IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 5619/08

In the matter between:

NEDBANK LTD	Applicant
and	
THE MASTER OF THE HIGH COURT (WITWATERSRAND LOCAL DIVISION)	First Respondent
N G NETSHITAHANE NO	Second Respondent
ALAN DAVID PELLOW NO	Third Respondent
OSMAN MOOSA NO	Fourth Respondent
LEBOGANG MORAKE NO	Fifth Respondent
ENVER MOHAMED MOTALA NO	Sixth Respondent
STRYDOM HENDRIK PETRUS NO	Seventh Respondent

J U D G M E N T

MBHA, J:

[1] This is an application for:

1.1 an urgent interim interdict that, pending the final adjudication of the relief sought in Part B of the Notice of Motion, the enquiry into the affairs of ATS Light Alloy Wheels South Africa (Proprietary) Limited (in liquidation) ("*the insolvent company*") in terms of section 417 and 418 of the Companies Act No. 61 of 1973, as amended, set to commence on 21 April 2008 before the seventh respondent be stayed; and

1.2 that the seventh respondent ("*Strydom*") is precluded from dealing with any aspect of the enquiry.

[2] The seventh respondent has, since the application was brought, decided that he no longer wishes to act as Commissioner.

[3] The third, fourth, fifth and sixth respondents ("*the liquidators*") have counter-applied for an order declaring that:

3.1 subject to para 3.2 below, the order issued by the Master of the High Court on 28 March 2008 in which he ordered the inquiry referred to in paragraph 1.1 above, as reflected in Annexure

"S4" to the applicants' founding affidavit, stands and may be given full effect to;

3.2 the Commissioner shall not be Strydom but shall be Alan Horwitz SC;

3.3 all subpoenas issued pursuant to the order referred to in 3.1 above stand and are of full force and effect;

3.4 the enquiry referred to in the said order proceed on 21 April 2008.

[4] On 18 April 2008, and having listened to full argument, I made an order as follows:

"*Ad main application*

1. *The application is dismissed with costs.*

2. *The applicant is ordered to pay the respondents' costs on a party and party scale, such costs to include those of two counsel.*

Ad counter-application

1. *An order is granted declaring that the order issued by the Acting Assistant Master of the High Court on 28 March 2008, as reflected in Annexure 'S4' to the applicant's sworn affidavit stands and may be given full effect to.*

2. *The Commissioner shall be Alan Horwitz SC.*

3. *I make no order as to costs pertaining to this counter-application.*"

I also ruled that full reasons for my order would be furnished in due course. Such reasons are set out hereinunder.

[5] The requirements for an interim interdict are trite and can be briefly summarised as follows: A *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted, that the balance of convenience favours the granting of an interim interdict and the lack of another satisfactory or adequate remedy in the circumstances. This matter turns, in the main, on the question whether the applicant has established a *prima facie* right.

[6] The *prima facie* right on which applicant seeks to rely is the intended review set out in Part B of the Notice of Motion. Basing its claim on the Promotion of Administration of Justice Act 3 of 2000 ("*PAJA*"), the applicant seeks to review certain decisions of the second respondent which can conveniently be grouped as follows:

a) The decisions –

(1) to authorise an enquiry in terms of sections 417 and 418;

(2) to close the second meeting of creditors;

(3) not to proceed and continue with an enquiry in terms of sections 415 to 416;

(4) to refuse any of the staff members of the first respondent to preside at the sections 414 to 416 enquiry.

All these decisions are interrelated and pertain, in essence, to second respondent's decision to refuse any of the staff members of the Master's office to preside at the section 415 enquiry, not to proceed with the 415 enquiry, as a consequence to close the second meeting of creditors and to authorise an enquiry in terms of section 417.

(b) Second respondent's decision to appoint Strydom as the Commissioner for the section 417 enquiry and the setting aside of the subpoenas issued by Strydom.

Background facts

[7] The insolvent company was wound up by Order of Court on 18 July 2007.

[8] On 23 November 2007 the first respondent convened a first meeting of creditors of the insolvent company in terms of the provisions of section 40 of the Insolvency Act, 1936 ("*the Insolvency Act*"). The first meeting of creditors was held on 6 December 2007. At the first meeting of creditors the applicant's claim was rejected.

[9] This resulted in the applicant launching review proceedings on 13 December 2007 under Case No. 07/32572 ("*the first review*"). The applicant subsequently launched an urgent application during January 2008 under Case No. 20026/08, *pendente lite* the first review, to prevent the continuation of a second meeting of creditors.

[10] Both the review application and the subsequent urgent application *pendente lite* the review application were settled. The consent order was made an Order of Court. In terms of the order of court:

10.1 the claim tendered for proof by the applicant at the first meeting of creditors was declared as admitted for proof;

10.2 the applicant was declared entitled to attend and vote at the second meeting as a proved creditor; and

10.3 the order did not derogate from the rights of the liquidators to pursue any remedy in relation to such claim as they may have in terms of the Insolvency Act or the Companies Act.

[11] The second meeting of creditors took place on 11 March 2008. The second respondent presided at such meeting. The applicant requested the second respondent to adjourn the second meeting of creditors as it wished to investigate the claim of one of the creditors, First Rand Bank Limited ("*FNB*"). The liquidators indicated that they also wanted an enquiry and one Edeling, representing certain creditors who were the majority in number and value, proposed a special meeting to be convened in terms of sections 417 and 418 of the Act.

[12] The applicant objected to a special meeting in terms of section 417 of

the Act and pointed out that in terms of section 414 of the Act "*it is not a liquidator's enquiry*. *It is the creditors' enquiry, at a creditors' meeting and that is what we want. We don't want to allow the liquidator to drive the enquiry and to receive undertakings from him regarding the enquiry. It is a creditor who is a proven creditor that is entitled to, at the creditors' meeting such as this one, to interrogate and we insist on that right*".

[13] After a short adjournment to consider the position, the second respondent refused to accede to the applicant's request to adjourn the second meeting of creditors and ruled as follows:

> "*The meeting is going to proceed and this meeting will not be closed. It will be postponed for interrogation so that Nedbank can interrogate FNB's claim. That is my ruling.*"

[14] A dispute arose thereafter as to the value of the claim proven by the applicant. The second respondent, having listened to submissions in this regard, ruled that the applicant was allowed to vote at the meeting in an amount of R52,7 million. Voting proceeded and the resolutions which were put forward at the meeting were carried by creditors representing the majority in number and value and who were represented by the same Edeling

[15] The second respondent thereafter adjourned the second meeting of

creditors for an enquiry in terms of sections 414 to 416 of the Act to take place between 7 and 11 April 2008.

[16] The applicant was unhappy with some of the rulings made by the second respondent at the second meeting of creditors and decided to approach the court to review certain rulings made by the second respondent.

[17] In anticipation of such review (which would constitute a "*second review*") the applicant, acting through its attorney, sought undertakings from the liquidators that they would not act upon the resolutions adopted pending the outcome of the applicant's review application, without first obtaining the applicant's prior written consent.

[18] As no such undertakings were given by the liquidators, the applicant launched an urgent application in this Court under Case No. 08/4831 ("*the second urgent application*") which was enrolled on 19 March 2008. This application was settled. The consent order was made an Order of Court. In terms of the order:

18.1 the applicant would, by no later than Wednesday 26 March 2008 and in writing, request the second respondent's reasons for his rulings given at the second meeting of creditors;

18.2 the applicant would file and serve its notice of motion and founding affidavit in its application for the review of the second respondent's decisions within 10 (ten) days of receiving the second respondent's written reasons referred to hereinabove;

18.3 pending the final determination of the review application, and without prejudice to the respective parties' rights, the liquidators may exercise any of the powers afforded by the resolutions adopted at the second meeting of creditors in the insolvent estate (save for resolution 13), in particular the payment of the proven claims of the former employees of the insolvent company.

Events relevant to the present application

[19] There followed an exchange of correspondence between the applicant and the liquidators' respective legal representatives concerning the holding either of a section 415 or of a section 417 enquiry. Attorneys acting on behalf of the liquidators suggested that the section 415 enquiry which had been convened for 7 April 2008 be converted into a liquidators' enquiry in terms of section 417 of the Act. This proposal was clearly not acceptable to the applicant who insisted that the section 415 enquiry should proceed as scheduled.

[20] On 26 March 2008 the second respondent addressed correspondence to the liquidators stating the following:

"*1.* *I record that at the second meeting of creditors ATS Light Alloys Wheels South Africa (Pty) Ltd (In liquidation), it was proposed that an enquiry be held by me into its affairs in terms of sections 414-416 of the Companies Act.*

2. *Whilst I, in principle agreed to the aforegoing and to the enquiry being held at a suitable venue from the 7 to 11 April 2008, I have given the matter further consideration and in the light of the allegations which have been made against me as second respondent in an application by Nedbank Ltd under Case No. 2008/4831, I believe that it would not be good policy or prudent on my part or any other member of my staff to chair any such enquiry.*

3. *I further record that the applicant in the aforesaid proceedings, Nedbank Ltd through its official, Hermanus Hendrik Coetzee, made the following allegations in his founding affidavit dated the*

14 March 2008:

'31. Acting upon submissions made, inter alia on behalf of the liquidators, the second respondent refused the request for an adjournment and ruled that the meeting should proceed. No reasons for the decision were given.

32. It is submitted that, in doing so, the second respondent committed a material irregularity. Second respondent's refusal to accede to the request for an adjournment will, together with other matters, form the subject-matter of the proposed review application to be launched by the applicant.

33. *As the vote of every creditor shall be reckoned according to the value of his claim, the correct value of the applicant's claim became an important issue. After hearing argument by the applicant's counsel, and certain other creditors, the second respondent ruled (without giving reasons) that the applicant's proven claim was only R52 788*

062,00. It is submitted that the second respondent should have ruled that the applicant's claim was valued at R88 291 252,00 alternatively R69 291 242,00. The second respondent's ruling was materially incorrect and the manner in which the decision was taken, grossly irregular and prejudicial to the applicant's rights. This ruling will also be the subject of the proposed review application.' (My emphasis)

The applicant is aggrieved by the decisions and/or rulings at the second meeting of creditors and has instructed its legal representatives to bring an application to court in terms of section 151 of the Insolvency Act No. 24 of 1936 for the review of the said decisions and/or rulings.

39. The applicant has been advised that the second respondent's decisions and/or rulings amount to the taking of 'administrative action' and that certain remedies and obligations are provided by the Promotion of Administrative Justice Act No. 3 of 2000 ('PAJA') for a party in the applicant's position. This includes the right, in terms of section 5(1) of that Act, of any person whose

rights have been materially and adversely affected by administrative action and who has not been given reasons for the action to request that the administrator concerned furnish written reasons for the action within 90 days after receiving the request. The applicant has instructed its legal representatives to make such a request for written reasons before the review application is launched.'

(my emphasis)

4. *From the above it is obvious that the applicant, Nedbank has challenged by rulings as being grossly irregular and incorrect and has sought to place reliance upon PAJA alleging expressly or by implication, that I have acted unfairly and/or prejudicially in its interests. Such contentions could be the forerunner of similar allegations which may be made to any rulings to be given at an enquiry which could only delay the matter and would not be in the best interests of the general body of creditors.*

5. *For the aforegoing reasons I have accordingly resolved not to chair any enquiry in terms of sections 414-416 of the Companies Act. Should you wish to proceed with an enquiry, I would suggest that you do so in terms of sections 417 and 418*

of the Companies Act before an independent third party Commissioner.

6. In the circumstances please note that the enquiry will not proceed on the 7th to 11th April 2008 before me or any other member of our staff. Please ensure that all interested parties are advised of my decision."

[21] On 28 March 2008 the liquidators' attorneys made application to the Master for the holding of a section 417 enquiry into the affairs of the insolvent company.

[22] On the same day on 28 March 2008, the Master duly granted the application for the holding of an examination in terms of sections 417 and 418 of the Companies Act No. 61 of 1973 into the affairs of the company. This examination was scheduled to commence at 09h30 on Monday 21 April 2008.

[23] On 1 April 2008 the third respondent, one of the liquidators, addressed correspondence to the Master as follows:

"*1. The second statutory meeting of creditors which took place before you on 11 March 2008 which meeting was adjourned to 7 and 14 April 2008 for the purposes of holding an enquiry.*

2. *Immediately following the conclusion of the second meeting of creditors, Nedbank Limited brought an application in the High Court of South Africa (Witwatersrand Local Division) under Case No. 2008/4831 against the Master of the High Court (Witwatersrand Local Division) and Mr N G Netshitahane NO together with duly appointed Joint Liquidators sighted* (sic) *… as the Third to Sixth Respondents.*

3. *The purpose of the application was to review the decisions made by the Master of the High Court at the second meeting of creditors.*

4. *In view thereof, application has been made to your offices for authority for the holding of a section 417 enquiry in terms of the Companies Act which enquiry will take place from 21 to 25 April 2007.*

5. *In view thereof, it would be appreciated if you could close the second statutory meeting of creditors as clearly that enquiry will not proceed.*"

[24] It is trite that on 7 April 2007 the Master ruled that the second meeting

of creditors was closed.

[25] Subpoenas have since been issued by the seventh respondent Hendrik Petrus Strydom appointed as Commissioner to preside over the section 417 enquiry. Subpoenas have also been served on a number of employees of applicant calling upon them to produce certain documentation pertaining to applicant's claim.

[26] As I have already stated, the *prima facie* right the applicant seeks to rely on securing interim relief is the intended review set out in Part B of the Notice of Motion, specifically under the Promotion of Administration of Justice Act 3 of 2000 ("*PAJA*").

[27] The applicant contends that the decisions made by the second respondent were:

27.1 procedurally unfair;

27.2 taken without regard to the *audi alteram partem* principle;

27.3 taken arbitrarily and capriciously;

27.4 taken despite irregularities in the procedure;

27.5 taken without reference to admissible or competent evidence; and

27.6 so unreasonable that no reasonable Master would have exercised the power or performed the functions of the Master in the manner in which the second respondent had done.

[28] It is trite that in order to seek a review of any administrative action, it must first be established that there has been administrative action, an issue to which I now turn. However, before doing so I deem it appropriate to briefly consider the nature and extent of the applications of sections 412 to 416 (conveniently grouped under 415) and of sections 417 and 418 (conveniently referred to as 417) of the Companies Act.

[29] Sections 412 to 416 of the Companies Act appear under the general heading of "*Provisions as to Meetings in Winding-up*" while sections 417 and 418 appear under the general heading "*Examination of Persons in Winding-up*". It is thus apparent that the two groups of provisions are complementary and are not mutually exclusive. Clearly they deal with different matters.

[30] A section 415 enquiry typically deals with examination of directors and

other meetings of creditors. Presiding at such a meeting is the Master or officer, who together with any liquidator of the company and a creditor who has proved a claim against a company, may "*interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after commencement of the winding-up, and concerning any property belonging to the company …*". A creditors' meeting is always a public hearing.

[31] Characteristics of a section 417 enquiry are essentially these:

31.1 The Master or the court may summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the court deems capable of giving information concerning the trade, dealings, affairs or property of the company. The rights regarding the representation, the obligation of witnesses to answer questions that might incriminate him or her and the power of the Master or court to obtain documents and books relevant to the enquiry are the same as those

provided for in a section 415 enquiry.

31.2 A magistrate or other person appointed by the Master or court, may preside at a Section 417 enquiry.

31.3 An enquiry under section 417 shall be private and confidential unless the Master or the court, either generally or in respect of any particular person, directs otherwise.

[32] Section 417 replaced the old section 155 in the 1926 Companies Act which had appeared under the heading "*Extraordinary Powers of Court*". The power under the old section 155 could only be exercised by the court. This was originally the position under section 417 of the 1973 Companies Act. It was only in 1985 when in terms of the Companies Amendment Act 29 of 1985 the power to summon a witness was extended to the Master. Clearly sections 414 to 415 are concerned with the examination of witnesses at a meeting of creditors.

[33] It is apparent that the two sections have different purposes and are implemented in different circumstances. The existence of the examination provisions in section 415 in no way exclude or substitute the provisions of section 417. It accordingly follows that whether or not an enquiry under section 415 is held, an enquiry under section 417 can still be held.

[34] As I have pointed out above, the power and function exercised by the court under section 417 is, clearly a judicial function. With effect from 1985 this power can also be exercised by the Master. In my view it would be a patent anomaly to hold that this function, if exercised by the court, can by definition not be administrative action, but if exercised by the Master should become administrative action.

[35] Administrative action is defined (in section 1 of PAJA) as a decision taken by an organ of state when exercising a public power or performing a public function in terms of legislation which "*adversely affects the rights of any person and which has a direct, external legal effect*".

[36] It is my view that when the Master gives effect to section 417, he does not act administratively and accordingly PAJA does not apply. Even if it could be argued that PAJA does apply, it can only apply to the most limited and constraint extent. I say so for the following reasons:

36.1 A reading of the language under sections 417 and 418 shows that these sections are purely investigative measures to facilitate the winding-up of a company. The decision to take evidence

from a witness in a winding-up clearly has no potential to adversely affect the right of any person. Nothing is decided by the Commissioner under these sections. No rights or obligations are determined. Under section 418(3) a Commissioner must report to the Master and the court on any enquiry referred to him.

36.2 It follows that the summoning of a witness to provide information concerning the affairs of a company is not "*administrative action*". Accordingly the procedural fairness contended for by the applicant does not arise. Alternatively, if it can be said to arise, it does not arise at the stage when the enquiry is ordered. The secrecy provisions of sections 417(7) make it clear that prior notice should not and cannot be given to witnesses. Procedural fairness is however ensured by the right of the witness to have an attorney and/or advocate present.

36.3 As was stated by C Hoexter in the *New Constitutional and Administrative Law*, Vol 2 p 214:

> "… the principle of fairness in particular, and the other requirements of legality in general, need not be applied identically or evenly in every case. It allows one to apply

> procedural justice to all administrative action while tailoring the content of that fairness to suit the particular occasion."

[37] Ackermann J's *dicta* in *Bernstein and Others v Besters NO and Others* 1996 (4) BCLR 449 (CC) in particular at [96], and following, on whether or not an enquiry in terms of sections 417 to 418 of the Companies Act 1973 constitutes administrative action, is instructive.

[38] In that case sections 417 and 418 of the Companies Act were sought to be attacked as being an alleged violation of section 24 of the then Constitution which provided for the right to lawful administrative action. That section corresponds with section 33(1) of the 1996 Constitution which provides that "*everyone has the right to administrative action that is lawful, reasonable and procedurally fair*".

[39] In a wide-ranging judgment supported by the majority of the court Ackermann J said the following:

> "*[95] … for the issue before us is not the common law one, but the constitutional question as to whether paragraphs (b) and (c) of section 24 of the Constitution apply to an enquiry under sections 417 and 418 of the Act. They only apply if the nature of the enquiry is characterised*

as being 'administrative action' because it is only in relation to 'administrative action' that section 24 rights arise.

[96] I have a difficulty in seeing how the enquiry in question can be characterised as administrative action. It forms an intrinsic part of the liquidation of a company, in the present case the liquidation of a company unable to pay its debts."

[40] The learned Judge continued as follows:

"*[97] The enquiry in question is an integral part of the liquidation process pursuant to a court order and in particular that part of the process aimed at ascertaining and realising assets of the company. Creditors have an interest in their claims being paid and the enquiry can, thus at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have some difficulty in seeing how section 24(c) of the Constitution can be applied to the enquiry, because it is hard to envisage an "administrative action" taken by the Commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others.* (my emphasis)

[41] Ackermann J then expressed difficulty in accepting that a Commissioner conducting a section 417 enquiry could be described as an executive organ of State in accordance with the definition of administrative action in section 1 of PAJA.

[42] In *Podlas v Cohen and Bryden NNO and Others* 1994 (4) SA 662 (T) an attempt was made to attack the constitutionality of an interrogation under section 152 of the Insolvency Act 24 of 1936 which corresponds to the provisions of section 417 of the Companies Act. It was argued that notice had to be given to the witness before the Master summoned the witness. The Master had not called upon persons who were to be summoned to make any representations.

[43] It was subsequently argued that the Master was performing administrative action as contemplated in section 24 of the 1993 Constitution.

[44] Spoelstra J held (at page 675E-G) that:

> "*The Master's decision to hold an enquiry and to issue the notices to persons who might be called to testify did not prejudicially affect the witness's liberty or property or any other existing right that would require the Master to apply the audi alteram partem rule. These*

notices are simply subpoenas. A person who is subpoenaed to give evidence before any legally constituted tribunal empowered to subpoena witnesses is, generally speaking, obliged to obey it. This seems to be so because he or she is called upon to perform what may be described as a public duty (Van Aswegen v Lombard 1965 (3) SA 613 (A) (at 623E)). Personal freedom, therefore, becomes subordinate to the public interest. In the words of the Constitution, the right to freedom is limited to that extent because it is reasonable and justifiable to do so (section 33(1) of the Constitution). There would be utter chaos if every official authorised to issue such a notice, summons or subpoena were required to hear the person who is to be summoned before actually issuing the notice, summons or subpoena. It would be grossly unreasonable to demand this. It also follows that no written reasons need to be furnished to anyone to justify the decision to issue the notice, summons or subpoena. The fact that different persons in the Master's employ were involved in the preliminary steps which preceded the issue of the notices, is also immaterial."

[45] Spoelstra J went on to state, expressly, that an enquiry in terms of section 152 of the Insolvency Act (which is equivalent to section 417 of the Companies Act) is purely investigative. Furthermore, the presiding officer neither made findings that could detrimentally affect any person's rights nor

determined any rights but simply recorded the evidence and regulated the proceedings.

[46] In *Roux v Die Meester en 'n Ander* 1997 (1) SA 815 (T) at 824B-C, the court reiterated that an enquiry under section 152 of the Insolvency Act was purely investigative in nature and did not envisage a finding determining or detrimentally affecting a person's rights and consequently section 24(b) of the Constitution providing for the right to procedurally fair administrative action where a person's rights or legitimate expectations were affected or threatened could not be applicable and thus could not help the applicant.

See also Strauss and Others v The Master and Others NNO 2001 (1) SA 649 (T) at 661A-G.

[47] In support of its contention that the decision by second respondent amounted to administrative action, applicant sought to rely on the case of *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga, and Others* 2008 (2) SA 570 (T). It is necessary to briefly refer to the facts in that case:

47.1 Applicants have a combined fleet of 233 vehicle combinations which operate in the Mpumalanga Province 109 of which are used to transport coal by road on the N4 highway and access roads thereto, from the mines to the power stations in the

Middelburg area.

47.2 It is common cause that numerous overloading offences were committed by drivers of these vehicles during 2005 to 2006. As a result in July 2006, the first respondent appointed the second, third and fifth respondents (the investigating team), in terms of section 50(3)(b) of the National Roads Traffic Act 93 of 1996 ("*the Act*") to investigate the activities of the applicants and directed them to make a written recommendation to him regarding what measures should be taken in that respect.

47.3 In August 2006 the investigation team reported to the first respondent that the applicants, in breach of their duty in terms of section 49(g) of the Act, had failed to take all reasonable measures to avoid axle overloading of their vehicles, and recommended as a result that the operator cards in respect of the applicants' vehicles be suspended.

47.4 Section 49(g) requires that the operator of a motor vehicle shall take all reasonable measures to ensure that such motor vehicle is operated on a public road in compliance with the provisions for the loading and transportation of goods as prescribed under the Act. The investigations of applicants' operations were

arranged after a meeting with the legal representative of the applicants.

47.5 On 13 July 2006 one Mr Frik Oosthuizen, of applicants, was given the opportunity of stating applicants' case. He also stated, according to para 3(8) of the report that "*the company was prepared to concede that they had transgressed the law but that everyone else in the area was also transgressing the law and that Oosthuizen Transport was being victimised*". Nine drivers employed by Oosthuizen Transport were also interviewed and they gave certain information.

47.6 The report of the investigating team concluded that from the evidence presented it was obvious that Oosthuizen Transport failed to exercise the duty imposed on it by section 49(c) and (g) of the Act, that they failed to exercise proper control over the drivers, and further failed to take all reasonable measures to ensure that the motor vehicles complied with the various provisions of the Act, relating to loading and transportation.

47.7 The investigating team recommended that all of Oosthuizen Transport's operator cards be suspended for a period of three months on condition that the operator is able to convince the

MEC, at the end of the three month period, that the company was in a position to exercise its duties as required by the applicable legislation.

47.8 On 3 November 2006 the applicants presented a memorandum to the first respondent requesting copies of all documents considered by the investigators and requesting a hearing before the MEC decided on the recommendations of the investigating team.

47.9 On 8 November 2006 the MEC issued a notice in terms of section 50(3)(d)(iii) of the Act suspending, with effect from 8 January 2007, the operator cards in respect of the applicants' entire fleet of 233 vehicle combinations, although the section 50(3)(b) investigation was limited to the Middelburg fleet of 109 vehicle combinations.

[48] Applicants succeeded in setting aside the report by the investigating team and also obtained an order interdicting and restraining the first respondent from suspending the applicants' operating cards or taking any other decision based on the section 50(3)(b) report.

[49] In my view the facts of this case relied upon by the applicant are clearly distinguishable from the ones *in casu*. The first respondent in *Oosthuizen's*

case is clearly a public organ as defined in section 1 of PAJA. Secondly, recommendations which the investigating team made, although a preliminary decision, clearly had the capacity to affect legal rights as it laid the foundation for a future decision which could have grave results. Clearly in such a case the *audi* rule had applied in relation to the consideration of that preliminary decision. Thirdly, first respondent in the exercise of an administrative action wholly suspended the entire fleet of Oosthuizen Transport while the complaint had related to only 109 of total fleet of 233.

[50] First respondent's conduct in Oosthuizen transport is clearly administrative action in contradistinction to the cases already referred to above.

[51] I therefore find that the applicant has failed to establish any administrative right whatsoever in relation to what it seeks to identify as administrative action. If there is no administrative action in issue, it follows there can be no rights, prima facie or otherwise, arising out of PAJA.

[52] Section 417 entitles both the court and/or the Master to grant an order thereunder as has happened in this case at the instance of the liquidators. Neither an order granted by the court nor by the Master, can amount to administrative action which entails administrative remedies.

[53] Section 417(1) expressly provides that "*In any winding-up of a company unable to pay its debts, the Master or the court may, at any time after a winding-up order has been made, summon before him or any director or officer of the company …*" for the purpose of an interrogation. Whether or not a second meeting of creditors has been held is therefore irrelevant. There is nothing preventing any person, including the liquidators from applying for an order under section 417 at any time, whether or not the second meeting has been held. It accordingly follows that the applicant's complaint regarding the closing of the second meeting of creditors by the second respondent is without substance. Nowhere does applicant specify why its right to interrogate or examine under section 415 is better or greater than its right to examine under section 417. The complaint in my view, merely rests on the unsubstantiated and vague ground that the enquiry will be driven by the liquidator and that the applicant would be sidelined.

[54] It is clear that whether or not the second meeting is closed or re-opened cannot prevent the liquidators from seeking an enquiry in terms of section 417 of the Companies Act. The fact that a creditor wants to conduct an interrogation before the Master under section 415 can never serve as a ground to prevent the holding of an enquiry under section 417.

[55] The applicant has therefore failed to show any *prima facie* right that would entitle it to the relief it seeks.

[56] The applicant wants an enquiry to be held in terms of section 414 to 416 of the Companies Act which of necessity can only be before the Master. However:

56.1 the applicant itself has made serious allegations against the Master in this matter. I have already referred to these allegations in paragraph [20] above. Some of these allegations are that:

56.1.1 the Master committed a material irregularity in refusing to accede to the applicant's request for an adjournment of the second meeting of creditors;

56.1.2 the Master's ruling, that the applicant's proven claim was only R52 788 062-00 and that the vote of the applicant was to be reckoned according to the value of his claim, was materially incorrect in that the manner in which the Master's decision was taken was grossly irregular. The applicant wanted the master to rule that the applicant's claim was valued at R88 291 252-00 alternatively R69 291 242-00.

56.1.3 In the first review launched by the applicant under Case No. 07/32572 the applicant made similar allegations in regard to the Master in respect of the Master's rejection of the applicant's claim at the first meeting of creditors.

[57] I am accordingly of the view that in the light of the allegations which have been made against him, second respondent's attitude that it would not be good policy or prudent on his part or on the part of any member of staff to chair any enquiry in terms of sections 414 to 416 is perfectly understandable and well-founded, in the circumstances of this matter.

[58] I fail to understand how applicant can insist on a Section 414 to 416 enquiry before the Master whilst at the same time expressing extreme reservations and criticism of the decisions of the same Master.

[59] The applicant's other complaint that the seventh respondent is not independent has since become academic as seventh respondent has elected to withdraw and not participate as Commissioner. The Commissioner who has been suggested Adv A Horwitz SC is acceptable to the applicant.

[60] I now deal with the applicant's contention of procedural unfairness allegedly on the basis that it was never given an audience prior to the Master making his order authorising an enquiry in terms of section 417. In this regard

the applicant claims that "*In particular, the decisions of the second respondent were made without adequate notice of the nature and purpose of the proposed decisions; and without a reasonable opportunity to the applicant to make representations in regard thereto and/or to present and dispute information and/or arguments in relation to all the decisions made*". This complaint is apparently based on section 3(2) of PAJA.

[61] I have already found that the applicant has failed to establish any *prima facie* right. It follows that applicant has no right of prior audience before the Master makes his decision to institute a section 417 enquiry.

[62] An application under section 417 is not one in respect of which the provisions of section 3(2)(b) of PAJA can apply. Section 417(7) also expressly provides for confidentiality in respect of the application. Clearly, if such an application is to be confidential, no notice thereof can be given. Undoubtedly there in no room for the making of representations. Section 417(7) expressly requires secrecy unless the Master or the court directs otherwise. Any prior notice would defeat the purpose of the section.

[63] In the circumstances of the case it was necessary for the second respondent to make the decisions he did.

[64] Furthermore, even though the applicant was not given notice, it can never be said that material prejudice could have ensued because the

applicant is still entitled to interrogate witnesses at the section 417 enquiry.

[65] In any event, it has been held that the *audi alteram partem* rule does not apply in all circumstances. See *Contract Support Services (Pty) Ltd v Commissioner SARS* 1999 (3) SA 1133 (W) at 1146C where the court held that not all administrative acts required the application of the *audi alteram partem* rule before they were given effect to. However each case will be decided on its peculiar facts.

[66] The applicant has not contended, in this case, that the prospective examination in terms of section 417 will be oppressive or would cause hardship. Nor has the applicant made out a case for any exceptional circumstances.

[67] In *Friedland and Others v The Master and Others* 1992 (2) SA 370 (W) the court held that a person who wishes the court to review a decision of the Master refusing to hear him on the question whether the Master should have made the order subjecting him to examination under sections 417 and 418 of the Act must show, not only that the Master refused to hear him, but also the following:

67.1 that he had approached the Master and asked to be heard before the Master made the relevant order;

67.2 that he had something relevant to say to the Master relating to:

67.2.1 the question of jurisdiction; or

67.2.2 the question of hardship to, or oppression of, himself, or

67.2.3 possibly some other circumstance that could be regarded as unusual, special or exceptional, and as calling for consideration before the decision to grant the order is made.

In my view applicant has not met any of the requirements just mentioned.

[68] Applicant also sought to rely on the review provisions under section 151 of the Insolvency Act read together with section 339 of the Companies Act. I was referred to the case of *Nel and Another NNO v The Master (Absa Bank Ltd and Others intervening)* 2005 (1) SA 276 (SCA). The appeal in this case turned on the proper interpretation of section 384(1) and (2) of the Companies Act 61 of 1973 relating to the determination by the Master of the High Court of the "*reasonable remuneration*" the liquidator was entitled to for his services. A determination was sought on the nature and extent of the Master's powers to reduce or increase such remuneration if, in his opinion,

there was "*good cause*" for doing so, as well as the ambit of the court's powers under section 151 of the Insolvency Act 24 of 1936, read with section 339 of the Companies Act, to review such a ruling by the Master.

[69] Section 151 of the Insolvency Act read together with the provisions of section 339 of the Companies Act provides:

> "*… Any person aggrieved by any decision, ruling, order or of the Master … may bring it under review by the court.*"

[70] The court rejected the contention that its powers under this "third kind of review" (the second type being the "ordinary" judicial review of administrative action) are "*unlimited*" or "*unrestricted*". Van Heerden AJA stated that the precise extent of any statutory review always depended on the particular statutory provision concerned and the nature and extent of the function entrusted to the person or body making a decision under the review.

[71] The Master's powers were analysed and likened to those of a taxing master of the High Court. Relying on the *dicta* of Innes CJ in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, Van Heerden AJA reiterated that the court's powers to intervene were limited to instances where the Master had been "*clearly wrong*" before it could interfere with a ruling made by him. He also stated in no uncertain terms that

where the Master had made a ruling, the court must be slow to interfere.

[72] *Nel's* case undoubtedly supports the view that a court's capacity to intervene in a ruling made by the Master in the third type of review is very limited. Most importantly, it has not been demonstrated in this case that second respondent was "*clearly wrong*" when he made the decision to institute an enquiry in terms of section 417 of the Act.

[73] Of fundamental importance is the fact that, as I have already mentioned, a reading of the language under sections 417 and 418 shows unequivocally that these sections are purely investigative measures to facilitate the winding up of a company. No rights or obligations are determined by the Master.

[74] It accordingly follows that Section 151 of the Insolvency Act providing for the "third kind of review" that is sought to be relied upon by the applicant is inapplicable to this case.

Necessity for investigation

[75] In my view there is good reason to proceed without delay to investigate the applicant's claim as well as that of FNB.

[76] The applicant's claim form was attached to the applicant's papers in the review proceedings under Case No. 32572/07 with which I have been

furnished.

[77] The applicant's claim against the company in liquidation is for R88 291 252,00 in respect of the value of rentals under a certain deed of lease, for a period of ten years. The commencement date of this lease is 1 June 1999 and the first rental payment was due on 1 June 2000. It is trite that the applicant cancelled this lease on 13 July 2007 and as at the date of the liquidation in July 2007 the lease had run for about 8 years.

[78] The applicant's claim which has been declared as admitted for proof is R52 788 062,00.

[79] In calculating its claim, the applicant relies on a computation of the "*value of the rentals, as calculated in terms of a computer program*". Regrettably, nowhere is this calculation explained. The computer programme referred to is not included in the claim form.

[80] The aforementioned value of the rentals is not calculated with reference to the unexpired and contractually agreed term of the rental agreement but to a much longer period. In terms of Schedule C to the lease agreement (appearing on p 86 of the review application under case no. 07/32572) the rentals which were payable in respect of the unexpired period of the lease were:

80.1	1 December 2007	-	R8 440 701,00
80.2	1 June 2008	-	R8 440 701,00
80.3	1 December 2008	-	R9 549 338,00
80.4	1 June 2009	-	R9 549 338,00

[81] As can be seen, because the company was provisionally wound-up on 18 July 2007, and assuming that the four rental payments from 1 December 2007 to the last payment of 1 June 2009 remained unpaid, the total outstanding amount according to Schedule “C” which also makes it clear that rentals are payable on a six-monthly basis, would be R35 980 000,78.

[82] I find it difficult to accept that even if facts may have changed pursuant to the computer programme on which the rental is based, that they would have more than doubled the outstanding rentals to an amount of R88 million. It accordingly follows that the claim for R88 million is highly questionable.

[83] Over and above what has been stated, applicant contends that plant and equipment which the applicant values at R16 503 180,00 has acceded to the immovable property in question and that it has become the owner of the plant and machinery. However, clause 13.1 of the lease provides that the lessee may for the purposes of its business “*affix such fittings and fixtures in and to any part of the leased premises as may be required in connection with*

the conduct of its business therein …". These fixtures and fittings may be removed upon termination of the lease. As the lease provides for the removal of the machines, it follows that applicant's claim for accession is also doubtful.

[84] Significantly, the liquidators do not agree with the computation of the applicant's claim and do not accept the accession contended by the applicant nor do they agree with applicant's valuation of the movable property. In my view, the entire structure of the lease with its unusual features is a matter that calls for investigation.

[85] The liquidators, quite justifiably, wish to investigate various aspects of the applicant's aforementioned claim. On the face of it, the applicant's claim does not accord with the document it relies on. The computer programme used needs to be fully explained and investigated.

[86] Under the heading "*Creditor Security*" the applicant's claim form refers to an "*Option agreement and a Policy*". The following is then recorded:

> "*30. The portfolio established in terms of and housed in the policy constitutes 95% of the entire issued share capital of NIB 29, which is the registered owner of the movable property. …*"

[87] In paragraph 31 of Coetzee's affidavit in the applicant's claim form, it is

stated that the applicant owns the entire issued share capital of a company called NIB and 5% of the property owning company. It then concludes that it indirectly holds "*the security arising as a result of the Option Agreement and the Cession …*". The security is apparently the cession of the policy. Clearly, this entire structure needs to be fully investigated.

[88] It has not been demonstrated in any way that irreparable harm actual or potential, would ensue following the Master's decision to institute a section 417 enquiry. Furthermore, it has not been shown that any balance of convenience is in favour of the applicant. On the contrary the facts of the case, considered in their entirety, show unequivocally that the balance of convenience lies in favour of permitting the enquiry to proceed.

[89] To my mind the issues canvassed in the counterclaim do not introduce anything new. The issues stated therein are adequately dealt with in the main application. I nonetheless decided, purely for the sake of clarity, to grant the specific orders sought in the counter-application without giving the respondents costs in relation thereto.

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B H MBHA
JUDGE OF THE HIGH COURT

DATE OF HEARING	17 APRIL 2008
ORDER OF COURT MADE ON	18 APRIL 2008
REASONS FOR JUDGMENT FURNISHED ON	18 JULY 2008
FOR THE APPLICANT	ADV A P JOUBERT SC ASSISTED BY ADV J E SMIT
INSTRUCTED BY	LOWNDES DLAMINI
FOR THE THIRD, FOURTH, FIFTH AND SIXTH RESPONDENTS	ADV S DU TOIT SC ASSISTED BY ADV T MASSYN
INSTRUCTED BY	KNOWLES HUSSAIN LINDSAY INC

SUMMARY

1. When the Master of the High Court makes a decision to institute an enquiry in terms of Section 417 of the Companies Act No 61 of 1973, as amended, his conduct as aforesaid does NOT amount to an administrative act as defined in the Promotion of Administration of Justice Act, No 3 of 2000 ("PAJA"). His conduct as such is not subject to review in terms of PAJA.

2. The aim and object of an enquiry in terms of Section 417 into the affairs of a company in liquidation is purely investigative. No rights or obligations are determined or affected when he makes the decision to institute an enquiry.

3. It also accordingly follows, that the 'special' type of review provided in Section 151 of the Insolvency Act, read together with the provisions of Section 339 of the Companies Act is also inapplicable to a Section 417 enquiry.