up could be brought in terms of 's 423 read with s 424' is purely a question of law. The question is whether the appellants should be allowed to advance a legal basis on appeal that appears to have been abandoned in the court below. The legal position on the point was stated in Herbstein and Van Winsen[35] as follows:

> 'If legal points are set forth in the application, the applicant is not confined to them but may advance any further legal basis for the application that may arise from the stated facts. A party is entitled to make any legal contention open from the facts as they appear on the affidavits, and the court may decide an application on a point of law that arises out of the alleged facts even if the applicant has not relied on it in the application.'[36]

[52] The learned authors point out in a footnote that the statement that an applicant is not confined to the legal points made in the application and that such party may advance any further legal basis that may arise from the stated facts has been qualified by the proviso that the principle should not be applied if its application would be unfair to the respondent.[37]

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[35] *Herbstein and Van Winsen* The Civil Practice of the High Courts and the Supreme Court of South Africa, 5 ed Vol 1 (Herbstein and Van Winsen)
[36] At 443.
[37] Herbstein and Van Winsen, footnote 153 at 443.

[53] On the question of whether the respondents would suffer prejudice if the appellants were allowed to revive the point of law they seemingly abandoned in the court below, counsel was at pains to pinpoint the alleged prejudice. Ultimately, counsel was contented in stating that the appellants' legal practitioners were deprived of the opportunity to consult their clients on the issue and that had they done so, they might have presented their case differently. It appears to me that the respondents have dealt comprehensively with all allegations and contentions made by the appellants in their answering papers. Whilst it may well be that the emphasis in the presentation of their case might have been different, there does not appear to me to be any appreciable prejudice as the new point does not raise any new factual issue.

[54] In any event, there is even a stronger reason why the appellants should be allowed to revive the seemingly abandoned legal point. Ordinarily, a court of appeal is not bound by a mistake of law on the part of a litigant. If that were the case, it would mean that the court of appeal would endorse a decision of the court appealed from that may be clearly wrong.[38] The issue of whether it is open to an appellant to revive an issue previously conceded or abandoned in a court below on appeal was dealt with in *Alexkor Ltd v Richtersveld Community*[39] as follows:

> '[43] The applicable rule is that enunciated in *Paddock Motors (Pty) Ltd v Igesund*. In that case, the Appellate Division held that a litigant who had expressly abandoned a legal contention in a court below was entitled to revive the contention on appeal. The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a

[38] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D–F.
[39] *Alexkor Ltd & another v Richtersveld Community & others* 2004 (5) SA 460 (CC).

> court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong. As the Court put it:
>
> "If the contention the appellant now seeks to revive is good, and the other two bad, it means that this court, by refusing to investigate it, would be upholding a wrong order."
>
> [44] It is therefore open to Alexkor and the Government to raise in this court the legal contention which they abandoned in the SCA. However, they may only do so if the contention is covered by the pleadings and the evidence and if its consideration involves no unfairness to the Richtersveld Community. The legal contention must, in other words, raise no new factual issues. The rule is the same as that which governs the raising of a new point of law on appeal. In terms of that rule "it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness . . . and raises no new factual issues".'[40]

[55] The appellants' utterly inept position that the point of law raised by the respondents was irrelevant is of no moment as such contention cannot bind this court. It may, however, have cost implications for the appellants. Unfairness is not discernible as the facts upon which the legal point depends are virtually common cause and there is no ground for thinking that further or other evidence would have been produced had the point (relying on s 394) been raised at the outset.[41] Given the background facts of the case as a whole, it is evident that the appellants sought to make application pursuant to s 394, read with s 424. It would have been proper pleading to have referred to the relevant section in this case, especially after reference to a wrong section was challenged. However, as stated by the Supreme Court of Appeal of South Africa in *Swartz v Heine*,[42] a court should not

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[40] Paras 43 and 44.
[41] Cf *Cole v Government of the Union of SA* 1910 AD 263 at 272.
[42] Para 6.

put form before substance. It is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply.[43] There can be no doubt that the facts pleaded by the appellants amply demonstrate that the provisions of s 394 read with s 424 are of application. That the appellants intended to bring the application in terms of s 394 read with s 424 appears to have borne out by counsel for the appellants in the court below (who is different from counsel who argued the appeal). It will be recalled that counsel invoked the key phrase in s 394 when he argued that it was 'just and equitable' to set up an enquiry.

[56] The history of the appeal presented in the introductory part of this judgment reveals that between the period 14 October 2014 and 24 February 2017 the concerned officials in Customs and Excise had referred the appellants from pillar-to-post. They did not seem to be in a hurry to find out if any duties or charges were owed to the Fiscus by the company in liquidation. They dragged their feet in completing the investigation that they promised to complete by a set date. They did not even have the courtesy to acknowledge receipt of the earlier letters or email messages sent to them. In the meantime, they did not call up the bonds. They dawdled while the time to wind up the company was fast running out. They initially refused the appellants access to the Asycuda++ system and appear to have relented only after senior counsel came on board. But even then, full access to log files appears to have been declined. Their inaction does not inspire confidence in public administration. On the contrary, it undermines it and creates the impression of public servants who do not have any inkling of what the concept

[43] *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A).

of ‘public servant’ entails as it is indicative of a could-not-care-less attitude towards members of the public they are supposed to serve.

[57] Given the full onus placed on the liquidators to prove that the goods had been exported, it would have been nigh impossible to so prove within the short period allowed for replying papers without resorting to the statutory tools of investigation available to them. The appellants have established that as new comers to the affairs of the company in liquidation and without access to the records of the company, they are entitled to a commission to establish if they should pursue the claim in the main application.

[58] The enquiry is necessary despite the concessions made by the respondents. Full access to the Asycuda++ system by the appellants’ expert is also necessary to assist the liquidators to endeavour to trace the documents required by the Ministry. The respondents agreed to allow only ‘viewing rights’ to the Asycuda++ system and have discovered only copies of printouts made from the system. They have not agreed to grant access to the log files. It is doubtful if a mere viewing of the documents would bring the intended results. If there are concerns for possible disclosure of privileged information, such concerns would have been addressed by the fact that the enquiry is a private and confidential process.

[59] It is just and equitable to institute the enquiry. It is ‘just’ because despite the respondents having issued a report stating that there were no outstanding duties, levies or taxes on the part of the company, now the same respondents say the

company owes the Fiscus millions in taxes and that the liquidators must prove that the goods attracting taxes had been exported. The liquidators do not possess the necessary documents concerning and/or knowledge of the transactions in question. The documents required by the respondents may well be under their control. It is safe to assume that there were paper files kept at Katwitwi Border Post through which the goods were supposedly exported. The respondents would know who worked at Katwitwi at the time of the impugned transactions.

[60] The former Managing Director of the company, if subpoenaed, may be able to provide the documents or at least tell the liquidators which entity was used to transport the goods. If allowed full access to the Asycuda++ system, the appellants' expert may be able to trace the documents in question. Moreover, the authors of the report that stated that the company owed no duties may be able to shed light on the basis for their findings and the other facts stated by them. It is 'equitable' to convene a commission, because the respondents sent the appellants from pillar to post without the resolution of the dispute being in sight. They procrastinated and were unresponsive. Yet they appear to be some of the key persons best suited to assist the liquidators to recover the company's property or at the very least enable them to decide whether or not to proceed with the main application. In the result, the appeal must succeed.

Costs

[61] The appeal having succeeded, there is no good reason why the costs should not follow the result. However, the appellants' vituperative and

argumentative type of pleading must have costs implications. Instead of correcting the obvious mistake drawn to their attention by the respondents, the appellants first seemed to contend that the pleading was correct, only to dismiss in the same breath the challenge as irrelevant and entirely inappropriate. This type of pleading is to be deprecated. To mark the court's displeasure, the appellants should be deprived of the costs of the preparation of the replying affidavit. The resultant order will so reflect. The appellants have asked in their heads of argument, a costs order against all the respondents. No such cost order was asked for in the application to convene a commission. The application to institute the commission is a technical matter, which the respondent opposed, no doubt acting on legal advise. There is therefore no justification to mulct all the respondents in costs. The costs of opposing the application should therefore be borne by the first respondent, the Minister, who was in any event initially cited as the sole respondent in the application under consideration. It remains to make the order.

Order

[62] In the event, the following order is made:

(a) The appeal succeeds with costs, such costs to include the costs of one instructing and two instructed legal practitioners.

(b) The order of the High Court issued on 20 April 2018 is set aside and substituted by an order in the following terms:

‘(i) A Commission of Enquiry (the Commission) into the affairs of Southern Africa Duty Free (Namibia) (Pty) Ltd (in liquidation) (SA Duty Free) be held in terms of the provisions of section 394 read with section 424 of the Companies Act 28 of 2004 (as amended) (the 2004 Act);

(ii) Ms Natasha Bassingthwaighte (the Commissioner), a practicing advocate and member of the Society of Advocates of Namibia, be and is hereby appointed as Commissioner in terms of section 424 of the 2004 Act and that she is authorized to fix the time(s) and place(s) for the holding of the Commission of Enquiry as she in her sole discretion deems fit;

(iii) The Commissioner is authorized and empowered to summon or cause to be summoned before her, a certain Luiz Marques, former Managing Director and/or any former director of SA Duty Free to be examined at the Commission of Enquiry by counsel or any legal practitioner on behalf of the applicants or by any of the competent party as is provided for in section 424 of the 2004 Act;

(iv) The Commissioner is authorized and empowered to summon such other persons or official(s) of the Ministry of Finance, Department of Customs and Excise before her who, as a result of the evidence led before her or representations made to her, appear to her to be capable of giving information concerning their knowledge of or dealings and associations with the business, trade, property and affairs of SA Duty Free, including but not limited to:

iv.i the transactions depicted in annexure “TCH 1” to “TCH 5” filed under Case Number HC-MD-CIV-MOT-GEN-2017/00144 hereto;

iv.ii all documents submitted and/or all or any transactions logged by SA Duty Free on the Asycuda++ system during the period 1 November 2011 up and until 3 November 2011; all EX1 and/or EX8 documents submitted by SA Duty Free to the Department of Customs and Excise in respect of “TCH1” to “TCH5” during the period 1 November 2011 to 30 November 2011 and processed by the Ministry of Finance, Department of Customs and Excise, including in particular those EX1 and/or EX8 documents bearing reference numbers C2477, C2478, C2479, C248 and C2481;

(v) All persons summoned before the Commissioner may be examined concerning the trade, dealings, affairs or property of SA Duty Free, including but not limited to all direct exports from Namibia and/or moving of goods by SA Duty Free between bonded warehouses during the period 1 November 2011 to 30 November 2011 and financial transactions relating thereto;

(vi) All persons summoned by the Commissioner be ordered to produce at the Commission, inter alia, all such books, records, documents, whether in printed format or sorted in digital format (including documents stored through the utilization of computer hardware or software, inclusive of the Asycuda++ system), in their possession, custody, power or under their control or in possession, custody, power or under the control of the Ministry of Finance, firm, company, trust, or other entity by which they are employed, instructed or agreed with, or which they represent in respect of all matters concerning the trade, dealings, affairs or property of SA Duty Free;

(vii) The signature of the Registrar of the High Court of Namibia or of the Commissioner on the summonses to be issued, shall be sufficient for the validity thereof.

(viii) The record of this application and all proceedings before the Commissioner shall be kept private and confidential and shall not be disclosed without the prior leave of the Court or the Commissioner having been obtained.

(ix) Save where otherwise indicated below the costs and expenses of the Commissioner of Enquiry on an attorney and own client scale be paid out of the assets/funds of SA Duty Free or as may be directed otherwise by the Commissioner, but the costs of opposing this application shall be borne by the first respondent, such costs to include the costs of one instructing and two instructed counsel, where employed. Provided that such costs are to exclude the costs of preparing the applicants' replying affidavit.'

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**SHIVUTE CJ**

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**SMUTS JA**

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**FRANK AJA**

APPEARANCES

| | |
|---|---|
| APPELLANTS: | R Heathcote (with him J Schickerling)<br>Instructed by Koep & Partners |
| FIRST to TENTH RESPONDENTS: | N A Cassim (with him S Akweenda)<br>Instructed by the Government Attorney |