Interrogation proceedings in insolvency law: a comparative study

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Declaration

I hereby declare that the thesis submitted for the degree LLD: Insolvency Law, at North-West University - Potchefstroom Campus, is my own original work, has been text-edited in accordance with the requirements and has not previously been submitted to any other institution of higher education. I further declare that all the sources cited or quoted are indicated and acknowledged by means of a comprehensive list of references.

MB Mwelase 19 November 2018.

Signature Date

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ABSTRACT

Interrogation Proceedings in Insolvency Law: A Comparative Study

Interrogation proceedings in insolvency circumstances have always been a thorny issue in South Africa, even prior to the advent of the new constitutional democracy. After the adoption of the new *Constitution* in 1993, a number of court cases seeking adjudication on constitutional compliance came before our courts. The insolvency of both natural and juristic persons necessitates the employment of specified proceedings such as insolvency interrogations. The latter is done to enable an efficient and effective collection and collation of information that would assist in the administration, sequestration and winding-up of the affairs of the affected person. These proceedings are intended to benefit creditors of an insolvent (natural and juristic). The matters of *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996) (1); *Bernstein and Others v Bester* 1996 (2) SA 751 (CC); *Harksen v Lane* 1998 (1) SA 300 (CC; *De Lange v Smuts* 1998 (1) SA 736 (C) are still leading cases in relation to the constitutionality of interrogations in insolvency circumstances. The Constitutional Court has on a number of occasions, declared the interrogation proceedings in insolvency matters constitutional, with minor amendments on a case-by-case basis. The effect of these judgements is that, in every case in which an insolvent debtor has to undergo an interrogation process, the presiding officer must ensure that compliance with the constitutional requirements are in place.

The current position in which the sequestration of insolvent estates and the winding-up of insolvent companies are respectively regulated by two statutes, is a matter for concern. This situation has led to duplication and contradictions in the two statutes.

Further, the absence of specialist tribunals or officers dedicated to the administration of insolvency related matters is a further hurdle to the effective and efficient finalisation of the affairs of insolvent estates or insolvent companies' affairs. The matter of Leong comes to mind. In this case, the Master of the High Court issued a warrant of arrest for a witness who was subpoenaed to appear at the meeting of creditors in his insolvent estate. This was the case, despite the fact that

Leong had previously submitted a medical certificate to the effect that he was unable to attend the meeting due to illness. This case is a clear indication of a lack of proper guidelines to deal with insolvency related matters - for non-judicial officers (such as the Master of the High Court). This incident took place in 2016, long after the decision in *De Lange v Smuts* 1998 (1) SA 736 (CC).

Interrogation processes in insolvency circumstances in Namibia and Botswana are almost similar to South Africa's processes. Divergent provisions in Namibia and Botswana exist, but not to a great extent. Like South Africa, the above-mentioned jurisdictions adopted a constitutional democracy long before South Africa. One would have expected that interrogation proceedings in insolvency circumstances would be in line with human rights. Further, as is the case in South Africa, insolvency of natural persons and of juristic persons are regulated by two separate statutes in these jurisdictions.

This thesis investigates issues relating to the interrogation process in insolvency proceedings in the three SADC countries, namely South Africa, Namibia and Botswana. It compares the position to two foreign jurisdictions, namely England and Canada – as leading jurisdictions in human rights. Thereafter, suggestions on processes and methods of information gathering in line with human rights and in specialist tribunals will be made. In addition, recommendations for inclusion in a unified statute regulating insolvencies of both natural and juristic persons will be made. This will be done taking into consideration the economical and socio-political circumstances of South Africa and the SADC countries forming part of this thesis.

Keywords: insolvency, subpoena, summons, interrogation, public enquiries, private enquiries, Master of the High Court, UNCITRAL Model Law, ROSC, World Bank, European Court of Human Rights, European Convention on Human Rights, Canadian Charter of Rights and Freedoms 1982.

Uittreksel

Ondervragingsprosedures in Insolvensiereg: 'n Vergelykende Studie

Ondervragingsprosedures in insolvensie is nog altyd 'n sensitiewe saak in Suid-Afrika, selfs voor die ontstaan van die nuwe grondwetlike demokrasie. Nadat die 1993-Grondwet in werking getree het, was daar 'n aantal hofsake om klarigheid te kry rakende grondwetlike nakoming. Gespesifiseerde prosedures is noodsaaklik in insolvensie van beide natuurlike- en regspersone, insluitend insolvensie-ondervragings met die oog op die insameling en samestelling van inligting wat van hulp sal wees tydens die administrasie, sekwestrasie, en likwidasie van die sake van die geaffekteerde persoon. Hierdie prosedures beoog om die krediteure van die insolvente persoon (natuurlik en regspersoon) te bevoordeel. Die uitsprake in *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996) (1); *Bernstein and Others v Bester* 1996 (2) SA 751 (CC); *Harksen v Lane* 1998 (1) SA 300 (CC; *De Lange v Smuts* 1998 (1) SA 736 (C) is steeds toonaangewend rakende die grondwetlikheid, of gebrek daaraan, van ondervragings in insolvensie aangeleenthede. Die Konstitusionele Hof het op verskeie geleenthede insolvensie-ondervragingsprosedures grondwetlik verklaar, met geringe wysigings wat relevant was vir die spesifieke saak. Die gevolg van hierdie uitsprake is dat die voorsittende beampte moet verseker dat daar in elke saak waar 'n insolvente skuldenaar ondervrae moet word, aan die grondwetlike vereisted voldoen moet word.

Die gebrek aan 'n eenvormige insolvensiewet wat die insolvensie van beide natuurlike- en regspersone reguleer, lei tot die onnodige duplikasie en teenstrydigheid in die twee wette wat onderskeidelik die insolvensie van natuurlike- en regspersone reguleer. Die gebrek aan spesialis tribunale wat op die administrasie van insolvensie aangeleenthede toegespits is, is 'n verdere struikelblok in die effektiewe afhandeling van die sake van insolvente boedels of insolvente maatskappy aangeleenthede. Dit herinner aan die Leong-aangeleentheid. In hierdie saak het die Meester van die Hooggeregshof 'n lasbrief vir inhegtenisname uitgereik vir 'n getuie wat gedagvaar was om tydens 'n krediteure vergadering rakende sy insolvente boedel te verskyn. Die lasbrief is uitgereik ten spyte van die feit dat Mnr.

Leong vroeër 'n mediese sertifikaat ingedien het wat verklaar het dat hy ongeskik is om die vergadering by te woon, as gevolg van sy gesondheid. Hierdie saak is 'n duidelike aanduiding dat daar gebrekkige maatreëls bestaan vir nie-regsprekende amptenare (soos die Meester van die Hooggeregshof), oor hoe om insolvensie aangeleenthede te hanteer. Hierdie aangeleentheid het in 2016 plaasgevind, lank na die uitspraak in *De Lange v Smuts NO and Others* 1998 (1) SA 736 (CC).

Die ondervragingsprosedures in insolvensie aangeleenthede in Namibië en Botswana is soortgelyk aan die Suid-Afrikaanse prosesse. Uiteenlopende bepalings bestaan in Namibië en Botwana, maar nie genoegsaam nie. Soos in Suid-Afrika, het die bogenoemde jurisdiksies 'n grondwetlike demokrasie aangeneem lank voor Suid-Afrika. Mens sou verwag dat insolvensie-ondervragings sou voldoen aan menseregte vereistes. Net soos in Suid-Afrika, word insolvensie van natuurlike- en regspersone deur twee afsonderlike wetgewings gereguleer in hierdie jursidiksies.

Hierdie verhandeling ondersoek aangeleenthede rakende die ondervragingsproses tydens insolvensie prosedures in die drie SADC lande, naamlik Suid-Afrika, Namibië en Botswana. Dit vergelyk die posisie met twee buitelandse jurisdiksies, (naamlik Engeland en Kanada – as vooraanstaande jurisdiksies in menseregte) en stel prosesse en metodes van inligtingsinsameling in lyn met menseregte, en spesialis tribunale, voor. Verder sal aanbevelings gemaak word vir die insluiting van 'n eenvormige statuut wat insolvensie van beide natuurlike- en regspersone reguleer, soos toepaslik vir Suid-Afrika en die SADC lande wat deel vorm van hierdie verhandeling.

Sleutelwoorde: insolvensie, getuiedagvaarding, dagvaarding, ondervraging, openbare navrae, Meester van die Hooggeregshof, UNCITRAL Model Law, ROSC, Wêreldbank, Europese Hof vir Menseregte, Europese Konvensie oor Menseregte, Kanadese Handves van Regte en Vryhede 1982.

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LIST OF ABBREVIATIONS

BIA	Bankruptcy and Insolvency Act
EIA	English Insolvency Act
Legislative Guide	UNCITRAL Legislative Guide on Insolvency Law
LRDC	Law Reform and Development Commission
OSCOLA	The Oxford Standard for Citation of Legal Authorities
ROSC	Report on Observance of Standards and Codes: World Bank
SADC	Southern African Development Community
SALC	South African Law Commission
SALRC	South African Law Reform Commission

Chapter 1: Interrogation proceedings in insolvency law: A comparative study

1 Introduction

This thesis seeks to investigate the divergent developments of interrogation proceedings in the insolvency law of certain Southern African Development Community (SADC) countries, such as Namibia, Botswana and South Africa. Furthermore, how these developments have contributed to more effective information gathering processes regarding the administration of insolvent estates.[1] Part of this investigation focuses on the aspect of whether or not these developments are in line with human rights and best practices. England and Wales (a single jurisdiction) and Canada,[2] as two leading systems, and the *European Convention on Human Rights* will be points of reference as far as Southern African compliance with these aspects is concerned.

The interrogation proceedings of South Africa, Namibia and Botswana, which are trading partners in the SADC, will be measured against these examples of best international practice with a view to proposing measures to strengthen the region's insolvency procedures in general and this important procedure in particular. The SADC initiative to promote trade and economic development, if successful, will result in increased trade and therefore higher levels of risk associated with the credit market. Confidence in the legal system of one's trading partners is thus imperative. Creditors and investors need to feel assured that effective procedures for the gathering of information (with respect to assets and finances of the insolvent) through interrogation in cases of insolvency are in place.

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1 Therefore, this investigation is a continuation and expansion of research the writer undertook in her LLM Dissertation. See Mwelase *Insolvency Interrogations.*

2 In my opinion, these jurisdictions have the most highly developed insolvency law systems in the world.

It would almost be impossible for a modern state to be self-sufficient and sustainable. Inter-state trade is inevitable, and it can occur only if clearly articulated rules, processes and procedures relating to debt collection and insolvency are in place.[3] Trade arrangements can function effectively if supported by clearly articulated laws and regulations that accord with international and regional legislation.[4] Inter-state trade also involves private persons, who demand protection from the states of which they are citizens. Clearly articulated financial legislation and insolvency law processes such as interrogations should therefore be accessible to investors. Erasmus states that transparency is amongst the valuable characteristics of rules and procedure-based arrangements, and that it is crucial for states to "provide for transparent domestic arrangements and for legal certainty" in order to attract foreign investment.[5] He further submits that transparency is crucial to enable citizens and companies to enjoy the benefits of debtor remedies[6] such as liquidation and sequestration.[7] The former and the latter relate to collective debt measures, necessitating interrogation of the debtor and other persons of interest on the financial affairs of the debtor in insolvency circumstances.

It is clear that the role of insolvency law in the economic development of a country cannot be denied.[8] Economic development often depends on the credit market, hence the need for the regulation of processes in the event of one failing to meet one's liabilities resulting from credit transactions. According to Garrido, "insolvency law serves several important functions in an economy. It is a useful instrument to reallocate assets to more productive uses, and an appropriate reorganisation or debt-restructuring framework providing instruments to preserve valuable businesses under distress".[9] Regarding the former, effective interrogation of

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3 The World Bank Principles for Effective Creditor/Debtor Regimes 11.
4 See Erasmus 2009 *Namibian Law Journal* 29.
5 Erasmus 2009 *Namibian Law Journal* 33.
6 Erasmus 2009 Namibian Law Journal 33.
7 See The World Bank Principles for Effective and Creditor/Debtor Regimes 11.
8 See Garrido 2013 *The World Bank Review* available at http://dx.doi.org/10.1596/978-1464800375 ch 4. Also see LRDC *Discussion Paper on Issues Relating to the Insolvency Act, 1936* (Act No 24 of 1936) 32 at 36.
9 See Garrido 2013 *The World Bank Review* available at http://dx.doi.org/10.1596/978-1-4648-0037- 5 ch 4. Also see LRDC *Discussion Paper on Issues Relating to the Insolvency Act, 1936* (Act No 24 of 1936) 32 at 36.

relevant persons in cases of insolvency may assist in unearthing concealed assets as well as devious conduct by certain persons as far as the financial affairs of the insolvent are concerned.

It is a common occurrence that assets are often concealed by a debtor foreseeing potential insolvency, it is for these reasons that such person and other persons who were in control of the assets of a company are interrogated to establish the whereabouts of these assets. Concerning the preservation of businesses in distress, it should be noted that the interrogation measures do not apply in cases of business rescue proceedings. This is the case despite the provisions of section 141 of the 2008 *Companies Act,*[10] empowering a Business Rescue Practitioner to investigate the affairs of a company in financial distress.[11]

The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law[12] provide useful guidelines as far as modern insolvency processes are concerned. Accordingly, the possession of a modern insolvency system is the basis of viable economic development.[13] It is for this reasons that effective interrogation processes in the insolvency system should be prioritised.[14] Part of the strengthening of the interrogation processes should involve specialised training for office holders, specifically those presiding at interrogation proceedings[15] to ensure the credibility and efficiency of information gathering processes.[16] This aspect is crucial for the maintenance of public confidence in the interrogation process as a tool for an efficient administration of the affairs of an insolvent or a

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10 Hereinafter the 2008 *Companies Act.*

11 See also Delport The New *Companies Act* Manual 145.

12 Hereinafter the UNCITRAL Guide.

13 The World Bank Principles for Effective Insolvency and Creditor Rights System 4; UNCITRAL Legislative Guide on Insolvency Law 10; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 4-5.

14 See Johnson and Meyerson 2012 *USAID* 2 regarding the consequences of an unregulated system.

15 Hopefully in the court structures or tribunals specializing in insolvency related matters which are to be created by legislation. See chapters 6 and 7 below on specialist insolvency tribunals as created by legislation.

16 See Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 2.

company in liquidation.[17] The general view amongst insolvency writers is that insolvency law is the most pivotal "indicator of attitudes of a legal system and arguably the most crucial of all legal disciplines."[18] As far as the international community is concerned, insolvency laws and systems are acknowledged as key for the development of the credit markets and business enterprises in developing countries.[19]

According to the World Bank[20]

> [a] modern credit-based economy should facilitate broad access to credit at affordable rates through the widest possible range of credit products (secured and unsecured) inspired by a complete, integrated and harmonized commercial law system designed to promote: reliable and affordable means for protecting credit and minimizing the risks of non-performance and default; reliable procedures that enable credit providers and investors to more effectively assess, manage and resolve default risks and to promptly respond to a state of financial distress of an enterprise borrower; a consistent policy governing credit access, property rights, credit protection, credit risk management and recovery, and insolvency through laws and regulations that are compatible procedurally and substantially.

The UNCITRAL Legislative Guide on Insolvency Law is a starting point for countries wishing to prepare new laws and regulations or to review their existing insolvency laws in accordance with the current trends in international trade.[21] Although all countries' financial systems operate independently and according to their domestic needs, they interact with the systems of their trading partners.[22] Southern Africa is not an island and operates in a global arena. It would be helpful if the region were to adopt international best practices,[23] as far as the gathering of information in insolvency circumstances is concerned. Further, it serves the interest of the economy and society if insolvency problems are solved fairly and efficiently, thus

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17 See Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South* Africa 2.

18 Wood Law and Practice of International Finance 1.

19 UNCITRAL Guide 10. See also Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 5.

20 Principles for Effective Insolvency and Creditor Rights System 11. See also *Calitz A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 141.

21 UNCITRAL Guide 1.

22 UNCITRAL Guide 15. Also see Wessels *International Insolvency Law* 3; also see Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 142.

23 Also, see Mbeki "We face the future with confidence" Vol No 1. 9-15 (January 2004) available at http://www.anc.org.za/docs/anctoday/2004/at47.htm; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 52.

limiting the time frame within which funds are released from insolvents into the economy, especially in difficult economic times, to generate growth.[24] It is thus important for all trading countries to have strong and effective insolvency processes to collect and collate information on the financial affairs of the insolvent. These processes should also encourage persons facing inevitable insolvency to come forward and declare an honest account of their financial affairs.[25] These disclosures should be done before an officer presiding at insolvency interrogation proceedings. In this regard, insolvency interrogation systems that are in line with human rights play a significant role in the collection of information for an efficient administration of the insolvent's affairs.[26] Tracing and gathering of assets is important for the effective functioning of an insolvency system. These processes can also be beneficial in cross-border situations. If investigations are conducted in line with transparent and constitutional procedures and by suitably qualified persons, interrogations can be beneficial to creditors and that would be in the public interest.[27]

The economies of South Africa, Namibia and Botswana are linked through inter-state and cross-border trade. Therefore, it would not be illogical to recommend the harmonisation of the insolvency laws in this region and as a result, also the information gathering procedures.

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24 See South African Law Reform Commission 2000 *Report on the Review of the Law of Insolvency*: Draft Insolvency Bill and Explanatory Memorandum (Project 63) at para 2.4. See also Zulman *Developments in South African Insolvency* Law 1-9.

25 UNCITRAL Guide 12-13.

26 See in general World Bank Report on Observance of Standards & Codes: *Insolvency and Creditors/Debtor Regimes.*

27 See also Keay "Insolvency Law: A Matter of Public Interest" 2000 *Northern Ireland Legal* Quarterly 525; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 293.

2 Problem statement

2.1 The South African perspective[28]

Interrogation[29] proceedings in insolvency law are a process through which information is gathered regarding the assets of an insolvent person or insolvent company, the insolvent's inability to pay his or its creditors, the reasons leading to such inability, the insolvent's assets, creditors and debtors, and so forth. An insolvent is obliged to go through the interrogation process to assist the trustees (or liquidators in the context of an insolvent company) of his,[30] insolvent estate. This will enable the trustees (the liquidators) to collate as much information as possible regarding the insolvent's estate and or company's affairs, which process takes place outside of the court structure.[31] It is inevitable that conflict will arise between the interests of an insolvent (or witness) and those of creditors in the implementation of the information collection process. Often, the interrogation is a cause of disagreement. In order to balance the interests of the participants involved, it is necessary that clear guidelines be put in place as to the capacity and scope of those entrusted with the duty to conduct these proceedings. This might limit the number of legal challenges and uncertainties relating to the process. South Africa is a member state to the UNCITRAL and her financial system was subjected to the

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28 See in general Mwelase *Insolvency Interrogations.* This dissertation dealt with the constitutionality of interrogation proceedings in terms of s 64, 65, 66 and 152 of the *Insolvency Act* 24 of 1936, hereinafter "South Africa's *Insolvency Act*". The corresponding sections 414, 415, 416, 417 and 418 of the *Companies Act* 61 of 1973, hereinafter "the 1973 *Companies Act* of South Africa" were touched on, in so far as these sections deal with interrogations in the context of companies unable to pay their debts. This research is an extension of that research in that this thesis will also look at liquidation procedures in all the countries referred to. It will therefore sometimes lean heavily on the viewpoints expressed in the dissertation.

29 For the purpose of this research, the verbs "interrogate" and "examine" will be used interchangeably in both the South African *Insolvency Act* and the Botswana *Insolvency Act,* 1929 (hereinafter "the *Insolvency Act* Bots") the verb "interrogate" is used. In the Namibian *Insolvency Act,* 2005 (hereinafter "the *Insolvency Act* Nam") the verb "examine" is used. In England and Wales (as a single jurisdiction) *Insolvency Act* Ch 45 of 1986, (hereinafter "the *EIA*") the verb "examine" is used and in the Canadian *Bankruptcy and Insolvency Act* RSC 1985 c B-3, (hereinafter "the *BIA*") the verb "examine" is used.

30 For the sake of convenience, the generic pronoun "he" will be used throughout this research to refer to both genders.

31 It takes place at meetings of creditors in terms of s 64, 65 and 66 (and privately in terms of s 152) of South Africa's *Insolvency Act* and s 414, 415 and 416 (and privately in terms of s 417 and s 418) of the 1973 *Companies Act* of South Africa.

ROSC[32] analysis by the World Bank.[33] It would be prudent that the recommendations of UNCITRAL and ROSC are adopted.

South Africa has no dedicated insolvency courts or tribunals and the information gathering process is almost entirely supervised and administered by the Master of the High Court. At the core of this process is the legislative desire that creditors of the insolvent estate or insolvent company are disadvantaged as little as possible and receive a portion, if not all, of what they are owed. It is inevitable that some creditors might not be paid and others might receive little. South Africa's *Insolvency Act* attempts to ensure that the interest of the creditors as a group enjoys preference over the interests of individual creditors and over the interest of the insolvent.[34]

While the provisions of insolvency law may appear to protect the creditors' interests, they also relieve a debtor to some extent by ensuring that he is not perpetually harassed by his creditors.[35] However, what is of the utmost importance is the advantage to creditors and a reasonable prospect that sequestration (or liquidation) will result in some pecuniary benefit to them.[36] These principles are designed to achieve fairness by ensuring that creditors as a group, as well as those holding similar legal rights against the debtor and his assets, are afforded equal protection by the law. Therefore, the liquidation of the debtor's assets and the consequent distribution of the proceeds should result in at least "equal settlement" among his

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32 Report on the Observation of Standards and Codes for Banking Supervision and Payment and Settlement World Bank Publications: Principles and Guidelines for Effective Insolvency and Creditor Rights Systems ("Principles").

33 The full report is currently confidential and unavailable. One would, however, assume that the recommendations are the same as those recommended for Namibia, see cha 4 above where this aspect is discussed.

34 See *Kebble v Gainsford* 2010 (1) SA 561 (GSJ); *Kawie v The Master of the High Court* (WC) (unreported) case number 21353/2011 of 3 November 2011; Bertelsmann *et al Mars on Insolvency Law;* Sharrock *et al Hockly's Insolvency Law* 4.

35 See for example 129(1)(b) of the *Insolvency Act*; Ex parte Pillay 1955 (2) SA 309 (N) 311; Ex Parte Ford; South African Law Reform Commission 2000 Report on the *Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (Project 63) at para 4.6; See Smith *The Law of Insolvency* 4; See Bertelsmann *et al Mars on Insolvency law* 3 for a different opinion in this regard.

36 See *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D); Ex *parte Kelly* 2008 (4) SA 615 (T) 617.

creditors.[37] Significant advantage to creditors will be gained from the proper investigation of the affairs of the insolvent, especially where it appears that the insolvent has failed to disclose certain assets.[38] Hence, creditors are afforded the opportunity to interrogate the insolvent.[39]

It must be pointed out that the advantage to creditors depends not only on the extent of the free residue in an insolvent estate, and the dividends to be earned upon liquidation of the assets, and distribution to creditors, but on the employment of the machinery of South Africa's *Insolvency Act* and the 1973 *Companies Act*. Latter statutes permits the interrogation and investigation of an insolvent's personal finances.[40] Generally, a less costly and more effective liquidation process will pay higher dividends to creditors, thus minimizing losses.[41] Furthermore, interrogation proceedings may reveal that the insolvent ended up in this predicament through no fault of his own and/or perhaps due to his unfamiliarity with the commercial world, or through dishonest actions.

Apart from relevant legislation, judgments of our high courts (including the Constitutional Court) and our common law principles are also relevant to

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37 Section 6 (1) of the *Insolvency Act* provides that the court will grant an order for the sequestration of the debtor's estate only if this will be to the advantage of all the creditors in the insolvent estate in the order of preference. The main purpose of sequestration (as opposed to an individual creditor proceeding against the assets of the debtor to satisfy his debt) is to ensure that every creditor receives what is due to him in an orderly and equitable manner, that is a due distribution of the proceeds among creditors in the order of their preference, as prescribed by the *Insolvency Act*. See *Kebble v Gainsford* 2010 (1) SA 561 (GSJ); Bertelsmann *et al Mars on Insolvency Law* 3; Sharrock *et al Hockly's Insolvency Law* 4. It must be noted that the advantage of creditors is actually only a formal requirement for sequestration in terms of the *Insolvency Act*. Trustees and liquidators are tasked to trace and gather the debtor's assets – they need interrogation procedures to assist in this regard.

38 See in general for example *Advanced Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 T; *Mitchell v Hodes* 2003 (3) SA 176 (C); *Huang v Bester* [2012] ZAGPJHC 111; *Miller v Nafcoc Investment Holding Company* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011 (4) 102 (SCA); *Nyathi v Cloete* 2012 (6) SA 631 (GSJ); *Huang v Bester* [2012] ZAGPJHC 111; *Kebble v Gainsford* 2010 (1) SA 561 (GSJ).

39 *Richter v Riverside Estates* Ltd 1946 OPD 209-223; *Ram Transport v Replication Technology Group* [2011] 2 All SA 628 (GSJ); *Nyathi v Cloete* 2012 (6) SA 631 (GSJ). See also Kunst *et al Meskin Insolvency Law and its operation in winding-up* 8-8(1) (hereinafter "Kunst *et al Meskin Insolvency Law*"); Bertelsmann *et al Mars on Insolvency Law* 2.

40 *Gilfillan v Bowker* [2012] ZAECGHC (4) SA 465 (ECG).

41 See Johnson and Meyerson 2012 *USAID* 9.

interrogation proceedings.[42] It should be noted that the rules governing the sequestration of estates of individual debtors under South Africa's *Insolvency Act* apply as they do to insolvent companies under winding-up.[43] The procedures under the two laws are similar.

The recommendations of UNCITRAL for unified legislation regulating the insolvencies of individuals and corporations is that there should be one harmonized statute. It is also one of the recommendations in the *Draft Insolvency Bill,*[44] that insolvency provisions for all corporate and individual insolvencies be unified. Among the reasons advanced by the Standing Advisory Committee on Company Law for a Unified Insolvency Law are:

> (1) that a unified statute is more user-friendly, especially for foreigners like prospective foreign investors;
> (2) that corporate insolvencies far exceed individual insolvencies in terms of value; and
> (3) that it is easier to make amendments to a single statute than to separate statutes administered by different ministries and considered by different portfolio committees.[45] It must be noted in this regard that the insolvency and liquidation proceedings of individuals and corporations are regulated under a single statute in most jurisdictions abroad. England and Wales, Germany, United States of America, Scotland and Canada are amongst these jurisdictions.

With regard to insolvency interrogations, sections 64, 65, 66 and 152 of South Africa's *Insolvency Act,* sections 414, 415, 416, 417 and 418 of the 1973 *Companies Act* of South Africa and Schedule 3 of the 2008 *Companies Act* are relevant. While the winding-up of solvent companies is regulated under the 2008 *Companies Act* of

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42 See Bertelsmann *et al Mars on Insolvency Law* 16; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 45.

43 This will be the case in respect to any matter not specifically provided for by the 1973 *Companies Act*. S 339 of the 1973 *Companies Act*. The latter statute will be in force until the proposed *Liquidation Act* is enacted. See item 9(1) of Schedule 5 of the *Companies Act* 71 of 2008, hereinafter the "2008 *Companies Act*".

44 *Insolvency Draft Bill* 2015 (an Unofficial draft - in the possession of the author) - Working Document of the Department of Justice. See South African Law Reform Commission 2000 *Report on the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum* (Project 63) www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf (date of use 10 Feb 2012). See also Boraine 1999 (January) *De Rebus* 66 67.

45 See South African Law Reform Commission 2000 Report on the Review of the Law of Insolvency: *Draft Insolvency Bill and Explanatory Memorandum* (Project 63) www.justice.gov.za/ salrc/reports/r_prj63_insolv_2000apr.pdf [date of use 10 Feb 2012].

South Africa,[46] the winding-up of insolvent companies (liquidation) remains regulated under Chapter XIV of the 1973 *Companies Act* of South Africa until the proposed *Liquidation Act* is enacted.[47]

The scope of interrogation under these provisions is wide. Briefly, in the case of an insolvent estate, sections 64(1), (2) and (3) of the *Insolvency Act* provide for the summoning of the insolvent and any person who is known or upon reasonable grounds believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate, or which belongs or belonged to the insolvent estate or to the spouse of the insolvent, or who is believed to be indebted to the estate.

Section 65(1) provides for the interrogation of the insolvent and other witnesses concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate. Section 152 provides for the private interrogation of persons of interest in relation to the administration of insolvent estates by the Master of the High Court.

In the case of a company in liquidation, sections 414 to 416 of the 1973 *Companies Act* of South Africa provides for compulsory attendance of creditors' meetings by directors and officers of the company concerned, a public examination of directors and officers of such a company. Provision is also made for the punishment of uncooperative witnesses. Sections 417(1) and 418 of the 1973 *Companies Act* provide for the summoning and examination (in private) of any director or officer of the affected company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company.

Section 418 in particular makes provision for the examination (in private) of any person by a commissioner (often a magistrate or retired judge) for the purpose of making enquiries in relation to the affairs of an insolvent company.

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46 Section 80(1) of the 2008 *Companies Act*.
47 Item 9(1) of Schedule 5 of the 2008 *Companies Act*.

Certain provisions under sections 64, 65, 66 and 152 of the *Insolvency Act* and the corresponding sections 414, 415, 416, 417 and 418 of the 1973 *Companies Act* have already been challenged for constitutional invalidity in several court cases. The mandatory nature of sections 64, 65 and 66,[48] (and 414 to 418), which compels certain persons to attend meetings of creditors and to provide necessary information at insolvency proceedings, and the associated threat of incarceration for failure to comply, have been held to be in the public interest and thus necessary. See *Harksen v The Magistrate*, *Wynberg*,[49] *De Jager v Booysen and Swanepoel,*[50] *Pressey South Africa (Pty) Ltd v Reci Import Export (Pty) Ltd,*[51] *Pitsiladi v Van Rensberg,*[52] (and other recent cases to be discussed in this thesis) with regard to the provisions of sections 64 and 65 of the *Insolvency Act.*[53] With regard to the provisions of section 66(3), the court in *De Lange v Smuts*[54] highlighted that only a presiding officer who is a judicial officer in the court structures established by the 1996 *Constitution* is empowered to issue an order for the incarceration of a recalcitrant witness. The provisions of the sub-section were declared invalid and unconstitutional but only to the extent that they empowered a presiding officer at a meeting of creditors, who is not a magistrate, to commit a person to prison. The court found that the power to commit a recalcitrant witness to prison at insolvency hearings served an important public objective.[55]

The objectives of good insolvency laws include the promotion of honest administration of the insolvent's affairs for the equitable and efficient distribution of the assets among the creditors, who suffered losses because of the insolvent's insolvency.[56] It is generally accepted, therefore, that the associated deprivation of

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48 These three sections are interrelated in the sense that the provision compelling witnesses to attend meetings of creditors is immediately followed by a provision compelling them to answer questions thereat and the consequent punishment for failure to comply with s 64 and s 65. S 152 of the same statute is also relevant.

49 1997 (2) All SA 205 (C).

50 1963 (4) SA 760 (W) 764H.

51 (CPD) (unreported) case number 8818/1982 of 19 May 1983.

52 2002 (2) SA 160 (SEC).

53 See Mwelase *Insolvency Interrogations* 32.

54 1998 (1) SA 736 (C) para 57.

55 At para 33 and 40. See in general *Bernstein v Bester* 1996 (2) SA 751 (CC). Also, see Mwelase *Insolvency Interrogations* 70.

56 The World Bank Principles for Effective and Creditors/Debtor Regimes 2015 11. Also see Rajak

the examinee's freedom is justified in the circumstances.[57] However, clear guidelines (and scoping) should be in place for persons entrusted with the administration and supervision of the processes and procedures.

The *De Lange v Smuts* case should have put to an end the uncertainty surrounding the powers of the Master (or a presiding officer who is not a magistrate) to order the incarceration of recalcitrant witnesses. However, it still appears to be unclear to some Masters of the High Court when one can, and who can order the incarceration of recalcitrant insolvents or examinees. Given the fact that prior to the coming into effect of the *Constitution*, (and the decision in the *De Lange v Smuts* matter) a non-judicial officer, presiding at a meeting of creditors could order the incarceration of a recalcitrant witness, the coming into effect of the *Constitution* (and the decision in *De Lange v Smuts*) should have settled the controversy as far as the Master's powers are concerned. However, the fact that such legislative developments through case law occur outside of the Master's domain, poses challenges.[58] The Master may not always be up to date with new developments in law, in this case, in respect of insolvency interrogations and the associated guidelines. More than fifteen years after *De Lange v Smuts*, *the* court's intervention and guidance is still sought in this regard.[59]

In March 2016, at an interrogation, the Master ignored the principles set out in *De Lange v Smuts* and issued a warrant of arrest of an insolvent for failure to appear as subpoenaed.[60] The warrant was issued for the arrest of Leong despite the fact that a medical certificate had been presented. The Master failed to take into cognizance the provisions of section 67 of the *Criminal Procedure Act.*[61] This section grants an accused person a grace period of 14 days. The purpose is to allow him

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The culture of Bankruptcy 22; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 49.

57 Section 36 of the *Constitution*.

58 See also Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 264.

59 See the matter of Leong as discussed in the paragraph below as a basis for this argument.

60 Master ref O/G20876/2014. My opinion in this regard is also based on comments by various practitioners on how they struggle with the Master's office.

61 51 of 1977.

an opportunity to come forward and explain to the court the reasons for his failure to comply with the subpoenas. This matter and the opinion of *De Lange v Smuts* in such circumstances should be revisited.

The purposes of this research include investigating if any other provisions of the interrogation procedure have been declared constitutionally valid or invalid since 2005,[62] and precisely what impact the declaration might have on the purpose and effect of the interrogation procedure. If a provision has been declared invalid, the focus will be on what has been put in its place, and whether or not the new provision is in line with the *Bill of Rights* and best practice, as reflected by the English and Canadian systems.

It will also be asked if these interrogation proceedings ensure certainty, accountability, and the promotion of international investment. A very important question is how South Africa (as well as Namibia and Botswana) fare with respect to interrogation proceedings as trading partners in the SADC region, in comparison with the English and Canadian jurisdictions; in as far as, human rights and the *European Convention on Human Rights* are concerned.

2.2 The Namibian perspective

Since Namibia was under South African administration prior to its independence, it is only natural that the legal systems of these two countries would be rather similar. In 1919, the Roman-Dutch law was declared the common law legal system of Namibia, and it still is today.[63] After 1990 and the coming into force of the Namibian *Constitution*, the legal system in this jurisdiction developed to accommodate the new dispensation. As in South Africa, the Namibian *Constitution* and *Bill of Rights* have become the yardsticks against which the validity of all laws is measured.[64]

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62 As of the date of my LLM dissertation: Mwelase *Insolvency Interrogation.*

63 Boraine 2010 *Obiter* 414-427.

64 See LRDC Discussion Paper on Issues Relating To The *Insolvency Act,* 1936 (Act No 24 of 1936) 32 2015.

Although Namibia has progressively strived to develop laws unique to its social and political dispensation since independence, it has largely retained the provisions of South African law.[65] The South African *Insolvency Act* of 1936 is still regarded as the principal statute[66] and the main source of Namibian insolvency law. Precedents set by South African courts still have relevance in this jurisdiction.[67]

As further changes are taking place in Namibia, the Namibian insolvency legislation is gradually being modified to accommodate the new dispensation. In 2005, Namibia amended the 1936 *Insolvency Act* through the *Insolvency Amendment Act* of 2005. This former statute still regulates the insolvency of individuals. This gradual modification brought with it not so much of a move away from the South African provisions. The statute still looks pretty much like the 1936 South Africa's *Insolvency Act*. Changes brought about by the *Insolvency Act* Nam include those made to section 65 of the principal statute, which has been amended to bring it in line with the *Constitution of Namibia* by being gender friendly.[68] These changes will be discussed in chapter four below. Further, the 1973 *Companies Act,* as inherited from South Africa, was repealed in 2004 and replaced by the Namibian *Companies Act*.[69] This statute regulates amongst other matters the insolvency of companies and close corporations. It is, however, noted that like the *Insolvency Act* Nam, the *Companies Act* Nam still looks similar to South Africa's 1973 *Companies Act*. This research will look closely at the similarities and any differences between the above statutes. The focus will be on constitutional challenges to these provisions (if any) and the effects of such challenges. Again, the changes and challenges brought about by this statute will be dealt with in chapter four below.

For the purposes of this research, it is also important to investigate whether the Namibian insolvency law, with regard to interrogation (or examination) proceedings,

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65 See ch 4 below for jurisprudence in support of this view.
66 Section 1 of the *Insolvency Amendment Act* 12 of 2005 Nam.
67 See *JCL Civilis Namibia (Pty) Ltd v Steenkamp* (SA8/06) [2000] NASC (8 December 2006). Also see in general Corder (2014) LRDC 28: Review of Administrative Justice In Namibia Discussion Paper.
68 See s 65 second proviso to sub-secs (2) and (6).
69 28 of 2004, hereinafter "the *Companies Act Nam*."

has developed away from the South African position. If that is the case, whether this development will have any effect on trade between South Africa and Namibia. In addition, whether South Africa, Botswana and even the greater region can learn from this development to improve insolvency interrogation proceedings in their various jurisdictions. Case law will be analysed in this regard. As was the case with South Africa's financial system, (which insolvency law is a part of) Namibia's system was subject to a ROSC[70] analysis by the World Bank, and this country wants to reform[71] its laws, with insolvency law being no exception.

2.3 The Botswana perspective

As a former British Protectorate subsequently administered in terms of the common law of the Cape of Good Hope (South Africa),[72] it is only natural that Botswana's legal system[73] should be a hybrid of the legal systems of these two jurisdictions. One would assume that its insolvency legislation and consequent judicial decisions would be similar to South Africa, Namibia and English jurisdictions.

The adoption of the Botswana's *Constitution* in 1965 and consequently the country's independence in 1966 meant that this jurisdiction's legal system could develop independently to accommodate the new dispensation. One would assume that the validity of all laws in a constitutional state would be measured against its *Constitution*. Botswana is one of South Africa's major trading partners in the SADC region.[74] It is thus imperative to investigate its insolvency interrogation proceedings. For example, a South African creditor should know that if something goes wrong and his Botswana debtor's estate is sequestrated, he would have the opportunity to investigate the insolvent's affairs. The relevant interrogation processes would need to be transparent, convenient and efficient if they are to be of benefit to the creditor.

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70 Reports on the Observation of Standards and Codes by the International Monetary Fund, available at www.worldbank.org.

71 Through the Namibian Law Reform and Development Commission. See LRDC *Discussion Paper* on Issues Relating to the *Insolvency Act*, 1936 (Act No 24 of 1936) 32 viii.

72 From 1885 until its independence in 1966. See Booi *Botswana's Legal System and Legal Research* 2 also available at http://www.nyulawglobal.org/globalex/Botswana.html and as updated by Fombad.

73 Roman-Dutch law is the basis of South African law, which was also influenced by English law.

74 See http://www.sadc.int/news last accessed 1 March 2018.

As is the case with South Africa and Namibia, Botswana has two statutes regulating the insolvency of individuals and the other regulating the insolvency of juristic persons respectively. The proceedings for the examination of individual insolvents are regulated by sections 55, 56, 57 and sections 131 to 136 of the Botswana *Insolvency Act*.[75] The latter statute is in essence similar to South Africa's and Namibia's *Insolvency Acts*.

Taking a cursory glance into this jurisdiction's insolvency law, it appears as if there are some differences, and the question is what the real effects of these are. For example, under the Botswana insolvency regime any statement made in the course of examination may thereafter be indiscriminately used as evidence against the maker.[76] The question is how this provision affects the quality or credibility of the information provided.

It is submitted that as contrasted with South Africa and Namibia, Botswana seems *prima facie* to be harsher on the insolvent, and the status of bankruptcy is treated almost as if it were a criminal offence.[77] An investigation of how the *Constitution* and the fundamental rights are applied in this context in this jurisdiction will be conducted.

Regarding the winding-up of insolvent companies, the procedures for examining persons who are deemed to be in a position to provide relevant information is regulated by the Botswana *Companies Act*.[78] As in South Africa and Namibia, there are two statutes regulating the same aspect, and again as in South Africa and Namibia, the provisions regarding insolvency examination under the *Insolvency Act* Bots apply as they are to companies under liquidation as well, where this is not provided for in the *Companies Act* Bots.[79] A cursory glance at the *Insolvency Act* Bots and the *Companies Act* Bots indicate that the two statutes are similar in

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75 Chapter 42.02 of 1929, hereinafter "the *Insolvency Act* Bots".
76 See s 131 (2) of the *Insolvency Act* Bots.
77 See ss 143-146 of the *Insolvency Act* Bots.
78 This statute is cited as *Act* 32 of 2004 since it received Presidential Assent only on 2 September 2004, and came into force only on 3rd July 2007 with supplementary regulations.
79 See s 432 of the *Companies Act* Bots.

material respect to their South African and Namibian counterparts. However, the perusal of case law may reveal differences.

Because of their commonalities, South Africa, Namibia and Botswana can assist one another in the development of an effective information gathering process in insolvency proceedings, in line with best practice.

Unlike South Africa and Namibia, Botswana's system was not subject to a ROSC[80] analysis by the World Bank. Its legislation and case law will be analysed specifically with this in mind.

As in the cases of South Africa and Namibia, the Botswana system will be investigated to see if any of the provisions of the insolvency interrogation procedure have to date been declared valid or invalid by the courts. The effects of such declarations on trade between South Africa and Botswana will be investigated as well, keeping the possibility in mind that South Africa may be able to learn from this investigation.

3 Research question

Legal certainty requires the enactment of coherent legislative provisions regulating the insolvency interrogations of both individual debtors and of officers of insolvent entities. The legislation should contain clear guidelines to be followed when the interests of insolvents and creditors are in conflict. An effective and transparent insolvency system ensuring the protection of creditors' rights plays a crucial role in the economic stability of any country's financial and investment system. Countries' trade and trade arrangements can function effectively if supported by clearly articulated laws and regulations complying with best practices.[81] This research thus seeks to investigate the divergent developments in the insolvency interrogation proceedings of the countries identified above.

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80 Reports on the Observation of Standards and Codes by the International Monetary Fund, available at www.worldbank.org.

81 The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes 3.

It attempts to answer a question, which can be formulated as follows: How can the insolvency interrogation proceedings in Botswana, Namibia and South Africa be improved in order to contribute to a more effective information gathering process within these jurisdictions and even beyond, in the broader SADC region.

4 Research objectives and methodology

The objectives and methodology of this research can be summarised as follows:

•To examine the legal framework and the context within which the interrogation of insolvent and other persons of interest occurs in South Africa, Namibia and Botswana, in comparison to the situation in certain other jurisdictions.

•To study the relevant reported court cases with the object of elucidating the scope of the interrogation proceedings and identifying the underlying policies and principles in line with the imperatives of the *Constitution* and basic rights.

• To examine and contrast the local position with those of two other leading jurisdictions from outside the SADEC region for the purposes of illuminating the shortcomings in the local system, if any.

• To make recommendations where necessary for the improvement of the relevant legislation, chiefly with respect to South African legislation, but also with Namibian and Botswana's legislation in mind. It should be noted that recommendations will be given only in relation to South Africa. The research is already too long to cover recommendations on the other jurisdictions.

• The qualitative method of research would be used in this study. The reason being that this method is suitable for a literature study this research is going to take.

5 Delineation and limitations of the study

This work is subject to the following limitations, delineations and qualifications:

Insolvency law as a field of study is far too broad, it is for this reason that the scope of research for this thesis is limited to interrogations in insolvency circumstances for

natural and juristic persons respectively. The *Insolvency Act* of 1936 as the principal source of our insolvency law, the 1973 *Companies Act* and to a lesser extent, the 2008 *Companies Act* will provide the theoretical groundwork for this research study. Legislation of comparative jurisdictions will be studied as well for the purpose of informing conclusions and recommendations for this thesis. Recommendations will be made in relation to South Africa only.

6 Reference techniques

For convenience purposes, the masculine form of referring to a natural person is used throughout the thesis. The style of reference employed in this thesis is that applied in the *Potchefstroom Electronic Law Journal*. This is supplemented by *The Oxford Standard for Citation of Legal Authorities* (OSCOLA). Full details for sources of reference are found in the bibliography and not in the footnotes.

When reference is made to court judgements, the full citation appears in the footnote as well as in the table of cases in the bibliography. Considering the case-driven nature of the developments of this area of the law, I decided to specify the name of the case and relevant paragraph or page numbers in each footnote to avoid confusion. This has resulted in repetition of case names and other references in successive footnotes. Still, it is anticipated that in the end, this will be more convenient for the reader. Books are referred to in the footnotes by way of short title; the full title is provided in the bibliography. For journal articles, the first two authors are cited in the footnotes, the complete list of authors will appear in the bibliography. With reference to internet sources, the website and date it was last accessed is given in the footnotes and the bibliography.

The law as stated in this thesis reflects the position as at 30 of June 2018. Cases in which judgements were delivered on or after this date, if referred to, will be highlighted.

7 Overview of chapters

This thesis is divided into eight chapters, including this one, which provides introductory background to the topic of the thesis. An integral part of the research question is whether the interrogation proceedings in insolvency circumstances are in line with human rights within the three SADC countries. To answer this question, Chapter 2 is devoted to an exposition of the current South African perspective as far as new developments of interrogation proceedings in insolvency law are concerned. Specific sections of the 1973 *Companies Act* of South Africa, in so far as they relate to the insolvency interrogations, will also be referred to in Chapter 3. The following points in particular will be explored: the insolvency regulatory framework; the aspect of a unified *Insolvency Act*; human rights and best practice as reflected in the interrogation proceedings; court structures dedicated to insolvency processes and the Master's powers.

In Chapter 4, divergent Namibian developments in this field of law will be investigated. Relevant sections of the Namibian *Insolvency Act, Companies Act* and related legislation will be analysed as well. An exploration of the current legal position in insolvency interrogation proceedings in Botswana will be performed in Chapter 5.

Current trends and best practice in this area of the law will then be investigated. England being the first jurisdiction to be used by way of comparison, with a view to identifying aspects of the law applicable to leading foreign jurisdictions, that could form the basis of the recommendations of this study in Chapter 6, to be followed by Canada in Chapter 7. Conclusions will be drawn and recommendations, posing suggestions for reform and proposals for statutory intervention to regulate the interrogation processes within the court structures or tribunals in South Africa, will be made in Chapter 8.

The research will involve a comprehensive review of existing literature. The South African *Insolvency Act*, South Africa's *Companies Act* of 1973, South Africa's *Companies Act* 71 of 2008, the relevant Namibian and Botswana legislation, decided cases, journal articles, internet articles and textbooks will be studied in this regard.

The same will be done with regard to the English jurisdiction, and with regard to Canada.

8 Terminology

For the purpose of this research, the following abstraction, regularly used in this study, are summarily elucidated:

8.1 Government and State

The concepts "government" and "state" are used indistinguishably in this study. "State" is commonly a more impartial, nonfigurative phrase, while "government" refers to a dogmatic creature.[82]

8.2 Insolvency and Bankruptcy

For the purposes of this research in relation to the three SADC countries, the term "insolvency" is generally used to refer to the state of inability to pay one's debts as they become due for natural and juristic persons and declared so by the courts.[83] In relation to the comparative jurisdictions, the concepts "bankruptcy" and "insolvency" are used interchangeably to refer to the state of being unable to pay one's debts and declared by the courts.[84]

8.3 Legislation and Statute

The two concepts are used indistinguishably throughout the thesis to refer to *Acts* of parliament.

8.4 Sequestration and Liquidation

The two concepts are used interchangeably in this research. The concept "sequestration" is used to refer to the process of bringing assets of an insolvent

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82 Hoexter Administrative Law in South Africa 5; *Calitz A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 13.

83 See in general ch 1 below. See also Bertelsmann *et al Mars on Insolvency Law* 1; Sharrock *et al Hockly's Insolvency Law* 3.

84 See Fletcher *Insolvency Law* 3, 30, 43; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 12.

person under the control of a trustee in insolvency. The process is employed to enable the trustee to deal with the assets according to procedures provided for by the *Insolvency Act* of 1936, as amended. The concept "liquidation" is used to refer to a process where the assets of an insolvent company are brought under the control of the liquidator(s). This is done to enable the liquidators of the affected company to deal with these assets according to rules provided for by the 1973 *Companies Act,* as amended.

Chapter 2: The South African perspective[85]

2.1 Introduction

A brief historical background of insolvency law, specifically interrogations and their implications on the insolvent and other witnesses as well as the current legal position will be the focus of this chapter. Case law detailing the history of challenges against these proceedings, both at common law and under the constitutional dispensation, will be given.

The foundation of the law of insolvency in South Africa can be traced back to the Roman law period, in particular, the law of the Twelve Tables.[86] Considering the fact that South Africa was a Dutch colony, it is only natural that Roman-Dutch law was adopted in this jurisdiction. It should be noted that legislation regulating insolvency related matters dates as far back as 1777.[87] The Ordinance of Amsterdam passed in 1777 is the foundation upon which much of the South African law of insolvency is based. Since then, legislation regulating insolvency matters has undergone several developments. These developments commenced with the Desolate Boedelkamer in 1803,[88] established in the Cape Colony, Ordinance 6 of 1843,[89] and the 1916 *Insolvency Act;*[90] and progressed to the subsequent 1936 *Insolvency Act.* The latter statute has to date, undergone several amendments while remaining in operation. These amendments have, largely, been necessitated by the developments in leading

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85 As stated at ch 1 above, this research is a continuation of my LLM dissertation. Because this Masters study clearly showed that a more comprehensive study was necessary, I will therefore rely on this previous research, but only partly and only in ch 2 and part of ch 3. The thesis is much more comprehensive and includes a discussion on company interrogations as well as interrogations in four other legal systems.

86 See Bertelsmann *et al Mars on Insolvency Law* 11; Kunst *et al Meskin Insolvency Law* 12; Sharrock *et al Hockly's Insolvency Law* 11; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 39; Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* (LLD thesis University of Pretoria 2008) 49, hereafter "Evans A critical approach".

87 By The Ordinance of Amsterdam, see in this regard *Fairlie v Raubenheimer* 1935 AD 135 146. See also Sharrock *et al Hockly's Insolvency Law* 12; Bertelsmann *et al Mars on Insolvency Law* 11.

88 To administer abandoned estates and for the execution of civil judgements. See Bertelsmann *et al Mars on Insolvency Law* 11; Sharrock *et al Hockly's Insolvency Law* 12.

89 See Bertelsmann *et al Mars on Insolvency Law* 11.

90 *Act* 32.

jurisdictions[91] as far as insolvency legislation is concerned and to some extent by the adoption of the new *Constitution* after the dawn of democracy in South Africa.[92]

2.2 Historical overview of the interrogation proceedings

The interrogation in insolvency circumstances has always been an important aspect of insolvency law. This feature can be traced back to the Pre-Union legislation, which is the 1883 *Ordinance,*[93] the Union legislation, which is the *Insolvency Act* 32 of 1916, subsequently amended by the 1926 *Insolvency Act,*[94] and to the subsequent and current insolvency legislation of 1936 as amended.[95] This feature entails a form of investigation into the affairs of an insolvent. In the case of the insolvency of a juristic person, company law legislation also provides for the interrogation of officers of an insolvent company. During this process, information relating to the affairs of an insolvent can be collated for the purposes of administering the affairs of an insolvent estate.[96]

Calitz,[97] highlights a crucial feature in the interrogation process under insolvency legislation; she notes that this aspect has since disappeared from the latter statute. The aspect of interrogating the insolvent on the "causes of his insolvency" is one such characteristic. In my mind, an insolvent should be questioned about this crucial aspect. Through this line of questioning, one is likely to establish whether that particular insolvent is credible or not. In addition, if he has defrauded his creditors when declaring his financial affairs, that factor might be established through interrogations.

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91 English jurisdiction for example and the human rights culture.

92 And through case law to be discussed in this thesis.

93 See Bertelsmann *et al Mars on Insolvency Law* 11; Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 234.

94 *Act* 29.

95 The 1843 *Ordinance* and the 1916 *Insolvency Act* also provided for the questioning of the insolvent on his financial affairs and the causes thereof. See Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 234.

96 See Bertelsmann *et al Mars on Insolvency Law* 418; Sharrock *et al Hockly's Insolvency Law* 159-160.

97 See Calitz *A Reformatory Approach to State Regulation of Insolvency Law in South Africa* 234.

Smith,[98] traces the history of interrogations in insolvency circumstances to the 1916 *Insolvency Act*. She highlights an important point that only an insolvent, as opposed to other witnesses, was divested of an entitlement to refuse to answer incriminatory questions at insolvency interrogations.

The aspect of interrogation is often a thorny issue. Steyn,[99]submits that common law has always had a negative view of compulsory interrogations and for this argument, she quotes Blackstone as follows: "For at common law, no one can be forced to betray himself and fault was not to be wrung out of himself, but rather discovered by other means and other men".[100] It is for these reasons that interrogation in insolvency circumstances should be developed in line with best practices and the human rights culture

For the purpose of this research, the development of insolvency law through legislation and case law, specifically the aspect of interrogation will be considered in this chapter. Of major importance for this thesis are amendments to the interrogation provisions in 1989,[101] and thereafter when the *Interim Constitution,*[102] and later the final *Constitution,*[103] were promulgated. The positive effect of these amendments is evidenced by the gradual removal of injustices that an insolvent person and any other witness were exposed to. It is my view that prior to these eras, both the insolvent and any other witness called upon to be interrogated under the provisions of sections 64, 65, 66 and 152 of the *Insolvency Act* had very little protection. An interrogatee or examinee was coerced into answering questions fully and to the best of his knowledge. The fact that such answers may be used against him at subsequent proceedings was no defence. Thus, in the case of *Wessels v Van Tonder,*[104] for example, evidence given at interrogation was said to be admissible in subsequent perjury related criminal and civil proceedings against the person giving

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98 *The Insolvency Law* 213.
99 Steyn 2005 *CILSA* 415-434, 415.
100 *Comm*.iv.296.
101 *Insolvency Amendment Act* 89 of 1989.
102 *Interim Constitution of the Republic of South Africa*.
103 *Constitution of the Republic of South Africa*.
104 *Wessels v Van Tonder* 1997 (1) 616 (O) 621.

such evidence.[105] The inequity is obvious. To add further to such obvious disadvantage against the insolvent and other witnesses at interrogations, section 67 of the statute mandated the officer presiding at the interrogation to refer any *prima facie* evidence of criminal conduct to the prosecuting authorities.[106]

Recognising the shortcomings of a provision compelling an examinee to answer even incriminatory questions, whose answers could be used in subsequent criminal proceedings against the deponent (section 65 of the *Insolvency Act*), the legislature made provisions for the amendment of this stipulation by introducing section 65(2A) into this statute. The aforementioned amendments came about in 1989, long before the *Interim Constitution.* This was the beginning of the legislature's protection of interrogatees at insolvency proceedings. The latter aspect will be discussed in detail in paragraph 2.3.2 below. Briefly, the sub-section provides that, if reasonably foreseeable that incriminatory evidence may be divulged by an examinee at the interrogation, the officer presiding thereat should order that such evidence be given *in camera* and should not be published[107] in any other way. Further, that evidence may not be admissible in criminal proceedings, unless it relates to perjury and related offences.[108] Additionally, the court could exercise its discretion on whether an enquiry should proceed or not, pending a criminal trial.

Further to the above, the court obtained the power to order that no question dealing with matters relating to criminal proceedings should be allowed.[109] The shortcomings of this section were further addressed by the final *Constitution,*[110] which brought with it the platform to challenge the legality of incriminating oneself. The number of cases brought before our courts since 1995 to date, provide evidence of the flood

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105 1997 (1) 616 (O) 621; *Du Plessis v Oosthuizen*; *D Plessis v Van Zyl* 1995 (3) SA 604 (0) 613. See also Bertelsmann *et al Mars on Insolvency Law* 419.

106 See also Bertelsmann *et al Mars on Insolvency Law* 419; Kunst *et al Meskin Insolvency Law* 8-13; Sharrock *et al Hockly's Insolvency Law* 165.

107 For example, made known to the public in any form of media publication.

108 See also Bertelsmann *et al Mars on Insolvency Law* 419; Kunst *et al Meskin Insolvency Law* 8-9; Sharrock *et al Hockly's Insolvency Law* 163.

109 *Kamfer v Millman & Stein* 1993 (1) SA 122 (C). See also Bertelsmann *et al Mars on Insolvency Law* 425.

110 Section 35(1) (c).

of legal challenges against the provisions of this section.[111] Judgments in most, if not all cases brought before our courts during this era, are clear indicators that there were serious flaws in insolvency interrogation proceedings, specifically in sections 65, 66 and 152. As of now, no evidence directly obtained from an examinee under insolvency interrogations is admissible in subsequent criminal proceedings,[112] other than criminal proceedings relating to perjury and correlating offences.[113] Furthermore, evidence indirectly obtained from interrogation may be admissible in subsequent civil proceedings and in criminal proceedings relating to perjury,[114] against the interrogatee. It must, however, be noted that the officer presiding thereat is empowered to exercise his discretion in relation to the admissibility of derivative evidence, that is evidence obtained as a result of the interrogation.

The protection against self-incrimination emanating from legislative amendments prior to the *interim Constitution,*[115] was subsequently confirmed by the final *Constitution,*[116] and was extended to an examinee at insolvency proceedings regardless of whether criminal proceedings were pending or contemplated at the time of the interrogation or not.

The current *Insolvency Act* also makes provision for three types of interrogations, namely: interrogation of a creditor wishing to prove a claim against the insolvent,[117] public interrogation of insolvent and other persons of interest at the meeting of creditors,[118] and private interrogation by the Master of certain specified persons, in relation to the administration of the insolvent estate.[119]

To be analysed next is the current position in the insolvency interrogation proceedings as provided for by sections 64, 65, 66 and 152 of the *Insolvency Act*,

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111 See ch 1 of this thesis.
112 Section 65(2A) (*b*) of the *Insolvency Act*.
113 See para 2.3.2.6 below.
114 And related offences. See s 65(2A) (*b*).
115 See also s 25(3) of the *Interim Constitution*.
116 Section 35(1). See also Bertelsmann *et al Mars on Insolvency Law* 420.
117 Section 44(7). It is submitted that the provisions of s 44(7) supports the view that interrogation in insolvency circumstances are of general application. An insolvent or other examinees should, therefore, not cry foul if called to explain what happened to the assets of their insolvent estates.
118 Sections 64-66.
119 Section 152.

as well as relevant case law. This scrutiny is done in order to establish whether or not there are any developments in these proceedings and whether these are in line with best practices. The topics to be investigated are therefore the following: compulsory attendance of meetings of the creditors by the insolvent and other persons of interest (s 64); the public interrogation of the insolvent and other persons (s 65); the penalty provisions for recalcitrant witnesses (s 66) and private enquiries by the Master of the High Court (s 152).

2.3 The Insolvency Act 1936

2.3.1 The provisions of section 64

2.3.1.1 Introduction

The section makes provision for the compulsory attendance of meetings of creditors of the insolvent estate by the insolvent and other persons deemed necessary to attend. The attendance at these meetings is crucial to the process of getting persons of interest under one roof for the purposes of confirming claims against and for the insolvent estate and for interrogation purposes. The range of witnesses who may be subpoenaed to appear for questioning and the documents to be submitted by these persons is broad.[120] This is done to allow the trustee(s) and creditors greater latitude for the purposes of investigating the affairs of the insolvent estate.[121]

2.3.1.2 Section 64(1): Attending meetings of creditors

The sub-section calls for the compulsory attendance of the specified meetings of creditors by the insolvent.

The sub-section reads as follows:

> An insolvent shall attend the first and second meetings of the creditors of his estate and every adjourned first and second meeting, unless he has previously obtained the written permission of the officer who is to preside or who presides at such meeting granted after consultation with the trustee to absent himself. The

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120 See Bertelsmann *et al Mars on Insolvency Law* 421; Kunst *et al Insolvency Law* 8-4; Sharrock *et al Hockly's Insolvency Law* 160.

121 See also Sharrock *et al Hockly's Insolvency Law* 160.

> insolvent shall also attend any subsequent meeting of creditors if required so to do by written notice of the trustee of his estate.

Section 64(1) is mandatory in nature in that it compels an insolvent to attend the first and the second meeting of the creditors of the insolvent estate for the purpose of interrogation in terms of section 65 of the *Insolvency Act*. An insolvent is also compelled to attend every adjourned first and second meeting. An insolvent can absent himself from such meetings only if he had previously obtained written permission from the presiding officer in agreement with the trustee. The insolvent shall also attend any subsequent meeting of creditors if required to do so by the written notice of the trustee of his estate. An insolvent cannot legitimately refuse,[122] to come forward when properly subpoenaed as a witness in terms of section 64(1). This duty is universally recognised in a democratic society built on the values of the *Constitution*.[123] Consequently, failure to attend these meetings as *per* the subpoena is an offence.[124]

It is the duty of the insolvent to keep himself up to date with information relating to the dates and venues of the meetings of the creditors of his insolvent estate.[125] This is necessary because the insolvent is obliged by section 64(1) to attend such meetings.[126] It is, however, my view that in certain circumstances an insolvent has to be informed of these meetings, especially in the case of an ignorant insolvent.[127] As mentioned above, the latter can absent himself provided written permission has been obtained from the presiding officer after consultation with the trustee.[128] According to my understanding, this means that the trustee cannot at his own accord lawfully give such permission.[129] The wording of section 64(1) is precise.[130] It

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122 *De Lange v Smuts* 1998 (1) SA 736 (C); *Harksen v Lane* 1998 (1) SA 300 (CC) para 60.

123 *Bernstein v Bester* 1996 (2) SA 751 (CC) paras 51 and 58, although decided in the context of an insolvent company and the consequent subpoena of that company's officers for investigatory purposes, this case is relevant in the context of individual insolvency.

124 Section 66 of the *Insolvency Act* read with s 139(1) of the same statute.

125 See also Bertelsmann *et al Mars on Insolvency Law* 354; Kunst *et al Meskin Insolvency Law* 8-5.

126 Bertelsmann *et al Mars on Insolvency Law* 355.

127 See Mwelase *Interrogations* 8.

128 Section 64(1) of the *Insolvency Act*.

129 See Bertelsmann *et al Mars on Insolvency Law* 355.

130 See Mwelase *Interrogations* 9.

is emphasised that the court will be slow to interfere with the decision of a presiding officer, refusing such permission.[131]

The significance of the weight placed on the presiding officer's powers in this regard is evidenced by an instance where the insolvent requested (two months' prior) permission to absent himself from a meeting because of scheduled medical treatment, but was denied such permission. The fact that the insolvent produced a medical certificate to that effect was not taken into consideration.[132] It is my submission that this provision appears to be very stringent, especially in the absence of a thorough investigation as to the legitimacy of the circumstances surrounding the insolvent's reasons for absence.[133] The presiding officer should not take very lightly the existence of a medical condition supported by a medical certificate.[134]

The insolvent is not necessarily compelled to attend any other subsequent meetings of his insolvent estate, unless he receives a written notice from his trustee to do so. It is, however, crucial for him to attend all the meetings of creditors in his insolvent estate.[135] The reason for this view is that it is imperative for the insolvent to keep abreast of any developments in his insolvent estate, in order to prepare for further processes in the administration of his estate.

If the husband and wife are married in community of property they are both insolvent and it is my view that both should attend.[136] Section 64(1) should be applicable with reference to both spouses as "the insolvent". If, however, they are married out of community of property, there will always be a solvent spouse and

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131 See Bertelsmann *et al Mars on Insolvency Law* 355; Kunst *et al Meskin Insolvency Law* 8-4; Sharrock *et al Hockly's Insolvency Law* 160. See also para *2.1* above on the discussion regarding the misapplied presiding officer's powers in the event of failure to attend the meeting of creditors by the subpoenaed insolvent.

132 *Ex parte Hertzfelder* 1907 TS 1056. See also Bertelsmann *et al Mars on Insolvency Law* 355; Mwelase *Insolvency Interrogations* 9.

133 Mwelase *Insolvency Interrogations* 9.

134 See para *2.1* at ch 1 above where the Master ignored the presence of a medical certificate indicating the insolvent's health condition (and thus his absence from the interrogations as subpoenaed). Again, this view is based on comments by various practitioners and their experiences at the Master's office.

135 See also Bertelsmann *et al Mars on Insolvency Law* 355; Mwelase *Insolvency Interrogations* 9.

136 Mwelase *Insolvency Interrogations* 10.

section 64(1) is not applicable to the solvent spouse *per se,* unless such spouse is identified as "other persons" by the presiding officer for the purpose of being subpoenaed in terms of section 64(2) of the *Insolvency Act*.

The compulsory nature of section 64 of the *Insolvency Act* to attend creditors meetings was emphasized by the court in *De Lange v Smuts*.[137] In this case the sole member of three close corporations that were unable to pay their debts and subsequently wound-up, was summoned to attend the meeting of creditors of the close corporations in terms of section 64,[138] of the *Insolvency Act*.[139] The court held the view that the obligation to attend the meetings as *per* the subpoena and to submit the required documents thereat is a legal duty and thus constitutionally sound.[140]

The court proceeded to explain the purpose of the provisions of sections 64, 65 and 66 of the *Insolvency Act* as being amongst others:

(1) to enable trustees of insolvent estates to identify the assets of the estate and their whereabouts;

(2) to recover such assets and money owed to the estate;

(3) and to obtain all information as might be required by the trustees or the creditors.

The court highlighted the fact that the trustee takes office of the administrator in the insolvent estate with no prior knowledge of how its business affairs were conducted. Without knowledge of these matters, it would almost be impossible for the trustee to efficiently and diligently perform his duties in relation to winding-up

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137 See para *2.1* at ch 1 above.

138 Although compelled in terms of s 64(2) of the *Insolvency Act* to attend creditors' meetings because the witness was in possession of the entities' documents and was responsible for running the entities, he would have been compelled in terms of s 64(1) to attend such meetings if he was an individual insolvent.

139 Made applicable by s 416 of the *Companies Act* of 1973.

140 Paragraph 7.

of the estate assets. It is for these reasons that the insolvent attends creditors' meetings to provide the required information.[141]

Bertelsmann,[142] Smith,[143] Kunst,[144] and Sharrock,[145] agree with this interpretation of section 64(1). With the exception of Bertelsmann,[146] these writers are silent on the issue of the court interfering in the granting of permission to an insolvent to absent himself from the meetings of creditors. No examples of acceptable excuses are given either.

2.3.1.3 Section 64(2): Summoning persons of interest

This sub-section envisages the compulsory attendance (for the purposes of interrogation) of the meetings of creditors (of an insolvent estate) by any business associate of the insolvent, the solvent spouse and any person deemed to be in a position to provide relevant information regarding the affairs or property of the insolvent[147] estate, for an effective and efficient administration of the insolvent estate.

The sub-section reads as follows:

> The officer who is to preside or who presides at any meeting of creditors may summon any person who is known or upon reasonable ground believed to be or to have been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or to the spouse of the insolvent or believed to be indebted to the estate, or any person (including the insolvent's spouse) who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated under section *sixty- five.*

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141 At 33.
142 Bertelsmann *et al Mars on Insolvency Law* 355.
143 Smith *Law* of *Insolvency* 212.
144 Kunst *et al Meskin Insolvency Law* 8-4.
145 Sharrock *et al Hockly's Insolvency Law* 160.
146 Bertelsmann *et al Mars on Insolvency Law* 355.
147 See para *2.1* at ch 1 above on the discussion of *De Lange v Smuts* 1998 (1) SA 736 (C) regarding the application of s 64(2) of the *Insolvency Act*.

(i) Material information relating to the insolvent estate

From the reading of this sub-section, it becomes clear that "material information" is information relating to the insolvent estate's finances, property, debts, claims and so forth.

It is my view that material information is any information that might be relevant with regard to the assets of the insolvent estate and the sequestration process that may assist the trustees,[148] in the proper administration of the insolvent estate and the execution of their duties for the benefit of the *concursus creditorum.*[149] The information should also be of financial interest to the insolvent estate and should have a true connection with advantage to all the creditors' requirements. Obviously, the insolvent's dealings and trading should be of material interest to the trustees. This viewpoint accords with Smith's remark that the object of the meeting of creditors is to enable the trustee and creditors, who have proved claims in the insolvent estate, to conduct an enquiry on the widest basis into the affairs of the insolvent. She submits that the power given to the presiding officer to summon witnesses therefore is very wide.[150]

Bertelsmann,[151] Kunst,[152] and Sharrock,[153] quote the sub-section as it is, but in addition to this, Kunst explains that "material information" may be any information concerning matters, which may be the subject of the interrogation. Bertelsmann[154] does not give a clearer meaning to the term "material information" either. This lack of clarity, in my opinion, does not bring one closer to the interpretation of this term.

(ii) The insolvent's spouse

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148 Liquidators in the case of an insolvent company.
149 Body of creditors.
150 For this point, she relies on the cases of *Yiannoulis v Grobbler* 1963 1 SA 559 (T) 601 and *Spain v Officer Designated under Act* 24 of 1936 1958 3 SA 448 (W) 492.
151 Bertelsmann et al Mars on Insolvency Law 421.
152 Kunst *et al Meskin Insolvency Law* 8-4.
153 Sharrock *et al Hockly's Insolvency Law* 160.
154 Bertelsmann *et al Mars on Insolvency Law* 422.

The broad scope of the subpoena permits even the encroaching, to a certain extent, into the solvent spouse's fundamental rights to privacy, freedom and dignity.[155] This encroachment is necessary under the circumstances and the solvent spouse has no legitimate complaint to being summoned concerning her affairs or her knowledge of her spouse's affairs, as long as these are relevant to the administration of the insolvent estate.[156] This is necessitated by the fact that the spouses' assets may be mingled in such a manner that it is difficult to separate them.[157]

In *Harksen v Lane,*[158] the court had to decide if compelling the solvent spouse to attend the meeting of creditors in the insolvent estate of his spouse[159] was in violation of the former's constitutional rights,[160] or not. The court held[161] that the provisions of section 64(2) were not inconsistent with the provisions of the *Interim Constitution* as alleged by the applicant and therefore valid. According to the *amicus*:[162]

> the primary purpose of the extended enquiry aspects of section 64 and 65 is to enable the trustee fully to investigate and untangle the affairs of the spouses and, in particular, to enable the trustee to identify and recover all the assets of the insolvent.[163]

According to the court,[164]

> if the focus of the provisions remains the estate of the insolvent, and not an enquiry into the independent affairs of the solvent spouse, there can be little constitutionality objectionable in the provisions. There can be no doubt that a trustee needs to be given considerable leeway to identify and recover all the assets in an insolvent estate. The trustee is generally in a position of ignorance when he or she is appointed as to those affairs, and an enquiry into those affairs in the widest sense will often be needed to ensure that the trustee's task is properly completed. I do not think that a spouse can complain about questions being asked concerning his or her property, business or affairs if such questions are relevant in

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155 *Harksen v Lane* 1998 (1) SA 300 (CC) paras 57 and 75.
156 See *Harksen v Lane* 1998 (1) SA 300 (CC) para 60.
157 *Harksen v Lane* 1998 (1) SA 300 (CC) para 88.
158 *Harksen v Lane* 1998 (1) SA 300 (CC).
159 In terms of s 64(2) of the *Insolvency Act*.
160 The right to privacy (s 13) and freedom and security of the person (s 11(1)) as guaranteed by the *Interim Constitution.*
161 At 79.
162 Friends of the court.
163 Paragraph 112.
164 Paragraph 112.

some way to the insolvent estate itself. Any person who has knowledge of the estate may be called upon to answer such questions.

In the court's view,[165] the solvent spouse can only complain if questions relating to her (or another person's) business, affairs or property which has nothing to do with the insolvent estate were to be asked. Further, the court acknowledged[166] that the provisions of section 64(2) discriminated against persons because of their marital status but that the said discrimination was not unfair. This, the court held to be the case because solvent spouses were not a vulnerable group who had suffered discrimination in the past.[167] On the basis of that, the court held[168] that sections 21, 64 and 65 of the *Insolvency Act* were consistent with the values of the right to equality. Regarding the inconvenience caused to the privacy and dignity of the solvent spouse, the court held[169] that the said inconvenience could be suffered by any person litigating and as such could not impair the dignity of the person.

With regard to the word "spouse" Kunst,[170] explains that section 64 of the *Act* does not give this word the extended meaning assigned to it in section 21,[171] of the *Insolvency Act.* She explains that regardless of that omission, it is clear that anyone who is the insolvent's spouse, within such meaning, may be subpoenaed in any event as a spouse. All the other writers referred to are silent on this point. I concur with Kunst's view. It is submitted that a "spouse" in terms of section 21(13) applies only to section 21. The live in partner could thus be summoned as "any person who in the opinion of the presiding officer may provide the required and material information" as explained above. Therefore, a person who lives with the insolvent as husband or wife, even in the case of same sex couples, may be summoned. This

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165 Paragraph 112.
166 Paragraph 63.
167 Paragraph 63.
168 Paragraph 61.
169 Paragraph 67.
170 Kunst *et al Meskin Insolvency Law* 8-4.
171 For the purposes of s 21 the solvent spouse is a person married out of community of property to the insolvent, s 21(13) provides that: "In this section the word 'spouse' means not only a wife or husband in the legal sense, but also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another, or partner living with the insolvent as husband or wife". This is so regardless of their gender. Spouses can thus be persons of the same sex and living together as husband and wife; or persons married according to any law or custom. See the next fn.

would include even persons in a girlfriend-boyfriend relationship, without a valid marriage.[172] One must remember the purpose of section 64. It is to secure attendance (of the meetings of creditors in the insolvent estate) of any person who is likely to provide information on the insolvent.[173]

On the issue of summoning the solvent spouse,[174] according to my frame of reference, compelling the latter to attend the meetings of creditors might be necessary based on the circumstances. He or she is expected to be in a position to provide material information relating to the insolvent. This comes naturally since they share an intimate relationship and surely such a spouse might know the whereabouts of the insolvent's assets as well as (some) of his dealings. In *Brink v Kitshoff;*[175] *Maudsley's Trustees v Maudsley;*[176] and in *Synman v Rheeder;*[177] the courts were not ignorant of possible collusion (or fraud) between spouses because of a close relationship that they enjoyed. It is my opinion that this stringent provision is intended to curb any collaborated fraudulent transactions or collusive dealings between the spouses.[178] Thus, section 21 of the *Insolvency Act;*[179] makes it compulsory for the assets of the solvent spouse to vest in the trustee. These will remain with the trustee until such time as the solvent spouse proves a true title to such assets.[180] The strict provisions of the *Insolvency Act* ensure that any dispositions that can be set aside are detected.[181]

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172 A valid marriage could be either in terms of the civil law and what we refer to as a civil marriage (*Marriages Act* 25 of 1961. Customary unions (*The Recognition of Customary Marriages Act* 120 of 1998) and same sex unions (*Civil Unions Act* 17, 2006) are now also recognized as valid marriages. These have the same legal consequences as civil marriages. S 21 (1) refers to couples married in community of property. S 21 (13) provides that the word "spouse" "means not only a wife or husband married to one another". It is submitted that since the commencement of the *Civil Union Act* 17 of 2006 on 30 November 2006, the definition of the term "spouse" in the *Insolvency Act* has by implication been amended to include persons of the same sex or of the opposite sex who have entered into a civil union.

173 However, the fact that a live in partner could be summoned as "any person" who in the opinion of the presiding officer may provide the required information, broadens the scope.

174 As is understood in terms of s 21 of the *Insolvency Act*.

175 [1996] ZACC 9 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) para 47.

176 1940 TPD 399 at 404.

177 1989 (4) SA 496 (T) 505.

178 Mwelase *Insolvency Interrogations* 10.

179 Section 21 of the *Insolvency Act* makes provisions for the attachment of the assets of the solvent spouse.

180 A detailed discussion of s 21 falls outside the scope of this thesis.

181 In terms s 26, 29, 30 and 31 of the *Insolvency Act* and in terms of the common law. This aspect

2.3.1.4 Section 64(3): Summoning any person to submit books and documents

For the purposes of this sub-section, what is sought to be obtained are books and documents relating to the financial affairs and property of the insolvent estate. Therefore, any person in possession of such may reasonably be required to submit them the creditors' meetings for interrogation purposes.

The sub-section reads as follows:

> The said officer may also summon any person who is known or upon reasonable grounds believed to have been in possession or custody or under his control any book or document containing any such information as is mentioned in sub-section (2), to produce that book or document, or an extract there from at any such meeting of creditors.

In *Beinash v Wixley* [182] the court had an opportunity to clarify the purpose and scope of a subpoena, for the production of books and documents required for the purposes of assisting litigants in the quest for the truth.[183] In this matter, a subpoena was issued by Beinash (respondent in the court below) to Wixley (applicant in the court below) for the production of a wide range of documents, books, papers, manuals, contracts etcetera. The documents were said to be relevant in certain proceedings in which Wixley was not a party.[184]

Wixley applied to have the subpoena set aside on the grounds that:[185]

(1) the subpoena was wide, general and unspecified in its scope and this, according to him made it difficult for him to comply.

(2) the required documents appeared not to be relevant to the primary proceedings in which Beinash was a litigant. It appears from his argument that had he been provided with a list, clearly specifying which documents were required, for the

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falls outside of the scope of this thesis.

182 [1997] ZASCA 32; 1997 (3) SA 721 SCA.

183 *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W).

184 Rule 38 (1) of the Uniform Rules of court apply in this instance - where documents are required from a non-party to the main proceedings. This rule emphasises that the subpoena *duces tecum* must specify in precise terms the documents or thing required.

185 Paragraph 22.

primary proceedings, he would have complied. As regards Wixley's arguments, the court ruled in his favour.

The matter went on appeal. The respondent raised the argument that[186] (1) the issue and service of the challenged subpoena in the circumstances of the present case amounted to an abuse of the court's processes. That the court below was correct in making an order setting aside that subpoena.

As regards (1) the court highlighted[187] that every court has powers to protect its integrity and those of litigants against an abuse of its processes. The court explained that, if it appeared objectively speaking that the subpoena as issued under the circumstances of a particular case, indeed constitutes an abuse, the court is intrinsically entitled to set it aside. In emphasizing its views, the court quoted the matter of *Hudson v Hudson and Another*[188] as follows:

> When ... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.

Further that[189] what constitutes an abuse of the processes of the court should be determined on a case-to-case basis – that there can be no "all-encompassing definition" of the concept of "abuse of process". Held[190] further that, generally speaking, abuse of processes is said to have occurred when court procedures as provided for by the court rules for the proper administration of justice are employed for purposes not intended for.[191] The view is that, subpoena *duces tecum*[192] must be issued for a legitimate purpose.[193]

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186 At 28.
187 At 28.
188 1927 AD 259 at 268.
189 At 29.
190 At 29.
191 *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W) at 820A-B.
192 Subpoena requiring the production of specified documents.
193 Citing *Wachsberger v Wachsberger* (WLD) (unreported) case number 8963/90 of 8 May 1990 and *Lincoln v Lappeman Diamond Cutting Works (Pty) Ltd* (WLD) (unreported) case number 17411/93 of October 1993.

The court highlighted[194] the fact that, parties to litigation are entitled to the production of any books or documents that would assist them in their respective cases - unless the disclosure of the required document is prohibited by law. The court motivated that the process of a subpoena was designed to clearly protect that right – and that justice would not be served if that right was encroached upon. The view is that, this reason necessitated caution on the part of the court when exercising its discretion to set aside a subpoena on the grounds that it amounts to an abuse of processes.[195] It is clear that if the need arises, the court will forthwith exercise its powers to protect parties affected by the intended abuse.[196] This provision is indicative of the legislative safeguards in the interest of justice.

The background and circumstances surrounding the issuing of the subpoena by the court below was analysed by the appeal court as follows:[197]

(1) Firstly, the appellant's attitude and purpose in seeking to enforce the terms of the subpoena was alarming - it appeared that the respondent was more than willing to produce the required books and documents if the appellant had precisely identified them.

(2) The language used in the subpoena was of the widest possible scope and encompassed documents that might possibly not even be related to the main proceedings.[198] The court[199] was of the view that the use of the phrase "and/or" in the subpoena in relation to the documents required was misconstrued by the appellant. Further, the appellant's failure to establish the existence or none thereof of the said documents and their importance to his case in the main proceedings compromised his case.[200]

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194 At 30.
195 At 30.
196 Citing the matter of *Sher and Others Sandowitz* 1970 (1) SA 193(C) and *S v Matisonn* 1981 (3) SA 302 (A).
197 At 31.
198 At 31.
199 At 31.
200 At 31.

(3) That the appellant failed to take into consideration the clearly articulated requirements of rule 38(1) of the Uniform Rules. This observation stems from the reading of the content of the challenged subpoena, which calls for the production of documentation, which is said to "arise from" or "in".[201] When misapplied, these two phrases do not assist for specification purposes. The court went further to highlight the questionable timing of the subpoena. It appears that the court's view was that there was no need for the appellant to vigorously enforce the subpoena since Wixley was in any event in the process of compiling a list of documents for the purposes of discovery.

The court went further to explain that, had Beinash been an honest litigant, he would have carefully considered the provisions of rule 38(1) regarding specificity as far as the required documents were concerned. This would have assisted the witness to decide which documents were required.[202]

As regards Beinash's lack of good faith, the court commented[203] as follows: had he been *bona fide* in his quest to obtain the documents relevant to his case in the possession or control of respondent:

(1) he would have placed him in a position to clearly identify the required documents;

(2) he would have refrained from leaving Wixley in the dark as far as establishing the nature of documents lawfully required;

(3) he would not have obliged Wixley to make crucial judgments in a short space of time in pain of possible criminal sanctions for failure to comply with the subpoena, he would have given Wixley sufficient time to compile such a massive volume of documents as demanded by the subpoena.[204] According to the court, there was clearly no limit to the number of documents required therefrom. The subpoenas

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201 At 31.
202 At 35.
203 At 35, 37 and 38.
204 At 38.

were said to be oppressive and almost impossible to comply with. This, according to the court, was suggestive of an abuse of the rule with the objective of securing some "illegitimate tactical or other advantage" not intended for by the rules of court[205] - which subpoenas could be set aside due to vagueness.[206] This would seem to be the case as well in the context of insolvency proceedings.

The appeal court concluded that the court below was justified in its decision that the nature of the subpoena constituted an abuse of the processes.[207] On the basis of the appeal court's analysis of facts as highlighted above, the appeal was correctly dismissed.[208]

In *Pitsiladi v Van Rensburg* [209] the applicant was subpoenaed in terms of section 64 and 65 of the *Insolvency Act* to attend the meeting of creditors of a trust of which he was the founder. Subsequent to the meeting, a subpoena requiring him to bring with books and documents relating to the trust's business, affairs, property and certain specified entities was issued. In response, he applied to the court to have the subpoena set aside. The applicant raised the argument that (1) the terms of the subpoena was wide and too general and in his view, that amounted to an abuse of processes, (2) that he was, however, willing to allow the trustees of his insolvent trust full access to all documents under his control.

As to (1), the court held[210] that the purpose of the enquiry under sections 64 and 65 was to enable the trustees to gather information about the affairs of the insolvent trust and of the entities that had business with the trust as mentioned in the subpoena. The court explained that, since trustees cannot be expected to have such information, those who were in possession thereof should be in a position to produce such. Very important in my view is the fact that the court was not ignorant

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205 At 38.
206 Citing the matter of *Lincoln v Lappeman Diamond Cutting Works* (Pty) Ltd 17411/93), where a subpoena was set aside for being vague and "too wide".
207 At 35. See also s 173 of the *Constitution* regarding the powers of the courts (Constitutional Court, the Supreme Court of Appeal and the High Court) to protect and regulate their own processes.
208 At 47.
209 2002 (2) SA 160 SE.
210 At 162.

of the point that the scope of the subpoena was wide, but indicated that the subpoena was within what was permissible under section 64(3) of the *Insolvency Act*. This is a significant look at the legal position in question.

As regards (2), the court highlighted[211] that the argument does not sufficiently answer the subpoena. According to the court,[212] the purpose of the insolvency enquiry was for the applicant to show through transactions in books and documents, the cash flow in the business of the trust. The court held the view[213] that it is common sense that only the applicant would know which documents related to such transactions. This makes sense. The applicant was responsible for the running of the business of the trust and not the trustees of the insolvent trust.[214]

The court went on to point out that, the applicant had intentionally arranged his business affairs through an elaborate and complicated network in order to evade accountability to the stakeholders, including the public.[215] According to the court, this complicated network could not assist the applicant to escape his public duty to account. He had a duty to assist the trustees of the insolvent trust with the required information to enable them to perform their duties. For these reasons, the court held[216] that the application for an order setting aside the subpoena could not succeed.

It is noted that the court in *Pitsiladi v Van Rensburg* [217] did not see a need to clarify the meaning of the concept "permissible" but emphasised that the subpoena should not go beyond what is permissible. Consequently, this grants the presiding officer powers to exercise his discretion, as submitted, which should not be exercised *carte blanche*. It must be exercised within the parameters of the law, seen against the purpose and function of sections 64 and 65. Again, if not satisfied with the presiding

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211 At 162.
212 At 162.
213 At 162.
214 At 162.
215 At 162.
216 At 163.
217 2002 (2) SA 160 SE.

officer's handling of the matter, the aggrieved person may use the power in terms of section 151 to resort to the court for a review.

In the matter of *Nyathi v Cloete* [218] the subpoena required the submission of specified documents, books or papers (relating to the affairs of the company in liquidation) in the possession of those running the affairs of the company. The court held the view[219] that even though the summons required a variety of documents, the required documents were clearly specified and this placed the witness in a position to know exactly which documents were relevant. This view is acceptable. The specified documents relate to the business affairs of the company in liquidation.

It is common sense that the information in books and documents as required must be material to the affairs of the insolvent estate in the sense that they are relevant. Smith[220] explains "material information" with reference to section 64(3) as information that the presiding officer might regard as essential in the meeting of creditors.

Kunst[221] on the other hand, addresses an important aspect and points out that it is not an abuse of the process if the subpoena does not specify in precise terms the documentation required from the witness. The presiding officer should, however, consider the position of a layman (and a laywoman) that is totally uninformed and might require more clarity with regard to documentation required. However, the subpoena should not be unlimited in scope and should not go beyond what is permissible for investigation.[222] This means that the onus is on the party concerned to know exactly which document is relevant, and then provide it.

Kunst further explains that the subpoena is in the form of a notice to attend the meeting for interrogation purposes. It must be served to the person concerned by

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218 *Nyathi v Cloete* [2012] ZAGPJHC 154; (6) SA 631 (GSJ) para 8. Although this matter related to interrogations in terms of the *Companies Act* of 1973, it is relevant to interrogations in terms of s 64 and s 65 the *Insolvency Act*.

219 Paragraph 8.

220 Smith *Law of Insolvency* 212.

221 Kunst *et al Meskin Insolvency Law* 8-4.

222 See *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.

the messenger of the Magistrate's Court having jurisdiction in the area where the person subpoenaed resides.[223] Kunst uses the word "resides" instead of "domicile" to denote that jurisdiction may depend on a less strict requirement.[224] The manner of such service is the same as that provided for the service of a subpoena issued in a civil case. To my mind, this provision emphasises the mandatory nature of this notice and the importance of the witness appearing before the presiding officer. This gesture indicates that failure to comply is not acceptable.

Relying on *Pitsiladi v Van Rensburg*, Sharrock[225] submits that if a person is subpoenaed to produce documents of a certain category in terms of section 64(3), such person must actually submit the documents. This implies that the person so subpoenaed must see to it that such required documents are brought to the possession of the person who subpoenaed the witness and actually explain what each document entails when so required. Sharrock further highlights that the scope of documents that may be required is broad. According to him, this is crucial for trustees and creditors to fully investigate the affairs of the insolvent. At times it might appear to a prospective witness that the scope of the subpoena is too wide, it is reassuring that the subpoena must be limited to what is permissible for investigation purposes in terms of section 64(3).[226] This reverts to the above-mentioned statement that a general authorisation is not sufficient. Documents must be produced and submitted as *per* the subpoena.

From these comments, it is clear that Kunst and Sharrock take cognisance of the fact that the scope of the subpoena may be wide and may be open to abuse, hence limiting what is legally permissible. The view is that the presiding officer has the

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223 Kunst *et al Meskin Insolvency Law* 8-4.

224 Heaton *The South African Law of Persons* 39, describes the word "domicile" as the place where a person is legally deemed to be constantly present for the purposes of exercising his or her rights and fulfilling his or her obligations, even in the event of his or her factual absence. It contains an *animus* requirement (the intention of permanent residing) and *corpus* requirement (presence there). See also Barratt *Law of Persons and the Family* 116. On the other hand, "reside" refers to a place where a person lives with no intention of making that place his permanent residence. See Hornby *Oxford Advanced Learner's Dictionary International Student's Edition* 7th Edition 434.

225 Sharrock *et al Hockly's Insolvency Law* 160.

226 *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE 162.

widest possible powers in terms of the procuring of information, books and documents that may be required at the meeting of creditors. My stance[227] is that, for the purpose of section 64, what is permissible for the investigation purposes is any information lawfully required and related to the assets, dealings and trading of the insolvent. Essentially, what may not be permissible is any defamatory and non-relevant personal information regarding the insolvent.[228] It is further my submission that, by inserting the term "permissible", the court[229] intended to curb the abuse of the provisions of sections 64 and 65 of the *Insolvency Act*.

Bertelsmann[230] points out that it is a competent course to summon one person both for information and for the production of books or documents at the meeting of creditors. He concurs with Kunst and Sharrock on the wide powers given to the presiding officer regarding the scope of the subpoena and on the question of the presiding officer's discretion. It must be pointed out that the courts are there to see to it that the process is not abused. Any person aggrieved by the discretion exercised by the presiding officer may resort to the courts for a decision.[231]

2.3.1.5 Limitation

It is noted that rights contained in the *Bill of Rights* may reasonably be limited by laws of general application.[232] In the context of insolvency interrogations, the rights[233] of a subpoenaed witness are justifiably limited by the rights of creditors, who also have a right to have information relating to the insolvent's financial

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227 Mwelase *Insolvency Interrogations* 13.

228 For example, information that may uncover the insolvent' promiscuous relationship and which has nothing to do with the administration of the insolvent estate - thus of no assistance to the trustee.

229 See *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.

230 Bertelsmann *et al Mars on Insolvency Law* 423.

231 Section 151 *Insolvency Act*. See also *Law Society of the Cape Good Hope v Randell* 2013 (3) SA (SCA) 437.

232 Section 36 of the *Constitution*. See also *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at 28 and 36; *Harksen v Lane* 1998 (1) SA 300 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC) para 102. See also Jeffery *Bill of Rights Report* 133. Currie and De Waal *The Bill of Rights Handbook* 151.

233 Amongst others, the right not to be compelled to self-incriminate, the right to privacy, the right to freedom for example.

affairs.[234] It is my view that the limitation does not, however, nullify the essence of the rights in the *Bill of Rights*. The compulsion to attend creditors' meetings may be an inconvenience to a person subpoenaed. It is, however, his legal duty as a citizen in a democratic society to assist in the proper administration of justice.[235] The limitation of his freedom is reasonable and inevitable in the context of the administration of insolvent estates as compared to creditors' rights that may be jeopardized in the absence of the subpoenaed person's co-operation.[236] However, one must not lose sight of the fact that there is no absolute yardstick regarding the limitation.[237] The extent or scope of the limitation will depend on the circumstances of each case.[238] It is assumed that, in the context of this research, the interest to be served by requiring the insolvent and other witnesses to appear at the meeting of creditors and thus limiting some of their rights is justifiable in the circumstances. The motivation for this view follows.

Section 36 of the *Constitution* provides that rights and freedoms as entrenched in the *Bill of Rights* are not fixed.[239] Their scope is determined by the rights of others and by the legitimate needs of a democratic society under the rule of law.[240] According to Currie and De Waal, factors such as public order and democratic values justify the imposition of limitations on the exercise of fundamental rights. This, they submit, serve a purpose that most people would regard as compellingly crucial.[241] They correctly state that "limitation" is a synonym for "infringement" or perhaps "justifiable infringement". A law, which limits a right, infringes that right. However, the infringement will not be unconstitutional if it takes place for a reason that is recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. They explain that not all

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234 *Harksen v Lane* 1998 (1) SA 300 (CC); *De Lange v Smuts* 1998 (1) SA 736 (C); *Nyathi v Cloete* [2012] ZAGPJHC 154; 2012 (6) SA 631 (GSJ)*; Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.

235 *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 SCA.

236 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at 28 and 36. See Currie and De Waal *The Bill of Rights Handbook* 163.

237 *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

238 *S v Makwanyane* above para 104. See also Currie and De Waal *Bill of Rights Handbook* 163.

239 See also Currie and De Waal *Bill of Rights Handbook* 150.

240 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) 28.

241 See also Meyerson *Rights Limited* 36-43 also cited by Currie and De Wall *Bill of Rights* 151.

infringement of fundamental rights is unconstitutional. I concur. If an infringement complies with the criteria set by section 36, it will be constitutionally sound. This is also apparent from the judgement in *Harksen v Lane*[242] and *De Lange v Smuts*.[243]

Currie and De Waal further acknowledge that the existence of a general limitation clause[244] does not mean that rights in the *Bill of Rights* can be limited for "any" reason.[245] According to them, the enquiry does not end at whether such limitation benefits others more than it will prejudice the right-holder. They are of the view that, if rights can be encroached upon simply because the welfare of society will be served by the said encroachment, there would be little value in the constitutionally entrenchment rights.[246] They further submit that there must exist valid and strong reasons before inroads are made on the constitutional rights. They opined that such encroachment and thus limitation must objectively speaking serve a purpose that is seen as universally important.[247] They further opined that the restriction would be justifiable only if it is reasonably believed that it would achieve the desired results. Further, their view is that the objective it accomplishes must be the one, which the limitation was intended for, and there must be no other reasonable way in which the purpose can be achieved without limiting the right.[248]

This view deserves approval.[249] First, the law of insolvency and especially section 64 is in my opinion, in the context in which it operates, of general application. This is confirmed by the wide definition of "persons interested" and the wide powers given to the presiding officer with reference to the insolvency interrogations.[250] Further, it is apparent that it might be necessary and reasonable in an open and democratic society to limit the rights of the insolvent and other witnesses.[251] In limiting such rights, the courts consider the following: First, the importance of the purpose of the

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242 1998 (1) SA 300 (CC) at 328 -330. See also Currie and De Waal *Bill of Rights Handbook* 151.
243 1998 (1) SA 736 (C) at 822-826.
244 Section 36 of the *Constitution*.
245 *Bill of Rights Handbook* 151.
246 At 151.
247 At 151. See also Meyerson *Rights Limited* 36-43.
248 Citing *S v Manamela* 2000 (3) SA 1 (CC) at 32.
249 See Mwelase *Insolvency Interrogations* 17.
250 Section 64(1), (2) and (3) of the *Insolvency Act*.
251 Section 36 of the *Constitution*.

limitation, which, from my standpoint, is undisputable in the context of insolvency interrogations. Secondly, the availability of less restrictive means to achieve the objective, which, in the context of insolvency enquiries does not seem to exist.[252] In the third place, the nature and extent of the limitation is material and fourthly, the relation between the limitation and its objectives must be evaluated.[253]

With reference to the provisions of section 64, it is my view that the limitation is necessary and reasonable. The reason being that without such proceedings, the interests of the society will be jeopardised. The necessity of the creditors' meeting, which is intended to discover material information for the trustees, appears to be competing with other rights in chapter 2 of the *Constitution*, for example, the right to privacy. The limitation of this right was confirmed in a number of court decisions to be fair and just, not only in the case of insolvent debtors, but also in the case of bankrupt companies.[254] Insolvent debtors[255] as well as directors[256] of bankrupt companies should not be entitled to refuse to comply with summons and subpoenas on the basis that their right to privacy is violated. The view is that directors especially, lose the right to privacy immediately when they assume the public office of directorship.[257] Their position is continuously subjected to public scrutiny. Legislation imposes on them the duty to properly disclose and account to creditors, shareholders and other relevant stakeholders.[258] Such expectation from them is not

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252 It is worth noting that even in the pre-*Constitution* case of *Agyrakis v Gunn* 1963 (1) SA 602 (T) 604, it was stated that the enquiry is conducted for the purpose of discovery, to obtain facts that the trustee and creditors do not possess and which may be of financial benefit to the insolvent estate and its affairs. In *Spain v Officer Designated under Act* 24 of 1936, the court emphasised the fact that no one can claim to be exempt from the statutory provisions relating to interrogation. The aim is to conduct an enquiry on the widest basis into the affairs of the insolvent.

253 See cases discussed in line with the *Constitution* at para *2.3* above.

254 See ch 1 of this work where relevant case law is referred to and para *2.3* above. Some of these cases will be discussed below.

255 *Harksen v Lane* 1998 (1) SA 300 (CC); *Nyathi v Cloete* [2012] ZAGPJHC 154; 2012 (6) SA 631 (GSJ); *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SEC; *De Lange v Smuts* 1998 (1) SA 736 (C).

256 *Bernstein v Bester* 1996 (2) SA 751 (CC) and related cases to be discussed in ch 3 below.

257 See *Bernstein v Bester* 1996 (2) SA 751 (CC). See also Mwelase *Insolvency Interrogations* 18.

258 See *Bernstein v Bester* 1996 (2) SA 751 (CC).

unreasonable since they are privy to the information relevant for the purposes of an effective and efficient liquidation process.[259]

2.3.1.6 Conclusions

From the consistent precedents set by our courts and the viewpoints of the different writers on section 64 of the *Insolvency Act,* it is clear that the legislature, through the mandatory nature of this section,[260] secures attendance of creditors' meetings by the insolvent and others referred to above. This is evidenced by the wide powers granted to the presiding officer to compel (by means of subpoenas) all relevant persons to attend the creditors' meetings.[261] It is critical because persons so subpoenaed might be in a position to assist the trustees in gathering sufficient information relating to the insolvent estate, which might assist in a fair and equitable administration, realisation, and distribution of the insolvent estate. The view is that if persons were not obligated to attend such meetings, the purposes of a fair, just, correct, and appropriate liquidation process, based on sufficient and accurate information, could be defeated.[262]

The fact that a person so subpoenaed may not absent himself from such meetings without prior permission from the presiding officer after consultation with the trustee of such estate, emphasises the mandatory and strict nature of this section.[263] Further, the courts are also reluctant to interfere with the discretionary powers of the presiding officer in granting or refusing permission to absent oneself from the meeting of creditors.[264]

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259 See Mwelase *Insolvency Interrogations* 18.

260 By empowering the presiding officer to subpoena any person whom he reasonably believes will be of assistance to the gathering of information about the insolvent estate or the insolvent's business transactions.

261 *De Lange v Smuts* 1998 (1) SA 736 (C); *Harksen v Lane* 1998 (1) SA 300 (CC); *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE; *Nyathi v Cloete* [2012] ZAGPJHC 154; 2012 (6) SA 631 (GSJ).

262 Mwelase *Insolvency Interrogations* 18.

263 *De Lange v Smuts* 1998 (1) SA 736 (C). See also Mwelase *Insolvency Interrogations* 14.

264 See Bertelsmann *et al Mars on Insolvency Law* 355; Kunst *et al Meskin Insolvency Law* 8-4.

Lastly, it is observed that section 64 is mandatory in nature in that the word "shall" is used throughout the section.[265] This appears to be necessary in order to achieve the purpose of discovery and to ensure that it is not jeopardised.

The Constitutional Court, in a number of judgments, settled constitutional challenges on the grounds of human rights violations raised regarding this section.[266] Amongst other rights that were alleged to be violated by the provisions of this section are: the right to equality[267] (which was alleged to be violated by the subpoena of the solvent spouse to the meeting of creditors - being singled out); the right to human dignity[268] (which was alleged to be violated by appearing at the meeting of creditors of the insolvent estate); the right to freedom and security of the person[269] (deprivation of freedom by compelling the witness to attend the meeting of creditors); the right to privacy[270] (violated by being identified in public to be an insolvent's spouse)[271] and the right to property[272] (violated by the temporary deprivation of solvent spouse's property which vests in the trustee). In all of the above allegations, the court held that there was nothing unconstitutional about section 64.

Currently the position is that the said rights may be limited only in terms of the law of general application.[273] The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Amongst factors that may be considered when limiting a right entrenched in the *Bill of Rights* are:

(i) the importance of the purpose of the limitation;

(ii) the availability of less restrictive means to achieve the purpose;

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265 Mwelase *Insolvency Interrogations* 14.
266 Court cases dealt with and to be dealt with in the subsequent chapters.
267 Section 9 of the *Constitution*.
268 Section 10 of the *Constitution*.
269 Section 12 of the *Constitution*.
270 Section 14 of the *Constitution*.
271 *Harksen v Lane* 1998 (1) SA 300 (CC).
272 Section 25 of the *Constitution*.
273 Section 36 of the *Bill of Rights*. See also Currie and De Waal *The Bill of Rights Handbook* 150.

(iii) the nature and extent of the limitation; and

(iv) the relation between the limitation and its purpose.[274]

In relation to section 64 of the *Insolvency Act*, the question may be asked as to whether or not there are less restrictive measures that may be applied to achieve its purpose. Will those less restrictive means suffice to achieve the purpose? The courts have in a number of judgments answered affirmatively the question whether there are not any less restrictive means to achieve the purpose of section 64. No creditor can have a legitimate complaint to being called as a witness under section 64 if his testimony is required.[275] It is worth mentioning the fact that the coming into effect of both the *Interim Constitution* and the final *Constitution* did not affect the provisions of section 64.

It is without doubt that competing rights invoke the provisions of section 36 in the balancing process. Further, it is inevitable that this process may not be favourable to all involved. It is my submission that the interest of the majority (creditors) should not be sacrificed for the convenience of an individual debtor, insolvent's spouse or other witnesses who have a public duty to assist in the effective and efficient administration of justice. It is the intention of the legislature to protect the interests of the public at large. Compelling the insolvent and any other witnesses to attend the meeting of creditors might serve as a deterrent to any person who might be involved in fraud to defraud creditors, and thereby serve public interest.

My view is,[276] therefore, that it is not unconstitutional (and not in violation of human rights as provided for by the *Charter of Human Rights* and the *European Commission on Human Rights*) to compel the insolvent or any other person subpoenaed to attend and furnish information so required at the meeting of creditors. The rationale behind this view is that without such information, which the trustees do not possess, it will be almost impossible to recover the assets of the insolvent estate, which are required for a fair distribution amongst the creditors. The attendance of creditors'

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274 *De Lange v Smuts* 1998 (1) SA 736 (C) para 87.
275 See *Harksen v Lane* 1998 (1) SA 300 (CC).
276 See Mwelase *Insolvency Interrogations* 18-19.

meetings as *per* the subpoenas precedes interrogation proceedings in terms of section 65 of the *Insolvency Act*. These proceedings will be discussed next.

2.3.2 The interrogation proceedings under section 65

2.3.2.1 Introduction

Interrogation is a very necessary process through which essential information relating to the insolvent estate is gathered by both trustees and creditors of the insolvent estate. More often than not, a trustee of an insolvent estate will have very little information relating to the insolvent's business transactions, assets, liabilities, other relations, fraudulently made or with intention, that can be set aside or that can be enforced, completed or uncompleted etcetera. The purpose of section 65 is to assist the trustee to gather as much information as possible regarding the insolvent estate.[277] Thus, it is imperative that the insolvent or anyone who worked closely with him, as persons privy to the above, may bring to the fore the required information that will enable the trustee to perform his duties in relation to the insolvent estate as best as possible.[278] On the other hand, Bertelsmann points out that the insolvent may be unwilling to divulge any incriminating information, especially if untoward dealings occurred prior to insolvency. Therefore, the mechanisms as provided for by the *Insolvency Act* are crucial in the investigation of the affairs of the insolvent estate.[279]

While compulsory interrogations have always been frowned[280] upon at both common law[281] and under the constitutional dispensation in South Africa, interrogations or examinations at insolvency proceedings have, in a number of court

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277 See *Spain and Spain v Officer Designated under Act* 24 of 1936 1958 (3) SA 488 (W); *Agyrakis v Gunn* 1963 (1) SA 602 (T) 604; *Du Plessis v Oosthuizen; Du Plessis v Van Zyl* 1995 (3) SA 604 (O) 613; *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) 824-825*; Pitsiladi v Van Rensburg* 2002(2) SA 160 (SEC); *Gilfillan v Bouker* [2012] ZAECGHC (4) SA 465 (ECG). See also Bertelsmann *et al Mars on Insolvency Law* 418.

278 A liquidator of a bankrupt company is often in the same dilemma. See para ch 3 below on the provisions of s 415.

279 Bertelsmann *et al Mars on Insolvency Law* 418; Steyn 2005 *CILSA* 415-434 418; Sharrock *et al Hockly's Insolvency Law* 162.

280 On the basis of the principle that he who alleges has the onus of proving the allegations and not force the confession out of an examinee.

281 See also para *2.2* above where this aspect is discussed.

cases, been regarded as rather investigative, requiring no protection against self-incrimination. Investigative processes are simply enquiries. Hence, to aid the equitable distribution to the insolvent's creditors, the insolvent and others with a close relationship to the insolvent are compelled to bring about clarity on the transactions made and the whereabouts of assets connected to the insolvent estate (nothing else beyond this).

The interrogation of the insolvent and other witnesses to enable the trustee and creditors to investigate the insolvent affairs and ascertain his true financial standing is clearly at the core of sections 64 and 65 of the Insolvency Act.[282]

The essence of the above assertion is grounded in the provision requiring a wide range of witnesses that may be called for interrogation. The latter is aimed at allowing the trustee and creditors to thoroughly investigate the affairs of the insolvent on the widest possible basis.[283] The significance of these processes is evidenced by the fact that a trustee is expected to interrogate formally and failure to do so will attract a penalty of reduced or disallowed fees.[284]

Steyn[285] is of the opinion that the strong common law traditional objection to compulsory interrogations has been largely watered down, especially in the bankruptcy jurisdiction. She notes for example, a debtor, subjected to public examination, cannot decline to answer questions on the basis that the answers may incriminate him. The reason being that the purpose of insolvency legislation is to ensure a full and complete examination and disclosure of facts relating to the insolvency in the interest of the public.[286] Accordingly, these examinations perform a vital role in facilitating the discovery and collection of assets belonging to the insolvent estate, for the benefit of creditors. The importance of the public interest

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282 See Bertelsmann *et al Mars on Insolvency Law* 423; Sharrock *et al Hockly's Insolvency Law* 160-161; Smith *The Law of Insolvency* 213.

283 See Bertelsmann *et al Mars on Insolvency Law* 427; Steyn 2005 *CILSA* 415-434 418; Sharrock *et al Hockly's Insolvency Law* 161.

284 *Thorne v The Master* 1964 (3) SA 38 (N) 52-3.

285 Steyn 2005 *CILSA* 415-434 416 and 426.

286 *Rees v Kratzmann* (1965) 114 CLR 63 at 80.

served by such examination is reflected in statutory provisions curtailing an examinee's right to silence and the right against self-incrimination.[287] She further submits that the application of the limitation clause on these rights[288] serves a crucial function in balancing the interests of the individual examinee with that of the public during a proper administration of insolvent estates.[289]

2.3.2.2 Section 65(1): Interrogation of summoned persons

This sub-section envisages the interrogation of persons subpoenaed in terms of section 64 of the *Insolvency Act*. The interrogation is preceded by an oath or affirmation by a witness. The officer presiding thereat, trustee or creditor who has proved a claim against the insolvent estate may carry out the interrogation. The subject matter of the interrogation concerns all matters relating to the insolvent estate or the insolvent's spouse.

The sub-section reads as follows:

> At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of subsection (2) of section sixty-four and the said officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person so called and sworn concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his/her spouse: Provided that the presiding officer shall disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.

(i) Interrogation to take place at any meeting of creditors

Interrogations as provided for by section 65 of the *Insolvency Act* may be conducted by either the trustee or any creditor whose claim against the estate has been proved. The statute provides that the interrogations may take place at any meeting of creditors. The meeting must be properly called. If not, the interrogation should

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287 See para 2.3.2.4 (iii) below.
288 Section 36 of the *Constitution*.
289 At 425.

not proceed.[290] I concur with this view.[291] The interrogation should take place at any meeting, but the fact that an interrogation will take place must be expressly mentioned in the notice. This, in my opinion is to ensure that an examinee or the creditors are well prepared for the interrogation process. Further, such notice will enable the examinee to collate information as per the subpoena and for creditors to prepare relevant questions. The principles of justice and fairness will be upheld if an examinee or the creditors are afforded an opportunity to prepare for the interrogation proceedings. Furthermore, constitutional attacks will to some extent be avoided.

From the interpretation of section 42(2) of the *Insolvency Act*,[292] it appears that a special meeting may be convened for the sole purpose of interrogating an insolvent and no other witness may be interrogated thereat. Sharrock[293] is of the view that since the provisions of this section refer only to an interrogation of the insolvent, a special meeting cannot be convened for the sole purpose of interrogating persons other than the insolvent.[294] According to Bertelsmann,[295] there is no logical explanation why the legislature wanted to make this distinction. Kunst quotes the section as is and adds no opinion.[296] It is my opinion that the distinction may lie in contention that the legislature regards the interrogation and consequent information provided by the insolvent to be of paramount importance and of central focus to the insolvency proceedings as compared to that provided by other witnesses. This may be especially urgent in circumstances where it is feared that the insolvent is in the process of misappropriating the insolvent estate's funds, to the disadvantage of creditors. Other witnesses may be interrogated at the first, second and general

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290 *Essop v The Master* 1983 (1) SA 926 (C). See also Sharrock *et al Hockly's Insolvency Law* 162.
291 See Mwelase *Insolvency Interrogations* 21.
292 This section provides as follows: "The trustee may at any time, and shall whenever he is thereto required by a creditor who has proved his claim against the estate, provided that the Master consents thereto, convene by notice in the *Gazette* a special meeting of creditors for the purpose of interrogating an insolvent, and at such interrogation the provisions of s 65 shall *mutatis mutandis* apply". See Kunst *et al Meskin Insolvency Law* 8-3.
293 Sharrock *et al Hockly's Insolvency Law* 112.
294 *Bernard v Klein* 1990 (2) SA 306 (W) 308.
295 Bertelsmann *et al Mars on Insolvency law* 421.
296 Kunst *et al Meskin Insolvency Law* 8-3.

meetings.[297] It is however, doubtful or unlikely that an interrogation will be held during a first meeting, because the trustee is yet to be appointed - but technically, it may be done. It is also unlikely that an interrogation may take place at a general meeting, because the said meeting is convened for a special purpose,[298] but technically, it can be done.

(ii) Administering the oath

The provision for the taking of an oath is indicative of the significance of the interrogation proceedings; persons interrogated should thus take them seriously. It is the duty of the presiding officer, to draw the attention of an examinee to the consequences of reconstituting the true state of affairs.[299]

The requirement of administering an oath to witnesses may be subject to constitutional attacks. Taking an oath is forbidden in some religious groups, the Muslim group and some Christians are an example of this. Textbook writers referred to here seem to have no objections with the content of this sub-section. They quote the sub-section as is.[300] It is my opinion[301] that the *Insolvency Act* should make an express provision for the taking of a solemn declaration from witnesses who may have objections taking to taking an oath. This will minimise constitutional attack by virtue of section 31(1) of the *Constitution*.[302] There is another viewpoint though, although not expressly provided for, the regulations concerning the oath should be read as making provision for the affirmation. However, in practice people are allowed to affirm if they object to taking an oath.

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297 See for example Sharrock *et al Hockly's Insolvency Law* 159.

298 See for example Sharrock *et al Hockly's Insolvency Law* 112.

299 See *Sibiya v Director-General: Home Affairs* 2009 (5) SA 145 (KZP); *Plumb on Plumbers v Lauderdale* [2012] ZAKZDHC 62; 2013 (1) SA 60 (KZD) 6.

300 See Smith *Law of Insolvency* 212; Bertelsmann *et al Mars on Insolvency* 423 and Kunst *et al Meskin Insolvency Law* 8-5; Sharrock *et al Hockly's Insolvency Law* 162.

301 See Mwelase *Insolvency Interrogations* 20.

302 See s 31 of the *Constitution* on this subject. Briefly this section provides that persons belonging to a religious community may not be denied the right to enjoy and exercise their religious customs.

The presiding officer must at all times ensure that the proceedings are conducted in accordance with the principles of justice.[303]

(iii) Interrogation on all matters relating to the insolvent or his business or affairs

The scope of interrogation is wide. This is crucial if the interrogation is to achieve its aims of obtaining a complete and detailed picture of the insolvent's estate and financial affairs.[304] There are no issues formulated beforehand, the inquiry is conducted for the sole purpose of discovery, to obtain facts that the trustee and creditors do not have and which may be of financial benefit to the estate.[305] Quoting *Pitsiladi v Van Rensburg*,[306] Sharrock[307] reiterates that it is permissible to hold an interrogation for gathering information for possible civil litigation against parties with whom the insolvent was connected or had dealings. Relying on *Costas Yiannoulis v Grobler;*[308] Smith[309] submits that the interrogation on matters relating to the insolvent is aimed at eliciting information which the creditors and trustees are not privy to. Furthermore, the interrogation's goal is to establish what the accurate circumstances are regarding the insolvent estate.[310] According to her, the broad scope of interrogation is necessary to obtain sufficient information regarding the insolvent. It is my opinion that the sole purpose of section 65(1) is to discover information that will assist the trustee to determine the true state of affairs with regard to the insolvent estate and for recovering any property that was disposed of by the insolvent, especially where he did not receive any benefits. Thus, any information that is calculated to affect the insolvent estate financially and that relates to the insolvent, his business or affairs, is extremely relevant.[311]

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303 Bertelsmann *et al Mars on Insolvency Law* 428; Kunst *et al Meskin Insolvency Law* 8-12; Sharrock *et al Hockly's Insolvency Law* 162.

304 Kunst *et al Meskin Insolvency Law* 8-1; Bertelsmann *et al Mars on Insolvency Law* 423; Sharrock *et al Hockly's Insolvency Law* 162.

305 *Harksen v Lane* 1998 (1) SA 300 (CC) at 57. See also Kunst *et al Insolvency Law* 8-12; Bertelsmann *et al Mars on Insolvency Law* 423-424; Sharrock *et al Hockly's Insolvency Law* 162.

306 2002 (2) SA 160 SE.

307 Sharrock *et al Hockly's Insolvency Law* 162. Kunst *et al Meskin Insolvency Law* 8-13.

308 1963 (1) SA 599 (T).

309 Smith *Law of Insolvency* 213.

310 Smith *Law of Insolvency* 213.

311 An example of irrelevant information is that which relates to the insolvent's personal affairs.

In the *De Lange v Smuts*[312] matter an examinee, as subpoenaed, appeared at the meeting of creditors. He, however, failed to answer questions regarding the affairs of the insolvent estate to the satisfaction of the presiding officer. The view was that the examinee did not answer questions fully and satisfactorily and as a result, a warrant for his arrest was issued. Although the warrant was subsequently withdrawn, this strict stance is indicative of the seriousness of the objectives intended to be achieved by this sub-section. The threat of imprisonment is intended to achieve the legitimate objectives of insolvency law and to protect the interest of creditors.[313] The court referred to this process as "civil contempt". Accordingly, the purpose of interrogating witnesses under this sub-section is to assist the trustees of insolvent estates to ascertain the insolvent estate assets and if they cannot be found in the estate, to trace their whereabouts. During this process, the trustee should also attempt to recover what is owed to the estate and to secure all necessary information for the purpose of an efficient liquidation process.[314] The court acknowledged the position of the trustee as an uninformed outsider whose proper performance of his administrative functions depended on the information to be provided by those privy to the business affairs of the insolvent.[315] It is for these reasons that the interrogation of an insolvent and related persons should be on all matters relating to the insolvent or his business affairs to assist trustees in the performance of their duties and to ensure benefit to creditors.

Acknowledging the possible resistance on the part of those subpoenaed to submit to the interrogations, the court highlighted the fact that public interest is served when those with the required information are compelled to provide it.[316] This was said to be the case in the context of the winding-up of a company as well. In the same way as the insolvent is compelled to be subjected to interrogation and submit the required information, directors of a company in the process of being wound-up

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312 *De Lange v Smuts* 1998 (1) SA 736 (C).
313 At 33.
314 At 33.
315 At 33.
316 At 34.

are equally subjected to compulsory interrogation.[317] The court emphasised the need in the context of insolvency to protect the interest of the general body of creditors by ensuring that all the assets of the insolvent be identified and recovered. Of further importance in the interrogations was said to be the uncovering of any collusive dealings and impeachable transactions.[318] It is only through these processes and procedures that insolvents and other people with the required information are not afforded an opportunity to evade their obligation.[319]

The court recognised the fact that insolvency proceedings are of a civil nature and that it is in the public interest in compelling the insolvent to disclose all such information regarding the insolvent estate.[320] This, the court held to be the case because the insolvent is "very often the only source of particular information".[321] Processes employed to coerce insolvents and other witnesses who are under a "legal duty to testify" are simply in aid of the legislative objectives.[322]

To emphasise the importance of attending to the interrogations, the court made reference to section 6(1) of the *Commissions Act* [323] which makes it a punishable offence for a person subpoenaed to fail to attend the enquiry.[324]

(iv) The business, affairs or property of the solvent spouse

To some extent[325] the business, property or affairs of the solvent spouse may be relevant to the administration of the insolvent estate. Consequently, the insolvent may be interrogated on those aspects and again "to the extent that they are relevant". This should be the case because of the solvent spouse's relation to the

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317 At 34, citing *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) and *Bernstein v Bester* 1996 (2) SA 751 (CC).
318 At 34.
319 At 34.
320 At 35.
321 At 35.
322 At 35.
323 8 of 1947 as amended.
324 At 98.
325 See *Harksen v Lane* 1998 (1) SA 300 (CC) para 113.

insolvent. The fact that the insolvent and his spouse are in a special relationship is a fact that cannot be ignored and therefore relevant to the insolvent estate.[326]

It is submitted that the existence of this special relationship between spouses can enable spouses to divert assets between themselves in order to defraud creditors of the insolvent estate.[327] If the focus of the provisions remains the estate of the insolvent, and not an inquiry into the independent affairs of the solvent spouse, the purpose of this provision may be defeated.[328] This provision enables the trustees to fully investigate and untangle the affairs of spouses. The trustee is given great latitude in order to identify and recover all the assets in an insolvent estate. In particular, the provision is intended to enable the trustee to identify and recover all the assets of the insolvent estate.[329] I concur. There is nothing wrong in requesting a person to provide information relating to his spouse, (information relevant and required)[330] as long as questions are lawfully put. A question will be unlawful when it is irrelevant, vexatious and malicious towards the interrogatee. Bertelsmann,[331] Kunst and Sharrock refer to *Harksen v Lane*'s principles in this regard.

(v) Exclusion of certain questions

As stated earlier, the scope of interrogation is wide. A wide scope does not, however, allow unnecessarily questions that would prolong the interrogation. The presiding officer is empowered to disallow any irrelevant question. The proviso to section 65(1) stipulates that the presiding officer **may** disallow any question, which would prolong the interrogation unnecessary. It further expressly states that the presiding officer **shall** disallow any question, which is irrelevant. In my mind the use of the word, "may" indicates again that the presiding officer has discretion to decide which questions to allow, thereby ensuring interrogations are not delayed.

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326 See *Harksen v Lane* 1998 (1) SA 300 (CC) para 61.
327 See Mwelase *Insolvency Interrogations* 10.
328 *Harksen v Lane* 1998 (1) SA 300 (CC) para 113.
329 See *Harksen v Lane* 1998 (1) SA 300 (CC).
330 See *Harksen v Lane* 1998 (1) SA 300 (CC) para 113.
331 See Bertelsmann *et al Mars on Insolvency Law* 420; Kunst *et al Meskin Insolvency Law* 8- 5; Smith *Law of Insolvency* 212; Sharrock *et al Hockly's Insolvency Law* 161.

On the hand, the word "shall" indicates that if the question is relevant, he has no discretion to exercise but to allow the question.

(vi) Conclusions re section 65(1)

Although acknowledging the broad scope of the interrogation, Smith is not in favour of the narrow compass of this section, which sets out that the presiding officer must disallow any question, which is irrelevant and may disallow any question, which would prolong the interrogation unnecessarily.[332]

Bertelsmann[333] points out that, once a question is relevant, the presiding officer has no discretion but to allow it, subject to the provisions of section 65(2A). His only further discretion is to disallow any question, which would prolong the interrogation unnecessarily.[334] Furthermore, Bertelsmann acknowledges that the interrogation may properly cover a wide field and it is up to the presiding officer to decide what is relevant to the enquiry in question. Thus, questions relating to a company of which the insolvent was a director may be relevant.[335]

Kunst acknowledges the wide scope of the interrogation and states that whether a question is one which would prolong the interrogation unnecessarily, depends on the facts of the case and disallowance thereof is in the discretion of the presiding officer.[336] Sharrock[337] also refers to the fact that the presiding officer is required to exclude a question, which is irrelevant and would prolong the interrogation unnecessarily. He further highlights that questions may be excluded if they are not calculated to produce material information about the insolvent's affairs. If, however, something is unclear or "shady", others should be interrogated to get the real picture of what happened in the insolvent estate. If the banker is present, he is the relevant person to request information from regarding the insolvent's bank

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332 Smith *Law of Insolvency* 212.
333 Bertelsmann *et al Mars on Insolvency Law* 423-424.
334 Bertelsmann *et al Mars on Insolvency Law* 422.
335 *R v Mahomed* 1933 ELD 136; *Pretorius v Marais* 1981 (1) SA 1051 (A) 1064(B). Bertelsmann *et al Mars on Insolvency Law* 423- 424.
336 Kunst *et al Meskin Insolvency Law* 8-12.
337 Sharrock *et al Hockyl's Insolvency Law* 162.

account.[338] No other persons should be expected to provide such information. Furthermore, information can be obtained more readily from the banker, as the original source of such information.[339] Interrogating others, other than the insolvent and his banker in this regard, should be precluded because it will prolong the interrogation unnecessarily.

It is my opinion that the presiding officer should be given a broader compass empowering him to disallow any question that is irrelevant and would prolong the interrogation process. Prolonging the proceedings unnecessarily should be avoided in order to fast track the winding-up of the insolvent estate. Whether the question is relevant or not should depend on the facts surrounding each case. What is relevant to one case might not necessarily be relevant to another. After all, questions should relate to the affairs of the insolvent, his assets, business and his dealings regarding these.[340]

Any person with any practical experience in insolvency interrogation knows that such discretion is essential to curb the abuse of the system, considering sequestration has become such a profitable profession and trustees (and liquidators, in the case of an insolvent company), will do almost anything to maximise their fees. Questions, which should be precluded, in my opinion, are those that, objectively speaking, may not produce material information that will benefit the insolvent estate financially. It is submitted that the sole purpose of the section is to discover information that will assist the trustee to recover any property that was disposed of by the insolvent, especially where he did not receive any benefits or apparently insufficient consideration. Any information that is calculated not to benefit the estate financially is not relevant, therefore immaterial, and should be excluded. An example of such is information relating to the insolvent's personal affairs.[341] To my mind

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338 See Mwelase *Insolvency Interrogations* 22.
339 See *Agyrakis v Gunn* 1963 (1) SA 602 (T) 604; *Absa Bank Ltd v Jooste* 2013 ZAECPEHC 58.
340 See Mwelase *Insolvency Interrogations* 23.
341 Such as the relationship between the debtor and his wife, for example. However, some personal affairs may be relevant such as the insolvent's banking account or marital status.

personal questions allowed should not even be permitted to prove that the debtor/insolvent has a dishonest character.

Perhaps another question should be regarding the suitability of a Master to be a presiding officer. One could argue that a person with thorough legal and court experience should conduct the interrogations. This could also fast track the administration process by ensuring that the witness submits credible information that would assist in the discovery of concealed estate assets. It can be argued that a Master is merely a public official with little or no experience in litigation.

Regarding questions meant to test the credibility of a witness, Bertelsmann[342] is of the view that lengthy cross-examination to test credibility should not be allowed. Kunst[343] concurs with Bertelsmann's views regarding the scope of the interrogation. She however, goes a step further in explaining why it may be important in certain circumstances to interrogate for the purpose of testing a witness's credibility. She specifies that a witness may be interrogated for that purpose where the matter of whether or not he is a credible witness is itself relevant and whether the credibility aspect relates to the insolvent's affairs.

Kunst's viewpoint of credibility can be criticised because the credibility of a witness is always relevant in order to arrive at a thorough and complete administration of the said estate. There is another viewpoint though. In insolvency proceedings conducted outside the court structure, the presiding officer may be of the opinion that he need not necessarily concern himself with credibility issues but rather answers to posed questions. My opinion of Kunst's view is that, during the interrogation proceedings, the credibility of a witness would always be relevant, regardless of the fact that the presiding officer does not make a judgment or ruling. If the credibility of a witness was questionable, the information gathering process would be a fruitless exercise in that no useful information to the benefit of the insolvent estate and its creditors would be obtained. This process should, however,

342 Bertelsmann *et al Mars on Insolvency Law* 424.
343 Kunst *et al Meskin Insolvency Law* 8-11.

not be misused to obtain information extraneous to the administration of the insolvent estate.

Therefore, it is submitted again that establishing the credibility of a witness without turning to and/or using personal questions is necessary in the facilitation of gathering required information; otherwise, the entire process would be a "sham".[344] If the witness's testimony is not credible, the purpose of the legislature will be defeated. Sharrock is of the view that although questions to establish the credibility of a witness are permissible, as long as they are relevant to the affairs of the insolvent, questions, which infringe on a witness' constitutional rights or are not lawfully put need not be answered.[345] I concur. Compelling a witness to answer in such a situation would discredit the interrogation proceedings. Lengthy cross-examinations should be left to the criminal justice system or civil litigation, specifically where the examinee fails to answer questions truthfully and to the best of his knowledge. It can be further argued that, if the insolvency interrogation proceedings were conducted in either a tribunal or within the court structures as civil proceedings, there might not be a need to transfer insolvency matters from one jurisdiction to another, especially where credibility issues arise.

2.3.2.3 Section 65(2): Production of books and documents

The sub-section calls for books and documents from persons subpoenaed in terms of section 64(3) of this statute. The law relating to privilege applicable to witnesses summoned to produce a book or document or giving evidence in a court of law is applicable in this context.[346] The insolvent's banker is amongst persons to be subpoenaed. The sub-section imposes an obligation on persons questioned thereat to answer all questions - the fact that such may be incriminatory to the examinee is no defence to the question posed.

The sub-section reads as follows:

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344 See Mwelase *Insolvency Interrogations* 25.
345 *Harksen v Lane* 1998 (1) SA 300 (CC) para 60. Sharrock *et al Hockly's Insolvency Law* 162.
346 Section 23 The *Magistrate Courts Act and Rules and s 35 of the Uniform Rules of court*.

> In connection with the production of any book or document in compliance with a summons issued under subsection (3) of section sixty-four or at an interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law, shall apply: Provided that a banker at whose bank the insolvent in question or his or her spouse keeps or at any time kept an account, shall be obliged to produce, if summoned to do so under subsection (3) of section sixty-four, any cheque in his possession which was drawn by the insolvent or his or her spouse within one year before the sequestration of the insolvent's estate, or if any cheque so drawn is not available, then any record of the payment, date of payment and amount of that cheque which may be available to him, or a copy of such record and if called upon to do so, to give any other information available to him in connection with such cheque or the account of the insolvent or his or her spouse; and provided further that a person interrogated under subsection (1) shall not be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.

(i) Books or documents to be submitted[347]

Certain persons[348] may be called upon to produce books or documents as per the subpoena. These books or documents must relate to the affairs of the insolvent (thus not just any book or document). As stated earlier, the subject matter of the interrogation is very broad. This broad scope is imperative if the examination is to accomplish its aims, namely obtaining a complete and detailed picture of the insolvent's estate and financial affairs. Section 65(2) applies to information about cheques as well.

Books and documents may reveal improper disposition by the insolvent, completed and uncompleted contracts and any financial transaction with his bank.[349] Even the solvent spouse's bank account is relevant in this regard. In *Harksen v Lane,*[350] the insolvent's spouse was compelled to produce at the meeting of creditors, all documents detailing her financial affairs and those of her husband. Here the court pointed out that the alleged deprivation of privacy was necessary under the circumstances, as much as it was constitutional to temporarily deprive the solvent

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347 See also *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE and *Nyathi v Cloete* [2012] ZAGPJHC 154; 2012 (6) SA 631 (GSJ).

348 Thus the insolvent, his spouse and even his and her banker may be subpoenaed.

349 See *Absa Bank Ltd v Jooste* 2013 ZAECPEHC 58.

350 At 25.

spouse of her property to vest it in the trustee, for the purpose of proving undisputed entitlement to the property by the solvent spouse.[351] Therefore, from my standpoint, the solvent spouse's bank account is relevant - **but** only in as far as the sought information is relevant to the insolvent estate - and the solvent spouse's banker may thus be required to produce bank statements detailing transactions accordingly to ascertain whether or not the insolvent or his spouse has acted improperly or fraudulently towards creditors. Bertelsmann and Kunst express no opinion on this point.[352]

The importance of producing documents relating to the affairs of the insolvent cannot be disputed - it even takes precedence over confidentiality and privacy associated with certain documents.[353] If compulsion were not provided for, one would ask how else trustees were going to learn about the insolvent's financial position.

It must be noted that the interrogation process is aimed primarily at identifying and recovering the insolvent estate assets for the benefit of the estate and its creditors. The process is conducted outside of the court structures, without having had to take expensive[354] litigation routes to recover the assets. Subsequent civil or criminal actions against those, whose conduct is questionable in relation to the insolvent estate affairs, are only secondary.[355] It is my submission that the interrogation of books and documents serves a crucial role in the administration of insolvent estates and should thus be retained.

(ii) Law relating to privilege

Although section 65(2) provides for the compulsory production of books and documents in compliance with a summons issued to any person required to do so,

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351 Section 21 of the *Insolvency Act*.

352 Bertelsmann *et al Mars on Insolvency Law* 426; Kunst *et al Meskin Insolvency Law* 8-11.

353 *Gumede v Subel* [2005] ZASCA 91; [2006] 3 All 411 (SCA), although the matter relates to the documents to be submitted in connection with an insolvent company, this provision is also relevant in the context of individual insolvency.

354 In already depleted estates.

355 Although one must admit that civil actions may also be used to recover assets, etcetera for the estate.

the section further provides for immunity to a witness. This is achieved by making applicable to a witness law relating to privilege as applicable to a witness summoned to produce a book or document or the giving of evidence in a court of law.[356] A person subpoenaed to produce such documents and books at the interrogation has privilege in respect of the said books and documents in the sense that he may not be compelled to produce them unless he is compelled to so do by the court.[357] However, the grounds for privilege must be stated clearly in the document's schedule.[358]

Privileged documents and books are of such a nature that when divulged, they will prejudice (in subsequent proceedings) the litigant's case. An example of privilege is the client-attorney privilege, the so-called legal professional privilege, where on consultation the client produces to his attorney documents and books in confidence so that the latter can prepare a defence for the client. The attorney is obliged to keep such books and documents confidential; the disclosure thereof might incriminate the subpoenaed person and/or prejudice the client's case in subsequent proceedings.[359]

With regard to persons to be subpoenaed for the production of books and documents "any person" will also include a banker who was previously expected to keep silent (because of banker-customer relationship) with regard to any financial information about his client. A banker is, under the provisions of the *Insolvency Act*, obliged to produce any cheque or its copy drawn by the insolvent as well as any added information that he might have in his possession.[360] Contrary to the case of client-attorney privilege, there appears to be no duty on the part of the banker to withhold crucial information from the authorities.[361] It is submitted that the banker-client relationship is different from that of an attorney-client one in that the

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356 Section 23(1) of the *Magistrates' Court Rules of Court* and s 35 of the *Uniform Rules of Court*.
357 See Schwikkard *Principles of Evidence* 123; Zefferett and Paizes *The South African Law of Evidence* 574.
358 Section 23(1) of the *Magistrates' Court Rules of Court*.
359 See Schwikkard *Principles of Evidence* 124; Zefferett and Paizes *The South African Law of Evidence* 586, 668.
360 Section 65(2) of the *Insolvency Act*.
361 See Zefferett and Paizes *The South African Law of Evidence* 668.

insolvent's financial transactions are not regarded as communication or documents submitted for the purposes of litigation or defending a matter. Therefore, there should be no conflict of interest when such books or documents (cheques and statements) are disclosed. After all, the insolvent's banker is privy to such transactions. Since he is the only person privy to information regarding the insolvent's finances, requiring the banker to produce such information should not be of any inconvenience. This argument is premised upon the understanding that it is not expected that the insolvent would have disclosed documents or books with any financial irregularities to his banker, which when disclosed at the creditors' meeting, would prejudice the insolvent.

It is my submission that the requisition of books and documents with the required information might be necessary for a justifiable purpose, (setting aside disposition intended to defraud creditors for example) where the interests of the creditors, who are already in a very detrimental position because of the sequestration of the insolvent debtor's estate, should be given preference.[362]

Schwikkard[363] has a different view. Referring to section 236(4) of the *Criminal Procedure Act*,[364] she emphasizes that even though professional privilege pertains only to the lawyer-client relationship (and thus not enjoyed by other professional relationships), bankers do enjoy limited privilege whereby they need not produce their books unless ordered by the court.

Bertelsmann, Kunst, Smith and Sharrock, concur that section 65(2) obligates a banker of the insolvent or the latter's spouse to produce all copies of cheques drawn by the insolvent or his spouse, if summoned to do so.[365]

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362 See Mwelase *Insolvency Interrogations* 28.

363 Schwikkard *Principles of Evidence* 152-153.

364 51, 1977 as amended by the *Criminal Procedure Amendment Act* 8, 2013. This sub-section provides that: "No bank shall be compelled to produce any accounting records of a bank, and any document which is in the possession of any bank at any criminal proceedings, unless the court concerned orders that any such record is produced". S236 substituted by s.45 of *Act* 129 of 1993.

365 Bertelsmann *et al Mars on Insolvency Law* 426; Kunst *et al Meskin Insolvency Law* 8-10; Smith *Law of Insolvency* 213; Sharrock *et al Hockly's Insolvency Law* 163.

Citing the matter of *Witz v Additional Assistant Magistrate and Witz's Trustee,*[366] Kunst[367] highlights the point that privilege should be claimed only in relation to specific issues and can thus not be general in nature. Further cited thereat are the contrasting provisions of sections 40 and 46 of the *Promotion of Access to Information Act*.[368] Section 40 restricts access to records (of a public body) for purposes of legal proceedings where the documents are protected by privilege, unless such a body waives privilege. Section 46 on the other hand obligates disclosure of documents of a public body where such disclosure would reveal evidence of a contravention of law, risk to public safety or environment and where the public interest necessitates such a disclosure.

Sharrock recognises the right of an examinee to "privilege". However, he is also not oblivious to the fact that, to some extent, the principles of privilege are relaxed to allow the interrogation process to achieve its intended purpose.[369] It is my submission that privilege by an attorney is acceptable in relation to aspects that the client has divulged to him, but not regarding other aspects which the attorney might generally know. Should unnecessary pressure to divulge information be placed on attorneys, clients would be unwilling to disclose certain information to their attorneys. The character and extent of legal professional privilege in our law was highlighted in *S v Sefatsa*.[370] The court opined that the protection of attorney and client communication is crucial for the proper functioning of the legal system.

In *Waymark v Commercial Union Assurance* [371] the court pointed out that if the legal professional privilege was to be eroded, the freedom of communication between the client and his attorney would not exist. According to the court, the client-attorney privilege has a special worth as part of the functioning of the law. Further, the court was not ignorant of the existing conflict between the need to compel

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366 1931 WLD 180 at 184 and 190.

367 Kunst et *al Meskin Insolvency Law* 8-14 fn 15. See also Bertelsmann *et al Mars on Insolvency Law* 426.

368 2 of 2000.

369 Sharrock *et al Hockly' Insolvency Law* 162.

370 *S v Sefatsa* 1988 (1) SA 868 (A) 885G.

371 *Waymark v Commercial Union Assurance CO LTD* [1992] 4 ALL SA 169 (Tk) 172 relying on the Australian case of *Baker v Campbell* (1983) 49 ALR 385 AT 442-5.

disclosure of evidence and the principle to preserve client-attorney confidentiality. In addition, it held that confidentiality of the said communication prevailed. The public interest was said to be better served by this principle of confidentiality, especially for the proper functioning of the adversarial system "which we depend for the attainment of justice in our society".[372]

The court concluded[373] that the right to claim protection from disclosure on the grounds of legal professional privilege has developed past the stage of being a rule of evidence and has now formed part of our substantive law. [374]

It is my view that client-attorney privilege should always be available. Should more clarity be required on certain issues and if the trustee or creditor(s) need certain information, the best person to provide this would be the insolvent himself and his business partners, not his attorney, unless the said books and documents are in the possession or control of the attorney. It is submitted that the attorney-client relationship should be kept intact. The client-attorney relationship should not be breached unnecessarily, especially if relevant documents, books and information could be obtained from the insolvent himself. In addition, one should always bear in mind why there is a privilege when it comes to legal matters: A litigant should never fear to divulge information to his legal representative when he consults. He should know that what he says "will not be held against him".

In *Gumede v Subel* [375] the court had to determine the issue of confidentiality as against the duty to submit books and documents relevant to the affairs of the insolvent company. It was contended on behalf of the subpoenaed that the said documents were confidential and did not pertain to the affairs of the insolvent company. The point highlighted by the court was that the claim of privacy ranked inferior as compared to the relevance of the documents for the winding-up

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372 Relying on *Waugh v British Railways Board* (1980) AC 521 at 535 and 536.
373 At 172, also cited there at the New Zealand case of *Commissioner of Inland Revenue v West Walker* 1954 NZLR 191.
374 See also *Sasol III (Edms) Bpk v Minister van Wet* 1991 (3) SA 766 (T) at 785G.
375 [2005] ZASCA 91; [2006] 3 All 411 (SCA).

process.[376] The importance of obtaining relevant information for the purposes of the administration of the insolvent's affairs is evidenced further by the compulsion to answer even incriminating questions.

(iii) The obligation to answer incriminatory questions and the use thereof

Despite the privilege provided for by this sub-section, a person so interrogated is compelled to answer fully and truthfully and to the best of his knowledge, any question posed. The fact that the information so provided may be incriminatory is no defence. The *Insolvency Act* makes provision for the admission of such evidence in criminal proceedings against the person giving it.[377] As incriminatory as it is, a witness is obliged to divulge such information. This is, however, subject to section 65(2A) (b) of the *Insolvency Act*.[378] The only limitation is that the officer presiding at the criminal proceedings is then allowed to exercise his discretion as to whether to allow such evidence or not. Incriminatory evidence is that information if divulged, has the potential of jeorppadising the deponent's case.[379]

Kunst[380] submits that one may not escape interrogation because of the fact that he may be a witness in a pending civil trial related to the subject matter of the pending interrogation. This is the case whether the said trial is ripe for hearing or not.[381] He points out that evidence so procured is admissible in any subsequent civil or criminal proceedings for perjury against the person who gave it, but it does not constitute proof of the facts revealed by such evidence.[382] The interrogation process has limitations. According to Kunst, the presiding officer's power to interrogate in relation to pending legal proceedings is limited, and especially where the interrogation would constitute an abuse of the provisions of section 65. He submits that the interrogation will be an abuse where the proceedings have reached such a

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376 At 20.
377 Section 65(2A) (*b*). Especially in perjury related offences. See also s 203 of the *Criminal Procedure Act* 51 of 1977 as amended.
378 Discussed at para *2.3.2.6* below.
379 See Zefferett and Paizess *The South African Law of Evidence* 578; Schwikkard *Principles of Evidence* 124.
380 Kunst *et al Meskin Insolvency Law* 8-10-12.
381 Kunst *et al Meskin Insolvency Law* 8-11.
382 Section 65(5) read with s 65(2A).

stage that the purpose of the interrogations is no longer the acquisition of information to assist the trustee in the performance of his administrative functions, but a fishing expedition for impending proceedings.

The required information and thus the object of the interrogation should be one that would assist the trustee to determine his course of action, or to learn about matters of which he was not aware.[383] From Kunst's observation, it is clear that the system may be open to abuse and to ensure that the abuse is curtailed, the presiding officer must bear in mind that the purpose of the interrogation is the collection of information relating to the affairs of the insolvent estate.[384]

Bertelsmann[385] acknowledges the fact that an interrogatee may not refuse to answer questions on the basis that they are incriminatory or that he will be a witness in a pending civil trial on the subject matter of the interrogation. He, however, points out that an examinee is protected from the direct use of incriminatory evidence in a subsequent criminal trial and from public gaze while incriminatory evidence is given.[386] He further highlights the fact that while the advent of the *Constitution* has to some extent protected the witness from self-incrimination, the said evidence is, however, admissible in subsequent civil proceedings.

According to Sharrock,[387] the reasoning behind this apparently harsh encroachment is not difficult to recognise. The purpose of an interrogation is to obtain information about the insolvent estate which the insolvent and other witnesses would rather not disclose to the trustee or to creditors, and which may be used to recover funds and insolvent's assets for the benefit of the estate and ultimately creditors.[388] This purpose can only be realised if trustees and creditors are enabled to ascertain whether the insolvent or any other person has acted improperly or defrauded

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383 Kunst *et al Meskin Insolvency Law* 8-12.

384 Information so collected must be material information that will benefit the insolvent estate financially, the information should also be regarding facts unknown to the trustee and knowledge required to effect the proper administration of the estate. See Mwelase *Insolvency Interrogations* 22.

385 Bertelsmann *et al Mars on Insolvency Law* 426.

386 Section 65(2A) of the *Insolvency Act*.

387 Sharrock *et al Hockly's Insolvency Law* 163.

388 Citing *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.

creditors. He observes that this purpose would not be achievable if the examinee and other witnesses could object to answer questions on the basis that they might be incriminating or evidence revealed at the interrogation could not be used in subsequent civil proceedings against the examinee or other witnesses.[389] He further observes that a witness may be interrogated even though he is a witness in a pending civil trial concerning the subject matter of the interrogation. If he can so refuse, the purpose of the interrogation would be defeated. I concur. If the opposite were to be permitted, the administration of the estate would be ineffective and delayed.

Smith[390] holds the view that the stringent provisions of this section might perhaps appear to be unjustifiable, more so to a person other than the insolvent. She states that in the 1916 *Insolvency Act,* no witness other than the insolvent was deprived of the right to refuse to answer incriminatory questions. The insolvent was deprived of this right in order to ensure that he does not withhold any information regarding the affairs of his estate to the disadvantage of creditors. One may be convinced that the deprivation of the right against self-incrimination of "other" persons, as provided for by the present *Insolvency Act*, is justified in the sense that such persons may be in a position to shed more light onto the affairs of the insolvent since they may have nothing to lose after all. Smith points out that the present *Insolvency Act* may have extended the deprivation of this right to any person giving evidence at the meeting of creditors for some reasons. She is of the view that the meetings of creditors are in a form of an enquiry with the purpose of finding out if any person has fraudulently colluded with the insolvent to the creditors' prejudice.

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389 See *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.

390 Smith *Law of Insolvency* 213, she maintains that should a person so interrogated refuse to answer questions lawfully put, then the purpose of the enquiry will be defeated. She is however silent on the issue of the interrogation venue, whether it is held in public or *in camera.* Smith does not make any distinction between s 65(2) and s 65(2A) (a)(b) of the *Act*. The reason being that the book was written before the amendments of this section. Although she is silent on the fact that evidence at the interrogation is admissible at later proceedings against a person giving it, she states that such evidence will not be admissible against a third party to a suit. This is more so if these evidence or admissions are not made contemporaneously with the transaction attacked, but after a lapse of time.

Further, on the issue of the interrogation, insolvency law writers referred to seem to be of the same mind with regard to the interpretation and purpose of the legislative provisions.[391] It is submitted that if the insolvent, and any other person summoned, are given sufficient time and facilities to prepare for the interrogation, there should be no problem of constitutional conflict. It is a given, that if persons were given a choice whether to attend or not, they would probably not attend nor answer questions even if they were innocent (for fear of implicating others for example), hence the compelled attendance and responses as provided for by the legislature. An enquiry in terms of the insolvency law serves an important purpose in the gathering of information for a fair and equitable liquidation process to the advantage of all the creditors in the insolvent estate and should consequently, be retained.

As incriminatory as it is, a witness is obliged to divulge such information. The officer presiding at the criminal proceedings is then allowed to exercise his discretion in allowing such evidence or not. The question of incursion into the right against self-incrimination as entrenched in our *Constitution* was answered in a number of court cases[392] and the alleged incursion was said to be justifiable in an open and democratic society, where the rights of all citizens are equally protected. The above-mentioned incursion was further justified by an understanding that insolvency interrogations are neither civil nor criminal proceedings, but mere enquires. Judging from a number of court cases since the inception of the constitutional dispensation, one is tempted to be convinced that there is almost no less drastic means to obtain information that might assist the fair liquidation process to the advantage of creditors.

According to *Advance Mining Hydraulics v Botes*,[393] to ensure that the proceedings are conducted in accordance with the fundamental principles of justice, the courts have powers to prescribe that the presiding officer performs his functions fairly and

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391 Bertelsmann *et al Mars on Insolvency Law* ; Kunst *et al Meskin Insolvency Law* ; Smith *Law of Insolvency*; Sharrock *et al Hockly's Insolvency Law*.

392 See para *2.3* above where this has been discussed and ch 3 below.

393 *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) 824. See Sharrock *et al Hockly's Insolvency Law* 162.

impartially. The *Insolvency Act* further grants the courts powers to intervene in cases where the provisions of section 65 are abused or used to vex or oppress an examinee.

From the above submissions, it appears as if there are no other means of obtaining information regarding the insolvent estate, except by way of interrogation or enquiry. The rampant abuse of the insolvency processes necessitates thorough investigation of the affairs of the insolvent.[394] Comprehensive investigation through interrogation proceedings is further necessitated by the fact that the statement of financial affairs of the debtor may not always be thoroughly interrogated by the court, due to heavy workloads.[395] It is during the interrogation of the insolvent and other persons of interest, that discrepancies between the actual statement of affairs and the fabricated one can be established. The public interest is usually at risk of being sacrificed in cases of insolvency, especially where there are no strict regulations. The legislature is therefore obliged to make provisions for means of obtaining information that may assist in the fair distribution of the insolvent assets amongst his creditors.

Although the mandatory nature of this section appears to be harsh, sacrifices have to be made, and the interests of innocent creditors and the public at large should be protected. This protection becomes even more crucial when one considers the extent to which shrewd debtors will go in an attempt to evade their indebtedness – consequently passing the burden to their creditors.[396] There seems to be no justifiable reasons why creditors should be prejudiced or their interests unnecessarily curtailed.

The interrogation process is thus a necessary tool to achieve the purpose of the *Insolvency Act*. This indicates that the interest of creditors is considered paramount

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394 See *Mthimkhulu v Rampersad* [2000] 3 All SA 512 (N) 514h; *Ex parte Shmukler-Tshiko* [2012] ZAGPJHC 209 paras 2 and 7; *Ex parte Arntzen* [2012] ZAKZPHC 66; 2013 (1) SA 49 (KZP) para 10*; Plumb on Plumbers v Lauderdale* [2012] ZAKZDHC 62; 2013 (1) SA 60 (KZD) paras 4 and 7. See also Mabe and Evans 2014 *MERCLJ* 26 651.

395 See in general *Ex parte Snooke* [2014] ZAFSHC 96; 2014 5 SA 426 (FB).

396 *Ex parte Shmukler-Tshiko* [2012] ZAGPJHC 209 para 2.

to those of the insolvent. I further concur with the court's interference as to the admissibility of evidence, especially if there are irregularities on the part of the presiding officer. It is my opinion that the court should (at subsequent criminal proceedings) refuse to hear irregularly obtained evidence given at the interrogation proceedings and make a declaratory order as to admissibility of such evidence. This should be in order to render the criminal proceedings fair. Although offences under the *Insolvency Act* might be discovered in the process of interrogation, it does not appear to be the objective for which this section was inserted in the statute.[397] It will, however, not be unlawful to interrogate an examinee concerning his knowledge of the nature of the offence in question.[398]

2.3.2.4 Section 65(2A) (a): *In camera* proceedings

Although the sub-section envisages compulsion to answer even incriminatory questions, it does provide some degree of protection for a witness to provide evidence away from the public gaze. This is achieved by providing for *in camera* proceedings for that part of incriminatory evidence. The sub-section further prohibits the publication of incriminatory evidence produced at the interrogations.

The sub-section reads as follows:

> Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions which may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the presiding officer shall, notwithstanding the provisions of section 39(6), order that such part of the proceedings be held in camera and that no information regarding such questions and answers may be published in any manner whatsoever.

Although section 39(6) of the *Insolvency Act* provides that insolvency interrogations are public meetings as both public policy and the *Constitution* [399] requires this, section 65(2A)(a) makes provisions for *in camera* interrogation proceedings. A meeting of creditors held for the purpose of interrogation is public in that it is

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397 Kunst *et al Meskin Insolvency Law* 8-2.

398 See *Lazarus v Said and Roos* 1958 (3) SA 864 (E) at 868; *Simon v The Assistant Master* 1964 (3) SA 715 (T) at 719; *Kebble v Gainsford* 2010 (1) SA 561 (GSJ).

399 Section 35(3). It is also my opinion that such an approach will serve the purpose of discouraging unscrupulous individuals.

advertised. The reason for such advertisement may probably be to alert all creditors and interested parties in the insolvent estate to attend the meeting or to protect its rights.

One can thus compare meetings of creditors in the insolvent estate with open court proceedings. The sub-section emphasises the provision that the proceedings will be held *in camera* regardless of the provisions of section 39(6) of the *Insolvency Act* (the *in camera* proceedings may be ordered in circumstances where an interrogatee might be compelled to divulge incriminatory evidence).

This section provides that the meeting of creditors shall be held at a place where the public will have access. Further, that the publication of any statement made at such a meeting shall be privileged, to the same extent as the publication of a statement made in a court of law which is precluded from being published unless by an order of court.

The presiding officer is obliged to order the *in camera* proceedings for that portion of the proceedings which have the potential of unearthing information prejudicial to an examinee or public interest, such as the state's confidential information.[400] This entails that proceedings be held behind closed doors.[401] The officer concerned is also obliged to order that such information not be published.[402] The mandatory nature of this provision implies that failure by the presiding officer to comply might amount to the dereliction of his duties and his decision may be brought under review.[403]

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400 Kunst *et al Meskin Insolvency Law* 8-9, Bertelsmann *et al Mars on Insolvency Law* 426 and Sharrock *et al Hockly's Insolvency Law* 162 concur on the provisions of the *in camera* proceedings. Bertelsmann *et al* and Sharrock *et al* elaborates further on this provision. They state that the fact that the presiding officer is obliged, in certain circumstances to hold the inquiry *in camera* does not mean that in all other circumstances it must take place in public. For this view, they rely on *Roux v Die Meester* 1997(1) SA 815 (T) 825. Smith is silent on the issue of the *in camera* proceedings, the reason being the fact that she wrote her book prior to the amendments on this section.

401 See s 153(1) of the *Criminal Procedure Act* 51of 1977; Schwikkard *Principles of Evidence* 389; Geldenhuys *Criminal Procedure* 100.

402 Section 154 (5) of the *Criminal Procedure Act* 51, 1977.

403 See Bertelsmann *et al Mars on Insolvency Law* 424.

For the purposes of the *Insolvency Act,* the *in camera* proceedings entail that no member of the public unaffected by the proceedings as well as "non-essential" persons shall be allowed at this creditors' meeting, especially where the insolvent or any witness, divulges incriminatory information that might be used at any subsequent proceedings against the person giving it. However, any creditor and interested person are allowed into the creditors' meeting, but will be excused for that *in camera* part of the interrogation. After that, they will be allowed back into the meeting. In any event, it is not permissible to divulge information and to use information against a person who has not been tried yet. Further, a person is not guilty until proven guilty.[404] Nevertheless, persons present at the meeting who have an interest in the matter and would want to sue in the near future, would use the opportunity to gather information to prepare either civil or criminal actions against examinees. Therefore, only parties that are closely affected by the insolvent's statement and who have a direct interest in the insolvency may be allowed at such meetings where incriminatory information is to be divulged.[405] The words, "not to be published", in my mind, prohibits publication of information of any kind in this connection, in any media, forum, meeting or in public documents where the public might have access to such information.[406] The information will obviously concern the insolvent and his financial affairs, business or actions in that regard. I do not see the reason behind the emphasis on the *in camera* proceedings, because the very people that might be a threat to the insolvent (trustee and proved creditors) are allowed at the meeting. They would obviously accumulate all the information required for future civil litigation. It is submitted that the in *camera* proceedings and a bar against publication of information serve, in this context, a very limited purpose to the insolvent.

De Waal and Currie[407] point out that although the Constitutional Court in *Bernstein v Bester*[408] stated that information obtained in an investigative enquiry may be used

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404 *S v Varma's* 1996 (1) SACR 528T.

405 For example, creditors and their agents, the insolvent's attorney and trustees are persons affected.

406 See Mwelase *Insolvency Interrogations* 32.

407 De Waal Revitalizing the Freedom Right 226.

408 1996 (2) SA 751 (CC).

in subsequent civil proceedings against examinees, it must be noted that the case was decided under the *Interim Constitution.* They highlight that the *Interim Constitution* did not expressly guarantee the right to a fair civil trial. The latter right now forms part of the right to access to courts as entrenched by section 34 of the *Constitution*. Despite the new wording, De Waal and Currie are optimistic as to the likelihood of the court arriving at a different conclusion. Bertelsmann[409] has a different opinion. According to him, section 65(2A) provides protection to an examinee in that no use of incriminatory information directly obtained under compulsion may be used in subsequent criminal proceedings against the person who gave the information. Such information is further protected from public exposure. Bertelsmann notes that the same evidence obtained is, however, admissible in subsequent civil proceedings against the person giving it.[410]

Sharrock[411] emphasizes that, although evidence given at an interrogation is admissible in civil proceedings instituted against the person who gave the evidence, the evidence does not necessarily prove that the facts are true. Accordingly, the court is required to take into account the whole evidence and determine the importance to be attached to each aspect of the evidence given.[412] The mandatory nature of this provision is further evidenced by the subjection of an examinee to interrogation; the fact that he will be a witness in a pending civil trial concerning the subject of the proposed interrogation is no excuse. Kunst[413] concurs with Bertelsmann and Sharrock on this point.

Further to this issue, Steyn[414] emphasizes the view that the effect of section 65 is that evidence so obtained may be used as evidence against an examinee in civil and criminal proceedings relating to perjury. According to him, the argument is that the purpose of the interrogation is to obtain information about the insolvent estate

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409 Bertelsmann *et al Mars on Insolvency Law* 426.

410 *Du Plessis v Oosthuizen* 1999 (2) SA 191 (O) *Du Plessis v Van Zyl* 1995 (3) SA 604 (C); Bertelsmann *et al Mars on Insolvency Law* 426.

411 Sharrock *et al Hockly's Insolvency Law* 164.

412 *Du Plessis v Oosthuizen* 1999 (2) SA 191 (O) 206.

413 Kunst *et al Meskin Insolvency Law* 8-9; Bertelsmann *et al Mars on Insolvency Law* 425; Sharrock *et al Hockly's Insolvency Law* 162.

414 Steyn 2005 *CILSA* 419.

which would not otherwise be disclosed (except through compulsion) to the trustee or the creditors, and which may be used to recover money or assets for the benefit of the insolvent estate.[415] It is crucial for the trustee and creditors to ascertain whether any persons unlawfully contributed to the insolvency of the debtor. Permitting examinees, the option to opt out of examinations or not using such evidence in subsequent civil proceedings will defeat the very objective of the examination. For this reasoning, he relies on *Equisec (Pty) Ltd v Rodriques,*[416] where a debtor applied for the stay of a final sequestration order against the estate, alleging that if the interrogation is permitted to proceed, it would prejudice him in criminal proceedings contemplated against him. The case was subsequently dismissed by the court on the grounds that section 65(2A) provided adequate protection in that incriminatory answers would not be permissible against an examinee in criminal proceedings.

2.3.2.4.1 Stay of Insolvency proceedings

Further, on this point, our courts have, in a number of decisions, emphasised the fact that for an application for a stay of insolvency proceedings to be successful, an applicant must establish a probability of prejudice occurring in the event that the civil proceedings sought to be stayed are not stayed pending the finalisation of criminal proceedings.[417] Additionally, a court may in its discretion make an appropriate order to avoid prejudice being suffered by a person with pending criminal proceedings. In exercising this discretion, a court may[418] make an order specifically directed to prevent prejudice because of the interrogation of the insolvent. The authorities[419] that provided for the stay of civil proceedings, where

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415 For this view he relies on *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.

416 1999 3 SA 113 (W).

417 See *Donaldson v Veleris* 1936 WLD 84; *Randell v Cape Law Society* (2011) JOL (ECG); *The Law Society of The Cape of Good Hope v Randell* [2013] (3) SA 437 (SCA).

418 As has occurred in numerous insolvency matters. See for example *Equisec (Pty) Ltd v Rodriques* 1999 3 SA 133 (W); *Donaldson v Veleris* 1936 WLD 84; *Randell v Cape Law Society* (2011) JOL (ECG); *The Law Society of The Cape of Good Hope v Randell* [2013] (3) SA 437 (SCA).

419 See in this regard *Standard Bank of South Africa Ltd v Johnson* 1923 CPD 303*; Irvin and Johnson Ltd v Basson* 1977 (3) SA 1067 (T) at 1072-1073.

criminal proceedings arising from the same conduct were pending, have become academic.[420]

In *The Law Society of the Cape of Good Hope v Randell*, [421] the court of appeal had to decide whether the stay of civil proceedings where criminal proceedings (emanating from the same matter) were pending against the appellant (respondent in the court below) was appropriate. In summary, the facts of the case were as follows: The respondent was a duly admitted attorney of the High Court. He was facing charges of fraud and theft committed while he was a co-trustee of a trust. The criminal proceedings against the respondent were still pending. Prior to the disposal of the criminal proceedings of the appellant, the Law Society of the Cape of Good Hope launched an application in the Eastern Cape High Court for the removal of the respondent's name from the roll of attorneys. The application is based on the same facts, which are the subject of the criminal proceedings pending against the respondent. Without filing an answering affidavit in opposition to the application to strike him off, the respondent launched a counter application for a stay of the striking off application, pending the disposal of the criminal proceedings. He submitted that by making a sworn statement in advance of the criminal proceedings, he might be prejudiced and his right in terms of section 35(1) (c) of the *Constitution* (not to be compelled to make any confession or admission that could be used in evidence against him) might be violated. He also claimed that he was entitled to remain silent pending the finalisation of the criminal trial and his right to do so under section 35(1)(a) of the *Constitution* would be compromised.

The question arising from this appeal was whether the court below was entitled to grant a stay of the civil proceedings, even though there was no compulsion on the respondent to file an answering affidavit in opposition to the striking off application. There was a further aspect to be considered, the question whether the respondent proved that he would suffer prejudice if he made a sworn statement in opposition to the striking off application. The appeal was with leave of the court below.

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420 Kunst *et al Meskin Insolvency Law* 8-14 fn. 9.
421 [2013] ZASCA 36.

In answering these questions, the court highlighted[422] that the principle of staying civil proceedings where criminal proceedings were pending emanated in cases involving sequestration proceedings in which the examinee respondent was required to subject himself to interrogation, or to answer questions put to him by the provisional trustee. Clearly, in those cases there was an element of compulsion because prior to its amendment, section 65 of the *Insolvency Act* provided that the person concerned was not entitled to refuse to answer questions, opined the court.[423] Further highlighted by the court was that the examinee's position was only improved by the intervention of the court in the exercise of its discretion where it deemed it necessary. In most cases, this involved directing that the examinee should not be interrogated.[424] The court, therefore, did not agree with the decision of the court below. It stated[425] that the approach adopted by the court below was erroneous in two important respects. The first involved its broad formulation of the general principle applied in determining whether a stay should be granted where civil and criminal proceedings arising out of the same circumstances are pending against a person. Secondly, whether there is a likelihood of prejudice to the person concerned if he made a statement prior to the disposal of the criminal proceedings.

On the approach adopted by the court below, the power to grant a stay under these circumstances would be unlimited and in the court's view,[426] this is undesirable. According to the court, one would envisage a situation where a stay would be refused because civil proceedings invariably create the potential for information damaging to the accused person to be disclosed by the accused person himself - not to mention, it will often serve his interest in the civil proceedings to do so.

The second important respect in which the court below erred is with regard to the application of the principle to the facts, said the court.[427] In the court's view, the respondent failed to show that he would be prejudiced if the application to strike

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422 At 12.
423 At 12.
424 See for example *Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226 at 231.
425 At 13.
426 At 13.
427 At 14.

him off the roll was not stayed. The court highlighted the fact that even though the usual practice is to stay the civil proceedings until criminal proceedings have been adjudicated upon, the accused person must still show that he might be prejudiced in the criminal proceedings should the civil proceedings be heard first.[428] Further, the accused must show that state compulsion or coercive means are to be employed in the civil proceedings. Further, the view is that the hard choice, which the defendant may face between abandoning his defence to the civil proceedings and waiving his right to remain silent, cannot be resolved for him by the court.[429] The appeal was upheld[430] with costs on an attorney and client scale, and the order of the court below set aside.

In support of its views, the court highlighted the matter of *Jefferson Ltd v Bhetcha*,[431] where the Court of Appeal in England dismissed an application by an accused person for the stay of civil proceedings for the recovery of moneys pending the finalisation of the related criminal proceedings. In dismissing the application, the court emphasised that there was no established principle in law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence is or likely to be, in the criminal proceedings.

Further referred to by the court was the matter of *R v BBC, Lavelle*,[432] where the Queen's Bench, through judge Woolf, emphasized that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that **there is a real danger**

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428 At 15.
429 At 18.
430 At 35.
431 [1979] 2 All ER 1108 (CA) at 1112-1113. With England as jurisdiction of comparison for the purposes of this research, it is crucial to take a glimpse at similar court cases decided in this jurisdiction and related jurisdictions. See ch 6 below for a complete discussion of the position in England.
432 [1983] 1 All ER 241 (QBD) at 255.

and not merely danger that there would be an injustice in criminal proceedings if the court did not intervene.

Lastly, the American case of *V v C* [433] was referred to. In this matter the court of appeal (in deciding whether a stay of proceedings should have been granted because the privilege against self-incrimination constrained the defendant from putting forward a defence) pointed out that there was no absolute right for a defendant in civil proceedings, not to have judgment entered against him simply because the privilege against self-incrimination was raised. The court refused the appeal on the basis that there was no need for the stay. In addition, it held that the defendant was entitled to enjoy the privilege against self-incrimination but, if he were to exercise it, he would have to suffer the consequences in the civil proceedings. I concur. One should not be allowed to enjoy the benefits of a provision and escape the unfavourable concomitant responsibilities that come with the benefits of the said provision.

With regard to the protection now available to an examinee under the amended section 65 by section 65(2A) of the *Insolvency Act*, the position of an examinee in insolvency proceedings is now improved by these amendments. Section 65(2A) now provides for some protection to persons under interrogation. The new section requires that, that part of the proceedings in which they are required to answer such questions should be held *in camera* and that their answers should not be published. Prior to the amendment,[434] the information elicited at these proceedings had generally been admissible in subsequent criminal proceedings. It must be noted that a practice whereby civil proceedings were stayed until criminal proceedings, arising from the same facts, had been disposed of. Currently this practice is not necessary any more.

It is now an established principle in South Africa that pending civil proceedings against an examinee are not stayed until interrogations or examination are

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433 [2001] EWCA Civ 1509.
434 Even before the advent of the *Constitution*.

completed.[435] From the above provision, it appears as if sufficient protection is thereby afforded an examinee. This is regardless of the fact that insolvency examinations are simply enquiries (and not civil proceedings), where an examinee needs to shed light as to the whereabouts of the estate's assets, for the equitable distribution to his creditors. It is submitted that, while insolvency proceedings take the form of civil proceedings in a court of law, interrogation of an examinee will proceed subject to the court issuing an order to protect an examinee against prejudice occurring because of incriminatory information being disclosed.

Regarding the provision for the *in camera* proceedings, it is my opinion that the risks of incriminating evidence should not be the sole reason the presiding officer should order the closed door proceedings. The risks of slanderous allegations, state secrets and other personal issues such as the insolvent's private life might crop up, thus rendering it impossible, undesirable or unfair for a witness to comply. Therefore, my view is that there must at least be more than one circumstance to put the *in camera* proceedings into operation, of which one should be incrimination at a next proceeding. Except for Bertelsmann, Kunst and Sharrock, all textbook writers referred to in above are silent on the issue of subsequent civil proceedings that might be instituted against the person giving such evidence.

2.3.2.5 Section 65(2A) (b): Inadmissible evidence

This sub-section provides a degree of protection to a witness at an insolvency interrogation by barring from admission in subsequent criminal proceedings, incriminating evidence obtained thereat. It is envisaged that the protection does not extend to perjury related criminal proceedings.

The sub-section provides as follows:

> No evidence regarding any questions and answers contemplated in paragraph (a) of this subsection shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administration or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers,

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435 See *Equisec* (Pty) Ltd *v Rodriques* 1999 3 SA 113 (W).

and in criminal proceedings contemplated in section 139 (1) relating to a failure to answer lawful questions fully and satisfactorily.

This sub-section provides protection to witnesses at the interrogation. Accordingly, no evidence regarding any questions and answers contemplated in paragraph (a)[436] shall be admissible in: any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge relating to the administration or taking of an oath; or the administering or making of an affirmation; or the giving of false evidence; or the making of a false statement in connection with such questions and answers; and in criminal proceedings contemplated in section 139(1), relating to a failure to answer lawful questions fully and satisfactorily.

There is, however, another viewpoint. The practice was that our courts had, in the past, recognised the potential hazard an examinee may be exposed to at subsequent criminal proceedings and developed the following practice: Where criminal proceedings arising out of the same circumstances are pending against a person, the practice was to stay the civil proceedings until the criminal proceedings had been disposed of.[437] This safeguard is no longer necessary in the light of the amendments to section 65 of the *Insolvency Act* and the further protection provided by the *Bill of Rights*.[438]

In *Equisec (Pty) Ltd v Rodriguez* [439] it was stated that our courts have intervened in cases where the potential exists for the person to be subjected to compulsory divulgence of information in conflict with the right not to self-incriminate. Relying on the amended section 65 by section 65(2A) and (b) of the statute, the court observed that the circumstances as they existed when orders had been granted to protect an individual from the effect of compulsory interrogation in terms of this legislation, had fundamentally changed.[440] The court went further to state that, when amending the *Insolvency Act*, the legislature intended to render a person liable to answer questions under interrogation, notwithstanding the criminal

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436 Of s 65(2A) of the *Insolvency Act.*
437 *Gratus and Gratus* (Pty) Ltd *v Jackelow* 1930 WLD 226.
438 *Gilfillan v Bouker* [2012] ZAECGHC (4) SA 465 (ECG).
439 1999 (3) SA 113 (W).
440 At 113.

proceedings pending against him. The court, further, pointed out that the safeguards introduced by section 65(2A) (*a)* and *(b)* are sufficient to protect an examinee's constitutional rights against self-incrimination.

Highlighting the importance of this legislation, the court made it clear that it will, under no circumstances, frustrate the express intention of the legislature to ensure that persons who might have knowledge of the affairs of the insolvent estate are given an option to opt out of the interrogation proceedings by reason of possible criminal proceedings arising from the interrogations. The court further pointed out that creditors have legitimate interests in establishing the whereabouts of the assets in an insolvent estate.[441] It appears that unless there are exceptional circumstances in relation to the insolvent, our courts may not deviate from this principle.

Bertelsmann[442] submits that, since the advent of the *Constitution*, the witness is protected from the use of evidence that is both incriminating and obtained under duress in subsequent criminal proceedings. He submits that the said evidence is, however, admissible in subsequent civil proceedings.[443]

Sharrock[444] explains that, where evidence tendered appears to be incriminatory against a person giving it, the insolvency statute mandates that it shall not be admissible in any criminal proceedings. However, this exclusion and therefore, protection will not be allowed in the case of criminal proceedings related to perjury, administration of an oath, and related proceedings.[445]

Smith's view regarding the admissibility of evidence submitted by the insolvent in subsequent proceedings against the insolvent is an indication that she wrote her commentary prior to the amendment of the *Insolvency Act*, which came into effect in 1989.

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441 At 117 D-I.
442 Bertelsmann *et al Mars on Insolvency Law* 426.
443 Relying on *Du Plessis v Oosthuizen, Du Plessis v Van Zyl 1995* (3) SA 604 (O).
444 Sharrock *et al Hockly's Insolvency Law* 163.
445 See s 65 (2A) (a). See also Kunst *et al Meskin Insolvency Law* 8-9 and Smith *Law of Insolvency* 213.

Although the *Insolvency Act* thus makes provisions for the "safe keeping" of such incriminatory evidence, it may, nevertheless, be used at subsequent civil proceedings against the witness.[446] However, there is another viewpoint. It is submitted that a finding, which may be made by one court, may not necessarily have a bearing on findings that another court may be called upon to make on the evidence before it, even if similar evidence is presented at that court. To rephrase, although evidence given at the interrogation is admissible in civil proceedings instituted against the person who gave the evidence, it does not simultaneously serve as proof of the facts it reveals.[447] Further to this submission, findings at interrogation proceedings cannot, in the case of criminal proceedings against an examinee, absolve the prosecution of the duty to prove by way of admissible evidence, all of the elements of the alleged offence beyond a reasonable doubt.[448] In addition, a court must consider the evidence as a whole and decide how much weight should be given to it. The principle, as elucidated herein, is that a court may in its discretion make an appropriate order to avoid prejudice being suffered by a person, especially in criminal proceedings.

Regarding the admissibility of incriminatory evidence in criminal proceedings relating to perjury,[449] administration or taking of an oath, or the administering or making of an affirmation, it is my view that at times principles of fairness might require that evidence obtained unconstitutionally through compelled testimony (during insolvency proceedings) be admissible in subsequent proceedings. Further, it is my view that the court should exercise its discretion when issuing an appropriate order to ensure the protection of an examinee in insolvency proceedings (this would not be an issue if insolvency proceedings take the civil proceedings route in a court of law) and where criminal proceedings against the insolvent are pending. This should be the case where there are possibilities that the insolvent may be prejudiced at his defence in the subsequent trial. Although this might cause delays in the

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446 See also *Du Plessis v Van Zyl* 1995 (3) SA 604 (O) and *Wessels v Van Tonder* 1997 (1) SA 616 (O); *Kebble v Gainsford* 2010 (1) SA 561 (GSJ); *The Law Society of the Cape of Good Hope v Randel* [2013] (3) SA 437 (SCA); *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) 551 (GSJ).

447 See Kunst *et al Meskin Insolvency Law* 8-10.

448 In support of this submission, see *Gilfillan v Bouker* [2012] ZAECGHC 11; 2012 (4) 465 (ECG).

449 Thus confirming lack of credibility on the part of an examinee.

sequestration proceedings, at least there will be fewer objections to the constitutional validity.

2.3.2.6 Section 65(2A) (c): Penalty provision

The sub-section highlights types of conduct that may be considered as offences, for example if such conduct relates to the publication of information obtained at the interrogation proceedings.

The section provides as follows:

> Any person who contravenes any provision of an order contemplated in paragraph (a) of this subsection, shall be guilty of an offence and liable on conviction to the penalty mentioned in subsection (5) of section 154 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

The provisions of this sub-section are indicative of the legislature's objectives of protecting the integrity of the insolvency interrogation proceedings. By making provision for penalizing conduct unbecoming from all the stakeholders involved are characteristics of the law of general application.[450] The publication of the proceedings by any person present at the interrogation and the making of it available to the public through any media is a punishable offence. A witness can therefore have no legitimate excuse for failure to comply with the subpoena as issued.

Kunst[451] quotes the sub-section as is, but adds a further opinion. She points out that, in the light of this sub-section's provisions, the question whether a court has a discretion to stay the interrogation of a potential witness on the latter's application, where criminal proceedings are pending against him, is now to be answered in the negative. According to this writer, the prohibition of publication is sufficient to protect prejudice to an examinee. I submit that, with regard to the general purpose of the *Insolvency Act* and the specific purpose of the interrogation provisions, this view is correct.

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450 Section 36 of the *Constitution*.
451 Kunst *et al Meskin Insolvency Law* 8-9.

Bertelsmann[452] emphasises that, although the interrogation is held in a place accessible to the public, any statement made thereat may not be published without the permission of the court.

2.3.2.7 Section 65(3): Recording evidence

Provision is made in this sub-section for the recording of the interrogation proceedings for safekeeping.

The sub-section provides as follows:

> The presiding officer shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section made to the trustee or his agent a statement which was reduced to writing, or delivered a statement in writing to the trustee or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and if then adhered to by him, shall be deemed to be evidence given under this section.

This sub-section is self-explanatory. All the writers quote the subsection as is and this indicates that they do not have any reservations as to its provisions.[453]

2.3.2.8 Section 65(4): Declaration by the insolvent

The sub-section underscores the weight placed by the legislature on the insolvent person's declaration of the state of his finances. This aspect would ensure that the integrity of the insolvency proceedings is maintained.

The sub-section provides as follows:

> The insolvent shall at such interrogation be required to make a declaration that he has made a full and true disclosure of all his affairs.

Bertelsmann[454] highlights that in addition to giving evidence or in the absence thereof, the insolvent is still obligated (at the interrogation) to make a declaration that he has completely and truly disclosed all his affairs. He further points out that

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452 Bertelsmann *et al Mars on Insolvency Law* 426.
453 See Bertelsmann *et al Mars on Insolvency Law* 424.
454 Bertelsmann *et al Mars on Insolvency Law* 424.

even if such declaration is not made, that fact does not affect the validity of the said evidence. It is submitted that the requirement of a declaration on the part of an insolvent is an indication of the stringent provisions of this section aimed at ensuring compliance.

Kunst[455] emphasises the point that this declaration by an insolvent is an indispensable requirement. To support this view, she quotes judge Tebbutt in *Nieuwoudt v Faught en Ander*[456] as follows:

> is dit daargestel sodat wanneer enige ander getuie, of die insolvent self, ondervra word sodanige ondervraging kan geskied op die grondslag dat wat die sake van die insolvent betref hy hulle volledig en na waarheid bekend gemaak het en dat vrae dan gestel kan word teen die agtergrond van so 'n volle en juiste bekendstelling van die insolvent se sake. Daardie verklaring het… geen betrekking op en is onafhanklik van enige ondervraging van die insolvent.

Sharrock[457] quotes the sub-section as is and further adds that the presiding officer must ensure that the proceedings are conducted in accordance with the fundamental principles of justice and must ensure that he performs his functions fairly and impartially.[458] The proceedings must be fair.[459]

Seeing that often insolvents are not forthcoming and frank with their financial affairs, it is through interrogation of these financial affairs and the insolvent himself (and persons of interest) that the true state of affairs can be established.[460]

2.3.2.9 Section 65(5): Admissibility of evidence[461]

This sub-section makes provision for the admission in subsequent civil and specified criminal proceedings of evidence submitted at the insolvency interrogation.

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455 Kunst *et al Meskin Insolvency Law* 8-10 and 8-11.
456 1987 (4) SA 101 (C) at 113.
457 Sharrock *et al Hockly's Insolvency Law* 162.
458 See *Advance Mining Hydraulics* (PTY) Ltd *v Botes* 2000 (1) SA 815 (T) para 18.
459 See Baxter *Administrative Law* at 556. See also *Turner v Jockey Club of South Africa* 1974 (3) SA 633 at 653H – 654A; *Schulte v Van der Berg* 1991 (3) SA 717 (C) at 720; *Receiver of Revenue, Port Elizabeth v Jeeva; Klerck v* Jeeva 1996 (2) SA 573 (A) at 579I.
460 See also in general Mabe and Evans 2014 *MERCLJ* 26 651.
461 See also paras 2.3.2.3 and 2.3.2.5 above where this aspect is discussed.

The section provides as follows:

> Any evidence given under this section shall, subject to the provisions of subsection (2A), be admissible in any proceedings instituted against the person who gave that evidence.

Except for Kunst[462] and Sharrock[463] all the writers referred to are silent on the application of this subsection, apparently because it is self-explanatory.[464] Kunst points out that such evidence is not admissible against anyone else but the examinee himself. According to Sharrock, the application of this sub-section is constitutional. This view is based on the fact that section 65(2A)(*b)* limits the scope of section 65(5) by prohibiting the admission of incriminating evidence in terms of the latter section in criminal proceedings, except in perjury and related offences.[465] Kunst and Sharrock thus concur on this point. It is my opinion that, although evidence given by a witness is admissible against him, he still has protection in that the evidence given does not constitute proof of the facts revealed by such evidence in other proceedings against him.

2.3.2.10 Section 65(6): Legal assistance

The sub-section appreciates the need for an examinee to have legal representation at the interrogations. This legislative gesture is indicative of the desire to conduct the proceedings as guided by the principles of justice.[466]

The sub-section provides as follows:

> Any person called upon to give evidence under this section may be assisted at his interrogation by counsel, an attorney or agent.

Further to the above-mentioned protection afforded to examinees at interrogations, section 65(6) makes provision for legal representation of an examinee by counsel, an attorney or agent. In *Advance Mining Hydraulics v Botes* [467] the court emphasised

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462 Kunst *et al Meskin Insolvency Law* 8-10.
463 Sharrock *et al Hockly's Insolvency Law* 163; Kunst *et al Meskin Insolvency Law* 8-10.
464 Bertelsmann *et al Mars on Insolvency Law* 424; Smith *Law of Insolvency* 104.
465 See *Equisec v Rodriques* 1999 (3) SA 113 (W); *Du Plessis v Oosthuizen* 1999 (2) SA 191 (O) 206.
466 See *Advance Mining Hydraulics (PTY) Ltd v Botes* 2000 (1) SA 815 (T) para 18.
467 *Advance Mining Hydraulics* (PTY) Ltd *v Botes* 2000 (1) SA 815 (T) para 16.4.

that the right to legal representation at insolvency interrogation is embedded in the *Constitution*. Persons required to appear and be interrogated must be made aware of that right. Efforts should thus be made by the presiding officer to explain such a right to prospective examinees in such a manner that the latter comprehends the contents and purpose of such a right.[468] The fact that the proceedings at interrogations are inquisitorial rather than adversarial in nature makes it even more compelling for the presiding officer to draw the attention of a prospective examinee to his legislative right to be represented.[469] Furthermore, the fact that insolvency interrogation proceedings are judicial in nature is a further compelling reason why a prospective examinee has to be informed of this right.[470]

Judicial proceedings in civilised constitutional jurisdictions require that persons be informed of their rights in a manner that such rights are understood by affected persons, and failure[471] to do that would render the right valueless.[472]

Regarding legal representation at the interrogation, Smith[473] explains the sub-section as is. She seems to be satisfied with its provisions. Relying on *R v Mahomed,*[474] Bertelsmann[475] emphasises that counsel, attorney or an agent may assist persons giving evidence at the interrogations.

Kunst[476] submits that in addition to the right to representation, a witness is also entitled to be informed of this right by the presiding officer. She further explains that this right to representation is intended to be a right to **effective** representation. According to her, the representative is entitled to question the witness he

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468 Paragraph 16.4.
469 Paragraph 16.4. See also *De Lange v Smuts* 1998 (3) SA 785 (CC) (1998 (7) BCLR 779 at para 79.
470 Paragraph 16.4.
471 See para 19.
472 Paragraph 16.4.
473 Smith *Law of Insolvency* 104.
474 1933 EDL 136. See also *Pretorius v Marais* 1981 (1) SA 1051 (A) at 1064B-D; *Hosking v Van der Merwe* 1992 (1) SA 920 (W); *Parbhoo v Getz* 1997 (4) SA 1095 (CC); *Advance Mining Hydraulics v Botes* 2000 (1) SA 815 (T); *Strauss v The Master of the High Court* 2001 (1) SA 649 (T); *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA).
475 Bertelsmann *et al Mars on Insolvency Law* 423.
476 Kunst *et al Meskin Insolvency Law* 8-10.

represents. This questioning, according to her, is aimed at affording such a witness an opportunity to explain specific aspects of the information given under interrogation. This entitlement validates the right to representation, if it were otherwise, the legal representative would be there only to ensure that the presiding officer comply with the provisions of the *Insolvency Act*.[477]

Sharrock makes a very important point. This is that although a person called upon to give evidence at an interrogation may be assisted thereat by an advocate, attorney or agent and is entitled to be informed of his rights to such entitlement,[478] he has neither a constitutional nor other right of access to information before the enquiry.[479] This is the case because he is called upon to assist in collating information required and not to receiving it.[480]

However, by receiving information prior to an enquiry, an insolvent and his legal representative can also provide efficient evidence if they had the documents before the enquiry. In other words, if an enquiry is about cheques being deposited into accounts, why not provide it to enable the witness to see what the purposes of the cheque were.

It is my submission that the fact that the sub-section provides for legal representation is an indication that the legislature envisages fair proceedings. Further, it is my opinion that effective representation should include more than the rephrasing of questions to the insolvent or any witness by his representative. With due respect, it is submitted that effective representation should also entail a request for clarification, illumination, elucidation and explanation from any person interrogating the witness by the witness's attorney. The attorney or counsel should also assist such witnesses in answering the questions[481] and not only rephrase interrogator's questions. The fact that the presiding officer is entitled to disallow

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477 Relying on *re Cambrian Mining Company* (1881) 20 Ch 376-379.
478 See *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) 824-5.
479 Sharrock *et al Hockly's Insolvency Law* 162.
480 Sharrock *et al Hockly's Insolvency Law* 162. For this view he relies on *Pitsiladi v Van Rensburg* 2002 (2) SA 160 SE.
481 This means to assist him on how to answer the question but not to answer for him.

irrelevant questions and questions which would prolong the proceedings unnecessarily, should eliminate any criticism of such proceedings.

Although an attorney may assist a person at the interrogation, the interrogation still proceeds and such a person will still have to answer incriminatory questions.

2.3.2.10.1 Specialised Insolvency Courts

Further to the above submissions, insolvency court structures are advocated for in South Africa, to deal with this epidemic in our economy.[482] These insolvency courts may be attached to both our Magistrate and High courts.[483] Jurisdiction will be determined by the complexity, severity and circumstances of each case, with the High court handling complex cases and the Magistrate court handling less complex cases. The courts' involvement may assist in minimising constitutional challenges and consequent delays in the finalisation of the administration of insolvent estates. It is my view that, with regard to the representation of a witness, insolvency interrogations should take a form of civil proceedings in a court of law where the proceedings will be presided over by a judicial officer in a court structure established by the *Constitution*.[484]

At present, insolvency interrogations are regarded simply as enquiries. One may argue that the insolvent needs no representation at enquiries - he needs to reveal the whereabouts of estate's assets, for the equitable distribution to his creditors. If, however, the proceedings take place within the court's structures, there will be fewer challenges to these proceedings since the insolvent will have full representation in a judicial setting. Furthermore, it is my view that professionals should conduct insolvency interrogations as in a court of law, with a view of establishing amongst other things, the possibility of any fraud on the part of the insolvent or other witnesses. This will further ensure protection to an examinee who,

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[482] See also Calitz *Reformatory Approach to State Regulation of Insolvency in South Africa* 310-314.

[483] See Calitz *Reformatory Approach to State Regulation of Insolvency In South Africa* 89.

[484] The institutional, structural changes and costs that would be needed for the purposes of specialised courts falls outside of the scope of this research. The reason being that this is a topic on its own. The researcher could not have done this as well.

through no fault of his own found himself in this predicament. This would only be possible if parliament consents to the institution of special insolvency courts.[485]

Calitz[486] advocates, with which I concur, for either specialist insolvency courts or judicial specialisation in our law. She submits that, in building an effective and efficient regulatory framework, it is of importance that an efficient and effective legal framework accompany any institutional design.

According to Calitz, policy makers and legislatures have two choices, either to maintain the existing legislation accompanied by specific minor adjustments, or implement a complete overhaul of the legislation underpinning our insolvency law. She acknowledges[487] the fact that these reform proposals might have adverse effects on the practical implementation of a regulatory reform proposal, but that those problems may be short term if the initial reform efforts are followed by more advance efforts at a later stage.

I concur. It is submitted that all the irregularities in insolvency interrogation proceedings are the result of not having dedicated insolvency courts (or at least specialisation) and structures to conduct proper investigations. Dedicated insolvency courts will ensure that presiding officers' daily involvement in insolvency cases gives them a better comprehension of complexities in insolvency matters.[488] It is my further submission that the time has come to place the institution, course and conclusion of the sequestration or liquidation process under proper insolvency courts or tribunals.

According to Calitz, any resistance to and doubts on the proposed reforms highlight the unnecessary opposition, which hinders the development of effective and relevant legal strategies in the law reform arena.[489] Besides, the current system in South Africa permits multiple and concurrent jurisdictions over insolvency cases.[490]

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485 See also Calitz *A Reformatory Approach to State Regulation of Insolvency in South* Africa 314.
486 At 314.
487 At 314.
488 See also Calitz *A Reformatory Approach to State Regulation of Insolvency in South Africa* 261.
489 See also Calitz *A Reformatory Approach to State Regulation of Insolvency in South Africa* 312.
490 See Johnson and Meyerson 2012 *USAID* 10.

Moving from one court to another creates unnecessary delays in the overall administration of the insolvent estate.[491]

Further, considering that huge amounts of money are exchanged between trustees and liquidators during liquidation processes, it is my humble opinion that this is indicative that insolvency courts can be sustained – if operating within the already established court structures. From a distance, this view might appear farfetched because of the possible financial implications. In weighing up the options, two aspects need to be considered, first the need for such courts, secondly the affordability thereof. Our courts have taken into cognisance the fact that the administration of insolvent estates has developed into a flourishing, lucrative and very competitive profession.[492]

It is an open secret that, although some insolvency related work is undertaken under judicial officers' supervision and by qualified professionals, some areas have limited capability and standards of professional qualifications, as noted by Johnson and Meyerson.[493] They further point out the fact that, broadly speaking, the practice of insolvency is currently almost entirely unregulated and they recommend a comprehensive and integrated framework to encompass all practitioners operating within the field of bankruptcy.

Calitz[494] notes that the lack of specialisation by the Master's office officials in the particular field of insolvency law, and the inadequate training and experience, creates a level of ineffectiveness and inefficiency among staff. This situation should not be allowed to continue. The state has a duty to protect the interest of the public at large. It must be noted that insolvency does not only affect the debtor and his creditors, but also the economy and the public at large. Calitz highlights a point that the South African economic stability could be negatively affected if insolvency and liquidation funds are not administered expeditiously, efficiently and effectively to

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491 See Johnson and Meyerson 2012 *USAID* 10.
492 See *Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP).
493 Johnson and Meyerson 2012 USAID 10; Calitz *A Reformatory Approach to State Regulation of Insolvency in South Africa* 264.
494 At 264.

enable the funds to be absorbed back into the economic stream. She further points out that the Master's office handles estates to the value of approximately R18 billion each year.[495] This is not right; these funds should be administered through an effective, efficient, well-resourced and specialised court or tribunal system.

It is a fact that, if the insolvency system operates to its optimal level through specialised courts, public confidence in the insolvency system can be maintained. It is submitted that effective administration of insolvent estates has the potential of releasing estate's funds back into the economy.[496] Furthermore, it is in the public interest that insolvencies are resolved orderly, consistently and expeditiously. The public must also be satisfied that there has been no commercial impropriety or perpetration of fraud by the insolvent. All these can be achieved if the proceedings take place in court structures established by the *Constitution*.[497]

2.3.3 Penalties as provided by section 66

2.3.3.1 Introduction

This section mandates compliance with the provisions of sections 64 and 65 of the *Insolvency Act.* Failure to comply with the provisions of these sections exposes one to sanctions under section 66 of the *Insolvency Act*.

2.3.3.2 Section 66(1): Apprehension for failure to attend meetings

This sub-section provides for the apprehension of witnesses who fail to comply with the subpoena in terms of section 64 of the *Insolvency Act*.

The sub-section provides as follows:

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495 See Calitz *A Reformatory Approach to State Regulation of Insolvency in South Africa* 264. This figure may be even higher than estimated.

496 Keynote address by Deputy Minister of Justice and Constitutional Development (hereinafter the Department of Justice), Mr A Nel, MP (hereinafter the Deputy-Minister), at the International Association of Insolvency Regulation (IAIR) annual general meeting and conference, Sandton, 2009-10-12 as cited by Calitz *A Reformatory Approach to State Regulation of Insolvency in South Africa* 284.

497 Cork Report at para 191; See also Keay Insolvency Law: A Matter of Public Interest 510, as cited by Calitz *A Reformatory Approach to State Regulation of insolvency in South Africa* 296.

> If a person summoned under section *sixty-four* fails to appear at a meeting, in answer to the summons, or if an insolvent fails to attend any meeting of creditors in terms of sub-section (1) of section *sixty-four*, or fails to remain in attendance at that meeting, the officer presiding at such meeting may issue a warrant, authorizing any member of the police force to apprehend the person summoned or the insolvent, as the case may be, and to bring him before the said officer.

Three contingencies are provided for in this subsection. These are:

(1) failure to appear at a meeting in answer to summons;

(2) failure to attend the meeting of creditors, and;

(3) failure to remain in attendance. If any of these occur the presiding officer, who is a magistrate,[498] may issue a warrant authorizing a member of the police force to apprehend such a person. The person apprehended shall be brought before the presiding officer. It appears that the apprehension is aimed at securing compliance with the summons. Summoned persons have a legal duty to comply with the summons,[499] failure to do so amounts to civil contempt.[500] Insolvent persons also have a duty to attend the meetings of creditors as provided for by the *Insolvency Act*.[501] It is noted that the person who has authority to order the apprehension of a recalcitrant witness or an insolvent must be a judicial officer.

Relying on *De Lange v Smuts*, Bertelsmann[502] highlight that the presiding officer must be a magistrate. If that is not the case, there will be constitutional challenges. Kunst is in agreement with the provision for the apprehension of an insolvent or other person under the authorisation of a presiding officer who is a magistrate.[503] Sharrock[504] quotes the subsection as is but further adds that, in line with the court's decision in *De Lange v Smuts,* the person ordering the apprehension and detention of a recalcitrant witness must be a judicial officer in the court structure.

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498 See *De Lange v Smuts* 1998 (1) SA 736 (C).
499 *De Lange v Smuts* 1998 (1) SA 736 (C) para 7.
500 See *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 SCA.
501 Section 64(1).
502 Bertelsmann *et al Mars on Insolvency Law* 427.
503 Kunst *et al Meskin Insolvency Law* 8-6.
504 Sharrock *et al Hockly's Insolvency Law* 165.

Following the judgment of the court in the *De Lange v Smuts'* case, it is clear that in line with the principles of just and lawful administration, the apprehension and detention of an uncooperative witness may not be ordered by an officer in the public service. This person might have all the integrity, but he might not necessarily have the proper legal expertise and legal experience to order the detention of a person to prison. It is at this point that the view that members of the judiciary should conduct insolvency interrogation fits in. Public officers presiding at the meeting of creditors might have all the experience in the world, but they might lack independent judgment, especially in the absence of any guidelines and formalities to be complied with, when an order for apprehension and detention is issued.[505] This provision appears good on the surface but closer inspection indicates otherwise. The fact is that not all presiding officers are educated in the law. The presiding officer may be the Master or an officer appointed by the Master.[506] In practice, this (appointed) person is usually someone without legal training. In such a case, it would not be in the public interest or constitutionally sound to make a legal decision.

2.3.3.3 Section 66(2): Committal for non-attendance of meetings

This sub-section reinforces compliance with the provisions of sections 64 and 65 of the *Insolvency Act* by means of apprehension and detention in prison.

The sub-section provides as follows:

> Unless the person summoned or the insolvent, as the case may be, satisfies the said officer that he had a reasonable excuse for his failure to appear at or attend such meeting, or for absenting himself from the meeting, the said officer may commit him to prison to be detained there until such time as the said officer may appoint, and the officer in charge of the prison to which the said person or insolvent was committed, shall detain him and produce him at the time and place appointed by the first-mentioned officer for his production.

The attendance of the creditors' meeting by a summoned witness or an insolvent for the purposes of providing the required information is crucial in the administration of the insolvent estate. The legislature saw it fit to make provision to compel the

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505 *De Lange v Smuts* 1998 (1) SA 736 (C).
506 See s 39 (2) of the *Insolvency Act*.

above-mentioned persons to so attend. An acceptable excuse for failure to attend as required may under normal circumstances save the said witness or insolvent from apprehension and detention. This is, however, not always the case. As indicated above in March 2016 at an interrogation,[507] the Master ignored the principles set out in *De Lange v Smuts* and issued a warrant of arrest of an insolvent for failure to appear as subpoenaed.[508] The apprehension was ordered despite the fact that Leong presented a medical certificate as an excuse for failure to appear. The Master failed to take into consideration the provisions of section 67 of the *Criminal Procedure Act.*[509] This section grants an accused person a grace period of 14 days. The purpose is to allow him an opportunity to come forward and explain to the court the reasons for his failure to comply with the subpoenas. This case is an indication that proper guidance and procedures need to be in place to prescribe the scope of the Master and other non-judicial officers' powers in relation to insolvency proceedings.

It should be clear by now that the threat of apprehension and detention serve as deterrence for would be recalcitrant witnesses and insolvents. This provision should however be clarified to presiding officers as follows: that it should be read subject to the qualification in the *De Lange v Smuts* matter.[510] Bertelsmann[511] is silent on the issue of whether the *De Lange v Smuts* decision should apply here as well. The other textbook writers agree on the interpretation and application of this sub-section.[512] In this respect, they add nothing to the interpretation of this sub-section. It is submitted that the continued detention is not just, let alone having been ordered by a public official who might not be learned in the law. In order to conform to the principles of justice and in line with the *De Lange v Smuts* matter, it is my opinion that as soon as it becomes clear to the presiding officer that the interrogatee does not want to comply, he should refer the matter back to the Master, who should appoint a commissioner to proceed with the matter through the court structure. It is my view

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507 See the discussion in ch 1 above.
508 Master ref O/G20876/2014. As stated earlier, my view is also based on comments by various practitioners on how they struggle with the office of the Master.
509 51 of 1977.
510 Sharrock *et al Hockly's Insolvency Law* 165.
511 Bertelsmann *et al Mars on Insolvency Law* 427.
512 See Kunst *et al Meskin Insolvency Law* 8-5; Smith *Law of Insolvency* 214.

that, if there was an insolvency tribunal or court structure, this situation of recalcitrant witnesses could be referred to the insolvency court. The court could thereafter deal with the matter in accordance with the principles of justice and convict the person if necessary. In this instance the *De Lange* case cannot work. To refer the matter back to another commissioner could be costly and time consuming. A judge or magistrate (preferably a senior magistrate at a regional court) should do all interrogations because the Master does not have the knowhow as far as the detention is concerned.

2.3.3.4 Section 66(3): Penalty for failure to produce books and documents

The sub-section provides for continuous detention for failure to comply with the obligations set by section 65 of the *Insolvency Act*.

The sub-section provides as follows:

> If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was supposed to produce, or if any person who may be interrogated at a meeting of creditors in terms of sub-section (1) of section *sixty-*five refuses to be sworn in by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the questions fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of sub-section (5).

The sub-section refers to the following contingencies:

(1) failure to produce a book;

(2) refusing to be sworn in by the presiding officer;

(3) refusing to answer questions lawfully put; and failure to answer any questions fully and satisfactorily.

Should the person summoned as mentioned fail to comply, the presiding officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him.

From the decision in *De Lange v Smuts* [513] the following is clear:

(1) as regards the apprehension and detention of a recalcitrant witness, it appears that in substance, the consequential detention for failure to comply with the summons for persons "who are under a legal duty to do so" is constitutionally sound.[514]

(2) the sub-section's committal provision is said to be a mechanism to oblige those with the required information to submit it, in order to facilitate the achievement of the legitimate goals of insolvency law.[515]

(3) the purpose sought to be achieved by the apprehension and detention is not primarily punitive.[516]

(4) the court considered it as a "form of process in aid or a form of statutory civil contempt power".[517]

(5) the insolvent and specified persons are often the only or most important persons who can provide the required information, hence the compulsion and subsequent detention in case of failure to comply[518]- it is thus for a "just cause".[519]

(6) that a constitutional and democratic state subject to the rule of law, of which South Africa is, places a duty on the state to protect and enforce the rights of both citizens and non-citizens.[520]

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513 *De Lange v Smuts* 1998 (1) SA 736 (C).
514 *De Lange v Smuts* 1998 (1) SA 736 (C) para 7.
515 At 14.
516 At 14.
517 At 14.
518 At 31, 33 and 35.
519 At 31.
520 At 31.

(7) it is, therefore, the duty of the state to assist trustees in the performance of their duties while assisting creditors in the enforcement of their claims against insolvent debtors.[521]

The above-mentioned objectives could be achieved through the processes of the courts and the legal system - in this case through insolvency laws.[522] These laws are a last resort for creditors to pursue their valid claims against their debtors[523] - to ensure "a fair and just distribution of debtors' assets among competing creditors in the event of such debtors' liabilities exceeding their assets".[524] This is considered constitutionally sound in other open and democratic societies[525] based on dignity, equality and freedom.[526] It is not regarded as encroaching upon an insolvent's or other witnesses' constitutional rights.[527]

It is clear that there is no "less severe measure which would adequately guarantee that the required information would be forthcoming from the examinee".[528] I concur. The insolvent would rather not expose himself to the inquisitorial processes by the trustee and the creditors. Accordingly, a mere fine would often not achieve the purpose of the enquiry.[529] In most instances, the examinee might prefer to pay a fine rather than to appear and provide the required information.[530] In cases of insolvency, it would not make economic sense to provide for a fine in an already burdened estate, regardless of the amount of the fine.[531] It is significant to note that recalcitrant examinees committed to prison can be released as soon as they submit the required information.[532]

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521 At 31.
522 At 32.
523 At 32.
524 At 32.
525 With England and Canada (comparative jurisdictions for the purposes of this research) amongst them.
526 At 39.
527 At 39.
528 At 40.
529 At 40.
530 At 40.
531 At 40.
532 At 40.

As regards committal powers, the legal position was stated as follows in *De Lange v Smuts*:

(1) "the power to commit an uncooperative witness to prison is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers".[533] This is the position in other democratic jurisdictions such as the United States of America[534] and Canada.[535] In these jurisdictions, the power to deal with recalcitrant witnesses is reserved for the judiciary.

(2) non-judicial officers lack the "objective structural independence"[536] - they report to the executive branch of the state and do not enjoy the independence of the judiciary.[537] This, therefore, poses danger to freedom when these officers are empowered to commit to prison recalcitrant witnesses in insolvency proceedings.[538] I concur. The above would make it difficult for these officers to make objective decisions.[539]

(3) on the basis of this reasoning, the court concluded[540] that the committal provision of section 66(3) infringes section 12(1) (b) of the *Constitution*. The only offending part of section 66(3) read with section 39(2) of the *Insolvency Act* was said to be permitting a person who is not a magistrate, to issue a warrant committing to prison a recalcitrant witness at a creditors' meeting held in terms of section 65 of the *Insolvency Act*. The court highlighted the fact that, because in certain circumstances magistrates presided over creditors 'meetings, the infringing part of section 66(3) should be qualified.[541]

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533 At 61.
534 At 62.
535 At 69.
536 At 73.
537 At 75.
538 At 75.
539 At 75.
540 At 75.
541 At 76.

With reference to the answering of questions, Sharrock[542] submits that where a party gives an answer, which is incomplete, or unsatisfactorily, the presiding officer must decide whether the party has answered to the best of his or her ability. If the answer is clearly untrue or evasive, it may be considered a form of intentional refusal to answer the question. Sharrock refers to *Nieuwoud v Faught*[543] and agrees that if the answer is not nonsensical or evasive, even if it is implausible, it cannot be said that the party has failed to answer the question to the best of his ability.

Sharrock,[544] Kunst[545] and Smith[546] emphasise the detention of the defaulter until the latter has undertaken to do what is required of him. Kunst is, however, silent on the issue of determining from the witnesses' answer, whether such answer is tantamount to the refusal to answer a question lawfully put. Relying on *Nieuwoudt v Faught* [547] Bertelsmann[548] concurs with the rest of the writers referred to on the point of the detention of a defaulter under this sub-section. He, however, places no duty on the presiding officer to determine the question of evasive answers. He adds that the presiding officer is not required to verify as to whether a witness or the insolvent is telling the truth. According to him, the said officer is only required to ascertain that the witness complies with his duty to **be** sworn in[549] and to answer questions fully and properly. Further to this, he emphasises that, where an answer is blatantly untrue, it can be considered as a form of intentional refusal to answer the question. If the answer is not nonsensical or evasive, even if it is dubious, it cannot be argued that the witness failed to give a "full and satisfactory" answer. According to him, the word "fully" must be understood in the context of precision and completeness as opposed to credibility.[550]

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542 Sharrock *et al Hockly's Insolvency Law* 164.
543 *Nieuwoudt v Faught* 1987 (4) SA 101 (C).
544 Sharrock *et al Hockly's Insolvency Law* 164.
545 Kunst *et al Meskin Insolvency Law* 8-5 -8-6.
546 Smith *Law of Insolvency* 214.
547 1987 (4) SA 101 (C).
548 Bertelsmann *et al Mars on Insolvency Law* 427.
549 See para *2.3.2.2*(ii) above for my view on the procedure to be sworn in.
550 Bertelsmann *et al Mars on Insolvency Law* 427.

It is my view that evasive answers are tantamount to a refusal to answer questions lawfully put.[551] If a witness is permitted to "get away with answers", then the purpose of interrogation will be defeated. Determining whether a witness is evading answering questions or not requires a judicial skill, that persons who have had legal training, were taught. Therefore, it is my submission that a legally qualified officer conducts such proceedings within a tribunal or court's structure.

Again, the *De Lange v Smuts* [552] matter is indicative of the stringent provisions of the *Insolvency Act* when it comes to compliance with its requirements. The fact that failure to answer questions satisfactorily and to produce books as required may lead to the apprehension and detention of the examinee, is more reason for advocating for judicial officers to preside at the interrogations.

2.3.3.5 Section 66(4): Continuous imprisonment for non-compliance

This sub-section emphasizes continuous detention for failure to comply with the provisions of section 65 of the *Insolvency Act*.

The section provides as follows**:**

> If a person, who has been released from prison after having undertaken in terms of sub-section (3) to do what is required of him, fails to fulfill his undertaking, the said officer may commit him to prison as often as may be necessary to compel him to do what is required of him.

All the other writers referred to interpret the section as is,[553] except for Bertelsmann. Relying on *Advanced Mining* Hydraulics (*Pty) Ltd v Botes*,[554] he[555] submits that while the search for the truth may be conducted with enthusiasm and with the threat of possible incarceration, the witness's fundamental rights should be respected. The latter is entitled to be treated with fairness and in line with the *Constitution*. He further holds that the witness is entitled to be informed of his rights, for example,

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551 See this view of mine also in Mwelase *Insolvency Interrogations* 42.
552 1998 (1) SA 736 (C).
553 See Kunst *et al Meskin Insolvency Law* 8-6; Smith *Law of Insolvency* 215; Sharrock *et al Hockly's Insolvency Law* 164. None of them mention any dissatisfaction to any constitutional clash.
554 2000 (1) SA 815 (T).
555 Bertelsmann *et al Mars on Insolvency Law* 428.

to legal representation where the *Insolvency Act* provides such representation and to be interrogated taking into consideration his dignity and humanity. I concur. The new constitutional dispensation prescribes that all laws and decisions should be in line with democratic values.[556]

It is my opinion that if a person has been released from prison after having undertaken in terms of sub-section 3 to do what is required of him, and fails to fulfill his undertaking, there should be a trial and refusal to answer questions should be treated as an insolvency offence. The matter should be handled by courts and sentences imposed instead of continuous detention without trial. Again, if there was an insolvency tribunal or court structure, such a situation could be avoided.

2.3.3.6 Section 66(5): Discharge from custody

This sub-section makes provision for the release from detention of a person who might have been wrongly detained.

The section provides as follows:

> Any person committed to prison under this section may apply to the court for his discharge from custody and the court may order his discharge if it finds that he was wrongfully committed to prison or is being wrongfully detained.

In *De Lange v Smuts*,[557] the court highlighted the fact that a detained person's deprivation of freedom is temporary in the sense that a person so committed can apply to the court for his release from prison.[558] The court further highlighted the fact that the safeguards provided for by this sub-section were significant for the protection of a detained person's right to freedom.[559] A question arises as to whether or not an admission that the person was wrongfully detained gives rise to a delictual liability. The answer to this question is in the negative – section 66(6) of the *Insolvency Act* grants immunity to an officer issuing a warrant of apprehension and detention. The answer to the above question should, however, be in the affirmative

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556 See in general *Holomisa v Argus Newspaper* 1996 6 BCLR 836 W.
557 1998 (1) SA 736 (C).
558 At 90.
559 At 41.

where a non-judicial officer issues an order for the apprehension and detention of a witness in light of the principles in *De Lange v Smuts*.[560]

All the writers[561] referred to above interpret the sub-section as is and express no opinion. On the surface, this sub-section appears to sufficiently protect the interests of witnesses under interrogation. However, one may argue that there would not be a need for this superfluous protection if insolvency proceedings were held within the court structures.

2.3.3.7 Section 66(6): Immunity for the presiding officer

This sub-section provides immunity for an officer presiding at the meeting of creditors and who subsequently issues a warrant of apprehension or committal of an examinee to prison.

The sub-section provides as follows:

> In connection with the apprehension of a person or with the committal of a person to prison under this section, the officer who issued the warrant of apprehension or committal to prison shall enjoy the same immunity, which is enjoyed by a judicial officer in connection with any act performed by him in the exercise of his functions.

Since the decision of *De Lange v Smuts*, it is clear that when issuing a warrant for the apprehension and detention of an examinee, the presiding officer who is a magistrate acts in a judicial capacity[562] and is thus entitled to immunity as applicable to judicial officers acting as such.

None of the textbook writers[563] referred to in this chapter express any different opinion about the section. It seems that that they are satisfied with the provisions of this sub-section. Constitutional challenges raised against the detention of a witness as ordered by a presiding officer who is not a judicial officer should have

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560 1998 (1) SA 736 (C).

561 Bertelsmann *et al Mars on Insolvency Law* 428; Kunst *et al Meskin Insolvency Law* 8-6; Sharrock *et al Hockly's Insolvency Law* 164.

562 At 81.

563 See Kunst *et al Meskin Insolvency Law* 8-6; Smith *Law of Insolvency* 215; Bertelsmann *et al Mars on Insolvency Law* 428. Sharrock *et al Hockly's Insolvency Law* 164.

rested after the *De Lange v Smuts* [564] case. The position now is that an order for the detention of a recalcitrant witness may only be unconstitutional if ordered by a non-judicial officer.[565] The Leong matter referred to above is unfortunate. Furthermore, continuous detention until the witness has undertaken to do what he promised is not to be regarded as detention without trial and can thus not be challenged. From the above discussion, it is my opinion that this sub-section should be read and interpreted as meaning immunity available to a presiding officer who is a member of the judiciary.

There is, however, another view. The insolvent (or any other examinee) is not a criminal offender and should not be treated as such. If the insolvent or other witness is continuously detained, then in these circumstances the proceedings have taken a criminal turn. To my mind, section 35 of the *Constitution* should then be applied where continuous detention crops up. This implies that the insolvent will be entitled to protection afforded to the arrested, detained or accused person. These categories of persons are guaranteed a fair trial.[566]

Furthermore, it is submitted with due respect, that this aspect of the interrogation proceedings should be handled by persons learned in the law. These officers should exercise an unquestionable independent judicial discretion in ordering the apprehension and detention of witnesses who fail to comply and thus commit a prescribed offence.

Interrogations in terms of these sections are mandatory and they have been through a number of court judgments held to be in the public interest and rank supreme to the interests of an interrogatee. It is for these reasons that the legislature has made provisions for penalties for non-compliance with these provisions in the form of section 66.[567]

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564 1998 (1) SA 736 (C).
565 See the *ratio decidendi* [decision and motivation thereof] on 824-826.
566 Which includes the right not to be compelled to give self-incriminating evidence; but in the light of s 65(*2A)* - as explained above - this aspect will be handled differently.
567 See Bertelsmann *et al Mars on Insolvency Law* 424.

Where a person who is summoned to attend and provide information at the meeting of creditors in an insolvent estate, fails to attend without a valid reason, or fails to provide information or documents as subpoenaed: any police officer under the instruction of a presiding officer may apprehend him. The presiding officer should be either a magistrate or judge. The apprehended witness should be brought before the presiding officer to answer to questions.[568] Detention in prison may be the last resort on the part of the presiding officer to secure attendance of an examinee at a meeting of creditors for the purpose of examination.[569] Failure to answer lawfully put questions fully and truthfully carries with it a penalty of imprisonment until an examinee is willing to talk. A recalcitrant examinee may be detained as many times as necessary until he undertakes what is required of him.[570] However, a person detained has remedies; he may apply to the court for his release and undertake to comply.[571]

Smith and Kunst are in agreement with the provision for the continuous detention of an insolvent or other person under the authorisation of the presiding officer. They do not add any opinion as to constitutional conflicts that may occur because of such detention, where the presiding officer is not a member of the judiciary, nor do they comment on any immunity available to the presiding officer.

2.3.4 Interrogations by the Master in terms of section 152 [572]

2.3.4.1 Introduction

In broader terms, this section provides for the calling upon and questioning by the Master of the High Court of any person (or even the trustee of the estate concerned when he is in possession of estate documents), who may provide information relevant to the administration of an insolvent estate. The process takes place in private.

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568 Section 66(1) and see also, Bertelsmann *et al Mars on Insolvency Law* 427.
569 Section 66(2) and see also, Bertelsmann *et al Mars on Insolvency Law* 427.
570 Section 66(4).
571 Section 66(5).
572 See in general Stander 2004 *THRHR* 556-583.

2.3.4.2 Section 152(1): Delivery of books and documents to the Master

The sub-section provides for the trustee to submit to the Master, books and documents relating to the affairs of an estate he is administering.

The sub-section provides as follows:

> The Master may at any time direct a trustee to deliver to him any book or document relating or any property belonging to the insolvent estate of which he is trustee.

Section 152(2) of the *Insolvency Act*, section 152(1) is aimed at trustees. It has been used to call trustees to account for their lack of commitment and related conduct in their administration of insolvent estates. This may be evidenced through books and documents. It is worth noting that the strict insolvency legislation provisions apply generally to all the participants involved in the insolvent estate, trustees are not spared either. One should not lose sight of the possibility that there might be circumstances requiring an element of surprise on the part of the Master. This should be the case where there are suspicions of misapplication of the insolvent estate's assets. These assets need to be brought back to the insolvent estate and where necessary, the trustee to be held accountable for lack of proper investigation.

The sub-section uses the words "of which he is trustee" and "at any time." One possibility is that it might mean that the Master may even demand delivery of a book or document after rehabilitation, because any property acquired immediately before the rehabilitation of the insolvent is vested in the trustee and remains there vested after rehabilitation for the purposes of realisation and distribution. The Master may invoke the sub-section where he seeks further clarity on the administration of the estate.

It is submitted that the wide application of this sub-section has implications. This is so because it does not specify the time scale allowed for further investigation, if there is any required. It is for this reason that the trustee's books and documents relating to the estate he is administering, are in order. This would also be of assistance for discovering the insolvent's assets that might have been misappropriated. One may argue that experience has shown that unethical and

shrewd people have a tendency of concealing assets through collusion with third parties. This situation thus necessitates a broader application.

This makes sense since the trustee must account for the assets in the estate, especially where suspicions of concealed assets exist. However, section 112 of the *Insolvency Act* stipulates that the Master's confirmation of accounts shall be final save as against a person who may have been permitted by the court, before any dividend has been paid under the account, to reopen it. Section 152(1) may assist in identifying the insolvent estate's debtors and possible maladministration of estate funds by the trustee.

Relying on *Appleson v The Master*[573] Bertelsmann[574] adds an opinion to this discussion and submits that this is a type of process that can be arranged at short notice, if necessary. Smith and Sharrock[575] quote the sub-section as is. They add nothing and appear to have no reservations regarding the provisions of this sub-section.[576]

2.3.4.3 Section 152(2)[577]: Submitting information to the Master

Together with section 152(1), this section provides for a process through which the Master may, in private, seek more clarity from the insolvent, trustee or any person regarding the insolvent estate. The process may take place at any time after the sequestration of the debtor's estate but before his rehabilitation.

The sub-section provides as follows:

> If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in

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573 1951 (3) *SA* 141 (T).
574 Bertelsmann *et al Mars on Insolvency Law* 430.
575 Smith *Insolvency Law* 215; Sharrock *et al Hockly's Insolvency Law* 165. Kunst is silent on this specific aspect.
576 Kunst *et al Meskin Insolvency Law* 8-19*;* Smith *Insolvency Law* 215*.*
577 Sub-section 2 as substituted by s 46 of *Act* 99 of 1965.

> the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or the other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate.

This power may be exercised by the Master at any time from the date of a provisional order of sequestration until before the insolvent's rehabilitation, if the Master deems fit.[578]

Bertelsmann[579] notes that, although the Master is empowered to summon any person who may be able to give information, it appears that he cannot so summon an officer who presided at a meeting of creditors or a person authorized by power of attorney to vote on behalf of a creditor.[580] He further points out that a prospective examinee in this process is not entitled to review the Master's decision to so examine, unless he can show that the Master exercised his discretion improperly.[581] This will be the case where it is evident that the Master conducted the enquiry in a vexatious or oppressive manner. Furthermore, these proceedings are referred to as private enquiries in that the public may be excluded therefrom. The application to hold such procedure is made *ex parte* and no person, (including the insolvent) except the person summoned, may be present thereat.[582] The use of the words "may be excluded" entails that under specified circumstances the public will be allowed to attend. In my view, an example of this circumstance is in instances where no questions requiring incriminatory answers or state related secrets are asked.

In *Appleson v Bosman* [583] it was said that persons summoned will be more willing to disclose information if interrogations were private. Smith[584] states that no person with an interest should be excluded - thus the process should not be private.

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578 See also Bertelsmann *et al Mars on Insolvency Law* 430; Sharrock *et al Hockly's Insolvency Law* 168.

579 Bertelsmann *et al Mars on Insolvency Law* 430.

580 *Ex parte The Master; Re Assigned Estate Mahomed* 1931 TPD 294; Bertelsmann *et al Mars on Insolvency Law* 430.

581 *Leech v Farber* 2000 (2) SA 444 (W); *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T).

582 *Roux v Die Master* 1997 (1) SA 815 (T).

583 1951 (3) SA 141 (T).

584 Smith *Law of Insolvency* 215.

Bertelsmann[585] highlights that it is an urgent and drastic questioning which can be arranged at short notice, therefore private. Stander[586] states as follows:

> Dit is my mening dat die doel met hierdie ondervraging juis is om die administrasie van die boedel beter te fasiliteer deur vinnig of dringend waardevolle inligting met betrekking tot die boedel te kry wat andersins nie beskikbaar sou wees nie. Daarom geskied die ondervraging nie tydens 'n vergadering van skuldeisers wat vir 'n sekere tyd voor die vergadering geadverteer moet word nie. Daarom kan die ondervraging ook so gou as moontlik na die toetstaan van 'n voorlopige sekwestrasiebevel gehou word. Daarom het al die reëls wat in die voorafgaande drie paragrawe uiteengesit is, in die praktyk ontwikkel. Dit gaan myns insiens nie soseer oor openlikheid van die opgeroepte persoon soos in die *Appleson*-saak beweer word nie want as die kurator tydens die ondervraging teenwoordig mag en kan wees, is ek nie oortuig dat die opgeroepte steeds so openlik sal wees nie. Ek meen dat die ondervraging privaat van aard is, maar my motivering daaroor verskil. Die meganisme van artikel 152 is na my mening absoluut essensieel vir die bereiking van die belangrike beleidsdoelwitte, naamlik om getuienis te lewer en/of documente voor te lê wanner persone deur middel van subpoena opgeroep word om dit te doen. Hierdie doelwitte kan in die insolvensiepraktyk nie op 'n ander manier vinniger bereik word nie. Deur artikel 152 kan die Meester en die kurator van 'n insolvente boedel inligting verkry wat hulle in staat stel om bates wat aan die insolvente boedel behoort, vinnig op te spoor. Deur artikel 152 kan hulle ook duidelikheid kry ten opsigte van eise teen die insolvent en sy boedel en vervreemdings uit die boedel gemaak. Dit is ook belangrik om die belange van persone wat inligting op 'n vertroulike wyse aan die kurator of Meester verskaf het, te beskerm. Dit is verder belangrik dat sulke persone weet dat hulle beskerm word. Is dit nie die geval nie, sal waardevolle inligting nie bekom word nie. Vir doeleindes van die adminstrasie van die insolvente boedel en die beskerming van die skuldeisers daarvan is die handhawing van hierdie beginsels belangrik.

Kunst[587] highlights the fact that the interrogation process is a private one. She submits that the purpose for making this process private is for the summary discovery of confidential information for facilitating the administration of the estate.[588] She points out that these private enquiries may be held as soon as a provisional order of sequestration has been granted. She emphasizes that the Master has an unfettered discretion to order an enquiry to be held before either himself or a magistrate or an officer in the Public Service. She further points out that in practice, the Master may call for this enquiry if the provisional trustee, the

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585 Bertelsmann *et al Mars on Insolvency Law* 430.

586 2004 *THRHR* 556-583.

587 Kunst *et al Meskin Insolvency Law* 8-19.

588 It is difficult to see how it can be regarded as a private process if the trustee may be present and may interrogate the person summoned unless it is because of the absence of creditors. But the fact is that the trustee represents the creditors.

trustee or a creditor make a convincing representation before him. The above-mentioned must make a submission that in the circumstances the information should be obtained at a private enquiry rather than at a meeting of creditors in the ordinary course. The Master may thus convene such an enquiry notwithstanding the fact that there has been no interrogation at a meeting of creditors.

Smith's[589] contribution to the discussion is interesting. She quotes Judge Blackwell's opinion that there might be very good reasons for holding certain interrogations in private. The view is that persons interrogated might be less wary to furnish information if ensured that such information would not be subject to public scrutiny. Smith is, however, not convinced as to the validity of these reasons. She submits that it is unacceptable that the interrogation is not advertised and notice is not given to interested parties. She points out that there is nothing in the *Insolvency Act* to justify the conclusion that interested parties should be excluded from attending the interrogation.

It is my opinion that, since this type of enquiry is preceded by a submission made to the Master by an affected person,[590] the latter is entitled to the privacy. No one really explains what is meant by "private interrogation". One is tempted to conclude that an interrogation is private if even interested parties, such as creditors, are precluded from attending and do not receive notices to attend. Only the trustee is allowed. This may often be necessitated by the fact that a person who furnishes information to the trustee or to the Master does so in confidence. If the Master makes such information available to persons summoned to interrogation, a valuable source of information might be destroyed.[591] It should be noted that this enquiry is conducted to obtain confidential information without further delay. If made available to persons summoned to the interrogation, they might trim their sails to the wind.[592]

Furthermore, often the trustee of an insolvent estate initiates these enquiries. Based on information provided by the trustee of an insolvent estate, the Master may decide

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589 *Appleson v Bosman* 1951 (3) SA 515 (W) 517; Smith *Law of Insolvency* 215.
590 An interested person may be the provisional trustee, the trustee or a creditor.
591 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T) 652.
592 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T) 655.

to hold an enquiry in terms of this section. The information so obtained facilitates the administration of the insolvent estate.[593]

While the *Insolvency Act* does not expressly regard the provision of information by the person so summoned as interrogation,[594] Sharrock[595] refers to this process as an "interrogation" by the Master of any person that may provide information regarding the insolvent estate.[596] He supports the view that the Master may exercise this power at any time after the sequestration and before rehabilitation of the insolvent. Relying on *Cools v The Master and Others*,[597] Sharrock further points out that the Master need not show that an interrogation under sections 64 and 65 is impossible or impractical before he can interrogate in terms of this sub-section. The person so interrogated must be in a position to give information, which the Master considers **desirable** to obtain concerning the insolvent, his estate, the administration of his estate, or any claim or demand made against the estate. He is, however, silent on the aspect of when this information will be desirable or what will necessitate this enquiry.

Stander's[598] view on this issue is as follows:

> Die soort inligting waaroor dit hier gaan is inligting wat die Meester wenslik ag om te verkry. Hierdie woorde bring onmiddellik 'n subjectiewe element by die toepassing van artikel 152(2) in.

Smith[599] emphasizes the fact that the period within which the Master may exercise his powers commences as from the date of the provisional order of sequestration.[600] Bertelsmann and Sharrock do not state what would necessitate the said enquiry. Only Kunst has a view on the question of when this enquiry will be **necessary**. One may argue that this is a significant view because valuable information may be

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593 See Kunst *et al Meskin Insolvency Law* 8-19.
594 Specifically, in sub-sec (2).
595 Sharrock *et al Hockly's Insolvency Law* 165.
596 Even sub-sec (4) states that the trustee may interrogate the person summoned.
597 1998 (2) SA 212 (C) 224-5.
598 2004 *THRHR* 556-583.
599 Smith *Law of Insolvency* 216. See also Bertelsmann *et al Mars on Insolvency Law* 430; Kunst *et al Meskin Insolvency Law* 8-19.
600 For this view she relies on *Appleson v The Master* 1951 (3) SA 141 (T).

discovered that may possibly lead to the quicker abolition of the provisional order if circumstances demand.

Regarding the issue of the period within which the Master may summon the insolvent (or any other witness) to provide any information he considers desirable is, in my opinion, necessary under certain circumstances, specifically to uncover any information regarding the insolvent estate that may have been overlooked. If there is any suspicion that the insolvent has defrauded his creditors, the Master may, by way of this enquiry, discover the truth. This information might be beneficial to creditors and the insolvent estate. Consider, as an example, the case of suspected dishonesty where two months prior to sequestration the insolvent's assets disappear or there is an unexpected sale of the assets to family for less than the true value. These enquiries may expose the insolvent. Another situation is where most of the insolvent's assets resurface immediately after his rehabilitation. Because of the above-mentioned issues, it is in my opinion necessary that a broader period be given within which these enquiries may be conducted. The Master should have this right according to section 152 until the rehabilitation of the insolvent.

On the issue of the private nature of these proceedings, the fact that the Master may take notes during the proceeding and not be compelled to make same available to either an insolvent or any witness is clear indication that these proceedings are indeed private. The said notes or minutes may not even be regarded as information held by the state, to which access can be gained on constitutional grounds.[601] Stander's opinion is

> (a)lhoewel die Meester se amp die skepping van 'n statuut is en die Meester as sodanig 'n statutere amptenaar (en dus ook 'n amptenaar van die staat) is, is hierdie feit nie die toetssteen nie. Die beoordeling of 'n spesifieke optrede van 'n amptenaar inderdaad 'n administratiewe optrede is, word gedoen met verwysing na die funksie wat die Meester in die proses van die administrasie van 'n insolvente boedel verrig. Dit gaan nie oor die funksionaris as sulks nie. Ten opsigte van artikel 152 is die funksie van die Meester en dus sy optrede nie 'n administratiewe optrede nie. Derhalwe beskik die applikante nie in hierdie geval oor die reg op inligting nie.

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[601] *Staedler v Wessels* 2000 (4) 544 (O). See Bertelsmann *et al Mars on Insolvency Law* 430; Sharrock *et al Hockly's Insolvency Law* 152; Stander 2004 *THRHR* 556-583.

2.3.4.4 Section 152(3): Appearance before the Master

This sub-section empowers the Master or other officer to call before him any person who has been summoned and interrogated in terms of section 152(2) for further clarity on specific issues as reflected on books and documents submitted.

The sub-section provides as follows:

> After having interrogated the person summoned as aforesaid the Master or other officer concerned may deliver to him a written notice to appear again before the Master or other officer at a place and upon a date and hour stated in such notice and to submit to the Master or such officer any further information or any book or document specified in such notice.

Bertelsmann[602] and Kunst[603] quote the subsection as is. They add no opinion. Sharrock[604] has an interesting opinion though. According to him, the relevance of the information and or/documents to the insolvent's estate and affairs, outweighs the right of privacy.[605] Stander's[606] view in this regard is that:

> (d)it beteken dat 'n persoon wat reeds deur die Meester ondervra is, nie kan weier om 'n volgende ondervraging by te woon nie.

2.3.4.5 Section 152(4): Interrogation by the Master

This sub-section empowers the Master or other presiding officer to administer an oath to a person summoned prior to interrogating him. Provision is also made for the trustee to be interrogated as well.

The sub-section provides as follows:

> When any person summoned as aforesaid appears before the Master or other officer in question in compliance with a notice issued under sub-section (2) or (3) the Master or such other officer may administer the **oath to him** and the Master or such other officer and if a person other than the trustee was summoned, also the trustee (or his agent) may interrogate the person summoned in this regard on any matter relating to the insolvent or his estate or the administration of the estate.

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602 Bertelsmann *et al Mars on Insolvency Law* 430.
603 Kunst *et al Meskin Insolvency Law* 8-20.
604 Sharrock *et al Hockly's Insolvency Law* 165.
605 Section 14 of the *Constitution*. See also *Gumede v Subel* 2006 (3) SA 498 (SCA) 504.
606 2004 *THRHR* 556-583.

Sharrock,[607] Bertelsmann[608] and Kunst[609] do not say much about the administering of an oath by the Master or any other officer.

My view is that in addition to an oath, there should be an express provision for an option of an affirmation to speak the truth to accommodate different religions.[610] There is another viewpoint. One may argue that the provision for an oath should be read as also making provision for an affirmation.

2.3.4.6 Section 152(5): Interrogation by the Master

Provision is made in this sub-section for the application of the provisions of section 65(2) of the *Insolvency Act,* subject to sub-section 2(A) of the same section. Section 65(2) relates to the production of books and documents or with the interrogation of any person.

The sub-section provides as follows:

> The provisions of sub-section (2) of section 65[611] shall, subject to sub-section (2A) of that section, *mutatis mutandis* apply in connection with the production of any book or document or with the interrogation of any person under the preceding provisions of this section.

It is said that an enquiry in terms of this sub-section is purely investigative and that the presiding officer make no findings that could detrimentally affect any person's rights. Accordingly, the presiding officer records the evidence and regulates the proceedings.[612] Although this sub-section appears to be a fact finding mission, information obtained thereat may be used in facilitating the administration of an insolvent estate. Creditors who failed to contribute under a composition may be identified through this fact-finding mission. The trustee may proceed against their property when they fail to comply.

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607 Sharrock *et al Hockly' Insolvency Law* 165.
608 Bertelsmann *et al Mars on Insolvency Law* 430.
609 Kunst *et al Meskin Insolvency Law* 8-19.
610 See Mwelase *Insolvency Interrogations* 18.
611 *Insolvency Act*.
612 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T) 661E-F.

Like the other writers referred to, Smith[613] has summarised the applicability of sections 65 and 66 of the *Act* to section 152's provisions. She submits that a person summoned by the Master under section 152 is not entitled to refuse to answer any questions because it might incriminate him. Thus, what is discussed with regard to section 65(2A) is also applicable here. Stander[614] alleges the following:

> Motivering vir die reel dat 'n opgeroepte persoon nie mag weier om 'n vraag te beantwoord nie, is waarskynlik omdat die ondervraging net (veronderstel is om te) gaan oor vrae wat verband hou met die insolvent, sy boedel en die beheer oor sy boedel. 'n Opgeroepte persoon sal derhalwe wel kan weier om 'n vraag te beantwoord as die vraag nie direk of indirek met die genoemde sake verband hou nie en vir doeleindes van artikel 152 dus irrelevant is. As dit die geval is, moet die betrokkene met uitdruklike vermelding van daardie rede weier om die vraag te beantwoord sodat die onus dan op die ondervraer is om die verband van die inligting met die insolvent, sy boedel of die beheer daaroor te bewys.

Regarding the question of legal representation, Smith[615] points out that section 152 does not make any provisions for legal representation by either counsel or attorney to any person called upon to provide information to the Master. She submits that it has always been said that a person is not entitled to representation at such interrogations.[616] This, she says, is because the tribunal investigates the facts but does nothing further. Whatever the outcomes, the rights of the individual under interrogation will not be affected. Relying on judicial precedent, Smith submits that either there is no reason, at common law or following the demands of natural justice, why an insolvent appearing before such tribunal should be afforded the right to legal representation.[617] She further submits that there is nothing under section 152 suggesting that the insolvent is entitled to representation or the right to cross-examine or question other persons who are being interrogated. To support this view, Smith quotes judge Wilson [618] as follows:

> However, there appears to be what in my view is a desirable practice, which should be encouraged, that is that persons who are interrogated in this way should be entitled to have a legal adviser present whilst they are being interrogated to advise

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613 Smith *Law of Insolvency* 216; Bertelsmann *et al Mars on Insolvency Law* 430-431; Kunst *et al Meskin Insolvency Law* 8-20; Sharrock *et al Hockly's Insolvency Law* 166.

614 2004 *THRHR* 556-583.

615 *Law of Insolvency* 216.

616 For this view she relies on *Appleson v The Master* 1951 (3) SA 515 (W).

617 For this view she relies on *Van der Westhuizen v Roodt* 1986 (1) SA 693 (N).

618 In the case of *Van der Westhuisen v Roodt* 1986 (1) SA 693 (N).

> them of their rights generally unless there are very strong reasons to the contrary. I am satisfied, however, that this is a matter which lies within the Master's discretion and I do not propose to make an order in this regard. It is a matter that I am quite satisfied can be left to the Master's good sense and judgment.

Kunst[619] and Bertelsmann[620] aver that although the section is silent on the right of representation afforded to the insolvent person or other witness other than the trustee, the Master has a discretion and he might under certain circumstances permit the witness to have a legal adviser present during the interrogation. The legal adviser is only there to advise the witness as to his rights generally and nothing else.[621] Both Kunst and Bertelsmann appear to support the right to legal representation of an insolvent under interrogation. This is deduced specifically from Kunst's argument where she relies on the provisions of the *Constitution*, relating to the principle of fair justice and impartiality. Accordingly, she proclaims that in line with the principles of justice there is no reason why an insolvent should not be entitled to legal representation under section 152. This she states will amount to a fair and impartial enquiry.[622] Also relying on *Appleson v The Master* [623] Sharrock[624] points out that a person other than the trustee is not entitled as of right to representation at the inquiry. He, however, acknowledges that the presiding officer will often allow representation, and that the court has indicated that it is desirable that a person who is being interrogated should be permitted to have a legal adviser present to advise him of his rights, especially where the interrogation may constitute a step in litigation hostile to the witness.[625]

Regarding the applicability of the provisions of sections 65 and 66 of the *Act* to section 152 of the same statute, it is my opinion that both the positive and negative provisions of sections 65 and 66 should apply *mutatis mutandis* to section 152. This

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619 Kunst *et al Meskin Insolvency Law* 8-20.
620 Bertelsmann *et al Mars on Insolvency Law* 431.
621 For this view Kunst relies on *Appleson v The Master* 1951 (3) SA 515 (W).
622 She relies on the case of *Advance Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 (T) at 824. He submits that although the case deals with proceedings under s 418 of the *Companies Act* which permits legal representation, there appears in his view no reason why this provision should not apply in cases of s 152 proceedings.
623 1951 (3) SA 141 (T).
624 Sharrock *et al Hockly's Insolvency Law* 166.
625 *Hosking v Van der Merwe* 1992 (1) SA 920 (W).

should be the case in order to ensure that the principles of justice, impartiality and fairness are upheld even though the view is that this process is a private one. It is therefore submitted that the right to legal representation should be applicable regardless of the fact that the outcome does not affect the rights of the person under interrogation. Stander[626] motivates that:

> (a)an die ander kant is dit so dat daar volgens die gemenereg en die reels van natuurlike geregtigheid geen rede is dat 'n person wat ondervra word, nie verteenwoordig mag word nie. In die insolvensiepraktyk kan die Meester self besluit om 'n getuie toe te laat dat hy tydens die ondervraging verteenwoordig word, om hom van sy regte in die algemeen te adviseer. Indien daar volgens die Meester 'n goeie rede is waarom die person nie verteenwoordig mag word nie, kan die Meester weier dat die person verteenwoordig word. Die Meester laat egter gewoonlik verteenwoordiging toe. Die hele kwessie van verteenwoordiging benus dus by die subjektiewe oordeel van die Meester. Dit is 'n vraag of so 'n beginsel inderdaad billik is?

Although it is argued that the outcomes of this enquiry do not affect the rights of the person under interrogation, information obtained thereat may be used in the administration of the insolvent estate, specified criminal proceedings and civil matters. The need to legal representation is necessitated by the fact that answers given thereat shall be admissible in any subsequent proceedings against the person giving them. An attorney or advocate will be in a position to ensure that the interrogations are not conducted oppressively and in a vexatious manner against his client.

I concur with Kunst on the application of the principles of justice and fairness in all proceedings, regardless of whether they amount to administrative action or not, as long as there are possibilities of the proceedings affecting any subsequent proceedings relating to the insolvent. Effective representation should therefore include legal representation. It is desirable that a person who is being interrogated should be permitted to have a legal adviser present to advise him of his rights.[627]

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626 2004 *THRHR* 556-583.

627 *Van der Westhuizen v Rood* 1986 (1) SA 693 (N). See also Sharrock *et al Hockly's Insolvency Law* 166.

In *Hosking v Van der Merwe* [628] the presiding officer at the section 152 enquiry had declined the examinees' requests to have legal assistance during the interrogation proceedings; hence this application for the court to intervene. The presiding officer was of the view[629] that allowing representation would frustrate the purpose of the proceedings. This would be the case since the representative would serve no purpose, especially since he could not put questions thereat.[630]

The court had to answer a question as to whether or not the applicants, subjected to interrogation in terms of section 152, should be allowed legal assistance. In answering this question, the court preceded by citing[631] *Appleson v The Master*[632] where the court held that 'a person, other than the trustee, is not entitled as of right to legal assistance at such interrogation or to be assisted by counsel or attorney or agent'. The question as to whether or not the officer presiding thereat has discretion to allow legal assistance or representation was, according to the court, (in the *Hoski*ng matter) expressly left open by the court in the *Appleson* case. However, the court in the former case did acknowledge the provisions of section 65(6)[633], which permits interrogatees the assistance of counsel, attorney or agent, and that such provisions could not be found in section 152 of the same statute.[634]

The court further cited[635] the matter of *Shamosewitz v Shamosewitz and Shatz's Trustee and Adler*.[636] In this case, the view held was that an insolvent, though not entitled to be present or to be represented at such private examination instituted for the purpose of obtaining information relating to his estate, it was customary to allow him to be represented by counsel and solicitor. This was said to be the case to ensure that the object of the enquiry is not defeated. However, the court

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628 1992 (1) SA 920 (W).
629 At 921D.
630 At 921D.
631 At 922E-F.
632 1951 (3) SA 141 (T) 146G-H.
633 Of the *Insolvency Act*.
634 'Notwithstanding the incorporation of the provisions of s 65(2) relating to privilege and the compulsion of the answering of incriminating questions, and s 65(7) in relation to witness fees'. At 922G.
635 At 922I.
636 1913 WLD 213 at 218-219.

expressed the view that any other witness in the same circumstances would be permitted professional assistance of a solicitor and counsel if the examination were considered a step in litigation hostile to the said witness. Furthermore, the presiding officer was said to be entitled to impose such conditions as he deems fit to ensure that the object of the examination is not defeated.[637]

The court proceeded (in the *Hosking* matter) to highlight[638] the provisions of section 65(6) of the *Insolvency Act* [639] which entitles an insolvent or other person called upon to give evidence at the meeting of creditors to be assisted thereat by counsel, attorney or agent. In the court's view, the provisions of section 67 of the same statute necessitated this. The latter section obliges the Master to convey to the Attorney-General, a certified copy of any statement made at such interrogation, where he reasonably suspects that any person committed an offence.

Further, with regard to legal representation at section 152 interrogations, the court held the view[640] that there was no reason why the law in the *Shamosewitz* case should not be applied in the same way to section 152 proceedings. According to the court, it was in the interest of justice and in no way in conflict with the goal, principle or spirit of this statute to do so. The court therefore concluded that the presiding officer at a section 152 proceeding has a discretion to allow the insolvent and the witness legal assistance. In essence the court agreed with the principles set out in the *Shamosewitz* case regarding legal assistance.

However, the court highlighted[641] that it is impractical and undesirable to attempt in any way to define or limit the scope of the presiding officer's discretion at a section 152 proceedings at least as far as allowing or disallowing representation was concerned. Further highlighted was the point that the presiding officer may exercise discretion in favour of some persons and not others, or in respect of some issues

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637 'For example that no notes of the proceedings would be taken or disclosed without leave of the court'.
638 At 923G-H.
639 24 of 1936.
640 At 924A.
641 At 924G-H.

and not others. In addition, may, for example, refuse to allow an insolvent legal assistance where the purpose of the interrogation is nothing more than establishing the whereabouts of books or property of the insolvent estate. On the other hand, he would typically allow it, in respect of an examination, which is a prelude to hostile litigation. The presiding officer's decision will be guided by the views and purpose of the trustee and, will usually allow legal assistance where the trustee is himself legally represented.

To emphasize the above point, the court quoted[642] the judge president in *Shamosewitz v Shamosewitz and Schatz's Trustee and Adler* [643] as follows:

> While it is the duty of the commissioner to see that the object for which the enquiry has been instituted is neither defeated nor in any way frustrated, he will be zealous in seeing that no unfair advantage is taken of any witness who appears before him. When he therefore allows the trustee to appear by counsel or solicitor he will accord the same privilege to the insolvent or to any other witness who, in his opinion, should be protected, but under such conditions, as he may deem proper.

The court further pointed[644] out that in this case in particular, the applicants should have been allowed legal assistance, specifically on the issue of the property of the first applicant vesting in the trustee.[645] This vesting was considered by the court to be a step in litigation hostile to the applicants. Further, an attempt on the part of the trustee's counsel to secure a written undertaking from the first applicant, which if successful, would have had serious legal implications for her, was also considered by the court as hostile to the applicants.

However, the court had difficulty with the applicants' claim being too wide. According to the court, only in rare occasions would an insolvent or other witness as summoned for interrogations under section 152 be entitled to an order permitting him legal assistance on all aspects of the interrogation.[646] The court pointed out that, as a matter of convenience and in the absence of objection thereto by the trustee, a blanket right to legal assistance may be granted by the presiding officer.

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642 At 924I.
643 1913 WLD 213 at 220.
644 At 925A-B.
645 In terms of s 21 of the *Insolvency Act* 24 of 1936.
646 At 925B-C.

This, the court cautioned, does not give rise to a right to be granted such a wide privilege.[647]

Further, the court felt the need to express its views regarding the applicants' claim for relief. According to the court,[648] the application was void of specifics on issues that required legal assistance. For this reason, the court held that it would not grant such an application. The court advised[649] that the applicants were welcome to request that the presiding officer consider their pleas for legal assistance on specific issues, as soon as the interrogations resumed. The court also pointed out that the trustee must be specific on issues to be interrogated. This was necessary in order to guide the presiding officer's decision whether to grant or not to grant permission for legal assistance.[650] Accordingly, if the trustee were to fail to define issues to be interrogated, that factor was considered by the court as having the effect of 'inducing the presiding officer to grant a general right to legal assistance'.[651]

Furthermore, the court (though in passing) saw the need to highlight[652] the failure on the part of applicants' counsel to distinguish between 'legal assistance' and 'legal representation'. Referring to section 73 of the *Criminal Procedure Act* [653] specifically sub-section 1[654] and sub-section 2,[655] the court made it clear and correctly so, that the concepts legal assistance and legal representation are not identical.

In conclusion, the court acknowledged the fact that the presiding officer's refusal to grant the applicants' relief for legal assistance and his failure to protect their rights where inappropriate issues were raised and when they were unfairly interrogated on behalf of the trustee (second respondent) could not be justified.[656] Further, the

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647 At 925C.
648 At 925E-F.
649 At 925F-G.
650 At 925F.
651 At 925G.
652 At 926H-J.
653 51 of 1977.
654 The sub-sec refers to the entitlement an accused person (who is arrested) has to the assistance of his legal adviser, as from the time of his arrest.
655 The sub-sec refers to the entitlement an accused person has to representation by his legal adviser, in relation to the criminal proceedings.
656 At 926B.

court held[657] that the applicants had in effect succeeded in establishing their rights to more limited legal assistance, than that originally requested by them. Accordingly, they could successfully claim the limited right to legal assistance at the resumed interrogation, so held the court. It was said to be within their rights to approach the court for a definition and protection of their rights, their only error being in the form of relief sought by them.

The implication of this decision is that persons who are questioned and other witnesses at the section 152 interrogation proceedings are entitled to be assisted by their legal representatives on specific issues. Assistance is probably limited to clarifying, rephrasing questions posed to them, and ensuring that the interrogation is not conducted unfairly. This limitation is fair when one considers the purpose of section 152 – that is, the questioning of persons of interest with the objectives of gathering the required information, for the proper administration and finalisation of insolvent estates.

2.3.4.7 Section 152 (6): Immunity for the Master

This sub-section makes provision for the application of the provisions of section 66 of the *Insolvency Act* to section 152(6). Section 66 empowers the presiding officer[658] at the meeting of creditors to issue a warrant for the apprehension and detention in prison of a recalcitrant witness.

The sub-section provides as follows:

> The provisions of section 66[659] shall *mutatis mutandis* apply in connection with a person summoned, and with his interrogation, under this section and the Master or other officer concerned shall, with reference to a person so summoned or with reference to such interrogation, have the powers and immunity conferred upon an officer mentioned in section 66.

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657 At 926E.

658 Now subject to the *De Lange v Smuts* 1998 (1) SA 736 (C) ruling.

659 Section 66 of the *Insolvency Act* provides for immunity to a presiding officer who issued the warrant of apprehension or committal to prison against a recalcitrant witness.

It is submitted that this sub-section should be read subject to the decision of *De Lange v Smuts*. Since the Master is not a judicial officer, he may not issue a warrant for the apprehension and detention of a recalcitrant witness.

Neither of the writers referred to above seem to have any reservations regarding the applicability of section 66 of the statute to section 152(6).[660] It is my opinion that the powers and immunity afforded to the Master might be open to abuse, especially where the insolvent is not entitled to legal representation. It is submitted that the provisions of section 152 of the statute are contradictory and not harmonious. The fact that the outcome does not affect the person's right does not seem to be in harmony with the consequences of non-compliance with the requirements of the *Insolvency Act*. The contradiction comes to the fore when one considers the fact that the latter statute makes it an offence for an insolvent not to comply with the summons, he might be detained in order for him to comply, and yet the interrogations do not affect his rights. Taking into consideration the seriousness of the consequences of non-compliance with the summons or proceedings, one might be tempted to advocate for legal representation at such proceedings in the widest sense.

2.3.4.8 *Strauss v The Master* [661]

In *Strauss v The Master* the court had to decide whether the summoning of certain witnesses by the Master under section 152, for the purposes of producing the required information, was reviewable or not. The court had to further answer the question whether the applicants were entitled to access the documents relating to the reason behind the Master's decision to summon them to a private enquiry or not.

The facts of the case are as follows: The applicants were heirs in the insolvent deceased estate. They were subpoenaed to appear before the Master in terms of

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660 See Kunst *et al Meskin Insolvency Law* 8-19; Sharrock *et al Hockly's Insolvency Law* 166; Smith *Law of Insolvency* 216; Bertelsmann *et al Mars on Insolvency Law* 430.

661 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T). See also a discussion of this case in Stander 2004 *THRHR* 556-583.

section 152 of the *Insolvency Act* to provide information relating to the insolvent (deceased) estate. On their appearance, they requested access to the information relating to the reason behind the subpoena. The presiding officer refused. Subsequently an application seeking to review the presiding officer's (first respondent) decision in terms of section 151 of the *Insolvency Act* was made. The purpose of the application was to enforce their rights in terms of section 32 of the *Constitution*.[662]

Regarding section 151, the first question that fell to be decided by the court was whether the applicants' contentions[663] were correct. It is clear from the wording of section 152(2) of the *Insolvency Act* that the only jurisdictional fact that must exist before the Master can issue a notice in terms thereof is the following:[664] He must be of the opinion that the person whom he intends to summon to appear for interrogation will be able to give information which he considers desirable to obtain concerning the insolvent or his estate or the administration thereof or concerning any claim or demand which has been made against the estate. According to the court, the subjective opinion of the Master can therefore rightly be described as the foundation for the operation of the section.[665] The court also pointed out that the powers of the court of law to review conduct, which has as its foundation the subjective opinion of a functionary or official, are very limited.[666]

In supporting this argument, the court cited the case of *South African Defense and AID Fund v Minister of Justice*.[667] In this case, judge Corbett stated[668] that the powers of the court to review the conduct of an official who exercises discretionary powers in terms of statutory provisions might fall into one of two broad categories. Accordingly, it may consist of a fact or state of affairs, which, objectively speaking,

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662 Section 32 provides that everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights.

663 Seeking to review the presiding officer's decision not to give the required information in terms of s 151 of the *Insolvency Act.*

664 At 656.

665 *Cools v The Master* 1998 (4) SA 212 (C) 225C-D; *Gumede v Subel* 2006 (3) SA 498.

666 At 656.

667 1967 (1) SA 31 (C) 34-35D.

668 At 656.

must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prerequisite for the exercise of that power in a particular case is justiciable in a court of law.[669] If, however, the court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power.[670]

On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power (the presiding officer) the sole and exclusive function of determining whether in its opinion the pre-requisite fact or state of affairs existed prior to the existence of the power.[671] In that event, the jurisdictional fact is, in truth, not whether the prescribed fact or state of affairs existed in an objective sense but whether, subjectively speaking, the repository of the power (the presiding officer) had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a court of law.[672] The court can only interfere and declare the exercise of the power invalid on the ground of non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive, or failed to apply his mind to the matter.[673] The court concluded[674] that the applicants had not made out a case against the first respondent because of the fact that he (respondent) acted *mala fide*. Based on this court's findings, the applicant's application could not succeed.

The court held that there is another reason why the applicants' application could not succeed.[675] The applicants contended that the first respondent had **made an**

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669 At 656.
670 *Kellerman v Minister of Interior* 1945 TPD 179; *Tefu v Minister of Justice* 1953 (2) SA 61 (T).
671 At 657.
672 At 657.
673 See also *Radebe v Minister of Law and order* 1987 (1) SA 586 (W) where judge Goldstone made it clear that in those cases where the court is confronted with statutory provisions which confer the power on an official to decide himself whether or not a jurisdictional fact for the exercise of his discretionary powers exists, the power of the court islimited to an enquiry whether or not the official had acted *bona fide* or *mala fide.*
674 At 656D/E-G.
675 At 658.

order when he approved of the application for an enquiry in terms of section 152 of the *Act.* The court found that the conclusion of the Master to summon the applicants to appear before him was not susceptible to review. According to the court, this was because such decision lacked three attributes.[676] Firstly, **it was not final in effect and was susceptible to alterations by the court** (where *mala fide* was present) of first instance. Secondly, they were **not definitive of the rights of the parties**, for example, because they granted definite and distinct relief. Thirdly, **they had no effect of disposing at least a substantial portion of the relief claimed**. In this case, there was also no definite resolution of a dispute by the first respondent when he concluded that an enquiry should be held in terms of section 152 of the *Insolvency Act.* His decision cannot therefore be taken on review in terms of section 151.[677] In terms of section 151 a decision, ruling, or order of the Master can only be taken on review to a court by any **person aggrieved** thereby.[678]

The concept "person aggrieved" has been discussed in a number of cases in the past. In *De Hart v Klopper and Botha*,[679] the court held[680] that any "person aggrieved" by an **order** of the court is entitled to appeal. The word "aggrieved person", was said not to mean someone who is dispossessed of a benefit, which he might have received if some other order had been made. The court held that a person aggrieved must be someone who has suffered a legal grievance; someone against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something.[681] It was argued on behalf of the respondent that an aggrieved person is someone who has a legal grievance in the sense that his legal rights have been invaded or infringed. The court further pointed out[682] that the Master's decision to hold an

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676 See *Guardian National Insurance Co* Ltd v Searle 1999 (3) SA 296 (SCA).
677 At 659.
678 At 660.
679 *De Hart v Klopper and Botha* 1969 (2) SA 91 (T).
680 At 659G/H-H, 660G and 661E-F.
681 See also *Friedman's Trustee v Katzeff* 1924 WLD 298 304-5 for the interpretation of the term "aggrieved person".
682 At 661B/C-D/E/F.

enquiry and to issue the notices to persons who might be called to testify did not prejudicially affect the witnesses' liberty, property, or any other existing right that would require the Master to apply the *audi alteram partem* rule. These notices were said to simply be subpoenas.

Regarding the subpoenas, the court held that 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 is so because a person is called upon to perform what may be described as a public duty.[683] 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.[684]

As far as section 152 is concerned, the court held[685] that the enquiry in terms of section 152 of the *Insolvency Act* is purely investigative. The presiding officer makes no findings that can **detrimentally affect a person's rights. Nor does he determine any rights**. He simply records the evidence and regulates the proceedings. Prejudicial consequences such as imprisonment awaits those who refuse to reply to relevant questions or commit perjury. The court cited the reasoning of judge Spoelstra in *Podlas v Cohen* [686] where he found that no rights of the applicants have been infringed by the decision of the Master to summon them to appear at the enquiry and to be interrogated.[687]

The court proceeded[688] to consider the further contentions of the applicants, that their right to fair procedure was infringed because they were denied access to the written application. The applicants had relied on the *dicta* of Judge Harms, who delivered the judgment of the court in *Receiver of Revenue v Jeeva* [689] and *Klerck v*

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683 See *Van Aswegen v Lombard* 1965 (3) SA 613 (A) 623E.
684 Section 33(1) of the *Interim Constitution* and 36 of the *Constitution.*
685 At 661E.
686 *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T) 675 D-I.
687 See also *Roux v Die Meester* 1997 (1) SA 815 (T) at 824A-C.
688 At 661H-I, 662D-I, 663B.
689 *Receiver of Revenue, Port Elizabeth v Jeeva* 1995 (2) SA 433 (SECD).

Jeeva.[690] In this case the court held that the applicants were entitled to all the information they sought. This entitlement was said to be limited to information not subject to legal professional privilege, and that they had a right not to be subjected to oppressive or vexatious interrogation. Responding to the contentions of the applicants and relying on *Jeeva v Receiver of Revenue*, the court emphasised that the proceedings under both sections 417 and 418 of the 1973 *Companies Act*, as well as an enquiry under section 152 of the *Insolvency Act* had to be conducted in a fair manner.[691] However, fairness did not imply that the applicants were entitled to access to the written application[692] put before the Master. The court stated that the applicants have sufficient remedies at their disposal in the event that proceedings under section 152 have been conducted in an oppressive or unfair manner or even if the provisions of section 152 have been utilised in such a manner.

In *Bernstein v Bester*,[693] the court stated that the High Courts of this country have, over many years, taken the view that they have the power to prevent the section 417- type enquiries, which would result in oppression. The court has the power to intervene where enquiries are conducted in an oppressive or vexatious manner or result in hardship to the examinee. The same would be the case where unusual, special or exceptional circumstances are present. The court in the *Bernstein's* case further held that: if a person who has been summoned to appear at an enquiry under sections 417 and 418 of the 1973 *Companies Act*, feels that in the light of the facts of the matter, it was oppressive or vexatious or unfair to summon him or interrogate him, his remedy would be to approach the High Court for relief. These, the court held, should also be applicable to section 152 enquiries.

Based on this argument, the court, in *Strauss v The Master*, held that the applicants failed to persuade the court that the first respondent had acted unfairly, oppressively or in vexatious manner towards them by refusing them access to the written application.[694] The court acknowledged the fact that the second respondent's

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690 *Klerck v Jeeva* 1996 (2) SA 573 (A) 579H-I.
691 See *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) 824J-825A.
692 For the reason behind the Master's decision to summon them.
693 *Bernstein v Bester* 1996 (2) SA 751 (CC) 776A-B.
694 The reason behind the Master's decision to summon them.

objections to the documents (containing the reason behind the Master's decision to summon the applicants) being disclosed to the applicants was with merit. This was so because the enquiry was a private and confidential one and the contents of the application to the Master to hold an enquiry should also be regarded as confidential. Stander's[695] opinion is that:

> (d)it lyk eerder of die hof van mening is dat daar in die geval van artikel 152 uitsonderlike of spesiale omstandighede bestaan waar prosedurele billikheid in die sin van die verskaffing van inligting nie ter sprake sal kom, soveel so dat die hof tussenbeide sal tree nie. Die hof kyk nie na die begrip "ontbering" en die toepassing daarvan op die feite nie.

Regarding section 152 enquiry, the court emphasised the fact that this is an important and valuable mechanism for the Master and the trustee of an insolvent estate to obtain information, which might enable them to secure assets belonging to the insolvent and to obtain clarity on claims or demands that have been made against the estate of an insolvent. It is therefore important to safeguard the interests of persons who furnish information to the trustee or the Master in a confidential manner. If the Master could readily make such information available to persons such as the applicants, who have been summoned to be interrogated, a valuable source of information for the Master and the trustee might be destroyed. It is therefore crucial for the Master, as a matter of policy, to keep information furnished to him in a confidential manner, said the court.

The second basis, upon which the applicants have relied on for the contention that they are entitled access to the written applications, is that section 23 of the *Interim Constitution* is decisive on the matter. Section 32 of the *Constitution* provides that, everyone has the right of access to any information held by the state or another person, and this is required for the exercise or protection of any rights.[696] Due to the fact that this application was launched on 16 July 1999 and at that time, the national legislation envisaged by section 32 of the *Constitution* had not yet been

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695 2004 *THRHR* 556-583.

696 The section also provides that national legislation must be enacted to give effect to this right. Item 23 of Schedule 6 to the *Constitution* provides that such national legislation must be enacted within three years of the date on which the *Constitution* took effect and until such time s 32(1) of the *Constitution* must be regarded to read as follows: 1 Every person has the right of access to all information held by the state or any of its organ in any sphere of the government insofar as that information is required for the exercise or protection of any of their rights.

enacted, the relevant provision to be applied was item 23 of schedule 6 of the *Constitution.* Based on the applicant's contention, the court had to determine whether the respondent was an organ of the state or not. If the respondent was an organ of state that could entitle the applicants to have access to the information held by him, in order for them to exercise or protect any of their rights.

The applicants had relied on *Jeeva v Receiver of Revenue* [697] where the court held that a commission of enquiry authorised by the Master of the High Court and held under the machinery of the *Companies Act*, is administrative action against the applicants, which in this case has a material bearing upon their rights and interests. The enquiry was said to be of a quasi-judicial nature and accordingly, applicants were entitled to administrative action which is lawful, justifiable, and both substantially and procedurally fair. It was further argued on behalf of the applicants that, because they must submit to interrogation, they are entitled to prepare themselves to deal with the subject matter of the enquiry. Furthermore, they were entitled to equality before the law, which included equal access to the information held by the interrogator, especially if the interrogator is directly or indirectly an organ of state.

In response to these contentions, the court cited the views in *Bernstein v Bester.*[698] In that case, Judge Ackermann expressed his doubts about whether an enquiry under sections 417 and 418 of the *Companies Act* could be classified as administrative action in terms of the *Interim Constitution.* According to him, such an enquiry is an integral part of the liquidation process pursuant to a court order and particularly part of the process, which aims at ascertaining and realising assets of the company. The guidelines or norms according to which the courts should judge the conduct of an official,[699] to determine whether or not the official performed an administrative act for the purposes of section 33 of the *Constitution*,[700] have recently

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697 *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECD).

698 *Bernstein v Bester* 1996 (2) SA 751 (CC).

699 See 665C/D-E/FG-H/I of the report.

700 Section 33 of the *Constitution* as is currently deemed to read and which provides, *inter alia***,** that every person has the right to lawful administrative action where any of their rights or interests is affected or threatened.

been laid down by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*.[701] In that case, the court decided that what matters is not so much the functionary but the function. The question is whether the task itself is administrative or not. Therefore, the focus of the enquiry, as to whether conduct is administrative action or not, is not on the arm of government to which the relevant actor belongs, but on the nature of the power he is exercising.

On the basis of Judge Ackermann's views and the guidelines set out in *President of the Republic of South Africa v South African Rugby Union* above, the court came to the conclusion that it cannot be held that the decision to hold an enquiry under those sections amounts to administrative action. The court therefore disagreed[702] with the judgment in *Jeeva v Receiver of Revenue* above, where it was held that proceedings under sections 417 and 418 are "administrative action". The court further disagreed with the views that such enquiry affects the rights of persons who have been summoned to appear and to submit to interrogation. The court cited *Podlas v Cohen* [703] where the court held that a person who has been summoned to appear before the Master in terms of section 152 of the *Insolvency Act*, suffers no prejudice because his rights are not infringed.

Accordingly, it was decided that there is no difference between an enquiry held under section 152 of the *Insolvency Act* and one held under sections 417 and 418 of the 1973 *Companies Act*. The decision of the court was that the applicants were not entitled to rely upon section 32 of the *Constitution*, read with item 23 of Schedule 6 to the *Constitution,* to demand access to the written application. This is so because they have no rights which need to be protected, or which they can exercise. The application was accordingly dismissed.

With regard to the court's interpretation of section 32 of the *Constitution* and its applicability, it is clear in my mind that section 32 does not apply to section 152

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701 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA I (CC); (1999 (10) BCLR 1059).

702 At 665G.

703 See *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T) 675 D-I.

interrogation proceedings. However, I do not see how such interrogation cannot affect the interrogatee's rights, unless the latter loses or does not have the rights in the circumstances. The right referred to is, for example, the right not to incriminate oneself. The latter mentioned right might be violated by section 152 in so far as information obtained at interrogation proceedings might be used as evidence against the interrogatee in subsequent civil proceedings. What is evident from the court's interpretation of these sections is the importance of the creditors' rights in insolvency proceedings. The position of the interrogatees is not entertained.

It is my view that the court's interpretation of both sections 151 and 152 is clear. The purpose of section 152 interrogation is the gathering of information. The information so gathered is essential to assist the trustees of the insolvent estate in the performance of their duties (in the process of fair distribution of the insolvent assets to creditors). However, it is my opinion that whatever information obtained from such enquiries might affect the insolvent. This might be so where the information obtained might be used against the insolvent in any subsequent proceedings, civil as well as criminal (relating to perjury for example). Therefore, caution should be taken. Safeguards should be taken when interrogating the insolvent to (especially where information might be used in criminal proceedings relating to perjury) ensure that the principle of justice is upheld. It is my conviction that the Master has, in the light of what was said, an enhanced obligation to see to it that the examinee is not subjected to vexatious and oppressive proceedings.

It is thus apparent that the examinee has no rights to exercise in this respect. Because the examinee is in a very sensitive situation, it is paramount that the Master ensures that the proceedings are conducted in such a manner that the principle of justice is upheld. This he can achieve by ensuring that fair procedures are adhered to and that he acts *bona fide* in all respects.

In respect of the question whether the Master' decision to summon the witnesses is reviewable or not, the court concluded that the Master's decision to summon the witnesses was not reviewable under section 151 of the *Insolvency Act*. According to the court, this was because section 152 provisions are not administrative in nature;

they are purely investigative. The view was that the applicants further failed to show that the Master had acted *mala fide* in issuing the summons. Regarding access to information by the applicants, the court held that the applicants were not entitled to such information because the enquiry under section 152 was a private one and that persons who provided the Master with information did so in confidence. Based on that argument, the applicants' application could not succeed.

Regarding fair procedure, the court in *Strauss v The Master*[704] held that even though the examinee is entitled to a fair procedure, it does not include entitlement to access the information held by the presiding officer. This information entailed the basis upon which the Master had decided to hold the enquiry. The court held that it was only where the enquiry was conducted in a vexatious or oppressive manner or might result in hardship to the examinee, that the court would exercise its powers to intervene. It further held that the applicants had not indicated how refusal by the Master to give them documents relating to the reason behind the holding of the enquiry could affect them negatively.

With respect to the application of section 32 of the *Constitution*,[705] the court held that the applicants were not covered by this section in so far as none of their rights could be affected by the enquiry. The court held this view since the insolvency proceedings did not amount to administrative action and did not affect the rights of persons who had been summoned to appear and submit to interrogation. For the reason that they had no rights that needed to be protected or exercised, the application was refused. Furthermore, the enquiry is said to be investigative in nature. The presiding officer investigates facts but makes no findings that can detrimentally affect anyone's rights nor does he determine any rights.[706]

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704 2001 (1) SA 649 (T).

705 Section 32 provides that every person is entitled to access to information held by the State or any State organ in any sphere of government in so far as that information was required for the exercise or protection of any of their rights.

706 *Van der Westhuizen v Roodt* 1986 (1) SA 693 (N) 698; *Podlas v Cohen and Bryden* 1994 (4) SA 662 (T) 675; *Roux v Die Meester* 1997 (1) SA 815 (T) 825. See also Sharrock *et al Hockly's Insolvency Law* 166.

From the authorities discussed, it appears that insolvency enquires are simply for information gathering, to assist in the effective and efficient administration of an insolvent estate. The fact that creditors wishing to prove a claim against an insolvent estate may be interrogated at meetings of creditors[707] is indicative of the legislature's desire for fairness and justice for all affected. It is thus crucial for insolvents and other affected parties to co-operate with the trustee and the Master, at least as far as interrogations are concerned. The said co-operation on the part of the insolvent would be taken into consideration when deciding the question of rehabilitating the insolvent.[708]

It appears from the authorities perused that the legislature envisages a clean break for an honest debtor who co-operates with the trustee in the administration of his insolvent estate. The interrogation process being one area in which the insolvent's co-operation is crucial. It is for this reason that the interrogation provisions should be viewed as a justifiable legislative gesture. I am considerably strengthened in my view through statutory provisions and case law perused that the legislature has good intensions for all the parties involved.

2.4 Conclusion

2.4.1 Introduction

With regard to the compulsory attendance of creditors' meetings and consequent public interrogation of the insolvent and other persons of interest, the penalties for recalcitrant witnesses, the private examination of the trustee and other persons of interest by the Master concerning the administration of the insolvent estate, the following views have been taken:

2.4.2 Re: section 64

The attendance of the creditors' meetings in terms of section 64 of the *Insolvency Act* as per the subpoenas is mandatory. The Constitutional Court has confirmed this

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707 Section 44(7) of the *Insolvency Act* 24 of 1936.
708 Section 27 of the *Insolvency Act* 24 of 1936.

position on a number of occasions. A person aggrieved by the provision of this section has no further recourse. Although this provision appears to be very stringent, I am of the opinion that this is necessary in order to safeguard against the insolvent fabricating any excuse not to attend the meetings for interrogation or any other purpose.[709] The provision should be relaxed only where the insolvent has a very good and solid reason for failure to appear for interrogation. In my opinion, a medical condition supported by a medical certificate is or should be a good enough reason.

If the husband and wife are married in community of property they are both insolvent and it is my view that both should attend. Section 64 should be applicable with reference to both spouses as "the insolvent". If, however, they are married out of community of property, there will always be a solvent spouse and section 64 is not applicable to the solvent spouse *per se,* unless such spouse is identified as "other persons" by the presiding officer for being summoned. The broad scope of the subpoena permits even the encroaching, to a certain extent, upon the solvent spouse's fundamental rights to privacy, freedom and dignity. This encroachment is necessary under the circumstances and the solvent spouse has no valid complaint to being summoned concerning her knowledge of her spouse's affairs.[710]

Although the insolvent is not bound to attend any other subsequent meetings unless he receives a written notice from his trustee to do so, it would be wise for him to attend all the meetings of creditors in his estate.[711] The reason for this view is that it is imperative for the insolvent to keep abreast of any developments in his insolvent estate in order to prepare for further processes in the administration of his insolvent estate.

On the issue of summoning the solvent spouse,[712] according to my frame of reference, compelling the latter to attend the meetings of creditors might be

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709 Mwelase *Insolvency Interrogations* 9.
710 See *Harksen v Lane* 1998 (1) SA 300 (CC).
711 See also Bertelsmann *et al Mars on Insolvency Law* 355.
712 As is understood in terms of s 21 of the *Insolvency Act*.

necessary based on the circumstances. He or she is expected to be in a position to provide material information relating to the insolvent. This comes naturally since they share an intimate relationship and surely such a spouse might know the whereabouts of the insolvent's assets as well as (some) of his dealings. It is my opinion that this is intended to curb any collaborated fraudulent transactions or collusive dealings between the spouses.[713]

Lastly, it is observed that section 64 is mandatory in nature in that the word "shall" is used throughout the section. This appears to be necessary in order to achieve the purpose of discovery and to ensure that legislative objective is not jeopardised. Further, the provisions of this section are of general application.

2.4.3 Re: section 65

While compulsory interrogations have always been frowned upon at both common law[714] and under the constitutional dispensation in South Africa, interrogations or examinations at insolvency proceedings have, in a number of court cases, been regarded as rather investigative, requiring no protection against self-incrimination. Investigative processes are simply enquiries. Hence, to aid the equitable distribution to the insolvent's creditors, the insolvent and others with a close relationship to the insolvent are compelled to give clarity on the transactions made and the whereabouts of assets connected to the insolvent estate (nothing else beyond this).

Regarding the notice to attend the meetings of the creditors: The view is that proper notice of meetings (especially where interrogation is to take place) should be given to the insolvent (other person) to enable the latter to collate the required information. The interrogation should take place at any meeting, but the fact that an interrogation will take place must be expressly mentioned in the notice. This, in my opinion is to ensure that an examinee or the creditors are well prepared for the proceedings. The principles of justice and fairness will be upheld if an examinee or

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713 Mwelase *Insolvency Interrogations* 10.
714 See para *2.2* above.

the creditors are afforded an opportunity to prepare for the interrogation proceedings. Furthermore, constitutional attacks will to some extent be avoided.

With regard the issue of an oath, the view[715] is that the *Insolvency Act* should make an express provision for the taking of a solemn declaration from witnesses who may have objections taking an oath. This will minimize constitutional attack by virtue of section 31(1) of the *Constitution*.[716]

The view is that the broad scope of the interrogation entails that business affairs of the solvent spouse are also not out of scope. The reason behind this requirement is obvious: the special relationship between the spouses and the possible diversion of assets between them cannot be ignored.

A further view is that books and documents belonging to the insolvent may be interrogated, to gather information for prospective future litigation against the insolvent and persons who have had dealings with the insolvent. It is submitted that the interrogation proceedings are a short cut to recovering estate assets without resorting to the expensive litigation route. Accordingly, subsequent civil and/or criminal actions against persons involved in defrauding the creditors are only secondary. Therefore, from my standpoint, the solvent spouse 's bank account is relevant - **but** only in as far as the sought information is relevant to the insolvent estate - and the solvent spouse's banker may thus be required to produce bank statements detailing transactions accordingly to ascertain whether or not the insolvent or his spouse has acted improperly or fraudulently towards creditors. The primary objective (the gathering of information) of the interrogation and the crucial role it plays in the administration of insolvent estates should thus be retained.

Regarding the scope of questions to be asked the view is: The fact that a presiding officer is empowered to disallow any question, which is irrelevant, is indicative of

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715 See Mwelase *Insolvency Interrogations* 20.

716 See s 31 of the *Constitution* for a complete discussion of this subject. Briefly this section provides that persons belonging to a religious community may not be denied the right to enjoy and exercise their religious customs.

the legislature's desire to maintain the integrity of the proceedings. In my mind the use of the word, "may" indicates again that, the presiding officer has discretion to decide which questions to allow, thereby ensuring that the interrogations are not delayed. On the other hand, the word "shall" indicates that if the question is relevant, he has no discretion to exercise but to allow the question. It is my opinion that the presiding officer should be given a broader compass empowering him to disallow any question that is irrelevant and would prolong the interrogation process. Prolonging the proceedings unnecessarily should be avoided in order to fast track the winding-up of the insolvent estate. Whether the question is relevant or not should depend on the facts surrounding each case. What is relevant to one case might not necessarily be relevant to another. After all, questions should relate to the affairs of the insolvent, his assets, business and his dealings regarding these.[717]

Any person with any practical experience in insolvency interrogation knows that such discretion is essential to curb the abuse of the system. The fact that sequestration has become such a lucrative profession and trustees (and liquidators, in the case of an insolvent company) will do almost anything to maximise their fees, calls for more caution. Questions, which should be precluded, in my opinion, are those that objectively speaking, may not produce material information that will benefit the insolvent estate financially. It is submitted that the sole purpose of the section is to discover information that will assist the trustee to recover any property that was disposed of by the insolvent, especially where he did not receive any benefits or apparently insufficient consideration. Any information that is calculated not to benefit the estate financially is not relevant, therefore immaterial, and should be excluded. An example of such is information relating to the insolvent's personal affairs.[718]

Perhaps another question should be regarding the suitability of a Master to be a presiding officer. One could argue that a person with thorough legal and court experience should conduct the interrogations. This could also fast track the

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717 See Mwelase *Insolvency Interrogations* 23.

718 Some personal affairs may be relevant such as the insolvent's banking account or marital status.

administration process by ensuring that the witness submits credible information that would assist in the discovery of concealed estate assets. It can be argued that a Master is merely a public official with little or no experience in litigation.

Further to questions that may be asked, the view is that lengthy cross-examinations should be left to the criminal and civil justice systems, specifically where the examinee fails to answer questions truthfully and to the best of his knowledge. It can be further argued that, if the insolvency interrogation proceedings were conducted in either a tribunal or within the court structures as civil proceedings, there might not be a need to transfer insolvency matters from one jurisdiction to another, especially where credibility issues arise.

It is noted that although the interrogations are pubic in nature in terms of section 39(6), there are exceptions. The presiding officer is required to order the *in camera* proceedings where it appears that incriminatory questions against the witness are posed. It is submitted that the risks of incriminatory evidence should not be the sole reason for the *in camera* proceedings. The risks of slanderous allegations, state secrets and other personal issues such as the witness's private life should also be considered as calling for *in camera* proceedings.

As regards legal representation, the view is that a witness is entitled to such. It is submitted that effective representation should also entail a request for clarification, illumination, elucidation and explanation from any person interrogating the witness by the witness's attorney. The attorney should also assist the witness on how to answer questions, but not answer for the witness. Dedicated insolvency courts or tribunals are advocated for to conduct these interrogations, to counteract constitutional challenges and fast track the sequestration process. These structures would be staffed with officers with legal expertise and legal experience to (lawfully) extract the required information from witnesses. It appears that these courts or tribunals could be sustainable, considering the huge amounts of money exchanged between trustees, liquidators and auctioneers.

2.4.4 Re: section 66

Regarding the penalties as provided for by section 66 of the *Insolvency Act* for non-compliance with its requirements, the view is that these penalties are necessary to ensure compliance. It is submitted that the penalties may be even more effective (and the administration processes efficient) if ordered by judicial officers within the court structures. Further, continuous detention would not be considered as detention without trial if ordered by the court.

As strict as the provisions of this section may appear, the *Insolvency Act* does provide some protection to witnesses. It is my submission that both the private and public interrogation processes serve a crucial role in the administration of insolvent estates and should thus be retained.

2.4.5 Re: section 152

With regard to the private enquiry, the following views have been taken: The private nature of this enquiry necessitates the exclusion of even interested persons such as creditors. It is aimed at obtaining confidential[719] information at short notice.[720] The provisions of this section are of general application – they are applicable to the insolvent, any person and even the trustee of the insolvent estate to account for his lack of commitment. Since the application to hold this enquiry is made *ex parte*, the view is that the applicant is entitled to privacy – another reason why prospective examinees are not entitled to access the content of the application in terms of section 32 of the *Constitution*. The view is that if information concerning the subject matter of the enquiry is made available to prospective examinees, valuable information may be concealed. It is further submitted that with this type of enquiry, a valuable source of information may be discovered that may possibly lead to the quicker abolition of the provisional order if circumstances demand.

Further, what was discussed under section 65(2A) of the *Insolvency Act* regarding incriminatory information is applicable to section 152. Although legal representation

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719 Kunst *et al Meskin Insolvency Law* 8-19.
720 Bertelsmann *et al Mars on Insolvency Law* 430.

for examinees is not expressly provided for by this section, it appears that the presiding officer has discretion in this regard.[721] Again, there is no basis why what applies to section 65 enquiries should not apply in this regard. Further, legal representation should be permitted regardless of the fact that the outcomes of the enquiry do not affect the rights of an examinee.

Regarding the immunity available to an officer presiding at the enquiry, the view is that powers afforded to the Master or a non-judicial officer might be open to abuse.[722]

Lastly, the recommendation of the Master to hold the enquiry may not be reviewed in terms of section 151 of the *Insolvency Act*, the reason being that such is not administrative in nature, but purely investigative[723] and is based on the Master's subjective opinion that the enquiry should be held.[724] An exception would be where *mala fide* appears to have influenced the Master to call for the enquiry. Furthermore, the recommendation of the Master to hold the enquiry is said not to be a decision or an order.[725]

The next chapter will be an exposition of the interrogation process of any person regarding the affairs of a company under liquidation in terms of the 1973 *Companies Act* [726] and the extent to which these proceedings are similar or different from interrogation proceedings in terms of the *Insolvency Act*. The aim is to investigate how the provisions of these two statutes have been contrasted and compared by the courts and secondary sources, and whether they are in line with the *Constitution* and the Bill of *Rights*.

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721 Kunst *et al Meskin Insolvency Law* 8-20; Bertelsmann *et al Mars on Insolvency Law* 431.
722 See the matter of Leong at ch 1.
723 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T).
724 *Cools v The Master* 1998 (4) SA 2112 (C).
725 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T).
726 And to some extent, the 2008 *Companies Act* where applicable.

Chapter 3: The South African Companies Act[727]

3.1 Introduction

As was indicated in chapter one above, South Africa has two separate insolvency legislation regimes, the one regulating the insolvency of individuals and the other regulating the insolvency of juristic persons such as companies and close corporations.[728] Insolvent companies will, until the proposed legislation[729] comes into effect, be wound-up under the provisions of the 1973 *Companies Act*.[730] Insolvency legislation affecting companies compel representatives of insolvent companies to comply with certain requirements in order to achieve an effective winding-up of the affairs of a company unable to pay its debts. The process will be discussed in detail below.

3.2 The process of gathering information for liquidation purposes

Provision is made by the 1973 *Companies Act* for the gathering of information essential for a fair and equitable administration of the affairs of a company unable to pay its debts and in liquidation. The processes undertaken to effectively gather the required information will be discussed next.

3.3 The Companies Act

This statute employs a process, which is almost the same as is provided for by the *Insolvency Act*.[731] The 1973 *Companies Act* has dedicated sections for the purposes of:

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727 61 of 1973. The 2008 *Companies Act* apply to some extent to liquidations, see ch 1, para *2.1* above.

728 See ch 2, para *2.1* above. It does not fall in the scope of this thesis to elaborate on close corporations.

729 A new *Insolvency Bill* currently proposed for discussion by the South African Law Reform Commission.

730 See Sch 5 para 9 of the 2008 *Companies Act*. See also in general *Boschpoort Ondernemings* (Pty) Ltd *v Absa Bank Ltd* [2013] ZASCA 173.

731 See sections 64-66 and section 339 of the 1973 *Companies Act*, which makes the *Insolvency Act* applicable to companies.

(1) coordinating the convening of meetings of creditors;[732]

(2) the summoning of persons of interest to the meetings;

(3) the summoning of books and documents relating to the affected companies;

(4) the interrogation of certain persons and the penalties for failure to comply with the subpoenas.

3.3.1 Section 414: The duty of directors and officers to attend meetings

3.3.1.1 Introduction

Section 414 has the same provisions as section 64[733] of the *Insolvency Act* and should be read with section 415 and 416 of the *Companies Act*. These provisions apply in the winding-up of a company unable to pay its debts, whether the winding-up is compulsory or voluntary.[734] It provides for the compulsory attendance at the company creditors' meetings by officers and directors of that company. The section further makes provision for the issuing of a subpoena to any person who is believed, on reasonable grounds, to be indebted to the company. Unlike section 64, this section provides for an extended duty to directors and officers of the company unable to pay its debts, to keep abreast as to any developments regarding meetings where they are expected to attend as well as other matters in this regard. This statute also makes provisions for sanctions in the case of non-compliance with the requirements.

3.3.1.2 Section 414(1): Compulsory attendance of creditors' meetings

This sub-section provides for the compulsory attendance of the creditor's meetings by directors and officers of a company unable to pay its debts and in winding-up.

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732 Of companies unable to pay its debts and consequently in liquidation.

733 Which should be read with ss 65 and 66 of the same statute.

734 Delport *Henochsberg on the Companies Act* 872; See also Kunst *et al Meskin Insolvency Law* 8-6(2); Blackman *et al Commentary on the Companies Act* 14-426; Sharrock et al Hockly's *Insolvency Law* 256; Cilliers *et al Corporate Law* 532-533; Cassim *et al Contemporary Company Law* does not discuss this aspect of company insolvency.

The section reads as follows:

> In any winding-up of a company unable to pay its debts, every director and officer of the company shall-(a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorized him in writing to absent himself from that meeting; (b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.

Although a director or officer of a company unable to pay its debts ceases to act in that capacity after the liquidation order,[735] he is, nevertheless, expected to attend the meetings. As soon as the winding-up order is issued and the *concursus creditorum*[736] established, the liquidator(s) is appointed to take over the administration of a company for the purposes of administering the liquidated company's assets and divest the directors of powers and control over the company. The directors become *functus officio*.[737] The company's legal personality continues under the administration of the liquidator(s) and supervision of the Master, until it is deregistered in terms of section 419 of the 1973 *Companies Act*.

Delport[738] avers that the duty of directors and officers to attend meetings is an absolute one. The requirement to perform is not dependent on notice of the meeting being given to him individually. Accordingly, each officer or director concerned should keep himself informed as to the dates of any meeting where his attendance is compulsory. This duty is applicable to directors and officers who have since ceased to be directors of the said company due to its insolvency. If the company is no longer in liquidation due to deregistration, the directors will as a matter of course

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735 Section 353 (2) of the 1973 *Companies Act*, although applicable to a voluntary winding-up, it is submitted that there is no reason why it should not apply in the case of compulsory winding-up (*Attorney-General v Blumenthal* 1961(4) SA 313 (T)). See also Delport *Henochsberg on the Companies Act* 873; Sharrock *et al Hockly's Insolvency Law* 254. Kunst *et al Meskin Insolvency Law* does not discuss this aspect.

736 Body of creditors.

737 *Attorney-General v Blumenthal* 1961 (4) SA 313 (T). See also Sharrock *et al Hockly's Insolvency Law* 254.

738 Delport *Henochsberg on the Companies Act* 872; Kunst *et al Meskin Insolvency Law* 8-5 with regards to an insolvent person (in terms of s 64 of the *Insolvency Act*), relying on *R v Abbass* 1916 AD 233 at 235; *S v Staden* 1976 (2) SA 685 (N) at 690 and at 8-8 with regards to an insolvent company; Cilliers and Benade *Corporate Law* 532; Blackman *et al* 14-427; Sharrock *et al Hockly's Insolvency Law* 257. Cassim *Contemporary Company Law* only discusses winding-up 918.

cease to act as directors.[739] Delport[740] submits that the officers of the company do not include its auditors. This might only apply to independent auditors as opposed to internal ones. The latter are regarded as officers of the company.[741]

The compulsory attendance of these meetings by the above mentioned is crucial since liquidators (as in the case of trustees) come into the affairs of a bankrupt company as strangers; they are unable to produce any books of account or bank statements for reference purposes.[742] It is for these reasons that directors and other officers of bankrupt companies are expected to come forward with information that will assist in the proper administration of the company's business affairs.[743] Because of the very complicated corporate structures companies often have, it is only fair to the *concursus creditorium* that the persons with inside information and knowledge should be expected to attend.[744] Bertelsmann notes that directors and officers of an insolvent company may be reluctant to come forward with information relating to the company, especially if shady dealings took place prior to insolvency. It is for these reasons that the 1973 *Companies Act* has made provisions to compel them to attend creditors' meetings of insolvent companies of which they were directors or officers. These meetings assist with the gathering of information to aid in the investigation of the company's affairs.

The provisions of this subsection are virtually identical to those of section 64(1) of the *Insolvency Act.* Directors and officers of the company in liquidation are almost in the same position as an insolvent.[745] This is reasonable since these officials may be the only ones privy to the affairs of the company (a company as a juristic person who can only function through its directors and other officers has the right to rely on them for information relating to itself) by virtue of their positions in the company.

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739 Section 353(2) of the 1973 *Companies Act*. See also *Attorney General v Blumenthal* 1961 (4) SA 313 (T). See Sharrock *et al Hockly's Insolvency Law* 254.
740 Delport *Henochsberg on the Companies Act* 872.
741 Other writers referred to are silent on this aspect.
742 See *Bernstein v Bester* 1996 (2) SA 751 (CC); (4) BCLR 449 (CC) para 16.
743 See in general *O'Shea v Van Zyl* 2011 ZASCA 156.
744 See also *Bernstein v Bester* 1996 (2) SA 751 (CC); (4) BCLR 499 (CC) para 50.
745 See Kunst *et al Meskin Insolvency Law* 8-8.

One should therefore apply court cases[746] and comments made to both sections in both statutes.

3.3.1.3 Section 414(2)

This section empowers the Master or officer presiding at a meeting of creditors to subpoena any person he deems to be in a position to provide the required information.

The sub-section reads as follows:

> The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person- (a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or (b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.

(i) The scope of the subpoenas: Books and documents relating to the company

While the legislature has, through the provisions of this sub-section endeavoured to enforce compliance with the requirements of section 414, the courts have jealously guarded against the abuse of subpoenas in insolvency related matters.

In *Cooper v SA Mutual Life Assurance Society*,[747] the Supreme Court of Appeal was tasked with answering the following question: whether or not, upon review in terms of section 151 of the *Insolvency Act*, the court *a quo* was correct in setting aside the subpoena issued by the Master. The subpoenas were issued at the request of the liquidators of two companies in liquidation[748] in terms of section 414(2) of the 1973 *Companies Act.*

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746 In the absence of court cases dealing specifically with s 414 (1).
747 [2000] ZASCA 64; 2001 (1) SA 967 (SCA); [2001] 1 All SA 355.
748 Namely Supreme Holdings Ltd and Supreme Investment Holdings (Pty) Ltd).

In this case, the subpoena had called upon one Stassen, the chief legal adviser of SA Mutual Life Assurance Society ("Old Mutual") to appear before the Master to be examined and to produce a high volume of documents. Prior to their liquidation, these two companies had made use of Old Mutual brokers to market their products. After a thorough analysis (of the nature of the business of these companies) by the court,[749] it was accepted that their business affairs were conducted fraudulently. As a result, a large number of innocent members of the public had lost substantial amounts of money.[750] It later transpired that the brokers were misled as to the true nature of the business. From the evidence submitted by the liquidators, it appeared that the section 414(2) enquiry, at the request of the liquidators, was specifically directed at a section 424[751] enquiry in terms of the 1973 *Companies Act* and indirectly to obtain information to be utilised for a delictual claim (of investors) against the brokers and their employer (Old Mutual).[752]

Realising that they (the liquidators) may not lawfully make use of a section 414(2) enquiry to obtain information to be used for a delictual claim, which according to the court[753] had nothing to do with the winding-up of the companies in question, they devised a plan. The court's view was that the delictual claim aspect ought not to concern the liquidators. The liquidators had devised some scheme and means to obtain information to pursue their delictual claim against Old Mutual and their brokers.[754]

After analysing arguments and evidence submitted (in the court below), the Supreme Court of Appeal had to deliberate on the decision of the court *a quo*, to set aside a ruling made by the Deputy Master to issue summons against Stassen. The court correctly pointed out that[755] before the Master can decide whether to authorise the issue of the subpoena, he must form the opinion that the proposed

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749 Paragraph 4.
750 Paragraph 4.
751 This section provides for personal liability of directors and others for fraudulent conduct of business of a company.
752 Paragraphs 7 to 9.
753 Paragraph 9.
754 Paragraph 6.
755 Paragraph 11.

witness may be able to give material information concerning the company or its affairs. The court expressed a view that it did not appear, from his reasons for the ruling, that the Master had formed the opinion. The court[756] further pointed out that a court, exercising its powers of review in terms of section 151 of the *Insolvency Act*, is not restricted to those cases where some irregularity has occurred. Accordingly,[757] the court can act as both the court of appeal and the court of first instance, by adjudicating the matter anew.[758] The court further held[759] that the Master had also failed to consider whether the information or documents alleged to be available from Stassen or Old Mutual was "material" to the enquiry - an aspect of major importance when deciding which persons and documents to subpoena.

Regarding the applicability of section 414(2) to delictual claims, the court acknowledged[760] that the Master, by implication, had correctly held that the delictual claims (against Stassen or Old Mutual) do not, in terms of section 414(2) concern the company or its affairs.[761] It is submitted that section 424 claims concern the affairs of the company, that is, only as far as the officers or directors of the liquidated company are concerned.[762] In conclusion, the court held[763] that the Master had no cause for making the ruling, and that the court below was correct in setting the subpoena aside because the Master had acted beyond his competence. The court noted[764] that the questions as to whether the subpoena was oppressive, vexatious or unfair[765] or whether it was applied for with an ulterior purpose[766] did

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756 Paragraph 11.
757 Paragraph 11.
758 This is correct, based on the court's inherent powers. See for example *Gilbey Distillers & Vintners (Pty) Ltd v Morris* [1990] ZASCA 134;1991 (1) SA 648 (A) 655G-J.
759 Paragraph 11.
760 Paragraph 12.
761 The two were not involved in running the business affairs of the liquidated company.
762 The court made reference to *Simon v The Assistant Master* 1964 (3) SA 715 (T); *James v Magistrate*, *Wynberg* 1995 (1) SA 1 (C) 16A-D.
763 Paragraph 19.
764 Paragraph 19.
765 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 36.
766 *Beinash v Wixley* 1997 (3) 721 (SCA). Reference was made in this case to *Brummer v Gorfil Brothers Investments (Pty)* Ltd 1999 (3) SA 389 (SCA).

not arise, and there was ultimately no need to answer them. The appeal was therefore dismissed with costs.[767]

The Master or presiding officer must be guided by the *Promotion of Administrative Justice Act* [768] in exercising the power to issue a subpoena. The view is that, since review under section 151 is not limited to instances where there were irregularities, the court may adjudicate the matter anew.[769] "Anew" means that the court hearing the review brought in terms of section 151 may deal with the matter as if it were a court of first instance.[770] The court will thus hear new evidence if it is of the opinion that such evidence is required.[771] In *Bestbier v Chief Magistrate, Stellenbosch* [772] in relation to section 151 review, the court stated[773] that our courts have repeatedly held that a court exercising such a power acts as a court of appeal and is entitled to adjudicate the matter anew. This view is said to be based on an acceptance that the legislature used the concept "review" in that section in the widest and most popular sense of an appeal. The ambit of this "wide" sense of appeal was enunciated by the court in *Johannesburg Consolidated Investments Co v Johannesburg Town Council* [774] where the court highlighted that, in an appeal of this nature, a court of appeal's function is not to consider whether the decision of such an officer is reviewable, but whether the decision is right or wrong.[775] This was said[776] to be subject however, to the proviso that, whereas a conventional appeal entails a rehearing of the matter based solely on the record of the proceedings, an appeal of

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767 At 24.

768 3 of 2000; Delport *Henochsberg on the Companies Act* 873.

769 *Gilbey Distillers & Venter v Morris* 1991 (1) SA 648 (A) and as cited in *Cooper v South African Mutual Life Assurance Society* at para 11 and in *Bestbier v Chief Magistrate Stellenbosch* 2006 2 All SA 598 (C) 602, para 22. See Delport *Henochsberg on the Companies Act* 873; Kunst *et al Meskin Insolvency Law* 8-24(1); Bertelsmann *et al Mars on Insolvency Law* 20-21; Sharrock *et al Hockly's Insolvency Law* 264. Delport, Kunst, Bertelsmann and Sharrock do not specifically discuss the concept "anew".

770 Bertelsmann *et al Mars on Insolvency* Law 21. Other writers referred to in this thesis do not discuss this aspect.

771 *Nel v The Master* 2005 (1) SA 276 (SCA) 286-287. See also Bertelsmann *et al Mars on Insolvency Law* 21.

772 2006 2 All SA 598 (C) and cases cited therein.

773 Paragraph 7.

774 1903 TS 111 at 117.

775 Reference was made to *Tikly v Johannes* 1963 (2) 558 (T) at 590 H.

776 At 590 H.

the wide variety entails that a court may deal with the matter as a court of first instance, with or without fresh evidence.[777] This is, as submitted, a further protection to examinees in the sense that it ensures that questionable decisions are brought to light and the process is not misemployed.[778]

In *Laskarides v German Tyres Centre*[779] the court had to answer the question of vexing in relation to persons subpoenaed to produce books and documents, costs involved in photocopying and collating the required documents and the scope of such request. The applicant (Laskarides) had been subpoenaed to the meeting of creditors of a company in liquidation (GTC) in terms of sections 414, 415 and 416 of the 1973 *Companies Act*. The proposed examinee was neither a debtor nor officer of the liquidated company. He was required to bring with certain books and documents. The authorisation for the issue of the subpoena was challenged by the proposed examinee based on section 151 of the *Insolvency Act*, hence this case. The applicants sought an order in terms of Rule 53 of the *Uniform Rules of Court* for the setting aside of the subpoena.

The application was based on section 151 of the *Insolvency Act*. This section allows the review of a decision, ruling or order of the Master or an officer presiding at a meeting of creditors.[780]

The grounds on which the applicants brought the application were summarised as follows:[781]

(1) the Master had no valid reason for issuing the subpoena;

(2) that the second and third respondents (the liquidators) had not established any lawful basis on which the Master could have issued the subpoena; and

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777 At 590 G.

778 *Bernstein v Bester* 1996 (2) SA 751 (CC) at 770 D-E. Although this case was with regard to s 417, it is applicable to s 414 since both sections are concerned with the collection of information for sequestration purposes in a just and equitable manner.

779 *Laskarides v German Tyre Centre* (Pty) Ltd (in liquidation) 2010 (1) SA 390 (W).

780 Paragraph 2.

781 Paragraph 3.

(3) that the Master had failed to apply his mind to the documents to be produced by the first applicant, including the relevance of the documents to the matter at hand; and the issue of the costs in relation to the copying of the documents requested by the subpoena.

It was established[782] that the reason behind the authorisation of the subpoena was a request through a letter from one of the liquidators. The said letter did not specify exactly which documents were required. It was more of a fishing expedition, to obtain information for matters unrelated to the affairs of the liquidated company.

In his defense,[783] the Master pointed out that after considering all the facts before him, he concluded that Laskarides might be in a position to provide material information to place the liquidators of GTC in a position to decide whether to pursue an action against the purported debtor.[784] In response to this, the applicants submitted that the subpoena had been issued solely to gather information unrelated to the affairs of the company in liquidation. Information was related to a matter between creditors of the insolvent company and a third person (Bandag); that the subpoena had thus not been issued for a legitimate purpose and amounted to an abuse of the process.[785]

In answering the above question, the court[786] highlighted the following:

The Master ought to have applied his mind independent of any influence prior to authorising the subpoena. The court was of the view that the letter motivating the issue of the subpoena failed to sufficiently set out the grounds for the issue of the subpoena; the relevance of the documents required to be interrogated and as to how these documents would assist the liquidators to learn about the affairs of the liquidated company. According to the court,[787] the Master had not carefully considered the application, at least as far as the relevance and the materiality of

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782 Paragraph 4.
783 Paragraph 6.
784 Paragraph 6.
785 Paragraph 8.
786 Paragraph 13.
787 Paragraph 13.

the information as subpoenaed. The view[788] was that, the presiding officer must consider whether the subpoenaed documents relate to the affairs of the company – if they do, they are relevant.[789]

After considering the applicant's argument, the court was content that since the subpoenaed witnesses were in no way related to the liquidated company, the sought documents and related interrogation was intended to obtain information or evidence in support of an action outside of the affairs of the company in liquidation.[790]

Ruling on the allegations made by the applicants, the court[791] found that the Master failed to apply his mind prior to authorising the issue of the subpoena – he had no grounds for such conclusion. The Master's handling of the matter was said to be unacceptable and that he failed to apply an independent mind. He did not establish the legitimate purpose required for the holding of the enquiry – the purpose being to benefit the liquidated company.[792] The court cautioned[793] against abuse of the processes of the court by referring to *Bernstein v Bester*.[794] Further referred to by the court was rule 38 of the Uniform Rules of Court to emphasise the importance of clarity and specificity of the subpoenas. The conclusion was therefore that, the request and subsequent authorisation of the subpoena amounted to an abuse of the procedure.[795] The court concluded that the applicants had successfully established the grounds for the relief sought.[796]

Taking into account what was said by the court in this case, it becomes clear that for the subpoena to be lawfully issued for the production of books and documents, it is necessary to ensure that the purpose of its issue is the facilitation of discovering the truth about the affairs of the company in liquidation. Matters unrelated to the

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788 Paragraph 15.
789 *Pretorius v Marais* 1981 (1) SA 1051 (A).
790 Paragraph 15.
791 Paragraph 22.
792 Paragraph 22.
793 Paragraph 10.
794 1996 (2) SA 751 at 770E(CC); 1996 (4) BCLR 449. See also *Beinash v Wixley* 1997 (3) SA 721 (SCA) 734F–735A; [1997] 2 All SA 241.
795 Paragraph 22.
796 Paragraph 22.

enquiry are not within the scope of the subpoena. Furthermore, the subpoena must be for the production of books and documents materially relevant to the enquiry in that they would assist the liquidators in performing their duties, such as the recovery of estate assets. It is through these books and documents that an efficient and effective administration of the affairs of an affected company can be achieved. It is thus crucial that the Master should thoroughly interrogate the reasons behind the request for the authorisation of subpoenas.[797] In this case, it appears that the subpoenas were for some fishing expedition and nothing else. I concur that the court gave the correct interpretation of the facts and correctly set aside the subpoenas.

Kunst[798] emphasises that the Master must, before he issues a subpoena in terms of this section, apply his mind to what may lawfully and relevantly be required of such person - especially where such person is neither a director nor officer of the company in liquidation. She submits that the Master has a duty to keep an independent mind on the matter and to establish the legitimate purposes required for an enquiry of this nature before issuing a subpoena. Failure to establish the above constitutes an abuse of the procedure.[799]

Kunst highlights the fact that the regulation pertaining to the service of a subpoena in terms of the *Insolvency Act,* applies as is to the service of a subpoena for the purposes of the interrogation in terms of the *Companies Act*.

It is, however, crucial that where the subpoena requires a variety of documents, such must be identified with specificity.[800] However, the mere fact that a subpoena requires a variety of documents to be produced is not a ground for the setting aside of the subpoena on the ground of vagueness.[801] Kunst concurs with this view.[802]

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797 Paragraph 5.

798 Kunst *et al Meskin Insolvency Law* 8-7. See also Blackman *et al Commentary on the Companies Act* 14-426.

799 For this view, he relies on *Laskarides v German Tyre Centre* (Pty) Ltd (in liquidation 2010 (1) SA 390 (W) and cases cited thereat.

800 Rule 38 of the *Uniform Rules of Court*.

801 *Nyathi v Cloete* 2012 (6) SA 631(GSJ).

802 Kunst *et al Meskin Insolvency Law* 8-7.

The person subpoenaed for the production of books, documents, and any photocopying requirements must be compensated for expenses to be incurred.[803] Expenses incurred include witness fees paid prior to compliance with the subpoenas. This payment arrangement might not sit well with professionals such as auditors. They are often reluctant to comply with the subpoenas requesting they provide the required information and documents for a meagre witness fee. This makes sense, these professionals should, instead of a mere witness fee, receive a professional fee applicable to expert witnesses. There is, however, another view. One may argue that, auditors who had previously rendered auditing services to the now financially ailing company, for a professional fee, owe it to the company and its creditors to provide the required information at the meagre witness fee, especially now that the said company has succumbed to its financial demise and its assets are depleted.

Delport[804] avers that in practice, the presiding officer or Master ordinarily issues the subpoena on the liquidator's written request. The subpoena is served by the messenger of the Magistrate court or by the liquidator or his clerk.[805] This provision is undesirable. Subpoenas should be authorised (for issue) by a judicial officer (in a tribunal or court structure) after careful consideration of all relevant factors and applicable legal principles[806] and served by a messenger of the court. By authorising the issue of subpoenas, the Master (or officer) makes a quasi-judicial decision, which in terms of rule 53 of the Uniform Rules of Court may be reviewed or set aside. This would be the case where the court finds that the said decision was motivated by bias, *mala fide* or failure to apply one's mind to the matter.[807] There is another view though. One may argue that there is a remedy for an aggrieved witness to approach the court in terms of section 151 of the *Insolvency Act*.[808] In terms of the latter

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803 *Laskarides v German Tyre Centre* (Pty) Ltd (in liquidation) 2010 (1) SA 390 (W) at 18-20. See also Kunst *et al Insolvency Law* 8-7.

804 *Henochsberg on the Companies Act* 873. Other writers referred to do no discuss this aspect.

805 Regulations 4(4) of the *Insolvency Regulations*. See also Kunst *et al Meskin Insolvency Law* 8-7.

806 See the matter of Leong above, where an uninformed Master issued a warrant of arrest for Leong for failure to appear as subpoenaed - the latter had a doctor's sick note.

807 See for example, *Laskarides v German Tyres Centre* (Pty) Ltd 2010 (1) SA 390 (W) and cases discussed hereunder.

808 The section reads as follows: "Subject to the provisions of section *fifty-seven* any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or

section, these subpoenas are subject to being set aside by the court on review under section 151 of the *Insolvency Act.* This section is made applicable by section 339 of the 1973 *Companies Act.* Review is an option, especially where the presiding officer or Master had not properly applied his mind in the matter prior to authorising the issue of a subpoena.[809]

From the cases discussed above, it is clear that the subpoenas serve an important function in the administration of the affairs of a company in liquidation. They should be targeted at specified persons. The latter must be in a position to provide material information to assist in the efficient and effective liquidation of an insolvent company, and nothing else outside of this objective. The courts are not ignorant of the fact that the use of subpoenas may be open to abuse; it is for this reason that the Master must thoroughly interrogate reasons behind requests for the authorisation of subpoenas.

Regarding the question of liens over books and documents, Delport[810] submits that the fact that a subpoenaed person has a lien over any relevant book or document does not entitle him to refuse to produce it as subpoenaed. Accordingly, by producing such documents or papers to the presiding officer for interrogating them as envisioned by the legislature, such person does not abandon possession thereof.[811] Furthermore, the fact that books and documents are confidential does not entitle the person subpoenaed to withhold them.[812] I submit, as was referred to

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order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one *hundred and twelve*".

809 *Cooper v SA Mutual Life Assurance Society* [2000] ZASCA 64; 2001 (1) SA 967 (SCA); [2001] 1 All SA 355; First Rand Bank v Magistrate, Germiston [2004] 2 All SA 629 (W) 641; *Laskarides v German Tyre Centre* (Pty) Ltd (in liquidation) 2010 (1) SA 390 (W).

810 Delport *Henochsberg on the Companies Act* 874. Other writers referred to in this thesis do not discuss this aspect.

811 *Re Toleman and England*; *Ex parte Bramble* (1880) 13 Ch D 885; *Re Aveling Barford* [1988] 3 All EE 1019 (*Ch*) at 1022-1023 in relation, respectively, to the broadly similar provisions of s 96 of the *Bankruptcy Act*, 1869 c 71 and s 236 of the 1986 *English Insolvency Act*. See also Delport *Henochsberg on the Companies Act* 874.

812 *Gumede v Subel* 2006 (3) SA 498 (SCA) at 505-506, cited in *Absa Bank Limited v Jooste* 2012 [2013] ZAECPEHC 58. Although said in ss 417 and 418 examinations, it is submitted that it is

in chapter 1, that one should ask why there is a lien over the books, as that could open a debate concerning privileged documents. The two concepts should not be confused. An attorney does not have a lien over client's files, but he does have a right not to allow the contents of the file if the right to client privilege is established.

(ii) "Fair and reasonable grounds"

The provisions of this subsection empower the presiding officer to subpoena any person who, in his opinion,[813] may be able to give material information concerning a company that has been wound up (and its affairs) to appear at a meeting of creditors. This criterion is said to be satisfied if it is shown that there are fair and reasonable grounds for suspecting that the person required to be subpoenaed can probably provide evidence of the required nature. Thus, the question is not whether there is a *prima facie* case of transgression or actionable wrongdoing.[814] Accordingly, a fair and reasonable ground of suspicion of the ability on the part of the person to be subpoenaed to provide such evidence, based on some basic facts that are at the disposal of such an officer, is sufficient.[815] Furthermore, the decision to subpoena a witness should depend on the circumstances and facts of each individual case.[816]

(iii) "Material information"

It is submitted that not everything about the company in liquidation will be regarded as material information and thus relevant in a liquidation process. In relation to the company, material information is information about its business affairs, accounting and audited financial statements, banking details and related transactions, its directors and how they conducted the business of the company, for example, is relevant. In addition, material information is information concerning the trade,

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equally relevant to s 414 (2) subpoenas calling for books and documents.

813 The subjective requirement resting on his discretion.

814 *Bestbier v The Chief Magistrate, Stellenbosch* 2006 2 All SA 598 (C).

815 *Ex Parte Brivik* 1950 (3) SA 790 (W) at 791 E-H; *Cooper v SA Mutual Life Assurance Society* 2001(1) SA 967 (SCA) at 974 H-975 A; *First Rand Bank v Magistrate Germiston* [2004] 2 All SA 629 (W) at 641 G-H.

816 *Bestbier v The Chief Magistrate, Stellenbosch* 2006 2 All SA 598 (C). See also Delport *Henochsberg on the Companies Act* 873; Kunst *et al Meskin Insolvency Law* 8-7 in general.

dealings, affairs or property of the company.[817] Furthermore, the said information must be relevant and related to the business dealings, financial and audited statements, property, reserves, revenue, liabilities and rights of the company in liquidation. Accordingly, information must not be outside of the affairs of the company in liquidation in the sense that it does not affect or relate to the liquidated company.[818] This information was said to be an aspect of major importance if regard is made to the number of documents that have to be produced by a person subpoenaed.[819] The test for material information is further given in section 417(1) of the *Companies Act.*[820] Delport[821] is in agreement with the provisions of this sub-section regarding material information in relation to the company that must be submitted by persons so subpoenaed.[822] Like Delport, Kunst[823] also approves of the provisions of this sub-section regarding the aspect of material information.

(iv) Affairs of the company

What may be investigated (or enquired into) by means of the exercise of these powers by the Master or presiding officer are the affairs of the company.[824] Accordingly, no matter affecting these affairs is excluded. In *Pretorius v Marais*[825] and confirmed by *Bestbier v Chief Magistrate, Stellenbosch*,[826] the powers to be exercised by the Master or the presiding officer were said to be discretionary powers.[827] According to the court, these powers fell within the category of discretion sometimes described as discretion in the wide sense. This was contrasted with the

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817 *Cooper v South African Mutual Life Assurance Society* [2000] ZASCA 64; 2001 SA 967 (SCA); [2001] 1 All SA 355 (A) at para 13 where the court quoted with approval the provisions of section 155 of the *Companies Act* 46 of 1926.

818 *Laskarides v German Tyre Centre* (Pty) Ltd (in liquidation) 2010 (1) SA 390 (W) at para 15.

819 *Cooper v South African Mutual Life Assurance Society* [2000] ZASCA 64; 2001 SA 967 (SCA); [2001] 1 All SA 355 (A).

820 To be discussed at para *3.4* below.

821 Delport *Henochsberg on the Companies Act* 873; Kunst *et al Meskin Insolvency Law* 8-7.

822 See para (iv) below regarding Delport discussion on material information.

823 Kunst *et al Meskin Insolvency Law* 8-7; Sharrock *et al* discusses this aspect only in terms of section 417(1) of the *Companies Act*, Sharrock *et al Hockly's Insolvency Law* 265.

824 Delport *Henochsberg on the Companies Act* 872; Kunst *et al Meskin Insolvency Law* 8-7; Blackman *et al Commentary on the Companies Act* 14-427. Bertelsmann *et al* and Sharrock *et al* do not discuss this aspect in relation to s 414 (2).

825 *Pretorius v Marais* 1981 (1) SA 1051 (A) 1063.

826 2006 2 All SA 598 (C).

827 At 16.

discretion in the narrow or strict sense. The discretion was to be exercised by way of contrasting a number of non-similar characteristics.[828] Delport[829] submits that the intention is that the Master or the presiding officer should issue the subpoena if, based on the facts before him, it ought *prima facie* to be issued. These facts must create fair grounds upon which the Master is able to properly form an opinion that the person proposed to be examined is one who could possibly give material information regarding what is suspected in relation to the company or its affairs, the so-called threshold.[830]

The general purpose of subpoenaing books, documents and related material information is to enable liquidators to proceed therefrom to recover and liquidate all the assets and property of the company - movable and immovable. Once the above is achieved, liquidators must thereafter give the Master such information to enable him to decide whether there should be any investigation or not in relation to the company in liquidation in terms of the *Companies Act*.[831] It must be noted that although the Master is not responsible for the actual winding-up process, he is, nevertheless, required to supervise that the process is conducted according to the prescribed rules.[832] Section 392 of the 1973 *Companies Act* imposes a duty on the liquidator in that every liquidator shall give the Master such information and access to and facilities for inspecting relevant books and documents of the company and generally provide assistance as may be essential for enabling that officer to perform his duties in terms of the above legislation.

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828 *Western Cape Housing Developments Board v Parker* 2005 (1) SA 462 (C) 466E-467E and the cases cited thereat; *Bezuidenhout v Bezuidenhout* [2004] (4) All SA 487 SCA 483J-494C.

829 At 873. See also Blackman *et al Commentary on the Companies Act* 14-427; Cilliers *et al Corporate Law* 533.

830 *Pretorius v Marais* 1981 (1) SA 1051; *Cooper v SA Mutual Life Assurance Society* 2001 (1) SA 967 (SCA) 974; *Bestbier v Chief Magistrate Stellenbosch* 2006 2 All SA 598 (C) at 602. See also Delport *Henochsberg on the Companies Act* 873; Blackman *et al Commentary on the Companies Act* 14-427.

831 See *Kebble v Gainsford* 2010 (1) SA 561 GSJ.

832 See also Sharrock *et al Hockly's Insolvency Law* 260. Other writers referred to herein do not discuss this aspect.

(v) Time limits on subpoenas

This issue came before the court in *Standard Bank of South Africa v Master of the High Court*.[833] A witness was subpoenaed by the Master (at the request of one of the creditors of the company in liquidation) in terms of section 414(2) of the 1973 *Companies Act,* to be questioned with regard to matters relating to the affairs of the company in liquidation in terms of section 415 of the same statute. The question the court had to answer was whether the Master was empowered to issue subpoenas and hold an enquiry post his approval of the final liquidation and distribution account and after the liquidator had made payment to creditors in terms thereof.[834]

In its deliberation, the court analysed the purpose of section 414 and held[835] as follows: In section (415), the full phrase "which is being wound up and is unable to pay its debts" is a 'composite one consisting of two complementary elements'. It qualifies the type of company in respect of which a creditor's meeting can be convened wherein the Master can conduct an "examination of directors and others". The court correctly held[836] that even though it appears in an abbreviated form (as in section 363A (1)) [837] it remains an accessory clause. Accordingly, the phrase does not purport to impose a timescale within which the holding of the examination contemplated in section 415 is to take place.[838] It describes the type of company in respect of which an enquiry may be held and is not prescriptive of the period within which it is to happen. In deliberating further, the court had an opportunity of contrasting section 415(1) with section 417(1) of the 1973 *Companies Act*. In its observation, the court noted that section 417(1) does contain the words "at any time after a winding-up order has been made" and that section 415(1) does not

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833 [1998] ZASCA 108; [1999] 1 All SA 299 (A).
834 Paragraph 6.
835 Paragraph 11.
836 Paragraph 11.
837 As inserted by s 8 of *Act* 84 of 1980. This section requires that directors and secretaries and certain former directors and secretaries of a company, which is being wound-up, must notify the liquidator in the event of change of address.
838 Paragraph 11.

contain those words.[839] Moreover, the comparable words in section 417(1) are "in any winding-up of a company unable to pay its debts".[840] The court held[841] that even in the absence of the exact phrase "which is being wound up", the Master or the court would not be time bound for the summoning of the categories of persons mentioned in section 417. The court held[842] further that, considering the connections in the broad purpose of the two types of enquiries,[843] it would be surprising, if a time constraint is found to have been built into the one section but not the other. Both sections form an integral part of the winding-up process.[844] Both are concerned with the enquiry to discover facts beneficial to creditors and to uncover activities detrimental to wrongdoers.[845] Accordingly, what the legislature regards as right for the one should equally be right for the other.[846]

A further question to be answered by the court of appeal was when exactly does the winding-up process come to an end? The repercussion of this is that after the winding-up process had terminated, the holding of an enquiry in terms of section 415(1) would be *ultra vires* the powers of the Master.[847] In answering this question, the court held[848] that the relevant sections to consider are sections 385 and 419 of the 1973 *Companies Act*. Section 385 provides that a liquidator may apply to the Master for a certificate of completion to the effect that he has "performed all the duties prescribed by this statute and complied with all the requirements of the Master". Section 419 provides as follows:

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839 Paragraph 12.
840 Paragraph 13.
841 Paragraph 13.
842 Paragraph 13.
843 See *Trust Bank van Afrika v Van der Westhuizen* 1991 (1) SA 867 (T) 869BE.
844 See *Moolman v Builders & Developers* (Pty)Ltd (in provisional liquidation): Jooste intervening 1990 (1) SA 954 (A) 960 G-J.
845 *Pretorius v Marais* 1981 (1) SA 1051 (A) 1062H-1064B; *Anderson v Dickson* (Intermenua (Pty) *Ltd intervening*) 1985 (1) SA 93 (N) 111F-H; *Bernstein v Bester* 1996 (2) SA 751 (CC) 766C-67E; [1996] ZASCA 2.
846 Paragraph 14.
847 Paragraph 15.
848 Paragraphs 21 to 22.

(1) in any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator;

(2) the Registrar shall record the dissolution of the company and shall publish notice thereof in the Government *Gazette*,

(3) the date of dissolution of the company shall be the date of recording referred to in sub-section 2.

Accordingly, the winding-up was said[849] to end when the affairs of the company have been completely finalised through winding-up. It does not end when the final liquidation and distribution account to creditors by the liquidator is confirmed by the Master.[850] This is correct, since it is possible to have a post final liquidation and distribution account in the event that more assets are unearthed.[851] The court further held[852] that the real question in this case is whether there is anything in the *Insolvency Act* to prevent the Master from conducting an enquiry in terms of section 415(1) after a distribution of funds had been made by the liquidator. The court held that the question, for the reasons stated above, must be answered in the negative.[853]

Again, there is hardly any difference between section 64(2) and section 414(2). The tests for deciding on books and documents to be submitted, "reasonable and fair", "affairs" and "material information" relating to the company in winding up are the same. Therefore again, the same opinion is held with regard to section 414(2) as above.[854]

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849 Paragraph 22.
850 Paragraph 22.
851 See de Clercq *et al Deceased Estates* 129, in relation to insolvent deceased estates, which it is submitted is also applicable as regards the time limit within which the Master may subpoena persons of interest.
852 Paragraph 26.
853 Paragraph 26.
854 See ch 2 above.

3.3.1.4 Section 414(3): Penalty provisions

This section makes provision for a penalty for failure to comply with the requirements of section 414.

The sub-section reads as follows:

> Any director or official of a company who fails to comply with any provision of this section shall be guilty of an offence.

To enforce compliance with the provisions of section 414, the legislature saw it fit to put in place sanctions for failure to act as per the provisions of this section. Accepting that the meeting has been convened lawfully, failure to attend it is an offence.[855]

Relying on *S v Van Staden*,[856] Kunst[857] submits that *mens rea*, in the form of a blameworthy lack of heed and alertness, is an element of such offence. In terms of section 441(1)(*f*) of the 1973 *Companies Act*, there is a penalty in the form of a fine and/or imprisonment for a period not exceeding six months if a director or officer of the company in liquidation fails to comply with the provisions of section 414 of the 1973 *Companies Act*. Further, the court hearing the matter may issue an order for compliance within a fixed period.[858]

Kunst further points out that, in the light of the provisions of section 414(3), the provisions of section 139(1) read with section 66(2) of the *Insolvency Act* have no application in the case of a director or officer of the company. Sections 138 and 139 would apply only in the case of any person in an insolvent estate. I concur, section 414 is sufficient to compel compliance with its provisions.

Unlike section 414(3), section 138 of the *Insolvency Act* makes provision for imprisonment and not for a fine. It is, however, not clear, why the legislature would want to provide different penalties for the same offences. One is tempted to assume

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855 Section 414 (3) of the 1973 *Companies Act*.
856 1976 (2) SA 685 (N) 693-694.
857 Kunst *et al Meskin Insolvency Law* 8-8.
858 Section 441 (2) of the 1973 *Companies Act*. See also Delport *Henochsberg on the Companies Act* 874; Blackman *et al Commentary on the Companies Act* 14-427-428.

that the legislature might have realised that the threat of imprisonment without an option of a fine would encourage an insolvent to comply immediately upon being served with the subpoena. Moreover, the insolvent cannot afford to pay a fine, lest he depletes an already strained estate. Furthermore, the distinction between sections 138 and 414 may be to provide an option of a fine to directors and officers of a company in liquidation so that they remain outside of prison. Besides, directors can afford to pay the fine because they are not insolvent – but the company is insolvent and cannot and does not have to pay a fine. The availability of directors would also enable the liquidators of the insolvent company to proceed against the said director's private estate by way of other remedies, like section 424 of the 1973 *Companies Act* [859] or delictual claims. These claims are usually resorted to where impropriety on the part of directors and officers of a company is suspected, and there are not sufficient funds in the liquidated company's estate to satisfy creditors' claims. Furthermore, unlike section 64, section 414[860] has built in penalties for non-compliance with its provisions.[861] Section 64 penalties are provided for in section 66 of the *Insolvency Act*.

Unlike section 64, this section provides for an extended duty to directors and officers of the company unable to pay its debts, to keep themselves informed as to the dates of meetings where they are expected to attend.[862]

Section 414 ensures that directors of bankrupt companies should not be entitled to refuse to comply with the subpoenas to attend meetings of creditors on the basis that their right to privacy will be violated, when they are called upon to provide information relating to the company of which they are directors. They lose the right to privacy, especially with regard to issues that affect the affairs of the companies of which they are directors, immediately when they assume the position of directorship.[863] It is therefore their statutory duty to come forward in compliance

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859 This section makes provision for personal liability of directors of companies for fraudulently and recklessly running the business of a company.

860 In s 414(3).

861 The penalties for non-compliance with s 64 is provided for in s 66 of the *Insolvency Act*.

862 See also Blackman *et al Commentary on the Companies Act* 14-427.

863 See *Bernstein v Bester* 1996 (2) SA 751 (C) para 74 and 85; [1996] ZASCA 2.

with the subpoenas. The mandatory nature of this section is emphasised by the fact that non-compliance with its provisions is an offence.

Moreover, compelling a director or an officer of a company unable to pay its debts to attend public creditors' meetings might serve as a deterrent to any would be fraudsters.[864] As is the case with insolvent persons, history has taught that without such compulsion, most people would not come forward with information that has a likelihood of incriminating them.[865] Further, like section 64,[866] section 414 is of general application and the general application is confirmed by the wide definition of "persons interested" and the wide powers given to the presiding officer with reference to the subpoenas. With the exception of minor linguistic differences, the effect and application of sections 414 and 64 are almost identical.[867]

3.3.2 Section 415: Examination of directors and others at meetings

3.3.2.1 Introduction

This section has the same provisions as section 65 of the *Insolvency Act*. It applies irrespective of whether the winding-up is by the court or voluntary, if the company is in fact unable to pay its debts, and irrespective of the grounds upon which it was wound-up by the court or the reason for which the members resolved to wind it up voluntarily.[868] In this instance, provision is made for the **interrogation** of directors and officers of a company unable to pay its debts. The section further provides for the interrogation of any other person who is deemed to be in a position to provide material information relating to the said company. The interrogation and enquiry under this section is a public one and thus less expensive[869] than a private one.[870]

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864 See Mwelase *Insolvency Interrogations* 18.
865 See in general ch 2 below; Mwelase *Insolvency Interrogations* 14.
866 See Mwelase *Insolvency Interrogations* 17.
867 See also the discussion of *De Lange v Smuts* at ch 2 above.
868 *Taylor and Steyn v Koekemoer* 1982 (1) SA 374 (T) 376.
869 This may be due to the fact that these examinations are presided over by public officials within the state's payroll, as opposed to private examinations, where usually a commissioner in private practice (who is an expert in that subject area), is tasked with the duty to examine.
870 Delport *Henochsberg on the Companies Act* 876. See para *3.2.2.2* below, where private interrogation is discussed.

According to Delport, the provisions of this section may be invoked by the Master even if the liquidator has confirmed his first and final liquidation and distribution account.[871] Kunst and Blackman are in agreement with Delport regarding the powers of the Master to invoke the provisions of this section.[872] This, the Master may hold at least until he is certain that the affairs of the company have been completely wound-up.[873] Kunst and Blackman are also of the same view as Delport regarding the period within which the Master may exercise his power in this regard.[874]

3.3.2.2 Private enquiries by the Master

These enquiries are conducted by the Master or the court or any person appointed by the Master or court, like a commissioner for example. In the case of insolvency of a natural person, section 152 of the *Insolvency Act* is invoked and in the case of insolvency of companies, section 417 and 418 of the 1973 *Companies Act* will be invoked.[875]

Delport contends that in view of the provisions of section 339 read with those of section 381(2) of the 1973 *Companies Act*, the provisions of section 152 of the *Insolvency Act,* relating to a private examination at the instance of the Master, have no application in a winding-up.[876] He avers that section 415 must be read with sections 414 and 416, which renders applicable *mutatis mutandis* to proceedings under section 415 the provisions of section 65-68 of the *Insolvency Act.* He further maintains that in the light of sections 339 and 366(1)(a), section 415 must be read together with the provisions of section 44(7), (8), and (9) of the *Insolvency Act*, providing for interrogation of a person in connection with a claim proved or proposed

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871 Or any other account.

872 Kunst *et al Meskin Insolvency Law* 8-17; Blackman *et al Commentary on the Companies Act* 14-430.

873 See para 3.1.3 (ii) above where the case of *Standard Bank of South Africa v Master of the High Court* [1999] 1 All SA 299 (SCA); 1999 (2) SA 257 (SCA) is discussed regarding this aspect. See also Kunst *et al Meskin Insolvency Law* 8-17; Delport *Henochsberg on the Companies Act* 876; Blackman *et al Commentary on the Companies Act* 14-430.

874 Kunst e*t al Meskin Insolvency Law* 8-17; Blackman *et al Commentary on the Companies Act* 14-431.

875 See also Joubert and Calitz 2014 *PER/PELJ* 889-935.

876 Section 381(2) provides that the Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit examine such liquidator or any other person on oath concerning the winding-up.

to be proven. These sub-sections give the Master additional powers to interrogate any person at a meeting of creditors who has proved or wishes to prove a claim against the estate;[877] to summon (where such person is absent from the meeting of creditors) and interrogate a person who wishes to prove or who has at any time proved a claim against the estate, and[878] to expunge (if already proved) or reject (if not yet proved) the claim if such a person fails without reasonable excuse to appear in answer to such summons or having had appeared refuses to take an oath (it is submitted, or an affirmation) or to submit to the interrogation or to answer fully and satisfactorily any lawful question put to him.[879]

There are, however, a few differences in section 381(2) as compared to the above-mentioned sections of the 1973 *Companies Act*. The former provides for the examination (instead of interrogation) and refers to a liquidator or any person (instead of someone with information).

3.3.2.3 Section 415(1): Interrogation under oath

The sub-section makes provision for the interrogation, under oath, of any person summoned in terms of section 414 of this statute. The interrogation covers all aspects material to the affairs of a company in liquidation.

The section reads as follows:

> The Master or officer presiding at any meeting of creditors of a company which is being wound-up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414(2)(a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, 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 the commencement of the winding-up, and concerning any property belonging to the company: Provided that the Master or such officer shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

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877 Sub-section 7.
878 Sub-section 8.
879 Sub-section 9.

(i) The oath and affirmation

Unlike section 65 of the *Insolvency Act*, this sub-section expressly provides for the admission of an affirmation in addition to an oath. Delport[880] submits that, in the context, the expression "so called and sworn" should be read as including the expression "so called and who has made an affirmation". This is correct. There is no reason why the legislature would want to differentiate between the two sections.

It is observed that this sub-section makes an express provision for those who, due to their faith, may not take an oath but an affirmation to tell the truth.

(ii) Persons to interrogate concerning matters relating to the company's affairs

The presiding officer or the Master, the liquidator and any proved creditor may interrogate the witness. No one else may so interrogate except for the above mentioned or their agents.[881] Delport [882] with Blackman[883] affirming, highlight that the above-mentioned may appoint agents to interrogate on their behalf. Agents in this context include an attorney or counsel (advocate) briefed by the attorney. [884] It is submitted that the word "include" entails that an agent may also be an accountant, auditor or an expert in the subject matter under interrogation.

Blackman[885] and Delport[886] submit that such an attorney is not required to produce written proof of his authorisation.[887] If his authority is challenged, it is for the presiding officer, based on the information put before him, to determine whether it exists. It is submitted that if authorisation was required from such attorney prior to the interrogation proceedings, unnecessary delays due to interruption by a party requiring proof of authorisation could be avoided. Delport[888] and Blackman[889] opine

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880 Delport *Henochsberg on the Companies Act* 880 (1). Kunst *et al* and Blackman *et al* do not discuss this aspect.
881 Delport *Henochsberg on the Companies Act* 877.
882 Delport *Henochsberg on the Companies Act* 880 (1).
883 Blackman *et al Commentary on the Companies Act* 14-432.
884 *Joel Melamed & Harwitz v Simmons* 1976 (4) SA 189 (T) 192.
885 At 14-432.
886 At 877.
887 *African Diamond Distributors v Van der Westhuizen* 1998 (4) SA 726 (T) 727.
888 Delport *Henochsberg on the Companies Act* 880 (1).
889 Blackman *et al Commentary on the Companies Act* 14-432.

that a liquidator of the company in a winding-up cannot, in his capacity as such be interrogated under this provision.[890] The latter can, however, be interrogated in his personal capacity.[891] It is submitted that the liquidator may be interrogated in his personal capacity in the instance where the latter is regarded by the Master as "any other person", for the purposes of providing the specific information so required by the Master.

The scope of the interrogation for which this sub-section provides for is defined in the widest terms and no matter affecting the company's affairs is outside its ambit.[892] The same requirements therefore, as discussed in section 65 of the *Insolvency Act* as to the terms "reasonable", "fair", "affairs" and "material information", apply in this context.

3.3.2.4 Section 415(2): The law relating to privilege

The sub-section makes applicable to a witness subpoenaed to produce books and documents (in terms of section 414(2) (b) of this statute), the law relating to privilege as applicable in a magistrate court.

The section reads as follows:

> In connection with the production of any book or document in compliance with a subpoena issued under section 414 (2) (b) or the interrogation of a person under subsection (1) of this section, the law relating to privilege as applicable to a witness subpoenaed to produce a book or document or give evidence in a magistrate's court shall apply: Provided that a banker at whose bank the company concerned keeps or at any time kept an account, shall be obliged, if subpoenaed to do so under section 414 (2) (b), to produce- (a) any cheque in his possession which was drawn by the company within one year before the commencement of the winding-up; or (b) if any cheques so drawn is not available, any record of the payment, the date of payment and the amount of the cheque which may be available to him, or a copy of such record, and shall, if called upon to do so, give any other information available to him in connection with any such cheque or the account of the company.

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890 They both rely on *Scott-Hayward v Queensland Insurance* 1961 (4) SA 540 (W) 543.

891 *Katz v Colonel Reality Trust* 1954 (4) SA 302 (W) 303F-G.

892 *Pretorius v Marais* 1981 (1) SA 1051. See also Delport *Henochsberg on the Companies Act* 881; Blackman *et al Commentary on the Companies Act* 14-431.

Kunst[893] highlights that the governing provisions of the 1973 *Companies Act* relating to privilege are essentially the same as those of section 65 of the *Insolvency Act.* Accordingly, what applies to insolvency interrogation proceedings applies to companies in liquidation, to the extent that they are not in conflict with each other.[894]

Delport[895] maintains that the objectives of the compelled production of books, cheques, and documents and the privilege applicable in these provisions is to ensure the unhindered identification of payments and transactions which may be capable of being set aside under section 340 of the 1973 *Companies Act*.[896]

Although this section provides for the compulsory production of books and documents in compliance with a summons issued to any person required to do so it does provide for immunity, in that the law relating to privilege as applicable in a court of law, shall apply.[897] This is the same as with section 65(2).[898]

Privileged information is that information, when divulged, which will prejudice (in subsequent proceedings) the person who gave it in a prior statement.[899] One is tempted to ask the question as to how different or similar the banker-customer privilege is from attorney-client privilege. For example, suppose an interrogatee has, during consultation with his attorney, made available to the attorney books, documents and statements which may be private and confidential, the question is whether the attorney will be obliged to hand over the said books and documents.

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893 Kunst *et al Meskin Insolvency Law* 8-15. See also Blackman *et al Commentary on the Companies Act* 14-434.

894 See para 2.3.2.3 (ii) above where this aspect is discussed.

895 Delport *Henochsberg on the Companies Act* at 878.

896 Referred to as impeachable transactions.

897 See also Blackman *et al Commentary on the Companies Act* 14-434.

898 See para *2.3.2* above where this aspect is discussed.

899 An example of privileged information is client-attorney privilege, the so called legal professional privilege, where on consultation the client divulges information to his attorney in confidence so that the latter can prepare a defence for the client. The attorney is obliged to keep such information confidential; the disclosure thereof might incriminate the client. Schwikkard *Principles of Evidence* 124; Zefferett & Paizes *The South African Law of Evidence* 586-688.

Relying on *Robinson v Van Hulsteyn Feltham and Ford*,[900] the court in *Wishart v Blieden* [901] had an opportunity of emphasising the importance of this privilege. In the *Wishart v Blieden* matter, the court held that "our law affords protection to the former client of a legal practitioner such that he or she will be precluded from acting against a former client where the practitioner has confidential information about the former client that may be misused". The court quoted the English case of *Prince Jefri Bolkiah v KPMG*.[902] This case also emphasised the need for this privilege. After discussing a lawyer's duty to a current client, the court held as follows:

> Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.
>
> Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to him.[903]

To answer the practical question posed in the example above, it is necessary to refer to section 415(3) and section 415(5), as together they make more sense.

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900 1925 AD 12 21.

901 [2014] ZASCA 120. See also *Waymark v Commercial Union Assurance CO LTD* [1992] 4 All SA 169 (Tk) 172-174.

902 [1998] UKHL 52; [1999] 2 AC 222 (HL) 235C-E.

903 In Australia the courts have adopted a principle that the court has an inherent jurisdiction to restrain lawyers from acting where it is necessary for the administration of justice. The principle was expressed thus by Judge Brereton in *Kallinicos v Hunt* [2005] NSWSC 1181 para 76 as follows: "The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice". The jurisdiction is to be regarded as exceptional and is to be exercised with caution. Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his choice without due cause".

3.3.2.5 Section 415(3): Compelled testimony due to public interest

The question to be answered is how is the basic principle that one can refuse to answer incriminatory questions applied in insolvency law. Section 415(3) provides the following:

> No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or officer presiding at such meeting: Provided that the Master or officer presiding at such a meeting may only oblige the person in question to so answer after the Master or *officer* presiding at such meeting has consulted with the Director of Public prosecutions who has jurisdiction.[904]

In *Parbhoo v Getz*,[905] the court had to answer the question whether or not, a witness at an insolvency interrogation proceeding was compelled to answer incriminatory questions. Another question the court had to answer was whether such incriminatory answers could be lawfully used in subsequent criminal proceedings against the person who gave them.

In this case, the former directors of a company (Plymouth International (Pty) Ltd (in liquidation)) were to be interrogated at a meeting of creditors in terms of sections 414 and 415(3) of the 1973 *Companies Act.* They feared that these proceedings would elicit from them some incriminatory information, which could be used against them in a subsequent (fraud related) criminal proceeding. With this in mind, they approached the High Court for relief. In their application, they contended[906] that the above-mentioned proceedings would be in violation of their constitutional right as provided for by section 35 of the *Constitution*.[907]

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904 Sub-section 3 substituted by s 10 (a) of *Act* 55 of 2002. See however the provisions of sub-sec 5 as discussed at para 3.3.2.6 below. The latter provides that incriminatory answers obtained at the s 415 interrogations are not admissible against the deponent.

905 [1997] ZACC 9; 1997 (10) BCLR 1337 (CC); 1997 (4) SA 1095.

906 Paragraph 8.

907 This section makes provision for a fair criminal trial by not compelling one to self-incrimination.

After careful deliberation, the court[908] came to the conclusion that the provisions of sections 415(3) read with 415(5) were unconstitutional.[909] This unconstitutionality was said to extend only to the provision in section 415(5) that "any evidence given under this section shall be admissible in any proceedings instituted against the person who gave that evidence" as applied to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, other than proceedings where the person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily.

It was further held that no incriminating answers, given in accordance with the provisions of section 415(3) of the 1973 *Companies Act*, shall be used against the person who gave such answer, in criminal proceedings against such person, other than proceedings referred to expressly in the declaration of invalidity. Consequently, the court correctly concluded[910] that the applicants' assessment of the risk they would run if they testified at the interrogation was well founded.

Further, the court had an opportunity to compare and contrast the provisions of sections 415 and those of section 417(2) (b)[911] of the 1973 *Companies Act*. It held[912] that the Constitutional Court in *Ferreira v Levin; Vryenhoek v Powell* [913] had struck down essentially similar provisions of section 417(2)(b) of the *Companies Act* on the basis of their inconsistency with the fair criminal trial guarantees of the *Interim Constitution.* The court acknowledged[914] the existence of minor distinctions between the two different provisions and correctly held that the reasoning adopted in the *Ferreira*'s case applied with equal force to the provisions of section 415(3) read with

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908 Paragraph 15.
909 The Constitutional Court confirmed in terms of s 167(5) para 14.
910 Paragraph 8.
911 The provisions and implications of this section will be discussed below at para *3.4*.
912 Paragraph 11.
913 1996 (1) BCLR 1 (CC).
914 Paragraph 11.

section 415(5). Concerning the section 35-trial rights guaranteed by the *Constitution*, the court held[915] that the said section now explicitly guarantees an accused the right not to be compelled to give self-incriminating evidence. Consequently, referring to the *Ferreira*'s case, Judge Chaskalson as he then was, stated[916] as follows:

> Judge Ackerman has demonstrated that the rule against being compelled to answer incriminating questions is inherent in the right to a fair trial guaranteed by section 25(3).[917] The reasoning that led him to conclude that section 417(2) (b) is inconsistent with section 11(1) would also have led him to conclude that it is inconsistent with section 25(3). It seems to me to be clear that this is so. To some extent, his reasons are shaped by the fact that the issue is treated as one implicating freedom and not the right to a fair trial. In substance, however, they can be applied to a section 25(3) analysis and I have nothing to add to them.[918]

Further in the *Ferreira*'s case, the court, with regard to section 25(3), referred to *S v Zuma* [919] where the Constitutional Court pointed out that South African courts have over the years recognised the origins and the importance of the common law rule placing the onus of proving the voluntariness of a confession on the prosecution. In this context, the court quoted[920] with approval the following passage from *R v Camane* [921]:

> Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history. Wigmore, in his book on *Evidence*, Vol 4, section 2250, traces very accurately the genesis, and indicates the limits of the privilege. And he shows that however important the doctrine may be, it is necessary to confine it within its proper limits. '*What the rule forbids is compelling a man to give evidence which will incriminate himself.'* (Emphasis added.)

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915 Paragraph 10.
916 Paragraph 11.
917 The *Interim Constitution* which provided for the right to a fair trial, which included the right (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial; (d) and not to be a compellable witness against himself or herself.
918 Paragraph 186.
919 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC).
920 Paragraph 11.
921 1925 AD 570 at 575.

Further tracing the history of the incarnation of this rule in South African legislation, the court in this case,[922] concluded as follows:

> The common law rule in regard to the burden of proving that a confession was voluntary has not been fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's "golden thread" – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt. Reverse the burden of proof and all these rights are seriously compromised and undermined. On the basis of the above, the court considered that the common law rule on the burden of proof was inherent in the rights specifically mentioned in section 25(2) and 3(*c*) and (*d*), and forms part of the right to a fair trial.

Regarding the applicability of section 65(2A) (*a*) of the *Insolvency Act* on section 415, the court in the present case (*Parbhoo*'s case) held[923] that the direct use of immunity, provided for in section 65(2A) (*b*) of the *Insolvency Act*, is irreconcilable with the combined effect of these provisions in section 415 and to that extent is inapplicable.[924] Consequently an order similar to that made in *Ferreira v Levin's* case was issued, although with slightly linguistic deviations.

Delport[925] mentions that prior to the section's amendment,[926] a witness could not refuse to answer a question on the ground that it would tend to incriminate him. Both Delport[927] and Kunst[928] highlight that in *Parbhoo v Getz* the court concluded that the provisions of section 415(3) were that any evidence given under this section shall be admissible in any proceedings instituted against the person who gave such evidence, is constitutionally invalid. However, this invalidity only extended to the use of such evidence in criminal proceedings against the person who gave it. This excluded instances where such person stands trial on a charge relating to administering or taking of an oath or making an affirmation, or perjury in connection with such questions and answers or a failure to answer lawful questions fully and

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922 *S v Zuma* 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC).
923 Paragraph 13, with reference to *Ferreira v Levin; Vryenhoek v Powell* 1996 1 (CC), after regarding the proper construction of and interrelationship between the provisions of these two sections.
924 Paragraph 13.
925 Delport *Henochsberg on the Companies Act* 877.
926 By the *Judicial Matters Amendment Act* 55 of 2002 with effect from 17 January 2003.
927 Delport *Henochsberg on the Companies Act* 877.
928 Kunst *et al Meskin Insolvency Law* 8-15.

satisfactorily. Accordingly, this invalidity operated in relation to evidence given at an interrogation under section 415 on or after 27 April 1994.[929] This was after the coming into effect of the Constitutional dispensation and consequently the *Interim Constitution* and the final *Constitution*. The said evidence is admissible in civil proceedings against the witness though. This insolvency principle is a deviation from the general rule of privilege against self-incrimination. Our courts have, however, indicated in a number of judgments that this deviation was constitutional and served an important public function.[930] It is a *sui generis* provision applicable only to insolvency proceedings.

Kunst,[931] Delport[932] and Sharrock[933] point out that at present a witness may still not refuse to answer a question on the ground that it could incriminate him. However, if he does refuse on that ground, the Master or presiding officer, after consultation with the Director of Public Prosecutions who has jurisdiction, can oblige the witness to answer the question.[934] However, this does not mean that the information will be used.[935]

Both Kunst and Delport[936] state that the purpose of the said consultation is, however, not clear from the statute. They submit that its purpose might be to avoid a situation that any criminal proceedings contemplated by the Director of Public Prosecution against the witness (or the body corporate of which the witness is or was an officer) are prejudiced. The prejudice, which might arise if the evidence obtained from the witness at the enquiry (or any evidence derived directly therefrom), were to be rendered inadmissible in the contemplated criminal proceedings, by virtue of the provisions of section 415(5).[937] I submit that this position is fair.

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929 Delport *Henochsberg on the Companies Act* 877; Kunst *et al Meskin Insolvency* Law 8-16.
930 See court cases already discussed above.
931 Kunst *et al Meskin Insolvency Law* 8-17.
932 Delport *Henochsberg on the Companies Act* 877.
933 Sharrock *et al Hockly's Insolvency Law* 264.
934 Section 415(5).
935 Section 415(5).
936 Delport *Henochsberg on the Companies Act* 880.
937 Section 415 (5) prohibits the use of both incriminating answers or evidence directly obtained from the interrogation and that which is directly derived from the interrogation.

Delport[938] contends that, if the Director of Public Prosecutions intends to prosecute a person required to be interrogated in terms of this section, or is of a mind to use such a person as an accomplice witness in a prosecution against some other person, he will of course have a valid interest in the evidence given at the interrogation. The Director of Public Prosecution in fact stands to be prejudiced in the former case, if by virtue of the provisions of sub-section 5, information or evidence directly obtained or derived from an incriminating answer given in an interrogation will not be admissible in a criminal trial against the person concerned. Further, because if such a witness obtains the protection envisaged by sub-section 5, he may well refuse to become an accomplice witness despite the indemnity against prosecution as provided for by section 204 of the *Criminal Procedure Act*.[939] This would be the case if he should testify in criminal prosecution against someone else. It is to avoid the occurrence of such prejudice that the provisions to sub-section 3 require the Master or other officer to consult with the Director before obliging the person concerned to answer a question, the answer to which may be self-incriminatory.

Although a person may well be **obliged to answer** incriminatory questions, the evidence so obtained **may not be used**. It is crucial to differentiate between the concepts "obliging an answer" and "using the answer". One cannot avoid the possibility that the answer may be used against him (examinee) in a criminal proceeding, but that discretion should be left to the trial court to exercise.

Delport further highlights that the intended meaning of the word "consult" is not clear. However, in my view, he correctly presumes it envisages that the Director is intended to have the power to prevent the Master or other officer from obliging a person to answer a particular question. According to him, there appears to be no statutory provision, which requires the Master or other officer to give effect to the Director's demand. Further, the Director, and therefore the public at large, stand to be prejudiced, notwithstanding the provision. Furthermore, Delport points out that the proviso to sub-section 3 does not require that the Director be consulted prior to

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938 Delport *Henochsberg on the Companies Act* 880.
939 51 of 1977.

the commencement of the interrogation of a witness against whom criminal proceedings may be brought. It applies only in the situation where a witness declines to answer a question on the ground that it might incriminate him. Accordingly, the proviso does not prevent prejudice occurring where a witness who may otherwise be prosecuted and who is aware of the implications of sub-section 5, willingly answers such a question, thereby precluding the use of such evidence in the criminal proceedings against him.[940] This makes sense. The legislature seems to have overlooked the possibility of an examinee[941] intentionally divulging incriminatory information in the hope of frustrating the subsequent criminal proceedings.

In *Levin v Ensor* [942] an application by a director of a company in liquidation came before the court. In this case, the court had to answer the question whether or not it was proper and fair, for the presiding officer at the meeting of creditors to require from an applicant to divulge information relating to the very matters in issue in the pending action. The applicant was a director of a company in liquidation and who would be a witness of the defendant (the company in liquidation) at the trial. It was further contended[943] on behalf of the applicant that the interrogation of the latter at that meeting brings with it the possibilities of same being cross-examined twice and that such was contrary to natural justice, the spirit of the statute and an abuse of the processes of the court. In answering the above question, the court correctly held that the purpose of this enquiry was to ascertain the facts in relation to transactions between the company in liquidation and its purported debtors. It was common cause that the information about the said transactions could only be found through the interrogation of its director (applicant).

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940 Other than those contemplated in sub-sec 5.

941 Who feels that he no longer has anything to lose after an order (and the stigma of "insolvent") of insolvency against him is issued.

942 1975 (2) SA 118 (D). This case challenged the provisions of s 180(2) of the *Companies Act* of 1926 which has the same provisions as s 412 of the *Companies Act* 61 of 1973. It is noted that this is a pre-constitutional dispensation case, it is however relevant to this research. See also Delport *Henochsberg on the Companies Act* 882.

943 At 400.

The court highlighted[944] that the 1973 *Companies Act* [945] empowers the presiding officer to require the person who is able, or who is reasonably believed to be able, to give material information concerning the company's affairs to submit to interrogation. Further, that the liquidator will have a right to interrogate such a person who has been subpoenaed and is present at the meeting. The court further highlighted[946] that this provision in the *Companies Act* did not exempt from interrogation a person who might be a witness in a pending civil trial relating to the subject matter of the proposed interrogation. Consequent to the above reasoning, the application was refused.[947]

In *Smith v Porriti*, [948] the court had to answer a question whether or not it would be permissible to withhold subpoenaed documents on the grounds of privilege. The facts of this case were as follows: The appellant, a superintendent in the SAPS, was subpoenaed to attend a meeting of creditors in EBN Trading (Pty) Ltd (in liquidation) and, on a different day, a meeting of creditors in Awethu Trust (in sequestration). The subpoena to attend the former was issued by the Master in terms of section 415(2) of the 1973 *Companies Act.* The subpoena to attend the latter was issued by the Master in terms of section 64 of the *Insolvency Act*. The appellant applied to the High Court for an order setting aside the subpoenas. The basis being that the documents subpoenaed were privileged and that the issuing of the subpoenas was an abuse of the process of the court – that is, with the purpose of prematurely obtaining documents relating to a pending criminal investigation.[949]

The application was dismissed by the court below, hence the appeal. The subpoenas correspondingly required the appellant to produce, at the meeting of creditors, 'the books and documents' or copies thereof, (relating to the claim proved by one creditor (PSC)) in his (superintendent) possession or under his control. The subpoenas further required the presence of the appellant for the purposes of being

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944 At 401.
945 Section 180(1) *Act* 46 of 1926.
946 At 401.
947 At 402.
948 2008 (6) SA 303 (SCA). See also Delport *Henochsberg on the Companies Act* 882.
949 Paragraph 1.

examined.[950] The said books, records and documents had been removed by the appellant from the custody of the provisional liquidators and their attorney.[951] Apparently, they were removed for investigating some criminal conduct against some persons (Porritt being one of them). This was the same Porritt at whose instance the subpoena was issued. The appellant's objection to produce documents and be present at the meeting to be examined was based on the argument that Porritt's true motive was to obtain information relating to the criminal investigation against him prematurely. The appellant further alleged that the said documents would serve no purpose to Porritt since what he sought to prove was already determined by the court below.[952]

In determining the appellant's case, the court highlighted[953] that the appellant's argument did not hold water and thus no grounds for setting aside the subpoena – further, that there appears to be no justification of the appellant's contentions that the true motive of the subpoenas was to prematurely access documents relating to a criminal investigation. The court was of the view[954] that the appellant could be of assistance regarding crucial information, for example, the completeness of the books and records in his possession, and the possible whereabouts of other documents relevant for the purposes of liquidation. In its deliberation, the court was not ignorant of the fact that questions relevant to the subject matter of the criminal investigation may arise at the interrogation. It pointed out[955] that in the event that such a question arose, the appellant would be free to object on the grounds of privilege or irrelevancy - thus justifying a ruling of the presiding officer on the issue. The court held[956] that in its judgment, the appellant had failed to establish that the issuing of the subpoenas constituted an abuse of the process.

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950 Paragraph 4.
951 Paragraph 7.
952 Paragraph 8.
953 Paragraph 13 and 14.
954 Paragraph 14.
955 Paragraph 14.
956 Paragraph 14.

The court proceeded to deliberate on the issue of privileged documents.[957] Highlighted thereat was the fact that the documents subpoenaed were limited to 'books, records and documents' relating to claims relevant in the liquidation process. They were referred specifically as either the books and records of PCS or the working documents (of auditors) of PCS. In the court's view, the only basis upon which the appellant relied on (for contending that the documents were privileged) was that the appellant took possession of them in the course of his investigation into Porritt's alleged criminal conduct and hence they were privileged – further, that they 'formed part of the police docket'. The court pointed out[958] that, considering the nature of the documents subpoenaed, that fact alone could not, in its view, render the documents privileged. Accordingly, such documents could not be withheld from the liquidators nor the trustees of the two entities who required them to complete their task of winding-up the affairs of those entities.[959] Based on the above, the reliance on privilege failed. The court highlighted the fact that the position would have been different had the 'documents comprised of witness statements or other documents directly concerned with the criminal investigation'.[960] The appeal was consequently dismissed with costs.[961]

Delport[962] is in agreement with this provision and contends that the said person is not excused from interrogation even if he is involved in a civil trial and regardless of whether or not such trial is ready for hearing or not.[963] Thus, in relation to any relevant matter, which is connected to a pending action instituted by the liquidator in his capacity as such, a person who would be a witness for the defendant in such action may nevertheless be interrogated by the liquidator[964] or by a proved

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957 Paragraph 15.
958 Paragraph 15.
959 Paragraph 15.
960 Paragraph 15.
961 Paragraph 16.
962 Delport *Henochsberg on the Companies Act* 882. Blackman *et al Commentary on the Companies Act* 14-438.
963 He refers to *Levin v Ensor* 1975 (2) *SA* 118 (*D*) at 121; *Pretorius v Marais* 1981 (1) SA 1051; *Corporate Finance v Liquidator Two Plus* 1978 (4) SA 42 (R) at 44-45; Delport *Henochsberg on the Companies Act* 882.
964 *Levin v Ensor* 1975 (2) SA 118 (D).

creditor.[965] Delport submits that there is, however, a limitation on the right to interrogate in relation to pending proceedings. This is limited in the sense that it may not be enforced where interrogation would constitute an abuse of the provisions of section 415. This begs the question, when would abuse be said to have occurred?

Delport opines that interrogation would be an abuse where proceedings have reached such a stage that the purpose of the interrogation is no longer the gaining of information. Information to enable the liquidator to determine his course of action or to learn about matters of which he is unaware, but simply to have a pre-trial enquiry which would be duplicated in the trial itself. He further contends that, depending on the facts of each particular case, if the liquidator has sued X who files a plea, interrogation of X on the contents of the plea, which does not involve reference to facts unknown to the liquidator, is an abuse of the provisions of section 415.[966] He mentions that the evidence given at an interrogation under this sub-section[967] may point to the availability of other proceedings, for example under sections 340, 423 or 424. Referring to *Du Plessis v Gunn*,[968] he concludes that accordingly, section 415 may indeed be invoked for the purposes of determining whether such other proceedings are available.[969]

It is now an acceptable principle that an examinee will be expected to come forward with the information so required, this will be the case even where such a person is engaged in that trial and has documents and information relating to investigations into possible criminal proceedings.[970] According to *Cox v Swanepoel*,[971] even a witness for the defendant in a civil trial relating to the subject matter of the

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965 *Cox v Swanepoel* 1977 (4) SA 260 (W).
966 *Corporate Finance v Liquidator Two Plus* 1978 (4) SA 42 (R); *Botha v Strydom* 1992 (2) SA 155 (N) at 160.
967 Subject to the provisions of sub-sec 5.
968 1962 (4) SA 7 (O) at 14.
969 See also Blackman *et al Commentary on the Companies Act* 14-430.
970 See in general *Smith v Porritt* 2008 (6) SA 303 (SCA).
971 1977 (4) SA 260 (W).

interrogation is not spared from interrogation by either the liquidator or a proved creditor.

In *Du Plessis v Oosthuizen*,[972] the view[973] was that even though the evidence is admissible to prove what the witness stated during the interrogation, that does not necessarily prove that what was stated is true. Further, the findings and judgment of another court cannot necessarily be used against a litigant in subsequent proceedings against him.[974] It is submitted that the onus of proving the truth should be left to the litigants in the subsequent proceedings or the court itself.

The cases above show clearly that a director or any officer of a company in liquidation has no option but to go through interrogation processes where he is expected to answer questions relating to the affairs of the said company. Information of how such company's business was conducted should also be brought forth. The fact that answers provided thereat may be incriminatory to the examinee is no defense. His rights against self-incrimination are, however, protected by the same section in that answers given thereat may not be used against him in subsequent criminal proceedings. It should be noted that the restriction on the use of incriminatory evidence in subsequent criminal proceedings is limited.[975] The deponent's evidence is, however, admissible in subsequent civil proceedings to negate his previous evidence.[976]

In conclusion, Kunst,[977] Delport,[978] Blackman[979] and Sharrock[980] submit that the position of a witness, who is interrogated under section 415, is that he may be obliged to answer any question lawfully put, notwithstanding the fact that the

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[972] 1990 (2) SA 191 (O) 206. See also Delport *Henochsberg on the Companies Act* 883.
[973] At 206.
[974] *Hollingham v Hewthorn & Co* Ltd 1943(2) ALL ER 35. See also *Van Rensburg v Master of the High Court, Kimberly Northern Cape Province* (448/04) [2005] ZANCHC 105 para 8.
[975] Section 415(5) of the 1973 *Companies Act*.
[976] Section 3 of the *Law of Evidence Amendment Act* 45 of 1988. See also *Wessels v Van Tonder* 1997 (1) 616 (O) 620-621; *Du Plessis v Oosthuizen* 1995 (3) SA 604 (O) 620-621; 1999 (2) SA 191 (O). See also Blackman *et al Commentary on the Companies Act* 14-436.
[977] Kunst *et al Meskin Insolvency Law* 8-17.
[978] Delport *Henochsberg on the Companies Act* 877.
[979] Blackman *et al Commentary on the Companies Act* 14-436.
[980] Sharrock *et al Hockly's Insolvency Law* 264.

answer might tend to incriminate him. His evidence is admissible in civil proceedings against him and in criminal proceedings (limited to the provisions of sub-section 5(*a*)-(*d*))[981] against him and a body corporate of which he is or was an officer. Accordingly, in the proceedings in which it is sought to be used, the evidence must be regarded as a whole, including any portions of it favourable to the witness or the body corporate.[982]

3.3.2.6 Section 415(5): Inadmissible incriminatory answers

This sub-section provides guidelines regarding circumstances under which incriminatory evidence obtained at the interrogations may or may not be admissible against the deponent (or company of which he is or was an officer) in subsequent criminal proceedings.

The section reads as follows:

> Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an interrogation in terms of subsection (1) shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he is or she is or was an officer, except in criminal proceedings relating to- (a) the administering or taking of an oath or the administering or making of an affirmation; (b) the giving of false evidence; (c) the making of a false statement; or (d) a failure to answer lawful questions fully and satisfactorily.[983]

Prior to the decision in *Parbhoo v Getz* [984] and the consequent amendment of this sub-section by the *Judicial Matters Amendment Act*,[985] this sub-section provided for the admissibility of a witness's evidence in criminal proceedings against the latter and the body corporate of which he is or was an officer in criminal proceedings as stated in sub-section 5 (a) to (d).[986] These are criminal proceedings relating to the administering or taking of an oath, or making of an affirmation, or the giving of false

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981 See the discussion on this sub-sec at para 3.3.2.6 below.

982 *R v Vather* 1961(1) SA 350 AD 353-355; *Fisheries Development Corporation of South Africa Ltd v Jorgensen* 1980 (4) SA 156 (W) at 161. See also Kunst *et al Meskin Insolvency Law* 817; Delport *Henochsberg on the Companies Act* 883.

983 Sub-section (5) substituted by s 10 of *Act* 55 of 2002.

984 [1997] ZACC 9; 1997 (10) BCLR 1337; 1997 (4) SA 1095 (CC).

985 55 of 2002. See also Kunst *et al Meskin Insolvency Law* 8-16; Delport *Henochsberg on the Companies Act* 883; Blackman *et al Commentary on the Companies Act* 14-445.

986 See Delport *Henochsberg on the Companies Act* 883; Blackman *et al Commentary on the Companies Act* 14-436.

evidence, or the making of a false statement in connection with such questions and answers, or a failure to answer lawful questions fully and satisfactorily.[987] Blackman[988] avers that it appears that the *Parbhoo v Getz* judgement rendered the provisions of section 65(2A) of the *Insolvency Act* applicable to section 415 (of the 1973 *Companies Act*) examinations prior to the latter's amendment. Currently, section 65(2A) (b) of the *Insolvency Act* is not applicable to section 415 of the 1973 *Companies Act*.[989] This is the case since the provisions of the former are in conflict with the latter's provisions.[990] Besides, section 415(5) covers this aspect of protecting an examinee against self-incrimination. There is, however, no reason why section 65(2A) (a) cannot apply to section 415 of the 1973 *Companies Act* examinations.

In civil proceedings, the witness's evidence was admissible against the witness who gave it and against the body corporate of which, at the time the evidence was given, he is or was an officer. Delport[991] submits that this was the case irrespective of the capacity in which the witness purported to give it. The sub-section now, as amended, no longer refers to the admissibility of a witness's evidence in civil proceedings. Delport therefore submits, and I concur, that the position remains the same as that which pertained prior to the said amendment.[992] This, then, is the difference then and now with regard to civil proceedings in this regard.

A case, which gave effect to the above amendments, is *Pharboo v Getz*.[993] In this case, the court declared section 415(5) unconstitutional and consequently prohibited, except for the circumstances mentioned thereat,[994] the use of not only an incriminating answer or evidence directly obtained from the interrogation, but

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987 *Parbhoo v Getz* [1997] ZACC 9; 1997 (10) BCLR 1337 1997 (4) SA 1095 (CC) para 1. See also Delport *Henochsberg on the Companies Act* 883; Kunst *et al Meskin Insolvency Law* 8-16.

988 Blackman *et al Commentary on the Companies Act* 14-436.

989 *Parbhoo v Getz* [1997] ZACC 9; 1997 (10) BCLR 1337; 1997 (4) SA 1095 (CC) para 13. See also Kunst *et al Meskin Insolvency Law* 8-16.

990 See also Blackman *et al Commentary on the Companies Act* 14-445.

991 Delport *Henochsberg on the Companies Act* 883. See also; Blackman *et al Commentary on the Companies Act* 14-436.

992 That it is admissible against the witness who gave it.

993 See a detailed discussion of this case at para 3.3.2.5 on s 415(3) above.

994 Paragraphs *(a)* to *(d)* of sub-sec 5.

also evidence directly derived from the interrogation. From the discussion of this case, it appears that not only direct evidence but also derivative evidence is excluded in criminal proceedings, other than those relating to the offences envisaged by paragraphs (*a*) to (*d*) of sub-section 5, both against the witness and a body corporate of which he is or was an officer.[995] This assumption is because the court did not expressly distinguish between incriminatory evidence directly obtained from the interrogation and that, which is incidentally obtained from the said interrogation. The difference between direct and derivative evidence is that the former could not have been obtained but for the interrogation and the latter could have been obtained independent of the interrogation. The difference with regard to the admissibility in criminal proceedings of incriminatory evidence then and now is that, evidence obtained from the interrogation could be used at criminal proceedings indiscriminately and now the use of the incriminating evidence is limited to proceedings mentioned in the *Pharboo v Getz* case above.[996]

According to both Delport and Kunst, it is not entirely clear from the wording of sub-section 5 whether, by its reference to incriminating evidence obtained or derived from an interrogation in terms of sub-section 1, the intention is to exclude from admissibility in criminal proceedings against A (who is or was a secretary or director of company B) or B (company) only the incriminating answers given by, or information obtained or evidence directly derived from the interrogation of A. Or is the intention that any such incriminating evidence derived from the interrogation as a whole, including that obtained from C (who is not necessarily related to the company) called to the interrogation, is inadmissible? Both these writers contend that having regard to the section as a whole, and in particular the provisions of sub-section 3, the intention is that the reference to an interrogation in terms of sub-section 1 is a reference to the interrogation of the person concerned against whom the criminal proceedings are envisaged. I concur. It would be unfair to persons (creditors, contributories and society) affected by the insolvency of B that all

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995 Kunst *et al Meskin Insolvency Law* 8-16.
996 Sub-section 5(*a*)-(*d*).

incriminating information be regarded as inadmissible against A or B regardless of the source.

Kunst[997] concurs with Delport[998] and they accordingly submit that currently the position of a witness who is interrogated under section 415 is that A may be obliged to answer any question lawfully put, notwithstanding the fact that the answer might tend to incriminate A or B. A's evidence is admissible in civil proceedings against A and in civil and criminal proceedings against B of which he is or was an officer, but A's evidence is not admissible in criminal proceedings against A or B of which he is or was an officer save in the limited circumstances described in sub-section 5. The evidence must be considered as a whole, including any portion of it favourable to the witness or body corporate.[999] I concur. This is in accordance with the principles of fairness and justice.[1000] Liquidators can only really understand the causes of the insolvent company's financial difficulties through specific and relevant information. This information has to be sourced from certain persons. The insolvent company cannot on its own provide or produce this information.[1001]

The position now is that section 415 (5) prohibits the use of both incriminating answers and evidence[1002] directly obtained from the interrogation and that which is directly derived from the interrogation both against the witness and a body corporate of which he is or was an officer.

At a glance, section 415 is almost identical to section 65 of the *Insolvency Act* except for the following: that evidence given under section 65 is generally not admissible against the deponent, except for the provisions of section 65(2A) (*b*), while section 415(5) provides that any incriminatory evidence given under this section shall not be admissible against the person giving it or the body corporate of which he is or

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997 Kunst *et al Meskin Insolvency Law* 8-16.

998 *Henochsberg on the Companies Act* 883.

999 *R v Vather* 1961 (1) SA 350 (AD) 353-355; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 161. See also Kunst *et al Meskin Insolvency Law* 8-17; Delport *Henochsberg on the Companies Act* 883.

1000 See in general *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T).

1001 See *Bernstein v Bester* 1996 (2) SA 751 (CC) 1996 (4) BCLR 449 para 84.

1002 In criminal proceedings other than those excluded by *Parbhoo v Getz* case.

was an officer. This distinction may be due to the fact that a company as a juristic person is unable to give evidence personally. A further distinction observed is that section 65 permits the use of derivative evidence in any subsequent proceedings, only incriminating evidence may not be used in criminal proceedings (except those specified under sub-sec 5 (*a*) to *(d*)). Section 415 as it reads now provides that a witness who is interrogated under this section may be obliged to answer any question lawfully put, notwithstanding the fact that the answer may incriminate him, subject to consultation with the Director of Public Prosecutions. His evidence is thus admissible in civil proceedings against him. However, his incriminating evidence obtained directly from an interrogation is not admissible in criminal proceedings against him or the body corporate of which he is or was an officer unless in the limited circumstances described in sub-section 5. The limited circumstances clearly apply only against the deponent and not the body corporate.

Moreover, the direct use of immunity, as provided by section 65(2A) (*b*) of the *Insolvency Act*, does not correspond with the provisions of section 415 of the 1973 *Companies Act*.[1003] The latter section's immunity is provided for at sub-section 5. In addition, section 415 does specify the type of proceedings in which such incriminatory evidence shall not be admissible. This entails that such evidence is admissible in proceedings not covered by section 415(5) (a-d) and in civil proceedings against any person giving it. The differentiation may be challenged on the basis of inconsistency in corporate insolvency matters, to the presumption that insolvency of a natural person is considered by our law as not so grave compared to the insolvency of companies. It is noted that since section 415 made no provision for an offence as afforded for by section 65(2A) (*c*), the latter is applicable to section 415 by virtue of section 339 of the 1973 *Companies Act*.

I submit that directors should be interrogated as they are in a position to provide information about the company and the whereabouts of its funds. They owe it to the shareholders, from whose funds the company was enabled to do business and to the public, to submit to the interrogation and provide any information that might

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[1003] See also Blackman *et al Commentary on the Companies Act* 14-446.

assist in the fair and effective liquidation process.[1004] The provisions of this section are appropriate and necessary to achieve certain public policy aims. I cannot think of any provision that can be less restrictive on the rights of those called upon to provide the required information. To emphasie the importance of the above-mentioned section, Judge Broome in the case of *Botha v Strydom* [1005] stated as follows:

> The legislature has deemed it necessary to authorize the constitution of enquiries of this nature and to deprive witnesses of many privileges which they might otherwise have enjoyed. This has been the case for many generations in the *Insolvency Act* and the earlier *Companies Act*. The Legislature obviously recognizes that there are often machinations which require exposure and that the only way that exposure can be obtained is by the drastic "draconian" methods of these enquiries, to get people there, to get them to produce documents and to answer questions. Really, when all is said and done, things goes no further than to remove all possible obstacles from the course of discovering the truth and it has been said in this Court in a different context that it is difficult to see how a person who truthfully answers questions on oath can be prejudiced by being required to do so.

These provisions on privilege are similar to those provided for in section 65(2) of the *Insolvency Act*.[1006]

3.3.2.7 Section 415(4): Duty to record evidence

This sub-section makes provision for the recording and filing of statements made at the interrogations.

The section reads as follows:

> The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section, has made to the liquidator or his agent a statement which has been reduced to writing, or has delivered a statement in writing to the liquidator or his agent, that statement may be read by or read over to that person when he is called as a witness under this section and, if then adhered to by him, shall be deemed to be evidence given under this section.

[1004] See in general *Bernstein v Bester* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449. See also Blackman *et al Commentary on the Companies Act* 14-428 and 14-429.

[1005] 1992 (2) SA 155 (D & C) 159-160.

[1006] See discussion on these provisions at para 2.3.2.3 above.

(i) Recording of the proceedings

The recording of the proceedings by the Master can be seen as part of his overall responsibilities in terms of the 1973 *Companies Act.* He is required to supervise the whole administration of estates of insolvent companies by inspecting books and documents.[1007] The recorded information may be required by the court where it deems it necessary and thus not for public consumption. This should be the case since the Master is not an administrative figure nor an organ of state.[1008] The court may require the recorded information together with the Master's report in cases of review for example. The records of the proceedings must be filed in the office of the Master.[1009] Kunst[1010] and Blackman[1011] highlight that a record purporting to be one of any proceedings of a meeting of creditors, and which purports to have been signed by the Master or the presiding officer, may be received upon its mere production as *prima facie* evidence of such proceedings. Delport[1012] concurs with Kunst and Blackman regarding the recording of the proceedings. He further contends that the record may be noted in shorthand or recorded by mechanical means.[1013] Accordingly, the presiding officer complies with the directive where recording by mechanical means is employed, even though during the interrogation what is so recorded is not immediately perceptible.[1014]

It is submitted that since evidence at insolvency proceedings is recorded in accordance with the relevant Rules of the Magistrates' courts in a civil case,[1015] this

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1007 Section 392 of the 1973 *Companies Act*.

1008 See the discussion of this aspect at para 3.3.4.10 below.

1009 See regulation 6 of the Regulations for the Winding-Up and Judicial Management of Companies, promulgated under GN R2490 of 28 December 1973, which provides for the recording of the enquiry or examination of a witness under the 1973 *Companies Act*. This excludes records of the 417 and 418 enquiries. See also in this regard Blackman *et al Commentary on the Companies Act* 14-439.

1010 Kunst *et al Meskin Insolvency Law* 8-17.

1011 Blackman *et al Commentary on the Companies Act* 14-439.

1012 Delport *Henochsberg on the Companies Act* 883.

1013 Rule 30 (4) of the Rules of the *Magistrate's Court Act* 32 of 1944.

1014 *Lazarus v Said & Roos* 1958 (4) *SA* 757 (E) 763.

1015 See also Kunst *et al Meskin Insolvency Law* 8-17; Blackman *et al Commentary on the Companies Act* 14-438.

makes it even easier for the insolvency proceedings to be absorbed into the court structures.[1016]

(ii) Viva-voce evidence or written interrogatories

Delport[1017] highlights that evidence will consist of that given under interrogation and that which is delivered by the witness to the liquidator or his agent. Customarily, the evidence as recorded in writing by the examinee is read by, or read over to him, and he must then confirm the content thereof.[1018] Accordingly, the fact that a witness has handed in a prepared statement, does not preclude his interrogation regarding the contents of the statement submitted by him or any other matter concerning the company's affairs.[1019] These provisions are similar to the provisions of section 65(3) of the *Insolvency Act*. Thus, what applies in that sub-section regarding privilege, compelled testimony, and its subsequent use, is also applicable in this regard.[1020] A further discussion on the above subject will be given at paragraph *3.4* below with reference to section 417.

3.3.2.8 Section 415(6): The right to legal representation

This sub-section permits an examinee to appoint a legal representative to represent him at the interrogations.

The section provides as follows:

> Any person called upon to give evidence under this section may be represented at this interrogation by an attorney with or without counsel.

[1016] It is my view that there should be insolvency courts in South Africa, especially when one considers the fact that insolvency of both natural and juristic persons is almost a daily occurrence.

[1017] Delport *Henochsberg on the Companies Act* 878. See also Blackman *et al Commentary on the Companies Act* 14-438.

[1018] Section 415(4) of the 1973 *Companies Act*.

[1019] *Pretorius v Marais* 1981 (1) SA 1051 at 1063.

[1020] A further discussion on the above subject will be given at para *3.3.4* below with reference to s 417.

The matter of *Benson Re Tait, In re: Tait v Jason* [1021] is indicative of the fact that the principle that an examinee is entitled to be represented at his insolvency examination is entrenched in the insolvency system. The examinee was specifically informed by the presiding officer of his right to have a legal representative present at his examination.[1022] The absence of a legal representative on behalf of an examinee places a duty on the presiding officer to ensure that the examination proceedings are conducted fairly and without prejudicing an examinee concerned.[1023] This obligation is said to arise from the presiding officer's obligations to ascertain that the examination proceedings in its entirety are fair.[1024] The case of *Advance Mining Hydraulics (Pty) Ltd v Botes* [1025] was referred to by the court,[1026] and that the reason for the setting aside of the enquiry thereat was the failure by the presiding officer to advise an examinee of his right to legal representation.[1027] Blackman[1028] brings forth the point that the High Court, in deciding that the presiding officer has a duty to an examinee in these circumstances, that the court decided the question in terms of the common law. The court was, however, not ignorant of the provisions of section 39(2) of the *Constitution*.[1029] The latter section commands the courts to uphold the spirit and aims of the Bill of Rights, particularly section 10 of the *Constitution*.[1030]

As regards representation, Blackman[1031] highlights that the aim of representation is to protect the deponent, specifically in advising him whether he is compelled to

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1021 [2012] ZAWCHC 377. Although this case referred to s 418 of the *Companies Act*, it is my opinion that same applies in the case of s 415. This should be the case because what is good for an examinee under the provisions of section 418 should also be good for an examinee under section 415.

1022 Paragraph 7.

1023 Paragraph 7. See also Blackman *et al Commentary on the Companies Act* 14-433.

1024 *Advanced Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 (T) 824-825 and cases cited thereat.

1025 2000 (1) SA 815 (T). See also Delport *Henochsberg on the Companies Act* 884; Blackman *et al Commentary on the Companies Act* 14-433.

1026 Paragraph 18.

1027 See also Blackman *et al Commentary on the Companies Act* 14-433.

1028 Footnote 300.

1029 Footnote 300.

1030 Footnote 300.

1031 Blackman *et al Commentary on the Companies Act* 14-432. Blackman relies on *Re Cambrian Mining Company* (1882) 20 Ch 376 378-379.

answer a particular question and to draw the latter's attention to any statement that may require clarity. Further, to ascertain if the information so recorded represents fairly and properly the deponent's version. Delport[1032] explains that the right to representation is intended to be a right to **effective representation**. According to him, the attorney or counsel is entitled to question the witness whom he represents. The purpose of this questioning is to explain something stated by him under interrogation. Consequently, rephrasing what the witness has said during his interrogation seems to be the prominent objective the legal representative serves at the interrogation. One is tempted to ask whether this is effective representation or not. My view is in the affirmative. One may also ask if cross-examining the creditor forms part of effective representation or not. The answer is in the negative, specifically with regard to this topic. The reasoning behind this view being that the objective of these proceedings is the establishment of the whereabouts of the insolvent company's assets. However, if cross examination could lead to clarifying a matter, then it should be allowed. For example, a witness who keeps on talking about his "partner", should be asked to clarify this. Many people talk loosely about "partners" while in fact they are co-members.

Delport[1033] submits that unless this entitlement exists, it is difficult to see what benefit the right to representation confers on the witness beyond having someone available to require the presiding officer to act under the provisions of section 415(1) in relation to any particular question. It is my submission that even if representation were for this reason alone, it is a good reason, and is fair and effective for the purposes of collecting relevant information. It ensures that unnecessary delays and possible abuse of the process are curbed. Citing *re Cambrian Mining Co*,[1034] and acknowledging the fact that this was cited in the context of a private enquiry, Delport submits that this is, however, applicable to the provisions of section 415. He highlights that it was pointed out[1035] thereat that re-examination by the witness's own counsel would only be properly and reasonably allowed for the particular

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1032 Delport *Henochsberg on the Companies Act* 883.
1033 Footnote 305.
1034 (1881) 20 Ch 376.
1035 At 883.

purpose of explaining the evidence given by the deponent during his examination on behalf of the liquidator. The said re-examination was to be confined and limited to that particular purpose, and that it would be quite legitimate when so confined. To my mind, this right of re-examination includes the right of access to books and papers relating to his client's interrogation, although none of the writers mention it.

I concur with the legislative interpretation of section 415. People identified as relevant for providing the required information should come forward as per the summons. It is only natural that those who were at the helm of the affected company's business affairs and are reasonably expected to be privy to the affairs of that company should be in a position to bring forth relevant information and answer questions relating to the said information. The fact that a company often operates with the funds of creditors or shareholders is more reason for high standards of accountability.[1036] Although subjected to interrogation in the quest to gather information regarding the affairs of a company under winding-up, the section does provide immunity to persons required to submit books and documents in that it makes applicable to such information the law relating to privilege. This section further complies with the principles of justice in that an examinee is entitled to legal representation when he is so examined.[1037] Unlike section 65, this section makes provision for the submission of written answers to written questions instead of *viva voce* evidence where this is sufficient in the circumstances.[1038]

3.3.3 Section 416: Penalty provision

3.3.3.1 Introduction

Provision is made in this section for the application of the provisions of sections 66, 67 and 68 of the *Insolvency Act* to a company unable to pay its debts in so far as these can be applied and are not inconsistent with the provisions of the 1973 *Companies Act*.[1039] In essence, section 416 reinforces the provisions of sections 414

[1036] See in general *Bernstein v Bester* 1996 (2) SA 751 (CC).
[1037] *Advanced Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) 824-825.
[1038] Section 415(4), see para 3.3.2.7 (ii) on the discussion of this aspect.
[1039] Blackman *et al Commentary on the Companies Act* 14-440; Delport *Henochsberg on the*

and 415 of the same statute. Same as section 66 of the *Insolvency Act*, section 416 provides for penalties in cases of failure to comply with the requirements of sections 414 and 415. How these provisions are applied in practice will be discussed below.

3.3.3.2 Section 416(1): Application of the *Insolvency Act* provisions

This sub-section makes provision for the application of sections 66, 67 and 68 of the *Insolvency Act* to persons subpoenaed to attend meetings of creditors (in terms of section 414) of a company unable to pay its debts and in winding-up and for interrogation purposes (in terms of section 415 of the 1973 *Companies Act* respectively). Together these *Insolvency Act* sections are intended to reinforce the provisions of section 414 and 415 of the 1973 *Companies Act*. The context in which these procedures are reinforced will be discussed below.

The sub- section provides as follows:

> The provisions of section 66, 67 and 68 of the *Insolvency Act,* 1936 (Act 24 of 1936), shall, in so far as they can be applied and are not inconsistent with the provisions of this *Act*, *mutatis mutandis* apply in relation to- (a) any person who in terms of section 414 (1) of this Act is required to attend any meeting of a company being wound up and which is unable to pay its debts, as if such person were an insolvent required to attend any meeting referred to in section 64 of the *Insolvency Act*, 1936; and (b) any person subpoenaed in terms of 414 (2) of this *Act* to attend any meeting of the creditors of such a company or to produce any book or document at any such meeting, and the provisions of section 65 of the *Insolvency Act*, 1936, shall, in so far as they can be applied and are not inconsistent with the provisions of this *Act,* mutatis mutandis apply in relation to the production of any book or document or the interrogation of any person under section 415 of this *Act,* as if such person had been subpoenaed to produce any book or document or were being interrogated under the said section 65 of the *Insolvency Act,* 1936.

(i) Penalty for failure to attend creditors' meetings

Seeing that the duty of directors (officers or any person subpoenaed) to attend meetings of creditors (of a company of which they were directors) is legislated, it is only logical that there should be concomitant penalties where the said persons fail to comply. The duty to attend creditors' meetings and provide the liquidators of the

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Companies Act 885. See Kunst *et al Meskin Insolvency Law* 8-15 as regards the provisions of s 65 of the *Insolvency Act* to s 416(1).

company in winding-up with the required information is considered an extension of these officers' duties to the company.[1040] Further, it is in the public interest in a civilised democratic society for any person subpoenaed to so attend.[1041] The application of the *Insolvency Act* provisions to reinforce the company legislation provisions is indicative of the legislature's desire to accentuate the importance of these proceedings. It appears that notwithstanding the provisions of section 416(1),[1042] section 414(3) is sufficient to enforce compliance with the provisions of section 414 regarding failure to attend creditors' meetings and there is therefore no need to further reinforce compliance with the winding-up provisions in terms of the 1973 *Companies Act* outside of this statute.

(ii) Penalty for failure to produce books and documents

As is the case with failure to attend creditors' meetings, penalties intended to reinforce compliance with the duty to produce books and documents as subpoenaed are provided for by section 414(3) of the 1973 *Companies Act*. It is therefore submitted that these provisions are sufficient to achieve the objectives of section 414 and therefore no need for the application of section 66 of the *Insolvency Act*.

(iii) Penalty for failure to answer lawful questions and perjury

The duty to answer lawful questions posed at the interrogations in terms of section 415 is another form of civic duty and should therefore be complied with. It appears that sections 415(3) and 415(5) have sufficiently provided for the reinforcement of the requirements of section 415. There is therefore no need for the application of the penalty provision under section 65 of the *Insolvency Act* as stated in section 416(1).

(iv) Dealing with suspected offences

[1040] See *Bernstein v Bester* 1996 (2) SA 751; (CC) (1996) (4) BCLR 449).
[1041] See in general *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) para 16.4.
[1042] See also s 339 of the *Companies Act* of 1973.

As regards the application of section 67 of the *Insolvency Act*, it does not appear that either sections 414 or 415 provides for steps to be taken on suspicion of an offence committed by directors, officers or other persons in relation to the business affairs of an affected company. It is, therefore, submitted that section 67 can be applied as provided for by section 416(1).

Irrespective of the explicit wording of section 416(1), Kunst[1043] and Blackman[1044] refer to Regulation 5 of the Winding-up. The implications are then that the provisions of section 67 of the *Insolvency Act*,[1045] are inapplicable to section 416 notwithstanding the provisions of section 416 (1) of the 1973 *Companies Act*.[1046] Like Kunst and to some extent Blackman, Delport[1047] indicates that there is in fact no scope for the application of section 67 of the *Insolvency Act* in a winding-up. He further submits that the matters for which section 65 of the *Insolvency Act* provides for are already provided for by section 415, there is therefore no scope for the application of section 65 in the winding-up of a company. I submit that it does **not** appear that section 415 is self-sufficient to deal with this aspect of suspected offences. The latter section only deals with offences as mentioned at sub-section 5.

(v) Recording of proceedings

As regards the application of section 68 of the *Insolvency Act* to winding-up provisions, the view is that this aspect is already provided for by section 415(4). There is therefore no need for the section 416(1) provisions. Irrespective of this, Blackman[1048] refers to the application of section 68 to meetings of creditors of the insolvent company. It is clear from this statement that only records of the proceedings of a meeting of creditors must be filed with the Master, and not statements of proceedings held in private, such as sections 152 of the *Insolvency Act* and 417 and 418 held in terms of the 1973 *Companies Act*. After careful

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1043 Kunst *et al Meskin Insolvency Law* 8-18, fn 12.
1044 Blackman *et al Commentary on the Companies Act* 14-444.
1045 This section provides for steps to be taken against any person suspected of committing an offence in terms of the *Insolvency Act*.
1046 See s 339 of the 1973 *Companies Act*.
1047 Delport *Henochsberg on the Companies Act* 886.
1048 Blackman *et al Commentary on the Companies Act* 14-444.

investigation, however, it is clear that section 415 is self-sufficient to the extent stated above.

3.3.3.3 Section 416(2): Reiteration of the provisions of 416(1)

This sub-section reiterates the provisions of section 416(1) and the two should be read together.

The sub-section provides as follows:

> In applying the said sections 66, 67 and 68 of the *Insolvency Act*, 1936, in terms of subsection (1) of this section, any reference in any of the said sections or in 64 or 65 of that *Act*- (a) to the estate of an insolvent, shall be construed as a reference to the estate of the company concerned; (b) to the trustee of an insolvent estate, shall be construed as a reference to the liquidator of such company; (c) to a meeting of the creditors of an insolvent, shall be construed as a reference to a meeting of the creditors of such company; (d) to a creditor who has proved a claim against an insolvent estate, shall be construed as a reference to a person who has proved a claim against such company; (e) to the business or affairs or property of an insolvent, shall be construed as a reference to the business or affairs or property of such company; (f) to any person indebted to an insolvent estate, shall be construed as a reference to a person indebted to such company; (g) to the sequestration of an insolvent estate, shall be construed as a reference to the commencement of the winding-up of such company.

This sub-section is self-explanatory. No writer expands on sub-section 2, for obvious reasons. Section 416 corresponds with the above-mentioned sections of the *Insolvency Act* and should be read with these sections.

As regards the aspect of punishment of persons not complying with the provisions of sections 414 and 415, the following is clear:

(1) the officer presiding over the meeting of creditors may issue a warrant for the apprehension of a transgressor only if such an officer is a magistrate.[1049]

(2) the person apprehended may be discharged after he has complied with what is required of him.[1050]

[1049] Section 66(1) of the *Insolvency Act*. See also the decision of *De Lange v Smuts* 1998 (3) SA 785 (CC) as discussed at ch 2 above; *Nel v Le Roux* 1996 (3) SA 562 (CC) in general.

[1050] Section 66(5). See also the decision in *De Lange v Smuts* 1998 (3) SA 785 (CC) as discussed at ch 2 above.

(3) it is in the public interest that persons subpoenaed should comply with the provisions of the subpoena. There is a compelling reason why they should do so.[1051]

(4) misleading the meeting of the creditors is not acceptable either. The presiding officer who is a magistrate may order committal of the witness to prison.[1052]

3.3.4 Section 417: Summoning and examination of persons

3.3.4.1 Introduction

This section makes provision for a **private** summoning and examination of directors and officers or any persons deemed necessary by the Master or Court as to the affairs of the company unable to pay its debts. It is commonly referred to as "private interrogation" Kunst[1053] points out that this type of examination is extensive and private in nature. This, she submits, is necessitated by the legislature's desire to facilitate the smooth administration of the winding-up. Blackman[1054] also highlights the extraordinary,[1055] secretive and private nature of this proceeding. He points out that this feature is unique to an enquiry held in terms of this section as opposed to an enquiry in terms of section 415, which is publicly held at the meeting of creditors of the affected company. He further avers that the section 417 enquiry is only applicable in compulsory winding-up by the court as opposed to section 415 which applies in both compulsory and voluntary liquidation.[1056] In addition, prior to its amendment,[1057] section 417 empowered only the courts to conduct examinations of this kind.

1051 *De Lange v Smuts* 1998 (3) SA 785 (CC) 823. See also Blackman *et al Commentary on the Companies Act* 14-441.

1052 Section 66(3) of the *Insolvency Act* as applicable to proceedings in company insolvency. See also Kunst *et al Meskin Insolvency Law* 8-17; Blackman *et al Commentary on the Companies Act* 14-443.

1053 Kunst *et al Meskin Insolvency Law* 8-23.

1054 Blackman *et al Commentary on the Companies Act* 14-457.

1055 Blackman *et al Commentary on the Companies Act* 14-457-14- 459.

1056 See also Cilliers *et al Corporate Law* 533.

1057 By s 9 of the *Companies Amendment Act* 29 of 1985.

Joubert and Calitz[1058] bring to the fore the point that there is a perception that the provisions of section 417 are exceedingly severe and that the potential scope of the provision is not proportionate to the underlying principle for which it was enacted.[1059]

Relying on *Ex parte City Silk Emporium*,[1060] Kunst[1061] points out that the provisions of sections 64 and 65 of the *Insolvency Act* have no application to an examination under section 417. This is due to the fact that section 417 proceedings are private as opposed to public proceedings in terms of sections 64 and 65 of the *Insolvency Act.* He, however, notes the fact that the provisions of regulation 4 of the *Insolvency Regulations* apply as is in this context.

Sharrock[1062] differentiates between interrogations[1063] and enquiries.[1064] He highlights that in the winding-up of a company unable to pay its debts, the Master or the court may, at any time after the winding up order has been made, hold an enquiry, or appoint a commissioner to hold an enquiry, into the trade, dealings, affairs or property of the company.[1065] He points out that the Master's decision to hold an enquiry is reviewable under section 151 of the *Insolvency Act*, but it is not an administrative action and hence not subject to review under the *Promotion of Administrative Justice Act*.[1066]

Although these proceedings may take place in a court of law, it is not the court itself that conducts these examinations. The Master or court appoints a commissioner who presides over the commission of enquiry in case of section 418 enquiries.[1067]

1058 2014 *PER* 1.

1059 See also Blackman *et al Commentary on the Companies Act* 14-450-14-451, he relies on *Ferreira v Levin* 1996 (1) SA 984 (CC) 1121.

1060 1947 (4) SA 576 (C) 579.

1061 At 8-30 fn 2.

1062 Sharrock *et al Hockly's Insolvency Law* 264.

1063 In terms of s 414 and 415 of the 1973 *Insolvency Act*.

1064 In terms of s 417 and 418 of the 1973 *Companies Act*.

1065 Sections 417 and 418 of the 1973 *Companies Act*. See also Blackman *et al Commentary on the Companies Act* 14-447.

1066 3 of 2000. He refers to *Nedbank v Master of the High Court, Witwatersrand Local Division* 2009 (3) SA 403 (W) 412, 416. See also Blackman *et al Commentary on the Companies Act* 14-449 regarding the nature of this proceedings.

1067 See also Blackman *et al Commentary on the Companies Act* 14-448.

Accordingly, this section is of no application to a company which is being wound-up as a result of creditor's voluntary winding-up in terms of section 351(1) of the 1973 *Companies Act*. Sharrock, however, highlights that the section may be rendered applicable by the court acting under section 388 of the 1973 *Companies Act* [1068] and/or by a member or creditor successfully applying to the court for such order.

This section appears to be an equivalent of section 152 of the *Insolvency Act.* An investigation is going to be conducted to verify if there are any similarities or differences between the two sections.

3.3.4.2 Section 417(1): Attending meetings of creditors

The sub-section makes provision for the summoning of directors and officers of a company in winding-up and unable to pay its debts to appear before the Master or court for examination on issues relating to the company in liquidation. Other persons suspected of being in possession of the said company's property, indebted to the company or with any links to the company may be summoned as well to provide information relating to the affairs, trade, dealings and property of the company.[1069]

The sub-section provides as follows:

> 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 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.[1070]

(i) Summoning directors, officers or any persons

[1068] This section provides for circumstances under which section 417 may apply to the liquidation of a company in voluntary winding-up. This can be possible for example if the liquidator, a member or creditor of the said company apply to the court for such an interrogation.

[1069] See *Ferreira v Levin* 1996 (1) SA 984 1076-1077; *Bernstein v Bester* 1996 (2) SA 751 (CC) 777. See also Blackman *et al Commentary on the Companies Act* 14-452-1.

[1070] Sub-section 1 substituted by s 9 (*a*) of *Act* 29 of 1985.

Although ordinarily an application for the examination will be made to the court or Master by the liquidator, such application may also be made by any person having no financial interest in the company.[1071]

In *Lok v Venter* [1072] the court pointed out that an application for examination in terms of section 417 of the 1973 *Companies Act* may be made even by a person having no financial or other interest in the company in liquidation.[1073] In this case, the applicant was a provisional judicial manager. The court equated a judicial manager to a liquidator. The court further held that section 417 gives the court the power to summon before it persons believed to be capable of giving information concerning the trade, dealings, affairs or property of the company. The court further pointed out that, although the liquidator and any other creditor or member has a right of representation and audience at such an enquiry, the power to conduct the enquiry and to summons witnesses before it, is a power which section 417 undoubtedly vests in the court.

The court decided In *R Miller v Nafcoc* [1074] that the sub-section does not require that any application for the examination be made. However, Delport[1075] submits that neither the Master nor the court will authorise an examination without being requested to do so. This may be due to the fact that it cannot be expected of the court or the Master to have information or knowledge of what is occurring in companies being wound-up (or companies under business rescue) within his/its area of jurisdiction, without someone formally bringing the relevant matters to its attention.[1076] Furthermore, it is also unlikely that a court will readily conduct an examination or cause an examination to be conducted without first being satisfied that the company is likely to benefit from such an enquiry.[1077] The court will also need to satisfy itself that an enquiry will not unnecessarily dissipate funds of the

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1071 *Lok v Venter* 1982 (1) SA 53 58A.
1072 *Lok v Venter* 1982 (1) SA 53 58A. See also Kunst *et al Meskin Insolvency Law* 8-23.
1073 See also Blackman *et al Commentary on the Companies Act* 14-461.
1074 [2010] 4 All SA 44 (SCA) para 9.
1075 Delport *Henochsberg on the Companies Act* 888.
1076 *Lok v Venter* 1982 (1) SA 53 58A.
1077 *Lok v Venter* 1982 (1) SA 53 58A.

company which otherwise would be available to creditors.[1078] I concur. The central objective of these enquiries is the interests of the general body of creditors.

Kunst[1079] and Blackman[1080] contend that the application is usually made by the liquidator because he is best suited to know why the effective administration of the winding-up necessitates there being an examination. This makes sense. The court or the Master may investigate upon allegations made by any interested person. The Master or the court would be unable to act unless he/it was given information from specified persons.[1081] This does not, however, restrict the court or the Master from investigating in the event of suspicion or the Master suspecting irregularities on the records submitted by the liquidator.

Delport[1082] and Blackman[1083] note that although the sub-section provides for the summoning of any person, including a director or officer of the company, it does not provide for the summoning of a company or other body corporate. The reasoning behind this provision is the fact that a company can only function and answer questions through its officers and directors and not the other way round.[1084] Like Delport, Kunst[1085] notes that it is not competent to summon a company or other body corporate to an enquiry.[1086] Relying on *Venter v Williams* [1087] Kunst, Delport[1088] and Blackman[1089] bring forth the point that the liquidator of the company, in his capacity as such, may be summoned. The latter highlights that there is in fact no rule prohibiting the summoning of the liquidator. She is, however, not ignorant of

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1078 *Lok v Venter* 1982 (1) SA 53 (W) 58A.
1079 Kunst *et al Meskin Insolvency Law* 8-23.
1080 Blackman *et al Commentary on the Companies Act* 14-461.
1081 *Venter v Williams* 1982 (2) SA 310 (N) 313-314, also reported at [1982] 1 All SA 8 (N) –Ed]; *Lok and v Venter* 1982 (1) SA 53 (W) at 58 [also reported at [1982] 3 All SA 105 (W)- Ed]; *Foot v Alloyex* 1982 (3) SA 378 (D) 383-384.
1082 Delport *Henochsberg on the Companies Act* 891.
1083 Blackman *et al Commentary on the Companies Act* 14-453.
1084 *Bernstein v Bester* 1996 (2) SA 751 (CC); (1996) (4) BCLR 449.
1085 Kunst *et al Meskin Insolvency Law* 8-24(1).
1086 Relying on *Simmons v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 913-916 and *O' Shea v Van Zyl* 2012 (1) SA 303 (SCA) para 19-25.
1087 1982 (2) SA 310 (N) 316.
1088 Kunst *et al Meskin Insolvency Law* 8-24(1); Delport *Henochsberg on the Companies Act* 891.
1089 Blackman *et al Commentary on the Companies Act* 14-453, he relies on *Venter v Williams* 1982 (2) SA 310 (N) 316.

the fact that the liquidator is in any event accountable to the Master. Both Delport, Blackman and Kunst acknowledge that in view of the Master's power under section 381 of the 1973 *Companies Act*,[1090] it would be in exceptional circumstances only, that the court or the Master would so summon the liquidator.

According to *Venter v Williams* [1091] this does not, however, mean that the liquidator's conduct is outside the powers of the court or Master for the purposes of the enquiry under this sub-section.[1092] Delport further submits that a liquidator of a company other than the company to which an enquiry pertains, may be summoned if he can give relevant information about the latter. He further submits that even a judicial manager of a company under judicial management may be summoned. It must be noted that judicial management has since been repealed and replaced by business rescue under the 2008 *Companies Act*. It is my submission that the sub-section should be applicable to a business rescue practitioner in business rescue. Accordingly, those deemed capable of giving relevant information should be summoned, including a business rescue practitioner.

(ii) The infamous *Kebble v Gainsford* [1093] case

In *Kebble v Gainsford* the only surviving director of an insolvent company in liquidation was summoned in terms of sections 417 and 418 of the 1973 *Companies Act* to be examined at a private enquiry. He challenged the court's decision to have him summoned. The basis of his challenge was that he was only an executive director of the company and was thus not involved in the day-to-day running of the business nor did he have knowledge of the manner in which the business was conducted.[1094] According to him, he was not supposed to be summoned – his argument based on the fact that he had already made a settlement agreement to discharge the company (of which he was an executive director) from liability to the

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1090 This section empowers the Master to control and supervise the conduct of the liquidators in relation to the administration of insolvent companies.
1091 1982 (2) SA 310 (N) at 313-314.
1092 1982 (2) SA 310 (N) 316. Delport concurs. See Delport *Henochsberg on the Companies Act* 891.
1093 2010 (1) SA 561 (GSJ).
1094 Paragraph 6.

main creditor. Further that the liquidators were already in possession of information required for the winding-up of the company. If the enquiry were to proceed, that would amount to an abuse of the processes of the court.[1095]

Responding to these contentions and quoting *Bernstein v Bester* [1096] the court highlighted[1097] the following point: that it is often that the very persons who are responsible for the mismanagement of and devaluations of the company are the only persons who have knowledge of the workings of the company prior to liquidation and are; for this very reason, reluctant to assist the liquidator voluntarily. The court specifically mentioned directors, other officers and certain outsiders working in collaboration with directors and officers. In the case in question, the court did not see the need to differentiate between an executive and a non-executive director. The reason might be that, for the purposes of sections 417 and 418, there is no need to so differentiate because both these officers are persons of interest for the purposes of the above-mentioned sections.

Further to the above view, the court pointed out[1098] that to determine whether the proposed enquiry is an abuse or not, depends on the circumstances of the case. To determine whether there is such an abuse, the court is obligated to collectively 'weigh up all of the factors both for and against the holding of an enquiry'. According to the court, cross-examination to test the credibility of a witness may or may not be permissible, depending on the circumstances.[1099] Investigation for possible offences is also one of the objectives of the enquiry - there is accordingly no limitation on the scope of such enquiry, especially if fraud is suspected.[1100] The fact that fraud was behind the incorporation of the company under investigation was said to be a factor strengthening the need for the enquiry. The enquiry was considered to have the potential to: (i) recover other assets for the estate; and (ii)

[1095] Paragraph 12.
[1096] 1996 (2) (SA 751) (CC) para 16.
[1097] Paragraph 57.
[1098] Paragraph 59.
[1099] Paragraph 60.
[1100] Paragraph 61-62.

determine the existence or validity of other potential claims against the insolvent company.

Considering the fact that the company under investigation was admittedly formed for the sole purpose of perpetuating fraud, that was certainly a legitimate reason to proceed with the enquiry for the purpose of interrogating the surviving director of that company, specifically on issues relating to the fraud involved.[1101]

The court[1102] pointed out that the very reason that Kebble is the only surviving director of the company, and he maintains that he has no knowledge of the affairs of the company, necessitates his coming forward to explain how is it possible for him to claim that he has no such knowledge and to test the sincerity of that argument. The court further pointed out and correctly so that it is possible that if documents relating to a particular transaction were presented to Kebble, his memory might be revived adequately for him to help the liquidators understand those documents better.[1103] Besides, it is the duty of a subpoenaed person to honour the subpoenas. This duty is recognised in all democratic states where the state has a duty to resolve civil disputes and to prosecute persons charged with the commission of crimes.[1104] The consequence of ignoring a subpoena is a sanction of imprisonment, that is also the case for persons who contravene lawfully passed legislation.[1105]

From the above discussion, it appears that Kunst and Delport agree with these viewpoints. Observing the consistency of court decisions on these issues over time convinces one to accept that these views are of general application and should thus be accepted as the general rule.

(iii) The purpose of summoning persons to the enquiries

[1101] Paragraph 63
[1102] Paragraph 72.
[1103] Paragraph 73.
[1104] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 51.
[1105] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 53.

The purpose and objectives to be achieved by summoning persons to the enquiry are amongst others: to search for and recover assets and property of a company unable to pay its debts and in winding-up; to establish whether or not an insolvent company was a party to any impeachable transactions which are capable of being set aside;[1106] to determine whether any claims can be instituted against officers, directors[1107] or other persons;[1108] to determine directors' liability in the case of companies in winding-up;[1109] and to test the validity of claims against the insolvent company.[1110]

The importance of these enquiries was demonstrated in the judicial decisions that follow. In *Minnaar v Van Rooyen* [1111] the section 417 interrogations established amongst other things, the liability of former directors of Askari (in liquidation) in terms of section 424 of the 1973 *Companies Act.* The enquiry established[1112] facts upon which the main creditors of Askari relied for their case of recklessness (against directors) in the running of the affairs of the company.

In *Van Zyl v The Master of the High Court* [1113] an enquiry held in terms of sections 417 and 418 established that a supposedly secured creditor (of a company in winding-up) was in fact not so secured, but could probably be a concurrent creditor. The Master of the High Court had initially declined to expunge the claim following the liquidators' plea. The decision of the Master was then referred to court for review, hence this case. It transpired after evidence was led that the claim was in

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1106 *Von Wielligh Bester v Merchant Commercial Finance and Others* (16211/13) [2014] ZAWCHC 16; *Gainsford v Tanzer Transport (Pty) Ltd*, *In Re*; *Gainsford v Tanzer Transport (Pty) Limited* (076/2013) [2014] ZASCA 32; 2014 (3) SA 468 (SCA); [2014] 3 All SA 21 (SCA) paras 32-33.

1107 In terms of s 77 of the *Companies Act* 71 of 2008.

1108 Such as former auditors, accountants and consultants. See in this regard *Minnaar v Van Rooyen* [2015] ZASCA 114; 2016 (1) SA 117 (SCA); *Bernstein v Bester* 1996 (2) SA 751 (CC).

1109 Sections 423 and 424 of the 1973 *Companies Act* and s 163 and 218 of the 2008 *Companies Act*. See also *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) discussed at para 3.3.5.3 below.

1110 *Van Zyl v Master of the High Court of South Africa, Western Cape High Court* (2876/2012) [2012] ZAWCHC 361.

1111 *Minnaar v Van Rooyen* (20407/2014) [2015] ZASCA 114; 2016 (1) SA 117 (SCA).

1112 Paragraph 6.

1113 *Van Zyl v Master of the High Court of South Africa, Western Cape High Court* [2012] ZAWCHC 361.

fact capable of being expunged due to fabrication and perjury. The court subsequently set aside the decision of the Master and rendered the claim expunged.

In the case of *Kebble v Gainsford* [1114] the court was called upon to answer the question as to the purpose of summoning directors and certain persons in terms of section 417 read with section 418 of the 1973 *Companies Act*. The court relied[1115] mostly on the case of *Bernstein v Bester*[1116] and cases there cited.[1117]

Applying the law to the facts of the case, the court[1118] held that the enquiry was necessary for the following reasons:

(1) Kebble was the only surviving director of the company in liquidation and has in his own version admitted that the company was formed merely as a vehicle for fraud. It conducted no legitimate business. The court held that if Kebble's testimony was taken as is, the business of the company was based on fraud. According to the court,[1119] this situation made it even more important that the liquidators be afforded an opportunity to interrogate the sole surviving director concerning the affairs of the company.

(2) the stronger the evidence of fraud, the more likely that an enquiry is justified. In this case, the examinee himself confirms that the sole purpose of the company was to commit fraud.

(3) the company is significantly indebted. Randgold's claim (one of its proved creditors), which runs into millions, remains unpaid as a result of an undisputed fraud. It is surely in the interest of the public for the liquidators to use all of the

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[1114] *Kebble v Gainsford* [2009] ZAGPJHC 3; 2010 (1) SA 561 (GSJ). See also Kunst *et al Meskin Insolvency Law* 8-22; Delport *Henochsberg on the Companies Act* 894(7).

[1115] Paragraph 57.

[1116] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 15-16. See the discussion of this case in this para below.

[1117] See *Clover Bay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] 1 All ER 894 (CA) 896; *Ex Parte Clifford Homes Construction* (Pty) Limited 1989 (4) SA 610 (W) 61.

[1118] Paragraph 75-86.

[1119] Paragraph 76.

machinery of section 417 to conduct a full enquiry into the causes of the company's failure.

(4) the fraud that was admittedly committed appears to be of a complex nature. In such a situation, it is even more important that the sole surviving director of the company be interrogated on the details of the transaction than in other situations.

(5) it is apparent that Kebble was willing to pay R30 million out of his own pocket in order to bring the enquiry to an end and to avoid Randgold pursuing further claims against him.[1120] This is not the action of a person who has no knowledge of the affairs of a company, held the court.[1121] From the evidence available, the very fact that he sought to enter into such a settlement strengthens the inference that he should be interrogated.

(6) as a matter of public policy, it is undesirable to permit an examinee, who is a former director of a company that was conceived for fraud, to avoid a liquidator's enquiry through a settlement to which the liquidators are not party.

(7) Kebble himself has conceded that the company or the liquidators may have legitimate claims against the other entities listed in the answering affidavit. The liquidators should have the opportunity to investigate these claims and to question the sole surviving director about them.

(8) as long as the Randgold claim against the company remains unpaid, and it is not yet clear that there are no other unsatisfied claims, the liquidators have a duty to diligently pursue all potential assets, claims and recoveries for the benefit of **all** creditors.

(9) the fact that the liquidators have conducted their own investigations and have properly prepared the groundwork for the enquiry can never be held against them.

[1120] Paragraph 80.
[1121] Paragraph 80.

If a liquidator has not done his homework and prepared for the enquiry, he will accomplish little in the enquiry.[1122]

The court expressed the view that since the Commissioner is an officer of the court, and duly appointed by the Master, it is incumbent on the former to protect the examinee from improper questions and abuse. Accordingly, if abusive questions were to be posed at the enquiry, it would be the duty of the Commissioner to disallow such questions.[1123] The court cautioned that, if the Commissioner were to exercise her discretion incorrectly, her decision would be subjected to review. Since there was no indication at that stage that the question to be posed to the examinee would be abusive, the objection to the interrogation was said to be premature.[1124] In conclusion, the court correctly held[1125] that, based on the above evidence, there is indeed a need for an enquiry.

Relying on the matter of *Bernstein v Bester*,[1126] the court in *Nyathi v Cloete* [1127] highlighted the reasons for summoning certain persons for examination purposes. The objectives to be achieved by bringing those individuals before the proceedings are crucial for the proper liquidation and administration of insolvent companies' affairs. It is submitted that this makes it clear that there is no other way to achieve the above-mentioned objectives. To ensure that the affairs of an insolvent company are investigated thoroughly and no relevant material facts are left outside of the investigation, it is crucial to fully employ mechanisms provided for in law. This additional measure can be added to the clear guidelines in the *Kebble v Gainsford* case.

Kunst[1128] highlights the fact that there is no limitation upon the matters about which there can be examination of the director, officer or other persons summoned under

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1122 Paragraph 85. According to the court, Kebble's argument was that if the liquidator was well prepared for the enquiry, the enquiry becomes unnecessary.
1123 Paragraph 86.
1124 Paragraph 87.
1125 Paragraph 88.
1126 1996 (2) SA 751 (CC).
1127 *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) paras 5 and 6.
1128 Kunst *et al Meskin Insolvency Law* 8-23.

these provisions. The rule is that all matters concerning the trade, dealings, affairs or property of the company are relevant to the examination. Accordingly, the scope is wide.[1129]

In *Bernstein v Bester* [1130] the court carefully and exhaustively analysed the nature and purpose of the section 417 enquiry and mostly the functions of the liquidators in relation to the latter section. The enquiry was said to assist the liquidators in any winding-up to proceed without delay to regain and reduce into possession all the assets and property of the company, movable and immovable; to give to the Master such information and generally such aid as may be vital for enabling him to perform his duties under the said legislation; to scrutinise the affairs and operations of the company before its winding-up for the purpose of determining whether any of the directors and officers or past directors or officers of the company have contravened or appear to have contravened any of the provisions of the statute or have committed or appear to have committed any other offence.

(iv) Enquiries' objectives

The enquiry under sections 417 and 418 was said to have many objectives.[1131] Amongst these objectives is the objective of assisting liquidators in discharging the aforementioned duties so that they can determine the most advantageous course to adopt in the liquidation of a company. In particular, the enquiry was said to be aimed at achieving the primary goal of liquidators, namely to determine what the assets and liabilities of the company are, to recover the assets and to pay the liabilities and to do so in a way that would best serve the interest of the company's creditors. The court held[1132] that liquidators have a duty to enquire into the company's affairs. This enquiry is aimed at reducing the assets of the company into their possession and to deal with them in a prescribed manner, and work as an ancillary power to recover the company's assets properly. The court further held[1133]

[1129] See also Delport *Henochsberg on the Companies Act* 894(7).
[1130] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 15-16.
[1131] Paragraph 16.
[1132] Paragraph 16.
[1133] Paragraph 16.

that it is only by conducting such enquiries that liquidators can determine what the assets are and who the creditors and contributories of the company are; to properly investigate doubtful claims against outsiders before pursuing them, as well as against the company before pursuing them. The court also held[1134] that it is permissible for the interrogation to be directed exclusively to the general credibility of an examinee, where the testing of such person's veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound-up.

In these circumstances, it is in the interests of creditors and the public generally to compel such person to assist. Accordingly,[1135] the interrogation is essential to: enable the liquidators, who most frequently come into the company with no previous knowledge and find that the company's records are missing or defective, to get sufficient information to reconstitute the state of knowledge that the company should possess; such information is not limited to documents because it is almost inevitable that there will be transactions which are difficult to discover or understand from the written materials of the company alone.

This additional measure can be added to the clear guidelines as regards the purpose and scope of the examination. Further, in the case, the court held[1136] that the liquidator must, in such circumstances, be enabled to put the affairs of the company in order and to carry out the liquidation in all of its varying aspects. The court further held that the interrogation may be necessary in order to: enable the liquidator, who thinks that he may be under a duty to recover something from an officer or an 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 claim. Further, in the *Bernstein* case it was also held[1137] that there is a responsibility on those who use companies to raise money from the public and to conduct business on the basis of limited liability to account

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1134 Paragraph 16.
1135 Paragraph 16
1136 Paragraph 16.
1137 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 85.

to shareholders and creditors for the failure of the business, if the company goes insolvent. Giving evidence at a section 417 enquiry is part of this responsibility. The responsibility was said not to be limited to officers of the company in the strictest sense, but extends also to the external auditors of the company. This makes sense. Auditors (although not officers of the company in liquidation)[1138] are in a position to provide a detailed financial history of the company, specifically for periods leading to its inability to pay debts and subsequent insolvency.

External auditors can also be persons of interest as far as the affairs of an insolvent company are concerned. They have a special relationship with a company. It is only fair that they should assist the company in sorting out its affairs. Blackman refers to the auditor-company relationship as a legal relationship. According to him, this special relationship necessitates the examination of these external 'third parties' as regards the financial affairs of the affected company.[1139] He refers to instances where courts have permitted the examination of the company's auditors, the auditors of companies who had business dealings with the affected company and of former officers of the latter. This would be the case despite the possibility of the institution of proceedings against the said officers.[1140] This broad scope is indicative of the need to call forward all persons who have in their possession information relating to the company concerned. This is intended for an effective and efficient administration of the affairs of the insolvent company.

The *Bernstein* case emphasised the important public purpose served by the section 417 enquiries.[1141] It is clear that this public purpose cannot be overstated. Through these enquiries, dishonest conduct of the affairs of companies may be unearthed.[1142] The co-operation of directors and other individuals is thus essential for the thorough investigation and reconstruction of the affairs of failed companies.[1143] Directors,

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[1138] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 50. See also Blackman *et al Commentary on the Companies Act* 14-474-1 – 14-475.
[1139] Blackman *et al Commentary on the Companies Act* 14-452-1 – 14-453.
[1140] Footnote 412.
[1141] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 85.
[1142] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 50.
[1143] *Bernstein v Bester* 1996 (2) SA 751 (CC) para 50.

office bearers and auditors of the company are considered 'think tanks' of the company, it is only fair for them to provide the company with information (stored in their brains and documents) about itself.[1144]

In *Ferreira v Levin* [1145] and *Bernstein v Bester* [1146] the courts highlighted the point that companies are funded through public money and its members enjoy limited liability. This is considered an advantage, especially in insolvency circumstances where members will under normal circumstances not be expected to pay the debts of the company. This is also particularly true of directors, who are often shareholders in companies in which they hold positions of directorship. The said advantage was said to have concomitant responsibilities which includes amongst other things, accountability to the shareholders and creditors, specifically in the manner in which the affairs of the company are conducted. Accountability was said to even apply in the case were the company subsequently goes insolvent. The responsibility that comes with holding the offices of directors and other officers in relation to the company were said to be well known by the said officers.

From all the cases discussed above, the following is clear:

(1) the position of directorship is onerous.

(2) these officers are expected to account throughout as to how the business of the company is or was conducted, the profit made and losses experienced.

(3) public policy dictates that persons with information relating to the affected company should bring the said information to the liquidators' attention.

(4) complete and full accountability is required and expected from the directors and other officers of an insolvent company. It should therefore not come as a surprise when the company, through its liquidators, requires them to account.

1144 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 50.
1145 *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC) para 151; *Bernstein v Bester* 1996 (2) 751 (CC) para 85.
1146 1996 (2) SA 751 (CC) para 85.

(5) they would not be allowed to abandon the company they once headed when it is now under insolvency circumstances.

(6) it is clear that external auditors who once audited the finances of the now liquidated company may be required to come forward with information in their books, as long as such information relates to finances of the company in liquidation.[1147]

(7) these enquiries can unearth fraud and crooked dealings.

3.3.4.3 Section 417(1A): Legal representation

The sub-section sanctions legal representation for anyone summoned in terms of section 417(1) of this statute.

The sub-section provides as follows:

> Any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.

This is a private enquiry like section 152 of the *Insolvency Act.* However, unlike section 152, this sub-section expressly provides for legal representation of an examinee by either attorney or counsel.[1148] Since this is a private examination, it is logical that a legal representative can only be present at the interrogation where his client is interrogated. If his client is not interrogated, he may be barred from attending.[1149]

It is important to note that an examinee is also entitled to be informed of his right to legal representation, especially if he is not represented – this duty, as imposed on the presiding officer at the enquiry, is intended to ensure that such interrogation is conducted within the precepts of justice.[1150]

1147 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 50.
1148 See also Blackman *et al Commentary on the Companies Act* 14-458-1.
1149 See Kunst *et al Meskin Insolvency Law* 8-26; Delport *Henochsberg on the Companies Act* 893.
1150 See *Benson, In re: Tait v Jason* [2012] ZAWCHC 377 at para 18 and cases cited thereat. See also Blackman *et al Commentary on the Companies Act* 14-479.

Kunst[1151] as well as Delport submit that this right to legal representation is intended to be a right to effective representation. This right to effective legal representation includes the limited right of re-examination by the witness's attorney or counsel[1152] and the right of access to books and papers relating to his client's interrogation. This will be the case, even in the absence of a direction under section 417 (7)[1153] and also as representative under the *Promotion of Access to Information Act*.[1154] Blackman highlights that the legal representative of an examinee may, on behalf of his client, object to any question posed by the examiner. This would be intended to protect the examinee and advise him as to whether or not to answer a particular question or draw his attention to clarifying his responses.[1155]

In *Benson, In re: Tait v Jason* [1156] an examinee chose not to be represented at his examination after he was informed by the Commissioner of his right to be legally represented. He explained his choice stating that he understood that the purpose of the enquiry was to ascertain the whereabouts of the company's assets. He later asserted that he did not realise that the enquiry might be used to 'seek evidence to substantiate a claim against him in his personal capacity'.[1157] The documents and records before the court indicate that the Commissioner noted the absence of any legal representation in attendance when the examinee was called to be examined.[1158] Before any questions were posed to him, the Commissioner drew the examinee's attention to his right to be represented and asked him if he was content to proceed without representation and he responded affirmatively. The Commissioner[1159] proceeded to explain to the examinee that he would be required to answer questions that could incriminate him. The Commissioner made it

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1151 Kunst *et al Meskin Insolvency Law* 8-26; *Henochsberg on the Companies Act* 893.
1152 *Re Cambrian Mining Company* (1881) 20 Ch 376 at 379.
1153 This section provides as follows: "Any examination or enquiry under this section or section 418 and any application therefore shall be private and confidential, unless the Master or the Court, either generally, or in respect of any particular person, directs otherwise".
1154 2 of 2000, hereinafter "the *Promotion of Access to Information Act*". See also Delport *Henochsberg on the Companies Act* 893.
1155 Blackman *et al Commentary on the Companies Act* 14-458-1.
1156 [2012] ZAWCHC 377. Although this case referred to s 418 of the 1973 *Companies Act*, it is my opinion that the same applies in the case of s 417.
1157 Paragraph 6.
1158 Paragraph 7.
1159 Paragraph 7.

pertinently clear that he was not ignorant of the fact that the examinee was not represented, and for that reason, he would ensure that he is not questioned unfairly.[1160]

3.3.4.4 Section 417(2) (a), (b) and (c): Examination under oath

The sub-section provides for the examination (under oath or affirmation) of persons summoned in terms of sub-section 1 of section 417 of this statute. The examination may be either oral or written. Examinees are required to answer even potentially incriminatory questions. The admissibility of the evidence so given at the examination is limited to specified criminal proceedings[1161] against the deponent.

The sub-section provides as follows:

> The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them;[1162] (b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecution who has jurisdiction;[1163] (c) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to- (i) the administering or taking of an oath or the administering or making of an affirmation; (ii) the giving of false evidence; (iii) the making of a false statement; or (iv) a failure to answer lawful questions fully and satisfactorily.[1164]

(i) *Viva voce* evidence or written interrogatories under oath

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[1160] In this case the application for the orders setting aside the decision of the court, authorising the
disclosure of the record of the enquiry proceedings in terms of ss 417 and 418 of the *Companies Act* in respect of the company in liquidation, was refused. The questions concerning the admissibility of the references to the enquiry evidence in the affidavits and annexures filed of record in the proceedings instituted in terms of s 424 of the *Companies Act* and the introduction in those proceedings - as agreed to by the applicants in those proceedings, was deferred for determination, if necessary, by the judge who presides in those proceedings.

[1161] Perjury related offences.

[1162] Paragraph (a) substituted by s 9 (*c*) of *Act* 29 of 1985.

[1163] Paragraph (b) substituted by s 11 (*a*) of *Act* 55 of 2002.

[1164] Paragraph (c) added by s 9 (*d*) of *Act* 55 of 2002.

Unlike the corresponding *Insolvency Act* provisions, this sub-section makes express provision for an affirmation in the stead of an oath to accommodate different religions as dictated by the *Constitution*. As regards the question of whether the interrogations should be by way of written answers to written questions or verbally submitted, the view is that the circumstances of the case and the type of evidence so required should be the determining factor.[1165]

In *Nyathi v Cloete*,[1166] the applicants had been subpoenaed to appear for a private enquiry in terms of sections 417 and 418 of the 1973 *Companies Act*. They requested from the Commissioner that their examination be by way of written interrogatories, instead of oral evidence. Their request was dismissed, hence this application

In arriving at its decision whether *viva voce* or written interrogatories should be opted for,[1167] the court took into consideration the following factors:

(1) In deciding on an application for the examination to proceed by way of oral interrogatories, the Commissioner is conferred discretion which he must exercise taking into consideration the circumstances of the case. According to the court,[1168] it was not desirable and in any event impossible to formulate an all-embracing list of criteria, which need to be considered before a choice is made as regards a suitable method of obtaining information. The court also considered the case of *Katz v Colonial Realty Trust* [1169] where it was highlighted[1170] that there must be good reasons for having a written enquiry as opposed to an oral examination.

(2) In its view, the court opined that written interrogatory would be appropriate where, for example, the information sought is merely formal in nature.

1165 See in general *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) as discussed in this para below.
1166 *Nyathi v Cloete* 2012 (6) SA 631 (GSJ).
1167 Paragraph 6.
1168 Paragraph 6.
1169 1954 (4) SA 302 (W).
1170 Further quoted thereat as useful guidance was the English case of *Re Rolls Razor Limited* [1969] 3 All ER 1386 at 1401, see discussion of this case below. This case is relevant to this thesis - English law is a comparative jurisdiction for the purpose of this thesis.

It is accepted that a written interrogatory as a forerunner to oral examination might in certain circumstances be appropriate and would save time and expenses.[1171] However, where the liquidation of a company is evidently the result of mismanagement or where fraud and theft on the part of the directors and other officers of the company seem to have steered the downfall thereof, the submission of written questions would indisputably undercut the goal and rationale of the enquiry.[1172]

The officers and directors of the company are the "only eyes, ears and brains of the company and often the only persons who have knowledge of the workings of the company".[1173] Again, the court supported the (already crystalised) principle that directors and other officers of a company in liquidation are compellable to come forward with the required information to assist in the effective and efficient liquidation of the affairs of the affected company. The liquidators do not have any prior knowledge of the business thereof - they are "strangers" to the affairs of the company[1174] and therefore dependent on the oral examination and cross-examination of witness to probe and hopefully learn the truth concerning the affairs of the company.[1175] This view of the court is, in my opinion, widely accepted. Most witnesses would rather answer to a set of written questionnaires instead of appearing before a commissioner or Master, to be verbally interrogated. One can argue that if given a choice, a witness would rather go through written questions and think carefully of the response before answering and even request assistance from his lawyer or accountant. This indulgence may not be allowed when such witness appear before the commission or Master as answers are required immediately.

1171 See *Leech v Farber* 2000 (2) SA 444 (W) 451A-B. See also SALC *Review of the Law of Insolvency* (Volume 2) Draft Bill clause 67; Boraine and Van der Linde 1999 *TSAR* 38, 46.

1172 See F*erreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) para 124.

1173 See F*erreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) para 124.

1174 See *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] 1 All ER 894 (CA) 900e; *Re Rolls Razor* Ltd (No 2) [1969] 3 All ER 1386 (Ch) 1396-7 (both referred to and quoted in *Ferreira v Levin* at 1059G-1060G).

1175 Paragraph 6.

The court in the above case further quoted the *Lynn v Kreuger*[1176] case above as follows:

> It is very often of fundamental importance for the liquidator of a company to find out what has been done with the assets of that company and how the company's business has been run. Speed is of the essence of effectiveness in such an enquiry because, all too often, the liquidator must take early and urgent action in order to recover mismanaged or misappropriated assets for the benefit of creditors. The case under consideration seems to be an excellent example of the importance of the need for full information at a comparatively early stage of the winding-up. In this case, on the evidence which is before me, the probabilities indicate very strongly, if not overwhelmingly, that the only person who can give the applicants the information which they require is the first respondent. I think that the first respondent's prospects of persuading the Constitutional Court that the 'interrogation procedure' in respect of people who have been involved in the dealings of a company before its liquidation is unconstitutional are remote indeed. I cannot conceive of any other procedure which would enable liquidators, effectively and efficiently, to fulfill their task.

Furthermore, the court[1177] pointed out that in the circumstances, the liquidators have highlighted the need for the holding of the enquiry. Information as regards financial records and documents of the company under liquidation were not available. Further that no documents could be found notwithstanding an in-depth search. Such information was said to be necessary to enable the liquidators to recover substantial sums of monies owed to the creditors. The report of the liquidators of the second meeting of creditors, revealed that the estimated value of the assets of the second respondent is stated as R705 000 and that its liabilities amounted to R91,8 million. The liquidators were thus in no position to report eloquently on the affairs of the company due to the non-availability of the necessary documents and other information. These circumstances necessitated an enquiry which was called for and rightly ordered by the Master, said the court.[1178]

Further, the lack of co-operation by the applicants necessitated an oral interrogation into the affairs of the company under investigation. The court held[1179] the view that the applicants have failed, before either the commissioner or this court, to put

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1176 1995 (2) SA 940 (N) at 944F-I.
1177 Paragraph 7.
1178 Paragraph 7.
1179 Paragraph 7.

forward reasons for a preference to the submission of written interrogatories. The sole reason behind their contention was that the written interrogatories would considerably shorten the enquiry proceedings. This contention was correctly rejected[1180] by the court as lacking in substance. Accordingly, the Commissioner's refusal of the request was fully justified and the application to review his decision to constitute the enquiry thereof, failed.[1181]

(ii) Written submissions and questions

The factors that may help the Master or the court to decide whether written interrogation would be appropriate or not are:

(1) the liquidators' ability to discharge their duties on the basis of written interrogatories;

(2) the liquidators' ability to ascertain the assets and liabilities of the company;

(3) the sufficiency of written interrogatories as the source of knowledge to enable liquidators to perform their functions;

(4) the absence of information and financial records and documents concerning the company; and

(5) the lack of co-operation from examinees.

The importance of an insolvency enquiry was stressed when the court in *Ferreira v Levin* [1182] cited and quoted the English case of *Re Rolls Razor*.[1183] In the latter case, the liquidators of a company (in a creditors' voluntary winding-up) applied *ex parte* to the registrar of the Companies Court for leave to examine the applicants and for the production of books and documents under section 268 of the *Companies Act* [1184]

[1180] Paragraph 7.
[1181] Paragraph 7.
[1182] *Ferreira v Levin*; *Vryenhoek v Powell* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 124. See also in *Bernstein v Bester* 1996 (2) SA 751 (CC) paras 24 and 55.
[1183] (2) [1970] 1 Ch 576.
[1184] 1948 (made applicable to a voluntary winding-up by s 307 of this statute).

winding-up. The applicants were at one time respectively a director and the general manager of a company in winding-up.

The applicants contended that written questions have to be submitted to them in order for them to have a reasonable time in which to answer them.[1185] In answering this contention, the court[1186] stated that one has to determine whether the circumstances of a particular case require the *viva voce* examination or the submission of written interrogatories.

Furthermore, one has to take into consideration that each case is unique.[1187] Accordingly, there may be cases in which it would be oppressive or unreasonable not to submit written questions first, thus granting the witness an opportunity to respond to such questions without appearing personally.[1188] There would also be other cases in which there ought to be an oral examination without first submitting any written questions. Between these two opposite categories, there may be many cases in which the court must determine which course is best suited to discover the relevant facts without being oppressive, vexatious or unfair.[1189] In deciding between these two opposite categories, the court will look at the facts of the case as a whole, without yielding to preconceptions; and in doing this, the court should give all proper weight to the views of the liquidator without abandoning the proper exercise of its discretion, or treating the liquidator's views as being in a way decisive of the matter.[1190]

It is a fact that the prior submission of written questions may sometimes aid and speed up the process of ascertaining the relevant facts, but sometimes it may hamper or delay the process.[1191] Furthermore, there may be a vast difference between information obtained from unsworn written answers which may have been tailor-made by attorneys and that which is obtained from *viva voce* answers given

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[1185] At 1392.
[1186] At 1401.
[1187] At 1401.
[1188] At 1401.
[1189] At 1401
[1190] At 1401.
[1191] At 1401.

under oath.[1192] In concluding, the court held that in the circumstances of this case and in the exercise of its discretion, there ought to be oral examination without any prior submission of written questions being made requisite.[1193]

It is my view that where it is possible for an interrogatee to submit answers to written questions, that option should be exercised (especially with regard to formal matters[1194] and where no unbecoming behaviour is suspected on the part of a witness in question), in order not to burden the insolvent company with expenses associated with witness fees. If not, *viva voce* evidence should be opted for.

Further to this, the issue as to whether the interrogatories are to be submitted to such a potential witness or not, must be raised initially at the enquiry.[1195] Blackman,[1196] Kunst[1197] and Delport[1198] concur with the views expressed above.[1199] From the above discussion, it appears that, where an enquiry is ordered by the Master, the court has no power prior to the commencement of the enquiry to direct that interrogations should be by way of written answers to questions pre-submitted to a contemplated examinee or be by way of oral evidence.

From the cases discussed, the following is clear: The examinee may submit evidence verbally or by answering to questions in writing. The circumstances of the case will determine whether verbal or written responses to questions will be suitable. This provision is acceptable depending on the circumstances of the case. It is thus not up to the examinee to opt for one or the other. The presiding officer applying his discretion and informed by precedent is in the best position to decide on this aspect.

(iii) The compelled testimony due to public interest

1192 At 1401.
1193 At 1401.
1194 *Nyathi v Cloete* 2012 (6) SA 631 (GSJ).
1195 *Mondi v The Master* 1997 (1) SA 641 (N). It is submitted that this should be the case to ensure that the proceedings are not unnecessarily interrupted by objections.
1196 Blackman *et al Commentary on the Companies Act* 14-480.
1197 Kunst *et al Meskin Insolvency Law* 8-26.
1198 Delport *Henochsberg on the Companies Act* 894 (3).
1199 They refer to *Mondi v The Master* 1997 (1) SA 641 (N) as authority.

It has been stated that insolvency laws have certain legitimate goals in which the public has a compelling interest that examinees disclose the required information relating to an affected liquidated company.[1200] This is said to ensure that the legitimate goals of the insolvency laws are achieved and affected persons such as creditors are protected.[1201]The public interest is said to be as compelling under certain circumstances (in this case insolvency interrogations) as would be the case in the context of a criminal trial where a person is compelled to testify in terms of section 189 of the *Criminal Procedure Act*.[1202] Everything necessary within the confines of the *Constitution* [1203] must be done to ensure that such persons are brought forward as summoned and in compliance with the laws of the state.[1204]

Although a witness may be compelled to answer incriminatory questions at the section 417 enquiry, he is protected in that he may still refuse to answer any question the answer to which would involve an unjustified infringement of any of his rights under the *Bill of Rights* in the *Constitution*.[1205] A witness may, however, still be compelled to testify in the latter case after the Master or the court has consulted with the Director of Public Prosecutions.[1206] The purpose of this consultation is, in my view, probably to avoid a situation that any criminal proceedings contemplated by the latter against the witness or the body corporate of whom the witness is or was an officer are not prejudiced.[1207] In addition, that the Constitutional rights of an examinee are not infringed upon.

It is significant to highlight the point that, prior to its amendment,[1208] section 417(2)(*b*) of the 1973 *Companies Act* compelled an examinee to answer a question

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1200 *Advance Mining Hydraulics* (Pty) Ltd *v Botes* 2000 (1) SA 815 (T) para 16.4.

1201 Paragraph 16.4. See *De Lange v Smuts* 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) at paras 33-35.

1202 51 of 1977.

1203 In terms of provisions of the *Bill of Rights* as contained in ch 2 of the *Constitution*.

1204 Paragraph 16.4.

1205 *The Bill of Rights*. *Bernstein v Bester* 1996 (2) SA 781 (CC) (1996) (4) BCLR 449 para 60; *Mitchell v Hodes* 2003 (3) SA 176 (C). See also Delport *Henochsberg on the Companies Act* 893.

1206 Section 417 (2)(*b*).

1207 See a detailed discussion on this aspect in the discussion under s 415(3) of the *Companies Act* para 3.3.2.5 above.

1208 After being declared by the Constitutional Court in *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996) (1) BCLR 1. See also *Blackman et al Commentary on the Companies Act* 14-451.

even though that meant incriminating the examinee. The section further provided that such incriminating answers could be used in subsequent criminal proceedings against the examinee indiscriminately. After the Constitutional Court's decision in *Ferreira v Levin*,[1209] it is now not unconstitutional[1210] to compel an examinee at an interrogation to answer even incriminatory questions.[1211] The witness can thus not refuse to answer a question on the ground that such a question or answer might tend to be self-incriminatory, but if he so refuses to answer, the Master or court, after consulting with the Director of Public Prosecutions who has jurisdiction, can oblige the witness to answer the question.[1212]

It is noted that, unlike section 65(2A) of the *Insolvency Act*, section 417 of the 1973 *Companies Act* does not expressly make any provisions for *in camera* proceedings in circumstances of possible incriminatory evidence being exposed. One can, however, assume that the provisions of section 65(2A) apply to section 417 by virtue of section 339 of the 1973 *Companies Act*. The Master or the court may order *in camera* proceedings where an examinee alleges that answers to questions posed might expose him to criminal charges. There could be no reason why the legislature would want to distinguish between the above provisions aimed at achieving the same objectives.[1213]

It is of significance that both direct (that which would not have been obtained independently of the examination of X by Y) and indirect evidence (that which would have been obtained even in the absence of the examination of X by Y)[1214] at the section 417 enquiries is admissible in subsequent civil proceedings against an examinee. Neither the *Bernstein* nor the *Ferreira* [1215] case made any changes to

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1209 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC).

1210 *Bernstein v Bester* 1996 (2) SA 751 (CC); (1996) (4) BCLR para 61. See also Kunst *et al Meskin Insolvency Law* 8-22.

1211 See the provisions of s 65(2A) of the *Insolvency Act* where a provision is made for *in camera* proceedings in circumstances where incriminatory evidence is likely to be exposed.

1212 See para *3.2.5* above.

1213 See *Mitchell v Hodes* 2003 (3) SA 176 (C) 112 as regards safeguards in place for an examinee.

1214 See also *Mitchell v Hodes* 2003 (3) SA 176 (C) 205.

1215 See specifically *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) para 154; *Benson In re*: *Tait v Jason* [2012] ZAWCHC 377 at para 13.

these provisions; the question as to the admissibility of evidence in subsequent civil proceedings did not arise.

(iv) Duty to answer questions

The compulsion to answer incriminatory questions in the context of a section 417 enquiry emanates from the justifiable limitation of rights in terms of section 36 of the *Constitution* of the Republic. The purpose is reasonable and necessary in an open and democratic society where competing rights are often an occurrence.[1216] In the context of insolvency of a company, the interests of creditors, contributors and society at large are in conflict with those of the examinee. This is the case since both parties are entitled to the protection of their constitutional rights. The legislature and courts have an obligation to assess the order of priority as far as these conflicting rights are concerned, hence the limitation of an examinee's right as found in section 417(2)(*b*) and the accompanying immunity at paragraph (*c*).[1217] Blackman brings to the fore the view that enquiries of this nature should not be seen as some form of witch hunt targeting certain individuals, but as a legislative endeavour to deal with company insolvency related matters.[1218]

In the *Benson, In re: Tait v Jason* case,[1219] an examinee who was a former director of a company in liquidation was sought to be examined in terms of sections 417 and 418 of the 1973 *Companies Act.* At the enquiry, he was required to answer questions whose answers had the potential to incriminate him. He argued that he was not advised that it was possible to refuse to answer a question on the ground that his answers might incriminate him. He also stated that he had not been advised that he be not compelled to answer a question that would result in an unjustifiable infringement of his constitutional rights. He further pointed out that it was not explained that his answers at the enquiry might be used in civil proceedings against him later. The Commissioner had, however, specifically drawn the examinee's

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1216 *S v Makwanyane* 1995 (6) BCLR 665 (CC) [1995] ZACC 3; 1995 (3) SA 391 (CC at paras 100-102).

1217 See also Blackman *et al Commentary on the Companies Act* 14-452-1.

1218 Blackman *et al Commentary on the Companies Act* 14-450 – 14-451.

1219 *Benson, In re: Tait v Jason* [2012] ZAWCHC 377 para 7-8.

attention to the fact that he is compelled to answer questions of which the answers may be incriminatory in nature and that, if he so refused, he may be compelled to answer after the Commissioner has consulted with the Director of Public Prosecution. This qualification on compulsion is said[1220] to be for the benefit of the prosecution service, and thus not intended to protect the examinee. Accordingly, any decision by the judge or a presiding officer at the section 417 enquiry whether or not to oblige a witness to answer a question should be deferred until proper consultation with the prosecuting authority.[1221] The reason for this provision was said to facilitate in the process of prioritising between the potentially conflicting public interests. The first being to ensure that those who owe accountability in relation to liquidated companies do not escape such. In addition, that those, who through their questionable conduct of the affairs of liquidated companies made themselves criminally liable, are made to answer in a court of law.[1222]

Further, the court highlighted the point that the provisions of section 417(2) obligated a commissioner to be alert not to insist on answers that have the potential of self-incriminating the examinee without first consulting the prosecuting authority. Accordingly, the commissioner may:

(1) compel answers to questions;

(2) even if answers are self-incriminatory;

(3) only consult with the prosecuting authority if an examinee declines to answer on the basis that his answers are likely to incriminate him;

(4) if his rights under the *Constitution* are likely to be infringed by insistence that questions be answered regardless. According to the court, the obligation placed on the commissioner applied generally, and not only when an examinee sought to refuse to answer a question on the basis that the answer might self-incriminate.[1223]

[1220] *Benson, In re*: *Tait v Jason* [2012] ZAWCHC 377 para 15.
[1221] *Benson, In re*: *Tait v Jason* [2012] ZAWCHC 377 para 15
[1222] *Benson, In re*: *Tait v Jason* [2012] ZAWCHC 377 para 15.
[1223] *Benson, In re*: *Tait v Jason* [2012] ZAWCHC 377 para 16.

It is my view that a competent commissioner would foresee that a particular question may prompt an answer that is likely to infringe an examinee's constitutional rights and would act accordingly to intercept that possibility.

In *Mitchell v Hodes*[1224] the applicants were the former officers of a company in liquidation. They were called upon to appear before a commission of enquiry in terms of sections 417 and 418 of the 1973 *Companies Act* and to submit certain documents. The enquiry was intended to extract from them information relating to the trade, dealings, affairs and property of the company in question. This application intended to review and set aside the commission of enquiry. The applicants did not wish to be examined on any information having a bearing on the criminal charges against them, or which relates to criminal charges to be formulated against them, at least until the finalisation of pending criminal proceedings against them.

According to the court,[1225] the applicants had acknowledged that the Commissioner's decision to call an enquiry does not constitute administrative action as defined in section 1(i) of the *Promotion of Administrative Justice Act*.[1226] Thus, this question was not before the court. After careful analysis, the court concluded that the applicants relied for the relief sought on the intrinsic power of the High Court to control the proceedings at sections 417 and 418 enquiries.

The applicants urged the court to determine whether or not the applicants' fair trial rights in terms of the common law and in terms of section 35 of the *Constitution* could be compromised by the compulsion to answer incriminatory questions at the sections 417 and 418 enquiries.

In answering this question, the court relied on the matter of *Ferreira v Levin*[1227] and *Bernstein v Bester*.[1228] Acknowledged[1229] by the court was the fact that, unlike the circumstances of the examinees in the mentioned cases, the applicants in the

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1224 *Mitchell v Hodes* 2003 (3) SA 176 (C).
1225 At 185G.
1226 3 of 2000.
1227 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1).
1228 *Bernstein v Bester* 1996 (2) SA 751 (CC); (1996 (4) BCLR 449.
1229 At 208B.

present case have already been arrested and charged and that some of the charges against them had not as yet been accurately and completely formulated. Accordingly, if compelled to provide further information at the section 417 enquiry, they may be dispossessed of their "*tactical advantages*" in conducting their criminal trial.[1230]

Further acknowledged by the court was the possibility on the part of the state to use the evidence given by examinees to complete and even amplify charges against them. The court was, however, not ignorant of the fact that the state would still be obliged to prove those charges against them beyond reasonable doubt. In proving its case, the State will have to source its own evidence, independent of evidence given at the section 417 enquiry.[1231]

Further highlighted by the court was the fact that the state must also source independent evidence to support further charges, which it may, in terms of section 81 of the *Criminal Procedure Act*,[1232] join in the criminal proceedings against them prior to any evidence to be given at the criminal trial. Furthermore, in the event that the State sought to rely on the derivative evidence obtained as a result of the section 417 enquiry, it was up to the trial judge to see to it that the applicant's fair trial rights are not so jeopardised. According to the court, the trial judge was entitled to exercise his discretion as far as the admissibility of derivative evidence was concerned.[1233]

The key position occupied by the applicants in the affairs of the company in liquidation and the tremendously multifaceted and tangled nature of the issues intended to be investigated by the liquidators, necessitated the enquiry, so opined the court.[1234] If the enquiry was to be delayed to indulge the applicants' relief, that could considerably jeopardise the very purpose of the section 417 proceedings.[1235]

1230 At 208D.
1231 At 208E.
1232 51 of 1977.
1233 See also *Key v Attorney-General, Cape Provincial Division* [1996] ZACC 25; 1996 (4) SA 187 (CC).
1234 At 209A.
1235 At 209A.

On the basis of the extremely crucial public policy objectives intended to be achieved by the section 417 enquiries, the court felt and correctly so, that the applicants cannot be allowed to rely on either their "fair trial rights" under section 35(3) of the *Constitution*, or on the potential loss of an ill-defined "*tactical advantage"* at their criminal trial, to escape examination on matters pertaining to the trade, dealings, affairs and property of the company in liquidation, including such matters as may have a bearing on the criminal charges against them.[1236]

Furthermore, the court had an opportunity to emphasise the importance of compelled testimony in the context of the section 417 enquiries. Accordingly, the conflicting rights of an examinee (in section 417 proceedings) and the unquestionable public interest in the proper investigation of corporate collapses have been adequately and fairly balanced by the Constitutional Court.[1237] This was said to have been achieved by the introduction of a "direct use immunity", and by making the use of "derivative evidence" at a subsequent criminal trial subject to the discretion of the trial judge (whose duty was said to be to ensure compliance with fair criminal trial standards).[1238]

The court acknowledged[1239] the fact that it could not be refuted that the ruling by the Commissioner in this matter was very vague, and failed to tackle the issues by the applicants in support of the relief sought by them from the Commissioner. Regardless of the said shortcoming, the court felt that the ruling made by the Commissioner was not "unconstitutional, oppressive or unfair" to the applicants. Accordingly, there was no reason for the (court) to interfere with the Commissioner's ruling.[1240] The application was consequently dismissed with costs.[1241]

Again, the question is what is the use of the examinee's answers obtained at the interrogation? The answer to this question is that such answers may be used in civil

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[1236] At 209B.
[1237] At 211H.
[1238] At 211H.
[1239] At 212A.
[1240] At 212B.
[1241] At 212C.

proceedings such as section 424 of the 1973 *Companies Act* by the liquidators on behalf of the creditors of an insolvent company (especially where fraud and recklessness in the conduct of the business of the company is suspected) against an examinee. It is not an abuse of the statutory enquiry process to use the interrogation proceedings to gather information for possible future civil litigation; that is in fact one of its legitimate purposes.[1242] These answers may also be used in perjury related criminal proceedings against an examinee.[1243]

From the cases discussed above, the principle is clear that an examinee is compelled to answer questions posed at the enquiry. This is the case regardless of the incriminatory nature of his responses. If he declines to answer on the basis that incriminatory evidence may be revealed, the public prosecution may advise as to the way forward. The reason behind this provision is that his answers may not be used against him in subsequent criminal proceedings. Further, the compelled testimony is required for the effective and efficient administration of the affairs of an insolvent company in liquidation. This cannot be achieved in any other way than to compel those with the required information to make it available.[1244]

(v) The admissibility of compelled incriminatory evidence in subsequent proceedings

An examinee compelled to answer incriminatory questions at the section 417 enquiries has a remedy at his disposal. The restriction against the use of self-incriminatory statements submitted at the enquiry by an examinee in subsequent criminal proceedings is one such remedy.[1245] The restriction is limited to criminal proceedings and does not extend to civil proceedings. However, the permissibility of the use of statements obtained at the enquiry against the examinee in

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[1242] *Pitsiladi v Van Rensburg* 2002 (2) SA (2) 160 (SECLD); *Macduff & Co Ltd v Lawn* 1922 WLD 66 at 70. See also Blackman *et al Commentary on the Companies Act* 14-483 as regards the use of compelled testimony.

[1243] Section 417(2) (*i*).

[1244] *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC); *Bernstein v Bester* 1996 (2) SA 751 (CC); *Mitchell v Hodes* 2003 (3) SA 176 (C); *Benson, In re: Tait v Jason* [2012] ZAWCHC 377.

[1245] See also *Benson, In re: Tait v Jason* [2012] ZAWCHC 377 para 16.

subsequent proceedings is articulately imbedded in the provisions of section 417(2)(c) of the 1973 *Companies Act*.[1246]

In *Van Zyl v Kaye* [1247] the applicants had sought to rely on the evidence obtained at the section 417 enquiry (into the affairs of a company in liquidation) for their action against one of the liquidated company' directors. Citing the matter of *O' Shea v Van Zyl* [1248] the court pointed out[1249] that the evidence is indeed inadmissible against the respondent in this context - since such evidence is admissible only against the deponent in the capacity in which the evidence was deposed. The court went further to state the purpose of section 417(2) and pointed out that the restriction in the section has no application on civil proceedings.[1250] The court proceeded to trace the history and rationale behind the prohibition of the use of incriminatory evidence other than with the permission of the court, master or commissioner.[1251] The conclusion arrived at was that evidence obtained at the section 417 enquiry is admissible in civil proceedings against the deponent.[1252] This embargo is based on the hearsay rule.[1253]

In *Von Wielligh Bester v Merchant Commercial Finance* [1254] the applicants sought to make use of evidence adduced at the section 417 enquiry as a basis for their action (of setting aside an impeachable transaction in terms of section 31(2) of the *Insolvency Act)* against the respondent.[1255] The evidence was submitted by one of the directors of a company in liquidation (Sarepa and Logistics).[1256] The respondents contended that such evidence was inadmissible against the liquidated company[1257]

1246 See *Benson, In re: Tait v Jason* [2012] ZAWCHC 377 at para 21.
1247 *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC).
1248 *O' Shea v Van Zyl* [2012 (1) SA 90 (SCA); [2012] 1 All SA 303 and cases cited thereat.
1249 Paragraph 36.
1250 Paragraph 41.
1251 Relying on the cases of *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC); *Bernstein v Bester* 1996 (2) SA 751 (CC); [1996] ZACC 2; 1996 (4) BCLR 449; *S v Heller* 1969 (2) SA 361 (W).
1252 Paragraphs 43 and 44.
1253 Section 3(4) of the *Law of Evidence Amendment Act* 45 of 1988. *Engelbrecht v Van Staden* [2011] ZAWCHC 447 at para 17-21.
1254 *Von Wielligh Bester v Merchant Commercial Finance* (16211/13) [2014] ZAWCHC 16.
1255 Paragraph 4.
1256 Paragraph 5.
1257 Paragraph 5, relying on Delport *Henochsberg on the Companies Act* 61 of 1973, 894(5) (SI 33);

(but was admissible against the deponent himself).[1258] The applicants responded by making reference to the matter of *Engelbrecht v Van Staden* [1259] where the court concluded[1260] that the admissibility or non-admissibility of the said evidence (as given at the insolvency enquiry) in civil proceedings appears to depend on the general principles of the law of evidence rather than on the terms of the 1973 *Companies Act.* Further expressed in passing was the view that a court may, in suitable cases, authorise a litigant to rely on evidence deposed by X at a section 417 enquiry, for the purpose of making out a case against Y. This could be permitted if the interests of justice would be served by such admission while ensuring that the principles as set out in section 3 of the *Law of Evidence Amendment Act*[1261] are complied with.[1262]

The court in the main case under discussion concluded by stating that it is not persuaded that the applicants' case is an "appropriate case" to authorise the applicants to rely on the evidence deposed to at the section 417 enquiry, to prove an impeachable transaction between the company in liquidation and the applicants.[1263] For that reason, the court correctly decided that the director's evidence at the enquiry is not admissible in the present proceedings.[1264]

The judgment in the case of *Ferreira v Levin* [1265] established a direct use immunity in respect of an examinee who is subsequently charged with a criminal offence (relating to the subject matter of the interrogation). This meant that such incriminatory evidence may not be used against an examinee in subsequent criminal proceedings, except for proceedings relating to perjury and failure to answer lawfully posed questions.[1266] It is significant to note that the *Ferreira v Levin* matter

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Blackman *Commentary on the Companies Act* 491 and 4(3) *LAWSA* (1st reissue) para 198 at n 61.

1258 See para 7 as regards the history of this principles.

1259 *Engelbrecht v Van Staden* (8318/2011) [2011] ZAWCHC 447.

1260 Paragraph 20.

1261 45 of 1988.

1262 Paragraph 21.

1263 Paragraph 11.

1264 At 12.

1265 *Ferreira v Levin; Vryhenhoek v Powell* 1996 (1) BCLR 1 para 127.

1266 Section 417 (2) (*c*). This decision is applicable since 27 April 1994.

led to the amendment[1267] of section 417(2) by the insertion of paragraph (c).[1268] This amendment brought section 417 and 418 of the 1973 *Companies Act* in line with the *Constitution*.

It is worth mentioning that the court in the case in question provided[1269] for the direct use immunity as in section 65(2A)(*b*) of the *Insolvency Act*, and not for indirect use immunity *per se*. Meaning that no direct evidence (incriminatory in nature) obtained from the examinee himself at the interrogations could be admissible against him in subsequent criminal proceedings other than proceedings relating to perjury and the failure to answer lawfully posed questions truthfully. Accordingly, evidence derived as a result of the interrogation could be used in the subsequent criminal proceedings against such examinee, depending on whether or not the presiding judge in exercising his discretion is of the opinion that the said evidence must be admissible.[1270] The reason being that this evidence could have been independently established, without the interrogations taking place. According to the court,[1271] there appeared to be no proper justification for distinguishing between the section 65(2A)(*b*) of the *Insolvency Act* and the section 417 of the 1973 *Companies Act'* enquiries, as far as direct use immunity was concerned. This is correct, there should be no distinction. The reason being that both sections are aimed at achieving the same goals of obtaining information for the efficient administration of the affairs of the debtor on the one hand and for the benefit of creditors of the insolvent on the other. Compliance with the principles of justice and constitutional provisions should be adhered to in all enquiries of this nature.

1267 On the 17 January 2003 by the *Judicial Amendment Act* 55 of 2002 (assented to 30 December 2002). See also Delport *Henochsberg on the Companies Act* 888 and Blackman *et al Commentary on the Companies Act* 14-451.

1268 This paragraph provides as follows: 'Any incriminating answer or information directly obtained, orincriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to - (i) the administering or taking of an oath or the administering or making of an affirmation; (ii) the giving of false evidence; (iii) the making of a false statement; or (iv) a failure to answer lawful questions fully and satisfactorily'.

1269 Paragraph 127.

1270 *Ferreira v Levin; Vryhenhoek v Powell* 1996 (1) BCLR at paras 146, 148, and 150.

1271 Paragraph 127.

Blackman,[1272] Kunst[1273] and Delport[1274] correctly submit that this amendment actually limits the effect of the *Ferreira* judgment by prohibiting the admissibility of evidence given by A through his answers to questions posed by B and that which was obtained by B independently of A's evidence, in criminal proceedings. It must be emphasised that this prohibition does not extend to criminal proceedings envisaged by paragraphs (i) to (iv) of sub-section (2) (*c*). According to them, the *Ferreira* case did not render inadmissible in criminal proceedings against A, evidence established independent of A's answers. Only evidence obtained from answers given by A was said to be inadmissible against A. It must be highlighted that evidence obtained by the examination of A may, however, not be used against A in proceedings other than those specified under this sub-section. It is submitted that this is further protection to an examinee.

It is now clear that the evidence is admissible in civil proceedings[1275] against an examinee or the body corporate of which an examinee is or was an officer. Kunst[1276] points out that in civil proceedings, the records of the proceedings may be admissible in so far as its contents serve to prove that the witness testified as to what is recorded therein. The evidence may also be used in cross-examination to test the credibility of the witness.[1277] These records may, however, not be used to prove facts obtained in the witness's testimony, for this is left to the determination of the court in question.[1278] Delport points out that the record of the evidence may be produced in any such proceedings against the witness who actually gave the relevant testimony. He submits that a party in possession of the evidence and wishing to use it is not required to notify an intention, or to obtain the court's

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1272 Blackman *et al Commentary on the Companies Act* 14-451.
1273 Kunst *et al Meskin Insolvency Law* 8-28.
1274 Delport *Henochsberg on the Companies Act* 888.
1275 Outside of insolvency proceedings, for example in specified proceedings such as the personal liability of directors in terms of s 424 of the *Companies Act* of 1973.
1276 Kunst *et al Meskin Insolvency Law* 8-28.
1277 Relying on *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (4) SA 389 (D). See also Blackman *et al Commentary on the Companies Act* 14-470 as regards interrogation aimed to destroy the credibility of a witness.
1278 *Du Plessis v Oosthuisen; Du Plessis v Van Zyl* 1995 (3) SA 604 (O) at 621.

permission, to do so, notwithstanding the provisions of section 417 (7) or order of the court that the proceedings of the commission were to be confidential.[1279]

In *O'Shea v Van Zyl*,[1280] the court stated that evidence given by an examinee at a private examination in terms of section 417 of the 1973 *Companies Act* is inadmissible[1281] against any person other than the examinee himself. For example, evidence given by A (director of company B) is not admissible against B. In terms of the common law, the general rule is that evidence adduced by a person in legal proceedings cannot be used in subsequent proceedings as evidence against himself.[1282] Such evidence in earlier proceedings can only be used for cross-examination.[1283] Consequently, the evidence[1284] of A in both section 417 enquiries

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1279 *Liquidators Platini v Versamapoulos* 1942 WLD 169.

1280 In *O' Shea v Van Zyl* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) at para 19; *Simmons v Gilbert Hamer & Co Ltd* 1963 (SA) 897 (N).

1281 In *O' Shea v Van Zyl* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) at para 19, the court cited *Simmons v Gilbert* 1963 (1) SA 897 (N) where one of the issues confronting the court was the admissibility of admissions made by one Lea, the managing director of Consolidated Portland Cement Co Ltd, during an enquiry in relation to claims against the company in liquidation under s 155 of the *Companies Act* 46 of 1926 (the predecessor to s 417) in subsequent proceedings by the liquidators to vindicate certain fabricated steel from Gilbert Hamer & Co. In an application before Judge Henochsberg, the learned judge struck out the affidavit of Lea as inadmissible against the liquidators. The court further held that "(i)n general it may be said that a person who testifies as a witness speaks for himself; he tells of what he, himself, knows and his oath vouches for its truth. If he is an employee or agent in any respect of another and gives evidence in litigation to which that other is a party, he does so, not as an employee or agent, unless his admissions bind that party, but as a person speaking on oath to the facts to which he testifies, and this is so whether he is called as a witness by his employer or principal or by the opposing litigant. Similarly, if he gives evidence in proceedings to which his employer or principal is not a party, although in relation to matters in which the latter has been or is concerned, he speaks as an individual; he is giving evidence, not taking part in the making of a contract or the giving of an undertaking on behalf of his employer or principal. His evidence in that case is not admissible against his employer or principal in a later case in proof of the facts stated in it. If called by his employer or principal, his evidence may, as that of any other witness called by that party, be regarded as evidence for that litigant and, so far as adverse to him, rebound to his disadvantage, but that is because it is accepted as true, not because the witness is the employee or agent of the litigant". This is correct. A person should only be bound by his own evidence. If information is required regarding a juristic person, which cannot speak for itself, then an officer or director of that company should be interrogated specifically for that purpose. Such evidence should logically speaking be admissible against the said company.

1282 *Van Rensburg v Master of the High Court, Kimberly Northern Cape Province* [2005] ZANCHC 105 at para 8 relying on the matter of *Hollingham v Hewthorn & Co* Ltd 1943 (2) All ER 35.

1283 See *Van Rensburg v Master of the High Court, Kimberly Northern Cape Province* [2005] ZANCHC at para 8.

1284 Adduced orally.

and in the winding-up proceedings given on affidavit cannot be used as evidence in other criminal proceedings except those specified under sub-section 5.

The court further highlighted[1285] reasons why such evidence may not be admissible in subsequent proceedings, as follows:

(1) persons against whom statements are made in such proceedings do not generally have a right to be present during such testimony nor are they afforded the right to cross-examine the deponent. To allow a liquidator to rely on such statements without calling the witness would be inimical to the law of evidence.[1286]

(2) evidence given by an examinee at a private examination is not admissible against any person other than the examinee himself.[1287] In further support of its view, the court cited with approval Judge Harcourt in the matter of *Simmons v Gilbert Hamer*[1288] who quoted the case of *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd.*[1289] Furthermore, the conclusions and judgments of another court cannot be used against a litigant in subsequent proceedings against him.[1290]

Delport[1291] and Kunst[1292] submit that notwithstanding the provisions of section 417(7) of the 1973 *Companies Act,* and in contrast to this explained common law general rule, one may use the evidence without obtaining the court's permission to do so.[1293] Kunst submits further that one may use such evidence irrespective of the nature of the proceedings and even if at the time, the enquiry has not concluded.[1294] He points

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1285 Paragraph 21.
1286 *Simmons v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 916G-918B.
1287 *Simmons v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 918B-E.
1288 *Simmons v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 918E-919C.
1289 1928 WLD 223 AT 225-6. See also *The Rhodesian Corporation Ltd v Globe & Phoenix Gold Mining Co* Ltd 1934 AD 293 at 304 as quoted in *O' Shea v Van Zyl* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012]1 All SA 303 (SCA) at para 24.
1290 *Hollingham v Hewthorn & Co* Ltd 1943 (2) ALL ER 35 as cited in the case of *Van Rensburg v Master of the High Court, Kimberly Northern Cape Province* [2005] ZANCHC 105 at para 8.
1291 At 888.
1292 At 8-28.
1293 *Liquidators Platini Café (Pty) Ltd v Versamapoulos* 1942 WLD 169 par 173-174.
1294 Relying on *Liquidators Platini Café* (Pty) Ltd *v Versamapoulos* 1942 WLD 169 para 174-175. See also Blackman *et al Commentary on the Companies Act* 14-470 as regards the use of evidence obtained at the enquiry.

out that the said evidence must be used as a whole though,[1295] that is, including parts, which are favourable to the witness.[1296] This is desirable for the purposes of fairness and justice and the principle is of general application.[1297] It is noted that Kunst had relied on the matter of *R v Vather*,[1298] decided long before the constitutional dispensation and might not be applicable anymore. Delport, Kunst and *Vather* do not take the broader purpose of justice into consideration, which is seen in the *Constitution* - the right not to be incriminated unjustly. It does not fall in the scope of this dissertation to elaborate on this.

In the *Benson* matter[1299] it was stated that it is not an abuse of the statutory enquiry process to use the examination process for the gathering of information for possible future civil litigation and that it is in fact one of the process's legitimate purposes.[1300] However, the permissibility of the use of the evidence obtained at such an enquiry against the examinee in subsequent proceedings is restricted to specified criminal proceedings against the latter. These restrictions have been recognised in a number of reported judgments of the superior courts over many years.[1301]

From the discussion of the above cases, the following is clear:

(1) compelled evidence is admissible only against the deponent in subsequent civil proceedings against him;

(2) the evidence is further admissible against the deponent in subsequent criminal proceedings as specified in sub-section 2(c)(*i*)-(*iv*) of section 417 and not in any criminal proceedings unrelated to insolvency;

(3) the deponent's evidence is thus not admissible against the body corporate in which he was an officer;

1295 Relying on *R v Valachia* 1945 *AD* 826 para 837.
1296 Relying on *Ismael v Regina* 1955 (1) PH H28 (C); *Du Plessis v Oosthuizen* 1999 (2) SA 191 (O); *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (4) SA 389 (D).
1297 *R v Vather* 1961 (1) SA 350 (AD) para 353-354.
1298 1961 (1) SA 350 (AD) 353-354.
1299 *Benson, In re Tait v Jason* [2012] ZAWCHC 377 para 11.
1300 See also *Pitsiladi v Van Rensburg* 2002 (2) SA 160 (SECLD).
1301 See *Venter v Coetzee* [2006] ZAFSHC 12.

(4) compelled evidence may also be used to test the credibility of the deponent;

(5) the compelled evidence may also be used to gather information for the proper administration of the insolvent company's affairs – this could include future civil litigation against the deponent.

3.3.4.5 Section 417(3): Documentary evidence

The sub-section compels specified persons to produce books and papers (in their possession or control) relating to the company in winding-up. However, this compulsion does not affect any lien claimable by examinees in relation to books and papers so produced.[1302]

The sub-section provides as follows:

> The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the court shall have power to determine all questions relating to any such lien.[1303]

(i) Compelled production of books and papers

The *dictum* in *Bernstein v Bester,*[1304] considered as influential in relation to the obligation to produce books and documents as required, is informative in this context. The court highlighted the fact that a witness is compelled to produce a wide variety of books and papers as may be required by the court or Master, including his confidential papers and books having a potential to incriminate him. This compulsion was said to extend beyond directors, officers, employees or agents of the failed company and against those suspected of having a hand in its failure. Further highlighted was the point that third parties who had at some point access to information relating to the business transactions, dealings, affairs or property of the company may be implicated and thus subjected to the compulsion to produce their "private books or papers", regardless of how confidential those books and papers are. In this context, former external auditors of the company in liquidation,

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[1302] Section 417(3).
[1303] Sub-section 3 substituted by s 9 (d) of *Act* 29 of 1985.
[1304] *Bernstein v Bester* 1996 (2) SA 751 (CC); (1996) (4) BCLR 449 at para 39.

were required to produce their books and documents relating to the company in question.[1305] The court considered the auditors as (examinees) not being different from witnesses in any other proceedings. This is especially where they could have access to invoke their direct use immunity as provided for by *Ferreira v Levin*.[1306] When they are compelled to disclose their confidential books, containing self-incriminatory information.[1307]

The duty on witnesses to produce books and documents as required by the courts was said to be indispensable to the proper functioning of the court system.[1308] This is correct. The courts cannot base its decisions only on word of mouth. Real evidence (in the form of documents, bank statements, invoices and so forth) may be required to assist the courts in arriving at sensible decisions.

Further in this case, the court expressed doubt as to whether the so called "private books and documents" of the firm of auditors (regarding the financial affairs of the company in liquidation) can be said to be private.[1309] The information contained thereat was regarded as information relevant to the purpose of the enquiry. I concur. Only through financial audits of the company can something be learnt of the company's past financial performance. This is a relevant subject at the section 417 enquiries. The court went on to emphasise the need for certain individuals to produce the recorded information in books and documents as required. Accordingly, the fact that the affairs of an artificial person with no senses of its own and thus wholly dependent on the knowledge and brains of natural persons were at issue, necessitated such persons' cooperation.[1310]

To emphasize its view, the court cited the matter of *Speedly Securities v Bond Corporation Holdings Ltd*.[1311] In this matter, the court pointed out that directors and others who were responsible for the running of the affairs of the liquidated company

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1305 Paragraph 39.
1306 *Vryenhoek and Others v Powell* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.
1307 Paragraph 50.
1308 Paragraph 51.
1309 Paragraph 83.
1310 Paragraph 83.
1311 1 ACSR (1990) 726 at 738 (Supreme Court of New South Wales – Commercial Division).

(auditors included) have an obligation towards affected stakeholders (like creditors and shareholders) of the insolvent company. These individuals were said to have a duty to provide a frank, complete and honest explanation as regards management of the affairs of an affected company.[1312] This is correct. Directors and other officers stand in a fiduciary position in relation to the company.[1313] They should therefore be the only go to persons where information regarding the company is concerned.[1314]

Citing the provisions of section 417(3) of the 1973 *Companies Act* providing for the production of books without prejudice to any lien claimed and empowering the court to determine all questions relating to any such lien, the court emphasised[1315] that the section 417 provisions should be read in such a way as not to infringe an examinee's right against seizure of private possession. According to the court, the person who is called upon to produce any document, paper or bank statement may rightfully refuse to do so if the production goes against his right not to be subjected to seizure of private property. This would be the case unless this right is limited in terms of section 33(1) of the *Interim Constitution*.

The court went further to comment on the scope of section 417 regarding the compulsion to produce books and documents. The view expressed thereat was that, in its proper application, the section would not be used to compel an examinee to produce private possessions. This was said to be the case because such possession would have nothing to do with the company affairs.[1316] The court found it difficult to comprehend the notion that documents relevant to the matters forming the legitimate subject of the interrogations could be considered a private document.[1317]

1312 Paragraph 83.
1313 See also Davis *et al Companies and Other Business Structures in South Africa* 115 hereinafter "Davis et al Companies and Other Business Structures"; Benade *et al Entrepreneurial Law* 130.
1314 See *R v Kritzinger* 1971 (2) SA 351 (W) in general. See also Davis *et al Companies and Other Business Structures* 111; Cassim *et al Contemporary Company Law* 509.
1315 Paragraph 88.
1316 Paragraph 89.
1317 Paragraph 89.

In relation to a determination as to when there may be a justifiable limitation of the right to privacy, the court in *Bernstein v Bester* [1318] concluded[1319] as follows: It is not unjustifiable to compel an examinee to produce his private property if such property (in this case books and documents) has information relating to the affairs of a liquidated company under investigation. These books and documents could reveal information that can achieve the objectives of the enquiry. The compulsion was said to be in accordance with section 33(1) of the *Interim Constitution*. It was further highlighted by the court that the public interest in getting to the bottom of the truth regarding factors that led to the demise of the company necessitates these enquiries. The interest of liquidators to effectively and efficiently conclude the liquidation process and the interests of creditors and contributors to recover the assets of the company for distribution amongst themselves cannot be overstated.

Furthermore, the consequential infringement of the right not to be subjected to seizure of private possessions was said to be undoubtedly limited under the circumstances.[1320] The said limitation constitutes a legitimate limitation of the right to personal privacy in terms of section 36 of the *Constitution.*

In *Saloojee v Khammissa* [1321] the applicants applied for an order to set aside a summons calling upon them to appear, testify and produce documents at an enquiry convened in terms of section 417, read with s 418 of the 1973 *Companies Act*. The purpose of the enquiry was to investigate the affairs of a company[1322] in liquidation and being wound-up.

It was only natural that the applicants were opposed to the summons issued against them. The summons was intended, among other things, to extract from them information which could expose criminal conduct on their part. According to the

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[1318] *Bernstein v Bester* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449.
[1319] Paragraph 90.
[1320] Paragraph 90.
[1321] *Saloojee v Khammissa* [2014] ZAGPJHC 372; 2015 (5) SA 554 (GJ).
[1322] Duro Pressings (Pty) Ltd (in liquidation).

applicants, if the summons were not set aside, chances were that their constitutional rights against self-incrimination would be in jeopardy.[1323]

The applicants based their case on the grounds that the documents so required to be produced may be used against them at subsequent criminal proceedings. They contended that section 417(2)(c) contains a use-immunity in relation to evidence which is compelled at section 417 enquiries. The same immunity, it was argued, did not extend to the documents compelled in terms of section 417(3). At the core of their argument was the absence of immunity where books and documents were compelled.[1324]

In answering the applicants' case, the court pointed out[1325] that the right against compulsion to give self-incriminating evidence included the right not to be compelled to produce documents in instances where such production had a potential to incriminate the person compelled. Further highlighted was the fact that courts, both in South Africa and in other jurisdictions,[1326] recognise the existence of the privilege in relation to documents or information provided or disclosed under a compulsory process of the 'court or extra-curial statute in non-judicial proceedings',[1327] in this context, enquires in winding-up of companies unable to pay their debts.

[1323] Paragraph 3.
[1324] Paragraph 7.
[1325] Paragraph 8.
[1326] Quoting *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443D-E as follows:"I do not think that adequate protection can be given by extracting from the plaintiffs, as a term of being granted an Anton Piller order, an undertaking not to use the information obtained in criminal proceedings. Even if such an undertaking were binding … the protection is only partial, viz against prosecution by the plaintiff himself. Moreover, whatever direct use may or may not be made of the information given, or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. In the present case, this cannot be discounted as unlikely: It is not only a possible but probably the intended result. The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences". It is crucial to highlight that although this case was discussed in the context of an Anton Piller requiring the respondent to point out and disclose certain documents; it is applicable in the context of s 417 read with s 418 of the same statute.
[1327] Paragraph 9.

Further, the court cited[1328] and quoted the matter of *Dabblestein & Others v Hilderbrandt & Ors* [1329] where that court in an Anton Piller proceeding requiring the respondent to point out and disclose certain documents, stated the following:

> … Where a 'point out and disclose' order is made and complied with by a respondent, his or her answer will in any event not be admissible against him or her in subsequent criminal proceedings because the necessary element of voluntariness will generally be H absent. In the event of criminal proceedings following, a statement made under compulsion, whether judicial or otherwise, will not be admissible against him or her because of the provisions of s 25(3), which gives all accused persons the right to a fair trial: a trial cannot be fair if evidence is admitted of an admission which the accused was compelled to make: compare s 25(2)*(c)* of the Constitution.

With regard to the constitutionality of sections 417 and 418, the court referred to the case of *Ferreira v Levin* [1330] and *Bernstein v Bester*, discussed above.[1331]

After analysing the two mentioned cases, the court pointed out that the vital question to be answered in the present case was whether or not, the use-immunity principle (emanating from the insertion of paragraph c in section 417(2)) was also applicable in instances of compelled production of books and documents.[1332] According to the court, the answer to this question depended on the statutory interpretation.[1333]

[1328] Paragraph 11. Also cited and quoted by the court in its determination of the applicants' case was the Australian case of *Sorby v The Commonwealth of Australia* 1983 (57) ALJR 248 at 260, where Gibbs CJ held that the privilege – … protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to discovery of real evidence of an incriminating character.

[1329] 1996 (3) SA 42 (C) at 66-67.

[1330] *Ferreira v Levin; Vryenhoek v Powell* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1. See the discussion of this case at para *3.4*.

[1331] *Bernstein v Bester* 1996 (2) SA 751 (CC); (1996) (4) BCLR 449. See the discussion of this case at para 3.3.4.2.

[1332] Paragraph 18.

[1333] Paragraph 20 with reference to *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 90 where the principle brought forth was the contextual interpretation approach in relation to the provisions and the basis upon which the statutory document was drafted. This approach was said to be commanded by s 39(2) of the *Constitution* whose purpose was to instruct that every legislative provision must be interpreted in a manner that promotes the essence, purpose and goals of the *Bill of Rights*.

The court proceeded to analyse[1334] the composition and language of section 417 and correctly observed[1335] that both the composition and the language of sub-section 417(2)(*c*) pinpoints to the conclusion that the use-immunity does not extend to documents compelled in terms of section 417(3). This conclusion, the court based on the ground that the production of books and documents as summoned is not evidence produced or derived consequent to the examination in terms of section 417(2). The answers given in relation to the books and documents produced at the examination would, however, if incriminating, be subject to the use-immunity[1336] as by its nature it would be evidence found or consequent to examination in terms of section 417(2).

Further, the court highlighted the point that the examinee may be interrogated on a wide array of matters and may even be compelled to disclose any of his books or papers. This was said to be the case irrespective of the confidential or incriminating nature of such books and papers.[1337]

Based on the authority cited and quoted, the analysis of the relevant statutory provisions and the purpose intended to be served by section 417, the court, so I submit, correctly concluded that section 417 does not extend the immunity in relation to documents or books summoned.[1338] Despite this absence of immunity in relation to books and documents produced thereat, the court concluded that the applicants must appear at the enquiries in honour of the summons.[1339] I submit that the applicants are protected by the built-in right against self-incrimination, as discussed above. The right to legal privilege could also be applicable, as was discussed above.

1334 Paragraph 24-26.
1335 Paragraph 27.
1336 Paragraph 30.
1337 Paragraph 31, for this view the court relied on *Bernstein v Bester* 1996 (2) SA 751 (CC); [1996] ZACC 2 at paras 39 and 92. See also *Cloverbay Limited (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] 1 All ER 894 at 901C-D.
1338 Paragraph 36.
1339 Paragraph 38.

The principle emphasised by the court[1340] was that the consequences of the absence of use immunity was that a person summoned in terms of s 417(3) is compelled to produce books or papers. The fact that books or papers were confidential or incriminating was no answer to the summons. The prospective examinees could not even object to the use of such documents at the enquiry. Should the need arise to object to same (by the affected person) in subsequent criminal proceedings, the objection should be raised thereat. Protection to the examinee remains in that incriminating answers submitted at a section 417 examination in relation to the documents submitted or directly derived thereat may not be used against such examinee in subsequent criminal proceedings.[1341]

The court felt the need to reassure people that the Supreme Court has the power to prevent the oppressive, vexatious and unfair use of s 417 proceedings. The examinee could approach the relevant court for relief to prevent oppressive or unfair conduct of the proceedings.[1342] The principle emphasised is the same as that provided for by section 65(1) of the *Insolvency Act*. The latter empowers the presiding officer to disallow any irrelevant question and questions that may protract the interrogation process needlessly.

The court further emphasised[1343] that in the normal course of litigation, a litigant is entitled to obtain the production of any document relevant to his case in the quest for the truth. He can only be denied such access if the disclosure of the document is protected by law. The process of a subpoena was said to be designed specifically and precisely to protect that right. If the opposite were true, the ends of justice would be hampered. It is said that it is for this reason that the Court must be vigilant in exercising its power to set aside a subpoena on the justification that it

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1340 Paragraph 39.

1341 Section 417(2)(c).

1342 Paragraph 40, citing *Bernstein v Bester* 1996 (2) SA 751 (CC) at paras 17-36; [1996] ZACC 2; 1996 (4) BCLR 449; *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734E-735A; *Hudson v Hudson* 1927 AD 259 at 268; *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W) at 820A-B; The unreported judgment of Marais J in *Wachsberger v Wachsberger* (WLD) (unreported) case number 8963/90 of 8 May 1990 and that of Plewman J in *Lincoln v Lapperman Diamond Cutting Works (Pty) Ltd* (WLD) (unreported) case number 17411/93 of 6 October 1993.

1343 At para 41, citing various authorities thereat.

constitutes an abuse of process.[1344] This power is said to be of such a nature that it is rarely exercised. However, once it is clear that the subpoena in issue in any particular matter constitutes an abuse of the process, the court will not waiver to so declare, in order to protect both the court and the parties affected thereby from such abuse.[1345]

In *Absa Bank v Jooste* [1346] would be examinees were summoned to bring forward all books, documents, loan agreements and any information related to the company in liquidation in terms of section 417. They subsequently launched an application to set aside the summons. The applicants did not wish to appear at the enquiry at all or to submit the required books, documents or papers. Their objection was based on the contention that the summons exceeded the boundaries of the order[1347], were self-contradictory,[1348] and bulky.[1349] The implication that can be drawn from their contentions is that the summons was an abuse of the processes of the court.[1350]

According to the respondent, the commission was necessary to compel the applicants who were evading submitting the required information, specifically the documents detailing some payments made to certain individuals.

Reiterating the provisions of section 417(3), the court highlighted[1351] that the documents needed to be produced. As regards the alleged confidentiality of the documents summoned, the court cited the matter of *Gumede v Subel*.[1352] In the court's view, a mere assertion that the documents were confidential was no answer to the summons. What is crucial therefore is whether the documents required may assist in the proper construction of the sequence of events leading to winding-up.

1344 *Sher v Sadowitz* 1970 (1) SA 193 (C); *S v Matisonn* 1981 (3) SA 302 (A).
1345 *Sher v Sadowitz* 1970 (1) SA 193 (C); *S v Matisonn* 1981 (3) SA 302 (A).
1346 *Absa Bank Ltd v Jooste* [2013] ZAECPEHC 58.
1347 Paragraph 10.
1348 Paragraph 12.
1349 Paragraph 11.
1350 Paragraph 31.
1351 Paragraph 32 and 33.
1352 *Gumede v Subel* 2006 (3) SA 498 (SCA) at 505-506.

The relevancy of the documents ranks superior to the confidentiality in this context.[1353] The application was thus dismissed by the court.

In *Gumede v Subel* [1354] the appellant, objected to the commissioner ruling for the production of certain documents in terms of section 417 read with section 418 of the 1973 *Companies Act*. The documents in question belonged to a related company of which the appellant was also a director. The appellant had asserted that the said documents were confidential. The Commissioner was not convinced and consequently dismissed the objection on the basis that he considered the documents to be relevant to the affairs of the company. The impression drawn herein was that, the Commissioner, on the basis of evidence[1355] presented, was satisfied that the required documents were relevant to the enquiry.

The court was then invited to determine whether the applicant's claim of confidentiality of documents held water and thus entitling him to refuse to disclose same on the basis of the right to privacy. Citing the matter of *Bernstein v Bester* [1356] the court highlighted the point that sections 417 and 418 do not *per se* infringe the right to privacy or affect the confidentiality of documents that a holder wishes to keep confidential.[1357] In the case under discussion, the court correctly opined that an unsubstantiated contention made by the appellants as regards the confidentiality of documents did not entitle them to so withhold the required documents.[1358] Their refusal to allow the Commissioner to view the supposedly confidential documents did not assist their case, had they allowed the Commissioner sight of the documents, that would have assisted the Commissioner to determine whether such were relevant to the enquiry or worthy of protection. Accordingly, the determining factor was whether the documents requested are relevant as far as the affairs of the company under liquidation are concerned.[1359]

1353 Paragraphs 35 and 40.
1354 2006 (3) SA 498 (SCA).
1355 From paras 3-5 and 13-16.
1356 *Bernstein v Bester* 1996 (2) SA 751 (CC) (1996) (4) BCLR 449 at paras 64 and 18.
1357 See full discussion of this case at para 3.3.4.2 above.
1358 Paragraph 19.
1359 Paragraph 19.

Emphasising the objectives of the section 417 enquiry as the acquisition of information, the recovery of the company's assets for the benefit of the creditors and the right to obtain relevant information as to the plight of the insolvent company, the conclusion reached by the court was that the latter mentioned objectives should prevail over the confidentiality of documents.[1360] In support of its view, the court quoted[1361] the English case of *Re Rolls Razor* [1362] where the necessity of the enquiry was highlighted as follows:

(1) the liquidator is not privy to the information as regards the manner in which the affairs of the now financially strained company were conducted;

(2) it is for these reasons that those with the information must provide same to the liquidator;

(3) through this enquiry, it may be established as to who are responsible for the mismanagement or improper conduct as far as the running of the affected company's affairs is concerned;

(4) improper conduct and mismanagement is relevant information for the purpose of liquidation;

(5) it is also possible that even the innocent may need some encouragement to come forward with information that may assist the liquidator in performing his duties;

(7) the legislative provisions to enable the submission of the required information is considered extraordinary and its importance cannot be overstated.

In concluding, the court held[1363] that it agrees with the acting judge Du Toit in the court below, that the efficient and effective winding-up and the protection of creditors' interests reign supreme as compared to privacy interests in the context of

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[1360] Paragraph 21. In support of its views, the court cited an English case of *Re Rolls Razor Ltd* 1970 1 Ch 576 at 591-592.
[1361] Paragraph 21.
[1362] [1970] 1 Ch 576 at 591-592 cited in *Bernstein v Bester* 1996 (2) SA 751 (CC).
[1363] Paragraph 21.

insolvency enquiries. Consequently, the appeal was dismissed with costs.[1364] This is the general rule. If the required books and documents are relevant to the matter, the question of confidentiality becomes secondary.

In *Lategan v Lategan* [1365] the applicants had argued that it was unfair of the commission to require from them the huge volume of documents.[1366] Their argument was that, it would require of them to dedicate a significant amount of time to read and study those documents in preparation for the enquiry. The court did not agree with their submission.[1367] According to the court, it was not as if the witnesses were expected to study the documents thoroughly as if they were preparing for an academic examination. The court undoubtedly confirmed that the applicants may from time to time and where the need arose be permitted to peruse some documents in order to answer a specific question. Further that, it would be unfair and possibly vexatious for the commissioner to decline adjournment for the purposes of perusing the documents for the said purpose. In support of its view and correctly so, the court quoted the remarks of judge Nugent in *Leech v Farber* [1368]

The principle highlighted by the above discussed cases are that:

(1) those in possession of books and documents considered relevant to the liquidation process may be compelled to produce them;

(2) the fact that the content thereof is likely to incriminate them is irrelevant;

(3) in any event, the examinee is entitled to privilege;

(4) even private books of third parties,[1369] who had at some point contracted with the now insolvent company, may be the subject of the enquiry, this would be the

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1364 Paragraph 27.
1365 *Lategan v Lategan* 2003 (6) SA 611 (D) at 624.
1366 Over 700 documents apparently consisting of some thousands of pages.
1367 At 625.
1368 *Leech v Farber* 2000 (2) SA 444 (W) at 452F.
1369 *Bernstein v Bester* 1996 (2) SA 751 (CC); (1996) (4) BCLR 449 PARA 83.

case where such books have information relating to transactions with the now insolvent company;

(5) limitation of rights to privacy is justifiably limited under these circumstances;[1370]

(6) the examine is still protected in that the Supreme court has powers to prevent the enquiry from being used in an oppressive, vexatious or any improper manner;

(7) the same principle as in section 65(1) of the *Insolvency Act* ensuring that the enquiry is not misapplied is applicable here;

(8) the process is needed for an effective and efficient administration of the liquidation process.

(ii) The production of books and papers without prejudice to any lien.[1371]

Section 417(3) of the 1973 *Companies Act* [1372] read together with section 418 (2) of the same statute makes provision that the production of books or paper as summoned is without prejudice to any lien claimed with regard thereto and the court or commissioner (if a magistrate) has power to determine all questions relating to such lien. This provision was quoted in the *Bernstein v Bester* [1373] matter. The court did not elaborate further than that the production of books and documents as required should not infringe a person's right not to be subjected to seizure of private property.[1374] As stated above, in addition to this protection, a witness is also entitled to claim the right of legal privilege to the said documents and papers.[1375]

1370 Section 36 of the *Constitution*.

1371 See in general *Gumede v Subel* [2006] 3 All SA 411 (SCA); *Absa Bank Ltd v Jooste* [2013] ZAECPEHC.

1372 Of the *Companies Act* of 1973.

1373 *Bernstein v Bester* 1996 (2) SA 751 (CC); 1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 para 86 and 88.

1374 See also Kunst *et al Meskin Insolvency Law* 8-27; Delport *Henochsberg on the Companies Act* 894(4). Sharrock *et al* does not discuss this aspect.

1375 *Waymark v Commercial Union Assurance* 1992 (3) SA 779 (TkGD); *Van der Heever v Die Meester* 1997 (3) SA 93 (T) at 99. See also Kunst *et al Meskin Insolvency Law* 8-27; Delport *Henochsberg on the Companies Act* 894(4).

Delport[1376] submits that the legislative intention with this provision is to ensure that books and papers are produced without first requiring the existence of the lien claimed to be admitted or established. This is acceptable. If the opposite were true, it will be time consuming to so establish its existence or non-existence. Delport, however, observes that if the company is being wound-up, a right of retention of any book or document of account, which belongs to the company or relates to its affairs, affords no security or preference in connection with any claim against it if production has been validly ordered in relation to a company unable to pay its debts. This is correct. Creditors are for the purposes of payment ranked on the basis of preferent, secured or unsecured.[1377]

The documents required to be produced, although wide-ranging, should be clearly specified and identified with adequate precision to enlighten the witness as to the exact nature thereof.[1378]

The principle brought forth from the above discussion is that the existence of a lien is no bar to the production of books and documents. Required books and documents must be produced if need arises for their usage in the liquidation process.

3.3.4.6 Section 417(4): Reinforcing compliance on recalcitrant witnesses

The sub-section makes provision for the apprehension of an examinee who, without a lawful excuse, fails to appear as summoned in terms of section 417(1) of this statute. The apprehended examinee is to be brought before the Master or court for examination.

The sub-section provides as follows:

> If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by

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1376 Delport *Henochsberg on the Companies Act* 894 (7).

1377 See also Sharrock *et al Hockly's Insolvency Law* 182.

1378 *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) at para 8. As said above, the mere fact that a variety of documents are required to be produced does not constitute a ground for setting aside the order for the enquiry to be held.

the Master or the court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.[1379]

It must be noted that the Master has the same powers as the court, which appointed him to deal with a recalcitrant witness. Further to this power, the Master (as in section 152 of the *Insolvency Act*) is afforded immunity conferred upon an officer presiding in terms of section 66 of the *Insolvency Act*.

The sub-section provides that the Master of the High Court may apprehend. If it was not for the *De Lange* case, the Master simply said this section empowers him to apprehend. In practice, he says "I may use the power to arrest and cause the person arrested to be brought before me".

It is clear that since the Master is not a magistrate, he may not lawfully order incarceration of a recalcitrant witness. This position therefore renders the said immunity unnecessary. This immunity may not even be necessary in instances where the presiding officer is a commissioner who is a magistrate. This would be the case since such a commissioner does not preside over a tribunal and he is not presiding as a judicial officer.[1380] However, the Master may find solace in the provision that a witness who fails to co-operate by for example, refusing to take an oath or affirmation or answer lawfully put questions, or submit a book is committing an offence.[1381] The said witness will be dealt with as an offender in terms of criminal procedure. This is justifiable since the enquiry proceedings are the court's proceedings and there is a compulsion to comply with orders of the court.

Delport[1382] highlights that the powers of the court or the Master under this sub-section are also available to a commissioner appointed under section 418(1)(b) except that the power to punish a defaulting or recalcitrant witness or to cause him

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1379 Sub-section 4 substituted by s 9 (*d*) of *Act* 29 of 1985.
1380 Blackman *et al Commentary on the Companies Act* 14-498.
1381 Section 418(5) (*b*) (*iii*) (*bb*) of the 1973 *Companies Act*.
1382 Delport *Henochsberg on the Companies Act* 894 (7).

to be apprehended are available only to a commissioner[1383] who is a magistrate.[1384] He contends that the court's powers of punishment of a recalcitrant witness are those available to it in the case of contempt of court.[1385] It must also be highlighted that a recalcitrant examinee shall be guilty of an offence if he fails to comply with the requirements of section 417(1) to (3) of the 1973 *Companies Act* in instances where the Master is presiding.[1386] The case of *De Lange v Smuts* [1387] decided, with regard to section 66 of the *Insolvency Act,* that the section is constitutional if the presiding officer who orders incarceration is a magistrate. Otherwise, such order is not constitutional. It is submitted that the same principle applies in the case of section 417(4).

It is further submitted that from the authorities discussed above, it appears that the legislature has made sufficient provision for the protection of an examinee's constitutional rights as provided for in the *Bill of Rights* of the *Constitution*.[1388]

3.3.4.7 Section 417(5): Witness fees

This sub-section makes provision for the payment of a witness fee for persons summoned to appear before the Master or court to provide the required information.

The sub-section provides as follows:

> Any person summoned by the Master under subsection (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.[1389]

1383 Although sub-sec 4 refers to Master or court, it is submitted that the Master will find solace in the provisions of s 418(4) of the *Companies Act* which makes it an offence for any person summoned in terms of s 417(1) to (3) who fails to comply with the provisions of s 417(1) to (3) of the same statute. These provisions make it unnecessary for a Master to deal with a recalcitrant witness. Only the court can thus deal with a recalcitrant witness.

1384 He refers to s 418(2) of the *Companies Act*.

1385 He refers to *Van der Berg v Schulte* 1990 (1) SA 500 (C) at 509-511. He also refers to the provisions of s 418(5).

1386 Section 418(5) of the 1973 *Companies Act*.

1387 See the full discussion of this case at ch 2 above.

1388 See cases discussed above regarding this aspect (*Bernstein v Bester* 1996 (2) SA 751 (CC), as the leading case in this regard).

1389 Section 5 added by s 9 (*e*) of *Act* 29 of 1985.

These fees[1390] are in most cases derived from the bankrupt company's assets, unless the court decides otherwise. The *Magistrate's Court Act* [1391] regulates the payment of these fees. In *Swart v Cronje* [1392] the court brought to the fore the point that a notice summoning a witness for interrogation in terms of section 65(7) of the *Insolvency Act* must make provision for travel and subsistence costs.[1393]

It appears that these proceedings are self-sustainable and that the courts' structures or tribunals may not necessarily be overburdened by these proceedings. As earlier submitted, insolvency proceedings resemble civil proceedings and this makes same to be easily absorbed into our court's structures. Both Delport and Kunst do not discuss this sub-section; they give no opinion on the subject.

3.3.4.8 Section 417(6): Financing the examination

The sub-section provides guidelines as to the source of funds to cover the expenses of the examination.

The sub-section provides as follows:

> Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.[1394]

In *Benson, In re: Tait v Jason* [1395] the court order provided for the petitioning creditor to fund the enquiry. Further, the order provided that the funding be treated as a loan to the company in liquidation. This loan was to be repayable as a first liability

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1390 *Absa Bank Ltd v Jooste* [2013] ZAECPEHC 58 at para 36. See Stander 2004 *THRHR* 566-583 for a discussion of these fees with reference to s 65(7) of the *Insolvency Act*; Kunst *et al Meskin Insolvency Law* 8-25 with regards to costs of the examination.

1391 32 of 1944.

1392 (1991) 2 All SA 432 (T). Although this case referred to s 65(7) and s 152 of the *Insolvency Act*, it is submitted that the same principles also apply in the case of s 417(7).

1393 See para 3.3.1.3 above on the discussion about the reluctance of auditors to attend to interrogations for a meagre witness fee.

1394 Section 6 added by s 9 (e) of *Act* 29 of 1985.

1395 [2012] ZAWCHC 377 para 3. Kunst *et al Meskin Insolvency Law* 8-25 and Delport *Henochsberg on the Companies Act* 892 agree that the costs and expenses incidental to the examination include the costs of the application. They highlight that these costs and those of the examination or enquiry must be paid by the applicant, unless the court or as the case may be, the Master, directs that fees or part thereof is to be paid out of the assets of the company.

on any free excess in the winding-up, and only if there was free excess. It was further highlighted by the court that,[1396] it is not uncommon for creditors in insolvency circumstances of a company to request and fund such enquiries. The results being to attain information, which might facilitate them in the process of satisfying their claims, said the court.[1397] The implication of this order is that these expenses are often carried by the applicants (for the enquiry) in cases of depleted funds in insolvent companies. This is the case unless the court or the Master directs that such costs or any thereof, may be paid out of the property of the company.[1398]

According to Kunst[1399] this instruction will be given regardless of the outcome of the examination or enquiry, unless the court or, as the case may be, the Master is of the view that the applicant acted in bad faith or irrationally, in the circumstances.[1400] She further contends that, in practice, the question of whether the instruction should be made should only be decided after the conclusion of the examination or enquiry.[1401] Delport concurs.[1402] I submit that this is the way to go, it is only after questions are posed and evidence led that one can be in a position to determine whether the enquiry was in good or bad faith or was for purposes related or unrelated to the winding-up of the affected company.

Delport[1403] highlights that, it follows that even a liquidator[1404] who makes the application for ulterior motives must personally bear the costs, unless the court orders otherwise. Delport points out that where, however, a liquidator, or any other

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1396 Paragraph 3.
1397 Paragraph 3.
1398 Delport *Henochsberg on the Companies Act* 892; Kunst *et al Meskin Insolvency Law* 8-25.
1399 Kunst *et al Meskin Insolvency Law* 8-25.
1400 This will be the case where the applicant acted unreasonably or when *mala fide* is found to have been the motive for such an application, where for example the applicant seeks to acquire information for use in matters not related to the winding-up. See *Benson*, *In re: Tait v Jason* [2012] ZAWCHC 377 para 12.
1401 *Ex parte Murray* 1960 (4) *SA* 553 (W) at 555.
1402 He points out that where, however, a liquidator, judicial manager (as stated above, it is submitted that judicial management has since been repealed and replaced by business rescue) or any other applicant acts in good faith and reasonably in the circumstances, neither the court nor the Master is likely to withhold the direction, irrespective of the results of the examination or enquiry. Delport *Henochsberg on the Companies Act* 892. Kunst agrees with Delport on this aspect.
1403 Delport *Henochsberg* on the *Companies Act* 892.
1404 And the then judicial manager of the now repealed judicial management.

applicant acts in good faith and reasonably in the circumstances, neither the court nor the Master is likely to withhold the direction, regardless of the outcome of the examination or enquiry.[1405] He submits that where the examination or enquiry is required by creditors of the company, against the advice of the liquidator,[1406] the latter may properly seek security from those creditors against any costs, which he may personally become compelled to pay. He points out that if such indemnity is not given, the liquidator should thus not invoke the section, unless directed to do so by the court upon the creditors' application.

There is, however, a provision in the *Insolvency Act* in the form of section 42(2) regarding the said matter. One would assume that in the absence of a similar provision in the 1973 *Companies Act*, the indemnity available to a trustee in terms of section 42(2) of the *Insolvency Act* would apply as is to the liquidator. Like a trustee who seeks the consent of the Master prior to his invoking the section 42(2) provision, a liquidator requires the approval of the court prior to invoking the section to permit the creditors to seek the examination.

Further, the provisions of sections 73(1A) and 104(3) of the *Insolvency Act* could also apply (as are) to section 417(6) above.[1407]

From the discussion above, it becomes clear that the funds for the administration of the affairs of an insolvent company are derived from the assets of the company, unless it is established that improper motives were behind the holding of the enquiries. In that case, those responsible for the misapplication of the enquiry provisions would be held accountable for related expenses.

1405 *Ex parte Murray* 1960 (4) SA 553 (W) 555.

1406 Or the then judicial manager, when judicial management as a rescue process was still applicable.

1407 Section 73(1A) permits the trustee of an insolvent estate to engage the services of an attorney or counsel where necessary and with prior approval by the creditors or the Master – the legal fees would then form part of the administration of that estate. Section 104(3) permits a creditor who has undertaken steps to recover the value of property or a right thereto under s 25(4), 26,29, 30 or 31 to have preferent claim over the proceeds of such property.

3.3.4.9 Section 417(7): Private and confidential examination

This sub-section expressly provides for a private and confidential examination of summoned persons. The Master or court may, however, order otherwise.

The sub-section provides as follows:

> Any examination or enquiry under this subsection or section 418 and any application therefore shall be private and confidential, unless the Master or the court, either generally or in respect of any particular person, directs otherwise.[1408]

(i) The private nature of the enquiry

This sub-section resembles section 152 of the *Insolvency Act*, which provides for private and confidential enquiries by the Master. The enquiry is private in the sense that only specifically identified individuals are allowed at those proceedings.[1409] It is confidential in the sense that documents which detail the proceedings may not be disclosed or published without prior authorisation by the presiding officer. The application for holding these enquiries is in most cases made *ex parte* without any notice to any person proposed to be examined. In the event that a prospective examinee has sight of the application, the effectiveness of the interrogation might be negatively affected.[1410] As a rule, the courts do not ordinarily afford witnesses sight thereof, unless special circumstances exist.[1411]

In *Van Zyl v Kaye* [1412] the court highlighted[1413] the point that the secrecy provisions in section 417 (7) and the consequential restrictions on the use of the evidence are aimed at accomplishing the objects of the enquiry[1414] and not for any other policy rationale. Further that, once the purpose is served, the grounds and the need for

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1408 Section 7 added by s 9 (e) of *Act* 29 of 1985.

1409 Section 417(7). See also Kunst *et al Meskin Insolvency Law* 8-25; Delport *Henochsberg on the Companies Act* 894(8).

1410 *Siyanda Resources* (Pty) Ltd *v Moloto; Mashile-Nkosi v Moloto* [2010] ZAGPJHC 14 para 50.

1411 *Siyanda Resources (*Pty) Ltd *v Moloto; Mashile-Nkosi v Moloto* [2010] ZAGPJHC 14 paras 50 and 52. See also Blackman *et al Commentary on the Companies Act* 14-476 and 14-477.

1412 *Van Zyl v Kaye* (1110/14) [2014] ZAWCHC 52; 2014 (4) SA 452 (WCC).

1413 Paragraph 42. Relying on *S v Heller* 1969 (2) SA 361 (W) with reference to s 155 of the 1926 *Companies Act* – the predecessor of s 417 of the 1973 *Companies Act*. The Winding-Up Rule 14 referred to in *Heller* has its equivalent under the 1973 *Companies Act* in reg. 4 of the Winding-Up and Judicial Management of Companies Regulations.

1414 Relying on *Bernstein v Bester* 1996 (2) SA 751 (CC); ZACC 2; 1996 (4) BCLR 449; 1996 (2).

such confidentiality falls away. The fact that the record of the proceedings is filed with the Master of the High Court is indicative of the fact that, what is sought to be protected is the process of applying for the holding of the enquiry and the process of leading and recording the evidence. Once that is complete, there will not be a need for confidentiality.[1415] According to the court, once the record of the proceedings is filed at the office of the Master, it becomes a public document and thus accessible to the public under section 11 of the *Promotion of Access to Information Act*.[1416] It is, however, not particularly clear, if incriminatory evidence against the deponent would be readily available for public consumption in this instance.

In *Benson, re: Tait v Jason* [1417] the Commissioner correctly pointed out that one of the advantages of a secret or confidential enquiry is that the witnesses who are summoned to give evidence do not have prior insight into or knowledge of the other evidence that has preceded theirs. The effect of the secrecy was said to assist in the exercise of untangling the affairs of the company in liquidation. The Commissioner[1418] brought to the fore the fact that this advantage would be prone to being lost if anyone privy to the proceedings were to disclose the record.[1419] The court has powers to control the use of the record of the proceedings.[1420] The Commissioner opined[1421] that a case has to be made out for a confidential enquiry when the application to establish the enquiry in terms of sections 417 and 418 is made. Similarly, if the Master concludes that such an enquiry is to be held, objectively identifiable reasons must exist. It is only under these circumstances that public power can be said to have been exercised logically.[1422] What was highlighted by the court was the point that there is no fixed number of reasons that might

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1415 Paragraph 42.
1416 2 of 2000.
1417 [2012] ZAWCHC 377 para 19.
1418 Paragraph 19.
1419 See also *Siyanda Resources* (Pty) Ltd *v Moloto; Mashile-Nkosi v Moloto* [2010] ZAGPJHC 14 at 50.
1420 Paragraph 19. See also *Kotze v De Wet* 1977 (4) SA 368 (T).
1421 Paragraph 20.
1422 Paragraph 20, citing *Pharmaceutical Manufacturers Assoc of South Africa: In re Ex parte President of the Republic of* South *Africa* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para 85.

determine the need for the holding of a private and confidential enquiry.[1423] The court emphasised that the decision to hold an enquiry in terms of either section 417 or 418 of the 1973 *Companies Act* will be dependent on the nature of the rights or interest of the persons to be examined and the need to shield the information submitted thereat from being made public.[1424]

The need for confidentiality in these proceedings is reflected in *Lategan v Lategan*.[1425] In this matter, the Commissioner declined to provide a list of matters upon which the applicants were to be interrogated. The question to be answered by the court was whether such refusal gave rise to a breach of the duty to act fairly in the conduct of the proceedings in terms of section 418 of the 1973 *Companies Act*. The applicants conceded that there was no specific provision in the companies' statute entitling them such access. They nevertheless pleaded for an exception since theirs was allegedly a special case, requiring the production of huge volume of documents.[1426] The court concluded that they were not entitled to such access and that if the need arises at the enquiry for the perusal of a document prior to answering a question, the commissioner would surely permit such.[1427]

It must be noted however, that the court or the Master has powers to direct that notice of the application be given to such person, when the circumstances of the case so permits.[1428]

According to Kunst[1429] should a notice be so given, the goal would be to afford such person an opportunity to answer satisfactorily, by way of an affidavit, the allegations made by the applicant where such is possible. The applicant can thus get time to prepare an affidavit. This would usually be the case where it clearly appears that

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1423 Paragraph 20.
1424 Paragraph 20 and relying on the Australian case of *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 para 22, accessible at http://austlii.edu.au/au/cases/cth/HCA/1989/21.html.
1425 [2003] 6 SA 611 (D).
1426 At 624.
1427 At 625, relying on *Leech v Farber* 2000 (2) SA 444 (W) 452-454.
1428 Section 417(7) of the 1973 *Companies Act*. See also Delport *Henochsberg on the Companies Act* 894(8); Blackman *et al Commentary on the Companies Act* 14-457; Kunst *et al Meskin Insolvency Law* 8-25.
1429 Kunst *et al Meskin Insolvency Law* 8-24.

such a person would be in a position to so do. In that case, the enquiry would not be necessary. I concur. Taking into account the fact that private enquiries are expensive, the possible use of affidavits (where suitable) will preserve the already financially strained insolvent company's assets. Kunst further submits that, in seeking an examination or an enquiry in this context, it is not a precondition that evidence should be provided to prove that there is *a prima facie* case against a contemplated examinee.[1430] Accordingly, it suffices to show a fair ground for suspicion and that the person to be examined can probably provide material information about what is suspected.[1431] It is my submission that this viewpoint is correct because what is required is the truth as regards the whereabouts of the company's assets. Stakeholders are entitled to know exactly what happened and how it happened. If such thorough investigation is not conducted, the possibilities exist that dishonesty will be concealed and creditors will be disadvantaged.

Kunst continues[1432] to submit that, seeing that interrogation is provided for and may take place at a meeting of creditors, the applicant must satisfy the court or Master that in the circumstances of the case in question, a secret examination or enquiry is preferable. There is a view that since the proceedings are inquisitorial in nature,[1433] they should not be allowed where it would be vexatious and oppressive to hold secret enquiries or examination.[1434] Understandably, Kunst supports this view.[1435] However, the question that begs to be answered is who is to decide or judge whether the proceedings would be oppressive? It is my view that the court should be approached by an aggrieved person to decide on this issue, that is, if the court or master do not judge it *mero motu*.[1436]

(ii) Access to the application and the documents accompanying it[1437]

1430 At 8-24.
1431 *Ex parte Brivik* 1950 (3) SA 790 (W) 791.
1432 At 8-24.
1433 *Merchant Shippers SA* (Pty) Ltd *v Millman* 1986 (1) SA 413 (C) at 417.
1434 *Bernstein v Bester* 1996 (2) SA 751 at para 17, 24 and 35; [1996] ZACC 2;1996 (4) BCLR 449; *Merchant Shippers SA* (Pty) Ltd *v Millman* 1986 (1) SA 413 (C) at 417.
1435 Kunst *et al Meskin Insolvency Law* 8-24.
1436 Of his/its own motion.
1437 See para 3.3.4.9 (i) where this aspect is also discussed.

Since the principle underlying section 417(7) is to preserve the secrecy of the enquiry,[1438] it is only natural that access to the application and the enclosed documents are kept confidential.

Delport[1439] highlights that although the sub-section is designed in such a manner that it denies all persons access to the application, the court has powers to direct otherwise.[1440] The said direction may be given at any time, even during the examination or enquiry, upon request of a person who is able to show a satisfactory interest.[1441] Accordingly, prior to his interrogation, whether by the court or the Master, a contemplated examinee has no access to the application and is therefore not entitled to discovery of documents in the possession of the applicant or the court in preparation for his examination.[1442]

Further highlighted by Delport is the impact of the provisions of section 32 of the *Constitution* and those of the *Promotion of Access to Information Act* [1443] on the private and confidential nature of this sub-section. *PAIA* gives effect to section 32 of the *Constitution*.[1444] Blackman[1445] also highlights that section 32 of the *Constitution* does not entitle an examinee, contemplated or not, access to such information. The reason being that neither the Master nor a liquidator is an organ of state.

According to Currie and De Waal[1446] this statute should be read to incorporate the constitutional right of access to information. The *Constitution* provides an unqualified right of access[1447] to all and any information kept by the state and access

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1438 See *Benson, In re Tait v Jason* [2012] ZAWCHC 377 at para 19.

1439 Delport *Henochsberg on the Companies Act* 894(8), referring to *Goodman v Druker* 1961 (4) SA 131 (W); See also Blackman *et al Commentary on the Companies Act* 14-457 and 14-458; Kunst *et al Meskin Insolvency Law* 8-25.

1440 Section 417(7) of the 1973 *Companies Act*.

1441 "Sufficient interest" is not explained.

1442 *Benson, In re: Tait v Jason* [2012] ZAWCHC 377 at para 20; *Goodman v Druker* 1961 (4) *SA* 131 (W).

1443 2 of 2000 (*PAIA*).

1444 See the Preamble to *PAIA*. *Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA) para 1; *Serious Economic Offences v Gutman* 2002 (4) SA 230 (SCA); *SA Metal & Machinery Co* (Pty) Ltd *v Transnet Ltd* [2003] 1 All SA 335 (W).

1445 Blackman *et al Commentary on the Companies Act* 14-459.

1446 *The Bill of Rights Handbook* 691.

1447 See s 32 of the *Constitution.*

to any information in private custody that is essential for the exercise or protection of rights.[1448] The right may, however, be limited by the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[1449] The "limitation of this right would be justifiable in the interests of privacy, commercial confidentiality, effective and efficient good governance and in order to protect other rights".[1450] The legislature aims to provide access to recorded information held by public and private bodies, which is necessary to enable a person to exercise or protect a particular right, and its provisions are expressed to apply to the exclusion of any other legislation that prohibits or restricts access to the record of a public body.[1451] This, however, does not apply to the record of a public or private body if the record is requested for the purpose of civil or criminal proceedings after the commencement of such proceedings where access to that record is provided in any other law.[1452]

It must be noted that the Master's decision to hold an enquiry in terms of this section is not an administrative action and thus not reviewable on that ground.[1453] Further, it is not a decision taken at a meeting of creditors subject to section 57 of the *Insolvency Act* or in relation to proceedings at insolvency enquiries that may be taken on review under section 151 of the latter statute. The reasons behind the Master's decision to so hold the enquiry can, however, be brought under scrutiny by the court for want of good faith, sound mind and lawful motives.[1454] Seeing that the Master's decision to have a private enquiry held is not an administrative action, it follows that the latter's decision can thus not be subject to review under the *Promotion of Administrative Justice Act.*[1455] The circumstances under which the

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1448 Currie and De Waal *The Bill of Rights Handbook* 692.

1449 Section 36 of the *Constitution*.

1450 Currie and De Waal *The Bill of Rights Handbook* 691.

1451 Section 5 of *PAIA*. See also Delport *Henochsberg on the Companies Act* 894 (9); Kunst *et al Meskin Insolvency Law* 8-25.

1452 Section 7 of *PAIA*. See also Delport *Henochsberg on the Companies Act* 894 (9).

1453 *Firstrand Bank Ltd t/a Rand Merchant Bank v The Master of the High Court, Cape Town* [2013] ZAWCHC 173; [2014] 1 All SA 489 (WCC); 2014 (2) SA 527 (WCC) para 25, 28, 50 and 51. See also paragraph 3.3.4.11 below where this aspect is also discussed.

1454 See in this instance *Strauss v The Master of the High Court of South Africa* 2001 (1) SA 649 (T) in relation to a comparable provision under the *Insolvency Act*.

1455 3 of 2000 (*PAJA*). *Benson, In re: Tait v Jason* [2012] ZAWCHC 377 at para 22; *Mitchell v Hodes*

decision of the Master, taken with regard to the holding of private enquiries can be reviewed, will be discussed next.

(iii) *Nedbank v Master of the High Court*, *Witwatersrand Local Division* [1456]

The aspect of review of the decision taken by the Master in relation to private enquiries came before the court in *Nedbank v Master of the High Court*, *Witwatersrand Local Division*. In this case, the court highlighted that the Master's decision to grant an application for the holding of an enquiry under section 417 of the 1973 *Companies Act* is not reviewable. This was said to be the case since, when granting an order for the holding of the enquiry, the Master gives effect to section 417. He does not act administratively and accordingly *PAJA* does not apply.[1457] It was pointed out[1458] that even if a case can be made that *PAJA* does apply, it can only apply to the most limited and guarded extent. This was said to be so for the following reasons:[1459]

(1) when one reads the language of sections 417 and 418; it becomes clear that these sections are solely investigative processes to expedite 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 court under these sections. No rights or obligations are determined.

(2) consequently, the summoning of a witness to provide information concerning the affairs of a company is not administrative action.

(3) accordingly, the procedural fairness contended for by the applicant does not arise.

2003 (3) SA 176 (C) at 185ff. *Bernstein v Bester* 1996 (2) SA 751 para 94; [1996] ZACC 2; 1996 (4) BCLR 449. See also Blackman *et al Commentary on the Companies Act* 14-459; Sharrock *et al Hockly's Insolvency Law* 264.

1456 2009 (3) SA 403 (W).

1457 Paragraph 36.

1458 Paragraph 36.

1459 Paragraph 36.

(4) alternatively, if it can be said to arise, it does not arise at the stage when the enquiry is ordered.

(5) the secrecy provisions of section 417(7) make it clear that prior notice should not and cannot be given to witnesses, said the court.[1460]

(6) procedural fairness is, however, ensured by the right of the witness to have an attorney and or advocate present.[1461]

To emphasise the point that the fairness principle must be adhered to, the court referred[1462] to Hoexter[1463] where it was highlighted that the principle of fairness and legality should be upheld at all times. However, this was said not to mean that the relevant principles should be applied indiscriminately in every circumstances. How they are to be applied was said to depend on the circumstance of the matter at hand.

The need to apply the principle of fairness in proceedings of this nature was also emphasised in the matter of *Firstrand Bank Ltd t/a Rand Merchant v The Master of the High Court, Cape Town*.[1464] In this case, an application was made for the review and setting aside of a decision made by the Master of the High Court, to authorise a commission of enquiry under sections 417 and 418 of the 1973 *Companies Act* into the affairs of *Lighthouse Square* (Pty) Ltd (in liquidation). The said enquiry was authorised at the request of a shareholder (Summer Wind Trust) of a liquidated company.

The applicants were FirstRand Bank Ltd (Rand Merchant Bank) as first applicant and RMB Property Holdco 1 (Pty) Ltd as second applicant, an associated company of FirstRand Bank Ltd. The respondents were Summer Wind Trust (the Trust)

1460 Paragraph 36.2.
1461 Paragraph 36.2.
1462 Paragraph 36.3.
1463 The New Constitutional and Administrative Law (vol 2) 214.
1464 [2014] 1 All SA 489 (WCC) para 1.

represented by its trustees and the joint liquidators.[1465] The Trust was not a proved creditor of the company in liquidation.

The second applicant was a 50% shareholder in Lighthouse, the Trust a 25% shareholder and Whalerock Whitecaps (Pty) Ltd held 25%. Prior to Lighthouse's liquidation, the first applicant had advanced some funds to Lighthouse.[1466] Lighthouse was unable to repay the loan, hence its liquidation. The applicants' claim was the only claim submitted to prove at a first meeting of creditors of Lighthouse.

The basis of the application was as follows:

(1)the Trust, through its attorney, had secretly attended a meeting with the Master in the absence of the applicants' attorneys.[1467] This meeting took place against an earlier agreement between the attorney of the Trust and the applicants that the matter for the holding of the enquiry should be heard in court at a later stage. The said meeting resulted in favour of holding the enquiry. According to the applicants, that conduct amounted to a misrepresentation in the form of a failure to disclose material facts. It was contended on behalf of the applicants that the attorney of the Trust was under a duty to disclose his intended visit to the Master to them.

(2) the Trust had commenced proceedings against one Baudinet (the trustee of the Trust) and Arijs as sureties for a debt owed by Lighthouse to applicants. The two were alleged to have envisioned using the intended enquiry to access information in favour of their defence to the action brought against them by the applicants. For their contention that the decision of the Master can be reviewed by the court in this instance, the applicants relied on *Friedland v The Master*[1468] that in turn relied on *Ex parte Liquidation Ismael Solomon & Co* (Pty) Ltd.[1469]

1465 Paragraph 2.
1466 According to the founding affidavit by one Du Preez, para 3.
1467 Paragraph 11.
1468 1992 (2) SA 370 (WLD) par 379EF.
1469 1941 WLD 33.

The Trust, through its representative, contended that the decision of the Master to order the enquiry is not reviewable.[1470] For this contention, the Trust relied on *Strauss v The Master*[1471] and *Nedbank Ltd v Master of the High Court, Witwatersrand Local Division*.[1472]

The court was requested to clarify the circumstances under which the court may review and set aside a decision of the Master to hold an enquiry in terms of sections 417 and 418 of the 1973 *Companies Act*. The instances under which the court may so intervene was thoroughly discussed by the court in this case.[1473]

As regards the conduct of the attorney of the Trust, the court highlighted the following as questionable conduct:

(1) the failure by the attorney of the Trust to disclose to the applicants' attorney, his intension to approach the Master for a meeting to discuss the holding of the enquiry was viewed as unacceptable.[1474]

(2) this conduct denied the applicants' attorney an opportunity to have his contentions heard by the Master.[1475]

(3) the prejudice to applicants was said to be clear.[1476]

(4) the behavior of the attorney of the Trust was of serious concern to the court.[1477]

As regards the Master's conduct, the court observed with disapproval,[1478] (1) the Master's failure to provide reasons for her decision to hold the enquiry. It was said that failure to provide reasons for one's decision might lead to a situation where a

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1470 Paragraph 15.
1471 2001 (1) SA 649 (T). See ch 2 para 2.3.4.8 above for the discussion of this case.
1472 2009 (3) SA 403 (WLD). See the discussion of this case above.
1473 Only aspects relevant to this thesis will be highlighted in this discussion.
1474 Paragraph 15. The court cited the matter of *Society of Advocates of Natal v Merret* 1997 (4) SA 374 (NDP) 383CD who in turn quoted Judge President James in *Ex parte Swain* 1973 (2) SA 429 (N) 434H in support of its view as regards the duty to disclose under these circumstances.
1475 Paragraph 17.
1476 Paragraph 19.
1477 See paras 20 to 22.
1478 Paragraph 23. Citing *Bel Porto School Governing Body v Premier, Westerrn Cape* [2002] ZACC 2; 2002 [3] SA 265 (CC) para 159.

presumption may be drawn.[1479] In the present case however, the court found it difficult to draw a presumption as to the Master's state of mind when she took that decision.[1480] The court could not find sufficient evidence to link her to the fraudulent actions of the attorney of the Trust.[1481] Despite the lack of fraud on her part, the court opined that she probably did not comprehend the repercussions of applicants' opposition for the holding of the enquiry.[1482] The Master relied solely on the representation made to her by the attorney of the Trust – she did not make an independent judgement as regards representation by the applicants' attorney before deciding on the holding of the enquiry.[1483] Therefore, the deceitful conduct of the attorney of the Trust and the Master's failure to make an independent judgement led to a flawed conclusion.[1484] The resultant enquiry was a consequence of the attorney's deception of the Master.[1485]

As regards the aspect of reviewing the decision of the Master, the court saw it fit to provide a summary of the recent developments in the law of judicial review. It was pointed out that pre *Constitution*, this aspect was governed by the principles of common law, which has advanced over the years.[1486] Accordingly, it may not always be possible to draw a correct inference from an officer's conduct (in this instance, the Master).[1487] What is clear however, is that the court might intervene where the following are present:

(1) an officer acted *mala fide*; from ulterior and improper motives;

(2) if he had not applied his mind to the matter at hand;

(3) or he did not exercise his discretion at all;

1479 Paragraph 24. Citing *Dendy v University of the Witwatersrand* [2005] ZAGPHC 39; 2995 (5) SA 357 (W) para 53.
1480 Paragraph 25.
1481 Paragraph 25.
1482 See para 25 of the applicants' attorney affidavit.
1483 Paragraph 25.
1484 Paragraph 26.
1485 Paragraph 26.
1486 Paragraph 27.
1487 Paragraph 27.

(4) or if he had disregarded the express provisions of a statute.[1488]

I submit that this is fair. Clear guidelines are put in place for officers who take decisions based on their subjective discretion, in this instance, the Master. Such guidelines must therefore be followed.

The court proceeded to clarify the aspect of the right to lawful administrative action, as provided for originally by section 24 of the *Interim Constitution,* and subsequently by section 33 of the *Constitution*. Also highlighted thereat was the relevance of the *Promotion of Administrative Justice Act* [1489] in relation to just administrative action.[1490]

After analysing the arguments of the litigants, the court, in the case under discussion, came to the opinion that it appears that the right to review a decision of the Master to hold an enquiry was in principle recognised in the cases referred to by the litigants in support of their contention.[1491] The court highlighted[1492] that the judgement in *Nedbank* [1493] (as relied on by the attorney of the Trust) was evidently influenced by the *dicta* of Judge Ackermann in the judgement of *Bernstein v Bester*. Further highlighted by the court was the point that, since the *Bernstein* judgement was handed down prior to the enactment of *PAJA* and based on an interpretation of the concept "administrative action" in section 24 of the *Interim Constitution*, it must be read in context.[1494] The court saw it fit to refer to paragraphs 94 and 95 of the *Bernstein* case. This was done with the intention to bring to the fore the context in which this case was decided upon.[1495]

1488 *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651-652. See also *Strauss v The Master* 2001 (1) SA 649 (T) in relation to s 152 of the *Insolvency Act* discussed at ch 2 above.

1489 3 of 2000.

1490 Particularly ss 1, 2(a) to (e) and s 6(2) with a list of actions that are subject to review.

1491 Paragraph 36, particularly the *Friedland v The Master* 1992 (2) SA 370 (WLD), *Ex parte Liquidators Ismael Solomon & Co* (Pty) Ltd 1941 WLD 33 and *Strauss v The Master* 2001 (1) SA 649 (T).

1492 Paragraph 36.

1493 *Nedbank Ltd v The Master of the High Court, Witwatersrand Local Division* 2009 (3) SA 403 (WLD).

1494 Paragraph 36.

1495 Paragraph 37.

In the main case under discussion, it is clear that although the decision of the Master to hold a private enquiry in terms of sections 417 and 418 of the 1973 *Companies Act* is not administrative action, it can be reviewed if it adversely affects the rights of the applicants.[1496] In this instance, being denied an opportunity (despite their legal entitlement) to make a representation to the Master, adversely affected the applicants' rights.[1497] The fact that a secret meeting resulted in a decision to hold an enquiry against their wishes as proved creditors of the company in liquidation, calls for concern.[1498] It is my submission that, it is thus justifiable for them to challenge the decision of the Master by taking same on review.

The court likened[1499] the position of the applicants as objectors in this case under discussion to that of applicants in the application cases.[1500] Consequent to the position of the applicants in this case, the court formed the opinion that their rights to procedural fairness were violated by the conduct of the Master, as influenced by the attorney of the Trust. The fact that the Master knew that the applicants were opposed to the holding of the enquiry should have conscientised her that the attorney of the Trust was acting in a crooked manner. In the court's view, the Master failed to think in the circumstances.[1501]

In addition to the applicants' remedies under *PAJA*, their remedies were said to be found in the provisions of the principle of legality.[1502] According to the court,[1503] the

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1496 Paragraph 40. The court quoted *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 41 to 43 in support of its view.

1497 Paragraph 41.

1498 Paragraph 41.

1499 Paragraph 42. See also para 43 as regards the submission by the Trust.

1500 In these cases, applicants whose application for licenses, tenders and permits were not successful
were said to be entitled to take on review the decision of the functionary. See De Ville *Judicial Review of Administrative Action in South Africa* (2003) 225-226.

1501 Paragraph 44.

1502 Paragraph 45. Reference was made to the matter of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC) para 56 as regards the exercise of public power which is only considered to be legitimate if it is lawful. See also *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) (CC) para 148 and *Albutt v Centre for the Study of Violence & Reconciliation* 2010 (3) SA 293 (CC) para 49.

1503 Paragraphs 48 t0 50.

Master's decision, as influenced by the fraudulent actions of the attorney of the Trust, offended against three features of the principle of legality:

(1) the first being fairness[1504] - the Master's action was considered to be both procedurally and substantially unfair;

(2) the second being rationality – this aspect was negatively affected by the conduct of the attorney of the Trust;[1505]

(3) the third being the principle of transparency[1506] - the conduct of the Master as influenced by the attorney of the Trust to authorise behind the applicant's attorney's back the holding of the enquiry, was questionable. The process and procedure of the meeting was thus clouded by secrecy.[1507] The court held that[1508] taking a decision in this manner was bound to cause resentment on the part of applicants. This had the potential to ruin the respect which an important institution like the Master's office deserves, cautioned the court. The court concluded[1509] by stating that, in taking the decision to authorise a commission of enquiry in the circumstances, the Master breached the applicants' rights to fair administrative action and violated the legality principle. For these reasons, the order for the enquiry fell to be reviewed and set aside. This decision is fair. The Master should be seen as an objective officer in relation to insolvency proceedings, and that his conduct is guided throughout by the principles of legality. He may thus not exercise his discretion *carte blanche*, as subjective as such discretion may be.

As regards access to information contained in documents or books, the court in *Cape Metropolitan Council v Metro Inspection Services CC*,[1510] highlighted[1511] that

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1504 Under s 3 of *PAJA*.

1505 Reference was made to *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134 para 69, where the decision of the court stated that the process of taking a decision and the decision itself must be rational. Rationality was, however, not described by the court and thus vague. It is submitted that the decision must be sound even to a reasonable person and the processes employed to arrive at that decision must be seen to be a legal process.

1506 Paragraph 50.

1507 Paragraph 50.

1508 Paragraph 50.

1509 Paragraphs 51 and 52.

1510 2001 (3) SA 1013 (SCA).

1511 Paras 28 and 29.

information may only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right concerned. As a precondition for such access, an applicant has to state what the right is that he wishes to protect, what the information is which is required and how that information would assist him in exercising or protecting that right.[1512] According to *Clutchco v Davis* [1513] the concept "required" means reasonably required and connotes a substantial advantage for the applicant. In the context of this research, the applicant must show that failure to access the records of the proceedings would prejudice him.

In *Leech v Farber* [1514] the court held that a witness cannot require as a pre-condition to his being questioned access to all information and documents available to his questioner, since such is inconsistent with the nature and purpose of an enquiry. Blackman, Kunst and Delport concur.[1515] In *Lategan v Lategan* [1516] the court held that an examinee is neither entitled to details of the subject or themes on which he is to be questioned. Of importance in my view, is that the court clarified that particular circumstances may arise which require that a witness be given time to study a document or to answer a question. These are, however, factors to be decided on by the presiding officer as and when they arise.[1517]

As regards access to records of the enquiries, Delport[1518] submits that the records of an interrogation under this sub-section are records of a public body and the provisions of the *Promotion of Access to Information Act* (*PAIA*)[1519] will therefore apply in relation to such records. He, however, acknowledges that access to information held by a public body (it is, however, doubtful if the Master is a public body in this context) is not unlimited, and in certain instances access **must** be

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1512 Paragraph 11.
1513 *Clutchco v Davis* 2005 (3) SA 486 (SCA).
1514 2000 (2) SA 444 (W) at 451. See also Delport *Henochsberg on the Companies Act* 894(3).
1515 Blackman *et al Commentary on the Companies Act* 14-460; Delport *Henochsberg* on the *Companies Act* 894(3); Kunst *et al Meskin Insolvency Law* 8-25.
1516 *Lategan v Lategan* [2003] 6 SA 611 (D); [2003] 3 All SA 204 (D); as discussed above. See also Delport *Henochsberg on the Companies Act* 894(3).
1517 *Leech v Farber* 2000 (2) SA 444 at 452, 454. See also Delport *Henochsberg on the Companies* Act 894(3); Blackman *et al Commentary on the Companies Act* 14-460-14-461.
1518 Delport *Henochsberg on the Companies Act* 894 (9).
1519 2 of 2000.

refused,[1520] while in other instances access **may** be refused.[1521] This limitation is similar to the one mentioned in *Strauss v The Master* [1522] with reference to private enquiries in terms of (a comparable provision to section 417) section 152 of the *Insolvency Act*. The court brought forth the view[1523] that the powers of the court to review conduct, which has at its foundation the subjective opinion of a functionary or an official, are very limited. For this reason, the decision of the Master to allow an enquiry is not reviewable. Furthermore, the decision was said[1524] to lack three attributes, firstly, because it was not final in effect and was susceptible to alterations by the court (where *mala fide* was suspected) of first instance. Secondly, they were not definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had no effect of disposing at least a substantial portion of the relief claimed.

The question then becomes what the reason behind the court's decision in the *Firstrand* matter above was to set aside the decision of the Master to hold an enquiry. The answer to this question is that the Master's decision to hold the enquiry was flawed by the presence of fraud on the part of the party who requested the enquiry. The court granted suitable relief for failure on the part of the Master to comply with procedural fairness when she took that decision that a private enquiry should be held.

From an overview of the authorities perused above as regards the nature of the section 417 enquiries, the following observations are made:

(1) these proceedings are private in nature – only the selected few who can provide the necessary information may be present.

(2) no prior notice is given to potential examinees to enable them to make representation to the Master as to why they should not be called to be examined.

[1520] Section 33 (1) (*a*) of the *Constitution*.
[1521] Section 33 (1) (*b*) of the *Constitution*.
[1522] *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T).
[1523] See ch 2 where this case is discussed in detail.
[1524] See ch 2 where this case is discussed in detail.

(3) no access to documents, records and prior witnesses' testimony may be required by examinees contemplated to be examined, in preparation for their examination.

(4) the proceedings should be substantially and procedurally fair.

(5) the decision of the Master to have the enquiry held is not reviewable, unless under exceptional circumstances as mentioned above.

(6) the principle of fairness is upheld by allowing an examinee to have an attorney, advocate or accountant present to clarify complicated questions for him.

It is now clear that the purpose of section 417 enquiries is to obtain information necessary to assist in the efficient winding-up of the affairs of a liquidated company, unable to pay its debts. There is therefore no room for persons with such information to evade bringing such to the administrators of the affairs of an insolvent company.

The nature of section 418 of the same statute will be discussed next to establish the presence of similarities and or differences between the two sections.

3.3.5 Section 418: Examination by commissioners

3.3.5.1 Introduction

Provision is made under this section for a private examination by a commissioner of any person deemed to be in a position to provide information in relation to a company in winding-up.

Section 417 and 418 are connected.[1525] Like section 417, section 418 is comparable to section 152 of the *Insolvency Act* (which provides for a private enquiry as a means of gathering information for the sequestration of insolvent estates of natural persons) and provides for private examination. This is provided for in cases of companies unable to pay their debts and in winding-up.

[1525] See also *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) para 21.

Section 418 is the only section in the 1973 *Companies Act* in terms of which the powers of the court or Master to examine and enquire into the affairs of a company in winding-up are delegated to a commissioner.[1526] An enquiry under section 423(1) of the 1973 *Companies Act* [1527] could be referred to a commissioner in terms of this section.[1528] The latter section applied in cases of judicial management[1529] which has since been repealed and replaced by business rescue proceedings.[1530] It is my view that the said section may also be appropriate in business rescue proceedings. The provisions of section 418 have been tested in the Constitutional Court. Related cases will be discussed below.

3.3.5.2 Section 418(1) (a): The powers of a commissioner at the enquiries

The sub-section empowers the appointed Commissioner as the presiding officer to take evidence and control the proceedings relating to the winding-up of a company in question. The section further provides for legal representation (for the purposes of interrogating witnesses) for persons[1531] whose presence is required at the enquiry.

The sub-section provides as follows:

> Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company; (b) The Master or the Court may refer the whole or any part of the examination of any witness or of any enquiry under this Act to any such commissioner, whether or not he is within the jurisdiction of the court which issued the winding-up order; (c) The Master, if he has not himself been appointed under paragraph (a), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness: Provided that a commissioner shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily; (d) The provisions of section 417 (1A),

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1526 *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) para 5.

1527 This section makes provision for personal liability of delinquent directors and others for the debts of a company and compels them to restore property misapplied by them. This usually occurs during the liquidation process and upon application to court by either the Master or liquidator for an order to that effect.

1528 See *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) paras 4 and 30. See also Blackman *et al Commentary on the Companies Act* 14-493.

1529 Applicable to financially distressed companies. See Delport *Henochsberg on the Companies Act* 895.

1530 Section 131 (4) (a) of the 2008 *Companies Act*.

1531 Including the Master.

(2) (b) and (5) shall apply mutatis mutandis in respect of such an examination or enquiry.

(i) The legislative powers of the court[1532] to appoint a commissioner

Section 418 empowers the court or the Master to hold the enquiry or delegate such authority to a commissioner. From the reading of this sub-section, it appears that the words "Master" or "Court" are used synonymously. The inference is then that either the court or the Master may appoint a commissioner. The delegatory powers as provided for are said to assist the Master or the court by way of relieving him or the court of certain responsibilities.[1533] After all, the appointed commissioner may be an expert in the subject matter of the enquiry.[1534]

Blackman[1535] brings forth the point that it is necessary to appoint an experienced senior counsel, especially where complicated financial transactions involving substantial sums of money are at issue. This, according to him, is necessitated by the fact that the court would want a thorough interrogation of these transactions with the objectives of producing a sensible report for the court. This report is crucial in achieving the objectives of the enquiry.[1536] This is correct. Interested parties would want the funds of the affected company to be used to uncover the truth. It is thus important that knowledgeable persons are appointed to unearth the truth regarding transactions that had possibly led to the insolvency of the affected company. If the opposite were the case, then the whole process would be a fruitless exercise.

What is worth noting as regards the delegatory powers of the court, is that the court has discretion as to whether or not delegation to a commissioner is necessary.[1537] The said discretion is exercised taking into consideration the following: the nature of allegations against a contemplated examinee; the position he holds; his conduct in relation to the subject matter of the enquiry; the scope of persons who may be in a position to provide the information in relation to such conduct; the nature of

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[1532] Or Master's recommendation.
[1533] *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) paras 26, 27, 30 and 31.
[1534] *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ at para 31.
[1535] Blackman *et al Commentary on the Companies Act* 14-495.
[1536] Blackman *et al Commentary on the Companies Act* 14-495.
[1537] *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ at para 32.

the information to be gathered, assembled and analysed and; the expertise required to gather such information.[1538]

Kunst[1539] submits that by empowering the Master to so delegate his powers, the legislature circumvents delays associated with an application to the court for authorisation. According to her, this would be necessary especially where the scope of the interrogation is not broad, where the information is urgently required or it involves issues related to the administration of the winding-up as opposed to pre-liquidation matters.[1540]

According to the decision in *Lipkie v Bloemfontein Auctioneers & Agencies* [1541] rigorous control should be exercised over the appointment of commissioners and that preferably an appointee should be an officer connected with the administration of the insolvency statute or senior counsel with a good standing[1542]

As regards the issue of objectiveness, Blackman highlight the fact that this section does not exclude the operation of the principles pertaining to recusation.[1543] This is applicable either expressly or impliedly. They correctly submit that if a ground for recusal exists, a commissioner is bound to recuse himself[1544] without the leave of the court, which appointed him.[1545] Although Blackman regards recusal as an appropriate form of relief, he is, however, not ignorant of the complexity of the section 418 enquiries. This, according to him, is even more intricate where the court is required to balance the interests of the affected person and those to be achieved by the enquiry itself.[1546] It is for this reason that the granting of this remedy may be a rarity, depending on how advanced the enquiry process is.[1547] The court would

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1538 *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) at para 32.
1539 Kunst *et al Meskin Insolvency Law* 8-24.
1540 At 8-24.
1541 1960 (4) SA 672 (O) at 673; *Anderson v Dickson* 1995 (1) SA 93 (N) at 111. See also Delport *Henochsberg on the Companies Act* 895.
1542 *Ex parte Bron Syndicate* (Pty) Ltd 1937 OPD 79. See Blackman *et al Commentary on the Companies Act* 14-495.
1543 Blackman *et al Commentary on the Companies Act* 14-496.
1544 Either from holding the enquiry generally, or as the case may be, in relation to a particular witness.
1545 *Schulte v Van der Berg* 1991 (3) SA 717 (C).
1546 Blackman *et al Commentary on the Companies Act* 14-496.
1547 Blackman *et al Commentary on the Companies Act* 14-496.

have to take into consideration the resources already employed in conducting the enquiry and the information already obtained thereat. The more advanced the enquiry, the more unsuitable the recusal remedy may be.[1548] Despite all these precautions, the availability of recusal as an appropriate relief in cases of bias is a positive legislative gesture. The commissioner must still report to the Master of his decision to recuse himself if he so decides. If a commissioner declines to recuse himself, an application for recusal can be made to the court.[1549] This, it is submitted, will ensure that processes are not flaunted and principles of justice are complied with. These proceedings may, in my view, be easily accommodated into our court's structures under civil proceedings.

(ii) Powers delegated by the court or Master to the commissioner

It was highlighted in the matter of *Huang v Bester* [1550] that despite the delegation, the enquiry in terms of this sub-section remains that of the court. The commissioner was said to obtain his authority to so act through his appointment by the court. He is therefore performing what may be referred to as the court's function and what would otherwise be performed by the court. Further, that an enquiry by a commissioner appointed by the court has been described as "the court's enquiry".[1551] The court is still in control of the process, cautioned the court.[1552] From this discussion, it becomes clear that, ordinarily, a commissioner should be a person with legal background, extensive knowledge and experience in insolvency related matters. This does not however, exclude the possibilities that a commissioner may be an experienced auditor or accountant, especially where the subject of the enquiry is complicated financial transactions, which some legal practitioners might find complex.

[1548] Blackman *et al Commentary on the Companies Act* 14-496.

[1549] For contrasting decisions, see *Schulte v Van der Berg* 1991 (3) SA 717 (C) and *Absa Bank Ltd v Hoberman* [1997] 2 All SA 88 (C) (1998 (2) SA 781 (C); See Delport *Henochsberg on the Companies Act* 895.

[1550] *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ) at para 33.

[1551] *Mitchell v Hodes* 2003 (3) SA 176 (C) at para 17-18. See para 3.3.4.5 where this case is discussed in detail.

[1552] Paragraph 47.

In *Miller v Nafcoc Investment Holding Company* [1553] the court highlighted the point that it is not out of the ordinary and unreasonable for the Master to delegate his functions in relation to the holding of an enquiry to the commissioner. The former is at liberty to refer a part or the whole of the proceedings to the commissioner if he deems it necessary to so do.[1554] This is rational since the Master is not a legal practitioner, he might thus not be familiar with some legal proceedings to be complied with.

As the presiding officer, a commissioner acts in a quasi-judicial capacity.[1555] He conducts the enquiry in a manner that the Master would conduct it. Applying his discretion, he is empowered to determine who may attend the proceedings, examine the witnesses, regulate and control the interrogation process[1556] and have access to the record thereof.[1557] This is reasonable. The decision of a commissioner is based on the discretionary powers delegated to him by either the court or the Master. He is the one who conducts the enquiry and he is the one who should decide whom to examine and who shall have access to books and documents, where this is necessary.[1558] It must not be forgotten that the purpose of section 418 is to gather information to assist the liquidators in the performance of their duty to the advantage of the company and in return the creditors.

Blackman,[1559] Delport[1560] and Kunst[1561] highlight the fact that, should the presiding officer fail in his duty to apply the procedural fairness as dictated by legislation, an aggrieved party may approach the court for a fitting relief. They refer to the case of *Receiver of Revenue, Port Elizabeth v Jeeva*.[1562] The court has authority to remove

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1553 2010 (6) SA 390 (SCA) 2011 (4) SA 102 (SCA) at para 13.
1554 Section 418 (1) (*b*).
1555 *Absa Bank Ltd v Hobermann* 1998 (2) SA 781 (C) 795; *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) at para 6. See also Blackman *et al Commentary on the Companies Act* 14-495.
1556 *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) at para 6; *Receiver of Revenue Port Elizabeth v Jeeva*; *Klerck v Jeeva* 1996 (2) SA 573 (AD) 579I).
1557 *Miller v Nafcoc Investment Holding Company* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011. See also Kunst *et al Meskin Insolvency Law* 8-26; Delport *Henochsberg on the Companies Act* 895.
1558 *Receiver of Revenue Port Elizabeth v Jeeva; Klerck v Jeeva* 1996 (2) SA 573 (AD) 579I-580B.
1559 Blackman *et al Commentary on the Companies Act* 14-495.
1560 Delport *Henochsberg on the Companies Act* 895.
1561 See Kunst *et al Meskin Insolvency Law* 8-22.
1562 1996 (2) SA 573 (A) at 579.

a commissioner from office if it is satisfied that he failed to act in accordance with the principles of natural justice, which require that he act fairly and impartially at all times.[1563]

Blackman further points out that, although the courts may in certain administrative enquiries order that the rules for procedural fairness be relaxed, especially with regard to rules against bias, the court may, however, not do so in section 418 type enquiries. This is the case since, according to him, the legislature has expressly provided for representation for prospective examinees at these enquiries. Provision for representation is, according to him, indicative of the legislative desire to uphold the firm standards of procedural fairness and impartiality. He points out that in cases where a senior counsel is presiding as commissioner at the enquiry, the court would be reluctant to interfere with the proceedings and how they are conducted. This is because the court has little information before it as regards the records of the enquiry.[1564] The commissioner is, however, well versed with the records.[1565] Despite this view, it is submitted that the provision for fairness is amongst the valuable safeguards against misapplication of this section. The commissioner would be expected to be conscious of the legislative expectations on his part. To my mind, these safeguards are sufficient to guarantee protection of examinees' rights. The examinee may still approach the court if he is of the view that he is not treated fairly.

The commissioner is furthermore empowered by Regulation 5 of the winding-up procedures[1566] to determine during the proceedings whether any person has committed an offence. If he is of the view that an offence has been committed, he may forward the records of the proceedings together with a report backing his suspicions to the Master.[1567]

[1563] *Absa Bank Ltd v Hoberman* [1997] 2 All SA 88 (C) 1998 (2) SA 781 (C) at 795; *Mitchell v Hodes* 2003 (3) SA 176 (C) 188-189.

[1564] Blackman *et al Commentary on the Companies Act* 14-496.

[1565] Blackman *et al Commentary on the Companies Act* 14-496.

[1566] See para 3.3.3.2(i) above for the reference to the regulations.

[1567] See Kunst *et al Meskin Insolvency Law* 8-29; Delport *Henochsberg on the Companies Act* 896; Blackman *et al Commentary on the Companies Act* 14-496.

Joubert and Calitz[1568] are of the view that this delegation appears to indicate that both the courts and the Master's office are overburdened with duties and thus in need of assistance. This, therefore, is indicative of the need for a tribunal to deal with insolvency related matters.

As stated above, a commissioner is empowered to hold enquiries in respect of a wide range of matters in respect of companies under winding-up, regardless of the reason for the winding-up. For example, he may hold enquiries concerning a company undergoing winding-up proceedings on the basis of it being just and equitable[1569] to so wind-up.

(iii) The right to legal representation at the enquiry

At a commission of enquiry in terms of this sub-section, the Master, the liquidator (and, whether or not he is a potential witness), a creditor or member of the company, is entitled throughout the enquiry to be legally represented by either attorney or counsel and be personally present. An attorney or counsel representing either of the above has a right to interrogate any witness.[1570] It is submitted that representation is given a wider meaning in this context. An auditor, accountant or any expert may so represent the above-mentioned persons at this enquiry.[1571]

Blackman[1572] opines that the object of representation is to some extent for the protection of the examinee witness by advising him as to whether or not he is obligated to answer a particular question. Further, to draw the witness's attention to a statement that may require rephrasing and more clarity. He further emphasises the need to inform an examinee of his right to representation.[1573] The fact that the

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1568 2014 *PER* para *4.2.1.*

1569 In terms of s 344 (h) of the *Companies Act* of 1973.

1570 See Kunst *et al Meskin Insolvency Law* 8-26.

1571 See *Miller v Nafcoc Investment Holding Company Ltd* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011 (4) SA 102 (SCA) at para 13. See also clause 65.1 of the Explanatory Memorandum on the Draft *Insolvency Bill*: SALC *Review of the Law of Insolvency* (Vol 1) Project 63.

1572 Blackman *et al Commentary on the Companies Act* 14-479.

1573 Relying on *Advanced Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 (T) 822-823, acknowledging that the case is with reference to s 415 of the same statute.

statute had made express provision for representation for examinees is indicative that strict standards of procedural fairness and impartiality are envisaged.[1574]

Both Kunst and Delport[1575] submit that the right to legal representation is intended to be a right to **effective** representation. This right to effective legal representation includes the limited right of re-examination by the witness's attorney or counsel[1576] and the right of access to books and papers relating to his client's interrogation. This will be the case, even in the absence of a direction under section 417(7). They further submit that an attorney or counsel has no right to be present at a commission of enquiry except during the examination of his client. This, they submit, is subject to any contrary direction in terms of section 417(7) of the 1973 *Companies Act*,[1577] unless his client is the liquidator or a creditor or member of the company.[1578] They submit that even though a witness has no right to be present at the interrogation except during his own interrogation, he is still entitled to legal representation as and when he does appear for his own interrogation before the commissioner. They further submit that an examinee is also entitled to be informed of his right to legal representation, since such interrogation must be conducted in accordance with the principles of justice.[1579] This section further provides a witness with the right to claim legal professional privilege.[1580] The same provisions as section 65(2) of the *Insolvency Act*, which makes provision for the claiming of privilege by an examinee, are provided for in this sub-section.

1574 Blackman *et al Commentary on the Companies Act* 14-496.

1575 Kunst *et al Meskin Insolvency Law* 8-26; Delport *Henochsberg on the Companies Act* 893.

1576 In *Re Cambrian Mining Company* (1881) 20 Ch 376 at 379. This right compares to that provided for by s 65(6) of the *Insolvency Act*.

1577 Also applicable here.

1578 In that case then the attorney or counsel may be present to interrogate on behalf of his client.

1579 *Advanced Mining Hydraulics* (*Pty) Ltd v Botes* 2000 (1) SA 815 (T) 822-823, in relation to s 415 of the *Companies Act* of 1973. See also Blackman *et al Commentary on the Companies Act* 14-497.

1580 W*aymark v Commercial Union Assurance Co* Ltd 1992 (3) SA 779 (TkGD) 783-784; *Van der Heever v Die Meester* 1997 (3) SA 93 (T) 99.

(iv) Safeguards against prolonging the enquiries unnecessarily

The commissioner is empowered to disallow any question which is irrelevant or which in his opinion would prolong the interrogation unnecessarily.[1581] It must be submitted that these safeguards are necessary to circumvent misuse of these processes and to ensure that high costs of enquires are curbed, especially where the services of attorneys are enlisted. The same safeguards are provided for at section 65(1) of the *Insolvency Act*.

3.3.5.3 Section 418(2): Summoning and examination of persons of interest

The sub-section empowers the appointed commissioner as the presiding officer to summon and examine persons so summoned. The latter may also be required to produce books and documents relevant to the inquiry. The sub-section must thus be read with section 417 of the same statute. A commissioner (who is a magistrate) is also empowered to deal with defaulting or recalcitrant witnesses and decide on issues relating to any lien on documents.

The sub-section provides as follows:

> 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 who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417.

(i) Powers of the Commissioner to summon certain persons

In *Patel v Master of the High Court, Western Cape* [1582] the question to be answered by the court was whether, the Commissioner appointed by the Master in terms of sections 417 and 418 of the 1973 *Companies Act* was empowered to (1) summon a liquidator of a company in liquidation; (2) to interrogate the liquidator in relation to

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[1581] See Kunst *et al Meskin Insolvency Law* 8-26; Blackman *et al Commentary on the Companies Act* 14-496. Delport *Henochsberg on the Companies Act* does not discuss this aspect.

[1582] *Patel v Master of the High Court, Western Cape Division, Cape Town* [2015] ZAWCHC 63. See also *Saloojee v Khammissa* [2014] ZAGPJHC 372; 2015 (5) SA 554 (GJ) discussed in relation to s 417(3) of the same statute para 3.3.4.5 above.

the latter's conduct in administering that company, post liquidation. In answering these questions, the court saw it proper to refer[1583] to relevant statutory provisions namely: (1) section 381 of the 1973 *Companies Act*, which provides for the Master's control over liquidators and (2) section 417[1584] of the same legislation providing for the summoning and examination of persons as to the affairs of a company in liquidation and (3) section 418[1585] of the same statute, providing for private examination by commissioners.

The applicant had argued[1586] that section 417(1) of the 1973 *Companies Act* is not applicable to him since he was neither a director, an officer of a company in liquidation, a person suspected of being in possession of the said company's property, indebted to the company, or a person whom the Master or the Court deemed to be in a position to provide information relating to the trade, dealings, affairs or property of the company. The applicant contended that, instead of a section 417 enquiry, the Master should have invoked the provisions of section 381[1587] of the 1973 *Companies Act*.[1588]

Analysing the case of the creditor (the bank) at whose instance the order of the enquiry was issued, the court highlighted[1589] that the creditor's major concern was the manner in which the administration of the affairs of the liquidated company were conducted.

After scrutinising[1590] the bank's case and the arguments thereat, the court proceeded to highlight[1591] and it is submitted correctly so, why the bank's argument could not be sustained. Further, the court saw it fit to point[1592] at the different purposes and

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1583 Paragraph 7.
1584 Paragraph 8.
1585 Paragraph 9.
1586 Paragraph 10.
1587 This section empowers the Master to supervise the conduct of the liquidator in relation to the latter's administration of the affairs of a company in winding-up. The Master is required to take action against a liquidator who fails to diligently perform his duties. See also s 381 as described in *Henochsberg on the Companies Act* Vol 1 [Issue 32] at 808 (2).
1588 Paragraph 13.
1589 Paragraphs 11 and 12.
1590 From paras 14-19 and 32-38.
1591 Paragraphs 20-21.
1592 Paragraphs 22-31.

objectives aimed to be achieved by sections 381[1593] and 417 read with section 418 of the same legislation. The court concluded that the Master made an error of law in deciding to have the sections 417 and 418 enquiry convened for the sole purpose of interrogating the applicant.[1594] Accordingly, the applicant (as a joint liquidator) could have provided the required information on request. It is submitted that was part of his duties as a liquidator. There would then be no need to convene an enquiry in terms of section 417 read with 418.[1595] Consequently, the decision to convene an enquiry was reviewed and set aside.

The principles set forth in this case provide clarity as to whom the Master or commissioner may or may not summon to the section 417 (read with section 418) enquiries. It is submitted that the restrictions set on the Master or commissioner in this regard guard against the abuse of legislative processes. Disgruntled creditors, contributories and even shareholders have recourse in law.[1596] This should be the case since private enquiries are funded by the already financially strained company, the resources of the latter could be used effectively to benefit the creditors.

In *Huang v Bester* [1597] the executor in the deceased estate (a 50% shareholder in Derry Properties) applied for and was granted an order for an enquiry to be held before a commissioner in terms of section 418 and 423 of the 1973 *Companies Act*. The enquiry was intended to question the financial manager of the company. The basis of that order was that it is common cause that Huang, as the financial manager of the company, is a person of interest in as far as the financial affairs of the company were concerned. The liquidator had based his application on the allegations that company monies were paid directly into the bank account of Huang and her daughter.[1598] Further, that there was a lack of accounting provided to the liquidator, that Huang submitted false claims, that documents furnished by Huang

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[1593] Paragraphs 30.
[1594] Paragraphs 39. See also *Venter v Williams* 1982 (2) SA 310 (N) at 316 C-F.
[1595] Paragraph 39.
[1596] Paragraph 31.
[1597] *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551 (GSJ).
[1598] Paragraph 2, see fn 1.

were deficient, that Huang did not furnish all the documents and that there are discrepancies between income and actual funds in the company's bank account.[1599]

In *Miller v Nafcoc Investment Holding Company* [1600] a company known as Serveco (Pty) Ltd was finally liquidated upon application by one of its major shareholders Nafcoc Investment Holding Company Ltd. Subsequent to the liquidation, certain officials of both the holding company and its subsidiary and their attorney were summoned to the enquiry in terms of section 417 and 418 of the 1973 *Companies Act*. They challenged the decision of the Master to convene an enquiry in terms of section 418 and sought to prevent their appearance thereat. They succeeded in the court *a quo*.[1601] They had based their argument on the fact that while the notices requiring their attendance of the enquiry were served on them, Serveco was deregistered. According to them, the notices were therefore void. The decision of the court *a quo* was, however, set aside by the court of appeal. The reason for the decision was that these prospective examinees' argument did not hold water since Serveco was restored to the register way before the date of the proposed enquiry.[1602] It was further held that, it was unnecessary for the court *a quo* to have set aside the enquiry as it did.[1603]

Further, once Serveco had been restored to the register, there was no basis for the order setting aside the decision of the Commissioner or the Master to continue or permit the continuation of the enquiry.[1604] In any event, deregistration is an administrative action, effected by an official in the Companies and Intellectual Property Registration Office, purporting to act in terms of section 73 of the *Companies Act* and on behalf of the Registrar of Companies.[1605] Highlighted thereat was the point that administrative actions of an official in the form of a Register

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1599 At fn 1.
1600 *Miller v Nafcoc Investment Holding Company Ltd* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011 (4) SA 102 (SCA) at para 1.
1601 Paragraph 2.
1602 Paragraph 12.
1603 Paragraph 17.
1604 Paragraph 12.
1605 Paragraph 11. See also Delport *Henochsberg* on the *Companies Act* 898; Blackman *et al Commentary on the Companies Act* 14-500 -14-501.

should not and cannot displace legislative provisions as provided for in section 419 of the 1973 *Companies Act*.[1606] Deregistration was said to be of no significance since Serveco had been wound-up on 23 May 2006. The consequences of a winding-up was said not to be deregistration but a dissolution in terms of section 419 of the 1973 *Companies Act,* opined the court.[1607] While in winding-up, the company continues to exist until completely wound-up. The continued existence of a juristic person after winding-up could not be topped by its deregistration.[1608]

After analysing the cases above, the following is clear:

(1) a commissioner may be appointed to conduct enquiries in terms of sections 417 and 418 of the same statute. This officer must be a person connected with the administration of the insolvency statute or an experienced legal practitioner.

(2) despite the delegation of powers to a commissioner to conduct an enquiry, that enquiry remains that of the court. The commissioner performs what may be referred to as the court's function and what would ordinarily be performed by the court.

(3) the court has powers to remove an incompetent or bias commissioner upon application by an interested person.

(4) the right to legal representation for the Master, liquidator, creditor or contributor of the company in liquidation is provided for. This entails that examinees are also entitled to have a representative present during their interrogation.

(5) the liquidator may not be summoned for examination in terms of section 418. The appropriate provision to have the liquidator of the insolvent company account for the administration of the affairs of the affected company is found in section 381 of the same statute. This restriction guards against potential misapplication of the enquiries to achieve objectives outside of the aims of section 418.

1606 See also *Kadoma Trading* (Pty) Ltd *v Noble Crest CC* [2013] ZASCA 52 at para 15; *Fintech* (Pty) *Ltd v Awake Solutions* (*Pty*) *Ltd* [2014] ZASCA 63 at para 17.

1607 Paragraph 11.

1608 *Fintech (Pty) Ltd v Awake Solutions* (Pty) Ltd [2014] ZASCA 63 at para 17.

(6) the examination of persons of interest, such as directors and other officers of an insolvent company, may be conducted at any time prior to the deregistration of a liquidated company.

(ii) Powers of the Commissioner to examine certain persons

The commissioner has the powers as the Master or court, which appointed him, to examine and compel a witness to produce books and documents. He is also empowered to punish a recalcitrant witness and determine all questions relating to any lien, **provided** such commissioner is a magistrate. It is now an established principle in our law that only a commissioner who is a magistrate, may deal with a recalcitrant witness in the context of insolvency.[1609]

The power of the commissioner to examine and compel the production of books and documents is reflected in the matter of *Miller v Nafcoc Investment Holding* [1610], where applicants (former directors and or employees of a company in liquidation together with their attorney) were compelled to appear before the enquiry and to bring with certain documents. The enquiry was authorised by the Master in terms of sections 417 and 418 of the 1973 *Companies Act*, although set aside by the court below, the order was subsequently upheld by the Supreme Court of Appeal.[1611]

3.3.5.4 Section 418(3): The duty of the commissioner to report to the Master

The sub-section imposes on the commissioner a duty to report on the enquiry he is appointed to conduct. He may report to the Master (who delegated his powers of examining) or the court that appointed him.

The sub-section provides as follows:

> If a commissioner- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or (b) has been appointed by the

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[1609] Section 418(5) (*a)* (*b*) (*i*). See also Kunst *et al Meskin Insolvency Law* 8-29.

[1610] *Miller v Nafcoc Investment Holding Company Ltd* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011 (4) SA 102 (SCA), see discussion of this case at para 3.3.5.3 (i).

[1611] Paragraph 20.

> Court, he shall, in such manner as the court may direct, report to the Master and the Court on any examination or enquiry referred to him.

After conducting the enquiry, it is required from the commissioner to report on his findings. It is from this report that creditors may be able to determine if they have any course of action against directors, officers or other persons.[1612] Through these reports, it may become evident that certain persons defrauded the insolvent company and that such conduct may have led to its insolvency. Implicated persons should be brought to book. It is thus imperative that the commissioner diligently conduct the examination.[1613]

Since a commissioner is often experienced[1614] and a specialist in the subject matter of the interrogation, he is expected to analyse the evidence submitted at the enquiry. The evidence led may be analysed either in the context of sections 423 and 424 of the 1973 *Companies Act*, or sections 77,163 and 218 of the 2008 *Companies Act.* It is for these reasons that Blackman[1615] correctly holds the view that strictly speaking; there is no such thing as a section 418 enquiry but a section 417 enquiry. The conclusion drawn from this view is that the section 418 enquiry is concerned with the affairs of a company in winding-up, whether due to its inability to pay its debts or in winding-up because it is just to do so.

The importance of the report of the commissioner is evidenced by a supplementary provision in regulations 5 and 6 of the *Regulations for the Winding-Up and Judicial Management of Companies*.[1616]

1612 See Report of the Commissioner in the enquiry held in terms of section 417 and 418 of the 1973 *Companies Act* (as amended) read with item 9 of schedule 5 of the *Companies Act* 71 of 2008 into the affairs of: Pinnacle Point Group Limited (in liquidation) Chestnut Hill Investments 111 (Pty) Limited (in liquidation) GR Equity (Pty) Limited (in liquidation) at pg3 available at www.saflii.org.

1613 See also Blackman *et al Commentary on the Companies Act* 14-495.

1614 *Anderson v Dickson* (1985) (1) SA 93 (N) 111.

1615 Blackman *et al Commentary on the Companies Act* 14-494.

1616 GN R2490 of 28 December 1973. See also Blackman *et al Commentary on the Companies Act* 14-496-14-497.

Further, the significance of the commissioner's report is demonstrated in the matter of *Engelbrecht v Zuma*.[1617] The sections 417 and 418 enquiry[1618] held into the affairs of a company (Pamodzi) in liquidation revealed[1619] that the directors and managers of an insolvent company (Aurora) were personally[1620] liable for the debts and liabilities owed by Aurora to Pamodzi group of companies. The said liability was based on their fraudulent and reckless conduct of the affairs of Aurora.[1621] The importance of these enquiries can thus not be overstated.

3.3.5.5 Section 418(4): Access to the records of the proceedings

The sub-section permits access to the records of the proceedings to a witness at his own costs. Access is limited to one's own evidence though.

The sub-section provides as follows:

> Any witness, who has given evidence before the Master or the Court under section 417 or before a commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.

It must be noted that the restriction on access to the documents of the proceedings is limited.[1622] A witness would still be allowed access to the records of the proceedings containing only his evidence. Such evidence may be required by the witness to prepare for subsequent proceedings emanating from the enquiry or examination. To ensure that the provision for access to a copy of the record of one's evidence is not abused, a witness is expected to cover the costs of reproducing such documents.[1623]

Despite the restrictions provided by this section on access to documents and books of the enquiry or examination, the court in *Jeeva v Receiver of Revenue, Port*

1617 *Engelbrecht v Zuma* [2015] All SA 590 (GP).
1618 See para 46. See also para 62 for the order of the court.
1619 Paragraph 19.
1620 In terms of s 424 of the *Companies Act* of 1973 read with s 77 and Sch 5 of the *Companies Act* 71 of 2008.
1621 Paragraph 16.
1622 See the discussion on this aspect at para 3.3.4.9(ii) above.
1623 Delport *Henochsberg* on the *Companies Act* 896.

Elizabeth [1624] held that at a commission constituted in terms section 418 of the *Companies Act* at the instance of the State, a potential witness is entitled, in terms of section 23 of the *Interim Constitution* to information in its possession relating to the company which is not covered by legal professional privilege. Held further that, the said witnesses were entitled to administrative action, which is lawful, justifiable and both substantially and procedurally fair. The court emphasised[1625] that, since witnesses were to submit to interrogation, they are entitled to prepare themselves to deal with the subject matter under enquiry. In addition, the court held that the witnesses are entitled to equality before the law. The said right includes equal access to the information held by the interrogator, especially if the interrogator is directly or indirectly an organ of State, said the court.[1626] As stated earlier, it is doubtful if the commissioner can be rightfully referred to as an organ of state.

Although the commission is a secret commission and the contents of the application and the terms of the court order are not to be disclosed without the leave of the court or the commissioner, if a proper case is made for the lifting of the veil of secrecy, the court will indeed grant an order to so lift the veil, held the court.[1627] Furthermore, although the grant of the order for the enquiry may be secret, it should be clear to anyone summoned to give evidence before the commissioner, that if they have grounds for believing that justice might be denied unless they are allowed access to the application and the order, they should apply for leave to peruse the documents.[1628]

3.3.5.6 Section 418(5) (a) (b): Offences for failure to comply with the summons

The sub-section makes failure to comply with the duties imposed by the summons an offence. From the reading of this sub-section it appears that, it can only be invoked in instances where the presiding commissioner is not a magistrate, empowered by the relevant statute to deal with recalcitrant witnesses in terms of

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[1624] 1995 (2) SA 433 (SEC) 443-444.
[1625] At 444.
[1626] Kunst *et al Meskin Insolvency Law* 8-25.
[1627] *Foot v Alloyex* 1982 (3) SA 378 (D) at 382B-G.
[1628] *Foot v Alloyex* 1982 (3) SA 378 (D).

the 1973 *Companies Act*.[1629] The exact implications of this sub-section will be analysed below.

The sub-section provides as follows:

> Any person who has been duly summoned under this section by a commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons; or (b) has been duly summoned under section 417 (1) by the Master or under this section by a commissioner who is not a magistrate and who- (i) fails, without sufficient cause, to remain in attendance until excused by the Master or such commissioner, as the case may be, from further attendance; (ii) refuses to be sworn or to affirm as a witness; or (iii) fails, without sufficient cause - (aa) to answer full and satisfactorily any question lawfully put to him in terms of section 417 (2) or this section; or (bb) to produce books or papers in his custody or under his control which he was required to produce in terms of section 417 (3) or this section, shall be guilty of an offence.[1630]

A witness commits an offence[1631] when, without 'sufficient cause', he fails to appear before the commissioner or produce books and documents as required in the subpoenas. The case of *Bernstein v Bester* [1632] is relevant in this context. 'Sufficient cause' would be fear of having one's rights as provided for in the *Bill of Rights* infringed by the questions posed and answers required at the enquiry.[1633] The built in offence provided for by this sub-section makes for the smooth running of the procedure, especially where the commissioner is not a magistrate. An examinee needs to comply with the subpoenas to avoid incarceration.[1634] Imprisonment would only ensue in cases of recalcitrant examinees. That would be one way of coercing an examinee to comply. Summary proceedings for incarcerating recalcitrant witness, where the ordinary strict criminal procedure rules are not necessarily applied, are common in open and democratic societies where freedom and equality is a norm.[1635]

1629 Of 1973.

1630 Section 418 is substituted by s 10 of *Act* 29 of 1985.

1631 In addition, liable to a fine or imprisonment for a period not exceeding six months or to both. See in general *Advance Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 (T); *Van der Berg v Schulte* 1990 (1) SA 500 (C) 511- 512; Blackman *et al Commentary on the Companies Act* 14-499.

1632 *Bernstein v Bester* 1996 (2) SA 751 (CC) paras 58-63; [1996] ZACC 2; 1996 (4) BCLR 449.

1633 Paragraph 61.

1634 *Strydom v Additional Magistrate Kempton Park* [2010] ZAGPPHC 32 at para 19.

1635 *Nel v Le Roux* [1996] ZACC 6; 1996 (4) BCLR 592; 1996 (3) SA 562 at para 22. Although this case was decided in the context of enquiries held in terms of s 205 of the *Criminal Procedure Act* 51 of 1977, it is relevant in the context of s 417 and s 418 enquiries since the three sections aim at the gathering of information in preparation for possible subsequent proceedings.

'Both civil and criminal contempt procedures are used to coerce a recalcitrant witness'. Since directors and officers who are often witnesses in the winding-up enquiries are not necessarily insolvent, they are in a position to pay a fine in the stead of imprisonment.

Blackman[1636] correctly highlights the fact that a commissioner who is not a magistrate has no legislative powers to deal with a witness who refuses to comply with what is required of him. The reason being that, since the former is appointed by the court or the Master, his power is derived from the provisions of section 418. Acknowledging that a section 418 commission of enquiry is not a tribunal nor is a commissioner presiding in a judicial capacity (even if he is a magistrate),[1637] he can therefore not commit such witness for contempt of court.[1638] This is also the case since section 418 does not empower a commissioner who is a magistrate to commit a recalcitrant witness.[1639] It is submitted that the provisions for an offence is sufficient penalty to deal with non-co-operative examinees.

Kunst[1640] highlights the point that a witness may not be obliged to comply with the requirements of this sub-section where there is a potential of the infringement of any of his *Bill of Rights*, as entrenched in the *Constitution*.

Delport[1641] brings forth the point that any of the defaults mentioned under this sub-section constitute an offence, the penalty for which is a fine and/or imprisonment for a period not exceeding six months.[1642] He submits that only a commissioner who is a magistrate may so punish such a witness and issue an order of court for his arrest and detention.[1643] It is submitted that this view is contrary to the view held by Blackman to which I subscribe. The provision that a commissioner who is not a

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1636 Blackman *et al Commentary on the Companies Act* 14-498.
1637 At 14-499.
1638 Relying on *Van der Berg v Schulte* 1990 (1) SA 500 (C) 506 and 507 and *De Lange v Smuts* 1998 (3) SA 736 (CC).
1639 Blackman *et al Commentary on the Companies Act* 14-499.
1640 Kunst *et al Meskin Insolvency Law* 8-29.
1641 Delport *Henochsberg* on the *Companies Act* 896.
1642 Section 441(1) (*f).*
1643 In line with what was said in *De Lange v Smuts* 1998 (1) SA 736 (C). See also Delport *Henochsberg on the Companies Act* 897.

magistrate may institute a criminal complaint against a recalcitrant witness should also be applicable to a commissioner who is a magistrate or judge.

From the analysis of cases above, the following is observed:

(1) directors and other officers of a company in liquidation may be required to submit books and documents and to be interrogated in relation to such.

(2) the report to be submitted to the Master by the commissioner on his findings is crucial; it may reveal irregular conduct on the part of certain officers.

(3) there are restrictions to access the records of the enquiry, unless just cause is shown why access should be permitted. An examinee is however, entitled to records of his evidence at his own costs.

(4) offences for failure to comply with the provisions of this section are crystalised.

Processes and proceedings employed in the administration of insolvent companies' affairs were dealt with and in particular, interrogation of specified persons in private, conclusion will be made below as regards the above.

3.3.5.7 General conclusion: Company interrogations

Regarding the provisions of the *Insolvency Act* relating to the sequestration of natural persons and those of the 1973 *Companies Act* relating to the liquidation and winding-up of juristic persons unable to pay debts, the view is that these are largely similar. There is thus no need to have two separate statutes regulating the same aspect. The provisions of sections 414, 415 and 416 serve an important legislative purpose to ensure that the required information is available to assist in the efficient administration of the affairs of a liquidated company. The provisions of sections 417 and 418 in particular are required, taking into account the complexity of company's finances and methods of conducting their business. The contribution of commissioners who specialise in the subject matter of the interrogation is often invaluable for the effective and efficient information gathering process. From the preceding discussion, it is clear that both sections 417 and 418 aim at obtaining

confidential information at short notice, probably before or after the creditors' meetings where the interrogation of specified persons, including the directors and officers of an insolvent company, is conducted. A detailed conclusion on all the sections discussed above will be given hereunder.

3.4 Conclusion

3.4.1 Introduction

With regard to public and private interrogation of directors and other persons of interest in relation to the affairs of companies in liquidation, the following views have been taken: Same as in the case of insolvency of a natural person, trust and partnership, the attendance[1644] of meetings of creditors (of an insolvent company) by directors and officers of the insolvent company is mandatory. From the discussion above, it appears that (same as provided for by sections 64, 65, 66, 67 and 152 of the *Insolvency Act*) the provisions of sections 414, 415, 416, 417 and 418 of the 1973 *Companies Act* and to some extent Schedule 5, item 9 of the 2008 *Companies Act* [1645] are aimed at the discovery (through investigation) of the insolvent company's assets.[1646] The latter to be fairly distributed amongst the company's creditors. After this investigation, I am convinced that this is the best way of achieving the above-mentioned objective. It does not look like there is any other way of achieving it except to call people to come forward with information that would assist in the effective and efficient liquidation process.

The coming into effect of the *Constitution* has affected the interrogation proceedings. Through case law, the Constitutional Court confirmed amendments[1647] made to the *Insolvency Act* in section 65 to be equally applicable to interrogations in the winding-up of companies unable to pay their debts. Further, the Constitutional Court ensured the separation of powers between the executive and the judiciary.

1644 Section 64 of the *Insolvency Act* of South Africa.
1645 Moreover, to some extent, in relation to the insolvency of close corporations.
1646 And/or close corporations as the case may be.
1647 Made in 1989 regarding the admissibility of evidence obtained at the insolvency interrogations.

This it did by expressly precluding non-judicial officers from punishing recalcitrant witnesses.

It is submitted that the investigatory mechanisms provided for by the legislature could be more effective if they were regulated by a single legislation for both natural and juristic persons. The shortcomings brought about by fragmented legislation regulating the insolvency of natural persons[1648] and the other regulating the insolvency of juristic persons[1649] such as companies[1650] cannot be denied. Solutions of latest proposals as *per* the Unofficial Draft Working Document on a new *Insolvency Bill* of 2015[1651] as well as those recommended generally by the ROSC on insolvency interrogations could alleviate the said shortcomings. Comments sub-section by sub-section are given hereunder.

3.4.2 Re: section 414

Like section 64 of the *Insolvency Act*, section 414 had, prior to the coming into effect of the constitutional era and post that era, made provision for the compulsory attendance of the creditors' meeting by directors and officers of a company unable to pay its debts.

As regards the latter section's provision for compulsory attendance of creditors' meeting by directors and other officers of insolvent companies, the view is that these officers are often the only people with information relating to the affairs of an affected company. Logic dictates that these officers come forward and provide the necessary information for the proper administration of the affairs of that insolvent company. A person aggrieved by this provision has no further recourse but to comply.

From a distance, this provision may appear as stringent. However, on closer inspection of the purpose sought to be achieved by the section, it becomes clear

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[1648] The *Insolvency Act* of 1936.
[1649] The 1973 *Companies Act* which continues to operate despite the coming into effect of the 2008 *Companies Act*.
[1650] In addition, close corporations.
[1651] In the possession of the author.

that officers of the company (in winding-up due to its inability to pay its debts) and other persons of interest must be present at insolvent company creditors' meeting. How else is the meeting going to be informed about the events leading to the insolvency of the said company, if probably the only persons with the most complete information can be allowed to avoid providing it? This provision should, however, be relaxed only where the said officer has a very good and solid reason for failure to appear for interrogations. As stated in the case of the insolvency of a natural person in chapter two above, a medical condition supported by a medical certificate should be a good enough reason.

As regards summoning former directors and officers of affected companies, the view is that the directors and officers of a company in liquidation must come forth despite the fact that they have ceased to act as such due to the liquidation of the company. The fact that they no longer occupy those offices does not take away their responsibilities to account to the insolvent company and its creditors. The mandatory attendance of creditors' meetings by the above-mentioned persons is obvious. A company is a juristic person and its business is conducted by these officers, it is only fair that they come forward with information that could assist the liquidators to finalise the liquidation process. After all, these officials are the only people privy to information as regards the assets and liabilities of the company in liquidation.

Regarding the compulsory production of books and documents relating to the business affairs of an insolvent company, the view is that books and documents must be brought forth to enable liquidators to access information relating to the conduct of the company's affairs prior to its insolvency.[1652]

Concerning means for the enforcement of the provisions of section 414, the view is that penalties provided are necessary. Directors and other officers of insolvent companies should not be entitled to refuse to comply with the subpoenas to attend meetings. Accordingly, no privacy or dignity rights are violated by attending

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[1652] *Bernstein v Bester* 1996 (2) SA 751 (CC); BCLR 449 (CC) paras 16 and 84.

creditors' meetings. Attending these meetings is part of directors' duties to the company.

Regarding costs for attending creditors' meetings, the view is that witnesses who are experts in their fields, like auditors, be paid expert witness fees. To my mind this view should be reconsidered where the affected company is hopelessly insolvent.

From authorities enunciated above, it is clear that, like section 64 of the *Insolvency Act*, section 414 has passed the constitutional test and it is beyond reproach for now. It is said that the section is of general application[1653] and that this is confirmed by the wide definition of "persons interested" and the wide powers given to the presiding officer with reference to the subpoenas. The temporary deprivation of freedom for persons subpoenaed to provide the required information or documents is said to be justified in the circumstances. This justification is said to serve a public purpose in a constitutional era.[1654]

3.4.3 Re: section 415

The stipulations of this section are the same as those of section 65 of the *Insolvency Act.* Section 415 makes provisions for the holding of a public interrogation of persons subpoenaed in terms of section 414 of the 1973 *Companies Act*.

As regards the public nature of these proceedings, the view is that this type of interrogation is less expensive as compared to private proceedings in terms of sections 417 and 418 of the 1973 *Companies Act*.

Regarding the interrogation under oath or affirmation, the observation is that the section expressly accommodates persons who, due to their faith, may not take an oath but an affirmation. This provision makes the section compatible with the *Constitution of the Republic of South Africa*.

1653 Section 36 of the *Constitution*.
1654 Section 36 of the *Constitution*.

With regard to privilege on books and documents to be submitted by the prospective examinees, the view is that such is necessary to ensure the unobstructed identification of transactions and payments made in the conduct of the company business affairs.[1655]

Despite the fact that compulsory interrogations have always been frowned upon at both common law[1656] and under the constitutional era in South Africa, it is now a well-established principle in our law that persons subpoenaed are compelled to answer all questions.[1657] This is the case even with regard to those questions which have the potential of incriminating the witness in subsequent specified criminal proceedings. The said evidence is admissible in civil proceedings. In spite of the not so favourable principle mentioned here, a witness might find solace in the provision that incriminating evidence is not admissible against him in criminal proceedings[1658] emanating from liquidation, in this instance, fraud related offences for example. Furthermore, evidence[1659] submitted at the interrogation would not necessarily prove the existence of an offence against the witness. The prosecution in the trial court has a duty of establishing its own evidence for its case beyond reasonable doubt.

As regards the use of incriminatory evidence in subsequent civil proceedings against the deponent, the position is that the evidence is admissible in civil proceedings against the person who gave the evidence. The courts have in a number of decisions,[1660] even after the advent of the *Constitution* held that this insolvency principle is a deviation from the general rule of privilege against self-incrimination.[1661] This deviation is said to be constitutional and serves an important public function. It is a *sui generis* provision, applicable only to insolvency proceedings.[1662] It is further noted that the fact that an examinee at the interrogation proceedings is to be a witness or a party in an imminent civil proceeding (emanating

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1655 See Delport *Henochsberg on the Companies Act* 878.
1656 See para *2.2* above where this issue is discussed in detail.
1657 *Parbhoo v Getz* 1997 (10) BCLR 1337 (CC) para 11.
1658 See in general *Ferreira v Levin*; *Vryhenhoek v Powell* 1996 (1) BCLR 1 (CC).
1659 Whether written interrogatories or *viva-voce* evidence.
1660 Before and after the 1989 amendments to the *Insolvency Act*.
1661 Paragraph 3.3.2.5 and 3.3.2.6 above.
1662 Paragraph 3.3.2.5.

from the liquidation proceedings), does not qualify to stay the interrogation proceedings. The reason being that the trial judge has discretion as to whether or not to admit evidence divulged at the interrogation proceedings.

Further, regarding the provision for the presiding officer to consult with the Director of Public Prosecutions where it appears that a witness declines answering an incriminating question, the view is that such consultation is intended to ensure the success of any criminal proceedings that may be contemplated against the deponent.[1663] Due to the fact that it does not appear to be clear why the section has made the provision for consultation with the Director of Public Prosecutions, the presumption held is that this is intended to allow the latter to form an opinion as to whether he would want to prosecute the said witness or not.[1664] If he so wishes to prosecute, he would not want to jeopardise the success of his case by forcing the witness to reveal his defence at the interrogation, thus making same inadmissible in the contemplated criminal action.

As for the preference between the *viva-voce* giving of evidence or written interrogatories, the view is that the choice would be in consideration of the nature of the required evidence.[1665]

It is noted that although the interrogation proceedings are recorded and filed by the Master who must make it available to the court when so required, the recorded information is not for public consumption and may not be published except by the order of the court.[1666]

With reference to legal representation of examinees, the principle is that an examinee is entitled to be represented by a legal practitioner of his choice. The right to legal representation must be communicated to an examinee by the officer

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[1663] Paragraph 3.3.2.5 above.
[1664] Paragraph 3.3.2.5.
[1665] Paragraph 3.3.2.7 (ii).
[1666] Paragraph 3.3.2.7 (i).

presiding at the interrogation proceedings to ensure that the principle of justice is upheld.[1667]

In conclusion, it is appreciated that section 415 provides some level of protection to subpoenaed persons in the form of section 415(5).

3.4.4 Re: section 416

Section 416 makes applicable to this section the provisions of sections 66, 67 and 68 of the *Insolvency Act*. This would be the case where the application thereof is not contradicting the section 416 provisions.

As regards penalties provided for by this section for failure to attend creditors' meetings as subpoenaed, the view is that these officers and other persons of interest are often the only people with information relating to the affairs of an affected company. It is only logical that they should come forward and provide the necessary information. This is part of their duties as directors, officers or auditors of the now liquidated company. Penalties provided are thus rational. The application of the *Insolvency Act* provisions to reinforce the provisions of sections 414 is indicative of the legislature's desire to accentuate the importance of these proceedings. However, the view is that the sanctions provided for by section 414 are sufficient. There is therefore no need for further reinforcements from sources outside of this statute.[1668] The same is the case with regard to penalties for failure to produce books and documents.

With regard to the failure to answer questions, even incriminatory ones, the view is that the protection afforded to examinees is sufficient and it is thus fair that compliance is enforced by sanctions. Directors and officers of companies in liquidation should not be entitled to refuse to answer relevant questions. It is, in my view, their civil duty to so comply.[1669] As with regard to penalties to reinforce compliance with the requirements to answer all questions lawfully put, the view is

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[1667] Paragraph 3.3.2.8.
[1668] Paragraph 3.3.3.2 above.
[1669] See in general *Bernstein v Bester* 1996 (2) SA 751 (CC); BCLR 449 (CC).

that sections 415(3) and 415(5) have sufficiently provided for the reinforcement of its provisions. Again, there is no need for the application of the penalty provision under section 65 of the *Insolvency Act* as stated in section 416(1).[1670]

Regarding the provision to deal with suspected offences committed by directors, officers of the liquidated company or any other person, the view is that the application of section 67 of the *Insolvency Act* to address instances where offences in terms of this statute are suspected is necessary. This is the case since neither sections 414 nor 415 provide for steps to be taken on suspicion of an offence by the above-mentioned persons.[1671]

As far as the provision for the recording of the interrogation proceedings is concerned, the view is that this aspect is already provided for by section 415(4). There is therefore no need for the section 416(1) provisions. After careful investigation, it is clear that section 415(4) is self-sufficient.[1672]

3.4.5 Re: section 417

Same as provided for by section 152 of the *Insolvency Act*, section 417 makes provision for the broad and private examination of persons of interest as to the affairs of a company in liquidation.[1673]

Regarding the compulsory attendance of the interrogations, the view is that such is necessary for the gathering of information in relation to the company's affairs and thus constitutional. The presiding officer should ensure that all the protective measures are put in place for the benefit of those examined and to ensure the credibility of the process.

As far as legal representation is concerned, the position is that an examinee is permitted legal representation and that he must be informed of such a right. The

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1670 Paragraph 3.3.3.2 (i) –(iv) above.
1671 Paragraph 3.3.3.2 (iv) above.
1672 Paragraph 3.3.3.2 (v).
1673 See Kunst *et al Meskin Insolvency Law* 8-23; Blackman *et al Commentary on the Companies Act* 14-457-14-459.

representative can only be present when his client is interrogated (and to re-examine his client). Further, to have access to books and documents containing his client's evidence. The view is that this representation should only go as far as assisting his client in answering or rephrasing questions for him and not to answer for him.[1674]

Regarding the choice between verbal evidence and written responses, the view is that the presiding officer has discretion. This discretion is dependent on the nature of the information required in the administration of the insolvent company's affairs. A prospective examinee may therefore not, as a rule, demand written questions instead of *viva voce* evidence.[1675]

In relation to compelled testimony under this section, the current position is that it is not unconstitutional[1676] to compel a witness to answer incriminatory questions if those are relevant to the affairs of a company in liquidation. An examinee is, however, protected in that the officer presiding at the interrogations is required to order the *in camera* proceedings. The view is that, in addition to the incriminatory evidence, there are other instances where *in camera* provision may be necessary, for instance where the state's secrets are concerned.[1677]

Regarding the admissibility of compelled incriminatory (directly or indirectly obtained at interrogations) evidence, the position is that such is admissible against the deponent in criminal proceedings limited to perjury related offences.[1678] The evidence is also admissible against the deponent in civil proceedings.[1679]

As far as the compelled production of books and documents is concerned, the position is that, where such books and documents are necessary for the effective

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1674 Paragraph 3.3.4.4 above.

1675 *Nyathi v Cloete* [2012] ZAGPJHC 154; 2012 (6) SA 631 (GSJ). See also paragraph 3.3.4.5 above.

1676 See in general *Ferreira v Levin; Vryhenhoek v Powell* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1; *Benson, In re: Tait v Jason* [2012] ZAWC HC 377.

1677 Paragraph 3.3.4.5 (ii) above.

1678 See in general *Ferreira v Levin*; *Vryhenhoek v Powell* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

1679 *Benson, In re*: *Tait v Jason* [2012] ZAWC HC 377 para 11; *Pitsiladi v Van Rensburg* 2002 (2) SA 160 (SECLD).

information gathering process,[1680] there is nothing unconstitutional about such requirement.[1681] The requisition of books and documents in these circumstances is considered a legitimate limitation of the right to privacy and the right not to be subjected to seizure of private property.[1682] Further, where books and documents are seized, such seizure does not affect the existence of any lien thereto.[1683]

Regarding the powers of the Master over recalcitrant witnesses, the position is as follows: Since the Master is not a magistrate; he may not lawfully order the incarceration of a recalcitrant witness. If he does, he would be ignoring the ruling in the *De Lange v Smuts*[1684] matter. The principle is that non-compliance by a witness of what is lawfully required of him, constitutes an offence. Such a witness will be dealt with according to rules relating to criminal proceedings. This immunity provided for thus fall away. It may not even be necessary or applicable in the case of a commissioner who is a magistrate or a judge. This is the case since such a commissioner does not preside at a tribunal in a judicial capacity.[1685]

Concerning the issue of witness's fees, the view is that such should be funded from the insolvent company's assets.[1686] As far as the funding of the enquiry or examination is concerned, the view is that the petitioning creditor funds costs associated with the enquiry. The said creditor would then be compensated from the residue of the estate, if there was any.[1687]

Regarding the private nature of this section, the view is as follows: Even though affected persons are not invited at these proceedings, since an application for such proceedings is made *ex parte*,[1688] irregular reasons behind the Master's decision to

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1680 In the effective and efficient administration of the affairs of an insolvent company.
1681 See in general *Bernstein v Bester* 1996 (2) SA 751 (CC); [1996] 1996 (4) BCLR 449. See also *Absa Bank Ltd v Jooste* [2013] ZAECPEHC 58; *Gumede v Subel* 2006 (3) SA 498 (SCA).
1682 Section 36 of the *Constitution*.
1683 *Gumede v Subel* 2006 (3) SA 498 (SCA).
1684 1998 (1) SA 736 (CC) at para 57 to 63. Although this matter relates to a recalcitrant witness in the context of the insolvency of a natural person, it is also relevant in the context of a witness in the winding-up of an insolvent company.
1685 See Blackman *et al Commentary on the Companies Act* 14-498.
1686 Paragraphs 3.3.4.7 and 3.3.4.8 above.
1687 Paragraph 3.3.4.8 and 3.3.4.9 (i).
1688 Paragraph 3.3.4.9 above.

hold same may lead to the court's intervention. It is also clear that such decision does not amount to an administrative action.[1689] The court's intervention provision is intended to allow a person aggrieved by the pronouncement for the holding of such proceedings, to have the decision reversed by the court, thus ensuring fairness. The court can only review the decision provided proof of failure on the part of the Master to properly apply his mind prior to the decision is found.[1690] Further, the private nature of this section means that, as a rule, would be examinees are not entitled to access the application (and enclosed documents) for the enquiry either.[1691]

The fact that the Master and not the court is empowered to authorise the issuing of the summons is a thorny issue. The Master is not a judicial officer. This makes him not a suitable person to authorise the issuing of the summons. This view is predicated on the assumption that there are no guidelines in place for the Master to decide which instances are appropriate for authorising the issuing of summons.

3.4.6 Re: section 418

When read with section 417, this section is aimed at the collection of information in a secretive and speedily manner. The section has same provisions as section 152 of the *Insolvency Act,* which provides for private enquiries.[1692]

With regard to the application of section 418 of the 1973 *Companies Act* provisions to the then judicial management, the view is that the said section may also be appropriate for application in business rescue proceedings.[1693]

1689 *FirstRand Bank Ltd t/a Rand Merchant Bank v The Master of the High Court, Cape Town* [2013] ZAWCHC 173; [2014] 1 All SA 489 (WCC); 2014 (2) SA 527 (WCC) para 25 to 28 and 51.

1690 *FirstRand Bank Ltd t/a Rand Merchant Bank v The Master of the High Court, Cape Town* [2013] ZAWCHC 173; [2014] 1 All SA 489 (WCC); 2014 (2) SA 527 (WCC) para 25.

1691 *Strauss v The Master of the High Court of SA* 2001 (1) SA 649 (T), although in relation to a private enquiry of insolvent person, it is relevant in this context. See also *Leech v Farber* 2000 (2) SA 444 (W) at 451, 452 and 454.

1692 Paragraph *3.3.5* above.

1693 Paragraph 3.3.5.1 above.

As for the legislative powers of the court[1694] to appoint a commissioner to hold enquiries into the affairs of a liquidated company, the view is that this may be necessary in certain circumstances. This would be the case in instances where expertise in relation to the subject matter of the intended interrogation is required.[1695] It would also be suitable in cases where a prospective examinee is not cooperative. This position should thus necessitate judicial pressure to investigate reasons behind such failures.[1696]

Pertaining to the principle of the recusal of the appointed commissioner, the observation is that this provision is intended to ensure the credibility of the process and that persons aggrieved by the conduct of the commissioner have a remedy at their disposal.[1697] Further, if these processes were to be accommodated into the court's structures, there would not be a need for concerns of possible misapplication of guidelines.

Despite the delegation of powers to a commissioner to conduct enquiries, the position is that the proceedings remains the court's proceedings.[1698] The court is still in control of the process.[1699] However, the appointed commissioner decides who may attend the hearing, whom to examine and he regulates the proceedings applying his discretion fairly.[1700] The view is that these safeguards are sufficient to counter the misapplication of the section 418 provisions and guarantee the protection of examinees. A further view with regard to the delegation of powers to a commissioner, the observation is that both the courts and the Master's office are overburdened[1701] and thus in need of assistance. This position calls for the establishment of expertise tribunals to deal with insolvency related matters.

1694 In addition, the Master's recommendations for such appointment.
1695 See in genera*l Lipkie v Bloemfontein Auctioneers & Agencies* 1960 (4) SA 672 (O).
1696 Paragraph 3.3.5.2 above.
1697 *Absa Bank Ltd v Hoberman* [1997] 2 All SA 88 (C) (1998 (2) SA 781 (C) at 796E-H.
1698 See in general *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551.
1699 See again *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551.
1700 Receiver of *Revenue Port Elizabeth v Jeeva; Klerck v Jeeva* 1996 (2) SA 573 (AD) 579I-580B. See also Delport *Henochsburg on the Companies Act* 895; Kunst *et al Meskin Insolvency Law* 8-22.
1701 See Joubert and Calitz 2014 *PER* para *4.2.1.*

As far as the availability of legal representation at the section 418 enquiries is concerned, the view is that representation is given a wider meaning in this context.[1702] An auditor, accountant or any expert may so represent an examinee. Furthermore, the legislature envisages fair and impartial proceedings.[1703]

Concerning safeguards against prolonging the enquires unnecessarily, the view is that these safeguards are necessary to prevent the abuse of these processes and to curb high costs of enquiries. This is especially necessary where the services of an attorney are enlisted.[1704]

In connection with the powers of a commissioner to summon certain persons, the principle is that the commissioner may summon any person who can provide information in relation to a company in winding-up. The information must be within the scope of sections 417 and 418.[1705] It is submitted that this restrictive principle constrains abuse of legislative processes by disgruntled creditors, contributories and even shareholders.

With regard to powers of a commissioner to compel the production of books and documents and to examine certain persons, the principle is that the former has the same powers as the court which or Master who appointed him.[1706] These powers are, however, subject to restrictions based on the view that even a commissioner who is a magistrate or judge does not sit in that capacity at these enquiries.[1707]

1702 See *Miller v Nafcoc Investment Holding Company Ltd* [2010] ZASCA 25; [2010] 4 ALL SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011 (4) SA 102 (SCA) para 13. See also clause 65.1 of the Explanatory Memorandum on the *Draft Insolvency Bill* : SALC *Review of the Law of Insolvency* (Vol1) Project 63.

1703 See *Advanced Mining Hydraulics (Pty) Ltd v Botes* 2000 (1) SA 815 (T) 822-823; *Waymark v Commercial Union Assurance Co Ltd* 1992 (3 SA 779 (TkGD) 783-784; *Van der Heever v Die Meester* 1997 (3) SA 93 (T) 99. See also Blackman *et al Commentary on the Companies Act* Vol 3 14-479; Kunst *et al Meskin Insolvency Law* 8-26; Delport *Henochsberg on the Companies Act* 893.

1704 Paragraph 3.3.5.2 (iv) above.

1705 See for example *Huang v Bester* [2012] ZAGPJHC 111; 2012 (5) SA 551; *Miller v Nafcoc Investment Holding Company* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011.

1706 *Miller v Nafcoc Investment Holding Ltd* [2010] ZASCA 25; [2010] 4 All SA 44 (SCA); 2010 (6) SA 390 (SCA) 2011(4) SA 102 (SCA).

1707 For a view that a presiding officer who is a magistrate is empowered to deal with a recalcitrant witness in the context of individual insolvency, see *De Lange v Smuts* 1998 (1) SA 736 (CC).

Despite this viewpoint, note must be taken of a provision for an offence against a recalcitrant witness. This provision seems sufficient without resorting to a contempt of the commission charge.

Regarding the duty of a commissioner to report his findings to the court, which appointed him, the view is that this duty is well placed. A commissioner is compensated from the funds of a liquidated company, such funds must be used economically (for the benefit of creditors, shareholders and affected persons) to yield the intended outcome.

Concerning restrictions on access to the records of the proceedings, the view is that since section 418 enquiries are private in nature, it is only fair that evidence produced thereat is protected. This should be the case unless the court directs otherwise.[1708]

With regard to offences factored into section 418(*5*)(a)(b), the view is that this built-in offence simplifies the running of the processes under this section, especially where an appointed commissioner is not a magistrate. Coercion by way of a threat of imprisonment may be necessary to compel the only people with information necessary for an effective winding-up of the affairs of a liquidated company. Since directors and officers who are often witnesses in the winding-up enquiries are not necessarily insolvent, they are in a position to pay a fine in the stead of imprisonment.

The South African perspective as regards interrogations and or examination in the insolvency circumstances of natural and juristic persons was discussed in the preceding two chapters. The next chapter will be an exposition, through legislation and case law, of the divergent development in the field of insolvency interrogation proceedings in Namibia (in case of the insolvency of natural and corporate persons). The objective of the mentioned investigations is to establish the extent of the development in this area of the law in that jurisdiction in the human rights era.

[1708] *Foot v Alloyex* 1982 (3) SA 378 (D) 382B-G.

Chapter 4: The Namibia perspective

4.1 Introduction

A brief historical background of the insolvency interrogation process and its implications on the insolvent and other witnesses as applicable then in Namibia, when it was under South Africa's administration,[1709] and the current legal position in that country will be the focus of this chapter. Case law detailing the history of constitutional challenges (if any), over these proceedings after independence from South Africa, and under the new constitutional dispensation will be given. The purpose being to establish how this jurisdiction has dealt with these challenges and whether such was in line with the human rights culture.

Like South Africa, Namibia is a member state to the UNCITRAL and her financial system was subjected to a ROSC[1710] analysis[1711] by the World Bank. As per the recommendations of both the former and the latter, this country also wants to reform[1712] its insolvency law to be in line with best practices. These reforms are necessitated by the acknowledgement that this jurisdiction's insolvency legal framework is fragmented and thus impractical.[1713] This position renders the framework inconsistent with international best practice due to its inability to balance the diverse interests of both the creditor and the debtor by providing measures to ease indebtedness.[1714]

1709 As reflected in ch 2 above.

1710 Report on the Observation of Standards and Codes: For Banking Supervision and Payment and Settlement World Bank Publication: Principles and Guidelines for Effective Insolvency and Creditor *Rights Systems* ("Principles") adopted by the World Bank Board at its meeting in April 2001, and modified in 2005 and in 2011.

1711 On the 01 to 10 July 2013. See in this regard Namibia *Discussion Paper On Issues Relating To The Insolvency Act*, 1936 (Act No 24 of 1936) 32 2015 7.

1712 Through the Law Reform and Development Commission, Namibia, hereinafter "the LRDC Namibia".

1713 Discussion Paper On Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 32 2015 35.

1714 Discussion Paper On Issues Relating To The *Insolvency Act,* 1936 (Act No 24 of 1936) 32 2015 35.

Seeing that Namibia, South Africa's trading partner within the SADC region[1715] is on the path of reviewing its law of insolvency,[1716] one is tempted to investigate as to how far this jurisdiction has gone to develop its system to be on par with best practices and in line with human rights and model law. The ultimate goal is to investigate whether South Africa can learn and adopt some of the provisions from this jurisdiction.

Same as South Africa, Namibia has no statute with dual function regulating the aspect of insolvency of individuals and that of companies.[1717] There are two separate statutes each respectively regulating the insolvency of individuals and the other regulating the insolvency of companies. As in South Africa, this position is not desirable, at least as far as the recommendation of ROSC[1718] and UNCITRAL is concerned. The insolvency of individuals as regulated by Namibia's *Insolvency Act* of 2005[1719] will be tackled first and followed by the insolvency of companies as regulated by Namibia's *Companies Act.*[1720]

4.2 Historical overview of the interrogation proceedings

As stated at paragraph *4.1* above, Namibia was under South African administration from 1915 until its independence in 1990.[1721] The consequence of its dependence on South Africa prior to 1990 is a legal system similar to South Africa's. Even after its independence, Namibia retained the laws of South Africa with minor adjustments to be in line with the current dispensation. Article 40 of the *Constitution* of the Republic of Namibia[1722] permitted all laws which were in force prior to independence

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1715 And a fellow member state of the Southern African Custom Union (SACU) and Commonwealth. See Discussion Paper On Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 32 2015 74 fn213.

1716 Discussion Paper On Issues Relating To The *Insolvency Act,* 1936 (Act No 24 of 1936) 32 2015 80.

1717 See LRDC Discussion Paper On Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 32 2015 vii.

1718 At 3 and 36. See also LRDC Namibia Discussion Paper On Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 32 2015 42-43.

1719 Hereinafter "the *Insolvency Act* Nam".

1720 28 of 2004, hereinafter "the *Companies Ac*t Nam".

1721 Geraldo and Skeffers 2007 - 2015 *Global Law & Justice* 5.

1722 *Act* 1 of 1990, hereinafter the "*Constitution* of Namibia".

to remain in force until repealed or amended by an act of parliament or until they are declared unconstitutional by a competent court.[1723]

Although Namibian legislation has devolved in the past two decades, it has largely retained provisions of South African law.[1724] Namibia enacted its *Insolvency Act* in 2005. This legislation repealed the South African *Insolvency Act, which* was applicable in Namibia then.[1725] It is therefore unsurprising that the Namibian *Insolvency Act* is inspired by the previously mentioned South African statute. As a result, the wording of both statutes is virtually identical. In the light of the above and to avoid unnecessary repetition, reference can thus be made to the comments on the South African *Insolvency Act* where it appears that to date; there have not been any reported comments or case law on a particular subject. The emphasis will be on those provisions that are unique to Namibia.

The South African insolvency law and aspects of the statute are still the main sources of the Namibian insolvency law.[1726] Furthermore, precedents set by South African courts still find relevance in this jurisdiction.[1727] The effect of this is that the two legal systems are virtually in harmony. They influence each other and one will encounter little if any conflict of laws between the two jurisdictions.

The first major amendment to the interrogation proceedings, which took place in South Africa in 1989, did not automatically apply to Namibia. However, after 1990 and the coming into force of the *Constitution* of Namibia[1728] the legal system

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1723 See *Gases v The Social Security Commission* 2005 NR 325 (HC). See also Geraldo and Skeffers 2007-2015 Global Law & Justice 5.

1724 Boraine 2010 *Obiter* 414-427.

1725 See also LRDC Namibia Discussion Paper On Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 35 2015.

1726 Boraine 2010 *Obiter* 414-427.

1727 See *Gases v The Social Security Commission* 2005 NR 325 (HC); *JCL Civilis Namibia* (Pty) Ltd *v Steenkamp* (SA8/06) [2000] NASC (8 December 2006); *Mbanderu Traditional Authority v Kahuure* 2008 (1) NR 55 (SC); *Knouwds v Josea* 2010 (2) NR 754 (SC).

1728 In 1990.

developed along its own lines.[1729] As in South Africa, the Namibian *Constitution* has become the yardstick against which the validity of all laws is tested.[1730]

As stated at paragraph *4.1* above, Namibia has through LRDC embarked on a project to develop and reform its insolvency legislation[1731] to be on par with jurisdictions such as Australia.[1732] The Commission acknowledged, however, that the insolvency legislation in that jurisdiction is more inclined towards insolvency rather than towards rescuing ailing businesses. This appears to be undesirable. Further, it is also clear from the Namibian perspective that the advantage of the creditors is at the core of the sequestration process.[1733] There is, however, a need in this jurisdiction to develop a meticulous and functional insolvency administration to balance the interests of both the debtor and the creditors and to further consider complementary debt relief means to assist over-indebted persons.[1734] The Commission (in agreement with ROSC) is of the view that other than liquidation provisions, there is not much that has been done in Namibia as far as developing measures to assist enterprises struggling to pay their debts is concerned.[1735] Another aspect highlighted by the Commission is the need to attract foreign investment and international trade.[1736] This is crucial for the economic growth of a country. Foreign investments can never be overemphasised for any country's financial stability, especially developing countries. Thus, an effective insolvency regime is crucial in attracting investments.

1729 See also Boraine 2010 *Obiter* 414-427.

1730 Article 1(6) of the Namibian *Constitution.* See also Geraldo and Skeffers 2007 *Global Law & Justice* 1.

1731 Considered as outdated.

1732 LRDC Namibia Discussion Paper on Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) vii 2015.

1733 LRDC Namibia Discussion Paper on Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 14 (and at 34) 2015, citing the South African case of *Lynn & Main Inc. v Naidoo* (NPD) (unreported) case number (10259/04) of 12 August 2005 at 311.

1734 LRDC Namibia Discussion Paper on Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 18 2015.

1735 LRDC Namibia Discussion Paper on Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 30-31 2015.

1736 LRDC Namibia Discussion Paper on Issues Relating To The *Insolvency Act*, 1936 (Act No 24 of 1936) 32 2015.

From the perusal of the Commission discussion paper, it becomes apparent to one that the objectives for the development of the insolvency legislative framework does not extend as far as the interrogation in insolvency proceedings is concerned. The constitutionality or not thereof of the insolvency interrogations is not touched upon either. For this reason, one would have to rely on case law and secondary sources in this jurisdiction on the aspect of interrogations and information gathering for administering insolvent estates and liquidation of insolvent entities. The position pre and post constitution is another aspect to be investigated.

Boraine[1737] correctly notes that the judgments of the South African and Namibian high courts are clearly still influential in both jurisdictions, but as amendments and separate legal developments continue to deviate from the former common model, older judgments would have to be treated with caution. The research conducted in this jurisdiction indicates that South African textbooks and journal articles on insolvency law are still the main secondary sources in Namibia. In the absence of information contrary to the above, South Africa's secondary sources will be referred to regarding the insolvency position in this jurisdiction, subject to some caution, though. In both the South African and Namibian jurisdictions, insolvency law and procedure dealing with consumers is largely regulated by the *Insolvency Act* and corporate insolvency is regulated by the applicable company legislation.[1738] Furthermore, it is observed that the Namibia *Companies Act* mirrors the winding-up procedures as provided for by the 1973 *Companies Act* of South Africa as amended by the *Companies Act* 71 of 2008.[1739] Given the fact that not much academic writing on the Namibian legal system could be found, one has to rely on South African writers as authority on this topic.[1740]

Unlike South Africa, Namibia does not have a Constitutional Court. Nevertheless, constitutional supremacy, respect for fundamental rights and the rule of law reign

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[1737] Boraine 2010 *Obiter* 414 427.

[1738] Boraine 2010 *Obiter* 414 427. In international terms, insolvency systems usually refer to consumer insolvency as those rules of insolvency that apply to natural persons or individuals, and corporate insolvency usually refers to the insolvency of companies and other corporations.

[1739] See also Boraine 2010 *Obiter* 420.

[1740] See also Boraine 2010 *Obiter* 420.

in that country.[1741] The Supreme Court of Appeal of that country is at the apex of the judicial hierarchy. It is thus entrusted and tasked with the constitutional responsibility of hearing and adjudicating appeals from the High Court, including appeals, which involve the interpretation, implementation, and upholding of the *Constitution*.[1742]

Constitutional supremacy[1743] and respect for the rule of law are evidenced by the amendments to the *Insolvency Act*, which took place in 2005[1744] to be in line with the *Constitution* of that country. It must be stated however, that the said amendments are modelled almost word for word on the South African *Insolvency Act*. Except for gender-neutral inclusions, the amendments are similar. However, the positive effect of these amendments is evidenced by the gradual removal of injustices an insolvent and any other witness were exposed to. The case of *Gases v The Social Security Commission*[1745] indicates that prior to these eras; both the insolvent and any other witness called upon to be interrogated under the provisions of sections 64, 65, 66 and 152 of the South African *Insolvency Act*[1746] and the relevant sections of South Africa's 1973 *Companies Act*[1747] had almost no protection whatsoever.[1748] An interrogatee or examinee was coerced into answering questions fully and to the best of his knowledge. The provision that such answers may be used against him at subsequent proceedings was no defence.[1749] Thus, evidence given at an interrogation was admissible in subsequent criminal and civil proceedings against the person giving it.[1750] To add to such disadvantage against the insolvent and other witnesses at interrogation, section 67 of the statute

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1741 See also Geraldo and Skeffers 2007 *Global Law & Justice* 1.

1742 Welcoming Message by the Chief Justice of the Republic of Namibia, The Honourable Mr. Justice Peter Shivute, available at www.superiorcourts.org.na, accessed on 14 June 2015; Namibia Superior Courts home page, available at www.superiorcourts.org.na accessed on 05 March 2018.

1743 See LRDC Discussion Paper On Issues Relating To The *Insolvency Act,* 1936 (Act No 24 of 1936) 32 2015 5.

1744 Way after the adoption of the *Constitution* in 1990.

1745 *Gases v The Social Security Commission* 2005 NR 325 (HC).

1746 And thereafter the *Insolvency Act* Nam.

1747 And thereafter the *Companies Act* Nam.

1748 See para *2.2* in relation to South Africa.

1749 See Gases v The Social Security Commission 2005 NR 325 (HC).

1750 See para *2.2* above.

mandated the officer presiding at the interrogation to refer any *prima facie* evidence of criminal conduct to the prosecuting authorities.[1751] This position was not affected by the coming into effect of the *Constitution* or any amendments.

As stated above, these changes do not deviate largely from the South African position. Despite these almost insignificant deviations from South Africa's position, these changes brought by the Namibia *Insolvency Act* are worth mentioning. The *Insolvency Act* will be analysed next.

4.3 The Insolvency Act Nam

4.3.1 Introduction

With the risk of repetition, it is noted that this legislation, whose roots are in South Africa, appears not to have deviated so much from its South African equivalent. A substantial part of it is identical to South Africa's *Insolvency Act.*[1752] Despite these not so major deviations, one is tempted to investigate their extent. The existing deviations will be detailed below.

4.3.2 Section 64: Compulsory attendance of creditors' meetings

It is submitted that the wording of this section is the same as section 64 of South Africa *Insolvency Act*, so is the interpretation and application,[1753] but the following aspects need referring to. It must be mentioned that this section was in no way affected by the amendment to the *Insolvency Act* Nam in 2005 and my assumption is therefore that, in the absence of information contrary to the above, what applies in South Africa in terms of this section applies in Namibia.

The aspect of a spouse needs mentioning. If the husband and wife are married in community of property they are both insolvent and both should attend.[1754] However, if they are married out of community of property, there will always be a solvent

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1751 See also Bertelsmann *et al Mars on Insolvency Law* 419 in so far as this authority is relevant and referred to in Namibia.

1752 24 of 1936.

1753 This is only natural since the two jurisdictions have a historical connection.

1754 See para 2.3.1.2 at ch 2 above in relation to South Africa.

spouse and section 64 is not applicable to the solvent spouse *per se* unless such spouse is identified as "other persons" by the presiding officer for the purposes of being summoned.[1755] The broad scope of the subpoena permits even the encroaching into the solvent spouse's fundamental rights to privacy and freedom. It appears that this encroaching is regarded as necessary under the circumstances and the solvent spouse will have no legitimate complaint to being summoned concerning her knowledge of her spouse's affairs.[1756] This assumption stems from the comments made in the Namibian case of *Gases v The Social Security Commission*,[1757] where the court aired the view that any Namibian court dealing with a constitutional aspect as provided for by any legislation in Namibia, would be persuaded by the South African Constitutional Court's *ratio decidendi* dealing with the same aspect.[1758]

On the issue of summoning the solvent spouse,[1759] the view is that compelling the latter to attend the meeting of creditors might be necessary in the circumstances. She is expected to be in a position to provide some material information relating to the insolvent. As stated in chapter two above in relation to the South African perspective, this comes naturally in that spouses share an intimate relationship and surely such spouse might know the whereabouts of the assets of the insolvent as well as some of his dealings. It is submitted that this precaution is intended to curb any collaborated fraudulent transactions or collusive dealings between spouses.[1760]

1755 See para 2.3.1.2 at ch 2 above.
1756 See para 2.3.1.3 at ch 2 above.
1757 *Gases v The Social Security Commission* 2005 NR 325 (HC). Although this case relates to company insolvency, it is submitted it is relevant to individual insolvency.
1758 At 333.
1759 As is understood in terms of s 21 of the *Insolvency Act,* Namibia, which is the same as s 21 of South Africa *Insolvency Act*.
1760 See Mwelase *Insolvency Interrogations* 10.

In *Gases v The Social Security Commission*[1761] the court quoted[1762] Judge Ackermann[1763] in the *Bernstein v Bester*[1764] case extensively. With regard to being compelled to attend meetings of creditors in the insolvent estate, the court highlighted[1765] the following view:

(i) that insolvency enquiries are considered by many as being arbitrary and not considerate to innocent parties who had no hand whatsoever in the financial calamities of affected insolvents.[1766]

(ii) These individuals are forced to attend meetings they do not want to attend and give evidence they do not want to give. Despite this view, the insolvency enquiries were said to be necessary for the purposes of gathering information about the insolvent debtor.

After case discussion in this chapter and chapter two above, one can thus see that the interpretation and application of this aspect is the same in both jurisdictions. Constitutional challenges on the provision of this section were settled in South Africa in the case of *Harksen v Lane.*[1767]

The test for materiality with regard to the person to be summoned and the information to be submitted is similar to South Africa's. The interpretation and application is thus the same.

1761 *Gases v The Social Security Commission* 2005 NR 325 (HC). Although this case is in relation to insolvent companies, it is relevant in the context of section 64, which calls for a meeting of creditors of the insolvent and persons required to be present at the meeting. Further, no case regarding this subject could be found either for the purposes of this thesis.

1762 At 332.

1763 Paragraph 43. See the full discussion of this case at ch 3 above.

1764 This case dealt with summoning certain persons to appear before the meeting of creditors for the purposes of being interrogated about the affairs of the company in liquidation in terms of ss 417 and 418 in the *Companies Act* of 1973. The provisions of these sections are similar to those of ss 64, 65, 66 and 152 of the *Insolvency Act* 24 of 1936 as amended, except for the fact that the former is private and confidential and the latter is public (except for s 152 which is also private).

1765 Paragraph 43.

1766 In this context, the solvent spouse.

1767 *Harksen v Lane* 1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300. See a full discussion of this case at ch 2 above.

Although no reported case law on the aspect of subpoenas to be issued for attendance of creditors' meetings has been found in terms of the Namibia *Insolvency Act*, Rule 37 (1) of the *Rules of the High Court of Namibia*[1768] provides for the issue of a subpoena to any person who, according to the court is able to provide the required information.[1769] The requirement for the production of books and documents at insolvency proceedings is further reinforced by Rule 35(12)[1770] and Rule 53, read with Rule 6(*11*) of the *Rules of the High Court of Namibia*. Together, these rules make provision for the production of books and documents when so required by the court.[1771]

As is the case in the context of subpoenas in South Africa, failure to comply with subpoenas without reasonable cause after all expenses have been paid, invites a warrant of arrest. It is submitted that even though insolvency interrogations are not civil proceedings *per se*, a witness is still compellable to comply with the subpoenas. It is my view that the former proceedings almost resemble the latter. In the absence of authorities on insolvency interrogation proceedings in Namibia, authorities on civil proceedings in that jurisdiction will be referred to. It is, therefore, doubtful that this rule would be excluded in insolvency interrogation proceedings.

4.4 Public interrogations

4.4.1 The provisions of section 65: The interrogation proceedings

This section is the same as its South African equivalent. The wording, interpretation and application are thus, referring to my motivation in paragraph *4.3.2* above, similar. As mentioned above, the first major amendment to the interrogation proceedings, which took place in South Africa in 1989, did not automatically apply to Namibia. However, recognising the shortcomings of section 65 of the *Insolvency Act,* the Namibia legislature made provisions for the amendment of this section by

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1768 *Act* 16 of 1990.

1769 This rule is similar to Rule 38 of the *Uniform Rules of the High Court of South Africa*. See also Marais *Cross-Border Taking of Evidence in Civil Matters* 256.

1770 This rule is identical to Rule 35(12) of the *Uniform Rules of the High Court of South Africa*.

1771 See *Alexander v Minister of Home Affairs* 2010 (1) NR 226 (HC) in general and specifically para 9.

introducing section 65 (*2A*) into the statute. The said amendments came about in 2005, long after they were effected in South Africa in 1989[1772] and long after the adoption of the Constitution in this jurisdiction.[1773] These amendments, it is submitted, were the beginning of the legislature's desire to protect persons at interrogation, to be in line with the *Constitution* of that country and the best practices.

What is worth mentioning is the fact that this sub-section is gender neutral. Like section 64, the wording of section 65 of the *Insolvency Act* Nam is virtually identical to section 65 of South Africa's *Insolvency Act*. Thus, comments made at paragraph *2.3.2* above in relation to section 65 are applicable here.

Although witnesses are generally examined under oath, provision is made for those individuals who, due to their religion, cannot take the prescribed oath. The same provision is made for those incapable of understanding the nature of an oath and the religious connotations thereof. A witness must comprehend the essence of taking an oath.[1774]

Regarding the exclusion of certain incriminatory questions, the court in *Gases v The Social Security Commission*[1775] highlighted that the rationale of interrogation may be aimed solely at the general credibility of an examinee. This would be the case where the testing of such person's sincerity is necessary in order to decide whether or not to embark on a trial to obtain what is owed to the insolvent (or by the insolvent or a debtor in an insolvent estate) being wound-up.[1776] It is, however, imperative that

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1772 *Insolvency Amendment Act* 89 of 1989.

1773 In 1990.

1774 See in general *S v Booi* 2004 NR 74 (HC); See also Marais *Cross-Border Taking of Evidence in Civil Matters* 2013 256.

1775 *Gases v The Social Security Commission* 2005 NR 325 (HC) at para 335. Again, although this case is in relation to insolvent companies, it is relevant for the purposes of section 65 of the *Insolvency Act*. Reason being that incriminatory questions may be posed in the case of either individual insolvency or company insolvency. Further, no case law regarding this subject could be found either for the purpose of this thesis.

1776 At 335. The Namibian court quoted the South African case of *Moolman v Builders & Developers* (Pty) Ltd 1990 (1) SA 954 (A) at

the presiding officer conduct the questioning in such a manner that his objectiveness is not tainted by unfairness against the affected party.[1777]

The requirement for the production of books and documents at proceedings is further reinforced by Rule 35(*12*)[1778] and Rule 53, read with Rule 6(*11*) of the *Rules of the High Court* of Namibia, which make provision for the production of books and documents when so required by the court.[1779]

As in South Africa, Namibia's law guarantees the legal professional privilege. This is a positive feature in this jurisdiction. In *Alexander v Minister of Home Affairs*[1780] the court highlighted[1781] the fact that legal opinion and communication exchanged between a client and his legal representative falls within the orbit of legal professional privilege. Further, that such opinion and communication are beyond access by an adversary of a litigant claiming privilege. The court proceeded to quote South African cases regarding the aspect of legal professional privilege. The latter facet is considered a basic right of a client.[1782] In the South African case, the court fully agreed with the principle as it stands and reiterated[1783] that any claim for the restraint or relaxation of professional privilege must be carefully considered. Further highlighted[1784] by the court was the point that privilege must be claimed and that it was not automatic to a party claiming it.[1785]

Marais[1786] notes that there is no reported case law on the privilege of professionals with the exception of legal advisers.[1787] Her assumption is that under Namibian law,

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1777 See in general *S v Wasserfall* 1992 NR 18 HC; Marais *Cross-Border Taking of Evidence in Civil Matters* 255.

1778 This rule is identical to rule 35(12) of South Africa' Uniform Rules of Court.

1779 See *Alexander v Minister of Home Affairs* 2010 (1) NR 226 (HC).

1780 2010 (1) NR 226 HC. See also Marais *Cross-Border Taking of Evidence in Civil Matters* 254.

1781 Paragraph 9.

1782 *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing* 1979 (1) SA 637 (C) at 643H-644B; *S v Sefatsa and Others* 1988 (1) SA 868 (AD) at 885 and cases cited there at.

1783 Paragraph 10.

1784 Paragraph 11.

1785 *Bogoshi v Van Vuuren; Bogoshi v Director, Office for Serious Economic Offence* [1995] ZASCA 125; 1996 (1) SA 785 (A) at 793G-I and cases cited thereat.

1786 Marais *Cross-Border Taking of Evidence in Civil Matters* 254.

1787 No case law regarding this subject could be found either for the purposes of this thesis.

the professional privilege is only applicable to legal advisers, but not other professionals such as doctors, clergymen or journalists. Mention must be made in relation to South Africa's position on this point. Even though professional privilege pertains only to the lawyer-client relationship,[1788] bankers do enjoy limited privilege in that they need not produce their documents unless ordered to do so by the court.[1789] South Africa's insolvency law is thus a step ahead. From the above discussion, it appears that if the issue comes before court, the court will probably follow the South African approach.

Regarding the obligation to answer incriminatory questions, mention must be made of Article 12 (*1*) (*f)* of the Namibian *Constitution* which provides that no person shall be compelled to give testimony against themselves or their spouses.[1790] These provisions are similar to South Africa's. Comments made above in relation to South Africa are thus applicable here.[1791]

Despite this constitutional provision, Mujuzi[1792] notes that unlike the case in other African countries, such as South Africa, Kenya and Zimbabwe, the Namibian *Constitution* does not prescribe to the court how to deal with evidence extracted through human rights violation.[1793] The discretion is left to the court to so exercise it, if in the court's view, such admission would bring the administration of justice into disrepute; the evidence would not be admitted.[1794] At most, Namibia has adopted the South African criteria regarding whether or not the admission of the said evidence would bring the administration of justice into disrepute.[1795] It is, however, crucial to indicate that in this jurisdiction, a person may in the context of

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1788 And thus not enjoyed by other professionals' relationships.
1789 Schwikkard *The South African Law of Evidence* 668.
1790 Although Namibia does not have legislation recognising customary marriage as is the case in South Africa, the former is on the path of enacting legislation (through LRDC Namibia) regulating this aspect. See in this regard a proposal for the Recognition of Customary Marriages available at https//www.lac.org.na.
1791 See para 2.3.1.2 *(c) (ii*) above.
1792 Mujuzi 2016 *AHRLJ* 16 407-434.
1793 He refers to the Namibian case of *S v Minnies* 1990 NR 177 (HC).
1794 Paragraph 2.1(2).
1795 Paragraph 2.2.

insolvency investigations[1796] be compelled to answer even a question whose answer may incriminate him at subsequent proceedings.[1797]

It is submitted that the aspect of *in* camera proceedings, as provided for by section 65 is further enforced by Article 12(*1*)(*a*) of the Namibian *Constitution* which envisages *in camera* proceedings. In my view, by mandating that the press and or the public may be excluded in certain proceedings is an indication that the Constitutional drafters are not ignorant of the possibilities that circumstances that require *in camera* proceedings for the purposes of protecting the constitutional rights of a litigant in a democratic society (an interrogatee in this instance) may arise.[1798]

Regarding the right to legal representation provided for by this section, it is worth mentioning that the court in the matter of *Gases v The Social Security Commission* pointed out[1799] that the right to legal representation at insolvency interrogations is not unqualified. This view is controversial and likely to give rise to objections by persons summoned to appear at insolvency enquiries. Despite the limited right to legal representation at interrogation proceedings, it is interesting to note that the legislature envisages fair proceedings. Mujuzi highlights[1800] that although the Namibian *Constitution* does not expressly provide for the right of an arrested person (and it is submitted in the case of an examinee in the context of insolvency interrogation as well) to be informed of his right to consult with a lawyer of his choice before making any statement or confession, this right does exist. Provision for the latter right is contained in Article 12 of the *Constitution* of Namibia.

1796 He refers to *Gases v The Social Security Commission* 2005 NR 325 (HC).

1797 Paragraphs 2.4(4).

1798 See paragraph *2.3.2.4* at ch 2 above in relation to s 65 of South Africa's *Insolvency Act*.

1799 *Gases v The Social Security Commission* 2005 NR 325 (HC) 343.

1800 Paragraph 2.5. He relies on the case of *S v Gariseb* 2013 JDR 0083 (Nm) para 48; *S v Shipanga* 2015 (1) NR 141 (SC) at para 42. Although the cases referred to were decided in the context of criminal law, it is submitted that the same principles would be applicable to insolvency interrogations and proceedings.

4.4.2 The provisions of section 66: Dealing with recalcitrant witnesses

This section mandates compliance with the provisions of sections 64 and 65 of the *Insolvency Act.* It is similar to its South African counterpart.[1801] There is no indication in all the Namibian sources studied, that the principles and application are different or will be interpreted different.

The provisions of the Namibian *Constitution* regarding the detention of a person are worth mentioning though. Article 11(*3*) provides as follows: (i) that all persons who are arrested and detained in custody shall be brought before the nearest magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest; (ii) if this is not reasonably possible, an arrested person should appear as soon as possible thereafter; and (iii) it is explicitly stated that no such persons shall be detained in custody beyond such period without the authority of a magistrate or other judicial officer. The assumption is that this would be the case as well in the context of detained recalcitrant witnesses in insolvency proceedings. This provision is admirable.

As is the case in South Africa, it appears that the detention of a recalcitrant witness will be justifiable provided it is ordered by a presiding officer who is a judicial officer in the judiciary, and not by any public official. I am strengthened in my view by what the court highlighted in *Gases v The Social Security Commission*,[1802] that the bad part[1803] of a legislative provision may be removed from the good part, and that the good part, which is now accepted also in South Africa, be endorsed.[1804] Further, that the insolvency enquiry is that of the court and that the decision to detain a recalcitrant witness would be taken by the court. Thus, comments made in relation to South Africa apply in this regard.

1801 Section 66 of the *Insolvency Act* 24 of 1936.
1802 At 333.
1803 Allowing a non-judicial officer to order the apprehension of a recalcitrant witness.
1804 See in general *De Lange v Smuts* 1998 (1) SA 736 (C).

In *Gawanas v Government of the Republic of Namibia*[1805] the court had to decide the issue of detention in circumstances not related to criminal offences and whether or not this detention was in conflict with Articles 7, 8, 11 and 18 of the *Constitution* of Namibia. These articles respectively provide as follows: Article 7 relates to the protection of personal liberty; Article 8 relates to the dignity of a person; Article 11 relates to the right to be free from arbitrary detention and Article 18 relates to the right to administrative justice. The trial court, not ignorant of the history prior to Namibia's independence, concluded[1806] that the aforementioned articles related to detention *in communicado,*[1807] detention without trial or unlawful detention. These were said to have been the practices designed to enforce the abhorrent laws and policies of apartheid.

However, the Supreme Court held[1808] that case law suggests that, in the absence of other considerations, the provisions contained in Chapter 3 of the Namibian *Constitution*[1809] should be interpreted extensively to give to individuals the full measure of the fundamental rights and freedoms provided for in the *Constitution*.[1810] The court further pointed out that[1811] a detention order by itself is not necessarily in conflict with the said provisions of the *Constitution.* This view is acceptable in relation to insolvency matters. There should be some consequences for witnesses at insolvency enquiries who fail to comply with the provisions of this statute without sufficient cause. As submitted in the context of South Africa, offences created by this section are sufficient.

The principle highlighted by the court in this case is that committal unrelated to criminal offences such as mental institution or in the context of this research,

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1805 (SA 27/2009) [2012] NASC 1 para 14.
1806 Paragraph 14.
1807 Where a detainee is stripped of all rights relating to the detainees.
1808 Paragraph 27.
1809 Equivalent to South Africa' *Bill of Rights* in ch 2 of the *Constitution*.
1810 Reference was made to the following case: *Minister of Home Affairs v Fisher* [1980] AC 319 329; *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) at 70G. The latter should be equally true in the case of the detention of a recalcitrant witness in the context of insolvency. Such detention must be in line with the fundamental rights and freedoms provided for in the *Constitution*.
1811 Paragraph 27.

insolvency related detentions bears no resemblance to such detestable practices.[1812] Such detention can therefore not be said to be a deprivation of personal liberty, an insult to dignity or arbitrary.[1813] Taking into consideration the above-mentioned conclusion of the court, one is convinced that the detention of recalcitrant witnesses in terms of section 66 of the *Insolvency Act* Nam does not, in any way, violate the above-mentioned rights as far as Namibia is concerned.[1814] This is so in that the said detention serves a legitimate public function[1815] to coerce people with the required information to submit such.

From the authorities perused, it is observed that constitutional challenges that may be raised against the detention and continued detention of a recalcitrant witness by a judicial officer will pass the constitutional test. Immunity in favour of the presiding officer who is a magistrate or judge will thus be validated. Further, the fact that judgments of South African courts are persuasive and influential in Namibia makes this view more sustainable.[1816]

Based on the authorities perused, the submissions and views made, it is established that insolvency interrogation proceedings in terms of these sections are mandatory. They have, through a number of court judgments held to be in the public interest and rank supreme to the interests of an interrogatee. From the above, it appears that detention of a recalcitrant witness may be the last resort to secure his attendance.

4.5 Private interrogations

4.5.1 The provisions of section 152: Private enquiries

This section, which provides for a private enquiry, is similar to section 152 of South Africa's *Insolvency Act*. The 2005 amendments on the *Insolvency Act* Nam had no

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1812 Paragraph 14.
1813 Paragraph 14.
1814 The court made reference to a South African case of *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) 34B-C in relation to the exercise of a public power by a public authority.
1815 See *Gases v The Social Security Commission* 2005 NR 325 (HC) 335-336.
1816 See mainly *Gases v The Social Security Commission* 2005 NR 325 (HC) and cases referred thereat.

effect on the provisions of this section. Again, it is submitted that the interpretation, application and principles are thus the same. The interrogation is private and confidential. From the reading of this section, it appears that persons so summoned are interrogated by the Master or an appointed officer.[1817] As in South Africa, the section is used mostly to investigate issues relating to the administration of insolvent estates. The said interrogation would allow the Master to conduct an urgent investigation into the financial affairs of the insolvent, especially where it appears that the insolvent or any person was involved in a variety of unlawful and corrupt transactions leading to his predicament.[1818] It is interesting to note that this section was not affected in any way by the amendments to the *Insolvency Act* Nam.[1819] The assumption is therefore that the enquiry in terms of this section is not conducted by the court, but by an administrative official (the Master). No case law to the contrary could be found in this jurisdiction. Accordingly, comments made concerning South Africa apply as are here.

As said in paragraph *4.1* above, Namibia has, like South Africa, no dual legislation regulating the aspect of insolvency for individuals and for companies. There are two separate legislations, each respectively regulating the insolvency of individuals and the other regulating the insolvency of juristic entities. The preceding paragraphs dealt with the insolvency of individuals in terms of the *Insolvency Act* Nam. The subsequent paragraphs will be dealing with the insolvency of companies as regulated by the *Companies Act* Nam*.* It is worth mentioning that the latter statute also has its roots in the repealed South Africa's 1973 *Companies Act.* As mentioned above, despite the substitution of the latter statute with the 2004 *Companies Act* Nam, there does not seem to be that much difference between the two statutes with regard to insolvent companies.

[1817] For a different view see *Ganes v Telecom Namibia Limited* [2003] SCA SA para 5.
[1818] See *Ganes v Telecom Namibia* Limited [2003] SCA SA para 4.
[1819] 12 of 2005.

4.6 The Companies Act Nam

4.6.1 Introduction

This statute[1820] mirrors South Africa's 1973 *Companies Act.* Same as provided for in section 339 of South Africa's 1973 *Companies Act*, provision is also made in this statute for the application of the *Insolvency Act* Nam to this legislation with the necessary changes on matters not expressly provided for in this legislation.[1821] As earlier submitted, this is not surprising since Namibia took with it after independence, South Africa's legal system and company law was no exception. Although this statute as inherited from South Africa underwent amendments prior to the enactment in 2004 of the Namibian *Companies Act* regarding insolvent companies, the statutes remain similar and a substantial part of it is identical to the provisions on insolvent companies as can be found in South Africa's 1973 *Companies Act*. It must be noted however, that some insertions and substitutions effected on the 1973 statute relating to winding-up provisions were not similarly effected in the *Companies Act* Nam*.* These insertions and substitutions will be highlighted below.

4.6.2 Section 420: Directors and officers to attend meetings of creditors

This section, which is worded almost the same as its South African[1822] counterpart, makes provision for the attendance of meetings by directors and officers of a company in winding-up and unable to pay its debts. There is no indication that this section was applied or interpreted differently from its South Africa's equivalent. The application, principles and interpretation are, therefore, the same. Unlike section 414 of the 1973 *Companies Act* the section describes the sanctions[1823] to be imposed upon persons who fail to comply with the section. It is noted that this description of penalty provision makes for easy reading and reference.

[1820] It must be noted that before this statute came into operation, Namibia applied South Africa's 1973 *Companies Act*.

[1821] Section 344 and 422.

[1822] Section 414 of the 1973 *Companies Act*.

[1823] Namely, a fine not exceeding N$2 000 or imprisonment for a period not exceeding six months or to both fine and imprisonment.

4.6.3 Section 421: Examination of directors and others at meetings

The section is similar to section 415 of South Africa's 1973 *Companies Act.* As opposed to section 415 which uses the words examine and interrogate, the section uses the word "question". It is my submission that one should, however, not put much emphasis on this differentiation since the effect and objectives of either interrogations or questioning are the same. Getting to the bottom of the affairs of a company unable to pay its debts and in liquidation is at the core of the interrogation process. It is noted that unlike in section 415,[1824] no provision is made in this section for the answering or non-answering of incriminatory questions and no mention is made of consultation with the Director of Public Prosecutions. No mention is made of the admissibility or not thereof in subsequent proceedings of incriminatory information obtained at the questioning either. There is, however, another view. It appears that through case law, these matters are gradually addressed by this jurisdiction as they occur. This position is not admirable. Certainty is key. A volume of cases heading to the courts as a result of lack of clear legislative guidelines on a particular issue could be curbed if statutory provisions are kept up to date and in line with judicial precedent.

It is interesting to note that the provisions[1825] mentioned above were made in South Africa in 2002, way before the enactment of the Namibia's *Companies Act* in 2004. One would have assumed that since the Namibian *Companies Act* is rooted in South Africa, that jurisdiction would consult and incorporate into its statute provisions from its South African counterpart in line with what is considered best practice. The fact that these provisions were not incorporated in Namibia leaves one with the assumption that they were intentionally left out in the Namibian statute. This assumption is not favourable for this jurisdiction and in my view not desirable. Objections and constitutional attacks, in addition to those that have already occurred in this jurisdiction are bound to occur in the long run.

[1824] Section 415(3) as substituted by s 10(*a*) of *Act* 55 of 2002.
[1825] Section 415(5) as substituted by s 10(*b*) of *Act* 55 of 2002.

4.6.4 Section 422: Application of Insolvency Act Namibia

This section's wording is similar to section 416 of South Africa*'s* 1973 *Companies Act.* The interpretation, principles and application are thus the same.

4.6.5 Section 423: Summoning and examination of persons

With minor linguistic differences, the section is virtually identical to section 417 of South Africa's 1973 *Companies Act* and is private and confidential in nature*.* The section further incorporates the type of penalties[1826] to be imposed on persons who fail to comply with the requirements of this section. Again, I am of the view that this incorporation makes for easy reading and reference. As is still provided for by its South African equivalent,[1827] the section makes provision that, like the court of law, the Master is also empowered to cause the apprehension of a recalcitrant witness. This appears to be an anomaly that needs remedying. The Master is an administrative official as opposed to a magistrate (or judge) who is a judicial officer and thus empowered to lawfully order the apprehension of persons consequently depriving them of their freedom. Even if the Master has a legal background, or was a magistrate, this would not make a difference. This view emanates from the perspective that the Master does not sit in the capacity of a judicial officer when he presides at the creditors' meeting, but as an administrative official.[1828] The view is, therefore, that the Master should not be empowered to order the apprehension of a recalcitrant witness, but the court. As opined in chapter 2 and 3 above, this anomaly may be remedied by the establishment of Insolvency Tribunals headed by judicial officers to decide on issues of compliance and none compliance thereof. A recalcitrant witness is also considered to be committing an offence if he acts contrary to the provisions of the summons.[1829] This should suffice to reinforce the provisions of this section instead of empowering the Master to order the apprehension of a recalcitrant witness. Furthermore, what is worth mentioning is the fact that substitutions effected in section 417(*2*)(*b*) and (*c*) of South Africa's

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1826 A fine not exceeding N$4 000 or imprisonment or both.
1827 Although this is no longer the case in practice.
1828 See para 3.3.5.6 above in relation to South Africa.
1829 Sub-section (5).

1973 *Companies Act*[1830] were not implemented in this section of the *Companies Act* Nam. As opined with reference to section 421 at paragraph 4.6.3 above, this calls for concern.

It is worth mentioning that prior to the coming into effect of the *Companies Act* Nam,[1831] the private and confidential interrogation of directors and other persons in relation to a company unable to pay its debts and in winding-up was conducted in terms of section 417 of the 1973 *Companies Act,*[1832] as inherited from South Africa. This section did not, however, allow the Master of the High Court of Namibia to hold the section 417 enquiry. The enquiry was said to be held by the court itself. It was thus the court's enquiry.[1833] Given that fact, the court had the discretion to prescribe the procedure to be followed in convening the enquiry and how this enquiry should be conducted.[1834]

The case of *Gases v The Social Security Commission*[1835] will be discussed in detail because the High Court made several decisions on several issues with regard to interrogations. These decisions are very important for this aspect of the insolvency law. The court was required to decide whether or not to stay the interrogation proceedings in terms of section 417 of the *Companies Act*[1836] pending the

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1830 By s 11 (a) of *Act* 55 of 2002.

1831 28 of 2004.

1832 A pre independence statute applicable prior to the enactment of the 2004 statute.

1833 See *Gases v The Social Security Commission* 2005 NR 325 (HC). It is interesting to note that this case was decided after the *Companies Act,* 28 of 2004 was enacted but on the basis of s 417 of the 1973 *Companies Act*. This may be due to the provisions of s 343 of the Namibia *Companies Act,* 28 of 2004, which provides for the application of the repealed statute in the winding up of a company whose winding up has already commenced prior to the coming into effect of the 2004 statute. The fact that the court did not mention s 423 of the 2004 latter statute, which is the equivalent of s 417, is an indication that according to the court, no amendments or substitutions worth mentioning were effected to the provisions of the new section.

1834 See *S v Smith* 1999 NR 182 (HC) at 184I-185C. Although the case was decided prior to the coming into effect of the *Companies Act* 28 of 2004, it is still considered relevant precedent in Namibia. This view is supported by the fact that the case was cited by the court in 2005 in the case of *Gases v The Social Security Commission* 2005 NR 325 (HC).

1835 *Gases v The Social Security Commission* 2005 NR 325 (HC). This case is still relevant to insolvency interrogations.

1836 This section has the same provisions as those in s 417 of South Africa's 1973 *Companies Act*. Again, it must be noted that Namibia inherited this statute as is from South Africa when it gained independence. Further, s 417 was subsequently replaced by s 423 of the Namibian *Companies Act* when it came into effect.

determination of the constitutionality of the said section. In summary, the facts of the case were as follows:[1837] The Social Security Commission, the applicant in the court of first instance, obtained an order for the liquidation of Avid Investment Corporation (Pty) Ltd, the respondent in the court of first instance.[1838] The cause of the Commission's action was failure by Avid to repay the N$ 30 Million invested by the Commission with the company (Avid). After being placed under provisional liquidation, a section 417[1839] enquiry into the affairs of Avid was ordered. The enquiry was to take place before the court.[1840] Subpoenas were issued to those required to appear before court for examination about the affairs of Avid and to bring with related documents. The subpoenaed persons applied for the stay of the examination pending the court's decision regarding the constitutionality of section 417 enquiries.

Predominantly the basis of their application was predicated on the provisions of Article 12(1)(*f*) of the Namibian *Constitution*. This Article conferred on them the right not to be compelled to give testimony against themselves and/or to incriminate themselves.[1841] According to them, section 417 enquiries compelled them to give evidence even though such evidence might be used in subsequent criminal proceedings against them. They further stated that article 25(2) of the Namibian *Constitution* bestows upon them the right to approach a competent court for the relief required.[1842]

According to the applicants,[1843] the fact that the section 417 proceedings are to be held immediately after the liquidation order was granted would be unfair and unreasonable to them. This was said to be the case since they have not been afforded ample time to consult with their legal practitioners. According to them, the

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1837 See 328 of the report.
1838 Hereinafter "Avid Investment Corp".
1839 As inherited from South Africa's 1973 *Companies Act*.
1840 As opposed to South Africa, where this enquiry is often held before the Master of the High Court.
1841 At 329.
1842 At 329.
1843 At 329.

section 417 proceedings would be contrary to the provisions of article 18 of the Namibian *Constitution*.[1844]

Fundamentally their constitutional attack was grounded on the premise that the enquiry in terms of section 417 would compel them to respond to all variety of questions posed to them, even the incriminatory ones. They contended that the section 417 enquiry had the potential of elucidating facts that are likely to implore incriminatory evidence against them. They further alleged that even if no self-incriminatory evidence is produced thereat, there is a prospect of threatening or infringing upon their fundamental rights as entrenched in the Namibian *Constitution*. In summary, the rights alleged to be violated by the section 417 enquiry were said to be as follows:[1845]

(1) Article 12(1)(*a*)[1846]

> In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or tribunal established by law: provided that such Court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(2) Article 12(1)(*f*)[1847]

> No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such person's testimony which has been obtained from such persons in violation of article 8 (2) (*b*) hereof.

(3) Article 18[1848]

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such

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1844 This article imposes a duty on administrative bodies and administrative officials to act fairly and reasonably when complying with the requirements imposed upon such bodies and officials by common law and any relevant legislation. It further provides for grievance process seeking redress through competent courts or tribunals by persons aggrieved by the exercise of such acts and decisions.

1845 At 330.

1846 At 330.

1847 At 330.

1848 At 330.

acts and decisions shall have the right to seek redress before a competent Court or tribunal.

(4) Article 25(2)[1849]

> Aggrieved persons who claim that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom.

(5) Article 25(3)[1850]

> Subject to the provisions of this Constitution, the Court referred to in sub article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

Prior to dealing with a range of basis of attack, the court saw it fit to highlight[1851] the fact that, unlike its South African counterpart, the wording of the Namibian *Companies Act* does not allow the Master of the High Court of Namibia to hold the section 417 enquiry. To my mind, this view is controversial since it is contrary to the provisions of the then section 417(1) and the present section 423 of the *Companies Act* Nam. The two sections appear to empower the Master to summon and to examine persons summoned. Unless the term enquiry is given an interpretation having nothing to do with the examination of summoned witnesses, (because one would assume that the examination of witnesses is the enquiry itself) to my mind this court's expression is controversial.

The principle highlighted in this case was that the enquiry was by the court itself[1852] as opposed to an administrative tribunal.[1853] It is thus the court's enquiry.[1854] The fact that this is the court's enquiry has the effect that the court will determine as to how these proceedings should be conducted.[1855] It is noted that despite the stated

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[1849] At 330.
[1850] At 330.
[1851] At 331.
[1852] At 331.
[1853] At 343.
[1854] At 331.
[1855] At 343.

differences, the court, in its deliberation relied heavily on South African authorities.[1856] It is further noted that regardless of this reliance on South Africa's authorities, Namibia is ambitious to get its house in order and in line with what is done throughout the world as far as insolvency law and its processes are concerned. South Africa is amongst its role models in this process.

Further, in the case, the court highlighted that considering the fact that section 417 enquiry is the court's enquiry, it was at liberty to decide on the procedure to be followed in convening the enquiry and the manner in which the enquiry should be conducted.[1857] Consequently, there was no need for the legislature to prescribe to the court how to conduct its business. If, however, it was the Master's enquiry as is often the case in South Africa, there would be a need for legislative intervention. This intervention would ensure that stated guidelines are complied with and transparency is upheld. In support of the court's view as to the extent of its jurisdiction, the court quoted *S v Smith*[1858] where the court brought forth the following points:

(i) that in addition to the power that may be specifically bestowed on the court by a statutory provision and with related restrictions, the Supreme Court has inherent powers[1859] to deal with and decide on any matter brought before it.[1860]

The said inherent power is meant to ensure that:

(i) the court's order is effective;

(ii) to control the court's procedures; and

(iii) to decide on any matter where the law has not made any provision for such a matter.

[1856] The following authorities were referred to: *Lok v Venter* 1982 (1) SA 53 (W) 53A; *Venter v Williams* 1982 (2) SA 310 (N) 313E and *Foot v Alloyex* (Pty) Ltd 1982 (3) SA 378 (D) 383F.

[1857] At 331.

[1858] 1999 NR 182 (HC) 184I-185C.

[1859] *Styltler v Fitzgerald* 1911 AD 295 315.

[1860] *Union Government and Fisher v West* 1918 AD 556 572-3.

The court pointed out[1861] that in determining the procedure as to how the section 417 will be conducted, it would act in terms of its inherent jurisdiction, which it is submitted, the Master does not have. In so doing, the court would undoubtedly be subjected to the provisions of the Namibian *Constitution*, held the court[1862]

After careful deliberation, the court pointed out[1863] that there is accordingly no justification in the submission made on behalf of the fourth applicant to stay the section 417 proceedings. The applicant having had based his case on a submission that the latter section would be declared unconstitutional due to its ambiguity and absence of legislative prescribed procedure.

In disposing of all the applicants' grounds of attack as based on Article 18 of the Namibian *Constitution*, the court reiterated[1864] that the court is not an administrative body or administrative official as envisioned in Article 18. In my view, the fact that the enquiry is conducted by the court as opposed to an administrative body is admirable. This submission is reinforced by the view that if the court conducts these proceedings, that provision would minimise objections and constitutional challenges. The court further emphasised[1865] that the question whether Article 18 might or might not be applicable to section 417 enquiries held by a person appointed by the court was irrelevant at this point. According to the court,[1866] it was thus not necessary to decide that question in this case. This question therefore remains unanswered. It is submitted that this is undesirable in that the latter position may give rise to other matters requiring the court's intervention.

The court opined[1867] that the grounds, other than the specific grounds mentioned in article 12(1)(*f*) read with section 417(2)(*b*) of the 1973 *Companies Act,* could be disposed of by referring to the South African case of *Bernstein v Bester.*[1868] In this

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1861 At 331.
1862 At 331.
1863 At 331.
1864 At 331 and 343.
1865 At 332.
1866 At 332.
1867 At 332.
1868 1996 (2) SA 751 (CC).

case the South African Constitutional Court had to decide the issue as to the constitutionality of section 417 (in the same wide sense as envisaged by the applicants) of the South African 1973 *Companies Act.* In this *Bernstein v Bester* case, as discussed in chapter 3 above, the court identified the attacks of the applicants as follows: First that the provisions of sections 417 and 418 compel persons unrelated to the company to appear before the Master and provide information regarding the affairs of a company unable to pay its debts and in winding-up. Secondly, that by providing the required information under duress, these persons run the risks of incriminating themselves in subsequent proceedings against them. Thirdly, they are denied the opportunity to be heard prior to the decision to have them subpoenaed. Fourthly, that these persons are denied effective legal representation. Fifthly, that there are no checks and balances as provided for in civil or criminal proceedings to ensure that this process is not open to abuse.

The Namibian court observed[1869] that the Constitutional Court dealt with each of the attacks, and held that none of them rendered the provisions of sections 417 and 418 of South Africa's 1973 *Companies Act* unconstitutional. Further noted by the court was the fact that, at that stage, part of section 417(*2*)(*b*) making it permissible to use incriminating evidence (in a later criminal trial) obtained through a section 417 enquiry, was already declared unconstitutional in South Africa.[1870]

Further observed by the court [1871] was that the applicants in this case had spread their net wide. It was therefore the court's view that there is no likelihood at all, particularly if it had to consider the *Bernstein v Bester* matter, that the provisions of sections 417(*1*), (*2*) (*a*), (*3*) or (*4*) will be declared unconstitutional by any court in Namibia. The view was that there are no reasonable prospects in that regard. In the exercise of its discretion, the court declined to stay the section 417 proceedings because the whole of section 417 is unconstitutional.

1869 At 332.
1870 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC).
1871 At 332.

In further support of its decision not to stay the section 417 enquiry, the court also cited[1872] the South African Constitutional Court case of *Ferreira v Levin; Vryenhoek v Powell.*[1873] In the latter case the court declared that section 417(*2*) (*b*)[1874] was "constitutionally invalid, to a limited extent". The unconstitutional part provided for the admissibility of incriminatory answers obtained at the interrogation in subsequent criminal proceedings against the deponent indiscriminately.[1875]

On the basis of this background, the court pointed out[1876] that it would become instantly clear that any Namibian court, which has to deal with the constitutionality of section 417(*2*)(*b*), would be swayed by the reasoning of the South African Constitutional Court (dealing with the exact same wording of a section in the *Companies Act*). The court further opined that in its consideration of the matter, any Namibian court will also be compelled to consider whether or not any unconstitutional part of section 417(*2)(b)* can be cut off from the rest of the section without diluting the purpose of the legislature. The principle confirmed[1877] by the court was that section 417(*2*)(*b*) can still serve its purpose by providing that answers given at the interrogation are not to be used in subsequent criminal proceedings against the examinee. This was to be the case seeing that it was now an established principle that at some point, a person of interest in the administration of insolvent estates or winding-up may be obliged to provide the required information regardless of its incriminatory potential.

Furthermore, the court was also not ignorant of the fact that throughout comparative human rights jurisdictions,[1878] it was no longer acceptable to use incriminatory evidence (obtained at the interrogation proceedings) against the deponent in subsequent criminal proceedings. This position, in the court's view,[1879] was compelling enough to persuade any court in Namibia to adopt an internationally

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1872 At 333.
1873 1996 (1) SA 984 (CC).
1874 Which at that time had provisions similar to s 417(2)(*b*) of the Namibian *Companies Act*.
1875 See the discussion of this case at ch 3 above.
1876 At 333.
1877 At 337.
1878 South Africa amongst others.
1879 At 337.

acceptable good practice. The court further observed[1880] that, as in South Africa and other comparative constitutional jurisdictions, the provisions of article 12(*1*)(*f*) can be limited where this is necessary and in the public interest. In the context of insolvency, it is necessary to limit this right to achieve a legitimate legislative objective. This view is acceptable provided proper safeguards are in place. Built-in immunity against the use in subsequent criminal proceedings of incriminatory evidence against the deponent is one such safeguard. Further observed by the court[1881] was the fact that this purpose should therefore be the guiding factor in deciding whether section 417 as a whole is constitutional or not.

The test for severability has been adopted by the Supreme Court of Namibia in *Government of the Republic of Namibia v Cultura 2000*[1882] with reference to the South African case of *Johannesburg City Council v Chesterfield House (Pty) Ltd*.[1883] In this case the court brought forth the following views: (i) that if it is possible to remove the bad part of a legislation and the remaining part thereof can still achieve the purpose of the said legislation, the removal should be effected; (ii) if, however, such removal would render the legislation ineffective, then such legislation must be repealed altogether; (iii) this should be the case since it is unimaginable that the legislature would want to enact a defective statute.

In further support of the above view, the court quoted[1884] Judge Maritz in *Hendricks v Attorney General, Namibia*[1885] where the court opined that removal of an unconstitutional part would not be appropriate where what subsequently remains is unable to achieve the aims of the legislative provision. This would be the case where the bad and the good part are so intertwined.[1886]

1880 At 337.
1881 At 337.
1882 *Government of the Republic of Namibia v Cultura* 2000 1993 NR 328 (SC) 345 (1994 (1) SA 407 (NmS) 424F).
1883 1952 (3) SA 809 (A) 822C-F.
1884 At 333.
1885 2002 NR 353 (HC) 3661.
1886 *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) at 649A.

With regard to the applicants' attack based on Article 25(2) of the Namibian *Constitution*, the court was of the view[1887] that:

(i) the applicants in this case are indeed aggrieved persons as envisaged in Article 25(2) of the Namibian *Constitution*;

(ii) that they can, as a matter of course, approach a competent court to protect such a right;

(iii) that is, the right not to incriminate themselves.

The court observed[1888] that the applicants in this case have chosen to approach this court to protect their right as provided for in article 12(1)(*f*) of the Namibian *Constitution.* Had they approached this court directly to declare section 417(2)(*b*) unconstitutional, the court would most probably have granted such an order, so held the court. The court highlighted that[1889] even if it did grant such an order, the section 417 proceedings would have continued. This position is correct. Any objections to the information gathering process should be raised thereat. The court further took the opportunity[1890] to highlight to the litigants the fact that it has an inherent discretion whether or not to stay the section 417 proceedings, pending an approach by the applicants to declare the whole of section 417 unconstitutional by a competent court. This is acceptable. The liquidation process should not be hindered by endless challenges regarding the legality of proceedings, which might not even have a day in court.

In exercising its discretion as regards the staying of proceedings, the court took into consideration[1891] what was said by Judge Ackermann in *Ferreira v Levin*,[1892] in relation to the purpose of section 417 proceedings. This consideration by the court is enviable; taking into cognisance authorities from neighbouring jurisdictions is

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1887 At 334.
1888 At 334.
1889 At 337.
1890 At 335.
1891 At 334-337.
1892 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) para 122.

recommendable for the purposes of checks and balances in one's system. The court in the latter case pointed out[1893] that before deciding on the constitutionality or not of these sections, it is necessary to determine the statutory purpose of the interrogation and other procedures in the 1973 *Companies Act*. Of particular focus was said to be the provisions of sections 417 and 418 of the latter statute. The court spoke plainly. It pointed out[1894] clearly that these sections were put in place by the legislature to assist the liquidators to perform their functions in any winding-up. This approach is correct. A provision in a statute is intended to achieve a particular result and should thus be interpreted and applied in a manner that would achieve the said objectives. The court correctly brought forth the point[1895] that these functions included the recovering and securing the possession of all the assets and property of the company, either movable or immovable. In the context of *Gases v The Social Security Commission*[1896] the enquiry was intended to establish the whereabouts of the thirty million Namibian dollars of public funds.[1897]

Further pointed out was the fact that the liquidator can only submit an informed report to the Master after obtaining the required information and assistance. This was said to be necessary to enable the latter to perform his duties under this legislation.[1898] In further highlighting the duties of the liquidator in relation to the winding-up process, the court pointed out that it is imperative that the liquidator scrutinise the business affairs of the company prior to its liquidation. This was necessary to establish with precision the gross value of the company. This is correct. It is my view that it would not be difficult to achieve this purpose if persons with the required information could come forward to state what happened to assets of the company and if misapplied, provide information about their whereabouts, so that they can be brought under the control of the liquidator for processing.

1893 Paragraph 122.
1894 Paragraph 122.
1895 At para 123.
1896 2005 NR 325 (HC).
1897 At 337.
1898 Paragraph 123.

The court made it clear that the purpose of the enquiry under these sections is unquestionably in place to assist liquidators in fulfilling their duties, to enable them to determine the most favourable course of action for the liquidation of the company. The court opined that in order to achieve this primary objective[1899] (that is, the ascertainment of the assets and liabilities of the company, the recovery of the one and the payment of the other, according to the prescribed laws and in a way which will best serve the interest of the company and its creditors) it was necessary to conduct these enquiries.[1900] This is correct. At some point when the company's business was flourishing, there were people who were running its affairs and enjoying benefits. It is only logical that they should come forward, especially now that the company needs their assistance in dealing with the affairs of its failed business.

Further pinpointed by the court was that companies are used to raise capital from the public and to conduct business on the basis of limited liability.[1901] This possibility was considered by the court as an advantage for the promoters. Further, that the said advantage is intertwined with the responsibilities to account to shareholders, for the way in which the company runs its business affairs. If the company goes bankrupt, they should account to shareholders and creditors for the failure of the company. The court further pointed out that it is not as if directors were unaware of these responsibilities when they took office. The compulsion to give evidence at a section 417 enquiry was said to be part of the responsibility to account. Consequently, the subsequent use of evidence obtained as a result of the enquiry is within the precinct of the administration of justice.[1902] According to the court, the public, and especially the victims of the crime, might be offended by the provision that independently found evidence cannot be used to achieve justice. It is submitted that the possibilities of witnesses being caught in their web of lies is unavoidable

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1899 As pronounced at para 123 of *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC), that is establishing which assets and liabilities belong to the company, to recover the former and settle the latter, as provided for by law and in the best interest of the company, its creditors and in the interest of the public.

1900 Paragraph 123.

1901 Paragraph 151.

1902 *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC) para 151.

and certainly a good thing that they are caught. This would serve as a deterrent to persons with fraudulent tendencies.

Regarding the delaying strategy by the applicants in *Gases v The Social Security Commission*, the court stated[1903] that the applicants cannot be allowed, through "tactical maneuvering", to delay the section 417 enquiry. To further support its stance, the court quoted[1904] the following pre-constitutional South African cases. Quoted first was *S v Naude*[1905] where the court brought forth the following points:

(i) that the privilege against self-incrimination is not applicable throughout;

(ii) it is only applicable in relation to specific questions;

(iii) this meant that an examinee cannot refuse to appear and give evidence at the proceedings;

(iv) the latter duty is fundamental in all democratic societies;

(v) it is, therefore, the court's duty to ensure that the principle in line with the *Constitution* is observed and without corruption or bad faith.

Quoted second was the matter of *Mahomed v Orr*[1906] where an application was made on behalf of the applicant to stay insolvency enquiries in anticipation of the finalisation of criminal proceedings against him. The application was dismissed.

In support of its decision, the court[1907] endorsed the judgement of Graham in *Hargreaves v Hargreaves Estate*[1908] where the following was highlighted:

(i) the legislature has saw it fit to oblige an insolvent to answer incriminatory questions;

1903 At 339.
1904 At 339.
1905 1977 (1) SA 46 (T) fn 46.
1906 1931 TPD 310.
1907 At 314 of the report.
1908 1923 EPD 258.

(ii) and provided that answers thereat may be used in subsequent criminal prosecution against the latter;

(iii) that these possibilities do not empower the courts to order that if there are pending criminal proceedings against the insolvent then insolvency proceedings should be suspended;

(iv) it was accordingly undesirable that the trustee's investigatory functions[1909] should be suspended until the outcomes of criminal proceedings against the insolvent.

In its deliberation,[1910] the court was not ignorant of the fact that both the *Naude* and the *Mahomed* authorities originate from a pre-constitutional dispensation. It stated that it sees no reason why the section 417 proceedings should not proceed where it was possible that the bad part of section 417(2)(*b*) can be set aside for want of constitutionality. It held[1911] that, if and when criminal proceedings are instituted against the applicants, the courts would probably come to their assistance. This could be achieved by ensuring that incriminatory evidence is not admissible in court against them or by holding that the bad part is unconstitutional. This is in my view an acceptable and sufficient safeguard against the abuse of the proceedings for purposes extraneous to those of the enquiry itself.

Regarding the issue of legal representation, the court was of the view[1912] that even though the applicants are entitled to a legal practitioner of their choice in the section 417 proceedings, that right is not an absolute one. This comment is controversial and thus not admirable for adoption into our system for fear of inviting constitutional challenges.

Further, in this case the court held the view that this right should be restrained by the purpose of section 417 proceedings. To my mind, it is difficult to comprehend

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1909 In terms of s 54 of the 1916 South Africa's *Insolvency Act*.
1910 At 339.
1911 At 339-340.
1912 At 343.

how an entitlement to a legal practitioner of one's choice would interfere with the purpose of the section 417 enquiries. It is an undeniable fact that these proceedings serve an important public function and that it would be strange if shady directors were more able to shun submitting themselves to the enquiries than sincere ones.[1913] These officers should, however, be allowed to have legal practitioners present, if they so wish. This is correct. Directors should come forward with information to assist the company unable to pay its debts and in winding-up to sort out its issues and enable an efficient and effective administration of its affairs. This does not, however, warrant denying the said officers legal representation, especially when the section permits the liquidators, Master and creditors to be represented by their agents. These agents are permitted to question an examinee thereat for the purposes of clarifying the whereabouts of the company's assets, how the business of the company was conducted and reasons why the company failed.

Considering the complex financial structures of some public companies, it is submitted that it would be fair for a director who is not so financially perceptive to be represented by an accountant at an interrogation, for example.

It is interesting to note that the court reiterated the fact that the applicants should be conscious of the fact that the enquiry is not conducted by an administrative tribunal. Further that, even if an administrative tribunal conducted such an enquiry, the High Court would exercise its jurisdiction to ensure that the proceedings are conducted partially and not repressively.[1914] An emphasis was made that the court, in conducting these proceedings, must ensure that such are conducted within the prescripts of the *Constitution*.[1915] The court proceeded to concede that the applicants were indeed entitled to ample time to prepare for the proceedings and accordingly ordered that the proceedings be postponed for such purpose.[1916]

1913 At 343.
1914 At 343.
1915 At 343.
1916 At 343-344.

It is now an established principle in Namibia that the section 417[1917] proceedings serve a crucial public function. Even though the courts have discretion whether to stay the proceedings or not, such proceedings may not be stayed without a just reason. Further, that, in circumstances such as insolvency interrogations, a person may be required to answer questions even though his answers may incriminate him. It is the desire of the courts in that country to be in line with best international practices. This position is admirable and likely to attract investments in this jurisdiction.

It is interesting to note that although the case was decided in 2005, after the coming into effect of the *Companies Act* Nam, section 417 of the 1973 *Companies Act* was invoked. The court was required to decide on the constitutionality of this section without mentioning section 423 of the Namibian *Companies Act*. As stated above, this anomaly may be due to the fact that the winding-up proceedings commenced prior to the coming into effect of this statute. Section 343 of the *Companies Act* Nam provides that the winding-up of a company, which has commenced prior to the coming into effect of this statute, would be regulated in terms of the 1973 *Companies Act* as if that legislation was not repealed. This would be the case as regards section 423 as well.

4.6.6 Section 424: Examination by commissioners

Except for the fact that the sub-sections in this section are numbered differently from its South African equivalent, this section is similar to section 418 of South Africa's 1973 *Companies Act.* The interpretation and application is the same. The section uses the word "questioning" instead of "interrogating". Again, no importance should be attached to this differentiation, but should be regarded simply as a linguistic preference of the authors of this statute. One should, however, not lose sight of the view expressed at paragraph 3.3.5.6 chapter 3 above in relation to the capacity in which a commissioner presides at section 418 proceedings. This latter view is also applicable in this context.

[1917] Now s 423 of the *Companies Act* Nam.

Like section 418(2) of South Africa's 1973 *Companies Act*, this section expressly differentiates between a commissioner who is a magistrate and a commissioner who is not a magistrate. Accordingly, only a commissioner who is a magistrate can punish a defaulting witness and determine questions relating to liens. This express provision is admirable and may curtail possible constitutional attacks. Like section 423, the section makes provision for legal representation for summoned witnesses – this is a positive feature. Furthermore, like section 423, section 424 has incorporated types of penalties[1918] to be imposed on witnesses for non-compliance with the provisions of this section, making for easier reading and reference.

4.7 Conclusion

4.7.1 Introduction

In summary, it is clear that the influence of South Africa's jurisprudence on Namibia's jurisdiction is undeniable. This is a natural consequence of the position that Namibia was under South Africa's administration[1919] prior to its independence in 1990. The legal systems of both jurisdictions are almost similar. This is the case; at least as far as insolvency law is concerned. Further, the provision that Article 40 of the Namibian *Constitution* permits all laws, which were in force until repealed or amended by legislation or declared unconstitutional by a competent court, also played a role in the sluggish deviation from South Africa's jurisprudence. The *Insolvency Act*[1920] as inherited from South Africa was enacted and further amended as Namibia's *Insolvency Act* in 2005.

Despite the fact that Namibia obtained independence from South Africa and adopted its *Constitution* in 1990, there are aspects in insolvency law that have been brought to courts for breach of rights as entrenched in the *Constitution*[1921] as is also the case in South Africa and Botswana. There is therefore a need in this jurisdiction to

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1918 A fine not exceeding N$2 000 or imprisonment for a period not exceeding six months or to both fine and imprisonment.
1919 From 1915 to 1990.
1920 24 of 1936.
1921 *Gases v The Social Security Commission* 2005 NR 325 (HC).

develop insolvency laws to be in line with the *Constitution*. It was also observed that Namibia does not have a Constitutional Court to develop and pronounce on constitutionally entrenched rights as far as insolvency law is concerned. This function is the responsibility of the High Courts of that jurisdiction.

The view that Namibia is a constitutional state (where constitutional supremacy and respect for the rule of law reigns) and its *Constitution* is the yardstick against which the validity of all laws are tested is an admirable attribute in this jurisdiction. This condition is conducive for the development of transparent and internationally acceptable insolvency practices. Both South Africa and Namibia's Bill of Rights influence the insolvency interrogation proceedings. This view is supported by cases discussed above, the amendments[1922] effected on the *Insolvency Act* Nam*,*[1923] and the research work currently being undertaken by the LRDC.[1924]

4.7.2 Current developments in insolvency legislation

These developments are currently conducted by the LRDC to develop and reform insolvency legislation (considered to be outdated)[1925] in this jurisdiction to be on par with jurisdictions such as Australia. Recognising the shortcomings in the current insolvency legislation as regards its inclination towards insolvency rather than assisting ailing businesses to recover, the Commission acknowledges that this is undesirable. The aspiration to develop insolvency practices to be on par with best practices is fuelled by the need to attract foreign investment and international trade. This aspect is necessary for financial stability in developing countries. The Commission has, however, neglected to tackle the aspect of the constitutionality of insolvency interrogation processes. The constitutionality or not thereof seems to be dealt with by the judiciary on a case-to-case basis,[1926] as influenced by foreign jurisdictions such as South Africa.[1927]

1922 Regarding the aspect of incriminatory evidence and its admissibility at subsequent proceedings.
1923 Specifically, on s 65.
1924 Paragraph *4.7.1* above.
1925 Paragraph *4.1* above.
1926 Paragraph *4.6.3* above.
1927 Paragraph *4.4.2* above.

This research has established that amendments effected on both the *Insolvency Act* Nam and the *Companies Act* Nam are modelled on the South African *Insolvency Act*.[1928] However, the positive effect of these amendments (through legislation and case law)[1929] is evidenced by the gradual removal of injustices an insolvent and any other witness were exposed to. It is also noted that these amendments and the removal of injustices were effected way after the coming into effect of the Namibian *Constitution*.

As regards the constitutional impact on insolvency interrogation proceedings in this jurisdiction, this research has established the following: Of all the developments in the insolvency system of this jurisdiction and the impact of the *Constitution* in the insolvency statutory provision, the following deserves highlighting:

(1) the amendment effected on the *Insolvency Act* in 2005 (specifically in relation to gender neutrality) is indicative of the need to adapt insolvency legislation to be in line with best practices;

(2) the adoption of the safeguards incorporated in section 65 as regards the subsequent use of incriminatory evidence against the deponent in subsequent criminal proceedings. This legislative gesture is admirable and the view is that the safeguards would minimise constitutional attacks arising from the interpretation and application of this section in insolvency matters;[1930]

(3) the availability of legal professional privilege guarantees;

(4) the provision for in *camera* proceedings where the circumstances so dictate;

(5) the right to legal representation at insolvency proceedings;[1931]

(6) the provision that the insolvency enquiries are courts' enquiries instead of administrative bodies' enquiries;

1928 Paragraph *4.3* above.
1929 See in general *Gases v The Social Security Commission* 2005 NR 325 (HC).
1930 Paragraph *4.6.5* above.
1931 Paragraph *4.6.6* above.

(7) the assumption that only judicial officers in a court structure may order the apprehension and detention of recalcitrant witnesses;

(8) clarity on the aspect that detention of recalcitrant witnesses is not necessarily in conflict with the *Constitution* since it serves a legitimate public purpose;

(9) the assumption that detained recalcitrant witnesses would not be denied an opportunity to appear before a magistrate within 48 hours or as soon as it is reasonably possible;

(10) the incorporation of the types of penalties to be imposed on persons who fail to comply with the requirements of the section makes for easier reading and referencing;[1932]

(11) the emphasis that the provision in section 417 as substituted by section 423 of the *Companies Act* Nam is the court's enquiry, is a positive attribute. Concerning the last mentioned attribute, the view is that if the enquiry into the affairs of a company unable to pay its debts and in winding-up was to be held by the courts or tribunals presided over by judicial officers, there would be fewer objections related to the conducting of the insolvency and or liquidation and winding-up proceedings.[1933] One should, however, not be ignorant of the fact that section 423[1934] appears to empower the Master (a non-judicial officer) to summon and examine persons summoned. This position is not echoed by the courts in this jurisdiction. It is my submission that it is crucial that the courts and the legislature are in agreement regarding issues of jurisdiction as far as the Master of the High Court is concerned.

The emphasis on the view that the court would not lightly take the decision to stay winding-up enquiries, because of the possibilities of incriminatory evidence to surface at such enquiries is a further positive attribute in the insolvency system of this jurisdiction. The desire within this jurisdiction to learn and adopt from

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[1932] Paragraph *4.6.2* above.
[1933] Paragraph *4.6.5* above.
[1934] And its predecessor, s 417.

neighbouring jurisdictions'[1935] attributes in line with best practices and to incorporate those in her legal system is a plus. This attribute would ensure that checks and balances are in place.[1936] The emphasis on the need for the accountability (and the accompanying public justice) of directors and officers of companies unable to pay their debts and in winding-up is also an enviable trait. Further to these positive traits, is the courts' preparedness to come to the assistance of a witness in relation to impending criminal proceedings emanating from insolvency related matters. This aspect is in line with human rights protection.

It is my view that the omission by the Namibian legislature to implement insertions and substitutions[1937] effected on section 417[1938] (by South Africa) to its 2004 *Companies Act* so as to be in line with the *Constitution* and best practices, may give rise to negative perceptions about the insolvency system in this jurisdiction. The view[1939] held by the court in *Gases v The Social Security Commission*[1940] that the right to legal representation at the section 417[1941] proceedings is not absolute, is not desirable.[1942] Witnesses at these proceedings must be assured that they are protected by the law in order to fully co-operate in the proceedings. The full co-operation of witnesses will bear favourable outcomes for creditors affected by the sequestration and winding-up of a debtor concerned or creditors of an individual insolvent. Benefits to the creditors is the very objective of insolvency enquiries. Further, it would be fair for a director who is not so financially well informed to be represented by an accountant at interrogation proceedings.[1943]

Failure by the court in *Gases v The Social Security Commission*[1944] to clarify whether Article 18 might or might not be applicable to section 417 or the current section 423

1935 Paragraph *4.3.2* above.
1936 Paragraph *4.3.5* above.
1937 Regarding incriminatory questions and answers and the admissibility thereof at subsequent proceedings against a person who gives such.
1938 Of *Act* 61 of 1973.
1939 If this view is still held.
1940 *Gases v The Social Security Commission* 2005 NR 325 (HC).
1941 The predecessor to s 423 of the *Companies Act*, Namibia.
1942 Paragraph *4.6.5* above.
1943 Paragraph *4.6.5* above.
1944 2005 NR 325 (HC).

enquiries held by a non-judicial officer is undesirable. It is submitted that this position may give rise to other matters requiring the court's intervention.[1945]

Like South Africa, Namibia was subjected to a ROSC analysis by the World Bank and it is eager to develop and reform[1946] its insolvency system to be in line with what was recommended thereat. With this development, one hopes that this jurisdiction will develop a single statute to regulate the insolvency of individuals and that of companies as indicated by the LRDC. The aspect of insolvency interrogation proceedings and the constitutionality thereof was not dealt with by the LRDC. One hopes that this crucial facet of constitutional and human rights compliance as far as interrogation proceedings are concerned would be addressed in insolvency statutes.

The fact that Namibia and South Africa's legal systems are virtually in harmony, is a positive indicator that these two jurisdictions will encounter less conflict of laws as far as insolvency related matters are concerned.[1947] The existence of this harmony gives one hope that the two systems will (individually) gradually develop an insolvency system in line with international best practices. The latter aspect has the potential to attract foreign investments.[1948]

The insolvency interrogation proceedings and the constitutionality thereof in Namibia was dealt with in this chapter, the next chapter will be an analysis of the position in Botswana as regards this aspect.

1945 Paragraph *4.6.5* above.
1946 Through the LRDC.
1947 Paragraph *4.2* above.
1948 Paragraph *4.6.5* above.

Chapter 5: The Botswana Perspective

5.1 Introduction

A brief historical background of the insolvency interrogation process and its implications on the insolvent and other witnesses in Botswana will be the focus of this chapter. Case law detailing the history of constitutional challenges (if any), over these proceedings will be given. The purpose is to investigate whether or not Botswana's insolvency interrogation proceedings are developing along the lines of best practices and perspectives, in sync with internationally accepted human rights.

From the research conducted in this jurisdiction, no evidence was found that this country's financial system was subjected to a ROSC analysis as was the case in South Africa and Namibia. The assumption is therefore that; the analysis would be conducted in the near future in order to guide this jurisdiction in the development of its insolvency legislation (at least as far as the insolvency interrogation processes are concerned) in line with best practices. Mention must also be made of the fact that Botswana is not a signatory to UNCITRAL and Cross-border insolvency protocol is not applicable in Botswana.[1949]

The fact that Botswana is a neighbouring country to South Africa and Namibia within the SADC region, means that inter-trade is bound to take place. It is for these reasons that one is tempted to investigate as to how far this region has gone to develop her system to be on par with the best practice in line with human rights. The crucial goal is to investigate whether South Africa and Namibia can learn and adopt some of the insolvency interrogation provisions from this jurisdiction.

As is the position in South Africa and Namibia, Botswana has a fragmented insolvency system. There are two statutes each respectively regulating the insolvency of individuals and the other regulating the insolvency of companies. Same as the position in South Africa and Namibia, this situation is not desirable, at

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[1949] See Osei-Ofei- Botswana in Leornard "Restructuring and Insolvency" 2009 *Getting the Deal Through*, available at http://www.oos.co.bw/botswanainsolvency.pdf; www.cassesbrock.com/files/file/docs/GettingtheDealThrough accessed on 05 March 2018.

least as far as the recommendations of ROSC[1950] and UNCITRAL are concerned. The current position may lead to overlaps and contradictions. The insolvency of individuals as regulated by the *Insolvency Act* Bots will be discussed first and followed by the insolvency of companies as regulated by the *Companies Act* Bots.

5.2 Historical overview of the interrogation proceedings

As posited in chapter 1 above, Botswana, Namibia and South Africa share a common law background and an English heritage. It is for this reason that their legal systems are similar if not identical. This appears to be the case with insolvency law. There seems to be no material differences between the *Insolvency Act* Bots and the South African *Insolvency Act*, the respective statutes being similar.[1951] Furthermore, it is not surprising that South African authorities on insolvency law find relevance and are referred to in Botswana.[1952] However, the courts (in Botswana) are cautious of being overly-reliant on South Africa's and other countries' authorities. Although the courts acknowledge the guidance obtainable from judicial decisions and legal commentaries of other countries, including South Africa, they warn that these should be utilised with caution.[1953]

In *Rustenburg Mill v Moolla*,[1954] the court cautioned and emphasised that even where the provisions of a Botswana statute mirrored statutes of other countries, those similar provisions must be interpreted in line with prevailing conditions in Botswana. The court pointed out that while acknowledging virtual similarities in statutes of the different countries, and specifically influential judicial decisions elsewhere, the paramount consideration should be the local law in the local perspective. In the light of the above (and the discussion in chapter four on the Namibia perspective) and to avoid unnecessary repetition, reference can thus be made to the comments on the South African *Insolvency Act* where it appears that to date, there have not been

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1950 See para *4.1* where this issue is referred.
1951 See *Botswana Housing Corporation v Estate Letsholo* 1995 BLR 363 (HC) para b.
1952 See *Botswana Housing Corporation v Estate Letsholo* 1995 BLR 363 (HC) para f, where the court refers to Nagel *Mars on Insolvency Law*.
1953 *Rustenburg Mill v Moolla* 1979-1980 BLR 298 (HC) 305.
1954 1979-1980 BLR 298 (HC) 305.

any reported comments or case law on a particular subject. The emphasis will thus be on those provisions that are unique to Botswana.

Botswana is a constitutional state and one is tempted to assume that all its laws are in compliance with its *Constitution*. This chapter investigates the veracity of the preceding assumption. The *Constitution* of the Republic of Botswana[1955] was adopted in 1966 when this jurisdiction gained independence from Britain.[1956] Further amendments to the Botswana *Constitution* took place in 1969, 1970, 1982, 1997 and finally in 2006. These continuous amendments to the *Constitution* are meant to be in tune with internationally acceptable practices and perspectives. The protection of fundamental rights is provided for in Chapter II of the Botswana *Constitution*.[1957] Unlike South Africa, Botswana (like Namibia) does not have a Constitutional Court. The Court of Appeal is the highest and final court in that country.[1958] It is the arbiter of all legal matters in Botswana.[1959]

Despite the fact that there is a *Constitution*[1960] in this jurisdiction, both the insolvent and any other witness called upon to be examined under the provisions of the *Insolvency Act*[1961] have almost no protection. This appears to be the case, at least as far as the current provisions of the insolvency legislation is concerned. As was the case in South Africa and Namibia prior to the amendments of their respective statutes, an examinee is coerced into answering questions fully and any evidence given or any statement made shall be admissible in evidence in any proceedings against him. The fact that such answers may be used against the examinee at subsequent proceedings is no defence. Thus, evidence given at an examination is admissible in subsequent criminal and civil proceedings against the person giving it. In addition, section 57 of the *Insolvency Act* Bots mandates and empowers the

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1955 Hereinafter the "Botswana *Constitution*".
1956 See Botswana *Constitution*. Also available at www.EISA.org.za.
1957 See Botswana *Constitution*. Also available at www.EISA.org.za.
1958 As in Namibia. See ch 4 of this research.
1959 Available at www.gov.bw under (AOJ) accessed on 06 March 2018.
1960 And the fundamental rights embodied therein.
1961 Sections 55,56,57,131,132,133,134,135 and 136, the equivalent of s 64,65,66 and 152 of South Africa *Insolvency Act*.

Master to transfer any statement indicating a reasonable suspicion of any offence committed by an examinee to the Director of Public Prosecutions.

In spite of the aforementioned, one is hopeful to find through the analysis of judicial decisions, law reforms and other authorities, some indications of legislative amendments and developments in this jurisdiction. This will be done in paragraph *5.3* and subsequent paragraphs through an analysis of judicial decisions, law reforms and other authorities.

5.3 The Insolvency Act Bots

5.3.1 Introduction

This statute is very similar and a substantial part of it is identical to South Africa's *Insolvency Act.* It makes provision for the sequestration of an insolvent estate of a natural person.[1962] In the absence of comments, case law and authorities in Botswana, comments made with reference to South Africa would be considered applicable in this jurisdiction. However, provisions unique to this jurisdiction will be highlighted. Same as provided for by South Africa's *Insolvency Act*, provision is made in the *Insolvency Act* Bots for public and private examination of insolvents and other persons of interest.

Public examination of an insolvent and other persons of interest is conducted at the meeting of creditors and private examination of the insolvent and other persons suspected of impropriety such as concealing the insolvent estate assets for example, is conducted by the courts. Public examination will be analysed first and followed by private examination.

[1962] Like in the case of South Africa, there are two acts in Botswana separately regulating the insolvency of natural persons and that of juristic persons.

5.3.2 Section 55: Compulsory attendance of creditors' meetings

Although this section does not bear the same wording as its South African counterpart,[1963] the meaning, interpretation and application of this section is the same. The assumption therefore, is that in the absence of information contrary to the above (like in Namibia), what was said above with regard to the South African insolvency law and the criticism that may have been expressed, would, in my opinion, be applicable in Botswana.

5.4 Public examination

5.4.1 Introduction

As is the case in South Africa, public examination of the insolvent and other persons takes place in open doors in this jurisdiction at the creditors' meetings. The examination is provided for by section 56 of the *Insolvency Act* Bots.

5.4.2 Section 56: Examination of the insolvent

This section, which provides for the public examination of insolvent and other persons, is the equivalent of section 65 (and 66) of South Africa's *Insolvency Act*. It appears to be similar to the provisions of section 65, except for the following aspects: Firstly, no provision is made for an affirmation. This implies that no provision is made for individuals who, due to their religious beliefs, have an objection to taking the prescribed oath under Botswana laws. Despite the section's

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[1963] Section 64 of the *Insolvency Act*. The difference lies in the provisions of sub-sec 1 which makes no provisions for consultation with the trustee as regards permission for an insolvent to absent himself from the meeting, thus granting the presiding officer powers to exercise his discretion as regards this aspect. Further, sub-sec 3 grants the presiding officer (non-judicial officer) all the powers vested in the court or a magistrate to secure attendance at the meeting. For convenience and the purpose of this research, reference to South African *Insolvency Act* should be construed to be reference to *Insolvency Act* Bots in so far as these two statutes are identical. Where the Botswana law differs, it will be stated explicitly.

silence on the availability of an option for an affirmation, provision is however made for same by sections 6[1964] and 29[1965] of the *Evidence in Civil Proceedings Act.*[1966]

Secondly, the concept "insolvent" does not only include the spouse of the insolvent, employees of the insolvent or any person who is called upon to give the required information, but also any relative of the insolvent within the fourth degree of affinity. Thus, if "B" (the insolvent's first cousin) is summoned to appear and provide the required information regarding "A" (the insolvent), "B" is for the purposes of the *Insolvency Act* Bots an insolvent and thus expected to so comply.

Thirdly, unlike its South African counterpart, the section further makes express provision for examination regarding information concerning the cause of the insolvency. Fourthly, unlike its South African counterpart, the section provides that evidence given at such examination and any statement made by any person in relation to the insolvent estate shall be admissible indiscriminately as evidence in any proceedings instituted against the **person making** it. No *in camera* provision is made and no provision is factored into this section same as provided by section 65(2A) of the South African *Insolvency Act*. The assumption is that the protection provided for by section 65(2A) is provided for in a separate section of the statute.

Fifthly, sub-section 4 of section 56 grants the presiding officer the powers and protection enjoyed by a magistrate to deal with an examinee who refuses to answer any question or fails to answer the question to the satisfaction of the presiding officer. This means that the presiding officer can order the apprehension and detention of such an examinee. This appears to be an anomaly. A non-judicial officer should not be empowered to exercise functions considered to be reserved for the judiciary.[1967]

[1964] This section highlights the need for an examinee who is required to take an oath to have an understanding of the nature and the purpose of taking an oath.

[1965] Provision is made in this section for the making of an affirmation in the stead of an oath, for witnesses who due to their religious convictions are unable to take the prescribed oath. This solemn affirmation is accorded the same weight as the prescribed oath.

[1966] Ch 10.02. See also Marais *Cross-Border Taking of Evidence in Civil and Commercial Matters* 247.

[1967] See *De Lange v Smuts* [1998] ZACC 6; 1998 (3) SA 785 as discussed throughout ch 2 above.

Furthermore, no provision is made in this section for review. The assumption is then that, review is provided for in a separate section of this statute[1968] in relation to the incorrect application of discretion by a presiding officer as far as administrative decisions are concerned. However, appeal is provided for, and the effect is that a party aggrieved by the final decision of the presiding officer as regards committal to prison (on the basis of any illegality or informality in the warrant of arrest issued by the presiding officer)[1969] may appeal same.

In the matter of *Kille ampamp Dannhauser Pty Ltd v The Registrar and Master of the High Court and Others*,[1970] the court was faced with an application to interdict the examination of witnesses at the meeting of creditors in terms of section 55 and 56 of the *Insolvency Act* Bots. The facts of the case are as follows: The applicants had already undergone the first examination proceedings and were reluctant to face the second one. They requested the Master to postpone proceedings until a later date. The Master declined their request and ordered that the examination proceed as planned. The decision of the Master not to postpone the second meeting of creditors and examinations led to an urgent application to interdict the proceedings.[1971]

On hearing their application, the court observed that the applicants, who had already attended the first examination, should have lodged an application to review the Master's decision, instead of interdicting the examination proceedings.[1972] This was the case regardless of the legality or non-thereof of the Master's decision to proceed with the examination. Despite this view, the court indulged the applicants by granting them an interim interdict against the Master from holding the second creditor's meeting, and the continuation of the examination. On the return date, the court dismissed the application on the ground that the applicants failed to exercise

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1968 See *Kille ampamp Dannhauser* Pty Ltd *v The Registrar and Master of the High Court* 2012 2 BLR 202 at 207.
1969 Section 135 of the *Insolvency Act* Bots.
1970 2012 2 BLR 202 HC.
1971 At 203.
1972 At 204.

their rights to seek to review the decision of the Master.[1973] The court further emphasised the fact that since the ruling or order of the Master is administrative in nature, it is valid and binding on the parties involved. This would be the case until it is set aside by an order of court. It appears that the Master's decision to order that the public examination of witnesses at a creditor's meeting proceed as planned, is considered administrative in this jurisdiction.

In support of its view, the court cited[1974] the South African case of *Oudekraal Estates (Pty) Ltd v City of Cape Town*.[1975] In this case, the views brought forth by the court were as follows: (i) unlawful administrative actions give rise to problems; (ii) to ensure certainty in a modern constitutional state, problems arising from unlawful administrative actions must be curbed; (iii) the recognition of the value of certainty is what it is assumed to be behind the legislature's gesture when it puts in place enabling legislation; (iv) giving effect to the principle of legality is a feature crucial to our legal order; (v) to ensure certainty, the legislature might provide for consequences to follow from an act of an administrator while the rule of law provides that the state can only compel certain actions from its subjects if the act is legally valid; (vi) that the rule of law compels a public authority to perform its public duty despite the invalidity of the originating administrative act, the public authority is obliged to set aside the invalid administrative act and not just ignore it. In the *Kille ampamp Dannhauser* matter above, the court's decision that the examination should proceed as planned is indicative of the weight placed (by the legal system) behind an administrative action.

On the basis of the above, the court rationalised its decision to dismiss the application.[1976] From the case under discussion, it becomes clear that the decision of the Master in this jurisdiction is considered administrative in nature. Further, the Master exercises quasi-judicial powers when he declines to have the meeting and examination postponed. The decision of the Master is thus subject to review.

1973 At 207.
1974 At 207.
1975 2004 (6) SA 222 (SCA) 246.
1976 At 208.

Furthermore, it is clear that the courts are reluctant to interfere with the decisions of the Master, at least as far as the insolvency meetings and examinations are concerned. The said position is the same as in South Africa[1977] The exception being that South Africa does not consider the decision of the Master, taken in connection with the holding or not thereof of the creditor's meetings and the subsequent interrogations, as administrative.

5.4.3 Section 57: Penalties for suspected insolvency offences

This section has the same provisions as section 67 of South Africa's *Insolvency Act*. Except for the provision that an insolvent's legal representative before sequestration shall, for the purposes of this section, be regarded as an insolvent, the sections are similar. The latter provision appears to have serious implications as far as legal professional privilege is concerned. Seeing that the insolvent is compelled to answer all questions despite fear of self-incrimination, the legal representative may also be compelled to answer questions that may incriminate his client. Assuming that this would not be the case in this constitutional jurisdiction, the principle, interpretation and application of the above-mentioned sections should be considered to be the same unless the contrary is proven.

5.5 Private examination

5.5.1 Introduction

This subject is governed by sections 131-136 of the *Insolvency Act* Bots. Provision is made in this statute for the private examination by the court of the insolvent and other persons. This provision appears to be similar but not identical to section 152[1978] of the South African *Insolvency Act* which also provides for the private enquiries. The fact that these proceedings do not take place at the meeting of creditors reinforces my assumption that they are indeed private proceedings. The position entailing that only specified individuals are summoned to provide the required information. What is unique to Botswana is the fact that the court makes an order

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[1977] See in general ch 2 above.
[1978] See the discussion on this section at para *2.3.4* ch 2 above.

for this enquiry upon application by an affected person like a trustee or creditor. The examination takes place before the court. This means that the Master does not preside at these enquires and therefore the judge or the magistrate, as the presiding officer, may pose questions to the examinees at the hearing. The exact procedure will now be explained and discussed.

5.5.2 Section 131: Examination of insolvent and other persons

This section has the same provisions as section 152(1) (2) (3) and (4) of South Africa's *Insolvency Act* and provides for private enquiries. Unlike as in the case of section 152(3) and (4), these enquiries are conducted by the court. Although not specifically mentioned thereat, this examination appears to be a private examination because it does not take place at the meeting of creditors. No mention is made of the Master or other public official presiding thereat. What is unique to Botswana however, is the fact that the court makes an order for this enquiry upon application by an affected person like a trustee or creditor. It does not appear as if the examination may be directed at the trustee as is often the case in terms of section 152(1) of South Africa's *Insolvency Act*.

Section 131 specifically provides that an examinee shall be examined before a court or a magistrate. No mention is made of who exactly is the court. The assumption drawn herein is that the enquiry may be headed by a judge or a magistrate. There is no mention of the Master as far as these examinations are concerned, except for the filing[1979] of evidence obtained thereat. In this context, filing means that the information obtained at the examination forms part of the sequestration process for record keeping purposes, with the possibility that the information may be utilised in subsequent proceedings.

Mention must be made of another unique feature that deserves highlighting. The statement made at such examination is recorded in writing and signed by the person examined. The said statement is to be transmitted to the Master to be annexed to

[1979] For record keeping purposes, with the possibility that the information may be utilised in subsequent proceedings.

the documents relating to the estate for use in subsequent proceedings against the examinee. The assumption is that the statement may be used in both civil and criminal proceedings. It must also be noted that an examinee may not refuse to answer questions on the ground that answers may be incriminatory on his part. As is the case with section 152 of South Africa's *Insolvency Act* which provides for the application of sections 65 and 66 of the same statute, the provisions of section 56 of the *Insolvency Act* Bots apply in these proceedings as well.

5.5.3 Section 132: Expenses of person examined

This section makes provision for the payment of witness' fee for the attendance of this examination, same as provided for by section 152(7).[1980] What is not mentioned though in this section is the source of the witness fee in the event that there are no assets in the insolvent estate to cover same. In terms of section 152(7), provision is made for the payment of these fees by the state in the event that there are not sufficient assets in the insolvent estate to cover such. The presumption is that in Botswana the petitioning creditor(s) may have to cover these expenses. This provision is fair and worth adopting. It is submitted that the risk on the part of the creditor is a natural consequence of the credit market. This risk should be provided for in the normal course of business (by the creditors and not the state). There is another view, since insolvency proceedings are treated the same way as civil matters in this jurisdiction, the plaintiff should cover the costs in the event that the defendant has no available assets as is the case in civil litigation

5.5.4 Section 133: Apprehension of persons failing to appear

Like the provisions in section 152(6) of the *Insolvency Act*,[1981] this section enforces compliance with the attendance of the examination as prescribed. What is more prominent from this section is the fact that the court or magistrate enforces compliance throughout the process. No mention is made of the Master's role in the apprehension and/or detention of a recalcitrant witness, unless the Master is

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[1980] Of *Insolvency Act* 24 of 1936.
[1981] 24 of 1936, read with s 66(3) of the same statute.

synonymous with the court. In my view, this position is fair. The provision, if it is, indeed available, appears to eliminate any constitutional attacks that may arise if a non-judicial officer is empowered to exercise judicial functions and/or discretion in instances of recalcitrant witnesses.

5.5.5 Section 134: Committal of recalcitrant witnesses to prison

The section is similar to section 152(6)[1982] and provides for the committal to prison of a recalcitrant witness who refuses to answer questions or produce documents. Again there is no mention of the Master. The court or magistrate is responsible for ordering the committal. What is worth mentioning is the fact that such a witness may, subject to section 135 of this statute, be denied the opportunity to make bail. The witness can only be released if he undertakes to do what is required of him or appeal such a committal. The witness's freedom depends on his compliance with what is required of him, therefore, the need for applying for bail will not arise if he so co-operates. It is submitted that this strict provision is perceived as this jurisdiction's strict stance against non-compliance with obligations imposed by the legislature in insolvency related matters. The extension of punitive measures against breach of duties imposed by the *Insolvency Act* Bots further reinforces compliance with this statute. As said in chapter 2, 3 and 4 above, the pressure exerted by the above procedure may be necessary in certain circumstances. This is especially the case where impropriety is suspected and no co-operation on the side of the witness is obtainable. However, the disadvantage with detaining the prospective examinee without an option of bail is the accompanying delay in the overall administration of that insolvent's estate.

5.6 Section 135: Appeal to court against order of committal

The provisions of this section would have been similar to those of section 150 of South Africa's *Insolvency Act*. However, the fact that section 135 of the *Insolvency Act* Bots provides for appeal against the order of committal on the grounds of either illegality or a flawed warrant, or that an examinee had a lawful excuse not to comply

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[1982] Of *Insolvency Act* 24 of 1936, read with s 66(4) and (5) of the same statute.

with the summons, makes this latter section unique to Botswana. Despite the fact that an examinee may be denied an opportunity to make bail as provided for by section 134 of the *Insolvency Act* Bots, any person committed to prison in terms of this statute may apply to court for his release in terms of section 135 of the *Insolvency Act* Bots.[1983] This provision is acceptable. A warrant of arrest should be issued as a last resort after ascertaining the lawfulness or lack thereof of the witness's failure to comply.

5.7 Section 136: Immunity for magistrates

This section is similar to section 152(6)[1984] except for the fact that it refers to the immunity of a magistrate where any proceedings are instituted by any person aggrieved by the decision of the latter or the said committal. Again, unlike the case with South Africa, no mention is made of the Master in this section, at least as far as the immunity is concerned. This entails that the Master does not feature in this section with regard to the material aspects touching the status of the examinee. This position is acceptable only if the Master is not synonymous with the court. The Master has no authority to order the apprehension of a recalcitrant witness. Provision for an offence in case of recalcitrance is sufficient and takes away the need for immunity.

5.8 Section 152: Review and appeal

As in South Africa, an option for review and appeal is available to a person aggrieved by the decision, order, and ruling of the Master taken in relation to insolvency processes. This section is verbatim section 151 of South Africa's *Insolvency Act*. There is, however, a difference. Contrary to the position in South Africa, section 152 of the *Insolvency Act* Bots does not pronounce the Master as being an official presiding at the examination. From a distance, one may be misled into assuming

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[1983] Section 135 of Botswana *Insolvency Act*, which provides that where an examinee is detained either on the basis of a defective warrant or illegality thereof, or had good reasons not to comply or on any ground which the court may considers appropriate, he may apply to court for his release.

[1984] Of *Insolvency Act* 24 of 1936, read with s 66 of the same statute.

that the Master is not really involved as a quasi-judicial figure, but the court, through a magistrate or judge is. However, on closer inspection, the Master is in fact involved in insolvency examination proceedings. His decision, order, and ruling are considered administrative in nature and thus subject to automatic review. Regardless of this position, the application, principles and interpretation of the latter mentioned sections is the same. Thus, in the absence of authorities regarding this aspect in that jurisdiction, comments made in the discussion of *Strauss v The Master*[1985] at chapter two paragraph 2.3.4.8 above, are also applicable here.

The preceding paragraphs dealt with the examination of insolvents and other witnesses as regards the insolvent estate concerned, the next paragraphs will investigate the nature of insolvency examination in the context of insolvency of companies.

5.9 The Companies Act Bots

5.9.1 Introduction

The *Companies Act* Bots is similar and almost a replica of South Africa's *Companies Act.* In the absence of case law or commentaries on the application of this legislation, reference to South African authorities would be made. As provided for in the latter legislation, provision is made in this legislation for the application of the Insolvency *Act* Bots where it is not in conflict with the provisions of this statute. The assumption is therefore that, in the absence of a provision specifically catering for the liquidation of companies unable to pay their debts in the *Companies Act* Bots, the *Insolvency Act* Bots would be invoked.

A provision is made in this legislation for both public and private examination of directors and officers of companies unable to pay their debts and in liquidation. Public examination will be tackled first, followed by private examination.

[1985] 2001 (1) SA 649 (T).

5.10 Public examination

Same as provided for by the *Insolvency Act* Bots, public examinations of directors and other persons of interest are provided for by the *Companies Act* Bots. These examinations take place in open doors at the creditors' meetings.

5.10.1 Section 430: Directors and others to attend meetings

This section provides for the summoning of directors and other persons to the meeting of creditors of a liquidated company. The meeting is publicly held to enquire into the affairs of a company unable to pay its debts and in liquidation. The section is the equivalent of section 414 of South Africa's 1973 *Companies Act*. There are, however, exceptions in the following unique provisions:

(1) the section specifically mentions persons who were the directors of a company within six months prior to liquidation as persons of interest for the purposes of examination;

(2) a fine not exceeding P1, 000 (one thousand pula)[1986] or to imprisonment for twelve months or both.

It is my assertion that the six months' provision is acceptable. This assertion stems from the presumption that it is likely that such directors vacated their positions as soon as they foresaw the likelihood of the company not pulling through its financial strains. They may not have wanted to be associated with a failed company or they may have been involved in questionable conduct in the running of the business of the affected company. For the said reasons, they should be compelled to come forward and provide the required information. The stated time limit should not, however, mean that directors who have been with the company affected but left its employ more than six months' prior to its liquidation are out of reach for the purposes of this investigation. If that were the case, persons with questionable conduct could escape accountability, which would be contrary to public interest.

[1986] Botswana currency, which is a little bit over a thousand rand in South African currency.

The fact that a specified amount for a fine is expressly mentioned ensures some sense of certainty to the affected persons. Furthermore, the threat of imprisonment may persuade those with the required information to make such information available to office holders without further delay. Since the company is insolvent and not the directors, directors are in a position to pay a fine and avoid imprisonment and to face the examination. Seeing that the section is similar to the above-mentioned South African provision, the logic is then that, the principle, interpretation, and applications are the same.

5.10.2 Section 431: Examination of directors and others at meetings

Section 431 is the equivalent of section 415 of South Africa *Insolvency Act*. The former provides for a public enquiry into the affairs of a company unable to pay its debts. The enquiry takes place at the meeting of the creditors presided over by the Master as opposed to section 131 of the *Insolvency Act* Bots where proceedings are conducted by the court. The Master may also interrogate persons summoned. The following provisions are particularly relevant: Privilege of a witness; representation[1987] of an examinee at his examination; admissibility of examinee's statement in evidence against the latter in civil proceedings; examinee's witness fee as in civil proceedings; failure to answer questions which may tend to be incriminatory to an examinee is not contempt of court; incriminatory evidence not admissible in criminal proceedings except in perjury related offences are provided for by this section. There is, however, controversy regarding the last mentioned aspect. Section 56 of the *Insolvency Act* Bots (the equivalent of section 431 of the *Companies Act* Bots) provides for the admissibility of incriminatory evidence against the examinee indiscriminately. It is not clear why the legislature would want to distinguish between the consequences of recalcitrance at the interrogation in relation to an individual insolvent and in relation to the recalcitrance at the interrogation of directors of insolvent companies. The assumption is that this aspect

[1987] By either a legal practitioner or accountant.

will be amended by the courts through case law, to bring these two sections in sync with one another.

What is, however, unique about the provisions of section 431 is the fact that an accountant[1988] is specifically identified as amongst those who may represent an examinee at his examination. This provision is fair and commendable. It becomes even more recommendable in the context of interrogations involving accounting and financial related aspects. This will be necessary in the case where complicated accounting books need to be interpreted. Some lawyers would be ill equipped to represent an examinee in such matters.

5.10.3 Section 465: Review by court

This section appears to be the equivalent of section 151 of South Africa *Insolvency Act.* The section, which provides for a review of the decision, ruling, or order of the Master in the case of the insolvency of persons, is also applicable in the case of companies unable to pay their debts. The section makes available to an aggrieved person, an opportunity to have reviewed by the court, the decision, order, or ruling of the Master. This would be the case where an aggrieved party is of the view that the Master exercised his discretion incorrectly and the effect of the said decision, order or ruling thereof is final. This is usually common for example, where the Master decides to subpoena individuals unrelated to the company in liquidation, the manner in which he chairs the creditors' meetings or his decision to hold an enquiry into the affairs of an insolvent company.[1989] Since the Master's decision is said to be administrative in nature,[1990] one would assume that it is subject to automatic review by the court in terms of this section.

1988 In addition to an attorney and counsel.

1989 See *Air Botswana v Thiro* 1995 BLR 315 (HC) as discussed at para 5.11.1.

1990 *Kille ampamp Dannhauser* (Pty) Ltd *v The Registrar and Master of the High Court* 2012 2 BLR 202 HC 207.

This section makes it clear that the Master is actively involved as a presiding officer at the meeting of creditors as far as insolvent companies are concerned, and for the interrogation of persons summoned.

5.11 Private examination

This aspect is provided for by section 466 of the *Companies Act* Bots. The latter section makes it possible for the private examination of directors and other officers of a company unable to pay its debts and in liquidation. These private examinations are preceded by an *ex parte* application and are conducted in closed doors.

5.11.1 Section 466: Special commissions for taking evidence

Provision is made in this section for the taking of evidence in private enquiries by commissioners. This section, although compressed, appears to have the same provisions and impact as sections 417 and 418 of South Africa's 1973 *Companies Act*. In the latter jurisdiction, commissioners are appointed from the ranks of magistrates and persons which the court may deem fit. These persons, it is assumed, are retired judges, magistrates or persons learned in the law, for example, senior advocates.[1991] As submitted in relation to South Africa's context, if a commissioner is not a magistrate, he should not order the apprehension and detention of recalcitrant witnesses. Another view is that even if a commissioner is a magistrate or judge, they should not order such apprehension and detention of recalcitrant witnesses. The reason being that they are not sitting in a judicial capacity when they preside at those commissions. If and when they are confronted with a situation where a witness fails to comply, the matter should then be referred to the court for a decision. The recalcitrant witness should be considered to have committed an offence and the ordinary consequences should thus follow.

Further, taking into account the rigid requirements for compliance with legislative provisions in this jurisdiction, one would assume that other persons would be appointed from the ranks of senior counsel. Provision would be made that if

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[1991] See *Air Botswana v Thiro* 1995 BLR 315 (HC) 317.

circumstances call for incarceration of a recalcitrant witness, the matter will be referred to the court to enforce such an order. From the language of this section, it appears that for the purpose of the taking of evidence in private enquiries, preference would be given to state employees with the hope of cutting expenses (for the benefit of the creditors affected by the said insolvency) of already depleted insolvent funds. This position is commendable when one considers the expenses associated with exorbitant legal fees charged by legal experts in private practice. However, special circumstances and the nature of the case may warrant the appointment of an expert practitioner in private practice.

In *Schwarz v Pax Trading Company (Pty) Ltd* (*in liquidation*),[1992] the court had an opportunity to enunciate on the nature of these enquiries. The facts of the case are as follows: An application was made *ex parte* for an order for a commission of enquiry in terms of sections 262 of the Botswana's *Companies Proclamation*[1993] read with section 204 of the same *Proclamation*. Certain persons were identified for the purposes of examination thereat. After hearing the application, the court adopted the view that would-be examinees were entitled to be notified of the intended application.[1994] This was said to be the position because it was necessary to confer to the examinees an opportunity to oppose the application if they chose to.[1995]

It was argued on behalf of the applicant liquidator that, it is not necessary to inform would-be examinees about an impending enquiry against them since this was a secretive enquiry.[1996] The court rejected this argument and proceeded to state that the would-be examinees must be notified and made parties to the application. In its deliberation, the court cited sections 155 and 194 of the then South Africa's 1953 *Companies Act* as the equivalent of sections 204 and 262 respectively. The court further relied on *Pyemont's Company Law of South Africa*[1997] and on *Henochsberg*

1992 1972 (2) BLR 21 (HC).
1993 71 of 1959, the predecessor of ch 42.01 of Botswana *Companies Act*.
1994 At 21.
1995 At 21.
1996 At 21.
1997 6th Ed.

on the Companies Act.[1998] Both authors had relied on the case of *Ex parte Liquidators Ismail Suliman & amp Company (Pty) Limited*.[1999] The latter case as it appeared in Bisset & Smith *The Digest of South African Case Law*[2000] was cited by the court. According to Judge Aguda, this case served as authority for his views and consequently his order.[2001] He went further to state that, apart from the said authorities, he himself would have supported the view that would-be examinees were entitled to be informed of a proposed enquiry into their conduct. In further support of this view, he pointed out that the rules of natural justice dictated that this be the case. This view he held regardless of submissions on behalf of the applicant that the secretive nature of these enquiries warranted absolute privacy. Acknowledging the secretive nature of the enquiry did not mean that affected persons (would-be examinees) should not be notified of an enquiry into their conduct, so went the judge's view. The application was consequently set aside.[2002]

As far back as 1979, the courts in this jurisdiction recognised the need for enquiries to be conducted in relation to companies unable to pay their debts, regardless of pending criminal proceedings against would-be examinees. It must be noted that when these cases came before the courts, Botswana had already adopted its *Constitution*,[2003] embodying the fundamental rights of all citizens. In *Swart v Klerck,*[2004] the court was faced with an application (by would-be examinees) to stay proceedings of the commission of enquiry in terms of section 204[2005] of the then Botswana *Companies Act.*[2006] A commission was set up to have them examined and to produce books and documents in relation to the affairs of the company in liquidation. The applicants were the former directors of a company unable to pay its debts and in liquidation.

1998 1953 (1st ed.) at 358.
1999 1941 WLD 33.
2000 1941.
2001 At 22.
2002 At 22. For a different view on this aspect, see *Air Botswana v Thiro* 1995 BLR 315(HC) at para *5.11.1* below.
2003 In 1966.
2004 1979-1980 BLR 156 (HC).
2005 The predecessor of s 430 and s 431 of the 2004 *Companies Act*.
2006 42.01 of 1959, predecessor of the *Companies Act* of 2004.

The basis[2007] of the applicant's case was that if the examination were to proceed, it would cause serious injustice to them. According to them, the injustice would arise in the following ways. Firstly, the applicants were said not to be in possession of any books or records of the company or pertaining to the company or its affairs. The said books were in the custody of the liquidator of the company. Secondly, that they were not prepared for an examination of the type envisaged since the affairs of the company cover a period of approximately eight (8) years. This period was said to be too long and entailed a vast volume of data that, because of such a long period, they (applicants) were unable to refresh their memories from the books and documents pertaining to the company's affairs. Thirdly, it was said that prejudice would arise from the fact that they are facing a serious criminal charge relating to the alleged dishonesty in conducting certain affairs of the company while they were directors. According to them, their examination in relation to the company's affairs would expose them to giving incriminating answers to question that may be posed thereat.

The court was of the view[2008] that in essence, the applicants did not want to be examined in relation to any matter pertaining to the company's affairs. They wanted this examination to be stayed at least until the conclusion of the criminal proceedings against them. Fourthly, the applicants alleged that they would suffer "legal prejudice" if they were to be compelled to answer questions with the potential of disclosing their defence to the criminal proceedings, both current and as contemplated.

Taking into consideration the applicants' dilemma and the alleged possible "legal prejudice" to them and the prejudice to the creditors of the company in the event that the proceedings were stayed, the court had to deliberate on this matter urgently. Relying heavily on both the English[2009] and South Africa's authorities as far as these are applicable to Botswana, the court[2010] deliberated as follows: That it was

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2007 At 157-158.
2008 At 158.
2009 *Imperial Continental Water Corporation* 1886 33 Ch D 314.
2010 At 158.

crucial to remind itself of the purpose of the legislation and the nature of the process under section 204.[2011] In this regard, the court referred to the decision of Judge Megarry in the case of *re Rolls Razor Limited.*[2012] In this latter case, the court dealt with the provisions of section 268 of the 1948 *English Companies Act* (the equivalent of section 204 under discussion) and described this section "as giving an extraordinary power of an inquisitorial nature".[2013] The effect of this statement is that the powers of the court should therefore be wide. This, it is submitted, should be the case since the court is expected to deliberate on a *sui generis* process.[2014]

The court also referred[2015] to an English case of *Re Repetition Engineering Service Limited.*[2016] There the liquidator of a company in liquidation applied for an order to examine a former employee of the company in liquidation. The examination concerned the affairs of the company. The Registrar declined the application because he was of the view that the employee could and would certainly refuse to answer questions put to him. The refusal would be based on the grounds that his answers might incriminate him, and his refusal to answer could be used against him in subsequent criminal proceedings. On appeal in that case, the court then held that the order should be made **despite the possibilities that** in the process of the examination some questions might be posed to the employee which he could refuse to answer on the ground that they would incriminate him. Emphasised by the court were the following points:

(i) where the underlying reason for the proposed examination was the compilation of information permitted by the section and for no subsequent criminal proceedings against the examinee, such examination must proceed; and

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2011 As was stated in the Namibian court decision of *Gases v The Social Security Commission* 2005 NR 325 (HC) as discussed at para 4.3.2 above in the context of insolvency interrogation, where the court cited the South African case of *Bernstein v Bester* 1996 (2) SA 751 (CC) and related cases. See ch 2, 3 and 4 above.

2012 (2) 1969 3 All ER 1386 at 1396H. See reference to this case throughout ch 3 and ch 4 above.

2013 At 159.

2014 At 159.

2015 At 159.

2016 1945 173 LT 75.

(ii) that if it was possible to secure such information without prejudicing the witness's subsequent criminal proceedings, the court can authorise the examination of the former employee of the company concerning the affairs of the company.

The court in *Swart v Klerck* under discussion pointed out that it had no idea what evidence was before the court (in *Repetition Engineering Service* case) that the examinee would refuse to answer the questions.

According to the court[2017] and to my mind correctly so, (i) normally an innocent person would grab an opportunity to clarify his non-involvement in an alleged offence as soon as possible; and (ii) that he may clarify his position to the prosecuting authority or someone else. I concur. He would want the world to know that he is innocent. However, the court did not want to assume that a person who claims to be innocent of any criminal charges would as a matter of course readily give his side of the story and pray that he is afforded protection by the law. I also concur with this cautionary statement by the court. An innocent witness may not at all times make himself available for questioning for fear of implicating others in his responses, for example. The general assumption is, however, that, under normal circumstances if a person is innocent, he would want the world to know he is innocent at the earliest convenience. In the end, the court took the view[2018] that the test[2019] provided in *Re Repetition Engineering Service Limited*[2020] is too narrowly defined. Emphasised by the court was the point that applicants' submissions were not at all out of place. This was said to be the case because if the need arises, the commissioner may adjourn the proceedings to a later date. This would be specifically necessary where identified witnesses are required to bring with documents not readily available.[2021]

2017 At 160.
2018 At 160.
2019 That to determine if the interrogation should proceed or not, the court should be guided by the objective of the proposed examination. If the examination was intended to glean evidence to be used in criminal proceedings against the person it was sought to examine, then it should not be granted. If, however, the examination was sought to obtain information as specified in the section then the examination should be allowed.
2020 1945 173 LT 75.
2021 At 160.

The court proceeded (in *Swart v Klerck* [2022]) to deal with the question of privilege. In its deliberation, it referred to section 21[2023] of *The Evidence in Civil Proceedings Act,* Botswana[2024] which provides that: (1) a witness in Botswana may legally refuse to answer questions which he may not be compelled to answer in the Supreme Court of judicature in England; and (ii) if the answer to such question had the potential to expose such witness to criminal prosecution, humiliate and expose same to any troubles, penalty or fine.

The court also pointed out that the corresponding provision in England is contained in section 14(1) of the English *Civil Evidence Act.*[2025] According to the court,[2026] as is the case in practice, the stage at which privilege must be considered is after the witness is sworn in and the question posed.

Further held that:

(i) the witness must pledge an oath that he honestly believes that the answer will or have the potential to incriminate him;

(ii) the court itself (in the present case the Commissioner) is at liberty to deduce from the circumstances of the case and the nature of the evidence the witness is called to give, that there is reasonable ground to expect danger from his being compelled to answer;

(iii) the court further held that once danger is made apparent, great leeway should be allowed to the witness in judging for himself the consequences of any specific question; and

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2022 *Swart v Klerck* 1979-1980 BLR 156 (HC).

2023 The equivalent of s 14 of the English *Civil Evidence Act* ch 64 of 1968.

2024 Ch 10.02. It must be noted that most of Botswana's legislation mirrors the English jurisdiction's statutes, consequently, English jurisprudence and legislation is relied on and in most instances without distinction between statutes of the two countries.

2025 1968, as set out expediently in *Phipson on Evidence* 11th ed at para 610.

2026 At 160.

(iv) further that it must be clear to the court that a claim of privilege is made for the protection of the witness's rights against self-incrimination and not for concealed purposes.[2027]

Turning to the South African position, the court[2028] referred to *De Jager v Booysen and Swanepoel*.[2029] In this case applicants sought the stay of an enquiry provided for by section 180 of the *Companies Act*.[2030] The basis for the application was that:

(i) there were criminal proceedings pending against the applicant;

(ii) there was clear prejudice to the applicant relating to criminal proceedings if the enquiry were to continue; and

(iii) there was absence of prejudice in respect of the creditors or anybody else if the proceedings were to be stayed until the conclusion of the criminal proceedings, contended the applicant.

The court[2031] proceeded to point out that in the *De Jager v Booysen* and other South African cases this court was referred to, the witness could be required to answer questions, which would or might incriminate him under the provisions of the relevant legislation. This was said to be contrary to the position in Botswana where an enquiry held in terms of section 204 of the *Companies Act* did not preclude the witness from claiming privilege.

In determining whether or not to grant the stay, the court in *De Jager v Booysen* deliberated as follows: Firstly, the guiding principle as to the exercise of one's discretion on the question whether or not to grant an examinee a stay of the enquiry should be a comparison between the following aspects:

(i) the prejudice on paper and the real prejudice to the applicant, which is often obvious when the latter is compelled to answer incriminating questions in the light

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2027 At 160, the court referred to *Re Reynolds* 1892 20 Ch D 294.
2028 At 161.
2029 1963 4 All SA 760.
2030 46 of 1926, the predecessor of *Act* 61 of 1973.
2031 In *Swart v Klerck* 1979-1980 BLR 156 (HC) 161.

of imminent criminal proceedings against him, and with the possibility of revealing his defines; and

(ii) the potential prejudice which creditors may suffer as a result of the loss of assets and other factors negatively affecting the assets and liabilities of the insolvent; and

(iii) if the potential prejudice to the examinee has far reaching negative consequences than the potential harm to the creditors, then the stay of such enquiries should be granted;

(iv) if the opposite were true, the stay should not be granted to the disadvantage of the creditors.

Secondly, a further guiding principle to eliminate potential prejudice should be to allow the examinee to refresh his memory regarding specific transactions from records, balance sheets and books in the possession of other persons. This should be allowed to enable an examinee to provide appropriate answers to questions posed at the enquiry.[2032]

According to the court in *Swart v Klerck*,[2033] the case of *De Jager v Booysen* provided a rational and accurate statement of the manner in which the court should approach the question of whether a stay should be granted or not. Of utmost importance was to bear in mind the purpose of the procedure laid down in section 204, reiterated the court. It is my submission that this test was fair and good then, but now that sufficient protection (that his answers may not be used against him in subsequent criminal proceedings (not perjury related)) for the examinee is provided for; there will not be a need for this test. With regard to the question of prejudice, the court pointed out that prejudice is present where one is compelled to answer questions even where the answer would or might tend to incriminate him. Further pointed out[2034] was the fact that in terms of section 204, the examinee is in a position to

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[2032] See also *Swart v Klerck* 1979-1980 BLR 156 (HC) 162-163.
[2033] *Swart v Klerck* 1979-1980 BLR 156 (HC) 161-162.
[2034] At 162.

avoid that prejudice because he is not compelled to answer incriminatory questions - another advantage.

Regarding prejudice to the applicants(examinees) due to the unavailability of books and documents for them to refresh their memories in order to answer questions, the long period of eight (8) years and the data involved, the court[2035] correctly (it is admitted) held to be unfair and prejudicial to the examinees. However, this (complaint) the court held to be answerable since the said books and documents were no longer in the custody of the prosecution, but in the custody of the liquidator.[2036] The court's view was that, if applicants were to request the said books and documents for the purposes of refreshing their memories, they certainly would be allowed access to refresh their memories. This is also true and reasonable. This application for access could be done either before or during the examination.

The court[2037] further held that, with regard to the time required by the applicants to prepare for the examination, it had no clue what type of preparation is envisioned by the applicants. According to the court, it was not as if the applicants were to read the company's records from the beginning to end. This (applicants') dilemma was said to be answerable. The correct procedure, according to the court (of which I concur) was to ask the Commissioner for a short adjournment, if necessary. That it was for the Commissioner to deal with such matters of procedure and not the court. Further highlighted[2038] was the confidence the court had on the Commissioner to act reasonably. By this, the court meant that the Commissioner would give judicious decisions on such matters. This, he would do after carefully considering arguments presented before him. This, the court said, was to dispose of the second head of alleged prejudice to the applicants.

[2035] At 162-163.
[2036] At 163.
[2037] At 163.
[2038] At 163.

With regard to the third head of prejudice,[2039] the court[2040] held that as opposed to the consequences that might arise if the examination were held under section 205[2041] of the *Companies Act* Bots,[2042] in the present proposed examination the applicants are entitled to refuse to answer questions. That is, if answers thereto would or may tend to incriminate them. The court highlighted that the applicants were not of modest intelligence and the fact that they were, in terms of the law, entitled to legal representation, added to their advantage. Their remedy as far as self-incrimination was concerned, was said to lie in the protection that the law afforded them. The court was not ignorant of the fact that the possibilities exist that the applicants may inadvertently or mistakenly make incriminatory statements during their examination as in most examinations of that kind, but that such mere possibility (of accidentally incriminating oneself) should not weigh heavily on the scales. With this statement, the court in my view meant that insolvency examinations must not be hindered by this possibility and must thus proceed.

Regarding legal representation, it is submitted that the court must have meant that the presence of a legal representative (for an examinee) would not necessarily make that much of a difference (at least as far as accidental utterances of incriminatory nature are concerned) because the end result of insolvency examinations was information relating to the affairs of a company in winding-up. One would assume that having a legal representative present would give an examinee some sense of calm because the representative would demand that the procedure is conducted within the precinct of justice. It must be pointed out further that the legislature has made it clear that the fact that questions posed at the insolvency examinations may

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2039 Which was to unintentionally or mistakenly incriminate themselves in the imminent criminal proceedings emanating from the alleged fraud related criminal charges against the would be examinees and potential witnesses.

2040 At 165.

2041 Where the examinees would be arrested and safely kept in custody until the court orders them to appear.

2042 This section provided for the arrest of an officer or contributor of a company facing imminent winding-up where the following factors are present: (i) suspicions that a contributory or officer is intending to leave or flee Botswana or to (ii) remove or hide any property for the purpose of evading payment of debts or of shunning the examination in relation to the affairs of the company. The above mentioned officers' books, papers and property may be seized for safe custody.

require incriminatory answers, does not entitle an examinee to refuse to answer such questions.[2043]

With regards to the possibilities of the applicants revealing their defence to the criminal proceedings due to the fact that they would not be entitled to refuse to answer questions on this ground alone, the court pointed out[2044] that there may be, as a result of an examination, prejudice to the applicants. It is submitted that this would be the case if examinees had something to hide. The court drew special attention to the fact that the loss of the strategic advantage, which the law affords an accused person to withhold his defence until trial, would be a disadvantage. This loss of an advantage was said to be a grave prejudice.[2045] The court was, however, not convinced that the said injustice exists in this context. The reason for this court's view was that what the examinees feared would happen, is already covered by the privilege blanket.

Regarding the creditors' position in the event that the proceedings[2046] were to be stayed until the conclusion of the criminal proceedings against the applicants, the court[2047] explained as follows: There is potential prejudice to the liquidator and creditors in this case if this commission is not proceeded with immediately. The potential prejudice to the liquidator (and the company) and consequently to creditors was evidenced by the following factors as submitted on behalf of the liquidator:[2048] (1) the examination of the applicants might disclose further information, which would lead to the discovery and recovery of assets. This argument was based on the following facts: Firstly, the fact that there were three apparent debts owed to the company by different third parties, one of P5 119.25, one of P690.51 and one of P1 955.34 making a total of P7 765.10, not an insubstantial sum according to the court. It appears from the evidence that these

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2043 See foregoing paragraphs where this aspect is discussed.
2044 At 165-166.
2045 In *De Jager v Booysen and Swanepoel* 1963 4 All SA 760.
2046 As requested by the liquidator for the proper administration of the insolvent company's affairs for the benefit of the company and its creditors.
2047 At 167.
2048 At 167.

three debtors claim that the debts were paid by them to the company in 1979 by cheque. In two such cases, copies of the cancelled cheques were sent to the liquidator who stated that they were endorsed by the company and paid into the personal bank account of the first applicant. This was evidenced by the various bank stamps on the cheques in question. As to the debt of P5 119.25, it appeared that none of the relevant cheques were sent to the liquidator and he was thus left in the dark as to what had happened to that sum, unless it is traceable in the company's records.[2049] I concur. Through records and information to be provided by the applicants, it might have appeared that the amount was subsequently repaid by one or both applicants, thus absolving them from any suspicions of fraud.

Secondly, the liquidator referred[2050] to certain earth moving equipment and vehicles which had been owned by the company but sold to Business Management (Proprietary) Limited some time in 1978. Applicants were questioned by the liquidator concerning these transactions and did not refuse to co-operate. They informed the liquidator that the equipment had been sold as scrap and that this accounted for what the liquidator thought to be a very low price. This appears controversial in my view. It is not indicated anywhere in the papers that Business Management (Pty) Ltd was dealing in scrap metals. The fact that applicants had an interest in Business Management (Pty) Ltd business affairs worked in disfavour of the applicants' claim of innocence. The liquidator was also able to ascertain from the applicants that in the course of its business, the company hired equipment and plant from Business Management (Pty) Ltd. On the personal attendance by the liquidator at the latter's premises, he saw a large number of items of plant and vehicles.

The liquidator further got hold of two hire purchase agreements between the two companies relating to various plant and equipment. He also pointed out[2051] that the two applicants were directors of Business Management (Pty) Ltd and there is, he contended, a strong likelihood that they have an interest in the third company

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[2049] At 166.
[2050] At 166.
[2051] At 166.

Channel Island. The latter company held the controlling interest in Business Management (Pty) Ltd. In the court's view,[2052] it appeared that these matters form the subject of the conspiracy charge against the applicants. Comparing the potential prejudice of the creditors and that of the applicants, the court was of the view that prejudice to be suffered by creditors is by far greater than that to be suffered by the applicants, if the order to stay examination was granted. Exercising its discretion, the court[2053] held that the examination should take its proper course in accordance with the order of the court and the application was thus refused.

Thirdly the liquidator deposed[2054] that three vehicles, once owned by the insolvent company, are in the possession of Business Management (Pty) Ltd which now claims ownership of these vehicles. This argument, according to the court, the applicants failed to satisfactorily reply to. The court [2055] pointed out that in the absence of any evidence contrary to the liquidator's, it accepts what the liquidator had said in his affidavit on the foregoing matters. The court also found that, throughout, the liquidator had been acting in accordance with his duties, had no interest in the criminal proceedings, and that his sole objective had been and is to trace and preserve all possible assets of the company. I subscribe to this court's view. The preservation of the unearthed insolvent company's assets are the very objectives of the insolvency enquiries.

About the liquidator's case, the court pointed out that the liquidator had indicated that firstly, there may be a claim against Business Management (Pty) Ltd, but that in order to properly evaluate such claim, it is necessary to seek further information from the applicants. Secondly, the liquidator is anxious to get to the bottom of the mystery surrounding the apparent disappearance of the items totalling P7 765. 10.[2056] Judge Hannah had an opportunity to paraphrase the statement of the liquidator, and stated[2057] that the liquidator was unaware of the financial standing

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[2052] At 166.
[2053] At 168-169.
[2054] At 166.
[2055] At 166.
[2056] At 167.
[2057] At 167.

of Business Management (Pty) Ltd and that in the light of their links with Channel Islands, he was concerned that funds may be repatriated before any civil proceedings got under way. The liquidator was also said to be anxious that the plant and equipment may be disposed of. The court pointed out that it was understandable that the liquidator is very anxious to start laying the ground for any proceedings[2058] as soon as possible. Further, to avail himself to any legal remedies that may be open to him. Lastly, the liquidator pointed out that he was unaware of the present financial position of the first applicant. That, if there should be evidence that the first applicant had received the sum of P7 765. 10 and no satisfactory explanation was forthcoming, he would be entitled to take immediate actions against him. This is correct. The recovery of the company's assets from those who are not entitled to them is one of the liquidator's main objectives and duty.

Next, the court turned to answer the question[2059] of the extent to which the examination of the applicants could assist the creditors of the company. Prior to its pronouncement on this issue, the court had an opportunity to hear arguments from both sides. On behalf of the applicants, it was contended[2060] that the examination would not assist the creditors in any way since, in relation to the matters referred to, the applicants could claim privilege and that the whole exercise would be futile. On behalf of the liquidator, it was contended that the examination would assist the creditors (and the liquidator) largely because they could either direct attention to matters, which would save fruitless civil litigation, or matters, which could pave the way to litigation, which might bear fruit. It is submitted that this is one crucial requirement that is to the advantage of the creditors and other stakeholders of a failed company. It is an undeniable fact that the maximising of benefit for the *concursus creditorum* is at the heart of insolvency proceedings. In addition, no one can deny the fact that civil litigation is expensive.

[2058] It is admissible, correctly so, taking into consideration the cloud of conspiracy surrounding the conduct of the business by the applicants.

[2059] At 167.

[2060] At 167.

In the liquidator's view,[2061] it was implausible that in relation to affairs stretching some eight (8) years, the applicants could claim privilege in respect of all such matters. In relation to this argument, the court pointed out[2062] that, although it may emerge at an examination that the applicants will choose to take advantage of the legal protection to which they are entitled, there can be no assurance that they will act on it.

The court[2063] hinted that many innocent people would be anxious and thus prepared to defend their innocence at the first available opportunity. That it was even possible that if certain questions were posed to them, one or more of them would be in a position to utilise the said opportunity. The court pointed out[2064] that the applicants did not state in their affidavits that they would not defend their innocence. The court further observed[2065] that in the instance of the debts for example, one or other applicants might give a plausible and honest clarification as his defense. Brought forth was the view that it would be wrong to conclude on the evidence presented that the examination of the two applicants would be a fruitless exercise. The court was, however, not ignorant of the possibilities that the examination may be futile. It held that only time and the holding of an examination would ascertain such possibilities.[2066] The court thereafter rejected the applicants' contention in this regard. It pointed out that if the applicants are examined, valuable information may be obtained which would enable the liquidator to pursue his avowed objective of tracing and preserving assets. The court's view, to which I subscribe, was that unless this was done swiftly, there is a real probability that any such assets, which exist, may be dissipated.

2061 At 168.
2062 At 167.
2063 At 168.
2064 At 168.
2065 At 168.
2066 At 168.

Exercising its discretion and correctly so, the court[2067] held that the examination should take its proper course in accordance with the order of the court, and the application was correctly refused.

The test used by the court to arrive at its conclusion in this case can be summarised as follows: In deciding whether to stay the insolvency examination (due to imminent criminal proceedings against would-be examinees emanating from same insolvency matters) or not, the court has to fairly weigh two opposing positions. The position of examinees if the examinations are not stayed and the position of the creditors if the examinations are not proceeded with. If not staying the examination would cause more hardship to examinees than hardship to the creditors if the proceedings were stayed, the examinations should not be proceeded with. However, one should not be ignorant of the fact that this case was decided prior to the amendments of the *Companies Act* Bots. The latter statute, as it stands now, makes provision for the protection of an examinee as regards incriminatory evidence submitted at the interrogations. There would, therefore, be no need for this test as things stand currently.

In *Air Botswana v Thiro*[2068] the liquidator had successfully applied for an order for the commission of enquiry in terms of sections 203[2069] and 261[2070] of the *Companies Act*.[2071] The aim of the enquiry being an investigation into the affairs of a company unable to pay its debts and in liquidation. Subsequent to this order, an application to the court was made by the applicants[2072] to set aside the commission. The court summarised[2073] the basis of their application as follows: Firstly, an application for

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2067 At 168-169.
2068 *Air Botswana v Thiro* 1995 BLR 315 (HC).
2069 This section (a predecessor of s 430 and s 431 of the 2004 *Companies Act*) provided for the summoning before the court persons suspected of having property of the company in liquidation for the purposes of examining them in relation to the said property.
2070 This section (a predecessor of s 466 of the 2004 *Companies Act*) provided for special commissions for the taking of evidence from specified persons in relation to companies in liquidation, and unable to pay their debts.
2071 Ch 42.01, the predecessor of the *Companies Act* of 2004.
2072 Who were at the time, creditors of the company in liquidation.
2073 At 319.

the order authorising the commission was brought *ex parte.*[2074] Secondly, since the matter was brought *ex parte*, the applicants' (the liquidator and respondent in the case under discussion) attorney had a duty to refer the learned judge to the court's decision in *Schwarz v Pax Trading Company*[2075] which he failed to do. Thirdly, the liquidator had no express authority of the creditors to make the application. Fourthly, the commission was held in secret. Fifthly, the liquidator failed to file security as per the provisions of the relevant statute and therefore lacked the power to act.

In answering these contentions, the court referred[2076] to the provisions of South Africa's 1973 *Companies Act;*[2077] which had the same effect as those of the *Companies Act* Bots.[2078] The case of *Lok v Venter*[2079] was extensively referred to by the court for reasons of relevance to the circumstances of the case at hand. The court considered the case as enlightening in that context. In that case, parties who were to be interrogated sought an order to set aside the commission. The basis of their challenge being the absence of authorisation on the liquidator's part. According to them, the liquidator was supposed to obtain express authorisation to hold the commission from the creditors of the insolvent company. In responding to this challenge, the court[2080] pointed out that the parties do not have legal standing to attack the validity of the proceedings initiated by the liquidator. In the court's view[2081] the absence of this authorisation did not render the commission defective, a factor necessitating the court to set that commission aside. Besides, the liquidator does not require permission (from the creditors, contributories or members of the company in liquidation) to perform duties imposed on him by the legislature. He must act in whatever manner not prohibited by legislature to do what is in the best

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2074 This is an application made to the court (for a specific order) by one party without notifying the other party(s) who may be affected by that order in the event that it is granted by the court.
2075 *Pty Ltd* 1972 (2) B.L.R. 21.
2076 At 320.
2077 Section 417 in particular.
2078 Ch. 42:01.
2079 1982 (1) SA (W) 53.
2080 At 56B-57A, D, H-58.
2081 *Lok v Venter* 1982 (1) SA (W) 53 58.

interest of the company in liquidation and consequently what is favourable to the company's creditors and contributories.

In conclusion, the court stated[2082] that it was not satisfied that any lack of authority on the part of the liquidator when he sought the order would render the enquiry a nullity, or make it obligatory for the court to set aside the orders. A creditor aggrieved by the liquidator's institution of any action negatively affecting the assets of the liquidated company may approach the court for an order of costs against the liquidator.[2083] The court further stated that the enquiry ordered under section 417 is the court's enquiry.[2084] This is correct. This enquiry as described then[2085] was unlike the one held in terms of sections 64 and 65 of South Africa's *Insolvency Act* or sections 414 and 415 of South Africa 1973 *Companies Act*. In the case of insolvency proceedings held at creditors' meetings, the presiding officer enquires into the affairs of an insolvent company at the offices of the liquidator and of a trustee in cases of the insolvency of an individual. If it was the liquidator's enquiry and it is found that he lacked authority to make an application to the court for an enquiry, it would be proper and justifiable to set aside the enquiry. The court has an inherent jurisdiction to exercise its discretion in arriving at a decision as to whether an enquiry in terms of section 417 or any other enquiry should be held, guided of course by precedent.

Back to the case under discussion, the court[2086] pointed out that it embraces the reasoning in *Lok v Venter*[2087] and concluded that the application to set aside the commission as a nullity on the third ground must not succeed. With regards to the second ground, the court held that it had no doubt that if a legal practitioner deliberately withheld any authority which was against him in an *ex parte* matter, his conduct merited reprimand as it amounted to unprofessionalism, that is, if he knew of the decision. The meaning of this statement is then that a legal practitioner

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2082 At 58.
2083 At 57.
2084 At 58.
2085 Prior to the amendment to the *Companies Act* 61 of 1973.
2086 At 321.
2087 *Lok v Venter* 1982 (1) SA 53.

who withholds an authority in a non-*ex parte* application may not be so reprimanded for his conduct. This would be the case since his opponent is also expected to assist the court with relevant authority in support of its case. This is acceptable. Attorneys are considered officials of the court and it is their duty not to mislead the court.[2088] The said duty extends as far as to assisting[2089] the court with available authority to enable the court to arrive at informed, correct, and justified decisions. One must, however, not lose sight of the fact that it would not always be easy for the court to establish whether or not certain information was deliberately withheld from it.

Regarding the information withheld from the court, the court pointed[2090] out that what is crucial to determine is the effect of the concealment of the judgment on the current judgment. If the judgment withheld was valid, correct and relevant, this then merited a sanction and, again, only if the attorney concerned was aware of the withheld decision. This makes sense. It will be up to the court to establish whether or not the attorney was aware of the withheld judgment. The court went on to state that even if the said judgment[2091] was not withheld, it was not relevant to the case before the court.[2092]

Reverting to the correct version of the misreported case[2093] of *Ex parte Liquidators of Ismail Suliman & Co*,[2094] the court pointed out[2095] that the court in that case decided that an examinee, who happens to get notice of the fact that it is proposed to examine him, has *locus standi* to oppose the granting of the commission. The would-be examinees had received information about the application to examine them before the application was made. Consequently, they appeared to request that the matter be postponed to allow them time, if so advised, to oppose the

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2088 See in general *Incorporated Law Society v Denner & Co* (1905) 22 SC 108.

2089 It is submitted that it is the duty of the opposing party to assist the court with authority relevant to his case (especially in a non-*ex parte* application) and not the other way around. One does not expect an attorney to bring forth authority to support his client's opponent.

2090 At 321.

2091 As incorrect and invalid as it was due to the fact that it was based on the misreported case.

2092 At 321.

2093 Which influenced the incorrect and invalid decision in *Schwarz v Pax Trading Company (Pty) Ltd* 1972 (2) BLR 21.

2094 *Pty Ltd* 1941 WLD 33.

2095 At 322.

application. Because this is an *ex parte* application, the assumption is that the prospective examinee can only get to know about the application prior to the order being issued, by chance or accidentally.[2096] The effect of this accidentally found information is that they could approach the court to hear their case, and where appropriate, prepare themselves to oppose the application to have them examined.

In answering their application, the court,[2097] relying on English authority[2098] dealing with the corresponding section of the English *Companies Act*, stated that a person summoned has no *locus standi* to appeal, except in a case of oppression. The court went on to state[2099] that in its view, before deciding whether or not to grant an examinee an opportunity to be heard prior to an order authorising the examination, the following have to be considered:

(i) the difficulty a witness may encounter if called to the examination before being given an opportunity to state why he should not be so summoned. It must be noted that the would-be examinees were not yet witnesses. This being the case makes the court's conclusion in *Ex parte Liquidators of Ismail Suliman* illogical. The court went further to state[2100] that a strong case of oppression must be made out before the court could decide in favour of the prospective examinee. It held further that if an examinee has *locus standi* to set an order aside, he could equally have a *locus standi* to oppose the grant of an order in the first place, if he happens to have had notice of the application. Consequently the court held[2101] that in its view, the two would-be examinees had *locus standi* to appear in this matter and that it was prepared to make an order in their case postponing the application to afford them an opportunity to take the necessary steps. This is fair only in instances where such would-be examinees are witnesses in a pending case and by accident get to find out about an application being made to have them examined. However, with such

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2096 Through the grape vine or rumours.
2097 In *Ex parte Liquidators of Ismail Suliman & Co* Pty Ltd 1941 WLD 33.
2098 Palmer's *Company Precedents* 14th ed. at 599.
2099 At 34E.
2100 At 34E.
2101 At 34E.

adequate protection at the disposal of a witness as regards incriminatory evidence, it is doubtful if this further protection would be necessary.

Further quoted by the court in *Air Botswana v Thiro* [2102] was the South African case of *Friedland v The Master* [2103] where the court highlighted the following:

(i) the limitation of the prospective examinee's right to receive notice of the intended enquiry provided for by sections 417 and 418 of the 1973 *Companies Act*;

(ii) that a prospective examinee who accidentally get to know of the intended enquiry can approach the court or Master for an opportunity to be heard prior to the holding of the enquiry;

(iii) that the limitation of the right at (i) is indicative of the principle that a prospective examinee is not entitled to the full right bestowed by the provisions of the maxim *audi alteram partem*.[2104]

The court proceeded to comment on the now correctly reported judgment of *Schwarz v Pax Trading Company.* The court highlighted[2105] its analysis as follows:

(i) that the balance of the judgment in that case which the then Chief Justice decided under the High Court Rules was contrary to the company law decisions both in English context and South Africa's context;

(ii) that judgement had incorrectly implied that notice of any application for a commission of enquiry must be given to every proposed examinee;

(iii) that the jurisprudence and legislation in the latter jurisdictions are crucial in as far as the present *Companies Act* Bots[2106] is concerned.[2107]

[2102] 1995 BLR 315 (HC).
[2103] 1992 (2) SA 370 W at 376D-E.
[2104] The legal right to be heard prior to a decision affecting a person's rights.
[2105] At 323.
[2106] The predecessor of the *Companies Act* of 2004.
[2107] Reference made to *Botha v Strydom* 1992 (2) SA (N) 155 at 159.

I concur. The legislature saw it fit to make provisions for the limitation of certain common law and subsequently constitutional rights of directors and other persons of interest. This seems and appears to be the only way crucial information regarding the collapse of corporations established through shareholders' funds can be obtained. Directors need to account to stakeholders. From the very first day, they take office of directorship they are expected to account for their conduct of the company's business. The subsequent duty of attending creditors' meetings, providing information and books and documents relating to the company unable to pay its debts is the natural progression of their duties.[2108]

Further, the court had an opportunity to refer to a South African case of *Botha v Strydom*[2109] where counsel for the applicant emphasised that an enquiry under section 417 is a "draconian" proceeding. According to the latter, witnesses are deprived of their so-called common-law right to remain silent; witnesses are compelled to answer questions, even if their answers might tend to incriminate them; and that any answers given by them may thereafter be used in evidence against them. In answer to these contentions, the court pointed out that it is undoubtedly a fact that enquiries of this nature constitute a substantial encroachment into the ordinary rights of witnesses in "ordinary" proceedings. The court was, however, not ignorant of the fact that the point has been made through earlier judgments that enquiries of this nature are no ordinary proceedings.[2110] According to the court, the legislature had deemed it necessary to authorise the constitution of enquiries of this nature and to deprive witnesses of many privileges which they might ordinarily have enjoyed. This is necessary for the following reasons:

(i) to protect the interests of the public;

(ii) to further restore public confidence in the justice system.

[2108] See in general comments made at ch 3 above with reference to *Bernstein v Bester* 1996 (2) SA 751 (CC).

[2109] 1992 (2) SA (N) 155 159C.

[2110] See also the discussion at para *3.3.4* and in ch 3 above.

The court pointed out[2111] that this has been the case for many generations in the *Insolvency Act* and earlier *Companies Acts*. The court's view was that the legislature obviously recognises that there are complex, inappropriate conduct on the part of those running the business affairs of companies (which are often ran to the ground). This situation requires exposure and that the only way that exposure can be obtained is by drastic "draconian" methods of these enquiries, to get people there, to get them to produce documents and to answer questions.

It must be noted that although this South African case was decided prior to South Africa's constitutional dispensation, the principles upon which it was decided are still relevant to South Africa,[2112] and influential to Namibia and Botswana.

Further on *Air Botswana v Thiro's* case under discussion, and regarding the liquidator's failure to refer the court to an earlier judgment which, according to the court, was incorrectly arrived at, the court reiterated[2113] that;

(i) unless it is shown that the concealed judgement is relevant to the case at hand; and

(ii) the concealment was done deliberately to mislead the court;

(iii) the court may not interfere by setting aside a good judgement as based on the judge's discretion. This, it was said, should be the case, unless the concealed judgement led to a wrong judgement.[2114] In this case however, the omission to refer to the concealed authority did not lead to a wrong judgment.

Regarding the secrecy submission, the court proceeded[2115] to refer to many decisions in South African and English law commencing with *Macduff & Co Ltd (in liquidation) v Lawn.*[2116] The objection thereat was that:

2111 At 159.
2112 See for example *Bernstein v Bester* 1996 (2) SA 751 (CC) and related cases discussed above.
2113 At 323.
2114 At 323.
2115 At 323.
2116 1922 WLD 66 at 70.

(i) the Commission of enquiry provided for no access by affected examinees to the application and the accompanying documents and;

(ii) it denies all persons potentially affected by the enquiry access to the examination process, the documents and records of the procedure, application and any documents accompanying it. In answering those objections, the court pointed out that despite these provisions a witness would still be entitled to a copy of his own evidence at his own costs.[2117] The court further made reference[2118] to *Re, Rolls Razor* case[2119] to emphasise the need for these enquires in assisting the liquidator, who often finds himself in the dark as far as the company's affairs are concerned, to perform his duties.

In further support of its views, the court felt a need to refer to another South African case of *Venter v Williams.*[2120] In this case the court pointed out[2121] that it finds it difficult to comprehend how a person who truthfully answers questions on oath can be prejudiced by being required to so do. It is submitted that, a person, who, provides answers and in the process assisting with the gathering of information (regarding the affairs of a company of which he was responsible to run) for a lawful purpose, should have no fear to answer relevant questions, unless he has something to hide. It is, however, important to qualify this conclusion by the court. The court does not pronounce a general rule, it limits its views to instances of company insolvency and subsequent winding-up of its affairs.

As to the aspect of security, the court concluded that there was no merit to this contention and referred to section 242(4) of the *Companies Act* Bots.[2122] The court consequently concluded[2123] that the applicants' argument to have the commission set aside did not hold water and held that the application should be dismissed. The

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2117 At 70.
2118 At 323-324.
2119 (No 2) [1970] 1 Ch 576. See the discussion of this case at ch 3 above, where this principle of secrecy is enunciated.
2120 1982 (2) SA 310 (N) at 317A.
2121 At 317A.
2122 This section validates the actions taken by the liquidator in the performance of his duties regardless of defects in his appointment.
2123 At 324.

court's view was that the application was ill conceived. The fact that the application was spiced with complaints about the liquidator's conduct did not assist the applicant's case either. According to the court, and I concur with this consideration, the correct method of removing a liquidator is to complain to the Master. Since the Master has authority to appoint a nominated liquidator, he has powers to remove him from office if, according to his evaluation of the circumstances, the liquidator fails to perform his duties as prescribed by the legislature.[2124]

5.12 Conclusion

5.12.1 Introduction

From the authorities discussed above, it is clear that the influence of other jurisdictions[2125] such as South Africa and English jurisprudence is undeniable in Botswana. This position is propagated by the fact that Botswana, South Africa and Namibia share a common law heritage[2126]. South Africa and English judicial precedents play a crucial role in Botswana's judicial system, at least as far as insolvency interrogation proceedings and related judicial precedence are concerned.[2127]

Despite the fact that Botswana adopted its *Constitution* in 1966[2128] and that further amendments were effected to the *Constitution* to comply with best practices, legislations such as the *Insolvency Act* Bots lagged behind as far as compliance with the fundamental rights (as entrenched in Chapter II of the *Constitution* of Botswana) is concerned. There is therefore a need in this jurisdiction to develop insolvency systems in line with its *Constitution* and best practices. It was observed that Botswana does not have a Constitutional Court to develop and pronounce on constitutionally entrenched rights as far as insolvency legislation is concerned. This function is served by the High Courts of this jurisdiction.

[2124] See s 379 of South Africa's 1973 *Companies Act*.
[2125] See paras *5.2*, *5.4* and *5.11* above.
[2126] See para *5.2* above.
[2127] See for instance paras *5.2; 5.4.* and *5.11* above.
[2128] After independence from Britain.

The current position in this jurisdiction might have an impact on the sluggish development of insolvency legislation. However, the fact that Botswana is a constitutional state and like all constitutional states, its *Constitution* is considered to be the measure against which all laws are tested, is a positive. This attribute is advantageous for the development of transparent and internationally acceptable insolvency practices. The fundamental rights as entrenched in the *Constitution* impact on the insolvency interrogations. This opinion emanates from court cases discussed in this chapter, specifically as regards company related insolvency.

Like both South Africa and Namibia, Botswana has a fragmented insolvency system, with two separate statutes dealing respectively with the insolvency of individuals and the other dealing with the insolvency of companies. This aspect is not recommendable since it is contrary to UNCITRAL recommendations. It was noted that Botswana has not been subjected to ROSC as was the case with South Africa and Namibia and it is not a signatory to UNCITRAL.[2129]

What is concerning with this fragmented insolvency system and the negative consequences thereof is a noticeable difference between the provisions of the *Insolvency Act* Bots and those of the *Companies Act* Bots regarding the admissibility (indiscriminately) of incriminatory evidence obtained at the interrogation in subsequent proceedings against the deponent. The evidence is said to be admissible indiscriminately in subsequent proceedings in terms of the *Insolvency Act* Bots, but not in the case of the *Companies Act* Bots. As stated at paragraph 5.10.2 above, it is not clear why the legislature would want to distinguish between the two statutes. This question arises when one had presumed that the two statutes are aimed at information gathering for the purpose of a fair distribution of what is left of an insolvent debtor's assets to the creditors of the latter. It is my view that the reason might be that the *Companies Act* has recently been amended and the assumption is that the objective was to align it with international best practice in line with human

[2129] See Osei-Ofei- Botswana in Leonard "Restructuring and Insolvency" 2009 *Getting the Deal Through* para 38.

rights. There are no express provisions for in *camera* proceedings as a safeguard to witnesses either in both statutes.

5.12.2 Current developments in Insolvency legislation

Unlike in the case of South Africa and Namibia, no evidence of current developments to the insolvency system could be found in this jurisdiction. The developments could assist to bring this jurisdiction's insolvency system in line with developed jurisdictions as far as compliance with human rights is concerned.

This research has established that the *Insolvency Act* Bots has not been amended to be in line with the provisions of the *Constitution* in this jurisdiction. This is the position despite the fact that Botswana looks up to English and South Africa's precedence as far as its judicial precedents in insolvency law is concerned. One is, however, prompted to assume that amendments to this piece of legislation will be gradually effected through case law as influenced by regional and international judicial precedence to be in line with its *Constitution* and consequently human rights.

Despite all of the above circumstances, there are developments in the *Companies Act* Bots in compliance with the fundamental rights entrenched in Chapter II of Botswana's *Constitution*. These developments entail the removal of injustices associated with the admissibility (in subsequent criminal proceedings other than perjury related) of incriminating evidence obtained at the insolvency interrogations against a witness at insolvency proceedings.

As with Namibia, except for the minor deviations from South Africa' provisions in the legislations mentioned herein, there seems to be not many outstanding differences between the South African and Botswana's insolvency proceedings as regards insolvent companies. What is more perceptible about the Botswana insolvency proceedings is the inference that insolvency as an occurrence is viewed almost in the same light as an offence (that is as far as *Insolvency Act* Bots is concerned, as opposed to the *Companies Act* Bots in that jurisdiction). Further, it

appears that the courts are more involved in the insolvency proceedings,[2130] ensuring that prescribed judicial procedures are administered in the precinct of the judiciary. South Africa can do well in adopting this approach and further build on it to absorb insolvency proceedings into the existing court structures. This can be achieved by gradually taking away insolvency administrative functions and responsibilities from the office of the Master and ensuring that those functions are streamlined to civil courts, especially the interrogation proceedings. Although not expressly stated in the statute and the sections already enunciated above, insolvency proceedings are viewed as civil matters in Botswana.[2131] This view is correct.

With the hope of finding outstanding principles (deviating from South Africa, Namibia and Botswana) to adopt, current international best practice as far as insolvency interrogation proceedings and human rights are concerned will be investigated in the next chapter. England and Wales[2132] and Canada[2133] will be the point of reference in so far as these countries' legal systems influence the legal systems of the three SADC countries forming the subject of this research, with insolvency law being no exception. The fact that these five countries are members of the British Commonwealth further influenced the decision to conduct a comparative study on these jurisdictions. England will be tackled first in chapter six, followed by Canada in chapter seven.

2130 See s 131-136 of the *Insolvency Act* Bots.

2131 See Osei-Ofei - Botswana in Leonard "Restructuring and Insolvency 2009 *Getting the Deal Through* para 6.

2132 As far as the insolvency legislation is concerned.

2133 As far as human rights are concerned.

Chapter 6: The English perspective

6.1 Introduction

A brief historical overview of interrogations in insolvency law and their implications on the insolvent and other witnesses and the current legal position in the English jurisdiction will be the main focus of this chapter. The purpose is to compare the position in this jurisdiction with the position in South Africa, Namibia and Botswana, the three countries forming the subject of this research. In order to achieve the aforementioned objective, the English (and Wales-a single jurisdiction) *Insolvency Act*,[2134] (in so far as this statute regulates the insolvency of individuals and of corporate entities) commentary, and case law on insolvency interrogation will be analysed.

6.2 Historical overview of insolvency legislation

The roots of the *EIA* can be traced as far back as to the medieval England.[2135] Milman[2136] traces the history regulating insolvency and bankruptcy to the 16th century. According to him, the process of formally examining bankrupts[2137] was introduced by the *Act* of 1603.[2138] Since then, legislation regulating bankruptcy[2139] has undergone several developments:

The developments commenced with the *Statute of Marlbridge* of 1267[2140] and leading to the *Statute of* Westminster *II* of 1285,[2141] the *Act of Parliament* by Henry VIII in 1542, the *Act of Elizabeth* 1570 during the reign of Queen Elizabeth I and

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2134 Ch 45 1986, hereinafter the "*EIA*".

2135 Many concepts are, however, from Roman law, for example *actio pauliana*. See Calitz "Historical overview of state regulation of South African Insolvency Act" 2010 *Fundamina* 16 (2) 12.

2136 *Personal Insolvency Law, Regulation and Policy* 5, hereinafter Milman *Personal Insolvency Law*. See also Fletcher *The Law of Insolvency* 8-9, hereinafter "Fletcher *Insolvency Law*".

2137 This concept is commonly used in this jurisdiction to refer to a person who is unable to pay his debts.

2138 1 Jac I, c. 15.

2139 A process after a bankruptcy order has been made.

2140 *Sturges v Crowninshield* 17 US 122,140 (Wheat, 1819). See also Calitz "Historical overview of state regulation of South African Insolvency Act" 2010 Fundamina 16 (2) 13.

2141 See also Calitz "Historical overview of state regulation of South African Insolvency Act" 2010 *Fundamina* 16 (2) 13.

culminated in the *Insolvency Act* of 1986, which has been amended substantially, particularly in 2002.

It is noteworthy that the *Act* of 1570 authorised the appointment of commissioners and empowered them to:

(i) examine the debtor's dealings and property; and[2142]

(ii) summon persons to appear before them; and

(iii) could also commit them to prison.[2143]

The immediate predecessor to the present *EIA* is the *Bankruptcy Act*.[2144] Calitz avers that the latter statute provided for a system that was more administratively managed with less judicial interference.[2145] This administrative system appears to be the dominating feature in the modern insolvency laws of this jurisdiction.[2146] The Insolvency Service,[2147] through Official Receivers (who serve the functions of the Master in South Africa), is hands-on in the supervision of the administration of bankruptcy[2148] matters. Most cases are dealt with by specialist accountants in professional firms. Very simple cases remain with the Insolvency Service throughout. Although an executive agency, the Insolvency Service appoints Official Receivers who are considered officers of the court.[2149] These officers may be appointed between the issuing of a sequestration order and the appointment of a

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2142 Plank "The constitutional limits of bankruptcy" 1995-1996 *Tennessee LR* 487.

2143 Tabb "The history of bankruptcy laws in the United States" 1995 *American Bankruptcy Institute LR* 9.

2144 Ch 46 & 47 of 1883.

2145 Calitz "Historical overview of state regulation of South African Insolvency Act" 2010 Fundamina 16 (2) 17.

2146 Martin "Common law bankruptcy systems: Similarities and differences"2003 *American Bankruptcy Institute LR* 367.

2147 Which is also tasked with the duty of managing the Insolvency Service Account, an account where insolvent estates funds are deposited and invested in interest bearing schemes. This is an admirable institution dedicated to insolvency related matters in the English system (s 403 of the *EIA*). This institution fulfils the role played by the office of the Master of the High Court in the context of insolvency matters in the South African jurisdiction. See also Milman *Personal Insolvency Law* 72 regarding the functions of the Insolvency Service.

2148 The concept 'bankrupt' used in this jurisdiction is synonymous to 'insolvent' as in the case of South Africa, Namibia and Botswana.

2149 See Floyd *et al Personal Insolvency*: A practical Guide 41.

Trustee in Bankruptcy, to temporarily administer the said estate. A Trustee in Bankruptcy takes control of the bankrupt's property as soon as he is appointed.

As in the case of South Africa, the judges of the High Court (and county courts) have jurisdiction over insolvency matters as far as the question of law is concerned.[2150] Prior to changes in April 2016, the Chancery Master, who is more of a procedural judge (as opposed to the position in South Africa, Namibia and Botswana), oversees an insolvency matter from petition stage until trial stage, if the matter reaches trial.[2151] Currently debtor's petitions are now on line; administrative creditor's petition are through the court as before. Bankruptcy Registrar in London and District Judge in county courts oversee these matters.[2152] Therefore, the court through a specialist judge has complete jurisdiction to decide all questions of priorities, law or fact in relation to insolvency. This control of the court over these proceedings is reinforced by penalties the court is empowered to impose for non-compliance with its directives.[2153] It must be noted that there are no specialised insolvency courts[2154] in this jurisdiction, contrary to the Cork Committee's[2155] recommendations. According to Milman,[2156] this state of affairs attracts mixed reactions. He points out that although the Insolvency Court Users Committee exists, it does not appear to be active from the viewpoint of the outside world. He alleges that behind the scene the committee performs a critical role. Nevertheless, particularly in London but also in larger courts elsewhere, certain judges do have recognised specialism in insolvency cases and deal with those cases specifically.[2157]

2150 See in general Fletcher *Insolvency Law* 2009.

2151 See Chancery Guide ch 19 2013-2016 available at http://www.judiciary.gov.uk/wp accessed on 06 March 2018.

2152 Chancery Guide ch 19 2013-2016.

2153 Section 363. See also Milman *Personal Insolvency Law* 37.

2154 See also Fletcher *Insolvency Law* 681, where he explains that there are no separate and distinct courts on insolvency matters. The concept "insolvency court" is used as a term of convenience to describe the High Court when exercising its jurisdiction on insolvency related matters; Chancery Guide ch 19 2013.

2155 Paragraph 1003 were the committee recommended as follows "We therefore propose the creation of an Insolvency Court having exclusive jurisdiction in all insolvency matters throughout England and Wales", hereinafter "the Cork Committee". See also Fletcher *Insolvency Law* 19.

2156 *Personal Insolvency Law* 19-20.

2157 Chancery Guide ch 19 2013-2016.

The above mentioned developments together with the 1976 *Insolvency Act* had laid the foundation for the present day insolvency laws providing for the judicial and non-judicial examination of bankrupts. It must be noted however, that public examination of individuals in relation to insolvency is no longer mandatory and is left to the discretion of the Official Receiver[2158] under the supervision of the Insolvency Service,[2159] or the independently appointed insolvency practitioner if there is one. Official Receivers perform the same functions as the Master of the High Court in the context of insolvency matters in South Africa. These officers temporarily safe guard the bankrupt estate's assets until the appointment of a trustee.

With regard to the public examination of individuals, the following aspects are relevant in the development of a credible process to gather relevant information for the just administration of bankrupt estates. With the 1883 *Act* came the office of the Official Receiver and the element of "public examination" was introduced to the bankruptcy procedure and it subsequently became a crucial phase in the bankruptcy procedure.[2160] Calitz highlights the point that public examination entailed that the creditors and the court could question the insolvent about his financial affairs, as well as the causes of his bankruptcy.

Martino[2161] avers that the 1883 statute emphasised the importance of investigating and analysing the debtor's running of his financial affairs as well as the official supervision of the sequestration process. These developments laid the foundation for the present day insolvency laws providing for the public examination of insolvents. What is more noticeable and to be commended with the bankruptcy proceedings (in this jurisdiction) is the investigatory element into the background to

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2158 He is appointed after the making of a bankruptcy order. His function is to manage the bankrupt estate until the appointment of a trustee who will then proceed with managing the estate.

2159 See *Smith v Braintree DC* [1990] AC 215 at 237. See also Milman *Personal Insolvency Law* 23.

2160 Calitz "Historical overview of state regulation of South African Insolvency Act" 2010 16 (2) Fundamina UNISA Press 17.

2161 Martino "Approaching disaster: A comparison between personal bankruptcy legislation in Italy and England (1883-1930)" unpublished paper presented at the Association of Business Historians Annual Conference, England, 2002; See also Holdsworth *The Bankruptcy Act of* 1883 *with Introduction and Notes an Appendix Containing the Debtors' Act,* 1869 *and an Index* (1884*)* 16-17. See also Calitz "*Historical overview of state regulation of South African Insolvency Act*" 2010 *Fundamina* 16 (2) 17.

the bankruptcy - arguably the cause of liabilities exceeding assets. It is my view that this is an indication of the legislative intention to investigate the affairs of the insolvent or rather the bankrupt in the broadest possible way in order to arrive at a conclusion that will benefit the creditors of the debtor.

Another interesting feature in the development of the English insolvency law was the establishment of several committees over the past years,[2162] preceding the Cork Committee established in 1977, to review bankruptcy laws.[2163] This Committee only published its recommendation in 1982. The Committee's recommendations are regarded by many insolvency law writers[2164] as having inspired reforms made in relation to the *EIA* in the English jurisdiction.[2165] The statute is mostly based upon the recommendations of this committee. It must be noted that this legislation has undergone several amendments since its inception to accommodate new developments and demands in this field of law.[2166] The statute was further influenced by the *Human Rights Act*.[2167] Of all these amendments, section 11 of the *Insolvency Act* of 2000, which recognises amongst other things, the need for the prosecution of delinquent officers of companies in a compulsory winding-up while conforming to the *Human Rights Act*,[2168] is of relevance to this research.

The latter legislation is of importance to the insolvency statute in the following sense:

2162 Muir Mackenzie Committee (1906 Cmnd 4068); the Hansel Committee (Cmnd 2326, 1925); and the Blagden Committee (Cmnd 221, 1957. See Fletcher (n 15) 13; Burdette *Framework for Corporate Insolvency Law Reform in South Africa* 84.

2163 Fletcher Bankruptcy Law Reform: The Interim Report of the Cork Committee, and the Department of Trade Green Paper vol 44 no 1 (Jan 1981 77-86; Fletcher The Law of Insolvency (209) 13.

2164 Fletcher *Insolvency Law* 66; See also Milman *Personal Insolvency Law* 11.

2165 45 of 1986.

2166 In 1994 by *Act* 2 of 1994, in 2000 by the I*nsolvency Act* 2000 and 2002 by the *Enterprise Act*. The latter statute, according to Milman *Personal Insolvency Law* 82, introduces a more draconian regime for those perceived to be guilty of misconduct and the statute is less vocal about the honest bankrupt.

2167 0f 1998 c. 42 which became fully operative in 2000, hereinafter the "*Human Rights Act*".

2168 See in general also Fletcher *Insolvency Law* 27.

(a) when deciding a matter, the courts are directed to take into account the established case law of the European Court and opinions and decisions of the European Commission on Human Rights and the Committee of Ministers;[2169]

(b) domestic legislation is required as far as possible, to be interpreted and construed in a way which is not in conflict with the Convention rights;[2170]

(c) the statute regards as unlawful for a public figure[2171] to act in a way which is incompatible with a Convention rights;[2172] and (d) it further requires that in the preparation of new legislation, the draftsman must concern himself with ensuring that such legislation is compatible with the Convention rights.[2173]

To be conducted next is an investigation into whether or not the *EIA* as far as the information gathering process during insolvency proceedings is concerned, is in line with human rights and best practice. For uniformity and in compliance with the format of this research, the examination in cases of insolvent individuals will be tackled first and followed by the examination of directors and officers of companies in winding-up.

6.3 The EIA 1986

6.3.1 Introduction

From its preamble it is clear that with this statute, the legislature has sought to consolidate and harmonise proceedings relating to the insolvency of individuals and corporate entities. From my standpoint, this is desirable in order to circumvent contradictions[2174] (associated with applying multiple statutes, as in South Africa, regulating one aspect of the law) when deciding insolvency or bankruptcy related

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[2169] Section 2, *Insolvency Act* 2000. Thus, the way in which an interrogation is handled, should be in line with human rights.

[2170] Section 3, *Insolvency Act* 2000. Thus, any provision with regard to interrogation should be in line with human rights as provided for by the Commission on Human Rights.

[2171] For example, the Secretary of State or the Insolvency Service. During an interrogation these officials should guard against breaching the Convention's guidelines.

[2172] Section 6 *Insolvency Act,* 2000. Thus, when new legislation regarding interrogations is enacted and implemented, such must be in sync with the Convention's recommendations.

[2173] See Pre-LIMS vol 11 available at www.Legalresearch.westlaw.co.uk 2.

[2174] Associated with applying multiple statutes regulating one aspect.

matters regardless of who is a party to the said proceedings. This statute further seeks to regulate the following:

(i) the administration of insolvency and related matters[2175]; and

(ii) the functioning and qualifications of insolvency practitioners. The latter aspect is necessary for checks and balances on participants within the insolvency system.

Successive English bankruptcy or insolvency statutes indicate that the legislature has sought to benefit creditors and not to protect debtors.[2176] From as far back as the Sixteenth Century, English bankruptcy statutes were designed to punish bad debtors.[2177] As a matter of fact, the earlier bankruptcy legislation perceived the bankrupt only as someone who committed fraud.[2178] Cork[2179] had a different view of the bankruptcy processes nonetheless. He perceived the process as a form of a social contract between the debtor and society, a contract which provided as follows:

(i) the debtor was protected from further harassment by his creditors, in return for giving up his property to his creditors; and

(ii) the debtor to subject himself to **investigation** and some form of **disability**. This social contract had the effect of allowing the debtor an opportunity to start on a clean slate. This view is acceptable, especially where it appears that the bankrupt conducted his affairs, prior to his insolvency, in an unquestionable manner.

[2175] The rehabilitation of insolvents and alternatives to insolvency processes such as business rescue processes, for example.

[2176] Tabb "The History of the Bankruptcy Laws in the United States" 1995 *American Bankruptcy Institute LR* 6-12; Tabb "The Historical Evolution of the Bankruptcy Discharge" 1991 *American Bankruptcy Institute* 329-331. See also Plank "The Constitutional limits of bankruptcy" 1995-1996 *Tennessee* LR 500.

[2177] Ch 4 the 1542-1543 Statute of Henry VIII. The preamble to this statute highlighted the following: (i) unscrupulous persons obtain unaffordable credit from unsuspecting creditors and disappear to avoid repaying their creditors; and (ii) they make no efforts nor means to repay their debts at the expense and disadvantage of their creditors. See also Plank "The Constitutional limits of bankruptcy" 1995-1996 *Tennessee LR* 502; Milman *Personal Insolvency Law* 2.

[2178] Plank "The Constitutional limits of bankruptcy" 1995-1996 *Tennessee LR* 502. See also Fletcher *Insolvency law* 9-10.

[2179] Cork Committee at para 192. See also Milman *Personal Insolvency Law* 5.

Nevertheless, Milman[2180] observes that even the current bankruptcy procedure has a feature of identifying and preventing abuses of the bankruptcy processes. The **investigatory** feature[2181] in insolvency statutes seems to have remained throughout the decades, although referred to by other insolvency writers as 'draconian'. In its recommendations, the Cork Committee intensely endorsed extensive investigative procedures.[2182] Milman correctly submits that this feature may be linked to the idea of maintaining public confidence in the ability of the bankruptcy system to weed out abuse.[2183] It is one of the aims of this research to:

(i) investigate the current legislative view of insolvency (or bankruptcy) and;

(ii) the extent to which the legislature in this jurisdiction is willing to go in order to protect the interests of the creditors of the bankrupt rather than those of the debtor in the face of the human rights culture. The procedure involved in getting to the bottom of the bankruptcy of individuals will be discussed next and followed by corporate insolvency.

6.4 Insolvency of individuals

6.4.1 The provisions of section 289: Investigatory duties of Official Receiver

Although not calling for the compulsory attendance of the bankrupt at meetings of the creditors of his insolvent estate as provided for by section 64 of South Africa's *Insolvency Act* for the purposes of interrogation concerning the affairs of an insolvent, the section does provide for the protection of the bankrupt's estate. It also provides for an investigation into his affairs and reporting its findings to the court by the Official Receiver (initially). This officer is appointed[2184] as soon as the

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2180 *Personal Insolvency Law* 4.

2181 The investigatory element in English insolvency law is today evidenced by the extensive powers given to the Official Receiver (and also other officeholders appointed at any time) to investigate the circumstances of the insolvent where he deems this to be necessary in relation to a particular case, s 289.

2182 Paragraph 238.

2183 *Personal Insolvency Law* 88.

2184 By the office of the Insolvency Services.

sequestration order is made by the court and prior to the appointment of a trustee, he appears to be the equivalent of the Master of the High Court in the South African context of insolvency law. The difference between the two may be that the Insolvency Service office (and thus the Official Receiver) is a more specialised office (as compared to the office of the Master in South Africa, Namibia and Botswana) and this feature is commendable. This latter view is predicated on the perception that this office is dedicated to insolvency related matters.[2185]

The report of the Official Receiver (like that of the Master in South Africa) is adequate to corroborate facts contained in the report and is especially crucial in instances where the bankrupt would wish to apply to the court for his rehabilitation[2186] from insolvency.[2187]

As in South Africa, an insolvent's obligation to attend the insolvency enquiries is said to be a public duty and in the public interest. Restricting an insolvent's movement by means of a court order to compel him to appear at the enquiries should not be considered an unreasonable duty.[2188] Imprisonment for non-compliance with the requests of the Official Receiver is another unpleasant consequence for the bankrupt.[2189] These provisions are also applicable in the South African context and the other jurisdictions referred to in this research.

6.5 Public examination

As was indicated above,[2190] it must be noted that the public examination of the bankrupt is no longer mandatory and is left to the discretion of the Official Receiver.[2191] This discretion does not seem to exist in the South African (Namibia

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2185 See Floyd *et al Personal Insolvency*: A Practical Guide 41.
2186 Section 280 of *EIA.*
2187 In the majority of cases, rehabilitation is automatic after 1 year if the bankrupt co-operates with the process (s 279 *EIA*). Suspended rehabilitation is a punishment for non-co-operation (s 279(3)).
2188 *Morris v Murjani* [1996] 2 All E.R. 384 (CA). See also Fletcher *Insolvency Law* 179.
2189 Section 364.
2190 At para *6.2.*
2191 *Smith v Braintree DC* [1990] AC at 237-8. See also Milman *Personal Insolvency Law* 23; Ch 14 *The Insolvency (Amendment) Rules* 2010.

or Botswana) context of insolvency law. In the English jurisdiction, an examination of this nature is often left for those insolvency cases where for example:

(i) an insolvent fails to volunteer the required information and/or not co-operative; or

(ii) there are suspicions of impropriety on the part of the insolvent; and

(iii) there is a need to expose same, thus protecting the public from the insolvent's unscrupulous activities,[2192] as well as the creditors from the consequences of those activities.

Provision is made in the South African context of insolvency enquiries for written questions for an insolvent to answer. This usually happens in uncomplicated cases.[2193] From authorities perused, it appears that public examination in the English jurisdiction is more of a penalty for a recalcitrant interrogatee.[2194] This feature is recommendable for adoption in the South Africa context of insolvency law. It is not necessary to publicly humiliate an honest person who, through misfortune, has become unable to meet his liabilities. Therefore, if it is established that an honest person has become insolvent, proceedings should be held in closed doors.

Although public examination is considered by Fletcher as an essential feature in the protection of the public interest, he welcomes the legislative move of empowering the Insolvency Services officers to exercise discretion as to the suitability of public examination (as opposed to private examination) depending on the nature of the case.[2195] Citing *Re Cronmire*,[2196] he contends that this move has the potential of shielding a scrupulous debtor from the public scrutiny on the one hand and of ensuring public exposure of a fraudulent debtor through vigorous investigation into his affairs. The consequence of this position is that public examinations will be reserved for those cases which are deemed by the Official Receiver as deserving of

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[2192] *Re Steyn* [1982] 1 WLR 860 at 866. See also Milman *Personal Insolvency Law* 82.

[2193] See ch 2 and 3 above.

[2194] The *Insolvency (Amendment) Rules* ch 14 2010; Floyd *et al Personal Insolvency: A Practical Guide* 49; *Re Steyn* [1982] 1 WLR 860.

[2195] Fletcher *Insolvency Law* 189-191.

[2196] [1894] 2 QB 246.

a public examination. The Official Receiver is guided amongst other factors by the English *Insolvency Amendment Rules* and the debtor's co-operation or not thereof.[2197]

Milman[2198] acknowledges that although the court, in exercising its jurisdiction in bankruptcy matters, adheres to the basic principles of open justice,[2199] there are exceptions to this rule of practice. He contends that the court does have the power, under the *Beddoe*[2200] application procedure, to conduct enquiries in private and away from public scrutiny.[2201] Such evidence would have been supplied by one party (a debtor perhaps) who would prefer to have the other party (a creditor perhaps) excluded.[2202] The implication of this aspect is that as is the case in South Africa, a creditor who has an interest in the matter may be excluded thereat. Milman[2203] contends that public examinations which date as far back as 1869 used to be a norm, but are rarely used today. As already indicated, the court may waive the requirement of this examination where it deems fit. The Cork Committee[2204] had distanced itself from the use of this type of examination, especially in cases where this was not fitting[2205] and recommended that this be reserved, for example, for cases where the bankrupt failed to co-operate.

6.5.1 The provisions of section 290: Public examination of bankrupt

This section which provides for a public examination of a bankrupt about his affairs, dealings, and property is similar to section 65 of South Africa's *Insolvency Act.* The examination may be authorised by the court upon application by the Official Receiver **at any time** prior to the rehabilitation of the bankrupt. The examination may be conducted by the Official Receiver, Trustee in Bankruptcy, any person

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2197 See also Fletcher *Insolvency Law* 189-191.
2198 *Personal Insolvency Law* 37.
2199 His view is based on the *Practice Direction: Insolvency Proceedings* [2000] BCC 92 paras 9.1 and 9.3.
2200 This procedure is named after *Re Beddoe (*1893) 1 ch 547.
2201 Section 152 of South Africa's *Insolvency Act* makes provision for this aspect.
2202 *Official Receiver v Davis* [1998] BPIR 771 at 781.
2203 *Personal Insolvency Law* 89.
2204 At para 599-604.
2205 In cases where no evidence of impropriety was detected.

appointed as special manager of the bankrupt estate or business, and any creditor of the bankrupt who has tendered proof in the bankruptcy. It is noted that questions may be put to a witness by the court as well.[2206]

Fletcher[2207] brings to the fore a point that in practice, public examinations are presided over by an officer[2208] of the court in open court and that these proceedings may be adjourned where necessary to serve the interest of justice.[2209] The assumption is that adjournment may be opted for, where for example, it is reasonably foreseeable that questions posed may solicit incriminatory statements, or state secrets are likely to be revealed. Fletcher[2210] warns that despite the recent reforms in the area of insolvency law, the public examination of the bankrupt remains a critical trait in this area of the law. This is the case in the sense that public examination draws public attention and scrutiny into the character of an insolvent examinee.[2211] This public attention is more likely to stigmatise those bankrupt witnesses. There is another view though, public examination may assist in educating the public about the negative impact of mismanaging one's financial affairs.

According to Fletcher,[2212] the possibilities that reputation damaging utterances (specifically in relation to persons not represented thereat or not invited to the proceedings) may be made at public examinations, calls for concern. He correctly asserts that public interrogations should be conducted with caution.[2213]
Section 290 provides that the interrogatee debtor must answer all questions put to him, and as allowed by the court.[2214] The fact that the answers thereof may be incriminatory is not an acceptable excuse.[2215] Since the record of the examination

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2206 Ch 14 *Insolvency Amendment Rules* 2010. See also Fletcher *Insolvency Law* 189.
2207 *Insolvency Law* 189-191.
2208 Registrars are only in London.
2209 *Insolvency Rules* 1986 e.6.176.
2210 *Insolvency Law* 189-191
2211 *Insolvency Law* 191.
2212 *Insolvency Law* 191-192.
2213 He bases his assertions on Poulson, Re, Ex p. *Granada Television Ltd v Maudling* [1976] 2 All E.R. 1020 and the accompanying public examination of Poulson.
2214 See also Fletcher *Insolvency Law* 189.
2215 *Atherton, Re* [1912] 2KB 251; Paget, Re [1927] 2 Ch 85; *Jawett, Re* [1929] 1 Ch 108; *Bishopsgate Investment Management Ltd v Maxwell, Cooper v Maxwell* [1993] Ch 1.

is kept by the court, such may be used when necessary as evidence against the debtor in insolvency related proceedings. The record of the proceedings is further available for inspection by a creditor,[2216] who it is submitted, may wish to decide whether or not to proceed with a claim against the insolvent estate or institute criminal proceedings. Further highlighted by Fletcher is that the record of the examination proceedings may be used against the bankrupt for a variety of proceedings, including the institution of criminal proceedings.[2217] He summarises the public examination as a formal procedure obligating the bankrupt to incriminate himself on oath, in public, and on record. There is hope for third parties who may also be summoned in relation to the debtor's affairs. Fletcher consoles in the sense that although available on record, the bankrupt's answers are not admissible against third parties. This is also the case in South Africa and Namibia.

Milman[2218] brings forth a point that the procedure in a public examination is public in the sense that apart from questions being put to the bankrupt by the Official Receiver, Trustee in Bankruptcy or creditors, diverse parties may also put the questions to the bankrupt. As embarrassing and humiliating as this investigative procedure may appear, Milman points out that it is unlikely that challenging it (on the basis of human rights violation) in a court of law would succeed. He argues that such procedures are necessary to reinforce the effectiveness and integrity of the bankruptcy system. I concur. There are, however, circumstances where such procedure may be better substituted with private interrogation. Instances such as where state secrets or third parties' private lives may be exposed, come to mind.

The emphasis that the interrogation may take place "at any time" before the rehabilitation of the insolvent is indicative of this jurisdiction's strict stance to root out any conduct intended to abuse the credit system. As in the case of the Master of the High Court (in South Africa), the Official Receiver is given wider investigatory

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[2216] *Insolvency Rules* 1986 rr.6.175 (5), 7.27, 7.28. 7.30, 7.61. *R v Widdop* (1872) LR 2 CCR 3; *Re A Debtor, Re* [1944] Ch 344; *R v Harris* [1970] 3 All ER 746 (a company case); *R v Kansal* [1992] 3 WLR 494. See also Fletcher *Insolvency Law* 189.

[2217] *R v Ribinson* (1867) L.R. 80; *R v Erdheim* [1896] 2 QB 260.

[2218] *Insolvency Rules* 1986 r 6.172-6.177. See also Milman *Personal Insolvency Law* 89.

powers. For the above reasons, the office of the Receiver is thus a commendable institution of the English law in the sense that this office is dedicated to regulate almost exclusively insolvency related matters. The latter provision does not exist in the South African (Namibia and Botswana) context. The availability of the office of the Receiver is especially recommended for cases where suspicions exist that assets may be concealed by the debtor.

Fletcher is of the view that the wider time frame (between the making of the bankruptcy order and the rehabilitation[2219] of the debtor from insolvency) within which the Official Receiver may bring an application for the holding of the public examination, has some advantage. Fletcher argues that this time frame allows the Official Receiver an opportunity to correctly apply his mind to the matter, that is, whether or not public examination is necessary under the circumstances.[2220] He, however, hopes that under the new insolvency law dispensation the "honest but unfortunate" type of bankrupt who is fully co-operative and willing to assist in the proper and equitable administration of his bankrupt estate, will be spared the humiliating and traumatic experience of public examination.

Fletcher seems to be concerned about the lack of guidelines[2221] to influence the Official Receiver's discretion in deciding whether or not to hold public examinations. He, however, seems certain that as uncomfortable as public examination may appear, this feature will remain in the legal system for a long time. Public examination, in his view, should be reserved for those instances where the Official Receiver is not satisfied that the bankrupt has been fully honest about all facts relevant to the affairs[2222] of his estate and the causes of his inability to honour

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[2219] A year after the bankruptcy order was made. S 279(1) of the *Insolvency Act* as substituted by s 256 of the *Enterprise Act* 2002. See also Fletcher *Insolvency Law* 361. This is a relatively shorter period as compared to the ten years' period provided for by s 127A of South Africa's *Insolvency Act*.

[2220] *Insolvency Law* 190.

[2221] By either the English *Insolvency Act* or *Insolvency Rules*.

[2222] See also Fletcher *Insolvency Law* 180.

debts. Further, if it appears that the bankrupt's insolvency is a matter of public concern, public examination may be called for.[2223]

Another distinctive and admirable feature expressly provided for in this section is the questioning of the bankrupt about the causes of his failures that consequently led to his bankruptcy. It is worth noting that investigation into the causes of insolvency is not expressly provided for in section 65 of South Africa's *Insolvency Act*. It is recommended that South Africa's insolvency legislation should expressly provide for this feature. The causes and not the consequences of insolvency should, in my opinion, be the starting point for any insolvency enquiry. This submission is based on the presumption that if one focuses on examining the insolvent about the causes of his financial woes, one is more likely to uncover relevant information. Due to self-pity, the insolvent would be more open to talk about his predicament if he is of the view that someone is interested in assisting him in starting afresh and subsequently relinquish the stigma associated with being insolvent.

Failure of the bankrupt to attend this public examination without reasonable cause is regarded as contempt of court and thus an offence. This aspect curbs challenges like those encountered in South Africa prior to the amendments (through case law) of provisions in the *Insolvency Act,* empowering non-judicial officers to order the arrest and detention of recalcitrant witnesses. To reinforce the element of investigation and assist with the examination processes, the insolvent is required to fully cooperate with the Official Receiver under section 291. How this reinforcement is applied in practice will be discussed next.

[2223] Fletcher *Insolvency Law* 191. Fletcher does not discuss the "public interest" element. See also Chan "The Public Interest in Judicial Management" 2013 *Singapore Journal of Legal Studies* 278-300 regarding the discussion of the public interest in insolvency matters. The public has an interest in an insolvency matter where the insolvent's ethics as far as managing his business affairs are questionable, and where public funds were involved in the running of his business.

6.5.2 The provisions of section 291: Duties of bankrupt

To reinforce the investigatory role of the Official Receiver,[2224] the statute has extended this official's power up until after the bankrupt is rehabilitated from bankruptcy. The effect of this provision is the prolonged opportunity to discover property concealed by the insolvent (often re-emerging immediately prior to the bankrupt's rehabilitation). This property can revert to the bankrupt's estate for further distribution to his bankrupt estate's creditors. The section is a commendable element of surprise (for those unscrupulous bankrupts who conceal assets to the disadvantage of the estate's creditors) and it is recommendable in cases of delinquent, dishonest bankrupts. Failure to comply, without reasonable cause, with any obligation imposed by this section is an offence. Another incentive of full co-operation on the part of the bankrupt is a positive report[2225] by the Official Receiver to the court permitting early rehabilitation from bankruptcy. A co-operative bankrupt may also be examined in private. How this process unfolds will be discussed hereunder.

6.6 Private examination

Provision is also made in *the EIA* for the examination of the bankrupt in private.[2226] As evidenced by the authorities elucidated above, it appears that the private examination of bankrupts is preferred in this jurisdiction. The public examination is viewed as some form of punishment for a not so co-operative interrogatee. These examinations are triggered by an application to the court by either the Official Receiver or the Trustee of the bankrupt estate. As indicated above,[2227] although the court in exercising its jurisdiction in bankruptcy matters adheres to the basic principles of open justice, there are exceptions to this rule of practice. There may exist circumstances calling for a private enquiry where certain persons are examined in a non-public court hearing on a confidentiality basis. Such circumstances may

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[2224] Upon appointment the trustee in a bankrupt estate is also empowered to investigate the bankrupt in terms of ss 311, 333 and 366.
[2225] In terms of s 289(1) of the *EIA*.
[2226] Section 366 of the *EIA*.
[2227] Paragraph *6.5*.

occur where evidence is supplied by one party who would prefer to have the other party excluded[2228] or it is submitted where evidence is supplied by a "whistle blower" who would wish to remain anonymous.[2229]

6.6.1 Section 366 provisions: Enquiry into the bankrupt's dealings and property

This section which calls for a private enquiry into the insolvent's dealings and property resembles section 152 of South Africa's *Insolvency Act*. The section empowers the court to call before it certain individuals deemed desirable to so appear. Amongst these is the bankrupt spouse including current and former spouse, current and[2230] former civil spouse and other persons of interest to the Official Receiver or Trustee in Bankruptcy. Failure to comply with the obligations imposed by section 366 amounts to an offence.[2231] Furthermore, the said person may be arrested and property in his possession seized for the purpose of bringing him before the court and same may be kept in custody until such time the court orders his appearance.[2232]

Fletcher highlights the broad application of this section.[2233] He points out that even the Trustee in Bankruptcy[2234] may be ordered by the court to submit to examination in relation to his dealings with the bankrupt estate.[2235] It appears that the provisions of this section are of general application and it is submitted that one should therefore not complain when subjected to its examination proceedings. Fletcher further points out that although the examination is regarded as private, the court may allow creditors to attend. He, however, cautions that the court has discretion[2236] to exclude, for example undesirable creditors who are on a fishing

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2228 *Official Receiver v Davis* [1998] BPIR 771 at 781.
2229 Section 152 of South Africa's *Insolvency Act*.
2230 Same as in South Africa with regard to s 152(5).
2231 Same as in South Africa with regard to s 152(6), except for the provision that the sub-sec arranges for an order for apprehension, and not specifically an offence.
2232 Same as in South Africa with regard to s 152(6).
2233 *Insolvency Law* 183.
2234 Same as provided for by s 152(1).
2235 Relying on *Taylor Re Ex Parte Crossley* (1872) LR 13 Eq 409; *Re Whichere* (1885) 5 Morr 173.
2236 He also highlights a point that the court can also exercise its discretion in relation to who must be summoned for examination, even though it will not readily intervene. The applicant is also expected to show a *prima facie* probability that some benefits will accrue to the estate or that

expedition in preparation for separate proceedings against either of the interviewees.[2237]

Fletcher notes an interesting point that, although not available to the bankrupt,[2238] the privilege against self-incrimination at this examination is available to any witness.[2239] A witness may therefore decline to answer questions whose answers will tend to incriminate him.[2240] Any such witness may further refuse to so answer where he is objectively of the view that the examiner is on a "fishing expedition".[2241] Regarding the bankrupt's legal adviser's rights to legal professional privilege in relation to section 366, Fletcher points out that this right may be lawfully limited. He contends that the said right is limited to any information which the (interviewee) client could lawfully not be compelled to reveal by means of examination. Therefore, the legal adviser may be compelled to reveal information which his client is legally compelled to reveal by virtue of the examination.[2242] He further points that, should it happen that confidential documents are in the possession of the legal adviser instead of the (interviewee) client, the Trustee in Bankruptcy would still be entitled to have access thereto.[2243]

Like Fletcher, Milman[2244] acknowledges that the examination in terms of this section may extend even to the bankrupt's current and former spouse and any person in a position to provide information about the bankrupt's affairs. He contends that the broad scope of section 366 appears to cover professional advisers and that the thorny issue of professional privilege may arise. It is noted that legal professional

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useful information is to be extracted therefrom. It appears that certainty in relation to the discovery of useful information from the examination is not a pre-requisite for the holding of an examination, the probability of discovering information will suffice.

2237 *Re Grey's Brewery Co* (1883) 25 Ch D 400.

2238 See also Fletcher *Insolvency Law* 184, where he points out that it is a settled principle in insolvency law that no privilege against self-incrimination is available to a bankrupt personally. This point he bases on a volume of authority of the past and present law of insolvency, as affirmed by the Court of Appeal.

2239 This feature is not expressly pronounced in the case of s 152.

2240 *Re Firth Ex parte Schofield* (1877) 6 Ch D 230.

2241 *Re Gregory* [1935] Ch 65. See also *Re Wright* (1883) 23 Ch D 118,128.

2242 Fletcher *Insolvency Law* 184.

2243 *Re Murjani* [1996] 1 All ER 65; *Re Ouvaroff* [1997] BPIR 712.

2244 *Personal Insolvency Law* 89.

privilege is protected in this jurisdiction, and this principle also applies in the context of bankruptcy matters.[2245] In support of his contentions, he cites the case of *Re Murjani* [2246] where the court ruled that a solicitor[2247] could be compelled to disclose any information which the bankrupt himself could have been obliged on examination to reveal. He, however, assures that beyond that point professional legal privilege did apply in this case. Further, he cautions that a section 366 application should be invoked only in cases of emergency. This, according to him, should be the case because the application is brought *ex parte*. In most cases however, the application is made on notice to the other party unless there is a demonstrable risk in "tipping-off" the intended respondent. There is first an application to have an examination, then an order that the examination takes place.

Milman[2248] has an interesting contribution on the aspect of legal privilege. He cites an unusual situation that arose in the case of *Re Ouvaroff*,[2249] where legally privileged documents had been handed over to the Trustee in Bankruptcy by the legal representative of the plaintiff in error. No underhanded conduct on the trustee's side in accessing those documents was established. The court held the view that there is nothing preventing the Trustee in Bankruptcy from utilising the documents in support of his case against the insolvent, to set aside a voidable transaction. Milman points out that it was according to the court, not unethical for the trustee to take advantage of this "windfall".

Taking into consideration the authorities enunciated above, the next question to be asked is, what then is to be done with the information obtained at the insolvency inquiries?

[2245] Section 434C makes applicable to insolvency examination and related matters the privilege of legal professional privilege. The section reads as follows "In proceedings against a person for an offence under this statute nothing is to be taken to require any person to disclose any information that he is entitled to refuse to disclose on grounds of legal professional privilege". This is also provided for by s 152(6) of South Africa's *Insolvency Act*.

[2246] [1996] 1 WLR 1498.

[2247] An equivalent of a lawyer whose appearance is limited to certain courts.

[2248] *Personal Insolvency Law* 89.

[2249] [1997] BPIR 712.

6.7 Section 433 provisions: The admissibility of statements

This stand-alone section provides that evidence of statements of affairs submitted at the insolvency proceedings are admissible in any proceedings against any person making it or concurring in making the statement. However, an exception is made in relation to cases of criminal proceedings arising from offences other than those created by this statute[2250] and perjury[2251] related offences. Statements made at examinations or enquiries are thus not admissible in criminal proceedings relating to offences other than those as provided by statute and perjury related. The limitations to the exception means:[2252]

(i) no evidence relating to the statement made by such person may be adduced;

(ii) no question relating to it may be asked, by or on behalf of the prosecution,unless evidence relating to such information is adduced, or a question relating to it is asked, in the proceedings by or on behalf of the person so prosecuted.[2253]

Seeing that the insolvency interrogation has the potential of incriminating the interrogatee in subsequent proceedings, it is recommended that interrogations should be conducted in a court system or tribunal, by judicial officers trained to carefully extract information from witnesses with little room for human rights violation. It is noted that the far reaching consequences of section 433[2254] have been greatly restricted by the coming into effect of the *Human Rights Act*[2255] in 2000, as necessitated by the *European Convention on Human Rights*.[2256]

2250 Section 22(6), 47(6), 48(8), 66(6), 67(8), 95(8), 98(6), 99(3)(a), 131(7), 192(2), 208(1)(a) or (d) or (2), 210, 235(5), 353(1), 354(1)(b) or (3) or 356(1) or (2)(a) or (b) or paragraph 4(3)(a) of Sch 7 of the *EIA*. These offences are mostly concerned with defaults and non-compliance with the duties imposed by this statute.

2251 In terms of ss 1,2 or 5 of the English *Perjury Act* 1911 (false statements made on oath or made otherwise than on oath).

2252 At sub-sec 2 of the *EIA*.

2253 Section 433(2)(*a*)(*b*). See also Fletcher *Insolvency Law* 188.

2254 See Fletcher *Insolvency Law* 188.

2255 1998.

2256 Hereinafter the "*Convention*".

Fletcher[2257] correctly points out that the section has since then undergone several amendments so as to be in line with the *Convention*.[2258] Citing the famous case of *Saunders v United Kingdom* [2259] and subsequent similar cases,[2260] Fletcher contends that a person facing imminent criminal charges arising from his insolvency has *locus standi* to apply to the court for an order against the use of such information by the prosecuting authority. According to him, the basis of this application is that the usage thereof would be in violation of the right to a trial, as entrenched in Article 6 of the *Convention*. He further contends that although no restrictions are placed on the gathering of information at these insolvency interrogations for purposes of proceedings not related to insolvency matters, the usage thereof in criminal proceedings, other than perjury related ones, is in conflict with the Convention's provisions. However, should the bankrupt waive this right as provided for in Article 6 of the Convention, by willingly providing the information to the court, he cannot later cry foul if same is utilised in criminal proceedings against him, cautions Fletcher.[2261] I concur. Inadmissible evidence should be given under compulsion and not freely submitted.

Having accepted all of the above, it is still possible that the information submitted at the said examination can provide useful hints and much needed leads to the prosecution to get to the bottom of a suspected crime.[2262] The consequent evidence[2263] so obtained could be legitimately utilised in subsequent criminal proceedings against the bankrupt on the basis that it was independently obtained and the usage thereof not in conflict with rights conferred by the *Convention*.[2264]

2257 *Insolvency Law* 188.
2258 Fletcher *Insolvency Law* 188.
2259 [1997] BCC 872.
2260 *R v Kansal* [2002] 2 AC 69 (HL); *Kansal v United Kingdom* [2004] BPIR 740.
2261 At 188.
2262 See Fletcher *Insolvency Law* 188.
2263 Made possible (for example) by access of the public to public examination of insolvents. See Fletcher *Insolvency Law* 188.
2264 See *Secretary of State v Crane* [2001] 2 BCLC 222 at 231-232, "to the effect that the police might attend non-criminal proceedings conducted under insolvency legislation and thereby gain insight into how best to formulate charges and to prepare the future prosecution case in the light of evidence given in court". It is submitted that the above scenario is possible but could be curtailed by continuously adjourning public examinations where it appears that incriminatory responses may come about.

The use of information from insolvency investigations is viewed by Milman[2265] as a complicated subject. To support his reservations about the nature of this complexity, he cites the case of *Trustee of the Estate of Omar v Omar*.[2266] In this case the court held that records of private interrogations could be handed over by the trustee to a third party who wished to bring fraud related charges against the bankrupt in relation to his conduct in the administration of an estate. He contends that although this course of action was unusual, the strong indications of fraud permitted the court to authorise the use of the said transcripts. As compared to South Africa's position with regard to the use of incriminatory information in subsequent proceedings, this view appears controversial. The basis for this reasoning is that it does not seem that provision is made for the prosecution to advance its own evidence in support of its case.

Milman notes that although section 433 provides for the indiscriminate admissibility of any statements made during the course of insolvency proceedings, human rights issues may arise if this section is applied as it stands currently. He, however, cites the case of *R v Kansal* [2267] where the Court of Appeal[2268] pointed out that self-incriminatory answers given by a bankrupt during the course of a public examination by the Official Receiver could be used to form the basis of a prosecution in respect of alleged offences under the *Theft Act* [2269] and the *EIA*.[2270] This was the case notwithstanding the position that the bankrupt did not enjoy the right of silence during the course of that examination.

Milman indicates that despite the conviction of Kansal, the case was nevertheless referred back for review. The Court of Appeal concluded that developments in human rights law, particularly the enactment of the *Human Rights Act*, meant that

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2265 *Personal Insolvency Law* 90.
2266 [2000] BCC 434.
2267 [1993] QB 244. It must be noted that this case was decided prior to the coming into effect of the *Human Rights Act* in 2000.
2268 Criminal Division.
2269 1968.
2270 Section 354(2).

the conviction must be viewed as unsafe.[2271] It is clear that the decision to convict in the Kansal case was contrary to human rights law development. It must be noted, however, that the conviction took place prior to the coming into effect of the *Human Rights Act* and the appeal was lodged after the coming into effect of the statute. To remedy the situation so as to be in line with human rights law meant that the court had to apply the law retrospectively to this case. However, this retrospective application of the law was viewed by the court as having the potential of undermining the criminal justice.[2272]

Milman highlights that in the interceding years the decision in *R v Kansal* and comparable authorities in company law became the subject of uncertainty due to the ruling of the European Court of Human Rights in *Saunders v UK*.[2273] In this case the court highlighted that it is contrary to the right of fair trial[2274] for a prosecution to be based substantially upon compelled evidence extracted without the benefit of the right of silence. Realising the short comings of this legislative provision after the court's ruling, (and, it is submitted, desirous of being in line with international best practice) the Attorney General issued new guidelines to prosecutors limiting the use of information obtained from compelled evidence.

Milman brings to the fore a point that the courts were again afforded an opportunity after the enactment of the *Human Rights Act* to reconsider the position in the context of a specific insolvency case in *R v Faryab*.[2275] This case involved theft and the question was whether confessions given to the Official Receiver could be used to bolster a charge of theft or not. The Court of Appeal opined that such confession could not be used and consequently set aside the conviction. Milman contends that the approach adopted by the English courts came at the right time, had the courts

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2271 [2001] EWCA Crim 1260, [2001] 3 WLR 751.
2272 [2003] UKHL 62, [2002] BPIR 370.
2273 [1997] BCC 872. Followed in *IJL, GMR and AKP v UK* [2002] BCC 380. It is significant to mention that in *R v Ross* (1995) 31 CBR (3d) 273 the Canadian court ruled that the use of evidence obtained at bankruptcy interrogations might contravene provisions in the *Charter of Rights and Freedoms* 1982.
2274 As enshrined in Art 6 of the *Convention*.
2275 [1999] BPIT 569.

adopted a contrary approach, that would have invited scolding when the *Kansal* matter was taken to the European Court of Human Rights. The court thereat issued an order in favour of Mr. Kansal.[2276] The reason for the decision of the court was that it is an infringement of human rights for the prosecution to be so heavily based upon evidence obtained without the privilege of a refusal of self-incrimination. This decision of the court meant that the prosecution had unjustifiably violated Kansal's human rights.

Like Fletcher, Milman warns that one must be careful not to place too much emphasis on these developments. His cautiousness stems from the perception, with which I am in agreement, that fundamental rights legislation has not completely eradicated the investigatory powers in insolvency matters. He correctly bases his contentions on *Attorney General's Reference No 7 of 2000,*[2277] where the Court of Appeal highlighted that the prosecution's use of recorded evidence freely given and subsequently delivered to the office of the Official Receiver under compulsion was not prohibited. This makes sense. Human rights law is against the use of compelled evidence and not information freely submitted and on record. The next aspect to consider is the position of the directors and other officers of a company in liquidation.

6.8 Corporate insolvency

Provision is made in *the EIA* for the examination of persons who were responsible for the running of the company's business prior to its insolvency. This provision is a crucial step towards establishing how the business affairs of a company were conducted and how its share capital was administered. This process will assist in untangling the often complicated financial dealings of companies. Fletcher[2278] points out that "a clearer picture" surfaces when one "peeks into the business activities of the company, particularly during the months leading to bankruptcy and

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[2276] [2004] BPIR 740.

[2277] [2001] EWCA Civ 888 [2001] BPIR 953. The case of *R v Brady* [2004] EWCA Crim 1763 [2004] BPIR 962 (which dealt with corporate insolvency matters) is in a similar vein.

[2278] *Insolvency Law* 844.

subsequently liquidation". He contends that as enquiries proceed, information indicating that one or more company laws were flouted by those managing the company, may emerge. The very requirements designed to safeguard against the flouting of the law by those who enjoy the privilege of utilising the vehicle of limited liability, to their advantage. Fletcher highlights a crucial factor that there are reasons why these regulations and laws are in place. These submissions make sense. If the opposite were true, the use of a vehicle of a company (having separate identity) by persons who wish to make profit and who abuse this privilege would be against public policy.[2279]

The volume of authority already enunciated on cases of insolvency and related contravention of the law in this field propels one to advocate for the firm measures to curb abuses of corporate identity and maintaining public confidence in the judiciary. The next issue(s) to be considered are measures designed to extract information from persons of interest (for the officers of the court), with the aim of assisting in the proper administration of insolvent companies.

6.9 Public examinations

As in the case of individual insolvency, provision is made in *the EIA* for the public examination of directors and officers of a company in winding-up. The practice of public[2280] examination (as already highlighted in the preceding paragraphs) can be traced back to medieval England. In the field of company winding-up, public examination of directors and officers is regulated by sections 133 and 134 of the *EIA.* Individual sections concerned with the examination for the gathering of information relating to the affairs of a company in liquidation will be analysed next.

[2279] See in general *Bernstein v Bester* 1996 (2) SA 751 (CC).

[2280] Which amounts to a public humiliation of such examined person as far as the history of this form of investigation in relation to insolvency regulations is concerned.

6.9.1 The provisions of sections 133 & 134: Public examination of directors

Although no mention is made in *the EIA* for the compulsory attendance of the insolvent company's creditors' meetings by directors and officers of a company in liquidation, unlike section 414 of South Africa's 1973 *Companies Act*, provision is made in this statute for the public examination of these officers by the Registrar of the High Court. By reason of the examination of these officers, sections 133 and 134 can be equated to section 415[2281] of South Africa's 1973 *Companies Act*. The difference lies in the provision that proceedings in terms of sections 133 and 134 are presided over by the Registrar of the High Court as opposed to proceedings in terms of section 415 presided over by the Master of the High Court. Failure to appear for the examination without reasonable cause amounts to contempt of court and it calls for immediate arrest. There appears to be no human rights issues as far as this section is concerned. This presumption is supported by the existence of a built-in sanction for non-compliance with the provisions of this section. It appears, therefore, that at no point does a need arise for a non-judicial officer to order the detention of a recalcitrant witness. The arrest is only triggered by non-compliance with the provisions of this section. The apprehension is not independently ordered by a non- judicial officer, but by the court. The court can and must consider human rights issues.

Fletcher highlights the point that as *per* the Cork Committee's recommendations,[2282] the public examination in relation to insolvent companies, as is the case with individual insolvency, is intended to be an important part in the process of company liquidation.[2283] He further highlights that the Official Receiver no longer has to allege the existence of fraud on the part of the company's officers, prior to the authorisation of a public examination. The requirement that fraud must be alleged was a feature in the now repealed section 563(1) of the 1985 *Companies Act*. The

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2281 And the relevant sections in Namibia and Botswana.
2282 At 653-657.
2283 *Insolvency Law* 720.

Official Receiver has the primary duty of exercising his discretion in deciding whether or not public examinations should take place and must inform the court accordingly.

Citing *Re Casterbridge Properties Ltd*,[2284] Fletcher brings forth the legislative history of the current provisions concerning public examinations and the policy embodied therein. He points out that the court is thus required to make an order for public examination upon an application by the Official Receiver if it is satisfied that doing so would serve a useful public purpose. I concur. It would be in the public interest that an interrogatee who is often not co-operative and/or unscrupulous is publicly interrogated. This provision would serve as a warning to unscrupulous directors, and maintain public confidence in the justice system.

The position in South Africa is that, depending on the circumstances of the case, a prospective interrogatee may receive written questions to respond to, especially where the required information is not complex.[2285] If, however, the opposite is true and the said interrogatee is not co-operative, public examination may be called for. The public purpose served by the interrogation of specified persons is also regarded as one of the crucial features in the context of insolvency law in South Africa.[2286]

6.9.2 The provisions of section 235: Non-judicial examination

This section is also similar to sections 415 and 416 of South Africa's 1973 *Companies Act*. It is unique to this jurisdiction only in the sense that it is explicitly referred to as non-judicial examinations of persons[2287] considered as of interest to the office holder.[2288] The enquiry seeks to delve into the indebted company's formation, dealings, affairs and property. It places a duty upon the officers of the affected

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2284 [2003] EWCA Civ 1246 [2003] 4 All ER 1041.

2285 See *Nyathi v Cloete* 2012 (6) SA 631 (GSJ) as discussed in ch 3 above.

2286 See in general ch 2 and 3 above.

2287 These include persons who have at any time been officers of the company (in winding- up), who have taken part in the formation of the company at any time within one year prior to the effective date, those who are employed or had been employed (by the company) within one year and in the opinion of the officer holder's opinion capable of giving information which he requires, s 235 of the *EIA*.

2288 Official Receiver or liquidator.

company to co-operate with the office holder. Should a person fail to comply with the office holder's request without reasonable cause, a fine will be imposed on him and for a continued contravention to a daily default fine. From the section overview, it becomes clear that these examinations are presided over by an Official Receiver, liquidator or administrator (as soon as the latter is appointed) under the supervision of the Insolvency Service Tribunal. The court appears not to feature in these enquiries. This position is recommended for adoption in South Africa for the reason that it would bring about some relief to the justice system when insolvency courts or tribunals are established. Resolution of less complicated matters and cases where examinees are co-operative can be dealt with by tribunals.

Fletcher[2289] correctly points out that this expeditious and essential step by the Official Receiver to investigate the company's affairs and dealings can facilitate the process of exposing concealed company's assets, especially where same has been disposed of unlawfully, thus legally recoverable. It appears that the office holder, where there appears a need to seek an order for judicial examination, may, after exercising his discretion, apply to the court for such an order.

6.10 Private examinations

6.10.1 Introduction

As is provided for in the case of personal insolvency,[2290] provision is made in *the EIA* for the private examination of directors and officers of companies in liquidation. The principle, application, and effect are thus the same.

As stated above, the enquiry seeks to delve into the indebted company's dealings, property, and business affairs. It places upon the officers engaged in the winding-up of a company a duty to co-operate with the office holder in the process of winding-up Should a person fail to comply with the office holder's request without

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[2289] *Insolvency Law* 713.
[2290] See para *6.6* above.

reasonable cause, a fine will be imposed on him and for a continued contravention to a daily default fine. This aspect is dealt with by section 236 of the *EIA*.

6.10.2 The provisions of section 236: Judicial examinations

Provision is made in this section for the so-called judicial examination of officers of the insolvent company and other persons of interest. The examination appears, although not expressly stated in this section, to be private in nature and similar to section 417 of South Africa's 1973 *Companies Act.* This view stems from the provision that section 236 proceedings are conducted *in camera*.[2291] However, the difference lies in the provision that the examination in the case of South Africa may be presided over by the Master (public officer) or the court. As the presiding officer, the Master conducts the examination.

The examinations, as provided for by section 236, are prompted by an application from the office holder to the court for the holding of these examinations by the court. Persons connected with the company, whose appearance before the court is desired, are notified by way of an order to so appear. These persons[2292] are required to produce information concerning the promotion, formation, business, dealings, affairs or property of the company, books, papers or records in their possession regarding the company under investigation. Non-compliance with the summons without reasonable cause will be visited with a warrant of arrest. The apprehension as ordered by the court, is to be effected by a constable or officer approved by the court. The person so arrested may be kept in custody until he is brought before the court under the warrant or until such other time as the court may order. The position is the same with regards to section 417 of the South African 1973 *Companies Act* which calls for the apprehension (as per the order of the Master or commissioner) of a recalcitrant examinee. As is the case in South Africa, it appears that the examinee is apprehended for the purpose of being brought before the court for

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2291 See Pepper & Pearson "Private examination and foreign aspects" 1989, 2 (5) 33-35.

2292 In *Re JT Rhodes Ltd* (1987) BCLC 77, the court held that these persons who have had what was perhaps no more than the misfortune to be involved in the affairs of an insolvent company owe a public duty to assist the liquidator to investigate the affairs of that company in the interest of creditors.

examination, and not as a penalty. Moreover, the order for the apprehension of an examinee is made by the court.

Fletcher[2293] points out that although an application for a section 236 examination may be made *ex parte*, the court would require that the application is substantiated with acceptable reasons as to why affected parties should not be part of the application and oppose the application if they so wish. I concur. This is the correct way to implement and apply the provisions relating to *ex parte* application. This position is the same as in South Africa.[2294] However, as stated previously, there might be good reasons why certain persons should not be permitted to interfere with this often urgent need for the discovery of specified information, hence the provisions for an *ex parte* application.

6.10.3 Application of section 433 provisions in corporate insolvency

As indicated in the context of insolvency of individuals, section 433 seeks to provide for the admissibility or not thereof of evidence from the insolvency examination or enquires in any proceedings. The application, principles, and effect are thus similar. Unlike the built-in safety guards in the case of South Africa, found in section 65(2A) (*a*) and (*b*) of South Africa's *Insolvency Act* and section 415(5) of South Africa's 1973 *Companies Act*, section 433 is a stand-alone. The application and effects of this section was considered in *Saunders v UK.*[2295] In this case the European Court of Human Rights held it to be contrary to the right of fair trial. The latter right as enshrined in Article 6 of the *Convention* is opposed to a position where the prosecution is to a larger extent based upon compelled testimony. This was considered to be so, especially in the absence of a benefit of the right to silence that an examinee is entitled to under normal proceedings.

2293 *Insolvency Law* 709.
2294 See in general ch 3 above.
2295 [1997] BCC 872.

6.11 The privilege against self-incrimination

The privilege against self-incrimination associated with the right of silence is one of the key rights available to persons suspected of being involved in some form of criminal conduct. The question is whether or not persons undergoing insolvency examinations are deserving of this right.

The above question was posed in *Bishopsgate Investment Management Ltd v Maxwell*.[2296] The court had to answer the question as to whether or not a director of a group of companies, in the process of insolvency proceedings, can escape examination in terms of sections 235 and 236 of the *EIA* by virtue of the right against self-incrimination. The thorny issue thereat was that there were fraud-related enquiries in which certain officers of the said companies were linked and there were fears of self-incrimination on the part of those to be examined. In its deliberation the court made it clear that the said director is not entitled to claim the right of privilege when called upon to comply with the compulsory provisions of section 235 and 236 of the statute.[2297] This meant that their right to claim privilege was limited by law of general application. It is submitted that this should be the case, providing the required information at the examination should be considered as the continuation of the directors and or officer's management duties. To come forward and assist the insolvent company with information required in administering its affairs, should be seen in a positive, as opposed to a negative light. The principle highlighted throughout the above case is that the legislature was at liberty to limit the privilege against self-incrimination in the context of insolvency interrogations. It must be noted however, that this case was decided prior to the coming into effect of the *Human Rights Act.*[2298]

The coming into effect of the *Human Rights Act* in 2000 brought with it clarity regarding the question of dealing with incriminatory evidence obtained at insolvency

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[2296] [1992] 2 All ER 856.

[2297] See the court's view as regards the right against self-incrimination as discussed by Fletcher below.

[2298] Of 1998, hereinafter "the *Human Rights Act*".

interrogations in this jurisdiction. As indicated above, section 3 of the *Human Rights Act* provides that any legislation within this jurisdiction must be read and elucidated so as to enforce the rights bestowed by the *European Convention on Human Rights*. The question then becomes what interpretation is to be given to section 433 above, as opposed to the privilege against self-incrimination as conferred by the *Convention*.

Fletcher[2299] brings to the fore a view expressed by the Court of Appeal where the latter authoritatively affirmed that under the modern law of insolvency, the right against self-incrimination cannot be relied on by any person undergoing a public examination in terms of either section 290 (personal insolvency) or section 133 (corporate insolvency). It must be noted that although the *Bishopsgate Investment Management Ltd v Maxwell* case was decided in 1992, prior to the coming into effect of the *Human Rights Act* in 2000, the principle upon which the decision was based is still relevant today. However, correct measures for the admissibility (or not thereof) of incriminatory evidence in subsequent criminal proceedings other than perjury related, must be put in place. This position is acceptable taking into account that provision is made for the non-admissibility of incriminatory statements in specified criminal offences.

With reference to *Bishopsgate Investment Management Ltd v Maxwell* [2300] (which traces the history of the statutory provisions concerning public examinations in cases of personal and corporate insolvency), Fletcher explains that Parliament had, through the 1985 and 1986 *EIA*, sought the harmonisation between individual and corporate insolvency to the closest extent possible. Consequently, the established principle of compulsion, considered to be a long standing feature of the law of bankruptcy, ought to apply equally to public examination of officers in cases of companies in liquidation.[2301] Fletcher submits that through section 133,[2302] the

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[2299] *Insolvency Law* 721.
[2300] [1992] 2 All ER 856.
[2301] See Fletcher *Insolvency Law* 722.
[2302] Or s 112 relating to company voluntary winding-up.

legislature has appropriately limited the privilege against self-incrimination.[2303] He considers this suitable, as long as this limitation is applied in such a manner that is not in conflict with the provisions of the *Convention*.

Citing *R v Director of the Serious Fraud Office, Ex parte Smith*,[2304] Fletcher highlights the evaluation by the legislature of the policy in relation to the limitation of the privilege against self-incrimination. This case concluded that a prospective insolvency interviewee was compelled to attend and answer questions in spite of imminent conviction for an offence under the *Criminal Justice Act.*[2305] The fact that the said interviewee had already been charged with other criminal offences relating to matters which he was to be questioned was not an excuse for not going through an insolvency examination process.

Fletcher notes that then it seems even the imminence of a criminal trial itself would not prevent such public examination or the fulfilment of other obligations (by a prospective interviewee) to co-operate as provided for by the *EIA*. He, however, acknowledges that the court, in compliance with the principles of justice, had a duty to consider the possible negative impact on the interviewee's compliance with the requirements of the *EIA* in the pending criminal trial. He correctly points out that the impact of both the *Human Rights Act* and the European Court of Human Rights on the use of compelled evidence in criminal proceedings does not prevent the rigorous public examination of persons of interest in the context of insolvency. Accordingly, this cautious threading is necessary when considering the criminal case and not the interrogation itself.

Citing the case of *Rottman v Official Receiver*,[2306] Floyd[2307] brings to the fore the point that in its deliberation regarding cases of self-incrimination, the courts may not ignore Article 6 of the *European Convention on Human Rights*. In the latter case,

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[2303] See Fletcher *Insolvency Law* 722.
[2304] [1993] AC 1; [1992] 3 WLR 66.
[2305] 1987.
[2306] [2008] EWHC 1794 (Ch).
[2307] *Personal Insolvency*: A Practical Guide 48-49.

the insolvent debtor facing imminent criminal proceedings in a foreign jurisdiction had to go through insolvency interrogations. The court was not ignorant of the position that even though the debtor's evidence at the interrogation was inadmissible against him in subsequent criminal proceedings (in terms of section 433 of the *EIA*), such evidence was admissible against him in Germany. On the basis of this ground the court adjourned the interrogation of the debtor and opted for a private enquiry by a High Court judge.

Floyd correctly submits that the court felt obliged to protect the debtor's rights while also protecting the rights of the creditors by proceeding with interrogations away from public scrutiny.

The question that comes to mind is what is to be done where a person is aggrieved by such an order of the English court adverse to him? Section 375 of the *EIA* makes provision for appeals and reviews of court orders in the context of insolvency matters.

6.12 The provisions of section 375: Appeals and Reviews

Provision is made in this section for appeals, reviews, rescission and variation of any court order or decision made by the court having jurisdiction on insolvency matters. On the surface, the section appears to be similar to section 151 of South Africa's *Insolvency Act* providing for reviews in the broader sense. There is, however, a difference in that section 151 of South Africa's *Insolvency Act* provides for review by the court of the decision, order or ruling of the Master (or officer presiding) at the creditors' meeting. This provision was put in place because the Master is not a judicial officer. The fact that the Master's decision, order or ruling is subject to review appears to serve as some form of a safeguard against the improper use of insolvency processes where the Master presides, considering that the latter is not a judicial officer. On closer inspection however, section 375 appears to be similar to section 150 of South Africa's *Insolvency Act*. The latter section makes provision for appeal by a person aggrieved by a final order of the court in relation to sequestration orders.

6.13 Conclusion

From the authorities discussed above, it appears that the *Convention* and the European Court of Human Rights' judicial precedents play a crucial role in the English judicial system, at least as far as insolvency interrogation proceedings and resultant judicial precedence are concerned.

The legislature's endeavour to harmonise the regulation of the insolvency of individuals and of companies by enacting one piece of legislation in this jurisdiction is admirable and commendable for adoption in South Africa. This assertion stems from the assumption that it is unlikely to encounter problems of contradictions and duplications when interpreting the provisions of one statute, especially where such provisions (as in the case of insolvency of individuals and that of companies) are applicable to more than one person.

Although not having insolvency courts that are dedicated full time to insolvency matters only, the availability of the Insolvency Service and the Insolvency Court Users Committee ensures undivided attention to insolvency related matters with the effect that a reliable and constant insolvency precedence bank is established. Unlike the position in South Africa, Namibia and Botswana with the office of the Master burdened with so many almost unrelated functions, the above mentioned institutions are dedicated to insolvency related matters and they are self-sustainable. South Africa could do well in adopting this system.

The potential for rigorous investigation on the causes of insolvency and of conduct unbecoming on the part of those involved in the administration of insolvency related matters is an admirable feature in this jurisdiction and commendable for adoption. This should be the case if financial constraint is not an issue. A provision that the public examination is reserved for recalcitrant witnesses as a form of a penalty is also recommendable. It is not necessary to humiliate an honest person who, through misfortune, has become unable to meet his obligations, by interrogating him in public. Empowering the Insolvency Services officers to determine which cases are

suitable for public examination as opposed to private examination is admirable. This discretion may protect honest debtors from being publicly shamed by having them examined privately, while also making provision for exposing shady characters, through public examination.

The extended investigatory role of the Official Receiver until the bankrupt is rehabilitated is admirable. This provision allows an opportunity to discover property concealed by the insolvent. The discovered property can revert back to the bankrupt's estate for further distribution to the insolvent estate creditors. Furthermore, this provision serves as an element of surprise for those unscrupulous bankrupts who conceal property to the disadvantage of affected creditors.

The fact that this jurisdiction has fewer public examinations is indicative of the need to shield honest insolvents. But on the other hand, the private interrogations are vigorous, specialised and thus intense and likely to extract the required information away from public scrutiny.

The next chapter will consider the position in Canada as far as the gathering of information (procedures) related to insolvency matters is concerned (in so far as this jurisdiction is considered as amongst exemplary jurisdictions on human rights[2308] culture).

[2308] See The *Canadian Charter of Rights and Freedoms* 1982.

Chapter 7: The Canadian perspective

7.1 Introduction

A brief historical overview of the interrogation proceedings in the insolvency law and its implications on the insolvent and other witnesses and the current legal position in Canada will be the focus of this chapter. The close link through the English and Scottish law,[2309] the simplicity in which this jurisdiction regulates the administration of insolvency related matters and the fact that this jurisdiction is rated amongst the influential ones as far as human rights are concerned, makes this jurisdiction a preferred yardstick. The purpose is to compare the position in this jurisdiction with the position in South Africa, Namibia and Botswana, the three countries forming the subject of this research. The *Bankruptcy and Insolvency Act* [2310] in so far as it regulates the insolvency of individuals and corporate entities, other related legislation, commentary and case law will be analysed to achieve the above mentioned objective.

7.2 Historical overview of the insolvency legislation

With its historical ties to the English jurisdiction[2311] and the fact that the Canadian legal system is based on English common law,[2312] the development of legislation regulating bankruptcy and insolvency in Canada can be traced to that of the United Kingdom. Ziegel acknowledges the fact that in comparison to Western Europe, the scope of the Canadian legislation on insolvency or bankruptcy is not that broad.[2313] He highlights the fact that the first *Bankruptcy Act* came about in 1869 to regulate compulsory bankruptcies of businesses. This means that individual bankruptcies were not catered for by this statute. This position could have been due to the fact that consumer credit was rare and that position could have led to fewer cases of

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2309 See Grundy *The Insolvency Laws of Canada* 7, hereinafter "Grundy *Insolvency Laws of Canada*". See also ch 6 above for the historical development of the English insolvency legislation.

2310 R.S.C. 1985 c. B-3, hereinafter the "*BIA*".

2311 See Grundy *Insolvency Laws of Canada* 7. See also ch 6 above for the historical development of the English insolvency legislation.

2312 See Grundy *Insolvency Laws of Canada* 132.

2313 Ziegel "The Modernization of Canada's Bankruptcy Law in a Comparative Context" *Texas International Law Journal* 1998 33:1 3-4.

consumer credit necessitating legislative regulation. The 1869 statute was subsequently repealed in 1880 and no legislation[2314] regulating bankruptcy was in place until 1919.[2315]

Ziegel brings to the fore the fact that the 1919 *Bankruptcy Act* was greatly influenced by the English *Bankruptcy Act* of 1914, though not in all aspects. What was unique about the 1919 statute was the fact that it regulated the insolvency of natural persons and those of companies. The English statute on the other hand exclusively regulated the insolvency of natural persons.[2316] This was the beginning of the divergent development in this jurisdiction as far as bankruptcy legislation is concerned. The development of the bankruptcy legislation in Canada along its separate lines then dates as far back as 1919 to the1960's.[2317] During the latter period a committee to review and make recommendations in insolvency laws was established with the objectives of reforming its bankruptcy laws. Further developments took place in 1985, 1992,[2318] 1997,[2319] and 2005.[2320] The 2002[2321] Personal Insolvency Task Force's recommendations found the Canadian insolvency system "basically sound". The general view aired by the task force was that the system only needed additional provisions and that there was no need to overhaul the system as a whole.[2322] The above mentioned developments (though tailored to

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2314 With the exception of the *Winding-up Act* of 1882 regulating the insolvency of insurance companies, banks and building societies.

2315 Ziegel "The Modernization of Canada's Bankruptcy Law in a Comparative Context" 1998 *Texas International Law Journal* 3-4 33:1.

2316 These differences have since disappeared with the coming into effect of the English *Insolvency Act*,1996 regulating the insolvency of both natural and juristic persons.

2317 Ziegel Canadian Perspectives on the Challenges of Consumer Bankruptcies 1997 *Journal of Consumer Policy* 20 2 211.

2318 This development added the concept "insolvency" to the title of the then *Bankruptcy Act* (*Bankruptcy and Insolvency Act*). See Houlden, Morawetz and Sarra *The 2015-2016 Annotated Bankruptcy and Insolvency Act*, hereinafter 'Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act'*. See also Ziegel "The Modernization of Canada's Bankruptcy Law in a Comparative Context" 1998 *Texas International Law Journal* 33:1 2.

2319 Relating to international insolvencies. See Ziegel "The Modernization of Canada's Bankruptcy Law in a Comparative Context" 1998 *Texas International Law Journal* 33:1 6.

2320 Grundy *Insolvency Laws of Canada* 9. See also Ziegel *Comparative Consumer Insolvency Regimes: A Canadian Perspective* 15.

2321 Established in 2000 by the Bankruptcy Superintendent.

2322 Ziegel *Comparative Consumer Insolvency Regimes*: *A Canadian Perspective* 16. See also Ziegel "The Modernization of Canada's Bankruptcy Law in a Comparative Context" 1998 Texas International Law Journal 33:1 2.

cater for the jurisdiction's unique conditions) indicated a need in this jurisdiction to adapt its bankruptcy laws to the "rapidly changing economic and social conditions".[2323]

A prominent feature of Canada's insolvency law is its close "geographical and economic proximity to the United States[2324] and its historical ties to the United Kingdom."[2325] Grundy contends that this aspect makes the insolvency laws in this jurisdiction a hybrid comprising of the characteristics of the latter two countries' insolvency laws.[2326] Houlden *et al* [2327] highlight the fact that the amendments effected in the *Bankruptcy and Insolvency Act* Canada in 1992 aligned the latter act with the United States of America's *Bankruptcy Code*.[2328] Understandably this position has made the jurisprudence and authorities of the latter jurisdiction influential in the interpretation of the *BIA*.[2329]

The *BIA* aims to regulate the insolvency of individuals and juristic persons. The term "bankruptcy" connotes a formal procedure whereby the assets of a debtor[2330] are liquidated.[2331] Grundy points out that although the state of being insolvent is still perceived in a negative way in Canada[2332] (and with Canada being pro-creditor)[2333]

2323 Ziegel Canada's Phased-In Bankruptcy Law Reform 1996 *Bankruptcy LJ* 70.
2324 See also in this regard Ziegel *Comparative Consumer Insolvency Regimes* 3.
2325 See also in this regard Ziegel *Comparative Consumer Insolvency Regimes* 3.
2326 *Insolvency Laws of Canada* 132.
2327 *The 2015-2016 Annotated Bankruptcy and Insolvency Act* 3.
2328 1898 as amended.
2329 *Re A & F Baillargeon Inc*. (1993) 27 CBR (3rd) 36 (Que SC). See also Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 3.
2330 Natural or artificial person.
2331 Grundy *Insolvency Laws of Canada* 9. See also Ziegel *Comparative Consumer Insolvency Regimes* 4 fn 1.
2332 As is the case in most jurisdictions.
2333 The protection afforded to creditors has concomitant duties for creditors of the bankrupt estate though. In *Re White* 2010 CanLII 1891 (ON SC), the court para 18 held that creditors are expected to "shoulder some financial costs in maintaining the integrity of the bankruptcy process for themselves and others to follow, as those before have no doubt done over the years". According to the court," this was an acceptable risk and burden for creditors who choose the bankruptcy procedure". See also Ziegel Canadian "Perspectives on the Challenges of Consumer Bankruptcies" 1997 *Journal Consumer Policy* 20 2 208.

that perception is gradually losing momentum. The latter view is strengthened by one of the objectives of this statute, being the rehabilitation of the bankrupt.[2334]

The Superior Courts of Provinces[2335] exercise jurisdiction over bankruptcy matters and when exercising bankruptcy jurisdiction,[2336] this court is described as the Bankruptcy Court.[2337] Grundy[2338] and Houlden *et al* [2339] point out that although the latter court is so described, this is for convenience sake; because formally there are no such courts in Canada. As in South Africa, a judge[2340] or Registrar preside over (judicially related)[2341] bankruptcy and insolvency matters. Ziegel concurs with Grundy and Houlden *et al* and highlights the fact that, unlike other federal states such as the United States of America, there is no separate system of bankruptcy courts in Canada.[2342]

Ziegel further points out that insolvency in Canada is creditor oriented and that the role of the judiciary is limited. As Houlden *et al* [2343] put it, the *BIA* is a "commercial statute whose administration is largely in the hands of businessmen". It is submitted that this position may be due to the fact that an individual's bankruptcy is usually not complex and even complex corporate bankruptcies are privately administered by experienced trustees and liquidators (from the application stage up to finality) under the supervision of experienced Superintendents of Bankruptcy.[2344] Hence less judicial intervention is required. Relying on the matter of *Royal Bank v Sefel*

2334 See the preamble to the *BIA*. See also *Re Zapisocki* 2002 ABQB 8 (CanLII) 32 CBR (4th) 137 para 14; *In the Matter of the Bankruptcy of Grandoni* 2007 BCSC 233 (CanLII) para 9.

2335 Same as in South Africa, with the High Court having jurisdiction over these matters.

2336 At law and in equity, s 183 of the *BIA*.

2337 Grundy *Insolvency Laws of Canada* 132.

2338 *Insolvency Laws of Canada* 132. This also the position in the English jurisdiction.

2339 The 2015-2016 Annotated Bankruptcy and Insolvency Act 410.

2340 Registrars, clerks and officers in bankruptcy may be appointed by the Chief Justice (or Commissioner) of the court to assist (as specified and with limited jurisdiction) with the transaction or disposal of matters in relation to bankruptcy (184 of the *Bankruptcy and Insolvency Act* Can. See also s 192 of the same act for powers of the registrars). This position differs from that applicable in South Africa where the office of the Master (and officers thereat) is empowered to assist with the supervision and administration of insolvency matters (excluding of course judicially related ones, which are dealt with by the High Court judges).

2341 And only a judge can commit a recalcitrant witness, for example for a contempt of court charge (s 192(2) of the *BIA*).

2342 Ziegel *Comparative Consumer Insolvency Regimes* 19. The position is the same in South Africa.

2343 Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 1.

2344 See *Roy v Poitras* 2006 FC 1386 (CanLII) at para 19-20; 36 CBR (5th) 1; 306 FTR 83.

Geophysical Ltd,[2345] Houlden *et al* brings to the fore the fact that creditors' benefits is at the core of this legislation. Therefore unnecessary and expensive litigation and court proceedings are not advocated.[2346]

The protection afforded to creditors of a bankrupt estate has concomitant duties though. In *Re White*,[2347] the court held that creditors are expected to "shoulder some financial costs in maintaining the integrity of the bankruptcy process for themselves and others to follow, as those before have no doubt done over the years". According to the court, "this was an acceptable risk and burden for creditors who choose" the bankruptcy procedure.

Section 187(4) provides for periodical Bankruptcy Court sittings for the transaction of the business of the Bankruptcy Court at such times, places and days as the court may direct.[2348] In practice the Bankruptcy Court is presided over by a Registrar to deal with less complex bankruptcy matters which sits on a weekly basis, while complex insolvency matters are dealt with by judges in commercial chambers.

The Superintendent[2349] of Bankruptcy attached to a Superior Court supervises the administration of bankrupt estates.[2350] The Superintendent is involved in the development of insolvency processes and is well versed in dealing with the administration of bankruptcy matters.[2351] The active involvement of this official is also evidenced by his establishment of a Personal Insolvency Task Force whose objectives include the development of insolvency processes on *par* with international

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2345 (1989) 76 CBR (NS) 29 (Alta QB).

2346 Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 1.

2347 2010 CanLII 1891 (ON SC) para 18.

2348 *Re Tridont Health Care Inc* (1991) 4 CBR (3d) 290 (Ont Bktcy). See also Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 418.

2349 Whose functions are similar to those of the Master of the High Court in South Africa. This officer is a federal government employee.

2350 As in the context of insolvency in South Africa, where the Master of the High Court is empowered to interrogate the bankrupt and "any person of interest", so is the Superintendent of Bankruptcy in Canada. Like the former, the latter is also tasked with the keeping of records of the interrogation proceedings. S 10 of the *BIA* and s 11.1 of the *BIA*. See also *Re Mancini* (1987) 63 CBR (NS) 249 (Ont SC).

2351 See in this regard Ziegel *Comparative Consumer Insolvency Regimes* 16.

best practices which aim to address the "perceived weaknesses of Canada's insolvency process".[2352] The role played by this official in insolvency related matters and the eagerness to keep abreast of global developments through research initiatives[2353] in insolvency processes is commendable. South Africa could do well in adopting a position which establishes an office of the Superintendent (also similar to the Insolvency Service in the case of the English jurisdiction) whose undivided attention would be to insolvency related matters and the development of legislation in this field of law in line with international best practices. The said office would be an alternative to a fully-fledged insolvency court system which may be too cumbersome to establish for South Africa as a developing state. This development could also relieve the office of the Master of the High Court which is already burdened by a host of almost unrelated functions.[2354]

To assist with the administration of bankrupt estates, an Official Receiver,[2355] considered an officer of the court,[2356] is appointed[2357] by the Governor in Council[2358] for every bankrupt estate as soon as the bankruptcy order is made by the court. The Official Receiver interviews an insolvent prior to the first meeting of creditors with regards to the insolvent's conduct and causes of bankruptcy. This officer who also presides over the first meeting of creditors,[2359] occupies the same role as that occupied by an officer as appointed by the Master of the High Court in the context of insolvency in South Africa. In the Canadian jurisdiction, an Official Receiver report to the Superintendent of Bankruptcy and trustees reports to the Official Receiver. In practice the latter official's duties are to supervise trustees. This is a positive trait in the insolvency system of this jurisdiction. To ensure that trustees are always

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2352 Ziegel *Comparative Consumer Insolvency Regimes* 16.
2353 See Sarra Economic Rehabilitation: Understanding the Growth in Consumer Proposals 2008-9 Banking and Finance Review 2.
2354 See ch 6 above on this aspect.
2355 An interim Official Receiver may be appointed to safeguard the debtor's assets, where upon application by the debtor's creditors a court concludes that the bankrupt estate may dissipate.
2356 Section 12(2) of the *BIA*.
2357 The same way as the Superintendent in Bankruptcy is appointed.
2358 Section 12(2) *BIA*.
2359 Section 105(1) of the *BIA*.

objective in their conduct as regards the administration of bankrupt estates, checks and balances need to be in place.

As is the case in South Africa, trustees[2360] (in respect of individual insolvents) and liquidators (in respect of corporate entities) are private practitioners in Canada[2361] and are respectively responsible for the administration of bankrupt estates (at a fee)[2362] from application to rehabilitation (in the case of an individual), under the supervision of the Superintendent of Bankruptcy.

The 1985 *BIA*, (as amended) regulates the insolvency of both individuals and corporate entities, and applies in all the provinces and territories in this jurisdiction.[2363] Unlike the *EIA*, the Canadian statute does not make provision for private and public examination of insolvents and other persons of interest. Instead, the latter statute provides for an outside investigation and public examination. Further, unlike its English counterpart, the Canadian jurisdiction advocates for open court proceedings over closed door court policy.[2364] The *BIA* distinguishes between the examination of the bankrupt which is mostly done at the Official Receiver's offices or at the trustee's offices, and bankruptcy/insolvency proceedings which take place in court. It is, however, rare that a bankrupt will be examined in court.[2365]

In contrast to the England jurisdiction, not much literature was found in this jurisdiction regarding its preference between outside investigation and public insolvency interrogation proceedings. In the absence of same, one has to rely on the provisions of the bankruptcy legislation, case law and the Canadian *Code of Civil Procedure*.[2366] Section 294 of the latter statute advocates open court

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2360 Whose appointment or recommendation for appointment is the function of the Superintendent.
2361 Ziegel *Comparative Consumer Insolvency Regimes* 17.
2362 Trustees are usually chartered accountants. See Ziegel *Comparative Consumer Insolvency* Regimes 18.
2363 See also Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 1.
2364 See *Globe-X Management Ltd* (*Proposition de*) 2006 QCCA 290 (CanLII) para 45; 266 DLR (4th) 493; [2006] RJQ 724; *Interconinvest (*Canada) *inc* (*Proposition de*) 2006 QCCS 1848 (CanLII).
2365 As evidenced by authorities referred to in this research.
2366 1965 C-25.

proceedings.[2367] In *Nova Scotia (AG) v MacIntyre* [2368] the court pronounced that the principle of openness as opposed to secrecy is favoured in that jurisdiction. This was said to be crucial for the purposes of the restoration and maintenance of public confidence in the court system and the administration of justice under the *Constitution* of that jurisdiction. To emphasise the importance of open court principle, the court in *Ascentia Capital Inc* (*Syndic de*)[2369] held that, "(as) a general rule, the judicial system in Canada abhors secrecy with respect to acts done pursuant to process issued by a court and strives for transparency regarding matters before a court". According to the court, this principle was to be upheld even if that meant that the latter principle flew in the face of a principle applicable in a foreign jurisdiction which the Canadian courts owed comity to.[2370] Section 187(3) of the *BIA* empowers the judge to hold insolvency proceedings in open court or in chambers. It is common cause that when the court sits in chambers, the public is excluded. This is however, not always the case in this jurisdiction. Houlden *et al* convey that it is common for a judge or registrar in chambers to permit public access.[2371]

7.3 The BIA Canada 1985

One of this statute's objectives is to give debtors a fresh start by providing for economic rehabilitation through compulsory counseling[2372] in the case of consumer debtors.[2373] In the matter of *Re Hardtke*,[2374] the court, citing *Re Posner*,[2375] reiterated the objectives behind the *BIA* as being to "enable an honest debtor, who had been unfortunate in business, to secure a discharge so he might make a new

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2367 See also *Global- X Management Ltd* (*Proposition de*) 2006 QCCA 290 (CanLII); 266 DLR (4th) 493; [2006] RJQ 724 paras 45-47.

2368 1982 (CanLII) 14 (SCC), [1982] 1 SCR 175 as quoted in *Ascensia Capital Inc*. (Syndic de), 2006 QCCS 1979 (CanLII) para 52. See also *Norbourg Gestion d'actifs Perfolio Inc* (*Syndic de*) 2006 QCCS 1976 (CanLII) para 49 and the case quoted thereat.

2369 2006 QCCS 1979 (CanLII) para 51 cited *Globe- X Management Ltd* (*Proposition de)* 2006 QCCA 290 (CanLII).

2370 Paragraph 51. See also *Norbourg Gestion d'actifs Perfolio Inc*. (Syndic de) 2006 QCCS 1976 (CanLII) para 51 and the case quoted thereat.

2371 *The 2015-2016 Annotated Bankruptcy and Insolvency Act* 418.

2372 Section 157 *BIA*.

2373 Preamble of the statute.

2374 2012 ONSC 4662 (CanLII).

2375 (1960) 67 Man R 288 (QB).

start".[2376] This legislative good gesture should, however, be exercised to preserve the integrity of the court and the insolvency system.[2377]

The *BIA* provides for a simplistic and precise process for effective information gathering. Like in many constitutional state jurisdictions, the statute is subject to the *Constitution* [2378] of that country and further supplemented by the provisions of the Canadian *Code of Civil Procedure* [2379] and *Evidence Act*.[2380] Like its English counterpart, the *BIA* (as opposed to South Africa, Namibia and Botswana) regulates the insolvency of both natural and juristic persons. Through this simplified statute, Canada has managed to avoid duplications as found in the insolvency statutes of South Africa, Namibia and Botswana. On the other hand, the English statute has endeavoured to regulate the insolvency of individuals and corporations but with different provisions which are often identical, this is undesirable as it may lead to interpretation dilemmas.

Proceedings regarding the insolvency of individuals and those regarding juristic persons will be dealt with next. As pointed out above, public examination of bankrupts is the norm in this jurisdiction and private examinations are a rarity. The reason might be that trustees are appointed from the ranks of experienced accountants. This position leaves no room for incompetent trustees and thus the necessity to appoint commissions of enquiries as is often the case in South Africa in relation to companies in liquidation.[2381] The so-called outside investigations[2382] in relation to the affairs of a bankrupt will be tackled first and followed by public

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2376 *Re Newsome* (1927) 32 OWN 292 8 CBR 279, [1927] 3 DLR 828 3 Can. Abr. 1332; *Industrial Acceptance Corporation Ltd C Lalonde* 1952 CanLII 2 (SCC) [1952] 2 RCS 109.

2377 *Re Hardtke* 2012 ONSC 4662 (CanlI) para 111, quoting *Re Johnson* (1987) 62 CBR (NS) 108 (Ont SC).

2378 Section 91(21) of the *Constitutional Act*, 1867, Canada. See also Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 4.

2379 1965 C-25.

2380 RSC 1985 c C-25. See also Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 4.

2381 Section 418 of South Africa's 1973 *Companies Act*.

2382 Which, from a distance, appear to be similar to private enquiries in the context of insolvency investigations in South Africa, Botswana and Namibia.

examination of the bankrupt and other persons of interest (in case of both natural and juristic).[2383]

7.4 Outside investigations

(i) Section 6 provisions

Provision is made in section 6[2384] of the *BIA* for the investigation or enquiry (by a person appointed by the Superintendent outside of the office of the Superintendent of Bankruptcy) in connection with the affairs of the insolvent.[2385] These outside investigators are often accountants or auditors. Section 6 further empowers the Superintendent to examine the bank account of the trustee wherein the estate funds are held. The latter section is aimed specifically at investigating the trustee's administration of the insolvent estate funds, as opposed to the bankrupt's conduct. There appears to be similarities between section 6 of the *BIA* and section 152 of South Africa's *Insolvency Act* as far as investigating the trustee's conduct is concerned. The Superintendent may also examine records and documents of the trustee or "any other person". The examination is intended to trace and recover the insolvent estate assets, especially where impropriety is suspected. It is noted that an application to conduct these investigations is made *ex parte*.[2386] The provisions of this section are a clear indication that the statute is of general application and it would almost be impossible to challenge the decision of the Superintendent to interrogate. No case law in this jurisdiction was found regarding the application of this section in practice though. Section 6 investigations are indeed very rare in Canada.

(ii) Section 10 provisions

Section 10(1) - (4) provides for the investigations or enquiries by the Superintendent. This investigation is prompted by the Official Receiver, trustee or

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[2383] In the context of bankruptcy and for the purposes of examination of a juristic person, the concept "bankrupt" refers to officers of a company.
[2384] Sub-sections 1 - 4.
[2385] Section 6 of the *BIA*.
[2386] Same as in South Africa, Namibia and Botswana for the purposes of private enquiries.

other person (having an interest in the matter) submitting information to the Superintendent,[2387] alleging the commission of an offence in relation to the *BIA* or any legislation. The said offences may involve the conduct, dealings, and transactions affecting the bankrupt estate assets, causes of bankruptcy and the disposition of the property of the debtor. It is noted that the examination is conducted (by the Superintendent) under oath before the Registrar of the court (or person authorised). Typically, the witnesses examined are not the bankrupt or his spouse, but any person reasonably believed to have the required information. Usually this is a public investigation before a Registrar, which means in practice an examination before a Court Reporter (as authorised representative of the Registrar).

Although differently worded, section 10 is almost similar to section 152 of South Africa's *Insolvency Act* which empowers the Master of the High Court to privately enquire into the affairs of the insolvent estate upon an *ex parte* application by an affected person. The difference being that section 10 is usually a public investigation.

Sections 6 and 10[2388] do provide for privilege and sealing of a transcript of the proceedings in extraordinary circumstances. All transcripts are generally public. The privilege as provided by the latter two sections extends to both criminal[2389] and civil proceedings (outside of the insolvency processes).[2390] This position differs from that of South Africa where privileged information is admissible indiscriminately in civil proceedings against the deponent.[2391]

Public examinations (for the purposes of collating information in the administration of insolvent estates) seem to be the norm and a preferred process of obtaining relevant information in this jurisdiction. The procedure thereat will be discussed below.

[2387] Who then applies for a court order for a subpoena to have the examination conducted.
[2388] These two sections must be read with s 5(2) of the Canadian *Evidence Act*.
[2389] Other than perjury related offences.
[2390] *Norbourg Gestion d'actifs Perfolio* inc (Syndic de) 2006 QCCS 1976 (CanLII).
[2391] Where criminal proceedings are pending against an examinee, *in camera* proceedings may be called. See ch 2 and 3 above.

7.5 Compulsory attendance of creditors' meetings

This duty is regulated by sections 158[2392] and 159[2393] of the *BIA*. The two sections are almost similar to section 64 of South Africa's *Insolvency Act* and section 414 of the *Companies Act* respectively. The bankruptcy statute provides for the compulsory attendance by the bankrupt at the first and subsequent meetings of creditors in his bankrupt estate. In practice the bankrupt and other witnesses appear at trustee's office and the proceedings are presided over by the trustee.[2394] This position is different from South Africa's where the first meeting of creditors is presided over by the Master. In Canada the bankrupt is compelled to attend the meeting and answer questions posed by the creditors and trustee. These are different types of examinations than that provided for by section 161 of the same statute. The purpose of the said attendance is providing information[2395] (regarding the business or property of the insolvent) and specified documents.[2396] The insolvent is also required to co-operate with the trustee of his bankrupt estate (if same is already appointed) and provide information required by the latter for the purposes of the performance of his duties.

The examination is a public one. Sections 158 and 159 differ from its South African equivalents in the sense that the two do not provide committal to prison as a sanction for failure to attend creditors meetings. Sanctions are, however, provided for by section 198(a) of the same statute which renders certain conduct as bankruptcy offences. This provision is commendable as it takes away the need by a non-judicial officer to order the detention of a recalcitrant witness.

[2392] In case of the bankruptcy of an individual.
[2393] In case of the bankruptcy of a juristic person.
[2394] See Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 607.
[2395] Under oath. The assumption is that by implication, affirmation is also provided for.
[2396] Section 158(*b*).

7.6 Public examination as a norm

7.6.1 Examination of bankrupt by Official Receiver: Section 161

Section 161 of the *BIA* makes provision for the examination (under oath) of the bankrupt by the Official Receiver. Like section 65 of South Africa's *Insolvency Act* and section 415 of South Africa's *Companies Act,* the examination in terms of this section covers a wide variety of questions, including amongst others, **questions on the causes of bankruptcy**. The examination may take place at **any time** before the bankrupt's rehabilitation from bankruptcy.[2397] Unlike section 65, section 161 expressly pronounces on the importance of questioning the bankrupt about the causes of his bankruptcy.[2398] As mentioned earlier, failure to examine all aspects regarding the causes of the insolvent's insolvency will deem the examination a fruitless exercise, increasing the likelihood of recurrent cases of bankruptcy. As Berry and MacGregor put it, "if no attempts are made to determine the monetary and non-monetary reasons for bankruptcy or its recurrence, debtors are more likely to choose bankruptcy, or remain in the cycle of bankruptcy".[2399]

Same as provided for by South Africa's *Insolvency Act*, section 161(2) makes provision for the Official Receiver to seal the record[2400] of the examination to the Superintendent and trustee. It must be noted, however, that the section does not provide for the use of the information so recorded and filed, in subsequent proceedings.[2401]

The record of the examination may be made available to a creditor who wishes to obtain it.[2402] In the case of South Africa, one is entitled to a copy of his own examination. With regard to the position in Canada, the assumption is that by

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[2397] Approximately 9, 21 and 24 months (respectively) after the liquidation of his estate, s 168.1(1)(*i*), (ii) and (*b*)(i) of the *BIA*.

[2398] As with s 290 of the English *Insolvency Act*. For comments on the importance of this aspect, see ch 6 above.

[2399] "Counseling Consumer Debtors under Canada's Bankruptcy and Insolvency Act" 1999 *Osgoode Hall LJ* 1.

[2400] As submitted to him by the Official Receiver in bankruptcy.

[2401] See also Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 359.

[2402] Section 161(2.1) (b) of the *BIA*.

requesting such a record, the creditor may want to investigate the prospects of recovery of estate assets and reasons behind the debtor's bankruptcy. Since section 161 is silent on the use of the said information in subsequent civil proceedings, one would assume that such would only be admissible in civil proceedings within the insolvency processes.

Section 161 does not provide for sanctions in cases of failure, without reasonable cause, by the bankrupt to attend his examination in terms of the provisions of these sections. However, provision is made for the recording and reporting of failure by the bankrupt to attend the meeting of creditors.[2403] With this reporting, it is assumed that the legislature intended to grant an opportunity to the creditors to decide on a path of action against the insolvent if they so wish. Although no indication is provided as to what the creditors may do with such reporting, one can only assume that it is probably to allow them to call for the rigorous examination of the bankrupt. There is another viewpoint though - attendance may be compelled by section 164(3) read with section 162(3).[2404]

7.6.2 Enquiry by Official Receiver: Section 162

As opposed to section 161 above, section 162 provides for the investigation, not an examination into the conduct of the bankrupt. This investigation is conducted by the Official Receiver as *per* the Superintendent's recommendations into the bankrupt's conduct, the causes of his bankruptcy and the disposition of his property. The Official Receiver is required to report on his findings to the Superintendent, the trustee and the court. The bankrupt is compelled to comply with the investigation by section 164. This section may be equated to section 152 of South Africa's *Insolvency Act* by reason of investigation at any time after the sequestration of the estate of a debtor and before his rehabilitation.

[2403] Section 161(4).
[2404] See also s 166.

7.6.3 Examination of the bankrupt and others by the trustee

This is the most common examination in bankruptcy proceedings. The Trustee typically retains counsel to examine the bankrupt and other witnesses[2405] about the affairs and property of the bankrupt.[2406] This aspect is regulated by section 163 of the *BIA*. The section empowers the trustee to examine the bankrupt and other persons of interest upon request by a majority of creditors. Again these "other persons" are those individuals who would be in a position to provide information regarding the affairs of the bankrupt. The examination may proceed without a court order and take place before a Court Reporter as authorised representative of the Registrar. It is submitted that this would prevent unnecessary delays, especially where information is urgently required. Same as provided for by section 65 of South Africa *Insolvency Act* and section 415 of South Africa's *Companies Act*, the scope of section 163 is wide[2407] and covers amongst other things, the administration of the bankrupt's estate by the trustee, the conduct of the bankrupt, and causes of his insolvency.

Houlden *et al* [2408] highlight the fact that the interrogation is investigatory in nature and thus not amounting to litigation.[2409] This position is the same as in South Africa in terms of section 152 of the *Insolvency Act* where, in a number of court decisions, the interrogation proceedings have been referred to as an information gathering process.[2410] The implication of this position is that examinees' human rights are in no way violated by the requirements to appear and answer questions in relation to their insolvent estates.[2411] As Houlden *et al*[2412] put it, "an examination under section

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2405 An agent or a mandatory, or a clerk, a servant, an officer, a director or an employee of the bankrupt.

2406 That is his dealings or property and the production of books, documents, correspondence or papers or power relating in all or in part to the bankrupt or the bankrupt's dealing or property, s 163(1).

2407 *Re DW McIntosh Ltd* (1993) 21 CBR 206 (Ont SC). See also Houlden *et al The 2015- 2016 Annotated Bankruptcy and Insolvency Act* 802.

2408 *The 2016-2016 Annotated Bankruptcy and Insolvency Act* 802.

2409 Relying on *Re Good Jr* (1979), 17 BCLR 244 33 CBR (NS) 101 (*sub nom Re Goode and Tom Goode and Son Invt* Ltd) (SC).

2410 See in general ch 2 and 3 above.

2411 See also s 152 of South Africa's *Insolvency Act* and *Strauss v The Master of the High Court of SA* 2OO1 SA 649 (T).

2412 *The 2016-2016 Annotated Bankruptcy and Insolvency Act* 802.

163(1) does not violate the rights conferred by section 8 of the Canadian *Charter of Rights and Freedoms*".[2413] This is the position since an examinee may invoke the provisions of section 5(2) of the *Evidence Act* Canada[2414] to protect his (allegedly infringed) rights.

Same as provided for by sections 161 and 162 above, the record of the interrogation proceedings in terms of section 163[2415] is filed with the Registrar in court and may be read in any proceedings (under the *BIA*) before the court where an examinee is interrogated. At first glance this provision appears controversial since no express qualification[2416] is made for the admissibility of incriminatory information in subsequent criminal proceedings (emanating from bankruptcy) against an examinee. However, on closer inspection of the section, it becomes clear that the admissibility of the records of the interrogation proceedings as evidence against an examinee could only come to bear in bankruptcy related proceedings.[2417] The assumption that incriminatory statements could only be used in bankruptcy civil proceedings is further drawn from the provisions of section 38 of the *Charter*. The latter section prohibits the use of evidence (in subsequent criminal proceedings) obtained at a tribunal against a person who gave same. As is the case in South Africa, Namibia and the English jurisdictions this prohibition does not extend to perjury related charges.

2413 Relying on *Re Leard (*1993) 23 CBR (3rd) 233 (Ont Gen Div).

2414 RSC 1985 c. C-5. The section reads as follows: "Where with respect to any question a witness objects to answer on the ground that his answer may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or any person, and if but for this *Act*, or the *Act* of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this *Act* or the provincial *Act* compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal proceedings against him thereafter taking place other than a prosecution for perjury in the giving of the evidence or for the giving of contradictory evidence".

2415 Section 163 (3).

2416 Same as provided for by s 433 of the English *Insolvency Act*.

2417 See s 5 of Canada *Evidence Act* and *Charter of Rights*; *Rusin v Selmon and Burdett* (1980) 35 CBR (NS) 144 (CA).

7.6.4 Examination by trustee regarding books and records

This aspect is regulated by section 164 of the *BIA.* This is an examination by the trustee aimed at securing all the books and records relevant to the bankruptcy proceedings. Persons examined would include any person suspected to have in his possession or control any property of the bankrupt or has knowledge about his dealings or indebted to the bankrupt. The examination takes place before a court reporter. This section appears to have the same effect as section 64 of South Africa's *Insolvency Act* and section 414 of South Africa's *Companies Act*.

In *Ascentia Capital Inc* (*Syndic de*)[2418] the court was faced with the question of whether or not information about the affairs, property, or dealings of the bankrupt as held by "other persons" could be obtained by the trustee of the said bankrupt estate. A further question the court had to answer[2419] was whether, if obtained, other persons could be permitted access to such information for use in proceedings outside of the insolvency proceedings.[2420]

Citing the matter of *Taylor Ventures Ltd*,[2421] where the court brought forth the fact that the trustee is empowered by sections 163 and 164 of the *BIA* to peruse the books and records of the insolvent estate to assist him in performing his duties and not to assist third parties[2422] to access same for their own purpose.[2423] The court highlighted[2424] (confidentiality) restrictions on the use of information obtained as a result of sections 163 and 164 proceedings. Further highlighted by the court[2425] was the scope of sections 163 and 164 as being broad enough to include perusal of books and records[2426] of "other persons"[2427] if such were partially or completely

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2418 2006 QCCS 1979 (CanLII).
2419 Paragraph 19-21.
2420 It is submitted that if the proceedings, although not insolvency related but associated with the conduct of the insolvent debtor in administering his finances, such evidence should be made available to third parties affected by his insolvency. This appears to be an unavoidable consequence the insolvent would have to face.
2421 (1999) BCJ No. 29 31.
2422 In this case inspectors acting on behalf of the creditors of the bankrupt estate.
2423 For example, actions against third parties who had dealings with the bankrupt.
2424 Paragraph 29.
2425 Paragraph 21.
2426 To the extent that the said information was not "privileged information".
2427 "Other persons" being accounting or auditor's firms previously mandated by the bankrupt in the

related to the affairs of the bankrupt and for the benefit of the creditors. This view is correct. The insolvent may not have conducted his business affairs in isolation. There will always be other people involved, for example, his accountants, auditors, banks, financial advisors, legal advisors, business associates and so forth. It is submitted that these people may assist the administration of the insolvent estate by bringing forward their books and documents relating to the insolvent's business; receipts of payments from the insolvent and so forth is all relevant information.

In further deliberation on the issue of confidentiality (on information obtained at insolvency interrogation), the court cited the case of *Re Hickman Equipment* (*1985*) *Ltd*.[2428] In that case an applicant who sought to prevent the use of information was facing imminent legal action by the trustee. The former intended to prevent use thereof by third parties (his creditors) in subsequent proceedings not related to the administration of his bankrupt estate. The court was of the view that permitting creditors same would be against the objectives of the *BIA* and access was thus denied.[2429] In *GMAC Commercial Credit Corp Canada v TCT Logistics Inc* [2430] the auditors of the bankrupt were obliged by the trustee to disclose documents relating to the affairs of the bankrupt. The trustee required the documents in order to institute actions to benefit the estate.[2431] Subsequent to the trustee's request, the auditors sought to prevent the production of the requested documents. The court held[2432] that while the trustee was permitted access, he was not permitted to share such information with the creditors to assist their separate claims against the estate. Allowing that would, in the words of the court, permit creditors to 'piggyback' upon the trustee's actions in order to pursue claims unrelated to insolvency proceedings (which might be in competition with the interests of the estate).[2433] The court

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conduct of its business.

2428 Quicklaw (2003) 2003 NLSCTD 108 (CanLII), NBJ No 181 2003 NLSCTD 108 as quoted in *Ascentia Capital Inc* (*Syndic de*) 2006 QCCS 1979 (CanLII) para 30.

2429 Paragraph 14.

2430 Quicklaw (2002) 2002 CanLII 35019 (ON SC) OJ No 4210 (Ont SCJ) Commercial List 108 as quoted in *Ascentia Capital Inc* (*Syndic de*) 2006 QCCS 1979 (CanLII) para 30.

2431 Paragraph 14.

2432 Paragraph 18.

2433 Paragraph 18.

opined[2434] that the trustees and inspectors (on behalf of the creditors) owed good faith to the general body of creditors. The court further held[2435] that allowing the use of such information as requested would undermine the public confidence in the proper administration of bankruptcy and insolvency legislation. Based on the above reasoning, the court restricted the use of the said information to the benefit of the bankrupt estate.[2436] This provision is fair to the general body of creditors. It is submitted that the inexpensive insolvency proceedings are aimed at compensating all the creditors of the insolvent estate from the little that is left of the estate's property. Permitting the use of information obtained thereat to institute actions which have the potential of further depleting the estate's funds appears to be unfair to the other creditors who are not intending to be parties to such other proceedings.

Despite its views on the use of the information obtained at bankruptcy interrogations in subsequent proceedings, the court went on to explain that the admissibility or not thereof was up to the court hearing the (subsequent) matter.[2437] As is the case in South Africa, such information becomes public information as soon as it is filed in court.[2438]

Regarding the recorded and filed information, the court highlighted[2439] that such are public documents and, in the absence of statutory restrictions on access to them or prohibition of their use by the court, the public have access to them. The implication was that even the media can publish or debate on them[2440] unless there is legislative restriction or order of court placing them under seal.

7.6.5 Compelled production of books and property of the bankrupt

This aspect is regulated by section 164 of the *BIA*. The latter is similar to section 64(3) of South Africa's *Insolvency Act* and section 414(2)(*b*) of South Africa's

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2434 Paragraph 18.
2435 Paragraph 22.
2436 Paragraph 23.
2437 *Ascentia Capital Inc* (*Syndic de*) 2006 QCCS 1979 (CanLII) para 42.
2438 *Royal Bank of Canada v Bacon* 13 CBR (4th) 250; Carswell 394.
2439 *Ascentia Capital Inc* (*Syndic de*) 2006 QCCS 1979 (CanLII) para 49.
2440 Paragraph 49.

Companies Act, which empowers the trustee (or liquidator) to compel any person suspected or known to be in possession of the bankrupt's property, books, or indebted to the bankrupt estate to deliver same to the trustee. The said person may also be compelled to attend and testify at an examination as if he were a bankrupt.[2441] Failure to comply with the trustee's requests may result in that person being ordered to appear before the Registrar of the court for examination. This examination may take place without the order of the court.[2442]

In *Bawolin v Wood-Layton* [2443] the court had an opportunity to describe the broad scope of section 164. In the court's view,[2444] the scope of the section is sufficient to permit the trustee to rely on his suspicions and believes that a summoned person has in their possession documents relating to the property, affairs, and/or the bankrupt's dealings.[2445] This means that the trustee does not have to establish without doubt that the required documents in fact relate to the bankrupt's affairs. However, his suspicions or beliefs should have grounds.[2446] The court does not make mention of reasonable grounds, but emphasises that the trustee's "suspicions and beliefs must have some basis".[2447] This requirement safeguards against the abuse of the section to achieve objectives not related to the affairs of the bankrupt and his affairs.

The plaintiff in the case under discussion was married to the bankrupt. By virtue of this close relationship, collusion to defraud or frustrate creditors' claims could not be ruled out completely.[2448] The court also highlighted the fact that the bankrupt's management of his financial affairs, the manner in which he handled the plaintiff's financial affairs and those of his clients and the manner in which the plaintiff managed her own financial affairs, raised suspicions.[2449] These circumstances were

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[2441] Section 164(3).
[2442] Section 164(2).
[2443] 2005 SKQB 365 (CanLII); 15 CBR (5th) 172; 273 Sask R 241.
[2444] Paragraph 13.
[2445] Paragraph 13-17.
[2446] Paragraph 14.
[2447] Paragraph 14.
[2448] Paragraph 11.
[2449] Paragraph 18.

sufficient grounds for the trustee to compel the plaintiff to produce books and documents as *per* the summons.[2450]

The court concluded that the trustee was entitled to demand the documents as requested in the summons[2451] in order to complete his investigations.[2452]This was the position regardless of the fact that this access to documents amounted to discovery before an action for recovery of funds, in which the trustee may have wished to pursue against the plaintiff.[2453] This is correct. What the trustee is concerned with at this stage is the source of these funds; if the funds belonged to the bankrupt, they must be recovered and restored to the bankrupt estate for the benefit of his creditors. This position is the same as in South Africa. The insolvent's banker or the solvent spouse's banker may be compelled to make available financial transactions relating to the insolvent or solvent spouse made within twelve months prior to insolvency.[2454]

Like section 65 of South Africa's *Insolvency Act* and section 415 of the *Companies Act* in the context of insolvency of individuals and liquidation of companies in South Africa, the purpose of section 164 enquiries is the recovery of the bankrupt estate's assets for the benefit of the creditors. In the search for the whereabouts of these assets, leads might be discovered to base legal claims against shrewd persons in relation to the estate.[2455] As stated above, the latter is however, not at the core of this section.

In *Norbourg Gestion d'actifs Perfolio Inc* (*Syndic de*)[2456] the court, quoting the matter of *Re Sun Squeeze Juices Inc*,[2457] deliberated on the issue of the trustee's right to access documents in terms of section 164 of the *BIA.* This right was said to extend to documents or records at the hands of "other persons" as long as those

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2450 Paragraph 18.
2451 Paragraph 30.
2452 Paragraph 41.
2453 Paragraph 24.
2454 See ch 2 above.
2455 *Bawolin v Wood-Layton* 2005 SKQB 365 (CanLII) para 26.
2456 2006 QCCS 1976 (CanLII) at para 21.
2457 (1994) 1994 CanLII 7467 (ON SC) 27 CBR (3d) 98 (Ont Ct of Justice-Gen Div) para 29.

related to the affairs of the bankrupt.[2458] In that case, "other persons" was an accounting firm. The firm was engaged to do accounting work for the bankrupt prior to its insolvency. According to the court, section 164 was "wide enough to include a right of inspection of documents even though they were the property of another person. Naturally, the production of such must be of documents relating in whole or in part to the bankrupt, his dealings or property".[2459] It is clear that the trustee is appointed for the purposes of investigating the affairs of an insolvent and that may include access to books and documents. The activities of the trustee must be limited to the legitimate interests of the general body of creditors and of the affairs of the bankrupt. To my mind this limitation is fair to curb abuse of the access provision.

7.6.6 Penalty for recalcitrant examinee

This aspect is governed by section 166 of the *BIA*. Like section 66 of South Africa's *Insolvency Act*, the former provides for the apprehension of the bankrupt who fails without reasonable excuse to appear for examination as required by the Official Receiver. In the context of South Africa, failure to answer questions put will result in the engagement of the Director of Public Prosecution in the matter.[2460] Although section 166 is silent on the consequences of failure by an examinee to answer questions at interrogations, this aspect is covered by section 198(1) (b) of the same statute.[2461] Section 198(1) (b) makes it a criminal offence not to answer questions posed at the examination. It appears that the apprehension of the defaulter in terms of section 166 as *per* the court order is aimed at bringing him to the examination and not as a penalty.

7.6.7 Compelled testimony

Section 167 provides that any person so called to provide information at the interrogation is compelled to answer all questions posed regarding the business or

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[2458] Paragraph 30.
[2459] Paragraph 21.
[2460] See ch 2 and 3 above regarding the provisions of s 65 of South Africa's *Insolvency Act* para *2.3*.
[2461] See also s 167 of the *BIA*.

property of the insolvent and the causes of the insolvent's predicament. Although the section is silent on the issue of self-incrimination, the assumption is that even incriminatory questions would have to be answered as long as they relate to the business, property, causes of the insolvent's predicament, and related matters. Despite this compulsion with the potential of revealing an examinee's defence at subsequent criminal proceedings, an examinee's rights seem to be protected by section 23 of the *Charter*. The latter section provides for *in camera* proceedings where the interest of justice or morality calls for same.[2462] That part of the transcript incriminatory to the examinee gets sealed. In addition to the said protection, it appears that an examinee is protected by the fact that information so obtained can be read in proceedings conducted in the Bankruptcy court in terms of the *BIA*, and not in any other proceedings.

Houlden *et al* [2463] points out that the aspect of self-incrimination is regulated by section 5(2) of the Canadian *Evidence Act* [2464] and the *Charter of Rights and Freedoms*.[2465] The averment put forth is that section 5(2) of the first mentioned statute suffices to protect the examinee against self-incrimination and leaves no room to invoke section 2(d) of the Canadian *Bill of Rights*.[2466] In what was said in paragraph *7.6.1* above, this seems to me to be the correct interpretation of the issue.

7.7 Contempt of court

Potential constitutional attacks and human rights issues associated with the apprehension and detention of a recalcitrant examinee (who fails to attend or answer questions at the insolvency enquiry) by a non-judicial officer appear to be sufficiently safeguarded in this jurisdiction. Although a Registrar of the court is empowered to dispose of bankruptcy related matters within his jurisdiction,

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[2462] Same as provided for in s 65(2A) (*a*) of South Africa's *Insolvency Act* and as applicable to s 415 of the 1973 *Companies Act*.
[2463] *The 2015-2016 Annotated Bankruptcy and Insolvency Act* 818.
[2464] RCS 1985 c. C-5.
[2465] *Rusin v Selman and Burdett* (1980) 35 CBR (NS) 141 (CA).
[2466] Relying on *Rusin v Selman and Burdett* (1980) 35 CBR (NS) 141 (CA).

committal of an examinee for contempt of court charges can only be ordered by a judge. The Registrar may, therefore, not commit to prison a recalcitrant witness.[2467] This is the case despite the fact that a Registrar is well acquainted with the law and court procedure. This provision is commendable and highlights this jurisdiction's aims to comply with the principles of justice at all costs. Section 24 of the *Charter* also emphasises caution on incumbents when exercising powers in relation to the deprivation of freedom or rights of persons. Judicial or quasi-judicial officers are obligated to exercise those powers in compliance with the laws and procedures so prescribed.

7.8 The privilege against self-incrimination

This privilege is entrenched in sections 33.1 and 39 of the *Charter* which prohibits compulsion to self-incriminate and the admissibility of evidence against the deponent in criminal proceedings.[2468] In addition to this, the court had in the matter of *Interconinvest* (*Canada*) *inc* (*Proposition de*)[2469] highlighted[2470] the fact that the trial court, in the subsequent criminal or civil proceedings (against an examinee), has discretion as far as the admissibility of information obtained at bankruptcy proceedings is concerned and that it was not for the Bankruptcy court to decide such a matter. As regards the use of the examination transcript in subsequent or pending legal proceedings outside the scope of the bankruptcy proceedings, the court pointed out that the question would be whether or not the use thereof negatively impact on the administration of justice or is unjust to a particular party.[2471] In the court's view, the judge deciding the subsequent matter has

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[2467] Section 192(3).

[2468] See also *R V Ross* (1995) 31 CGR (3d); Ch 6 above for a detailed discussion on the admissibility of incriminatory statements made at the insolvency interrogations in subsequent criminal proceedings against an examinee, specifically in jurisdictions which adopted the *Charter of Human Rights*.

[2469] 2006 QCCS 1848 (CanLII) para 23-28. Although this matter referred to s 52 proposals and not fully fledged bankruptcy proceedings, it was decided within the context of the *BIA* and thus relevant to this research.

[2470] Paragraph 23, citing *Norbourg Gestion d'actifs Perfolio inc* (*Syndic de*) 2006 QCCS 1976. It must be noted that although this case was decided in the context of a proposal by the debtor to its creditors and an examination in terms of s 52 of the *BIA*, the court was of the view that the examination in terms of s 52 is 'subject to the same type of publicity as an examination under s 163 of the *BIA*, which must also be made public'.

[2471] Paragraph 25.

discretion to decide which part of the transcript should or may be used. The court further highlighted[2472] the fact that, if questions unrelated to the affairs of the bankrupt or the administration of his estate were to be posed at the interrogation proceedings, an examinee should object to such and the presiding officer would be required to rule on that objection.

To emphasise the importance of the *BIA* examinations regardless of possible incrimination, the court cited[2473] *Re: Claude Boivini*.[2474] In this case the Court of Appeal authorised an examination[2475] despite the fact that the proposed examinee was being sued by one of the examining creditors. Based on the above reasons, the application to nullify the subpoena and stay the examination was dismissed.

In *R v Morris* [2476] the court had to answer the question whether or not statements made subsequent to a voluntary surrender of the bankrupt estate are admissible against the bankrupt in subsequent criminal proceedings. In that matter the plaintiff sought to prevent the use in criminal proceedings of information she divulged at the bankruptcy examination proceedings. Following her filing of bankruptcy, the plaintiff was interrogated in terms of section 161 of the *BIA*.

Subsequent to the section 161 examination, fraud related criminal charges were laid against the plaintiff. At the criminal trial, the Crown sought to use as part of its case or for cross examination purposes, information obtained at the examination against the plaintiff.[2477] The Crown argued that the onus was on the accused person to prove that the use of the said evidence violated her right as guaranteed by section 13[2478] of the *Charter for Human Rights*.[2479] The latter section provides for the protection of a witness against incriminating himself.

[2472] Paragraph 24.
[2473] Paragraph 26.
[2474] REJB 1997-02614 CAM.
[2475] In terms of s 163(2) of the *BIA*.
[2476] 2012 ONSC 1185 (CanLII).
[2477] Paragraph 6.
[2478] The section's provisions are as follows: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence".
[2479] Paragraph 7.

The basis of the Crown's argument[2480] was that the plaintiff is not compelled to surrender his estate in bankruptcy. The effect of this position is that the bankrupt should bear the consequences of such surrender. In my view this argument is fair. One should not be allowed to enjoy only the advantages of a provision and avoid its disadvantages. The advantages being to keep creditors at bay and subsequently paying them a fraction of what they are owed. The disadvantages lie in having to answer incriminatory questions about the whereabouts of (a person's bankrupt estate) assets, and possibly questionable conduct on the examinee's part leading to his bankruptcy. Amongst the effects of voluntary surrender is the subsequent examination of the bankrupt, where he will be compelled to answer incriminatory questions.

In answering the above question, the court saw it fit to elaborate on the principle embodied by section 13 of the *Charter* in relation to the principle against self-incrimination and related rights.[2481] It viewed the latter principle as being at the core of every person's rights "in a free and democratic society".[2482]

In its deliberation, the court quoted[2483] the matter of *R v Henry* [2484] as relevant to this case. According to the court,[2485] the *R v Henry* matter serves as a guideline as far as the scope of section 13 is concerned and to a great extent, clarifies the implications of the section, thus putting to rest the uncertainties regarding its application. The court highlighted the fact that in earlier decisions,[2486] the question whether section 13 of the *Charter* was applicable to a matter or not, could be answered by determining the purpose for which the prior evidence served for the prosecution. In cases where the evidence was used to directly incriminate the deponent, section 13 would apply. If prior evidence was used in cross examination

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2480 Paragraph 9.
2481 Including the right to silence, the right not to be compelled to be a witness against oneself and the right to counsel.
2482 Paragraph 10.
2483 Paragraph 11.
2484 2005 SCC 76 (CanLII); [2005] 3 SCR 609.
2485 Paragraph 11.
2486 Citing *Dubois* 1985 (CanLII) 10 (SCC), [1985] 2 SCR 350; *Mannion* [1986] 2 SCR 618; *Kuldip* [1990] 3 SCR 272 and *Noel* 2002 SCC 67 (CanLII), [2002] 3 SCR 433.

to expose inconsistencies in the deponent's earlier and present versions, section 13 did not apply.[2487]

The court pointed out that the *R v Henry* matter changed this approach in the sense that it did away with the distinction previously made regarding the application of section 13.[2488] It must be noted that although cited in the *R v Morris* matter, the *R v Henry* matter related to self-incrimination at a criminal trial. In that matter, the court stated that whether section 13 applied to the matter or not, depended on (i) whether the defendant will testify in the present proceedings and (ii) was he so compelled to testify at the previous proceedings. Where the answer is in the negative for the former question, then the defendant's prior statement is not admissible in the present proceedings.[2489] However, where the defendant will testify the court highlighted that the Crown could use prior statements for the purposes of testing the credibility of the witness in the current matter and to also incriminate him.[2490]

The court reiterated that, unlike "previous cases" where a decision on whether section 13 applied or not depended on the question of what purpose the prior statements were utilised for, the *R v Henry* matter's decision on the applicability of section 13 depended on whether or not the incriminatory statement was compelled.[2491] Following this analysis, the court concluded in the latter matter that, where the accused was compelled to self-incriminate in prior proceedings, his testimony could not be used at his subsequent criminal proceedings. This was the case regardless of the fact that the said testimony was used to test the credibility of the deponent or to incriminate same. The evidence could, however, be used in perjury related offences against the deponent.[2492]

2487 This non-application was according to the court, to some "extent dependent on whether the prior evidence" was harmful or not, para 11.
2488 Paragraph 12.
2489 Paragraph 12. Cited thereat, the matter of *R v Henry* 2005 SCC 76 (CanLII); [2005] 3 SCR 609.
2490 "Thus overruling" the previous decisions on this principle. See *Dubois* 1985 CanLII 10 (SCC), [1985] 2 SCR 350; *Mannion* [1986] 2 SCR 618; *Kuldip* [1990] 3 SCR 272 and *Noel* 2002 SCC 67 (CanLII), [2002] 3 SCR 433.
2491 Paragraph 13.
2492 Paragraphs 49 and 50.

In *R v Henry*, the court used the opportunity to do away with the difficulties the presiding officer in the subsequent proceedings had to face in his attempt to distinguish between the uses of prior statements to test the existence of inconsistencies in the deponent's versions on the one hand and on the other, to incriminate the deponent.[2493] In that case, the court focused[2494] exclusively on the question whether or not the statements were compelled, in order to determine its admissibility. The conclusion was that if the statement was compelled, it was inadmissible.[2495]

According to the court in *R v Morris*,[2496] the court's focus on "compulsion" in the *R v Henry* matter narrowed the meaning of "compulsion". In the court's view,[2497] this narrow distinction has led to the conclusion that an accused who testifies at his first trial is doing so voluntarily. This, the court held to be the case since an accused person has a right not to testify at their trial. This position has the effect that if there is no testimony provided at the first trial, there is no testimony to be used against the deponent in the subsequent trial. The court further pointed out that the fact that a person might have had no choice but to testify at his previous trial to defend his case, is not for the purposes of section 13 compelled to testify, he thus voluntarily gives his testimony.[2498] As stated above, the *R v Henry* matter relates to the admissibility of evidence given by a deponent (at his first criminal trial) at his retrial.

The court went further to highlight[2499] the anomaly in allowing a defendant to "tailor" his testimony to suit his case by referring to the matter of *R v Nadelcu*.[2500] In this case the court had to answer the question whether or not a defendant in a civil matter is compelled to testify at the discovery proceedings, which testimony he

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2493 Paragraph 14.
2494 Paragraph 15.
2495 Paragraph 15.
2496 Paragraph 15.
2497 Paragraph 15.
2498 Paragraph 15.
2499 Paragraph 17.
2500 [2007] OJ No 1188 (SCJ), reversed on 2011 ONCA 143 (CanLII) 2011 OJ No 795 (CA), appeal to SCC pending 2011 SCC No 194.

can later discard. In the process of its deliberation, the court pointed out[2501] that the principle that an "accused person should not be allowed to tailor his evidence with impunity in different cases was noted with approval by the Supreme Court of Canada in *Juman v Doucet"*.[2502]

Further, the court brought to the fore[2503] the fact that the principle in the *R v Henry* matter regarding the non-admissibility in criminal matters of statements made at prior proceedings by an accused person to persons in authority, is upheld. If, however, the said statement was made to "any person" other than a person in authority, the statement was admissible against the deponent. In the context of insolvency, "persons in authority" would include amongst others, the trustee, Official Receiver, or Superintendent of Bankruptcy. Statements made to these officials would not be admissible in subsequent criminal proceedings other than in perjury related matters as evidence in chief, against the deponent.[2504] This would be the case regardless of the fact that the statements were voluntarily made.[2505]

In the *R v Morris* matter, the court highlighted[2506] the fact that the Crown has not clearly articulated its argument that section 13 of the *Charter* does not apply to statements made under oath before the bankruptcy official, as *per* the provisions of section 161 of the *BIA*. This was because such statements were made under oath and in insolvency proceedings.

The court further emphasised[2507] the fact that previous decisions[2508] on the application of section 13 prior to the *R v Henry* matter, have maintained that statements made at bankruptcy proceedings were not admissible in subsequent

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2501 Paragraph 17.
2502 2008 SCC 8 (CanLII); [2008] 1 SCR 157.
2503 Paragraph 18.
2504 See Sopinka *et al The Law of Evidence in Canada* 3rd Ed S 8 206.
2505 *R v Henry* 2005 SCC 76 (CanLII), [2005] 3 SCR 609, confirming the principle in *Dubois* 1985 (CanLII) 10 (SCC), [1985] 2 SCR 350 para 26, 27 and 40.
2506 Paragraph 20.
2507 Paragraph 21.
2508 The court referred to *R v Ross* (1995) 31 CBR (3d) 273 (Man QB), *R v Gobuty* (1997) OJ No 200 (Ont Gen Div).

criminal proceedings against the deponent. These restrictions did not, however, extend to perjury related matters.[2509]

The court went on to acknowledge[2510] the fact that previous decisions[2511] dealing with the application of section 13 on bankruptcy statements and the use thereof for cross examination purposes have not always been consistent. As examples of the inconsistencies in previous decisions, the court cited[2512] the following cases:

(1) *R v Langille* [2513] where cross examination on the bankruptcy evidence was permitted. According to the court in that case[2514], disallowing cross examination on the said evidence as the court put it, "would be to invite witnesses to tell one story at one time with the full knowledge that the story could be changed with impunity in another proceedings", with the exception of perjury related offences. The court is, however, hopeful that the said anomaly will be put to rest by the court of appeal in *R v Nedelcu*, where the Crown seeks to have the Supreme Court of Canada expand the latitude of *R v Henry.*

(2) In *R v Ross* [2515] the court acknowledged the fact that, although the use of information obtained at the bankruptcy examination of the bankrupt in a search warrant was in conflict with the provisions of section 13 of the Charter, such information was admissible under section 24(2) of the *Charter* and that the prosecution can cross examine the bankrupt on the affidavit filed in bankruptcy.

(3) *R v Fitzpatrick* [2516] provided a framework for the assessment of whether or not a statement is voluntary as opposed to legally compelled, by setting out the four determining factors, that is, the existence of coercion, whether or not there is an

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[2509] Paragraph 21. See in this case *R v Staranchuk* [1985] SCJ No 21.
[2510] Paragraph 24.
[2511] Most pre *R v Henry* decision.
[2512] Paragraph 25.
[2513] [1986] NSJ No 255 (CA).
[2514] Paragraph 25.
[2515] [1995] MJ No 129 (QE).
[2516] 1995 [CanLII] 44 (SCC), [1995] 4 SCR 154.

adversarial relationship, the prevention of unreliable confessions, and abuse of power.

To enunciate the coercion factor, the court highlighted[2517] the purposes of the *BIA*, as ensuring a fair distribution of a bankrupt debtor's assets and to provide for his financial rehabilitation.[2518] Further to that, the statute was said[2519] to provide for two methods by which a debtor may be declared bankrupt, namely voluntary surrender or compulsory surrender of his estate. The court highlighted[2520] that in both methods, the statute provides for a vigorous search for assets for the purposes of distributing them to creditors. To achieve this purpose, the bankrupt debtor and related persons are compelled to attend meetings to submit to interrogations under oath.[2521]

The court acknowledged[2522] the fact that the defendant (Morris) had voluntarily surrendered her estate (and subsequently volunteered information). A broader question that was regrettably not before the court was[2523], whether or not section 13 of the *Charter* applied to an examinee whose estate was a compulsory sequestration.

Regarding the adversarial relationship[2524] factor, the court pointed out[2525] that the *BIA* provides a regulatory framework to administer insolvency matters. Acknowledged by the court[2526] was the fact that this regulatory framework may appear adversarial where a bankrupt is obliged to submit to interrogation and provide documents of which he would rather not - the substance of this relationship is, however, not adversarial.

2517 Paragraph 29.
2518 *Husky Oil Ltd v Canada* 1995 [CanLII] 69 (SCC), [1995] SCJ No. 77 para 7.
2519 Paragraph 30.
2520 Paragraph 30.
2521 Paragraph 30.
2522 Paragraph 31.
2523 And thus not answered by the court.
2524 Between the state and an insolvent examinee as far as compulsion to attend meetings of creditors and answer questions posed thereat is concerned.
2525 Paragraph 34.
2526 Paragraph 34.

On the unreliable confessions factor, the court brought to the fore the fact that in many instances where a person submits information to the authorities, he might be tempted to submit misleading statements.[2527] The latter position can be alleviated by incorporating an offence within a provision, to counteract incidents of submitting untrue statements. This view is commendable to discourage perjury.

In concluding, the court elaborated on the alleged abuse of state power factor. The aspect highlighted by the court was that,[2528] at the heart of legislation regulating bankruptcy is the desire to assist persons experiencing temporary financial setbacks to get back on their feet. It would thus be absurd to conclude that this position increases the possibilities of abuse of power by the state.[2529] It is a fact that compulsory surrender of one's estate is preceded by an inability to meet one's financial obligations and the applicant is not necessarily the state but a disgruntled creditor.[2530] In conclusion:

(1) prior to the *R v Henry* matter, the use the prosecution was making of the previous statements was the determining factor on whether or not section 13 of the *Charter* could be utilised to prevent the admission of statements previously obtained from the deponent. If the use of the evidence was to directly incriminate the accused, section 13 applied. If the use was to question the deponent's credibility, through using the prior statement during or in cross examination to show inconsistencies, section 13 did not apply, to an extent depending on whether the previous evidence was not harmful.

(2) *R v Henry* then set out the test as follows: the distinction between the use of previous statements for the purposes of incriminating the deponent and for cross examining the deponent was discarded. The determining factor is whether the evidence was forcefully extracted from the deponent; if it was so compelled then it

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[2527] Paragraph 35.
[2528] Paragraph 36.
[2529] Paragraph 36.
[2530] Paragraph 36.

was inadmissible in subsequent criminal proceedings for all purpose, except for perjury related offences.

(3) the court in *R v Morris* decided the test to be as follows: information voluntarily given in a previous proceeding may not be used by the state as the sole basis of its criminal case, but may be so used by the state in subsequent criminal proceedings for the purposes of questioning the credibility of the deponent. The court highlighted[2531] the point that, it would be absurd to allow a deponent to give different versions of one event in two proceedings without having had to account for the inconsistencies in the two versions. Accordingly, allowing that situation to prevail would be contrary to the objective of section 13.[2532]

Taking the above analysis into consideration, the court came to the conclusion that the information submitted by Ms. Morris at her bankruptcy examination may be used by the prosecution to cross examine her, in the event that she testifies at her subsequent trial.[2533] The said statement may, however, not be used as the basis for the Crown's case against her.[2534]

In *Interconinvest* (*Canada*) *inc* (*Proposition de*)[2535] the court was called upon to nullify a subpoena and to cancel the continuation of an examination in conformance with section 52[2536] of the *BIA*. The examination was aimed at a certain Black, a representative of the debtor company (Interconinvest (Canada) Int.). The latter had previously filed the Proposal and no meeting of creditors had been held to consider and vote on the Proposal.[2537] The objection by Black to the continuation of the

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2531 Paragraph 38.
2532 Paragraph 38.
2533 Paragraph 39.
2534 Paragraph 40.
2535 2006 QCCS 1848 (CanLII).
2536 This section reads as follows: "Adjournment of meeting for further investigation and examination-where the creditors by ordinary resolution at the meeting at which a proposal is being considered so require, the meeting shall be adjourned to such time and place as may be fixed by the chairman (a) to enable a further appraisal and investigation of the affairs and property of the debtor to be made; or (b) for the examination under oath of the debtor or such other person as may be believed to have knowledge of the affairs or property of the debtor, and the testimony of the debtor or such other person, if transcribed, shall be placed before the adjourned meeting or may be read in court on the application for the approval of the proposal".
2537 Paragraph 4.

examination came before court in the light of an imminent civil claim against the examinee.[2538] The basis of the objection to the holding of the examination was that the examination was meant to obtain information for use by the examiners in imminent civil claims against him, and not for the purpose of investigating the debtor's affairs.[2539] Therefore, the examinee did not wish to be further examined pursuant to section 52 of the *BIA*.

In answering the above contention by the examinee, the court highlighted[2540] that although relating to Proposals, section 52 of the *BIA* mirrors the provisions of section 163[2541] of the *BIA*. The court therefore, felt obligated not to deviate[2542] from the jurisprudence in terms of section 163 and that statements made thereat, if recorded, are public documents. In support of this view, the court cited[2543] *Norbourg Gestion d'actifs Perfolio inc.* (*Syndic de*).[2544] Highlighted by the court was the fact that the examination had to proceed regardless of imminent civil proceedings against the examinee.[2545] Further highlighted by the court[2546] was the fact that, imminent civil proceedings against an examinee "does not and should not operate as any kind of stay of proceedings in bankruptcy or insolvency matters".[2547] This position is the same as in the context of insolvency proceedings in South Africa. [2548]

Citing the matter of *Norbourg Gestion d'actifs Perfolio inc*. (*Syndic de*),[2549] the court reiterated[2550] that the discretion on the admissibility or not thereof, in subsequent proceedings, of statements made at the bankruptcy examination, is to be exercised by the trial court and not the Bankruptcy Court. Furthermore, witnesses wishing to object to certain questions for want of relevance to the affairs of insolvent are

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2538 Paragraph 7.
2539 Paragraph 9.
2540 Paragraph 12.
2541 Discussed at para *7.6.2* above.
2542 Paragraph 17.
2543 Paragraph 14.
2544 2006 QCCS 1976 (CanLII).
2545 Paragraph 19.
2546 Paragraph 19.
2547 Paragraph 22.
2548 See ch 2 above.
2549 2006 QCCS 1976 (CanLII).
2550 Paragraphs 15 and 16.

welcomed to so object. The principle put forward by the court,[2551] was that if a litigant were to seek to use information obtained at interrogation in civil proceedings outside the context of bankruptcy, the court in such a matter should determine whether or not the use thereof would be to the detriment of the administration of justice or a party affected. If the court is of the view that, to some extent, jeopardy might occur, it would limit the use thereof to a certain degree.[2552]

To emphasise the importance of the above mentioned principle, the court[2553] further referred to the matter of *Re Claude Boivin.*[2554] In this case, the Court of Appeal ordered the examination in terms of section 163 to proceed regardless of the fact that an examinee was being sued by one of the creditors.

On the basis of the above court's reasoning, the application to stay the examination pursuant to section 52 of the *BIA* could not succeed and was dismissed with costs.[2555]

Furthermore, the decision to allow or disallow access to the transcript of the examination proceedings or any decision therefrom is subject to review and appeal according to stated rules.

7.9 Appeals and Reviews

Section 187(5) of the *BIA* provides for a review power of limited application.[2556] Section 192 (4) of the statute read with *Rule* 30[2557] provide for appeal from an order or decision of the Registrar. An order or decision of the Registrar is a court decision. This position is admirable and worth adopting. The delegation of decision making to the Registrar in bankruptcy, if adopted, could assist the South African jurisdiction in disposing of insolvency matters urgently and effectively. The main appeal provisions are sections 193-196 of the *BIA*. The sections provide that "an appeal

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2551 Paragraph 25.
2552 Paragraph 25.
2553 In *Interconinvest (Canada) Inc*. (Proposition de) 2006 QCCS 1848.
2554 *REJB* 1997-02614 CAM 500-09-004695-979.
2555 Paragraph 28.
2556 See Houlden *et al The 2015-2016 Annotated Bankruptcy and Insolvency Act* 945.
2557 Canada's *Bankruptcy and Insolvency General Rules CRC* c 368.

lies to the Court of Appeal from any order or decision of a judge of the court". Cases involving future rights,[2558] if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings,[2559] if the property involved in the appeal exceeds in value ten thousand dollars,[2560] from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars,[2561] and in any other case by leave of a judge of the Court of Appeal can be heard by the court.[2562] It is noted that the decision of the Court of Appeal is not appealable, save for the special leave to appeal to the Supreme Court of Canada[2563] and an appeal to the Supreme Court of Canada may not stay proceedings, unless so ordered by the court.[2564]

Further to the above, a decision of the Superintendent is also subject to review and to be set aside in terms of the *Federal Courts Act*.[2565] This position emanates from the fact that such decisions are considered as of a federal board, commission or other tribunal and are thus quasi-judicial in nature. This provision appears to have the same effect as section 151 of South Africa's *Insolvency Act,* except for the fact that the former is provided for in a separate statute.

7.10 Conclusion

Reading the historical developments of the *BIA* up to its current form, highlights the need in this jurisdiction to tailor its insolvency legislation in such a manner that it is in line with human rights and best practices. Like the English jurisdiction, the consolidated insolvency legislation appears to be guided by that jurisdiction's *Constitution*.

2558 Section 193 (*a*).
2559 Section 193 (*b*).
2560 Section 193 (*c*).
2561 Section 193 (*d*).
2562 Section 193 (*e*)
2563 Section 194.
2564 Section 196.
2565 RSC 1985 c F-7, s 27(*d*), the section reads as follows: "An appeal lies to the Federal Court of Appeal from any of the following decisions of the Federal Court: (*d*) a determination on reference made by a federal board, commission or other tribunal or the Attorney General of Canada.

The consolidated legislation to regulate the insolvency of individuals and juristic person is commendable for adoption in South Africa. This could alleviate inconsistencies and contradictions in the interpretation of applicable principles in the two statutes regulating insolvency of individuals and that of juristic persons.

The fact that the bankruptcy courts are not dedicated full time to bankruptcy matters only[2566] (in this jurisdiction) is not fatal to the proper administration of insolvency related matters. The availability of a section within the Superior Court dedicated to bankruptcy related matters and with bankruptcy designated judges having exclusive jurisdiction on bankruptcy matters, indicates the desire within this jurisdiction to provide world class service, at least as far as insolvency related matters are concerned. The fact that the Superintendent in Bankruptcy is appointed to specifically supervise the administration of bankrupt estates and involved in the development of insolvency processes on par with best practices and global developments is commendable. South Africa could do well in adopting, at a developmental phase, these approaches for the advancement of the insolvency court's structures if the latter subsequently becomes sustainable. As stated above, these approaches could relieve the office of the Master of the High Court, which is already burdened.

Further, the involvement of the Registrar of the High Court as a procedural judge will assist in the alleviation of backlogs in the finalisation of insolvency matters. The Registrar is conversant with both the court procedure and the *BIA*.

The undertaking that insolvency legislation in this jurisdiction concerns itself with the importance of getting to the bottom of the causes of insolvency and providing avenues for the rehabilitation of bankrupts (in the case of natural persons), is commendable for adoption in South Africa.

Another admirable feature in this jurisdiction is the requirement that insolvency laws in Canada are reviewed and updated every five years. The Insolvency Institute of

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[2566] The court also deals with other commercial related matters.

Canada[2567] plays a major part in making sure that all out of date provisions are updated.

Because creditors determine who the Trustee, Receiver or Monitor will be, there is no room for the irregularities in appointment (like with the Master of the High Court in South Africa). It also results in trustees without ability not surviving. The Superintendent and Official Receiver ensure effective administration of bankruptcies. The courts (Registrars and Justices) ensure effective resolution of insolvency disputes and effective restructuring of insolvent entities. This feature is commendable for adoption in South Africa. Creditors' involvement in the decision making on the appointment of suitable candidates has the potential of doing away with the hiccups often encountered with the Master's exercise of his discretion for the appointment of trustees and liquidators with consequent delays in the administration of bankrupt debtors' assets.

It is clear that the principle of openness as opposed to secrecy is a norm in this jurisdiction as regards investigations or examinations of bankrupts regarding their affairs. With the majority of examinations conducted under the auspices of the Superintendent of Bankruptcy by independent trustees, investigations into the affairs of the bankrupt outside[2568] of this office are rare.[2569]

As is the case in South Africa and the other jurisdictions referred to in this research, the attendance of creditors' meeting and the consequent interrogation thereat is a civil duty. Failure to comply with this duty is a criminal offence. No human right violation objections could be successfully raised against this duty.

As regards the incriminatory statements deposed by examinees at the interrogation, the principle is that since such statements are recorded, they are public documents and could be used in any civil proceedings within the bankruptcy proceedings only.

[2567] A private sector (non-profit) insolvency organisation. It is aimed at improving the insolvency process and enhancing the professional quality of the practice in Canada. Available at https//www.insolvency.ca last accessed 07 March 2018.

[2568] As may be the case in South Africa, for example, with the appointment of a commission in terms of ss 417 and 418 of the 1973 *Companies Act*.

[2569] See para *7.4* above.

These statements may not be used in criminal proceedings against the deponent except for perjury related offences.

Appeals and review from an order or decision of the Registrar ensure checks and balance within the system.

This chapter covered the interrogations of bankrupts under the *BIA*, the next chapter will be conclusions on the research conducted and putting forward recommendations based on the research conducted for adoption and implementation into South Africa's insolvency legislation.

Chapter 8: Conclusions and recommendations

8.1 Introduction

As postulated by the World Bank,[2570] the world is driven by credit and there is therefore a need for the development of processes to effectively deal with defaulting creditors, thus cultivating commercial credence and calculability. If properly designed, insolvency legislation and laws regarding creditors' rights can contribute to the economic health and growth of countries by providing a fortress for investors in case of economic slowdown.[2571]

The state of being insolvent is one of the unavoidable consequences of credit oriented economies. Therefore, the legal system should put in place processes to resolve disputes arising between the insolvent debtor and his creditors. There should, therefore, be credible structures wherein insolvency investigations take place. This research has sought to investigate the divergent developments of the interrogation proceedings in the insolvency laws of the three SADC countries, South Africa, Namibia and Botswana. The purpose of the research being to investigate how these developments have contributed to more effective information gathering processes.[2572] Part of the investigation focused on the aspect of whether or not these developments are in line with human rights, best practices and perspectives. To achieve the latter objective, the English and Canadian interrogation processes, the structures within which these processes are conducted and officers tasked with the investigation process were studied.

It was posited in chapter 1 above that transparent, effective and efficient legal systems are attractive to potential investors. Investors would, for example, want to know which route to take in the event of non-payment of credit debts and which structures are put in place for the enforcement of debt repayments. The current global market makes it easier for inter-country trade. It is for these reasons that

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[2570] See ch 1 above.
[2571] See ch 1 above.
[2572] See ch 1 above.

trading partners would want to have access to each other's legal processes that may have an impact on trade related consequences, such as insolvency.

To promote investments in the SADC region, it was thought essential to compare the interrogation proceedings of South Africa to those of Namibia and Botswana as trading partners in this region. This was to be measured against leading jurisdictions in insolvency law systems with best practices and human rights culture. In order to have insight into the current position of insolvency interrogation proceedings of South Africa in relation to other jurisdictions, a comparative study was conducted.

Highlighted at chapter 1 was the point that the three SADC countries have no single statute regulating insolvency related matters for individuals and juristic persons. This position is not desirable and goes against the recommendations of UNCITRAL. It was further noted that unlike Botswana, South Africa and Namibia are in the process of adapting their processes in accordance with the UNCITRAL recommendations and were both subject to a ROSC analysis by the World Bank.

The South African legislature has, through the *Insolvency Act* and the 1973 *Companies Act,* put in place formal mechanisms to regulate the process of administering insolvent estates (and affairs of insolvent companies) from beginning to end. The purpose of the administration of insolvent estates or winding-up is to distribute the proceeds of the debtor's assets to the debtor's creditors.[2573] It was highlighted above that the advantage to creditors is at the core of insolvency processes. To achieve this core objective, part of the administration of insolvent estates is the interrogation or examination of the insolvent or its representative in the context of company insolvency. The interrogation process and the structures within which these processes occur and officers tasked with the investigations is clearly a thorny issue, hence this research. In South Africa (Namibia and Botswana), unlike the English jurisdiction and Canada, there are unfortunately no insolvency dedicated courts or tribunals to conduct the necessary investigations into the affairs

[2573] See in general ch 2 above.

of the insolvent. To my mind, this would have greatly improved things for South Africa's insolvency investigatory mechanism.

8.2 Conclusion

The purpose of this research was thus to identify and analyse the problems arising and the shortcomings in South African insolvency law, specifically the aspect of interrogation of specified persons in insolvency circumstances. To achieve this purpose, the following was investigated: In chapter 1, an introductory background to the topic of the thesis was given, including the recommendations by UNCITRAL, the World Bank and the South African Law Reform Commission on best practices in relation to insolvency laws. To my mind, of importance in the said recommendations were: the need for a single statute to regulate the insolvency of natural and juristic persons; and the need for transparent, effective and efficient insolvency processes, specifically the collection of debts in insolvency circumstances.

In chapter two, a brief historical overview of South Africa's insolvency legislation and interrogation processes was highlighted. The following aspects were also highlighted, namely: an exposition of the current South African position on interrogation in insolvency circumstances, including the compulsory attendance of creditors' meetings by the insolvent and other persons of interest was done; the compulsory public interrogation of the insolvent and of other persons of interest at meetings of creditors; compelled production of books and documents; the subsequent use of incriminatory evidence against an interrogatee at consequent civil and specified criminal proceedings; the aspect of privilege; legal representation of examinees; penalties provided by section 66 of the *Insolvency Act* for non-compliance with the provisions of sections 64 and 65 of the *Insolvency Act*; the compulsory and private interrogations or examinations by the Master of specified persons, specifically those concerned with the administration of the insolvent estate; costs of private enquiries; circumstances under which the Master's decision to summon certain persons for interrogation purposes may be reviewed. Further, the contexts under which the constitutional limitation of rights of interrogatees may be permissible were also emphasized.

In chapter three, the following aspects were highlighted: An exposition of the current South African position on compulsory attendance of the meetings of creditors of insolvent companies by officers of the affected company and by persons of interest; the public interrogation of such persons; the private interrogation of specified persons by the Master or a commissioner; the subsequent use of incriminatory evidence in ensuing civil and specified criminal proceeding; the aspect of legal representation of examinees; constitutionality issues; penalties for non-compliance with the provisions of sections 414 to 418 of the *Companies Act*.

In chapter four, an account of the following was given: a brief history of Namibia's insolvency legislation; a discussion of the current position in Namibia on interrogation in insolvency circumstances for natural and juristic persons; amendments to insolvency legislation; cases challenging the constitutionality of interrogations in cases of insolvency. The same was done in relation to Botswana in chapter 5.

In chapter six, the following were discussed in relation to the English jurisdiction: a brief historical overview of insolvency and bankruptcy legislation; a single statute regulating the insolvency of both natural and juristic persons; investigation of the bankrupt's affairs by Official Receivers; current position in the English jurisdiction in relation to interrogation in bankruptcy circumstances; the effects of the *Human Rights Act* and the European Court of Human Rights on bankruptcy interrogation proceedings; the distinction between public and private interrogations of bankrupts and other persons of interest; the admissibility of incriminatory evidence in subsequent proceedings; the privilege against self-incrimination; circumstances under which decisions made by the courts having jurisdiction on insolvency matters can be appealed or reviewed; and the office of the Superintendent of Insolvency.

In chapter seven, the following areas were dealt with, investigated and analysed, namely: a brief history of bankruptcy and insolvency legislation in the Canadian jurisdiction; private investigations for bankruptcy related matters; compulsory attendance of creditors' meetings by the bankrupt and other persons of interest; public examinations of bankrupts and other persons of interest at creditors'

meetings; the impact of the Canadian *Charter of Rights and Freedo*ms on bankruptcy interrogations; penalties for non-compliance with the provisions of the *BIA*; compelled testimony and the subsequent use thereof at ensuing proceedings; privilege against self-incrimination; the circumstances under which decisions taken by the Registrar as to who should be interrogated could be taken on appeal or review; and the office of the Superintendent of Bankruptcy.

Hereafter, the research conducted will be defined and the key findings relevant for this research will be given. Finally, recommendations will be made for the adoption and inclusion of positive aspects from comparative jurisdictions into our insolvency legislation, specifically on interrogations as a form of information gathering process and the structures to regulate this area of insolvency legislation.

8.3 Research conducted and the key findings [2574]

8.3.1 Meetings of creditors [2575]

It is clear that this is a formality an insolvent and other persons of interest cannot escape. This is the only way to get the insolvent and other persons of interest to come forward and provide material information for the proper administration of the insolvent affairs. Presently, there are no alternatives to this process

8.3.2 Public interrogations [2576]

This aspect is an integral part of South Africa's insolvency legislation; it can be traced back as far as 1916. Currently an insolvent and other persons of interest are publicly interrogated. This is the case, regardless of how co-operative they are with the investigation. Provision for *in camera* proceedings is, however, put in place in cases of possible incriminatory evidence being uttered or scandalous information presented.

[2574] As stated in chap 1 above, the key findings will be made in relation to South Africa only. Paragraphs where the other jurisdcitions were discussed would be refered to in footnotes.

[2575] Paragraphs 2.3.1.2 and 3.3.1.2, ch 2 and 3 above. Also paras *4.3.2*, *4.6.2*, *5.3.2*, *5.10*, *6.4.1, 7.5* in relation to Namibia, Botswana, English and Canadian jurisdictions.

[2576] Paragraphs *2.3.2* and *3.3.2,* ch 2 and 3 above. Also paras *4.4*, *4.6.3*, *5.4*, *6.5*, *6.5.1*, *6.9, 7.6*.

8.3.3 Private interrogations [2577]

This form of interrogation is, in most cases, ordered by the Master or the courts. In circumstance calling for urgent and confidential information, interrogation is held away from the public eye. It is also common that creditors may also request the Master to authorise the holding of these private enquiries. This process is not dependent on the co-operation or not thereof of witnesses.

8.3.4 Compelled testimony in the public interest [2578]

Submitting to compulsory interrogation is not an option for persons required to give evidence. It is said to be in the public interest that specified persons provide the required information under duress and there is no defence at their disposal

8.3.5 Subsequent use of incriminatory evidence [2579]

Currently, incriminatory evidence obtained at interrogations is admissible against a person who gave such evidence and not against any one, in civil and specified criminal proceedings. However, the court, in subsequent proceedings has discretion regarding the admissibility or not of evidence obtained at interrogations. There is also a distinction between direct and indirect evidence.

8.3.6 Legal representation for witnesses [2580]

The position is currently that witnesses are entitled to legal representation by their attorneys or counsel at the interrogations. This is a right as opposed to a privilege, and is intended to ensure fairness and justice. Legal representation in these circumstances entail legal assistance and not legal representation. This means that

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[2577] Paragraphs *2.3.4* and *3.3.4* ch 2 and 3 above. Also paras *4.5, 4.6.6, 5.5.2, 5.11, 6.6,6.10* in relation to Namibia, Botswana and the English jurisdictions. Canada has no provision for private interrogations, but the so called outside investigations.

[2578] Paragraphs 2.3.2.3 and 3.3.4.3, ch 2 and 3 above. Also paras *4.4.1, 6.11, 7.6.7* in relation to Namibia, English and Canadian jurisdictions.

[2579] Paragraphs 2.3.3.9 and 3.3.2.6, ch 2 and 3 above. Also paras *6.7, 6.10.3, 7.8* regarding the English and Canadian jurisdictions.

[2580] Paragraphs 2.3.3.10 and 3.3.2.8, ch 2 and 3 above. Also para *4.4.1* on Namibia.

a witness is still required to answer questions himself. His attorney only rephrases and clarifies questions and does not answer on behalf of the witness.

8.3.7 The position of the Master of the High Court [2581]

Currently, the Master is responsible for the supervision of interrogation processes in insolvency circumstances. However, the suitability of the Master to be in charge of these processes is questionable, especially in the absence of clear guidelines to be followed by this office.

8.3.8 Constitutional aspects

At present, the interrogation and all processes employed to ensure that specified persons comply with what is required of them are considered to be within the confines of the *Constitution*. Prospective witnesses cannot cry foul when called upon to provide information. The obligation to submit to interrogations is said to be a civic duty.

With the research conducted and findings made, it is appropriate to make recommendations for incorporation into our legal system.

8.4 Recommendations [2582]

8.4.1. Sections 64 and 414

With regard to these two sections dealing with the compulsory attendance of creditors' meetings in insolvency circumstances of natural and juristic persons respectively, I propose the following recommendations:

8.4.1.1 Attending meetings

It is recommended that the provisions of both sections 64 of the *Insolvency Act* and 414 of the 1973 *Companies Act* be retained and merged in the new impending

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[2581] See para *2.3.4* and 3.3.4.9, ch 2 and 3 above. Also para *4.5.1* on Namibia.

[2582] Recommendations will be made in relation to South Africa only. The author has no authority to make recommendations in relations to other jurisdictions.

insolvency legislation. The two sections are basically similar and are aimed at a similar objective, there is therefore no need for this duplication. Persons summoned to appear at the meeting of creditors must appear, that is one way to get people there to provide what is required of them. In relation to section 64, the insolvent's spouse should also be regarded as a person of interest to attend these meetings. She should also be treated like any business associate of the insolvent, but with caution, considering the possible collusion between spouses.

8.4.1.2 Deviation from the provisions of attending compulsory creditors' meetings

I recommend that where it appears to the trustee that an insolvent or any other prospective examinee is co-operative in providing the required information, they should be excused from attending compulsory meetings. In that case, meetings should be reserved for proof of claims and paving a way forward for examinees to submit an honest account of their affairs. Public creditors' meetings should be reserved for hostile examinees.

8.4.2 Section 65 and 415

As regard the two sections dealing with the interrogation of insolvents and officers of insolvent companies at meetings of creditors respectively, I propose the following recommendations:

8.4.2.1 Public interrogation at creditors' meetings

Regarding the public interrogation at the meetings of creditors, I recommend that this aspect is retained, with the following provisions: interrogation to be reserved for hostile examinees who are not forthcoming with the required information; in cases of suspected fraud and concealed assets, thorough interrogations and investigations should be provided for. The presiding officer should thus be competent, experienced and in a position to apply his discretion properly to decide which cases are suitable for public interrogation, as opposed to private interrogation, and also to decide which processes are suitable for *in camera* provisions. Appropriate legal qualification and practical training is recommended.

If these meetings were conducted within a tribunal by suitably qualified personnel, who are up to date with developments in insolvency legislation, there would be less challenges as regard proper procedure. It is known that in practice, creditors' meetings are often held in trustees' offices. This position makes the processes susceptible to impropriety due to absence of checks and balances.

Any uncertainties regarding the compulsion to answer incriminatory questions and the role of the Director of Public Prosecutions must be removed. Further, the powers of the presiding officer to deal with a recalcitrant witness must be clarified in details to avoid delays as a result of review referrals.

8.4.2.2 Use of compelled incriminatory answers

Regarding this aspect, I recommend that the discretion of the courts as to which evidence is admissible and which is not, at subsequent criminal proceedings, be retained. However, clarity on the admissibility of incriminatory evidence in subsequent civil proceedings must be provided.

8.4.3 Sections 66 and 416

In relation to the two sections, which provide for penalties in cases of non-compliance with what is required of examinees in the context of insolvency of natural persons and of a juristic person respectively, I propose the following:

8.4.3.1 Penalties for recalcitrant examinees

I recommend that the provisions of section 66 merge with the provisions of section 416. Seeing that the two sections are punitive in nature and their provisions are almost similar, they should be merged and retained in the impending legislation.

There is a need to enforce compliance with the provisions of sections 64-65 and 414-418 respectively. It is only through these measures that people, who possess information relating to the insolvent, can provide such information as required for the proper administration of the affairs of the insolvent. Means should, therefore, be made to persuade compliance. Apprehension and subsequent incarceration or a

fine are the only means to persuade such persons. Clarity should, however, be provided as to who may or may not order apprehension and detention of an insolvent who fails to attend meetings of creditors or produce a book or document thereat or a witness who fails to comply with the summons. A judicial officer should, as per the recommendations in the case of *De lange v Smuts,* be the only competent official to order apprehention and detention of a person who fails to comply.

8.4.3.2 Provisions for an offence

It is also my recommendation that non-compliance with the requirements of the above-mentioned sections be considered an offence and such offence be factored into these sections. If that is the case, there would, therefore, be no need for a presiding officer who is not a magistrate, to issue a warrant of arrest and detention of a recalcitrant witness.

There should be some form of deterrence for delinquents. The latter should not be permitted to deny creditors what is lawfully due to them. It is, thus, a duty of the legislature to ensure that wrongdoers are exposed and they face consequences.

8.4.4 Sections 152, 417 and 418

It is my recommendation that the three sections be merged and retained under the proposed insolvency legislation. The essence of these provisions is the private gathering of information relating to the insolvent.The provisions of the merged sections could then be employed in complex insolvency matters, requiring extensive investigation under the auspices of a competent institution such as those in the English and Canadian jurisdictions. Specialised insolvency tribunals would be suitable institutions to deal with the complex matters.

8.4.4.1 Private examinations

As regard this aspect, it is my recommendation that private examination of specified persons be conducted by qualified and experienced officers. This should take place under the supervision of an institution specialising in insolvency matters. Further, this type of investigation should be reserved for those instances where witnesses

are co-operating with the investigation and there is a need to shield them or their evidence from the public eye.

Concerning the subsequent use of incriminatory evidence at ensuing criminal and civil proceedings, it is my submission that the same recommendation as at paragraph 8.4.2.2 are applicable here.

8.4.4.2 Funding for private examination

It is my recommendation that funding should always form part of the sequestration expenses.

The issue of compensation for the attendance of creditor's meetings should be addressed. The meagre fee paid to witnesses is often a point of dissatisfaction. This is often the case where professionals such as auditors, are subpoenaed to provide information or documents and books at the meetings of creditors. It is recommended that a professional fee be mandatory, unless under exceptional circumstances where a debtor is hopelessly insolvent. It is known that in practice, insolvency lawyers, trustees in insolvency and liquidators receive their fair share, it is only just that the same should apply to other professionals summoned to insolvency examinations.

8.4.4.3 Legal representation

It is my recommendation that this aspect be retained as a matter of principle and not a privilege. Clarity should, however, be provided as to the extent of this representation. This should be done in order to ensure the smooth running of the enquiry without interruptions.

8.5 General recommendations

An overall recommendation for this thesis is necessary to encapsulate the essence of this research. This will be given hereunder.

8.5.1 The development of a single insolvency statute

The following statutory intervention is proposed in the insolvency interrogation processes of both natural and juristic persons. It is submitted that no extensive research was conducted in this area for the purposes of this thesis.

As per the recommendations of UNCITRAL,[2583] it is recommended that a unified legislation regulating the insolvencies of individuals and corporations is enacted. This would make for easy reading and amendments where necessary, seeing that the provisions in the two insolvency statutes are almost identical. This position is also adopted by the Standing Advisory Committee on Company law.[2584] It must also be mentioned that this locus is also common in most jurisdictions abroad.[2585]

8.5.2 The creation of tribunals

It is recommended that tribunals to regulate insolvency systems be created. They should be equipped with properly trained office holders to supervise processes employed in the administration of insolvency related matters, such as those available in the English and Canadian jurisdictions. This would ensure the credibility and efficiency of the insolvency system[2586] as a process of collating information for the proper administration of the insolvents' affairs. These processes would require minimal financial resources, since there are already examiners at the office of the Master. These officers should be provided with adequate and appropriate training in order to minimise case backlogs and court interventions.

The enactment of insolvency legislation should also ensure that developments in this area of the law are not taking place on a case by case basis. The development through the judiciary, which takes place outside of the Master of the High Court's domain, poses challenges. The Master may not always be up to date with new developments in law, in this case, in respect of insolvency interrogations. More than

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[2583] See para *2.1* at ch 1.
[2584] See para *2.1* at ch 1.
[2585] See para *2.1* at ch 1.
[2586] See para 1 at ch 1.

fifteen years since the *De Lange v Smuts*[2587] matter, the courts guidance is still sought in relation to whether or not the Master has powers to order the incarceration of an examinee presumed to be recalcitrant.[2588] And guidance is still sought on the question of under which circumstances such order can be issued.

It is, therefore, recommended that an office such as the office of the Superintendent in Bankruptcy, Insolvency Service and Insolvency Court Users Committee in the English and Canadian jurisdiction respectively, be created. It was noted that this office is also hands-on in research and development of insolvency legislation.

Further, it serves the interest of the economy and society that insolvency related problems are solved fairly and efficiently.[2589] It is conceded that delays cannot be completely eradicated. Should the matter at hand prove to be too complex for the tribunal to resolve, the services of the courts should be sought to decide on the issues involved. Clear guidelines should be put in place regarding the capacity and scope of the officers in charge of supervising the processes. This might limit the number of legal challenges and uncertainties that are often encountered in the system.[2590]

This research has established that there may be cases requiring private interrogation where there is a risk that personal affairs relating to an examinee or state secrets may be revealed. In the event that it is foreseen that such may occur, it is recommended that private interrogation is conducted. It is also recommended that private interrogations be the preferred method of collating the required information, with public interrogations being reserved for recalcitrant witnesses as a last resort, and only where prospects of obtaining the required information voluntarily from a prospective witness are narrow. This undertaking can be bolstered by the employment of mechanisms that would contribute to more effective information gathering processes. An innocent insolvent for example, may be willing to declare his insolvency circumstances sooner, if he is assured that he will not be

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2587 See ch 1 and 2 where this case is discussed.
2588 See para *2.1* at ch 1 above.
2589 See para 1 at ch 1.
2590 See the matter of Leong at para *2.1* ch 1.

publicly humiliated at interrogations.[2591] These would enable the debtor to start afresh and be an active participant in the economy.[2592]

The interrogation proceedings should be in line with constitutionally entrenched rights as enunciated in *De Lange v Smuts*; *Ferreira v Levin*; *Vryenhoek v Powell*; *Bernstein v Bester* and subsequent cases discussed. The contribution of constitutional and democratic jurisdictions, as regard human rights compliance in insolvency interrogations, cannot be over emphasised.

[2591] See ch 6 above where this aspect is discussed in details.
[2592] See para *7.3*.

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