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Business Rescue, Restructuring & Insolvency

NEWSLETTER

DISPUTE RESOLUTION

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

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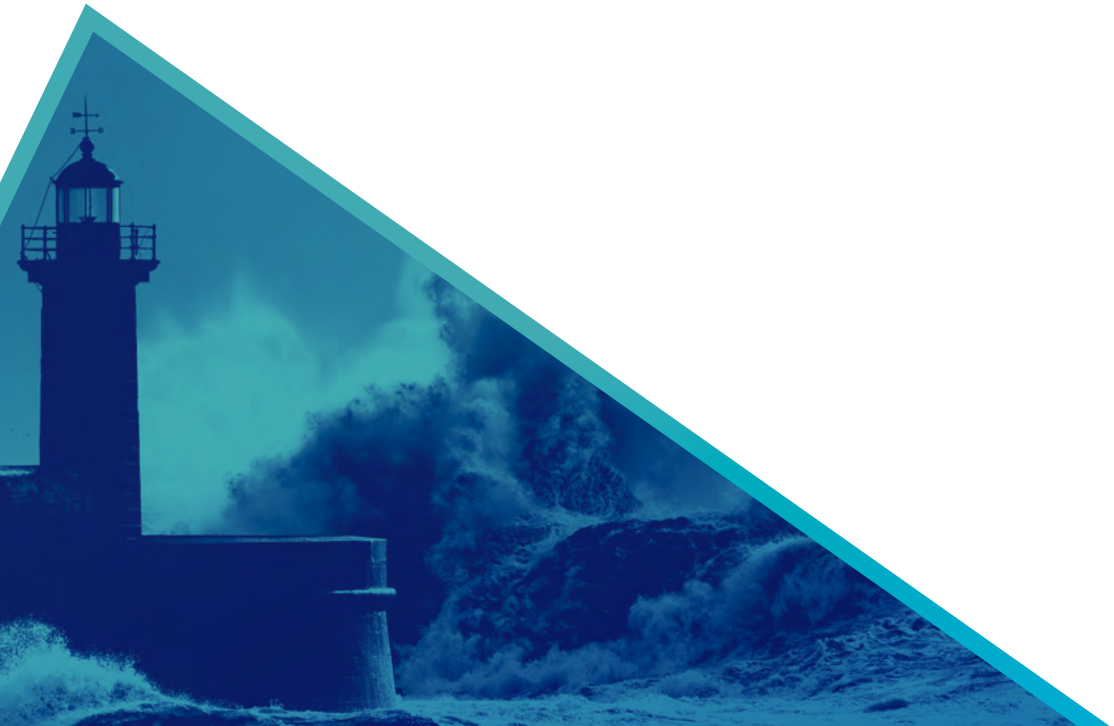
As we enter the month of public holidays and various religious celebrations and observations, the chilly weather reminds us that winter is not so far away. As with all seasons, April has come with highs and lows, both in the insolvency space as well as in the general news arena.

In acknowledging one of the greatest lows experienced in the sector in the last few weeks, we would like to recognise the devastating news of Mr. Cloete Murray and his son, Thomas Murray's, untimely deaths, and the effect this has had on the insolvency sector and the South African public in general. A giant in the field of insolvency, Cloete Murray leaves a legacy in the sector and legal fraternity, and we would like to take this opportunity to extend our condolences once again to his family in this terribly sad time.

In other news, the pockets of South African consumers have yet again taken a hit as the Governor of the South African Reserve Bank, Mr Lesetja Kganyago, announced that the repo rate would increase from 7,25% to 7,70%, with the prime lending rate increasing from 10,75% to 11,25%. Notwithstanding that this decision has been made in an effort to curb inflation, the news has sent shockwaves through the country as many South Africans are already finding it difficult to repay loans and keep up with the ever-increasing cost of living.

We might, however, get some relief as the Competition Commission has recently found that consumers have been subjected to unjustified and opportunistic pricing in essential food items such as maize meal, bread and sunflower oil between 2021 and 2022. The Commission has also launched an inquiry to assess if there are any features impeding competition in the fresh produce market. These developments confirm the Commission's sentiment that food price monitoring will remain a priority given its importance to the welfare of South Africans.



Adding insult to injury, in recent news we saw Gledhow Sugar Mill in KwaDukuza – which is a supplier of refined sugar to manufacturers in various markets in Southern Africa – entering voluntary business rescue. This follows the well reported Tongaat Hulett business rescue proceedings which began in October 2022. The financial strain experienced by the sugar mills in South Africa signals a concerning trend in the sugar market and an uncertain future for the entire North Coast sugar industry.

Taking a look at international trends, various companies such as Google, Amazon, Twitter and Microsoft, to name a few, have conducted mass layoffs in response to financial constraints and fears surrounding a global economic slowdown. McDonalds has also recently announced that it will be conducting layoffs of hundreds of employees. Reports show that roughly 121,205 employees have been left jobless by these retrenchments. Only time will tell if this trend makes its way to South African shores but, should this be the case, companies in financial distress are advised to consider their options available in the restructuring space while there remains a positive prospect of rescuing the business.

In this month's edition, Mongezi Mpahlwa, Claudia Moser and Buhle Duma discuss the recent judgment of *Smith N O and Others v Master of the High Court, Free State Division, Bloemfontein and Another* (1221/2021) [2023] ZASCA 21, which answers the question of whether the duty of examining witnesses in insolvency enquiries is a power held only by the Master of the High Court.

In addition, Sammy Ndolo looks at the case of *Cytonn High Yield Solutions LLP (in Administration) v Official Receiver (2023) KEHC 16 (KLR)*, which considers the appointment of an administrator and the role that they play in the administration of a limited liability partnership.

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SOUTH AFRICA

Insolvency enquiries: Who may examine witnesses?

Insolvency enquiries envisioned under section 417 and 418 of the Companies Act 61 of 1973 (Act) are convened either by the court or the Master of the High Court (Master). Typically, such enquiries provide a useful method for liquidators to obtain the necessary information from relevant parties to assist them in winding up the affairs of a company.

In the recent judgment handed down by the Supreme Court of Appeal (SCA),namely the case of *Smith N O and Others v Master of the High Court, Free State Division, Bloemfontein and Another* (1221/2021) [2023] ZASCA 21, the role of the Master in insolvency enquiries was unpacked. In particular, the SCA dealt with the question of whether the Master, and only the Master, may examine witnesses.

Background

The appellants were appointed as joint liquidators of BZM Transport (Pty) Ltd (BZM), which was liquidated following failed business rescue proceedings. The respondent, Mr Engelbrecht, was the CEO of BZM before its liquidation. The liquidators complained that Engelbrecht failed to provide them with the relevant financial information and agreements necessary for them to wind-up the company.

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Insolvency enquiries: Who may examine witnesses?

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As a result, the liquidators applied to the Master to convene an enquiry into the business affairs of BZM in terms of section 417 of the Act. Engelbrecht was summoned to appear before the enquiry which was presided over by the Assistant Master. Engelbrecht's legal representative protested against the proceedings, stating that "*only the Master*" and "*no one else*" was authorised to interrogate witnesses. The Assistant Master dismissed this contention and continued with the enquiry, resulting in Engelbrecht making an application to the High Court to review and set aside the enquiry on the basis that only the Master had the requisite authority to interrogate witnesses, and not the liquidators.

The High Court agreed with Engelbrecht, reviewed the enquiry, and set it aside. The liquidators appealed this decision to the SCA.

Insolvency enquiries in terms of the Companies Act

Section 417 of the Act makes provision for a private enquiry into the trade, dealings, affairs or property of an insolvent company unable to pay its debts. At any time after a winding-up order has been made, including a provisional winding-up order, the court or the Master may summon a wide range of people who the Master or court deem capable of giving information regarding the affairs of the company. The Master or the court may also examine any person summoned above under oath or affirmation.

Section 417 must be read with section 418 of the Act, which makes provision for a magistrate or any person appointed by the Master or the court to act as a commissioner for the purpose of taking evidence or holding any enquiry under the Act in connection with the winding-up of any company. The Master and the court, may in accordance with this delegation of power, refer the whole or any part of the examination of any witness or of any enquiry held in terms of the Act to any such commissioner. The Master, the liquidator or any creditor, member or contributory of the company shall be entitled to interrogate any witness during the proceedings. The section provides that a commissioner shall in any matter referred to him, have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master or the court which appointed him.

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Insolvency enquiries: Who may examine witnesses?

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In the SCA

The liquidators argued that based on the language and history of the section, the word *"may"* is directory rather than peremptory, and accordingly the Master or the court has a discretion on how to conduct the enquiry.

Engelbrecht argued that sections 417 and 418 are two distinct provisions under which an enquiry may be conducted. His argument was that the Master did not delegate his authority to a commissioner, as the case would have been had the enquiry been conducted under section 418. Since the subpoena summoning him to appear only made mention of section 417, he argued section 418 was not applicable. Accordingly, only the Master could question witnesses, and the Assistant Master should not have allowed questioning of witnesses by the liquidators.

The court held that when interpreting legislation, a narrowly textual and legalistic approach is to be avoided. The provisions should be considered in terms of the language used, the context, its purpose and its practical effect. By placing *"only"* before *"the Master or court may examine"*, Engelbrecht adopted restrictive language, not appropriate to statutory interpretation. After weighing up all the factors, the court found that sections 417 and 418 are complementary provisions and should be read together as they provide a dual method for holding an insolvency enquiry. Since the enquiry is quasi-judicial in nature, the Master determines the witnesses to be called, the manner in which evidence is given and how to conduct the enquiry. The fact that section 417 does not specify who may interrogate witnesses is of no import as, when read together with section 418, it is clear the Master can delegate this power to the liquidator or any creditor, member or contributory of the company.

Importantly, the court held that, when a section 417 enquiry is established, the liquidators, the court or the Master may not know the intricate details of the company. It is for this reason that the legislature envisioned that a person who has the knowledge may question a particular witness, and to say that section 417 only allows for the Master to examine a witness would be inconsistent with its purpose.

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Insolvency enquiries: Who may examine witnesses?

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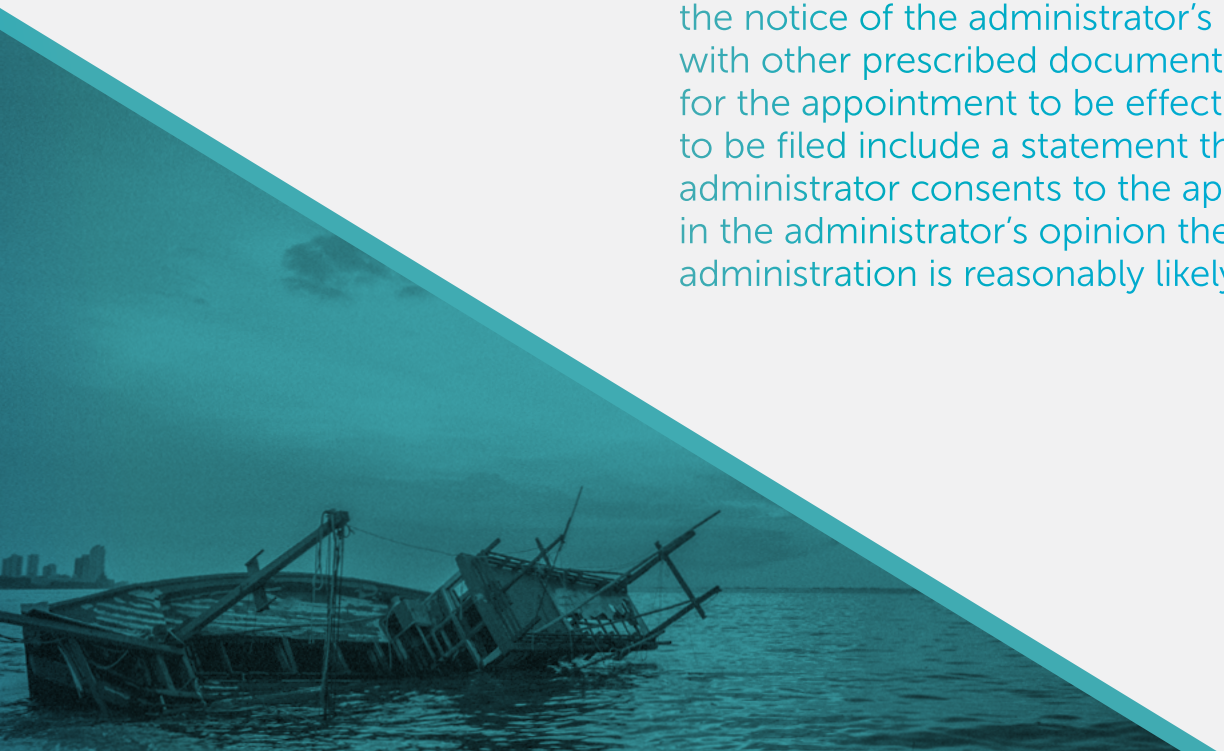
Accordingly, the appeal was upheld with costs and the order of the High Court was set aside.

This case illustrates the importance of interpreting a statutory provision in accordance with the purpose of the provision, as without considering its purpose, the interpretation thereof would be illogical. The bedrock of insolvency enquiries is to safeguard the interests of creditors and to ensure that directors of insolvent companies are held to the strictest standard of transparency. Accordingly, the Master (or the court) can delegate his powers to any person(s) whom (the Master or the court) deems appropriate within the confines of the Act in order to accomplish the purpose of such enquiries.

Mongezi Mpahlwa, Claudia Moser and Buhle Duma

KENYA

Insolvency administrator's burden



The role of an administrator was brought into sharp focus recently in the case of *Cytonn High Yield Solutions LLP (in Administration) v Official Receiver* [2023] KEHC 16 (KLR), which involved the administration of a limited liability partnership that was unable to repay certain investments that had matured. An administrator may be appointed by, among others, the company (this is defined in the Insolvency Act of 2015 to include a limited liability partnership) or its directors, and the appointers file the notice of the administrator's appointment together with other prescribed documents with the High Court for the appointment to be effective. The documents to be filed include a statement that confirms that the administrator consents to the appointment and that in the administrator's opinion the objective of the administration is reasonably likely to be achieved.

The administrator must give prior consent to their appointment and it will invariably be the case that the person appointing the administrator will inform the administrator about the state of the company and their proposed appointment before it occurs. In the *Cytonn* case, although the nature of the administrator's alleged dealings with the company were not elaborated upon, the ruling suggests that extra care must be taken to disclose to the court engagements leading to the appointment to avoid imputation of bias.

The Insolvency Act, 2015 grants an administrator numerus duties and powers, including the administrator's ability to remove and appoint directors or to consent to the performance of management functions by directors. In performing

KENYA

Insolvency administrator's burden

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their work, the administrator must do so in the interests of the company's creditors as a whole while remembering their primary objectives (i) to maintain the company as a going concern; (ii) to liquidate the company if such maintenance is not possible and if it achieves a better outcome for the company's creditors as a whole; and (iii) to realise the property in order to make a distribution to the secured or preferential creditors if the first two objectives cannot be achieved.

A creditor who is unhappy with the administrator can apply to court for the removal of the administrator on an allegation of improper motive. Improper motive should only be alleged on the part of the person who appointed the administrator or, in the case of an administrator appointed by the court, on the part of the applicant for the order.

The ruling in the *Cytonn* case indicated that the administrator was appointed by the company and not by the court, but, this notwithstanding, the allegations of improper motive were successfully made against the administrator with the court finding that "*improper motive*" is achieved when administration is carried out in a way that defeats the purpose of the administration. In the court's view, the purpose of administration is defeated when it reaches the conclusion that nothing substantial has been done or there is perceived complacency in achieving the objectives of administration within the 12 months prescribed for administration.

Despite the shortcomings that arise from the ruling in the *Cytonn* case, it points to an increased demand and burden on an administrator to resolve and conclude the administration processes within the prescribed 12-month period, or to demonstrate that they have done all that could be done to warrant an extension of the administration. It is likely that an appeal will be made against the ruling given the thorny path that was followed to order the liquidation of the company following expiry of the administration.

Sammy Ndolo

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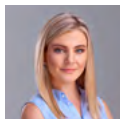

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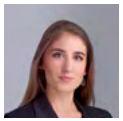

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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