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SECTION 417 OF THE COMPANIES ACT 1973

by

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UNIVERSITY OF JOHANNESBURG

STUDY LEADER: PROF J CALITZ

DECEMBER 2012
I hereby declare that the thesis submitted for the LL.M degree to the University of Johannesburg, apart from the help recognized, is my own work and has not been formerly submitted to another University for a degree.

Y M Joubert
ACKNOWLEDGEMENTS

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SUMMARY

This thesis deals with the question whether section 417 is adequately framed in order to fulfill its intended purpose in South African law. The necessity, efficiency and validity of private examinations are explored. Chapter 1 provides an introduction which sets out the methodology relied upon, namely a closer look at the primary source, namely section 417 as set out in the Companies Act 61 of 1973, as well as the consideration of secondary sources including academic texts and court decisions. In particular the matter of Kebble v Gainsford 2010 (1) SA 561 GSJ is considered as it is a recent case which again highlighted the value of private examinations. The law applicable to South African private examinations is considered in Chapter 2. By unpacking the various provisions relating to private examinations, which have been honed by the courts in a prolific number of cases, the aim of the thesis is to determine whether section 417 in its present format remains lawful, purposeful and necessary in our current society.

As a comparison, section 236 of the English Insolvency Law 1986 is considered in Chapter 3, where the relevant legislation and complimentary rules are firstly ventilated, before the scope and purpose of the section as crystalised in English law, is determined.

It is found that the main objective of the private examination procedure in South African law is to collect information which is not available by other means, in order that liquidators may determine as many assets as quickly and efficiently as possible. Although this purpose is echoed in English law, the wider scope of the section in that jurisdiction suggests areas where South African law may be enhanced by reform. In particular, the duty to investigate the cause of failure of a company is emphasised in English law, but underplayed in South African law. It is submitted that liquidators should have a duty to determine the cause of failure of a company, as the failure of a company affects society as a whole. Further suggestions for reform, based on the English example, comprise the adoption of supportive measures to complement the liquidator in the performance of his duties. It is acknowledged that a restructuring of South African insolvency law as a whole is needed.
OPSOMMING

Hierdie skripsie handel oor die vraag of artikel 417 voldoende opgestel is ten einde sy doel in die Suid-Afrikaanse reg te vervul. Die noodsaaklikheid, doeltreffendheid en geldigheid van private eksamens word dus ondersoek. Die metodologie word uiteengesit in Hoofstuk 1 en behels bestudering van die primêre bron, artikel 417 van die Maatskappywet, Wet 61 van 1973, asook die oorweging van sekondêre bronne, insluitend akademiese skrifte en hofbeslissings. In besonder word die saak van Kebble v Gainsford 2010 (1) SA 561 GSJ in meer detail beskou aangesien dit is 'n onlangse geval is wat die waarde van privaat ondersoek weereens uitlig. Die wetgewing met betrekking tot Suid-Afrikaanse privaatondersoeke word oorweeg in Hoofstuk 2. Deur die bestudering van die betrokke wetgewing, soos verfyn deur die howe in 'n vloed van sake, is die doel van die tesis om te bepaal of artikel 417 in sy huidige formaat geoorloof, doelgerig en wel nodig is in ons huidige samelewing.

Ter vergelyking word artikel 236 van die Engelse Insolvency Law 1986 oorweeg in Hoofstuk 3, waar die relevante Engelse wetgewing en aanvullede reëls eerstens nagegaan word, gevolg deur die bepaling van die omvang en doel van daardie artikel, soos uitgekristaliseer in die Engelse sake.

Daar word gevind dat die hoofdoelwit van die privaat ondersoek-proses in Suid-Afrikaanse reg die insameling van inligting is, wat andersins onbeskikbaar sou bly, ten einde likwidateurs te bemagtig om soveel bates as moontlik, so vinnig en doeltreffend as moontlik, te bepaal. Alhoewel hierdie doel ook in die Engelse reg voorkom, stel die wyer omvang van die artikel in daardie jurisdiksie hervorming voor vir die Suid-Afrikaanse reg. Meer in besonder, word die plig om ondersoek in te stel na die oorsaak van die mislukking van 'n maatskappy in die Engelse reg beklemtoon, maar wel nie in die Suid-Afrikaanse reg nie. Daar word voorgestel dat likwidateurs verplig moet word om die oorsaak van die mislukking van 'n maatskappy vas te stel, aangesien die ondergang van 'n maatskappy 'n uitwerking op die samelewing as 'n geheel het. Verdere voorstelle vir hervorming, gebaseer op die Engelse voorbeeld, behels die goedkeuring van aanvullende maatreëls ten einde die likwidateur in die uitvoering van sy pligte by te staan. Dit word toegewe dat 'n totale herstrukturering van die Suid-Afrikaanse insolvensiereg moet plaasvind.
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CHAPTER 1

Introduction

“It is well established that wording must be interpreted in the light of their context being ‘the matter of the statute, its apparent scope and purpose and, within limits, its background…’ [one] must have regard to the context in which the words of the section occur even though …the words themselves appear to be clear and unambiguous…the emerging trend in statutory construction is to have regard to the context in which the words occur even where the words to be construed are clear and unambiguous. This ‘technique’ is now required by the Constitution, in particular by section 39(2).”\(^1\)

1. Legislation forming basis of discussion

This dissertation deals with Section 417 of the Companies Act 79 of 1973. Section 417 provides for the private examination by the Master of the High Court or the Court of companies in a winding-up. Section 417 forms part of Chapter 14 of the Companies Act 79 of 1973. This chapter, albeit part of the old act, continues to apply with respect to the winding-up and liquidation of companies under the new Act, the Companies Act 71 of 2008, as if the old act had not been repealed, subject to the proviso that certain sections do not apply to solvent companies, unless they are necessary to give effect to the winding-up of solvent companies.\(^2\) Reference is also made to section 418 of the Companies Act of 1973, as section 417 and 418 are linked and should be read together. It has been noted that sections 417 and 418 form a “discrete sub-chapter” of the Act under the heading “Examinations of persons in winding-up.”\(^3\) Section 417 uses the word “examination” and section 418 uses the words “examination” and “enquiry”. In the interests of consistency I have relied on the term “examination” throughout.

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\(^1\) Satchwell J in *Huang v Bester NO* 2012 (5) SA 551 (GSJ) par 17.
\(^2\) Section 79(2) of the Companies Act 2008 read with Item 9(2) of Schedule 5.
\(^3\) n1.
2. **Background to the study**

It appears customary in secondary sources to initiate any discussion on section 417 of the Companies Act 61 of 1973 with the word “draconian”. Consulting a dictionary one is informed that “draconian” relates to, or is characteristic of, Draco or the severe code of laws held to have been framed by him.\(^4\) Draco was an Athenian law scribe under whom small offences had heavy punishments and thus, the perception appears to be that the provisions of section 417 are overly harsh and that the potential scope of the provision is disproportionate to the rationale for which it was enacted. It is hoped that this thesis will show that section 417, although wide in ambit, does not offend our sense of justice and fairness and that it therefore deserves to remain part of the future South African insolvency law regime.

South African insolvency law finds itself in a period where reform is much debated and keenly awaited. Many significant changes have come about in our legal landscape, with the Constitution undeniably being the most important. The Constitution of the Republic of South Africa powered into force on 4 February 1997 and ushered in a standard of constitutional supremacy and democracy against which all existing legislation stands to be tested. Cassim, in advancing reasons for the new Companies Act, makes the following observations which are similarly applicable to insolvency law:\(^5\)

> “…both the domestic and the global environment [has] changed dramatically. Many of the traditional company law doctrines and concepts inherited from nineteenth century England have been abandoned or substantially modified. New corporate law concepts have been developed… The underpinning principle is that legislation that has outlived its usefulness and that is stifling the development of the economy must be repealed.”

A further factor heralding a need for reform is the fact the legislative provisions governing insolvency are not to be found in one cohesive body. Legislation applicable to personal insolvency is dealt with under the Insolvency Act 24 of 1936, which in

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itself is outdated.\textsuperscript{6} Corporate insolvency is covered by both the old Companies Act of 1973, governing the winding-up of insolvent companies and the new Companies Act of 2008,\textsuperscript{7} providing for the winding-up of solvent companies and business rescue.\textsuperscript{8} An overall review and integration is clearly called for and in the light of these anticipated changes, it is apposite to evaluate how the provisions dealing with private examinations are to be taken forward. Finally, the incidence of significant corporate failures locally and in other jurisdictions have brought insolvency law under greater scrutiny. The validity of section 417 must be seen in light of the need for greater accountability by directors and the inter-dependence between enterprises and the societies in which they operate.

3. \textit{Problem statement}

This study was undertaken to explore, describe and evaluate the necessity, efficiency and validity of private examinations as provided for in section 417. The reason for focusing on this particular section is namely the unique and inquisitorial nature of the section which does not conform to our modern sense of fair play and justice and therefore seems a curious inclusion in a predominantly adversarial system. A section which allows for a witness to be summoned \textit{ex parte}, where such person has no access to the application and cannot compel discovery of documents, nor has access to the enquiry itself or the record of it\textsuperscript{9} does indeed seem draconian in our modern age of constitutionalism and the Promotion of Access to Information Act 2 of 2000. Although the scrutiny of private examinations is not novel, it is felt that further exploration of the subject is justified by virtue of the fact that robust and innovative legislative changes have recently been seen in the South African corporate landscape.

\textsuperscript{6} The South African Law Commission Discussion Paper 86 Volume 1 Project 63 Review of the law of insolvency notes that this act replaced the Insolvency Act 32 of 1916 but did not amend it drastically. The Insolvency Act of 1936 has been amended more than 20 times, but it has never been reviewed as a whole.

\textsuperscript{7} Sections 79 to 81 of the Companies Act 2008 provide for winding-up of solvent companies, by means of a members’ resolution (voluntary winding-up) or by means of a court order.

\textsuperscript{8} The Companies Act of 2008 is phasing out close corporations, but the liquidations of close corporations will continue to be dealt with by the Close Corporations Act 69 of 1984, as well as both the old and the new Companies Acts, where necessary.

\textsuperscript{9} Meskin \textit{Insolvency law} (updated 2012) par 8.5.2 notes that a witness is entitled to a copy of the record of his own evidence at his own cost.
The section has already been tested and found to be lawful and constitutional\textsuperscript{10}, but the aim was to ascertain whether the section serves a legitimate purpose and is necessary in a democratic society. A further impetus to this study was the judgment of \textit{Kebble v Gainsford}\textsuperscript{11} which again brought section 417 to the fore and thus prompted a more in-depth investigation of the nature, scope and objectives of the section. The court concluded in \textit{Kebble} that the circumstances of that matter clearly indicated the need for private investigation by the liquidators and the judgment is therefore a positive affirmation for the continued demand for investigations of this nature. The intention is not to suggest that the \textit{Kebble} matter is in itself novel or even seminal with regard to the interpretation of private examinations. The reasoning behind highlighting this one case is rather due to the fact that it a recent case which has, yet again, alerted us that section 417 is indispensable in circumstances where liquidators are faced with clear difficulties in obtaining information. Although the applicant, Kebble, freely admitted that the company in question had been formed for purposes of fraud, he alleged that an enquiry into the affairs of the company was a clear abuse. The circumstances of the case provide an excellent example of a situation where one is persuaded that the individual’s rights to privacy should give way to the right of the liquidators to gather information quickly and expeditiously. The reasoning of the court also supports one of the aims of this thesis, namely to show that the purpose and scope of the section, although wide, is sufficiently circumscribed by the court in the exercise of its discretion. The \textit{Kebble} judgment is not critically analysed, as such an analysis would not aide a deeper understanding of section 417, but the approach of the court in the matter in coherently setting out the nature, scope and purpose of the section was thought to be a convenient outline and springboard for my own investigation. In short, the problem question for this thesis is whether section 417 is adequately framed in its current format, in order to fulfil its intended purpose in South African insolvency law.

\textsuperscript{10} Meskin \textit{Insolvency law} (updated 2012) par 8.5.2 where it is noted that save for part of section 417(2)(b), all provisions of section 417 and 418 are not constitutionally invalid. \textit{cf} Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC). The provision of section 417(2)(b) that “and any answer given to any such question may thereafter be used in evidence against him” are constitutionally invalid with effect from 27 April 1994, in relation only to criminal proceedings other than those mentioned in the text. \textit{Cf} Ferreira v Levin NO and Others 1996 (1) SA 984 (CC).

\textsuperscript{11} 2010 (1) SA 561 GSJ.
4. Methodology

The approach taken in this thesis is premised upon a policy evaluation and thus, the aim was to determine whether the section conforms to the underlying values and interests that it was designed to serve and whether the outcome is advantageous to society. As stated in the quotation above, the current trend is to interpret legislation with reference to its context, i.e. the scope and purpose of such legislation. Chapter 2 considers private examinations in South African law. The primary source relied on in this section is the Companies Act 61 of 1973. Secondary sources include academic texts and judicial interpretation, particularly as there is a liberal body of case authority relating to section 417 which is constantly being added to by the courts. Chapter 2 looks at general aspects pertaining to private enquiries in South African law, the purpose and objects of such enquiries and aspects which safeguard against the abuse of the section. The approach relied on was to firstly look at how the court dealt with these aspects in *Kebble v Gainsford*, and thereafter to consider other texts.

Chapter 3 provides a comparative study, whereby the similar provision in the Insolvency Act of the United Kingdom, namely section 236 of the Insolvency Act 1986 is considered. The purpose of the comparative study is to look for means of enhancing the treatment of private enquiries in our own jurisdiction. The rationale for choosing England as a source of comparison is premised on the fact that much of South African insolvency law emanates from England. Further, in the *Kebble* judgment many references are made to English cases which are seminal in this area of the law. It was therefore a logical step to look at English law, in an endeavour to gain a better understanding of private examinations in general and with a view to pinpointing possible areas of reform in the way that private examinations are dealt with in South Africa. Chapter 3 commences with an introduction to the regulated nature of English insolvency law, followed by a discussion of section 236 and the commensurate insolvency rules. In keeping with the approach adopted in Chapter 2, the scope and purpose of private examinations in English law are considered.

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12 The United Kingdom encompasses the jurisdictions of England and Wales, Scotland and Northern Ireland. I do not distinguish between these jurisdictions, but refer to “England” throughout.

interests of society, as well as the balancing of interests between the parties are also looked at.

A comparison between the two systems and the conclusions that can be drawn from this is set out in Chapter 4. Although the indisputable conclusion is drawn that section 417 is an invaluable weapon in a liquidator’s arsenal and that its continued existence is fundamentally necessary, areas are identified where the South African law is found wanting and suggestions for reform are made. Suggestions for reform are of necessity tied up with general reforms that are indicated in insolvency law in general, including the creation of a statutory body to govern insolvency law and to regulate the appointment and functions of insolvency practitioners. The recent amendments brought about by the new Companies Act of 2008 provide some suggestions for reform.
CHAPTER 2

PRIVATE EXAMINATIONS IN SOUTH AFRICAN LAW

1. Introduction

This chapter comprises three parts. The first part deals with general aspects pertaining to private enquiries, the second part, using *Kebble v Gainsford* 14 as a springboard, deals with the purpose and objects of such enquiries and the third part considers aspects which safeguard against the abuse of the section. In the first part, general aspects considered include the nature of proceedings in terms of section 417 and whether such proceedings constitute administrative action, the scope of section 417, who may bring an application for a private examination and the private nature of the examination. In the second part, where the purpose and object of section 417 is considered, the approach is to firstly look how the court dealt with these matters in *Kebble v Gainsford*, thereafter to look at other relevant cases. Aspects covered in this part include the duties of a liquidator and the purpose and objectives of the private enquiry. In the third part, it is discussed how potential oppression must be balanced against the need for information in order to safeguard the rights of examinees. The possibility of written as opposed to oral examinations is further considered and other means of protecting examinees, such as proceedings in camera and the furnishing of security, are briefly touched on.

2. Part 1 : General aspects pertaining to private enquiries

2.1 Section 417

Section 417(1) reads 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

14 n11.
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.”

In addition to requests for information, The Master or the Court may require any person summoned in terms of section 417 to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien.15

2.2 The nature of proceedings in terms of section 417

2.2.1 Extraordinary process

It is often stated that the private examination is a unique and extraordinary process.16 In Jeeva’s case the court commented on the sui generis nature of such an examination, as follows:

“An examination of this nature is a serious inroad into … ordinary common law rights. [Persons] are required to attend proceedings which are secret and inquisitorial in nature. They can be compelled against their will not only to attend but to give evidence on oath or affirmation; to sign a transcript of their evidence; and to answer all questions put to them, including self-incriminatory questions, under pain of being dealt with as a recalcitrant witness. One of the possible penalties is imprisonment.”17

Our legal system is essentially adversarial in nature, premised on the rules of natural justice and the norm of audi alteram partem, meaning that a party has the right to be heard, to cross-examine witnesses and to have insight into evidence already delivered. Parties are represented by advocates who present a case before an impartial judge who is the decision maker and not the investigator. In such a system a process that is inquisitorial in nature is an anathema, but is nevertheless tolerated if the process does not violate any individual rights. The machinery provided in section 417 is inquisitorial in that it provides for an examination, not a trial. The High Court has

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15 section 417(3).
16 The most quoted case in this context is Re Rolls Razor Ltd Re Rolls Razor Ltd (1969 3 All ER 1386 1396 H-I.
17 Jeeva and another v Receiver of Revenue, Port Elizabeth and others [1995] 2 All SA 178 (SE) at 185 – 186.
confirmed that such an examination is purely investigative and not determinative of any rights.\textsuperscript{18} The presiding officer does not determine any rights, nor does he make findings that can detrimentally affect a person’s rights. He records the evidence and regulates the proceedings.\textsuperscript{19} As an examinee’s rights, liberty or property are not affected by receiving a summons in terms of section 417, the Master does not have to comply with the \textit{audi alteram partem} rule.

Hockley cautions that the presiding officer at an examination is bound to act in accordance with the precepts of natural justice, which call for procedural fairness and even-handed impartiality to all persons who may be adversely affected by his actions and adds that the presiding officer must see that the examination is not conducted in an oppressive, vexatious or unfair manner.\textsuperscript{20} In \textit{Van der Berg v Schulte}\textsuperscript{21} the court pointed out that there is no \textit{lis} between the persons involved in an examination under section 417 and confirmed that it is a means of obtaining information from persons and that such persons are not parties to any litigation.\textsuperscript{22}

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,\textsuperscript{23} however counsel’s role is limited during the examination. The ordinary standards of procedure do not apply during a private examination and Calitz warns that as the evidence furnished at such proceedings have not been tested by means of cross-examination or re-examination, it is essential for the Master or the court to exercise control over the publication of such information.\textsuperscript{24}

\textsuperscript{18} \textit{Podlas v Cohen and Bryden NNO and Others} 1994 (4) SA 662 (T) at 675D – I.
\textsuperscript{19} \textit{ibid}.
\textsuperscript{20} Sharrock \textit{et all Hockly’s Insolvency Law} 2006 of \textit{Lategan & Others v Lategan NO & Others} 2003 (6) SA 611 (D) 623-5
\textsuperscript{21} 1990 (1) SA 500 (C) 510 E.
\textsuperscript{22} The court referred to Bowen LJ in \textit{Re North Australian Territory Co} (1890) 45 ChD 87 93.
\textsuperscript{23} subsection (1A).
\textsuperscript{24} Calitz J “Sections 417 and 418 of the Companies Act 61 of 1973 – relevance prevailing over the right to privacy \textit{Gumede v Subel NO} 2006 3 SA 498 (SCA)” 2006 Obiter 403 404.
2.2.2 An examination is not an administrative procedure

There is a continuing debate whether an examination instituted in terms of section 417 constitutes administrative action. The aim for defining a private examination as an administrative procedure is to bring it within the parameters of section 33 of the Constitution relating to lawful, reasonable and procedurally fair administrative action, as well as the protections afforded in the Promotion of Administrative Justice Act 3 of 2000. Section 5 of this act entitles a person to demand adequate reasons for an administrative action and if such reasons are not provided, the action is presumed to have been taken without good reason. Such an action may be subject to a judicial review, should other internal remedies have been exhausted. As stated, our courts have avoided the definition of a private examination as administrative action. In the matter of Leech v Farber NO and others the court referred to the Bernstein matter where the court touched on, but did not decide whether an examination is an administrative action. In Leech’s case the court concluded that it was not necessary to determine whether an examination constitutes administrative action, as a court on its own accord would not countenance an examination being conducted unfairly. In Nedbank Ltd v Master of the High Court WLD the court opined that when the Master gives effect to section 417 he does not act administratively, accordingly the Promotion of Administrative Justice Act 3 of 2000 does not apply. In Akoo the court concluded as follows:

“The question therefore as to what the nature is of the Master’s decision to issue a subpoena in section 417 proceedings and whether PAJA applies to it has yet to be determined. For present purposes I do not need to do so. Ultimately, whatever the nature of the act, its lawfulness is what counts.”

2.2.3 Private and confidential

An examination under section 417 or 418, as well as any application for such examination will automatically be private and confidential, unless otherwise directed.

26 2000 (2) SA 44 (W).
27 Bernstein v Bester NNO 1996 (2) SA 751.
28 2009 (3) SA 403.
29 Akoo and Others v Master of the High Court and Others (5612) [2012] ZAKZPHC 45 (31 July 2012) par 34.
by the Master or the Court.\textsuperscript{30} Prior to the amendment of subsection 7, only the court had a discretion to order a private examination.\textsuperscript{31} Meskin notes that the Master has to be satisfied by representations made to him by the provisional liquidator, the liquidator or a creditor and in the circumstances the information should be obtained at a private enquiry rather than at a meeting of creditors in the ordinary course and that the Master may convene such an enquiry notwithstanding that there has been no interrogation at meetings of creditors.\textsuperscript{32} The Johannesburg Bar Practice Manual of the South Gauteng High Court notes in paragraph 10.8 which relates to examinations in terms of section 417 that where an application is made to examine a particular witness, it must be shown that the examination be held in secret should be fully motivated as secrecy will not be ordered as a matter of course. The practice manual also states in this chapter that since the amendment of section 417 which has given the power to the Master to hold the examination, any application to the Court under this section must indicate whether the Master himself has instituted an examination and why it is necessary to apply to Court for this purpose.

2.3 \textit{Scope of application}

The scope of section 417 is very wide. Reference is made to the word “any” five times in subsection 1. The court has pointed out that the word “any” “offers the most open-ended and far-reaching enumeration…which it is possible to describe”.\textsuperscript{33} The applicability of the section is however limited by the express stipulation that it only applies to a company “unable to pay its debts” and after a winding-up order has been made.\textsuperscript{34} Companies wound up voluntarily by special resolution are precluded from relying on sections 417 and 418.\textsuperscript{35} O’Brien is of the view that this may be an aspect...
requiring reform\textsuperscript{36} and on this point is interesting to note very recent case law emerging on the applicability of section 418 in the context of a company that was liquidated on the basis that it was just and equitable to do so (and therefore not “unable to pay its debts”).\textsuperscript{37} It is worth mentioning that section 418 is not subject to the same constraints as section 417. The matter in question is that of \textit{Huang v Bester}\textsuperscript{38} where the company was wound up on the ground that it is just and equitable to do so. The case involved an examination into the conduct of an officer of the company in terms of Section 423 of the Companies Act which relates to the possible misapplication of money or property of a company. On appeal the court, per Satchwell J, noted that there is only one section of the Companies Act of 1973 that makes provision for the powers of a court examining or enquiring into the affairs of a company in winding up to be delegated to a commissioner, namely section 418, which provides firstly for the appointment of a commissioner and secondly for the referral of matters to such commissioner.\textsuperscript{39} It was held that section 418 is extremely broadly worded and that the language should be given its ordinary grammatical meaning.\textsuperscript{40} The wording of the section was found to be clear and unambiguous and the wording did not preclude the appointment of a commissioner to an enquiry in terms of section 423,\textsuperscript{41} notwithstanding the fact that the company was not liquidated on the basis that it was unable to pay its debts. This was so, as similar difficulties, namely troublesome and unclear controversies requiring investigation, may apply to all liquidations. In conclusion the court stated that it was not extending section 418 beyond its original intended application, but merely giving effect to the ordinary meaning of the words within their context.

Meskin notes that it is not an abuse of section 417 to obtain information for purposes of further litigation.\textsuperscript{42}

\textsuperscript{36} O’Brien P “The application of the statutory mechanisms providing for private enquiries in terms of the insolvency act in the winding-up of companies” 2002 J.S Afr. L 736.
\textsuperscript{37} \textit{Huang v Bester} n1.
\textsuperscript{38} \textit{Ibid}.
\textsuperscript{39} \textit{Ibid}, par 5.
\textsuperscript{40} \textit{Ibid}, par 7 and 8.
\textsuperscript{41} \textit{Ibid}, par 16.
\textsuperscript{42} Meskin \textit{Insolvency law} (updated 2012) par 8.1.
2.4 *Locus standi*

2.4.1 Application by the court or the Master

Section 417 notes that the Master or the court may summon a person for an examination. Formerly only the court was entitled to summons a person for purposes of examination in terms of this section and the examination was also referred to as “the court’s enquiry”, however in 1985 section 417 (1) was amended with the effect that the power to summons was extended to the Master. In extending such power to the Master the legislature had presumably endeavoured to fulfil a need where the Master will serve the purpose of the section better than the court itself. Meskin forwards the following reasons for this:

“...It is submitted the Legislature recognises that there are genuine cases where a secret examination is necessary for the beneficial winding-up or judicial management of a company. Its intention in empowering the Master to conduct such an examination, either himself or by a Commissioner who he appoints is, it is submitted, to facilitate the obtaining of the required information, ie without recourse to the Court, in those cases where the scope of the examination is likely to be narrow or where it should occur urgently or where its subject is the administration of the winding-up or the judicial management rather than pre-liquidation or prejudicial management conduct.”

It is submitted that of the reasons advanced by Meskin above, the factor of urgency is the more common precursor to the instigation of a private examination by the Master.

As stated above, the Master or the court may appoint a commissioner for the purpose of taking evidence or holding any examination and may refer the whole or any part of the examination to such a commissioner. Such a commissioner is usually a senior

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43 *Mitchell and another v Hodes* 2003 (3) SA 176 (C) par 17-18.
44 The section was amended by Act 29 of 1985. The provisions of section 418(5) did not exist prior to 1985, as discussed in *Van der Berg v Schulte* 1990 (1) SA 500 C. In the *Van der Berg* case the court pointed out that a commissioner who is not a magistrate has no statutory power to deal with a witness who refuses to answer questions. The commissioner has no inherent or common law powers and derives his power solely from section 418(5).
45 Meskin *Insolvency Law* (updated 2012) par 8.4.1.
46 section 418.
magistrate, advocate or attorney with experience in insolvency examinations.\textsuperscript{47} In conducting the examination, the commissioner acts in a quasi-judicial capacity and performs the court’s functions on its behalf.\textsuperscript{48} Although delegation means that that the court does not see or hear every witness, the court retains a discretion whether to delegate powers to a commissioner and will only do so in appropriate cases.\textsuperscript{49}

The office of the Master is somewhat of an anomaly in that the Master oversees not only insolvency law, but also a number of diverse other disciplines, which has led some writers to question the efficacy of the Master’s role in the insolvency arena.\textsuperscript{50} The pervasive role that the Master plays in insolvency law is to be questioned. It is submitted that the extension of powers to an already overburdened Master’s office may not be the best way to facilitate efficiency.

2.4.2 Other personae empowered to apply for a private examination

As the Master appoints a liquidator for the purpose of conducting the proceedings in a winding-up of a company as soon as a winding-up order has been made in relation to a company,\textsuperscript{51} the initiative for issuing a summons in terms of section 417 in practice emanates from the liquidator. Meskin points out that the liquidator is best situated to know why the effective administration of the winding-up necessitates there being an examination and notes, further, that one cannot attack an examination by challenging the liquidator’s authority.\textsuperscript{52} Our courts have also sanctioned the examination being instituted by a provisional liquidator.\textsuperscript{53} Calitz notes that the one of the Master’s most controversial duties is the appointment of a liquidator.\textsuperscript{54} Currently in South Africa there are no statutory or licensing requirements to regulate the qualifications or experience needed by a person to practice as a liquidator, which is widely held to be

\textsuperscript{47} Calitz J “Sections 417 and 418 of the Companies Act 61 of 1973 – relevance prevailing over the right to privacy Gumede v Subel NO 2006 3 SA 498 (SCA)” 2006 Obiter 403 404.
\textsuperscript{48} Mitchell and Another v Hodes and Others n43.
\textsuperscript{49} Huang v Bester n1 para 30 to 32.
\textsuperscript{51} Sections 367 and 368.
\textsuperscript{52} Meskin Law of Insolvency (updated 2012) par 8.5.2.
\textsuperscript{53} Papiyana & Others v Master of the High Court & Others [2010] JOL 26559 (GSJ) par 18.
an inadequate, capricious and flawed system. This is a clearly an area in need of urgent redress, considering the very wide statutory powers which are afforded to a liquidator, including the power to instigate a private examination.\textsuperscript{55}

A creditor may apply to the Master or the Court to instigate an examination in terms of section 417. Private enquiries can be very expensive and depending on the available assets of the company in liquidation, the creditor may have to initially fund the holding of a private examination. Any person who applies for an examination in terms of section 417 or 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. \textsuperscript{56}

In bringing an application for a private examination, Meskin advises that the applicant need only show a fair ground for suspicion, and does not have to make out a \textit{prima facie} case of actionable conduct.\textsuperscript{57} The application may be made \textit{ex parte} without any notice to the person proposed to be examined, but the court may, in appropriate circumstances, direct that notice be given, in order to afford the intended examinee the opportunity to answer by way of affidavit.\textsuperscript{58} Meskin notes further that the Master does not need to justify his decision and does not need to afford the witness an opportunity to respond.\textsuperscript{59} The court in the \textit{Podlas}\textsuperscript{60} matter held that it would be grossly unreasonable and lead to chaos to give each witness a right to be heard, as the notices served on witnesses were merely subpoenas calling on the persons summoned to perform their public duty.\textsuperscript{61}

\textsuperscript{55} The liquidator’s authority for proceeding in terms of section 417 is derived from his general powers as set out in section 386, more specifically the “very wide power” in terms of section 386(5) which notes that he may “\textit{do any other thing which the Court may consider necessary for winding-up the affairs of the company and distributing its assets}”. Meskin submits that the liquidator’s power to make an application to court for a private examination derives exclusively from section 386(4)(i), which notes that a liquidator has the power “\textit{to perform any act or exercise any power for which he is not expressly required \ldots to obtain the leave of the Court}” and that he must be authorised accordingly.\textsuperscript{55} On another occasion the court has stated that the functions of liquidators in terms of a section 417 examination were ancillary to their statutory powers set out in section 386(1)(e).\textsuperscript{55} subsection 6.

\textsuperscript{56} ibid.

\textsuperscript{57} Meskin \textit{Insolvency law} (updated 2012) par 8.5.2.

\textsuperscript{58} ibid.

\textsuperscript{59} ibid.

\textsuperscript{60} \textit{Podlas v Cohen & Bryden NNO and others} n18.
2.5 Conclusion

The above discussion aims to furnish some insight into the nature and scope of the section 417 procedure. In summary it can be noted that the proceedings provided for in section 417 are *sui generis*, inquisitorial in nature and wide in scope. The court will on its own accord guard against an examination being conducted unfairly. The proceedings are automatically private, although it remains incumbent on the applicant to convince the court that a private enquiry is appropriate. Both the court and the Master may instigate the proceedings. The court and the Master may delegate their powers to a Commissioner. It is commonly debated that the Master’s role in insolvency law is an aspect that requires reform, particularly as far as his appointment of liquidators is concerned, to counter law in caprice. In conclusion of this section it may be noted that private examinations have been interpreted in a consistent manner for over a century, as can be seen from this extract of an English judgment passed in 1883 in the matter of *Re Greys Brewery Co* (dealing with a section similar to section 417):\(^{62}\)

> “The nature of the proceedings is essentially this: the person examined is not examined as a witness, and to talk of examination in chief, or cross-examination, or re-examination in a case of this kind, is to use terms that are not really applicable. What is being done is this: discovery is sought to be obtained which may be useful to the Court in the conduct of the proceedings in the winding-up, and to my mind, looking at the section and the purpose for which the provisions of that section were inserted, an examination of this kind must be considered in the nature of a secret proceeding. It stands, both in bankruptcy and in a winding-up, on a footing which, of course, is not the footing on which cases are conducted which are by way of litigation between parties.”

\(^{62}\) *Re Greys Brewery Co* (1883) 25 ChD 400 at 403 quoted in the case of *Lategan v Lategan NO* 2003 (6) SA 611 (D).
3. Part 2: *Kebble v Gainsford* and the purpose and objectives of the section 417 examination

3.1 *Introduction*

The matter of *Kebble v Gainsford* is a useful vehicle for looking at the nature and purpose of a section 417 examination as the judgment contains extensive and constructive references to the various objectives of such an examination. In his judgment Levenberg AJ relied heavily on the approach of the constitutional court in the matter of *Bernstein and Others v Bester and Others No* 63 where the constitutionality of section 417 and 418 was tested. Levenberg J finds himself in good company in his reliance on the *Bernstein* case as this case has been embraced as a seminal decision on particularly the right to privacy and in the approximate six years since the judgment, it has been referred to in almost ninety High Court and Constitutional Court cases.64 For purposes of this dissertation, the comments relating to sections 417 and 418 are of relevance. The court in *Bernstein* declared sections 417 and 418 to be constitutionally valid. The comments of Ackerman J relating to the objectives of a section 417 examination are of particular interest and these comments will therefore be used as a point of reference. To begin with, however, the facts of the Kebble matter are provided below.

3.2 *Kebble v Gainsford*

3.2.1 The facts

The facts of the Kebble case are evident from the judgment and can be summarised as follows: The applicant, Kebble was faced with a summons compelling him to testify in a section 417 examination. He did not wish to be submitted to such an examination and brought an application for the proceedings to be set aside. Kebble and his late son, Brett Kebble, were the sole directors of a company called BNC (“the company”) prior to its liquidation. As a result of the death of Brett Kebble (the son), Kebble (the father) was the sole surviving director of the company. It was common cause that

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63 *Kebble v Gainsford* n11.

Brett’s deceased estate was insolvent. Examinations by forensic accountants had revealed that the company had been used as a vehicle to perpetrate a fraud against another company, Randgold. This was openly admitted by Kebble in an affidavit. As a result, Randgold launched successful winding-up proceedings against the company. After the Master’s order for final liquidation was granted, Kebble concluded a settlement agreement with Randgold in terms of which he agreed to pay Randgold an amount of R30 million in settlement of any claims that Randgold might have against him. Kebble alleged that Randgold also undertook to withdraw its support of the Master’s examination to the extent that Kebble might be called to give evidence at the examination. Kebble commenced payment in terms of the settlement agreement, but soon stopped due to an alleged dispute. This necessitated a second settlement agreement. The liquidators declined to be party to either of the settlement agreements due to the inherent risk they would be exposed to. The liquidators were of the view that as no payment was made to the company itself, it was not to the benefit of all creditors. Although Randgold was the only creditor to come forward at that stage, other creditors had been identified. Randgold was not prepared to indemnify the liquidators against possible claims by other creditors. Kebble alleged that the proposed examination was an abuse for two reasons: the only proved creditor, Randgold, did not want the examination to continue as its claim had been satisfied by the settlement agreements and the liquidators were already possessed of sufficient information to effect the winding-up of the company, as well as pursuing litigation, if necessary. The liquidators disputed these allegations.

3.2.2 The judgment

Kebble’s main contention of abuse was found to be unsubstantiated. He contended that the continuance of the examination would invalidate the settlement he had reached with Randgold, however, the court found that had he wanted to rely on his bargain with Randgold, he should have included the liquidators as parties to the agreement. With regard to his second main contention, namely that the liquidators already had sufficient information to proceed with litigation, the court pointed out that
even if the liquidators had a subjective intention to sue, based on the decision in
_Clover Bay_,65 that would not preclude them from going ahead with the examination.

The court held that it was not incumbent upon the liquidators to demonstrate a need for the examination. It was the obligation of the party wishing to stop the examination to demonstrate a “clear abuse”.66 This Kebble had failed to do. On the contrary, this was clearly a case where an examination was warranted. The court listed nine reasons in support of this contention: 1) Kebble was the only surviving director of the company. 2) The only reason the company was formed was for fraudulent purposes. 3) The company was hopelessly insolvent and the liquidators had a duty to enquire as to the causes of the company’s failure. 4) The fraud that had been committed was of a complex nature requiring further examination. 5) The fact that Kebble was prepared to pay R30 million to bring the examination to an end showed that he was not a person without knowledge of the affairs of the company. 6) It was against public policy to permit an examinee to avoid a liquidator’s examination through a settlement to which the liquidators were not a party. 7) Kebble himself had conceded that there may be other legitimate claims against the company and the liquidators should be given the opportunity of investigating such claims. 8) As long as there were outstanding claims against the company, the liquidators had a duty to pursue all potential assets. 9). The fact that the liquidators had carried out their own examinations and prepared the groundwork for the examination should not be used against them. If this were not so, liquidators would be prevented from ever preparing for enquiries, lest their diligence count against them. The court noted: “if a liquidator has not done his homework and prepared for the examination, he will accomplish little in the examination. If he is well prepared for the examination, according to Kebble, the examination then becomes unnecessary.”67

The court pointed out, further, that it is the duty of the court to protect examinees at an examination. If questions are asked that are abusive, the Commissioner, as an

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66 _Kebble v Gainsford_ n11 par 71.
67 _Kebble v Gainsford_ n11 par 86.
officer of the Court, should disallow them. If the Commissioner’s discretion is exercised incorrectly, the correct procedure would be to apply for a review.

3.3 The duties of a liquidator

3.3.1 The duties set out in Kebble’s case

As stated above, Levenberg J quoted extensively from the Bernstein matter where Ackerman J summarised the major statutory duties of a liquidator in a winding-up. Ackerman J’s summary is provided verbatim below:

“Some of the major statutory duties of the liquidator in any winding-up are:

(a) to proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable;

(b) to give the Master such information and generally such aid as may be requisite for enabling that officer to perform his/her duties under the Act;

(c) to examine the affairs and transactions of the company before its winding-up in order to ascertain –

(i) whether any of the directors and officers or past directors or officers of the company have contravened or appear to have contravened any provision of the Act or committed or appear to have committed any other offence;

(ii) in respect of any of the persons referred to in subpara (i), whether there are or appear to be any grounds for an order by the court under s219 of the Act, disqualifying a director from office as such;

(d) except in the case of a member’s voluntary winding-up to report to the general meeting of creditors and contributories of the company, the causes of the company’s failure, if it has failed;

(e) if the liquidator’s report contains particulars of contraventions or offences committed or suspected to have been committed or of any of the grounds mentioned in (c) above, the Master must transmit a copy of the report to the Attorney-General.”

When this extract is compared with the duties of a liquidator set out in the Companies Act, it can be noted that Ackerman J’s summary is in substance premised on those set out in the Companies Act, as discussed below.
3.3.2  *Statutory duties of liquidator*

The duties of a liquidator are found in sections 391 to 410 of the Companies Act, 61 of 1973. The relevant sections are mandatory, thus in each case the liquidator “shall” perform the duty stipulated. The act first stipulates general duties and then lists specific duties. General duties of the liquidator are noted to be the following: to proceed without delay to recover and take possession of all the assets and property of the company, to apply such assets and property in satisfaction of the costs of the winding-up and the claims of creditors, and to distribute the balance among those who are entitled thereto. Specific duties of the liquidator include the duty to give information to the Master, to facilitate the Master’s inspection of the books and documents of the company and to generally aid the Master in the performance of his duties under the Act. A liquidator further has a duty to expose offences and act thereon. He must examine the affairs and transactions of the company before its winding-up in order to ascertain whether any of the directors and officers or past directors and officers of the company have contravened any provision of the Act or committed any offence. Where appropriate, the liquidator must report whether there are any grounds to disqualify a director. The liquidator has to, before his final account, submit a report to the Master containing full particulars of any contraventions or offences. The Master in turn has a duty to transmit a copy of this report to the Attorney-General. The liquidator has a duty, except in the case of a member’s voluntary winding-up, to present a report to the creditors and contributories. This report has to be submitted no later than three months after the date of the liquidator’s appointment to a general meeting of creditors and contributories of the company and has to set out, *inter alia*, the capital issued by the company, its estimated assets and liabilities, the causes of failure of the company (if it had failed) and the progress and prospects of the winding-up. Of significance is the fact that the liquidator has to note in this report whether or not further examination is

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68 Companies Act 1973 section 391.
69 Companies Act 1973 section 392.
70 Companies Act 1973 section 400(1)(a).
71 Companies Act 1973 section 400(1)(b).
72 Companies Act 1973 section 402.
in his opinion desirable in regard to any matter relating to the promotion, formation or failure of the company or the conduct of its business.\(^{73}\)

As stated above, the duties of a liquidator summarised by Levenberg AJ in the \textit{Kebble} matter correspond in material respects to those set out in the Act. Thus, proceeding from there, it needs to be considered to whom the liquidator owes these duties to.

\subsection*{3.3.3 To whom does the liquidator owe these duties?}

Although a company remains in existence during winding-up, it ceases from the commencement of the winding-up to carry on its business except in so far as may be required for the beneficial winding-up thereof and its directors lose their powers except insofar as their continuance is sanctioned by the liquidator.\(^{74}\) Whereas the business and affairs of the company up to that point is managed by or under the direction of its board,\(^{75}\) who are accountable to the body of shareholders as a whole, the focus changes on winding-up to the benefit of creditors. It must be noted, however, that advantage to creditors is not one of the circumstances required for a company to be wound up by a Court.\(^{76}\) Here the Companies Act differs from the Insolvency Act which requires an advantage to creditors if a debtor’s estate is sequestrated.\(^{77}\)

It is trite in South African law that the liquidator owes a duty to the creditors as a whole, otherwise known as the \textit{concursus creditorum}.\(^{78}\) The following dictum of Innes JA in the case of \textit{Walker v Syffrei}\(^{79}\) is considered the \textit{locus classicus} on the effect of a \textit{concursus creditorum}, namely:

\begin{itemize}
  \item \textit{Companies Act 1973 section 402(1)(f)}.\(^{73}\)
  \item \textit{Companies Act 1973 section 353}.\(^{74}\)
  \item \textit{Companies Act 2008 section 66}.\(^{75}\)
  \item \textit{Companies Act 1973 section 344(a) – (h) sets out the circumstances in which a company may be wound up by a court, with sections 344(f) (when the company is unable to pay its debts) and section 344(h)(when it appears just and equitable that the company should be wound up) most often being referred to.}\(^{76}\)
  \item \textit{Insolvency Act 24 of 1936 section 6(1)}.\(^{77}\)
  \item \textit{Basil Nel NO and two others v Master of the High Court and two others case no. 290/2000 par 6}.\(^{78}\)
  \item \textit{1911 AD 141 at 166}.\(^{79}\)
\end{itemize}
“... the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered not with regard to estate matters by a single creditor to the prejudice of the general body.”

The liquidator stands in a fiduciary relationship to the company, to the body of members as a whole and to the body of creditors as a whole.80 The nature of a liquidator’s functions were considered in the matter of James v The Magistrate Wynberg and others.81 Before pronouncing on the fiduciary duty of a liquidator to the creditors, the court considered obiter whether a liquidator ought to be considered an officer of the court in South African law. In doing so the court referred to the judgment of Coetzee J in Gilbert v Bekker and Another82 from which it is evident that Coetzee J did not place much value on such a distinction:

‘To refer to a trustee as an officer of the Court seems to me inappropriate as he is just the holder of one of a host of offices created by various statutes such as directors, executors, mayors, town clerks, etc. But even if it is felt that he qualifies for this honour, there are no legal consequences which flow from that position, qua officer, nor powers to prescribe how he should perform his job. The furthest that one can take it is to feel free to censure him, when occasion demands, for conduct not becoming an officer and a gentleman, which seems to be just about the same thing, with as little legal content.’83

In the event the court in the James matter did not find it necessary to determine whether or not a liquidator is an officer of the court in South Africa, as the matter was decided on the basis that “whatever his status he stands in a fiduciary relationship both to the company of which he is the liquidator and to the body of its members as a whole, as well as to the body of its creditors as a whole.”84 In addition, and what turned out to be of greater importance in the James matter was the fact that the liquidator is expected to be detached, independent, impartial and even-handed in his

81 James v Magistrate Wynberg and others n80.
82 1984 (3) SA 774 (W) at 777F-G and 778A-B.
83 Ibid at 79-80.
84 Ibid at 13-14 where the Court referred to the following matters as authority for this proposition: Re Corporation, Gooch’s Case (1872) 7 Ch App 207, Caroline Trekkers en Implemente (Edms) Bpk v Venter 1982(2)PH E9 (A), Fey NO and Whiteford NO v Serfontein and Another 1993 (2) SA 605 (A), Ex parte Klopper NO: In re Sogervim SA (Pty) Ltd (in Liq) (Sogervim SA Intervening) 1971 (3) SA 791 (T), Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood NO and Another.
dealings and must also be seen to be so.\textsuperscript{85} This was considered to be particularly important when considering the “\textit{far-reaching machinery of interrogation}” created by the Companies Act, giving rise to a \textit{sui generis} procedure where the powers of the liquidator are “\textit{extraordinary and inquisitorial in nature}”.\textsuperscript{86} The impartiality of a liquidator is a safeguard against the potential abuse of the examination procedure.

Whether a liquidator is an officer of court in South African law still remains uncertain. As stated above, the court in the \textit{Kebble} matter expressed the view that the Commissioner \textit{as an officer of the Court}, should disallow abusive questions. It is submitted, in line with the decision in the \textit{James} matter, that it will not advance standards in the winding-up process to make a liquidator an officer of the court. A statutory obligation on the liquidator to act in a fiduciary capacity towards the body of creditors as a whole and to carry out his duties in an independent, impartial and even-handed way will, it is submitted, be more effective in order to regulate the liquidator’s conduct.

It is noteworthy that the focus of the liquidator’s duties falls squarely on his responsibility to determine assets. Whilst one must concede that this is an important duty, there are other objectives in insolvency which warrant consideration. One such duty is the need to investigate the cause of failure of a company. Calitz notes the following in this regard:

\begin{quote}
“Another disparity that one notices when examining the functions of the Master within the context of international standards is the lack of investigative powers of the Master relating to the cause of the insolvency. In most foreign jurisdictions the examination into the cause of insolvency, which also includes the behaviour of the insolvent prior to the sequestration of his estate, represents a major objective in the justification of these regulatory institutions. Customarily, the investigative process of insolvency law is also established as a public policy measure. Although the South African system hosts a strong interrogation procedure, the investigative powers of the Master are limited to the general enquiries afforded by the Act, which generally aims to obtain information on the financial affairs of the insolvent and the whereabouts of property. Being able to determine the cause of insolvency not only
\end{quote}

\textsuperscript{85} \textit{Ibid} at 14D.
\textsuperscript{86} \textit{Ibid} at 81.
has the advantage of separating the bona fide insolvent from the person abusing the system, but in the context of law reform will also have substantial scientific and empirical value.\textsuperscript{87}

3.3.4 Sanctions against a liquidator

Should the liquidator fail to perform his duties or comply with a reasonable demand by the Master for information or proof required by him in connection with the liquidation of the company, the Master or any person having an interest in the company, after giving the liquidator at least two weeks’ notice, can apply to Court for an order directing the liquidator to perform such duty or comply with such demand.\textsuperscript{88} The liquidator runs the risk of having a costs order \textit{de bonis propriis} against him.\textsuperscript{89} The liquidator may also be removed by the Master and by the Court if he has failed to perform any duty imposed upon him satisfactorily or to comply with a lawful demand by the Master or if the majority of creditors (or members in a case of a member’s voluntary winding-up) has requested him to do so.\textsuperscript{90} A court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in the act or for any other good cause.\textsuperscript{91} It is significant that no action for damages can be brought against a liquidator for failing to do his duties. A liquidator may himself not be questioned in terms of a section 417 procedure.

3.4 The objectives of the section 417 examination

3.4.1 Objectives set out in the \textit{Kebble} matter

Following a \textit{modus operandi} similar to the one above, this starting point of this section is to look at what the court determined in the \textit{Kebble} case regarding the objectives of the section 417 examination. In that case Levenberg AJ again referred extensively to Ackerman J’s summary in \textit{Bernstein} of the objectives of a section 417 and 418 examination, as follows:

\textsuperscript{88} Companies Act 1973 section 405.
\textsuperscript{89} Companies Act 1973 section 405(2). \textit{Thorn v The Master} 1964 (3) SA 38 (N) 52-3.
\textsuperscript{90} Companies Act 1973 section 379 (1)(b).
\textsuperscript{91} Companies Act 1973 section 379 (2).
A section 417 and 418 examination has many objectives:

(a) It is undoubtedly meant to assist liquidators in discharging these aforementioned duties so that they can determine the most advantageous course to adopt in the liquidation of a company.

(b) In particular it is 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 interests of the company’s creditors.

(c) Liquidators have a duty to enquire into the company’s affairs.

(d) This is as much one of their functions as reducing assets of the company into their possession and dealing with them in a prescribed manner, and is an ancillary power in order to recover properly the company’s assets.

(e) It is only by conducting such enquiries that the liquidators can:
   (i) determine what the assets are and who the creditors and contributories of the company are;
   (ii) properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.

(f) It is permissible for the interrogation to be directed exclusively to the general credibility of an examinee, where the testing of such person veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound-up.

(g) Not infrequently the very persons who are responsible for the mismanagement and degradations on the company are the only persons who have knowledge of the workings of the company prior to liquidation (such as directors, other officers and certain outsiders working in collaboration with the former) and are, for this very reason, reluctant to assist the liquidator voluntarily. In these circumstances it is in the interests of creditors and the public generally to compel such persons to assist.

(h) The interrogation is essential to enable the liquidator, who most frequently comes into the company with no previous knowledge and finds 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 form the written materials of the company alone.

(i) 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.

(j) 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.
(k) 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 to shareholders and creditors for the failure of the business, if the company goes insolvent. Giving evidence at as 417 examination is part of this responsibility. This responsibility is not limited to officers of the company in the strict sense, but extends also to the auditors of the company.

3.4.2 Purpose of section 417

Meskin notes that the purpose of interrogations is a means of obtaining information. Hockly confirms this when stating that the examination is essentially an interrogation in which information is sought to be pieced together so that the affairs of the company can be properly wound up. He points out that the purpose is not to put the liquidator in a better position that that of the debtors and creditors, but to place him on an equal footing with debtors and creditors, which he may not have been due to the disabilities resulting from sequestration. Although much can be said about the sui generis nature and the far-reaching scope of the examination, every matter concerning section 417 seems to return to this crucial point, namely the weighing up of perceived injustices against the purpose of the section. That the purpose of the section is clear and unequivocal is substantiated by the fact that cases have consistently noted the purpose of the section in a similar manner. This was again seen in the very recent matter of P Nyathi and others v M P Cloete NO and others where the court had to consider the purpose of section 417 and in doing so it referred to a number of cases that pronounced on the objects of the section 417. The purpose of this section were variously noted to be the following: to assist officers of the Court in performing their duty to creditors, the Master and the court, to determine the most advantageous course to adopt in regard to the liquidation of the company, to assist the liquidator with the primary goal of winding-up, which is to identify the assets and liabilities and to administer them to the advantage of the creditors, to provide the company with

94 *Ibid.* Reference is made to *Pitsiliadi v van Rensburg and Others NNO* 2002 (2) SA 160 (SEC) 162.
95 Case no 2012/7667 GSJ.
96 *Lynn No ano v Kreuger and others* 1995 (2) SA 940 (n) 944 F.
97 *Western Bank Ltd v Thorne NO and others* 1973(3) SA 661 (C) at 666F.
98 *Merchant Shippers SA (Pty) Ltd v Millman NO and others* 1986 (1) SA 413 (C) 417 D – E.
information about its affairs, claims and liabilities which the company’s officers fail or refuse to make available and to piece together information in order to assist the winding-up process. In another recent matter, *Kawie v The Master of the High Court*, it is simply noted that the purpose of the section is to investigate the affairs of the company. The overall tenet of these decisions is that the purpose of section 417 is to obtain information. These recent interpretations of the purposes of the section have not varied from those stated more than 40 years ago in the English matter of *Re Rolls Razor Ltd* where the following was stated:

“The process ... is needed because of the difficulty in which the liquidator in an insolvent company is necessarily placed. He usually comes as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who were wholly innocent of any wrongdoing may have motives for concealing what was done. In any case there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly the Legislator has provided this extra-ordinary process so as to enable the requisite information to be obtained.”

### 3.5 Responsibility to account

Ackerman J in the *Bernstein* matter was of the view that those who obtain funds from the public had a responsibility to account for how those funds were spent. Ackerman J’s comments relating to the responsibility of those who obtain funds from the public to account for how those funds were spent, were reiterated in the matter of *Mitchell v Hodes*. In another matter, *Ferreira v Levin and Others, Vryenhoek and Others v Powell NO and others*, Sachs J stated as follows:

“Company directors and other officials who appeal to the public for funds and engage in public commercial activity with the benefit of not being personally liable for company debts, cannot complain if they are subsequently called upon to account for their stewardship…Indeed, it

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99 *Ferreira v Levin NO and others; Vryenhoek v Powell NO and others* 1996 (1) SA 984 (CC)(1996(1) BCLR 1).
100 *Leech v Farber NO and others* 2000 (2) SA 444 (W) 450 J.
101 Case no. 21353/2011 WC 3 November 2011 (unreported).
102 *Re Rolls Razor Ltd* (2) [1970] a Ch 576.
103 *Bernstein v Bester NNO* n27.
104 *1996(1) SA 984 (CC) at 1116 para 261.*
would be ironical if crooked directors were more able to avoid submitting themselves to an examination than honest ones”.

Ackerman J’s comments raise the question to whom directors owe a responsibility to account. It appears to be suggested that directors must account to the public or that directors in general must be accountable for their actions. It is trite that a director is only accountable to the shareholders of the company. This position is confirmed in the Companies Act 71 of 2008 which prescribes that a director must act in the best interests of the company,\(^\text{105}\) i.e. the body of shareholders as a whole. The interests of other stakeholders, such as creditors, employees, suppliers, the community and the environment, have received no formal recognition under the new Companies Act and the duties of directors are focused on maximising shareholder wealth.\(^\text{106}\) Should a director fail in his duties, there are provisions in the new Companies Act that will call him to account.\(^\text{107}\) A company in existence owes no duties to its creditors. This position naturally changes upon liquidation when the *concursus creditorum* is established, but at that point the duties of the director have ceased, other than the duties to attend meetings\(^\text{108}\). It is exactly for this reason that the examination in terms of section 417 is of such value, as it is the only means to gain information from a director. It is therefore submitted that Ackerman J’s comments on the responsibility of directors to account to the company’s affairs refers to a director’s duty to attend at enquiries such as the section 417 enquiries.

Furthermore, when one considers the prevailing economic situation it seems crucial to maintain a section such as section 417 in order to counterbalance the prevalence of white collar crime and fraud in our society. In the *Bernstein* matter, Ackerman J took judicial notice of “*the particularly high crime rate…currently prevalent in South Africa*”, as well as the collapse and liquidation of companies that were of concern to the state and noted that this gave added weight to the argument that liquidators should act efficiently, quickly and prudently with assets to protect the interests of creditors and the public at large.\(^\text{109}\)

\(^\text{105}\) Companies Act 2008 Section 76(3)(b).
\(^\text{106}\) Cassim et al *Contemporary Company Law* n5 517.
\(^\text{107}\) Eg Companies Act 2008 sections 77, 20(6) and 218(2).
\(^\text{108}\) Companies Act 1973 section 414(1).
\(^\text{109}\) *Bernstein v Bester NNO* n27 par 151.
Again, in the matter of *Mitchell v Hodes*\(^{110}\) it was highlighted that the honest conduct of companies was a matter of great public concern, requiring the exposure of dishonest conduct, especially since the liquidation is frequently the result of mismanagement involving fraud on the part of the directors and other officers of the company. These persons are often the only ones to have details of the pre-liquidation business affairs of the company. It is especially in these cases that an examination is required.

3.6 **Conclusion**

The judgment in the *Kebble* provides a useful insight into the approach adopted by our courts in applications in terms of section 417. The section must be interpreted in order to give effect to the liquidator’s duties. These duties are twofold: firstly and most importantly, the liquidator’s general duty is to determine as many assets as possible and to realize these assets in order to satisfy the claims of the creditors. Secondly, the liquidator has specific duties to assist the Master, to expose any offences, to determine whether directors are to be disqualified and to determine the causes of failure of the company, where applicable. It is significant that the courts emphasise the general duty of liquidators to collect assets, and that less focus, if any, is placed on the duty to ascertain the cause of the company’s failure. The primary objective of the section is to obtain information. In the *Kebble* matter the court raised the point that directors should have a duty to account to the public.

4. **Part 3: aspects which safeguard against the abuse of the section**

4.1 **Introduction**

In view of the wide scope of section 417, and the potential inconvenience and harm that may be caused to examinees, the section is made subject to certain restrictions. This part discussed a number of checks and balances which operate to restrict the wide powers that the Master or the court may wield. Firstly, there is the balance to be

\(^{110}\) Mitchell and Another v Hodes and Others *NNO* n43.
achieved between the infringement of a party’s rights and the importance of the information requested. This aspect also touches on the right of a party not to incriminate him or herself. Further aspects include written versus oral interrogatories, the furnishing of security and proceedings held in camera.

4.2 Balance

It is submitted that the balance to be achieved between the information requested and possible hardship to the examinee goes to the heart of the purpose of section 417. Balance is the fulcrum on which the section rests. Ackerman J in Bernstein, as quoted in the Kebble matter, refers to an English decision, Clover Bay Limited (Joint Administrators) v Bank of Credit and Commerce International SA, where the Court of Appeal highlighted the balance between the requirements of the liquidator and possible oppression to the person to be examined. The court pointed out that where the information requested is fundamental to the winding-up process such balance would clearly weigh in favour of an examination, however, if the liquidator wanted to merely “dot the i’s and cross the t’s on a fairly clear claim” the balance would lie against him. Conceding that few cases will be this plainly weighted, it is noted that a court will have to exercise its discretion whether to order an examination. The court outlined certain guidelines for the exercise of such discretion, as follows:

“The first consideration is that the purpose of the provisions is to enable the liquidator to reconstitute the state of knowledge to the company in order to make informed decisions. The purpose is not to place the company in a stronger position in civil litigation than it would have enjoyed in the absence of liquidation. Second, the appropriate strategy is not to require proof of the absolute need for information before an order of examination will be granted, but proof of a reasonable requirement of information. Third, the case for examination would be much stronger against officers or former directors of the company, who owe the company a fiduciary duty, than against third parties. Fourth, an order for oral examination is more likely to operate against an examinee than an order for the production of documents. The court is also likely to treat an application for the holding of a s417 examination from an office holder, such as the liquidator, with more sympathy than it would treat a similar request from a contributor…”

111 Bernstein v Bester NNO n27.
112 n65.
The court concluded by stating that a clear case of abuse had to be established before a discharge from a subpoena could be ordered. As stated above, Kebble failed to establish any abuse. On the contrary, it was found that this was a clear case where an examination was patently indicated, for the reasons set out above in the discussion of the judgment.

Applicants wishing to set aside an order in terms of section 417 must prove that the statutory balance does not protect them properly. It is the Master who determines the relevance of the documents requested and not the party seeking to prevent disclosure. In the *Gumede* matter, where the application was for a production of documents, the court held that the balance to be in favour of the liquidator, in that the relevance of the documents requested trumped the applicant’s right to privacy. The decision was premised on the balance between the harm to a person summoned to produce books or papers in his custody and the importance of the documents sought.

The possible harm to a person under private examination is evident when considering the potential for self-incrimination. As noted by Mars, an examination prior to the advent of the interim Constitution could and did have serious implications in subsequent criminal proceedings for witnesses who, upon pain of incarceration, had to answer all questions fully and truthfully. Meskin sets out the current position as follows: a person is required to answer any question, the answer to which would not involve an unjustified infringement of any of his rights under Chapter 3 of the Constitution of the Republic of South African 200 of 1993, notwithstanding that the answer may tend to incriminate him and the answer may be used subsequently in evidence against him, but with effect from 27 April 1994, only in civil proceedings or criminal proceedings relating to perjury. In *Mitchell’s* case the court, was dealing with self-incrimination, highlighted the need for balance between oppression to the examinee and the need to obtain information:

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113 *Akoo and Others v Master of the High Court and Others* n29.
114 *Gumede v Subel* 2006 3 SA 498 (SCA) 505.
116 Meskin *Insolvency law* (updated 2012) par 8.5.2 *cf Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) and *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).
117 *Mitchell v Hodes* n43 286.
“To my mind, the inevitable tension between the rights of an examinee in section 417 proceedings (in particular, the broad right to a fair trial of an examinee who is also an accused person) and the indubitable public interest in the proper examination of corporate collapses, has been adequately and fairly balanced by the Constitutional Court 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 it is to ensure compliance with fair criminal trial standards).”

Direct and derivative use immunity refers to the fact that a witness’ own evidence cannot be used against him or herself, unless such evidence is substantiated independently. This immunity differs from blanket immunity which is an undertaking not to prosecute the witness. By allowing the use of derivative evidence, flexibility has been retained in that the trial judge may decide whether to admit the evidence or not. It also avoids immunity baths where a witness offers up evidence in order to side-step future prosecution. In terms of section 417(2)(b) any person may be required to answer any question put to him or her at the examination, notwithstanding that the answer may incriminate him or her. A person shall be obliged to answer at the instance of the Master or the Court, provided that the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.118 Academic writers have criticized the requirement to involve the Director of Public Prosecutions, on the basis that this may unnecessarily stultify proceedings.119

4.3 Abuse of process

The court has the inherent power, both at common law and in terms of section 173 of the constitution to regulate its own process, including the right to prevent an abuse of its process in the form of frivolous or vexatious litigation.120 The court can interfere and declare the exercise of power invalid only where it is shown that the repository of the power acted mala fide or from ulterior motive or failed to apply his mind to the

118 Section 417(2)(b) was amended in 2002.
119 eg. Woodland “Recent Companies Act amendments: a charter for delinquent corporate controllers” AIPSA (now SARIPA) Newsletter June 2003 1-2. Woodland argues that the court went further in amending section 417(2)(b) than required by the Constitutional Court in Ferreira v Levin NO & Others 1996 (1) SA 984 CC by adding the requirement to consult with the Director of Public Prosecutions.
120 Cassimjee v Minister of Finance (455/11) [2012] ZASCA 101 (1 June 2012) par 8.
matter. In evaluating whether there is an abuse the court is required to cumulatively
weigh up all of the factors both for and against the holding of an examination. Whether there is an abuse will in all instances depend on the circumstances of the case. The court thus has the power to prevent the oppressive, vexatious and unfair use of section 417 proceedings. In the matter of Leech v Farber, Nugent J stated this unequivocally as follows:

“As long as enquiries of this nature have been permitted by legislation in this country, the courts have had the power to intervene in order to supervise the manner in which they have been conducted.”

The liquidator must apply his mind in order to determine whether a legitimate purpose exists and that sufficient cause is made out for the enquiry to take place. Should he not do so, he runs the risk of the court declaring that the enquiry amounts to an abuse of process. However, a witness does not have a right to a list of questions prior to a section 417 hearing. An opportunity should be given to the witness to consult documents and to consider a reply, but it is not necessary for him to prepare for an enquiry as for an academic examination. Where applicants have averred that the subpoenas issued against them were vague in that they failed to specify the nature of the documents that were required, this was rejected by the court. The mere fact that a variety of documents are required, did not mean that the request for documents was vague.

4.4 Oral or written interrogatories

The Master or the Court may examine any person summoned on oath or affirmation concerning any matter referred to in subsection (1), either orally or on written interrogatories and may reduce his answers to writing and require him to sign them.

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121 Strauss & others v The Master & Others NNO 2001 (1) SA 649 (T) 657 A.
122 Bernstein v Bester NNO n27.
123 Leech v Farber NOO and others n100.
124 Laskarides and Another v German Tyre Centre (Pty) Ltd and others (in liquidation) NNO 2010 (1) SA 390.
125 Lategan v Lategan NO and Others 2003 (6) SA 611 (D).
126 Nyathi v Cloete NO case no 2012/766 SGHC (7 September 2012).
127 Ibid. cf Leech and others v Farber NO and others 2000 (2) SA 444 455 A – C.
128 subsection 2(a).
The recent *Nyathi*\(^{129}\) matter dealt with a review of a decision not to allow examination of the applicants in an examination in terms of section 417 and 418 by written interrogatory. The applicants further wanted an order setting aside the subpoenas issued in terms of section 417.\(^{130}\) The court pointed out that it has a discretion whether to proceed by means of an oral interrogation as opposed to a written interrogatory and that there must be good reason for having a written examination rather than an oral examination.\(^{131}\) The court referred to the English matter of *Re Rolls Razor Ltd*\(^ {132}\) where it was held that one must look at the facts as a whole, without yielding to preconceptions. In the *Nyathi* matter it was held that a written interrogatory may be indicated where the information sought is merely formal in nature. In other circumstances, a written interrogatory as a precursor to oral examination may be more suitable.\(^{133}\) However, one should be disinclined to take the written interrogatory route when this would undermine the object and purpose of the examination, especially where failure of the company was, on the face of it, caused by the fraudulent actions of the directors.\(^{134}\) In such instances it would be counterproductive not to get the necessary information from the directors themselves, as quickly as possible, as they may be the only sources of information as to the pre-liquidation affairs of the company. In the *Nyathi* matter, there was a typical absence of information, lack of financial documents and information of the insolvent company, as well as a lack of co-operation from the directors. So little persuaded was the court of the “ill-conceived” application in the *Nyathi* matter, that costs on a punitive scale were awarded against the applicants.

In the Draft Insolvency Bill\(^ {135}\) clauses 417 and 418 have been retained in clause 65 and 66. Van der Linde and Boraine\(^ {136}\) note that the draft bill provisions are similar to sections 417 and 418 of the Companies Act, with certain innovations. One such novelty is found in clause 67, which empowers the liquidator to put written questions

\(^{129}\) *Nyathi v Cloete* n126.

\(^{130}\) *Ibid par 1*.

\(^{131}\) *Ibid par 6 cf Mondi Ltd and another v The Master and others* 1997 (1) SA 641 (N) 645E.

\(^{132}\) *Re Rolls Razor Limited* [1969] 3 ALL ER 1386.

\(^{133}\) *Nyathi v Cloete* n126 par 6.

\(^{134}\) The court referred to the matter of *Lynn No and ano v Kruger and others* 1995 (2) SA 940 944F-I.


to the insolvent, creditors and other witnesses. Answers to such questions are treated as evidence given at an interrogation. The authors note that this procedure should save time and money. In response to their viewpoint, reference is made to the *Nyathi* decision discussed above, where the court noted that written interrogatories are not appropriate in all cases and that there is a risk that necessary information, which could be elicited by means of oral evidence, may not be exposed.

4.5 Security

A further innovation Draft Insolvency Bill is the fact that the creditor is required to give security for the costs of the interrogation.\(^{137}\) This aspect is not controversial and it is not foreseen that its inclusion will meet with any opposition.

4.6 In camera proceedings

There is no provision in sections 417 and 418 for holding *in camera* proceedings when self-incriminating evidence is given, as is provided in section 65(2A) of the Insolvency Act of 1936.\(^{138}\) Section 65(2A) provides that where a person giving evidence is obliged to answer incriminating questions, the presiding officer shall 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. As stated, sections 417 and 418 do not contain a similar provision, however it is submitted that such a provision is indeed not required. This view is based on the stance taken by the Law Reform Commission, in omitting a requirement for *in camera* proceedings in respect of the interrogation of an insolvent.\(^{139}\) Van der Linde and Borraine note the omission of this requirement and refer to the explanatory memorandum annexed to the Commission’s report which makes it clear that the obligation to answer such questions should not depend on whether the proceedings are held *in camera*, but that the presiding officer should retain a discretion to order

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\(^{137}\) Draft clause 66(2).

\(^{138}\) *Mitchell v Hodes* n43.

that any proceedings be held *in camera*.\textsuperscript{140} The safeguard of *in camera* proceedings is therefore deemed unnecessary.

4.2.4 Conclusion

Balance is an important process in law. The law is not black and white, but is premised upon a complex system of values, most importantly that of rationality. Excessive rigidity should be avoided in order to promote the application of reason to each set of circumstances. Every case should be viewed separately. Should one include too many checks and balances in a procedure based on discretion, it may be counter-productive and lessen the effectiveness thereof. This is the case with written interrogatories. Although written interrogatories may be less invasive than oral examination, our courts have warned that written interrogatories are not as effective in obtaining the information that is required for an effective and efficient winding-up and have denied the applications for written interrogatories in cases where it was found to be not appropriate. It is submitted that it is vital for the court to retain a sufficient discretion to evaluate each case on its own merits. Similarly, with procedures to be held in camera, the court should have a discretion to determine whether the proceedings are to be held in camera and a *numerous clausus* of circumstances should not be provided.

\textsuperscript{140} Van der Linde and Boraine “The draft Insolvency Bill – an exploration” JSAfrL (1999) 38 47.
CHAPTER 3
PRIVATE EXAMINATIONS IN TERMS OF ENGLISH LAW

1. Introduction

This chapter contains the comparative aspect of the study, and the English provision for private examinations, namely section 236, is thus considered in detail in this section. As has been noted above, South African insolvency law has a strong link to English insolvency law, as is evidenced by the seminal English cases that are still referred to and relied on by our courts, including the Constitutional Court, in reaching their decisions. In order to familiarize the reader with the regulated nature of the insolvency system in England, the section commences with a brief exposition of the structures underpinning English insolvency law. Another preliminary aspect addressed here is the differences between public and private examinations. The section then continues to look at the law, as encapsulated in section 236 itself, as well as the corresponding insolvency regulations. The progression is influenced by the provisions of the act and the regulation and thus, the section considers the provisions of section 236, the enforcement powers of court, the form and content of the application, the court order, the procedure for the examination, the record of the examination and the cost of proceedings. The scope and purpose of private examinations are considered next, which of necessity leads on to a consideration of the duties of the official receiver. As private examinations are premised upon the achievement of a balance between the interests of the competing parties (the need for the liquidator to obtain information and the right to privacy of the respondent), the protection of public interests and the balancing of interests are next considered. In conclusion of this chapter, some remaining aspects are looked at, namely how self-incrimination has been treated in English law and finally, how the functions of the liquidator is complemented by other acts and organisations.

For purposes of clarifying nomenclature I point out that English insolvency law makes provision for a number of regimes, including voluntary winding up, winding up by court, receivership, administration and voluntary arrangements, with the result that the insolvency practitioner may be variously referred to as an administrative receiver, administrator, nominee or supervisor, liquidator or provisional liquidator, the
office holder, official receiver etc. I have not reduced these varying terms to a standard terminology such as “the practitioner”, but have reproduced the nomenclature used in the act, the case or the text that I refer to without alteration.

2. Preliminary aspects

2.1 The regulated system in England

The English insolvency system has been the subject of extensive reform and now has a robust regulatory framework. Insolvency law in England is regulated by the Insolvency Act of 1986. The Insolvency Act 1986 was prompted by the Report of the Review Committee of Insolvency Law and Practice (“Cork Report”) Cmnd.8558 (1982). Finch notes that the Cork report was published at a time when business failures were at a record level and the report advised fundamental reforms, moving away from punitive towards rehabilitative objectives, producing a “sea change” in English corporate insolvency. Rajak described the 1986 Insolvency Act “the most explicit and comprehensive code yet for the conduct of the liquidation” and notes that it greatly assists the liquidator in the execution of his duties. The act adopts an integrated approach and deals with bankruptcy (personal insolvency) and corporate insolvency in one act. Broadly speaking, the liquidation practitioner has the duty to gather as many assets as possible and to deal with the creditors fairly. Should the practitioner experience a lack of co-operation or encounter difficulty in locating assets, one of the weapons available to him is the power to make examinations in terms of the Insolvency Act. The power of the court to examine persons apply in all forms of insolvency proceedings, although not in a voluntary arrangement.

The Insolvency profession is authorised and regulated by the Insolvency Service, the executive agency of the Department for Business, Innovation and Skills. It has a statutory framework based on the Insolvency Acts of 1986 and 2000, as well as other

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141 Finch Corporate Insolvency Law: Perspectives and principles (2nd edition) 16.
143 Clover Bay Limited (Joint Administrators) v Bank of Credit and Commerce International S.A n65.
acts. The Insolvency Service has been called the “regulator of regulators.” Recognised professional bodies are declared by the Secretary of State to regulate the practice of insolvency practitioners and maintain and enforce rules for securing that its members are fit and proper to act and that they meet acceptable requirements as to education and practical training and experience. Members have to adhere to a code of ethics, as well as statements of insolvency practice, insolvency guidance papers and the relevant rules and regulations of the authorising bodies. All insolvency practitioners are subject to regular monitoring visits, at least once every six years or sooner if necessary, from their authorising bodies. There is no doubt that the English insolvency profession is strictly regulated. One publication mentions that there are over 120 pieces of legislation, extending to some 2 000 pages, excluding statements of insolvency practice, which govern insolvency practice. The practitioner faces disciplinary action in the event of his non-compliance with any of the regulations.

An insolvency practitioner must carry on his practice with independence, integrity and the professional skills appropriate to the range and scale of the practice and the proper performance of the duties of an insolvency practitioner and in accordance with generally accepted professional standards, practices and principles. If a practitioner fails to disclose circumstances where there may be a conflict of interest he may be found to be not fit and proper. The Joint Code of Ethics provides insolvency practitioners with five fundamental principles to which they must adhere, namely integrity, objectivity, professional competence and due care and professional behaviour. Goode notes that in a compulsory winding up, the liquidator is an officer of the court and as such, he is “required to act with scrupulous fairness and impartiality, avoiding ‘dirty tricks’ that might be open to an ordinary person and his status as an officer of the court is relevant to the propriety of contracts into which he

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147 Section 391 of the Insolvency Act 1986.
enters.” Rajak also states that the liquidator is an officer of the court and an agent of the company, adding that the liquidator owes trustee-like obligations to the creditors, who can remove him by majority vote.  

2.2 Public versus private examinations

The Insolvency Act makes provision for two types of examinations, namely public examinations and private examinations. Rajak points out that the power conferred by the Insolvency Act for private examinations is wider than that for public examinations. He notes further that section 133 specifically identifies those who may be summoned whereas section 236 refers to “any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs and property of the company”. Lightman highlights a number of differences between public and private examinations and mentions that private examinations are the most commonly used by practitioners. Differences include, *inter alia*, the following: public examinations take place in open court and creditors and contributories are invited to attend. Written records and documents can be freely accessed. This is in contrast with a private examination where no records of the examination are filed in court and the court file is not available for inspection. The aim of the public examination is to expose suspected frauds or suppressed facts. This differs from the aim of the private examination which is to assist the insolvency practitioner to perform his duties. Only the official receiver can apply for a public examination, whereas “the office holder” can apply for a private examination, which includes a liquidator, administrator, administrative receiver or official receiver. The examinee in a public examination may be questioned by the court or by any creditor, whereas only the applicant may question the examinee in a private examination. In a private examination the examinee is examined on oath and is required to verify by

151 Goode *Principles of Corporate Insolvency Law* (2011) 152 where reference is made to the cases of *Re Contract Corpo, Gooch’s case* (1872) L.R. 7 Ch App 207 and *R v Tower Hamlets LBC, ex p Chetnik Ltd* [1988] AC 858.
153 Insolvency Act 1986 section 133.
154 Insolvency Act 1986 section 236.
156 Insolvency Rule 4.212(5).
157 Insolvency Rule 4.215(1).
affidavit the written record of his examination.\textsuperscript{158} These characteristics are not found in public examinations. Whereas the court has a discretion whether or not to order a private examination, it has no discretion not to make an order for the public examination if an application is made by the official receiver. From the above can be seen that public and private examinations are entirely different procedures performing different functions.

3. *Procedural aspects*

3.1 Section 236

Section 236 of the Insolvency Act 1986 regulates private examinations. According to this section the court may, on the application of the office holder, summon to appear before it any officer of the company, any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company or any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.\textsuperscript{159} “Office holder” means the administrator, the administrative receiver, the liquidator or provisional liquidator,\textsuperscript{160} but also has an extended meaning to include the official receiver.\textsuperscript{161} For Rajak the most striking feature of the section is the fact that anyone can be summoned under it, provided that person is capable of giving information concerning the affairs of the company.\textsuperscript{162}

The onus of proving that the information is reasonably required rests on the office holder. He has to establish a reasonable requirement for information. The burden on the office holder is eased by the fact that the court regards the views of the office holder with ‘a good deal of weight’.\textsuperscript{163} Factors which are relevant are the stage of the insolvency process, the importance of the information required and the purpose for which it is required, the proximity of the relationship between the respondent and the

\textsuperscript{158} Insolvency rule 4.215(4).
\textsuperscript{159} Insolvency Act 1986 section 236 (2).
\textsuperscript{160} Insolvency Act 1986 section 234(1).
\textsuperscript{161} Re Pantmaenog Timber Co Ltd [2004] 1 A.C. 158.
insolvent, whether the order is for an oral examination or an order to produce documents, self-incrimination and the entitlement of a respondent to documents.\footnote{164}{Re Pantmaenog Timber Co Ltd [2004] 1 A.C. 158.} Finch notes that the power to examine is not designed to offer liquidators special advantages in ordinary litigation and should not be used oppressively.\footnote{165}{Finch Corporate Insolvency Law (2009) 565, where reference is made to the matter of \textit{Re Embassy Art Products Ltd} [1987] 3 BCC 292.}

3.2 Enforcement powers of the court

The court may require any such person mentioned in subsection 2 to submit an affidavit to the court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or to the matters mentioned in subsection 2.\footnote{166}{Insolvency Act 1986 section 236 (3).} Should a person fail to appear before the court without a reasonable excuse, or there is reasonable grounds for believing that a person has absconded, the court may cause a warrant to be issued for the arrest of that person and for the seizure of any books, papers, records, money or goods in that person’s possession.\footnote{167}{Insolvency Act 1986 section 236 (4) and (5).} The court may authorize a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held until such person is brought to court or until such time as the court may order.\footnote{168}{Insolvency Act 1986 section 236 (6).}

The court has certain enforcement powers under section 236. If it appears that a person has property of the company in his possession, the court may order, on the application of the office holder, that such property be delivered to the office holder.\footnote{169}{Insolvency Act 1986 section 237 (1).} If it appears that any person is indebted to the company, the court may order that person to pay to the office holder the whole or part of the amount due.\footnote{170}{Insolvency Act 1986 section 237 (2).} The court may order that any person who would be liable to be summoned under section 236, to be examined where he may be, in any part of the United Kingdom or outside the United Kingdom.\footnote{171}{Insolvency Act 1986 section 237 (3).} Any person who is brought before the court under section 236

\begin{itemize}
   \item \textit{Re Pantmaenog Timber Co Ltd} [2004] 1 A.C. 158.
   \item Finch Corporate Insolvency Law (2009) 565, where reference is made to the matter of \textit{Re Embassy Art Products Ltd} [1987] 3 BCC 292.
   \item Insolvency Act 1986 section 236 (3).
   \item Insolvency Act 1986 section 236 (4) and (5).
   \item Insolvency Act 1986 section 236 (6).
   \item Insolvency Act 1986 section 237 (1).
   \item Insolvency Act 1986 section 237 (2).
   \item Insolvency Act 1986 section 237 (3).
\end{itemize}
may be examined on oath, either orally or by interrogatories, concerning the company or matters mentioned in section 236(2).172

3.3 Form and content of the application

The Insolvency Rule 9 applies to applications to court for an order under a section 236 examination into a company’s dealings when it is, or is alleged to be, insolvent. The section refers to the person in respect of whom an order is applied for as “the respondent”.173 The rule deals with the form and content of the application, the nature of the court order, the procedure, the record of the proceedings and the costs of the proceedings.

With regard to the form and contents of the application, it is noted that the application shall be in writing and be accompanied by a brief statement of the grounds on which it is made.174 The respondent must be sufficiently identified in the application.175 It shall be stated whether the application is for the respondent to be ordered to appear before the court, or to answer interrogatories (if so, particulars are to be given of the matters in respect of which answers are required), or to submit affidavits (if so, particulars are to be given of the matters in respect of which answers are required), or to produce books, papers or other records (if so, the items in question are to be specified). Any two or more of those purposes may be stated.176 The application may be made ex parte.177

The general rule is that applications to court for orders in terms of section 236 must be made inter partes and that a good and sufficient reason is required to justify the exceptional course of an application ex parte.178 This general rule is stricter where mandatory orders are made, for example to attend an examination or to produce documents.179

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172 Insolvency Act 1986 section 237 (4).
173 Insolvency Rule 9.1 (2).
174 Insolvency Rule 9.2 (1).
175 Insolvency Rule 9.2 (2).
176 Insolvency Rule 9.2 (3).
177 Insolvency Rule 9.2 (4).
178 Re Murjani (a bankrupt) [1996] 1 BCLC 272 284.
179 Ibid.
3.4 The court order

Although the procedure under section 236 is sometimes referred to as a “private examination”, the court may make a range of other orders. 180 Rajak notes that the court is given a number of powers, namely to require the respondent to submit an affidavit containing an account of his dealings with the company, for the respondent to produce any books, papers or other records in his possession or under his control which relate to the company, for the respondent to pay the amount owed to the company and for the respondent to be examined on oath either orally or by interrogatories. 181 The court shall specify a venue for a respondent’s appearance, which shall not be less than 14 days from the date of the order. 182 If a respondent is ordered to submit affidavits, the order shall specify the matters which are to be dealt with in his affidavits and the time within which they are to be submitted to the court. 183 If the order is to produce books, papers or other records, the time and manner of compliance shall be specified. 184 The order must be served forthwith on the respondent, and it must be served personally, unless the court otherwise orders. 185

3.5 Procedure for the examination

At any examination of the respondent, the applicant may attend in person, or be represented by a solicitor with or without counsel, and may put such questions to the respondent as the court may allow. 186 Any other person who could have applied for an order under the applicable section in respect of the insolvent’s affairs may, with the leave of the court and if the applicant does not object, attend the examination and put questions to the respondent (but only through the applicant). 187 If the respondent is

182 Insolvency rule 9.3 (2).
183 Insolvency rule 9.3 (3).
184 Insolvency Rule 9.3 (4).
185 Insolvency Rule 9.3 (5).
186 Insolvency Rule 9.4 (1).
187 Insolvency Rule 9.4 (2).
ordered to answer interrogatories, the court shall direct him as to the questions he is required to answer, and as to whether his answers (if any) are to be made on affidavit.188 Where a creditor has provided information which led to the application, that creditor may, with the leave of the court and if the applicant does not object, attend the examination and put questions to the respondent (but only through the applicant).189 The respondent may at his own expense employ a solicitor with or without counsel, who may put to him such questions as the court may allow for the purpose of enabling him to explain or qualify any answers given by him, and may make representations on his behalf.190

3.6 Record of the examination

A record in writing shall be made of the examination as far as the court thinks proper. The record shall be read over either to or by the respondent and signed by him.191 The record may, in any proceedings (whether under the Insolvency Act or otherwise) be used as evidence against the respondent of any statement made by him in the course of his examination.192 The written record shall, unless the court otherwise directs, not be filed in court.193 Only an applicant or a person who could have applied for such an order may inspect the written record, as well as the grounds for application for an order, although the court may order otherwise.194 The court may give directions for the inspection and furnishing of copies of, or extracts from, such documents.195

3.7 Costs of proceedings

The costs of the application shall be paid out of the insolvent estate.196 The rules outline two situations where the costs of the examination may be ordered to be paid by the respondent, namely: where it appears that the examination was made necessary

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188 Insolvency Rule 9.4 (3).
189 Insolvency Rule 9.4 (4).
190 Insolvency Rule 9.4 (5).
191 Insolvency Rule 9.4 (6).
192 Insolvency Rule 9.4 (7).
193 Insolvency Rule 9.5 (1).
194 Insolvency Rule 9.5 (2) and (3).
195 Insolvency Rule 9.5 (4).
196 Insolvency Rule 9.6 (3).
because information had been unjustifiably refused by the respondent, or where a person was ordered to deliver up property in his possession which belongs to the company, or to pay any amount in discharge of a debt due to the company.\textsuperscript{197} No order of costs shall be made against an official receiver who applies for an order in terms of rule 236, unless he acts in the capacity of liquidator or trustee.\textsuperscript{198}

4. Scope and purpose of the application

4.1 Scope of the application

The scope of section 417 is premised upon the discretion of the court. Sealy and Milman comment that the court’s discretion under section 236 is unfettered,\textsuperscript{199} yet circumscribed by the overriding requirements that the examination should be necessary in the interests of winding-up, and that it should not be oppressive or unfair to the respondent.\textsuperscript{200} In view of the fact that the legislature saw fit to award a discretion to the court in respect of private enquiries, it has been noted that it would be counterproductive to classify all the occasions upon which it may be proper to make an order.\textsuperscript{201} The section has been held to be very useful and as such it was unnecessary and undesirable to limit its scope.\textsuperscript{202} A principal authority on the scope of section 236 is the decision of the House of Lords in \textit{British & Commonwealth Holdings plc v Spicer and Oppenheim}.\textsuperscript{203} In that case very extensive information had been requested and the respondents objected to the wide terms of the order, claiming this to be oppressive.\textsuperscript{204} The principal matter for the court to be decide was whether the jurisdiction under section 236 was limited to make provision for such information as would have been available to the company but for its insolvency, based on the “reconstitution of knowledge” argument. It was accepted that at least some of the

\textsuperscript{197} Insolvency Rule 9.6 (1).
\textsuperscript{198} Insolvency Rule 9.6 (5).
\textsuperscript{199} \textit{In re Rolls Razor Ltd (No.2)} [1970] n102 reference was made to “the unfettered discretion of the judge brought to bear upon any exercise of this extraordinary jurisdiction”. Sealy and Milman Annotated Guide to the Insolvency Legislation 2007/2008 (2007).
\textsuperscript{201} \textit{In re North Australian Territory Co} (1890) 45 Ch.D 87 92.
\textsuperscript{202} \textit{In re Highgrade Trades Ltd} [1984] BCLC 151 177.
\textsuperscript{203} [1993] AC 426.
\textsuperscript{204} This summary of the \textit{British and Commonwealth} matter is included in the judgment of \textit{Cowlishaw v O & D Building Contractors Ltd} [2009] EWHC 2445 (Ch).
information requested was information that the company would not have been entitled to. In the principal judgment it was held that there was no such limitation in jurisdiction and no rule establishing such a limitation had been held down in the decision of Cloverbay Ltd.\textsuperscript{205} Mayson et al note that the court has the power to order the production of books, papers and records relating to the company even if they are not in the company’s property and the company itself could not have obtained them.\textsuperscript{206} The scope of the section is such that it can even be used against an official receiver himself, as noted by Rajak with reference to the case of Re John T. Rhodes Ltd,\textsuperscript{207} namely that the receiver is liable to be summoned to appear before the court to provide an account of his dealings as receiver.\textsuperscript{208}

4.2 Purpose of the examination

The case of In re British & Commonwealth Plc (Nos. 1 & 2) addressed the purpose of the section 236 examination. The court approved the dictum of Buckley J in In Re Rolls Razor Ltd\textsuperscript{209} to the effect that the purpose of the section is to obtain information that the liquidator, as a stranger to the company, may not be privy to. The dictum of Buckley J was also referred to in the Kebble matter and is quoted in Chapter 2 above and will therefore not be repeated here. In summary, the purposes of the section as set out in the In re Rolls matter are as follows: to assist the office holder to “discover the truth”, so that he complete his function as effectively and with little expense as possible, to put the affairs of the insolvent estate in order, to identify and recover assets and to discover facts surrounding potential claims, including claims against the potential respondent to the application. In the In re British matter counsel for the appellants summarized the purpose of the section as follows:

“The office holder faces the obvious difficulty or disadvantage that he is a stranger to the company’s affairs. This is the ‘mischief’ at which section 236 is aimed: the section overcomes the difficulty or disadvantage by allowing the office holder to acquire (cheaply and, if appropriate, quickly) the knowledge that the company over which is he

\textsuperscript{205} Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce Internntional SA n65.
\textsuperscript{207} (1986) 2 BCC 99.
\textsuperscript{208} Rajak Company Liquidations 1988 338.
\textsuperscript{209} n102 700.
is appointed should possess. The section remedies disadvantage rather than confers advantage.”

The above quote is included here, as the formulation by counsel, to the effect that section 236 does not confer additional advantages to a liquidator, but rather redresses an imbalance that exists due to the fact that the liquidator is a stranger to the company, is submitted to be a useful one for a true understanding of the purpose of section 236.

What can be added to the above purposes of section 236, is the aim to obtain evidence for use in directors disqualification proceedings. This aspect is addressed more fully below under the discussion of the duties of the official receiver. Before continuing with that discussion, it is worth mentioning that section 236 should not be where a debt is in dispute, as the correct procedure in such a case would be for the liquidator to object to the debt and for the creditor to appeal the liquidator’s decision under the relevant insolvency rules.

Although the purpose of the examination is to assist office holders in carrying out their duties, Keay notes that private examinations tend to be utilized as a last resort, the reasons for this being the cost of the process. He notes that every effort is first made to obtain information needed through interviews, especially of company officers, however, if they are found to be recalcitrant, or where such officers refuse to attend an informal interview, examination may be the only alternative. Keay however accepts that there are benefits to an examination, namely that answers are obtained on oath, providing greater veracity and if there is a recorded transcript, this may be used as evidence in further proceedings. He acknowledges, further, that courts have granted applications for private examinations more freely in recent years, due to significant concern related to fraudulent conduct, particularly of company officers.

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210 In re British & Commonwealth plc (Nos 1 & 2) 1993 AC 426 428.
212 Ibid.
213 Ibid. cf Re Arrows Ltd (No 4) [1994] BCC 641 at 650.
4.3 Duties of the official receiver

4.3.1 General duties including to investigate why company had failed

Rajak divides the a liquidator’s duties into the following categories: 1) the duty to get in and distribute property (noted to be the fundamental duty and the raison d’etre of the liquidation) 2) duties of notice 3) duties to hold certain meetings and 4) the duty to provide information.\textsuperscript{214} The Insolvency Act notes that the general functions of the official receiver of a company which is being wound up by the court are to secure that the assets of the company are got in, realized and distributed to the company’s creditors and, if there is a surplus, to the persons entitled to it.\textsuperscript{215} An official receiver’s duties are however not confined to the determination of the assets of the company, the liquidator also has a duty to investigate the affairs of the company.

Mayson et al note that a person who is appointed as a practitioner in a company insolvency is usually unfamiliar with the company but must take charge of it very quickly and the legislation therefore makes several provisions for information about the company to be provided to the practitioner.\textsuperscript{216} One such provision is section 131 of the Insolvency Act. In terms of this provision the official receiver may require a person, such as an officer, employee or former employee of the company to submit a statement as to the affairs of the company, including particulars of the company’s assets and liabilities, the names and addresses of the company’s creditors, the securities held by the creditors and such further information as the official receiver may require.\textsuperscript{217} The official receiver has the duty to investigate if the company has failed and generally, the promotion, formation, business, dealings and affairs of the company and to make such a report as he thinks fit.\textsuperscript{218} Fletcher notes that the official receiver has a discretion whether to submit a report or not and if his investigation reveals no misconduct a report may dispensed with.\textsuperscript{219} However, if he does submit a report, it may play a significant part in proceedings under the Company Directors

\textsuperscript{215} Insolvency Act 1986 section 143.
\textsuperscript{216} Mayson et al Company Law (2003) 744.
\textsuperscript{217} Insolvency Act 1986 section 131.
\textsuperscript{218} Insolvency Act 1986 section 132.
\textsuperscript{219} Fletcher The law of Insolvency 1990 452.
Disqualification Act 1986, alternatively proceedings in terms of the Insolvency Act 1986 concerning wrongful trading, dispositions without value, voidable preferences, extortionate credit transactions or proceedings for remedies against delinquent directors.\(^{220}\) Goode points out that the insolvency of a company affects creditors, employees and the Government, which loses out on taxes and, accordingly, insolvency law imposes an obligation on liquidators to investigate the cause of failure of a company and the imposition of applicable sanctions.\(^{221}\)

4.3.2 Section 235 of the Insolvency Act 1986

The official receiver is assisted in his duty by section 235 of the Insolvency Act 1986 which creates a duty to co-operate with the office-holder. This section notes that each person mentioned in section 236 shall give to the office holder such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office holder may at any time after the effective date reasonably require and attend on the office holder at such times as the latter may reasonably require.\(^{222}\) The persons referred to are those who are or have at any time been officers of the company, those who have taken part in the formation of the company at any time within one year before the date on which the company entered administration, those who are in the employment of the company (or another company), or have been in its employment (including employment under a contract for services) within that year, and are in the office holder’s opinion capable of giving information which he requires and in the case of a company being wound up by the court, any person who as acted as administrator, administrative receiver or liquidator of the company.\(^{223}\)

If a person without reasonable excuse fails to comply with any obligation imposed by this section 235, he is liable to a fine and, for continued contravention, to a daily default fine.\(^{224}\) No prescribed procedure is required in terms of Section 235 and the office holder may merely contact the relevant person requesting his attendance or the information that he requires. The office holder should give a reasonable time for

\(^{220}\) Ibid.
\(^{221}\) Goode *Principles of Corporate Insolvency Law* (2011) 62.
\(^{222}\) Insolvency Act 1986 section 235 (2).
\(^{223}\) Insolvency Act 1986 section 235 (3).
\(^{224}\) Insolvency Act 1986 section 235 (5).
compliance and state as precisely as possible what information is sought and why such information is reasonably required.  

Fletcher points out that the official receiver relies on the powers of private examination conferred on him by section 235, reinforced by the right to apply for judicial examination in terms of section 236, to take prompt and effective steps for purposes of investigation into the company’s affairs and to trace assets which may have been disposed of under circumstances which render them recoverable. Finch notes that there will be little use in a liquidation system if liquidators are ill-informed as to the extent and whereabouts of the company’s assets or the directors’ dealings and thus the liquidator has been given extensive powers in terms of section 235 and 236. Goode identifies the objectives of English corporate insolvency law as restoring the company to profitable trading, maximizing returns to creditors, providing a fair and equitable system for the ranking of claims, identifying the causes of the company’s failure and imposing sanctions for culpable management by its directors and officers.

4.3.3 Interaction between section 235 and section 236

In the matter of *RGB Resources plc* it was held that section 236 should be read together with section 235, but whereas section 235 contained a mandatory obligation on an officer to give information reasonably required, the court had a discretion to order a private examination under section 236. This was interpreted to mean that Parliament intended that even if an examinee was obliged to give information reasonably required under section 235, the court retained a discretion to refuse an order under section 236. Section 236 is wider reaching in scope than section 235 as it can be used to obtain documents and information from persons other than former directors and office holder, for example those outside the company such as bank officials. For applications under section 236 all that is required is for the proposed examinee to have property of the company or information or documents relating to

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226 Fletcher *The law of Insolvency* 1990 453.


229 *Re RGB Resources plc* [2002] EWHC 1612 (Ch).
the company’s affairs. In the Re Embassy Art Products Ltd matter it was held oppressive to seek production of documents in the wide terms which applied in that case, and examination in the general terms that was requested in that case, without having made any attempt to obtain information by letter or by any other means in the first place.

4.3.4 The Insolvency Service

The insolvency practitioner does not act alone in the execution of his duties, but is regulated by The Insolvency Service, which is an executive agency within the Department for Business, Innovation and Skills. The Insolvency Service appoints official receivers to investigate the affairs of bankrupts and companies in compulsory liquidation, and to establish the reasons for the insolvency and report on misconduct on the part of bankrupts and directors. The Insolvency Service operates under a statutory framework, consisting of the Insolvency Acts 1986 and 2000, the Companies Directors Disqualifications Act 1996 and the Companies Acts 1985 and 2006. Goode notes that The Insolvency Service performs a variety of functions, including inter alia the administration and investigation of affairs of companies wound up by the court and to establish why they became insolvent, to act as liquidator where no practitioner has been appointed, to act on reports of directors’ misconduct, to deal with the disqualification of unfit directors, to authorize and regulate the insolvency profession, to conduct confidential, fact-finding investigations into companies where it is in the public interest to do so, to provide information to the public on insolvency, redundancy and investigation matters. There is also a Companies Investigations Branch which conducts confidential investigations into companies where it is in the public interest to do so.

233 www.bis.gov.uk/insolvency/About-us (10 November 2012).
235 Ibid.
In *Re Pantmaenog Timber Co Ltd*\(^ {236}\) the House of Lords held that it is acceptable for an official receiver to apply for disclosure of documents by private examination if such disclosure is required for the sole purpose of disqualification proceedings against directors. In terms of the Companies Directors Disqualification Act\(^ {237}\) the court has a wide power to disqualify officers, including directors, liquidators, receivers or managers of companies. Disqualification may arise on the grounds of personal bankruptcy, misconduct in relation to a company\(^ {238}\) or unfit conduct in relation to insolvent companies. Applications for disqualification may arise from reports made by inspectors appointed by the Secretary of State to investigate companies’ affairs, from information received from the Serious Fraud Office or from reports made by insolvency officers dealing with formal insolvencies. In terms of section 7(3) of the Disqualification Act the office holder must make a report to the Secretary of State if it appears to him that the conditions for disqualification in section 6(1) of the Act are satisfied. The act provides guidelines in the form of a list of matters which the court would take into account in determining whether a person is unfit to be a director. The Companies Directors Disqualification Act has associated statutory instruments, such as The Insolvent Companies (Report on Conduct of Directors) Rules 1996.

### 4.3.5 The Disqualification Act

Although no mention is made of the Directors Disqualification Act in section 236 of the Insolvency Act 1986, these two measures are undoubtedly intended to be read together.\(^ {239}\) In the *Pantmaenog* matter the court refers to section 21 of the Disqualification Act which provides for the interaction of the two statues, section 22 which ensures that the terms and expressions that they use are compatible and section 25 which states that they are to come into force simultaneously. The court points out that there is a close and important link between section 236(3) of the Insolvency Act 1986 and section 7(3) of the Companies Directors Disqualification Act and refers to the matter of *Re Polly Peck International plc*\(^ {240}\) where it was stated that the purposes

\(^{236}\) *Re Pantmaenog Timber Co Ltd* n164.  
\(^{237}\) 1985 and 2006.  
\(^{238}\) For example trading whilst insolvent or failing to comply with requirements under the Companies Act 2006.  
\(^{239}\) *Re Pantmaenog Timber Co Ltd* n164.  
\(^{240}\) [1994] BCC 15, 16A-B.
of the liquidation, administration or receivership, as the case may be, must include the
gathering of information as to the conduct of the affairs of the company and those
responsible for it in order that the office-holder can report to the Secretary of State as
he is required to do by section 7(3) of the Companies Directors Disqualification Act.
Returning to the Pantmaenog matter, the court refers to section 7(4) of the Companies
Directors Disqualification Act and notes that, again, the language is in the widest
terms and there is not even the qualification built into section 236(3) of the
Insolvency Act, that the information requested must be in the possession or under the
control of the office holder. The only qualifications are that the information must be
relevant and the requirement must be reasonable. The court concludes that these
provisions are complimentary to each other and that it would be wrong to read them
too narrowly. In terms of practical considerations, the court points out that
information obtained under section 236 may be of use for more than one purpose and,
therefore, it the section should not be interpreted narrowly.

4.4 Protection of the public interest

The case of Re Pantmaenog Timber Co Ltd\textsuperscript{241} also mentions of the public interest
aspect of insolvencies. The court emphasized that the liquidator serves a public
interest and not merely the financial interest of the creditors and contributories. The
court refers to the report of the Cork Committee which observed that “The law of
insolvency takes the form of a compact to which there are three parties: the debtor, his
creditors and society”. As a result, the court points out, insolvency proceedings are
not treated in English law as an exclusively private matter between the debtor and his
creditor, as the interest of the community must be taken into account.\textsuperscript{242}

Keay defines public interest as those interests which society has a regard for and
which are wider than the interests of those parties directly involved in an insolvent
matter.\textsuperscript{243} He however submits that it is difficult to define the concept of the public
interest and that there is no general consensus as to what the public interest involves.
He concludes that it should not be assumed that the interests of the debtor and the

\textsuperscript{241} Pantmaenog Timber Co Ltd n164.
\textsuperscript{242} Ibid par 52.
creditors take preference over the public interest, nor should one say that the public interest is paramount. The correct approach is to consider all interests in each case, and to engage in a careful balancing exercise to determine which interests, based on the facts, should be preferred. It is submitted that this is a useful formulation to bear in mind, namely that in certain circumstances interests are better served if they are not circumscribed, but rather left to the court’s discretion, taking into account the particular facts of each case.

4.5 Balancing of interests

In light of the wide discretion of the court in matters arising from section 236, it has been held that the court must be astute to prevent any oppressive, vexatious or unfair use of the section. The court must balance the needs of the liquidators with the potential oppression to the individuals. In Re Castle New Homes Ltd [1979] 1 W.L.R 1075 the court put it thus:

“...The court will always be concerned to avoid vexation, oppression or injustice in making an order under section 236. If the evidence shows that the purpose of a litigator in seeking the examination is to achieve an advantage beyond that available to the ordinary litigant, in litigation which he has already commenced or which he has definitely decided to commence, the predisposition of the court may well be to refuse an immediate order for examination, unless the liquidator can show special grounds to the contrary. If, however, it appears from the evidence that the object of the liquidator is simply to elicit information that will enable or assist him to decide whether or not his company has a valid claim against a third party, the court will approach the liquidator’s application with no such predisposition. While it will still be anxious in such a case to avoid oppression, it will also bear in mind that one of the very purposes of section [236] is to enable the liquidator ‘as effectively as possible and…with as little expense as possible and with as much expedition as possible… to complete his function as liquidator…; and that to assist him in this may inevitably involve giving him a degree of advantage which would not be available to an ordinary potential litigant.”

244 In re Rolls Razor Ltd n16.
The above passage was quoted with approval in the matter of *Re Cloverbay*. In addition, the court noted the following in the *Cloverbay* matter:

“The words of the Insolvency Act 1986 do not fetter the court’s discretion in any way. Circumstances may vary infinitely. It is clear that in exercising the discretion the court has to balance the request of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to the assessment of whether or not there is a cause of action and the degree of oppression is small (for example in the case of ordering premature discovery of documents) the balance will manifestly come down in favour of making the order. Conversely, if the liquidator is seeking merely to dot the i’s and cross the t’s of a fairly clear claim by examining the defendant to discover his defence, the balance would come down against making the order. Of course, few cases will be so clear, it will be up to the judge in each case to reach his own conclusion.

That being said, the court continued by stating that there are a number of factors which should be borne in mind in exercising the discretion. Firstly there is the fact that the liquidator comes into the company with no previous knowledge and frequently finds the company’s records missing or defective. The purpose of section 236 is for him to reconstitute that knowledge. Secondly, the case for making an order against an officer of the company will usually be stronger than against a third party, as officers owe the company fiduciary duties and often possess information pertaining to the company. Thirdly, an order for oral examination is more likely to be oppressive than an order for the production of documents. In the matter of *Re British and Commonwealth Holdings plc (No 2)* the court took into account the fact that the granting of an order will inconvenience the respondent and cause him a lot of work, or make him vulnerable to future claims.

The entitlement of the respondent to obtain the documents is a further factor considered by the court. In the matter of *Cowlishaw v O & D Building Contractors Ltd* the respondents were concerned that the administrator’s true purpose was to

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246 *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA n65.*
247 This was confirmed in *Green v BDO Stoy Hayward LLP [2005] EWHC 2413 Ch.*
248 *[1993] AC 426 439.*
249 n204.
obtain the documents so that they can be sold to a buyer as a part of a package to sell the development. It was submitted on their behalf that it was an abuse of the procedure under section 3236 to seek from them the “fruits of their labours”, for which they had not been paid. The liquidator was a stranger to the companies in question and but for the insolvency, he would have been under no obligation to produce any of the documents to these companies. It was held that the benefit to the liquidator of obtaining the documents was outweighed by the unfairness to the respondent in producing them. The Cowlishaw matter is therefore an example where the court’s discretion under section 236 was restrained.

5. Some remaining aspects

5.1 Self-incrimination

In public examinations the rules provide that if criminal proceedings have been instituted against the examinee, and the court is of the opinion that the continuance of the hearing would be calculated to prejudice a fair trial of those proceedings, the hearing may be adjourned.\(^{250}\) There is no equivalent rule in relation to private examinations.

It was previously the rule that an officer holder may not apply for examination if he has made a firm decision to commence proceedings against the respondent, which was known as the “Rubicon” test. This rule has since been held to be too inflexible.\(^{251}\) In Re Bishopsgate Investment Management Ltd it was held that the statutory provisions of the Insolvency Act override the privilege of self-incrimination.\(^{252}\) Sealy and Milman point out that the situation has been somewhat altered by the decision of Saunders v UK and further, by the incorporation of the European Convention on Human Rights into English law in terms of the Human Rights Act 1998.\(^{253}\) In the Saunders decision it was held that a statement obtained under compulsion may not be

\(^{250}\) Insurance Rule 4.215(6).

\(^{251}\) Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA n65.

\(^{252}\) [1993] Ch 1. See also Re Arrows (No 4) [1995] 2 AC 75.

used in subsequent criminal proceedings as this amounted to a breach of Article 6 of the European Convention of Human Rights. As a result of the decision in *Saunders*, English law was amended so as to render compelled statements inadmissible on behalf of the prosecution in criminal proceedings. Section 433 provides that a statement made in pursuance of the Insolvency Act 1986 may be used in evidence against any person making or concurring in the statement. However, in criminal proceedings in which any person is charged with an offence, no evidence relating to the statement may be adduced and no question relating to it may be asked by or on behalf of the prosecution, unless the person himself decides to rely on the statement he had made.

5.2 Other organisations and acts

English law has a network of Government agencies and other organisations which work to combat fraud and corruption. One of these is the Serious Fraud Office that investigates and prosecutes serious or complex fraud and corruption. This office was established in April 1988 when it was created by the Criminal Justice Act 1987. Section 2 of this act empowers the Serious Fraud Office to search property and to compel persons to answer questions and produce documents if there are reasonable grounds to suspect an offence has been committed involving serious or complex fraud or corruption. Only the most serious types of crime are investigated by the Serious Fraud Office, for example where the value of the alleged fraud is more than 1 million pounds, where there is an international dimension and where there is likely to be widespread public concern.

6. Conclusion

From the above discussion it can be seen that insolvencies in England are strictly regulated. The Insolvency Service, a governmental agency created by statute, oversees the process. Although rooted in statute, the process is scaffolded by

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254 Insolvency Act 1986 section 433(1)(a).
255 Insolvency Act 1986 section 433(2).
recognized professional bodies, rules, regulations, codes of ethics, statements of insolvency practice and insolvency guidance papers.

Directors are under a statutory duty to assist the process by providing such information as the office holder may require. In relying on this duty, the office holder may merely request the director to provide the necessary information or documentation, without complying with any prescribed procedure. The office holder can also proceed by means of a voluntary examination. The private examination procedure is seen as a procedure of last resort and the office holder is expected to attempt to obtain information by any other means in the first instance.

The procedural steps are spelled out in the rules and it is noteworthy that the application must be accompanied by a brief statement of the grounds on which it is made and that particulars must be furnished of the information or documentation that is required to be furnished. The order, too, must set out details of the affidavits or documents that are required. Section 236 provides for examination on oath, either orally or by interrogatories. The respondent may appoint legally representation. A record is made of the proceedings, which may be used as evidence against the respondent. The record is usually not filed in court and is not open for inspection, unless the court orders otherwise.

The scope of the private examination in English law is unfettered, yet it must be interpreted in ways that are not oppressive and unfair to the respondent. The court retains a discretion whether to order an examination or not and one may interpret this to mean the legislature, by awarding a discretion, did not want to limit the application of the section by naming definitive set of circumstances.

The purpose of the section is to help the office holder to effectively carry out his duties. Although the office holder has the general duty to secure assets, this is not his only duty. It is also his duty to investigate why the company has failed. It has been found acceptable to use a private examination solely for the purpose of obtaining information relating to the possible disqualification of a director. The office holder is assisted in his duties by the fact that there is a statutory duty on directors to assist the process, as noted above. The office holder is also backed by other agencies, such as
the Insolvency Service which is tasked with company investigation, director disqualification and referrals to prosecuting authorities. The Insolvency Act and the Disqualification Act are intended to work together and this shows that the focus of insolvencies in English law is wider than the determination of assets. The liquidator serves a public interest and does not only represent the creditors and contributories. Public interest is a nebulous concept which is better left undefined.

The court prevents oppressive, vexatious and unfair use of the section by balancing the needs of the office holder against the rights of the respondent. In terms of self-incrimination, English law has been shaped by The European Convention of Human Rights and the current situation is that compelled statements cannot be used by prosecutors in criminal proceedings.\textsuperscript{257}

\textsuperscript{257}par 5.1.
CHAPTER 4

Summary and recommendations

1. Comparison between the South African and the English procedures

The scope of application of a private examination is very wide.\(^{258}\) In both South Africa and England the procedure is unavailable in voluntary insolvency. In England the procedure is available in all other forms of insolvency, whereas the South African section refers to cases where a company is unable to pay its debts. This restriction is being eroded by our courts and has been made applicable to a company that was wound up on the basis that it was just and equitable to do so.\(^{259}\) The interpretation of the court in doing so is commended and it is submitted that future legislation should do away with the requirement of a company “unable to pay its debts”. As stated by the court in *Huang*, liquidators in all cases of winding-up face similar problems and there appears to be no rational basis to make a procedure available to only certain types of winding up. This interpretation is not an extension of the section beyond its original intention and as such, should be countenanced.

The Master or the Court can instigate the procedure in South Africa, on the assumption that there are instances where a secret examination without recourse to the court would benefit the winding-up process.\(^{260}\) In terms of English law, the procedure can only be instigated by the court and the office holder applies to court to commence a private enquiry. In the interests of certainty, some thought needs to be given to the personae that are empowered to instigate a private examination in South African law and this aspect is addressed below under the heading of reform. It is submitted that the private examination, premised as it is on discretion and balance, is one that is best confined to the court’s examination.

Both the English and the South African systems view the private examination as an extraordinary procedure of a *sui generis* nature, where the examination is inquisitorial

\(^{258}\) par 2.3.

\(^{259}\) ibid.

\(^{260}\) par 2.4.
and the ordinary standards of trial procedure are not applicable. Both systems make use of discretion in order to balance the rights of examinees against the need for information. Again, in both jurisdictions examinees may be represented, however counsel’s role is limited. In light of the fact that no rights are determined at an enquiry, it is submitted that the provision for representation is adequate.

In South African law both the application and the enquiry is private. The enquiry has not been classified as administrative action and there is no right to access information. A person who has been examined is entitled to a copy of his evidence. In English law a record is made of the examination as far as the court thinks proper, however, the record is usually not filed in court. Only the applicant may access the record, as well as the grounds for the application. In both jurisdictions the legislature thought it necessary to make provision for both public and private examinations, indicating that there are times when justice will be best served by restricting the access to information. It is submitted that this aspect of the procedure will not be improved by reform.

The applicant is responsible for the costs in terms in South African law, unless the Master directs otherwise. English law makes provision that the costs be paid out of the insolvent estate, unless the examination was made necessary because information had been unjustifiably refused by the respondent or where he failed to deliver property in his possession or discharge a debt due to the company. The latter is a practical deterrent and could usefully be included in South African law.

In South African law the private examination is part of the administration process. In English law it is held to be oppressive to proceed with a statutory examination if information or documentation has not been requested informally by letter or other means. English law therefore envisages that a statutory examination be seen as a last resort. Furthermore, although the procedure under section 236 is sometimes referred to as a “private examination” the court may make a range of other orders, including the production of witness statements or documents. It is submitted that the insolvency

\[\text{par 2.2.1.}\]
\[\text{par 2.2.3.}\]
\[\text{par 2.4.2.}\]
process in South Africa will be enhanced by an adoption of the English approach and this is discussed more fully under reform below.

The liquidator in South African law must apply his mind in order to determine whether there is a legitimate cause to hold a private examination.\textsuperscript{264} The witness is, however, not entitled to a list of questions. English Insolvency Act stipulates that the applicant has to furnish particulars of the answers, books or other records that are required. Good or sufficient reasons are required to justify an ex parte application. There does not appear to be any benefit in emulating the English requirements for particulars to be furnished as the examination does not amount to a trial proceeding.

The general duties of the liquidator in South African law and an office holder under English law coincide in that they both consist of recovering the assets of the company, paying the creditors and distributing the surplus (if any) to the persons entitled to it. In English law the duties of an office holder are wider, including the duty to investigate the causes of a company’s failure, to expose offences and to report grounds to disqualify a director. This is an aspect where South African law does not measure up as discussed more fully below.

The liquidator is probably not an officer of the court in South African law, but what is more important is that the liquidator is seen to be independent and impartial in his dealings.\textsuperscript{265} It is submitted that a statutory obligation on the liquidator to act in a fiduciary capacity towards the body of creditors as a whole will give clarity and credence to his position. This aspect is therefore discussed under reform below. The insolvency practitioner is an officer of the court in the England, but there no evident benefit in following this practice in South African law.

Sanctions against the liquidator include an order by the Court for the liquidator to comply with a reasonable demand by the Master. The liquidator may also be removed by the Master and by the court, or by a majority of creditors, if he has not performed his duties satisfactorily. No action for damages can be brought against a liquidator for failing to do his duties. In English law, insolvency practitioners belong to one of the

\textsuperscript{264} par 4.3.
\textsuperscript{265} par 3.3.3.
regulated bodies and these bodies may issue disciplinary orders against their members. These bodies can also withdraw a practitioner’s insolvency licence on the basis that the practitioner is no longer a fit and proper person to perform the functions of a liquidator.

2. Recommendations

2.1 Introduction

From the above discussion it can be seen that certain aspects pertaining to private examinations are ideal and should not be altered such as the wide discretion of the court and the balance to be achieved between the rights of examinees and the needs of liquidators. Others are adequate, such as the provision for legal representation and access to information. Suggestions for reform are related to the following aspects of the private examination: who may instigate a private examination, using a private examination as a last resort, putting supportive measures and structures into place in order to scaffold the statutory foundation, encoding the fiduciary duties of liquidators and extending the focus of a private examination.

2.2 Who may instigate a private examination.

In South Africa a private examination may be commenced by the Master or the Court. The Master’s office is overburdened with duties. With particular reference to private examinations, the delegation of functions to a commissioner recognises that both the Master and the court are in need of assistance. It is submitted that delegation to a commissioner is treating the symptoms rather than eradicating the root of the problem. Instead of extending the power to instigate a private examination to the Master, and then attempting to ease his burden by making provision for delegation, it is submitted that a more realistic solution would be to limit the involvement of the Master altogether. In order to expand on this point of view, it is necessary to briefly consider reform to insolvency law in general, with reference to recent corporate reform in South Africa.
Insolvency in South Africa has long been waiting its turn for reformatory legislation. Recent years have seen the creation of a new corporate dispensation with the coming into being of new Companies Act 71 of 2008, which also introduced a new business rescue regime. With the development of company law policy considerations have come into play, such as providing a “clear, facilitating, predictable and consistently enforced law” and “a protective and fertile environment for economic activity”. Five points of economic growth were identified, namely enterprise development, promoting investment, making companies more efficient, encouraging transparency and high standards of governance and following best practice jurisdictions internationally. Goal statements in reviewing corporate law included simplification, flexibility, efficiency, transparency and predictability. It is submitted that the same policy considerations and goals are applicable to corporate insolvency law and should similarly be adopted.

In accordance with the policy to emulate best practice jurisdictions, one may look to English insolvency law, which has close links with South African insolvency law and which has seen extensive reform, for guidance. In England insolvency is regulated by an organ of state, namely the Insolvency Service. It is submitted that the appointment of an independent body to regulate insolvency law in South Africa is similarly required. A local example of such a regulatory body is the National Credit Regulator, which is responsible for the regulation of the South African credit industry. The National Credit Regulator has the task of education, research, policy development, registration of industry participants, investigation of complaints and ensuring the enforcement of the National Credit Act. The establishment of a statutory regulatory body tasked with the supervision of the insolvency industry, with duties of education, research, policy development, registration of insolvency practitioners, investigation and enforcement will result in increased clarity, predictability, and confidence in the system. With particular reference to private examinations, the insolvency practitioner, an appropriately qualified individual, should in applicable instances be empowered to apply to court to instigate a private examination.

266 Memorandum on the objects of the Companies Bill, 2008 par 1.
267 ibid.
268 Established by the National Credit Act 34 of 2005.
examination. Of importance is that this should, however, only occur at the point when all else has failed.

2.3 The private examination as a last resort

The English interpretation of the private examination as an expedient to be adopted as a last resort is commendable and South African law may benefit from incorporating a similar approach. Keay confirms this when he notes that formal examinations pursuant to either section 133 or section 236 should be used sparingly, citing cost as the primary reason, but also noting that this would save time and prevent alienation of those persons involved. Keay also notes that it is inappropriate to use private examinations merely to enforce a person who is uncooperative to comply with the requests of the official receiver. Emphasis should be placed on the informal examination of persons who may assist in the liquidation process and the statutory duties of directors to assist in the liquidation process should be underscored. A leaning towards this approach is found in the Johannesburg bar practice manual which notes that when an application is made to examine a particular witness, it must be shown that the witness in question has refused to furnish the information required of him or is otherwise unwilling to cooperate with the liquidator.

2.4 Supportive measures

Sufficient supportive measures should be included in the new insolvency regime to bolster the insolvency practitioner in his duties. This is another instance where English law may assist reform in the South African context. Augmenting strategies employed by the English system include complimentary legislation such as the Director’s Disqualification Act 1986 which has its own body of investigation and enforcement. The procedure in terms of English law appears to be more a more effective way of policing the behaviour of directors. In English law, further, the Insolvency Service appoints official receivers to investigate the affairs of companies

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271 Ibid 361. Keay notes that it is more appropriate to apply to court in terms of rule 7.20 to ask for an order requiring the persons to fulfill their obligations.
272 Johannesburg Bar practice manual of the South Gauteng High Court directs in Ch 10.8.
in compulsory liquidation to establish the reasons for the insolvency and report on misconduct.273 Furthermore, for grave offences there is the Serious Fraud Office that investigates and prosecutes serious or complex fraud or corruption.

2.5 Statutory statement of the fiduciary duties of a liquidator

Our courts have highlighted the need for a liquidator to be independent and impartial and to act in a fiduciary capacity towards creditors and the company.274 Again, it is useful to have regard to the recent innovations in company law in this regard. One of the novel aspects introduced by the act is the fact it includes a statutory statement of the fiduciary duties of directors. The act includes “standards of director’s conduct”275 in terms of which a director must exercise his powers and functions in good faith and for a proper purpose,276 in the bests interests of the company277 and with the degree of care, skill and diligence that may reasonably be expected of him.278 If a director breaches his fiduciary duties, he can be held liable in accordance with the principles of the common law279 or in terms of delict for any loss, damages or costs as a consequence of a breach of care, skill and diligence. These duties are mandatory, prescriptive and unalterable, they apply to all companies and directors cannot contract out of these duties.280 Cassim notes that their object is to raise the standards of corporate and directorial behaviour.281

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273 The Insolvency Service also investigates persons in bankruptcy.
274 Chapter 2 par 3.3.3.
275 Companies Act 2008 section 76.
276 Companies Act 2008 section 76(3)(a).
277 Companies Act 2008 section 76(3)(b).
278 Companies Act 2008 section 76(3)(c).
279 Companies Act 2008 section 77.
280 Cassim Contempoary Company Law n5 507.
281 The statutory fiduciary duties are extended to a business rescue practitioner in terms of the business rescue proceedings contained in Chapter 6 of the new Companies Act, by virtue of the fact that a business rescue practitioner, during rescue proceedings, has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77 (Companies Act 2008 section 140(3)(b)). In addition, the business rescue practitioner may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner, although he is not liable for any act or omission in good faith in the course of the exercise of his powers and the performance of his functions. [section 140(3)(c)].
It is submitted that a similar approach may be adopted in order to regulate the duties of a liquidator, namely a statutory statement of duties that will make these duties more clear and accessible. A codification, or statutory statement of duties will likewise have the object of raising the standard of behaviour of insolvency practitioners and will provide a predictable and effective environment for the efficient discharge of a practitioner’s duties. These duties should be mandatory and unalterable. In Australia, in the winding-up of a company, a liquidator owes fiduciary duties to the company, its creditors and members.282 As a fiduciary, liquidators must act honestly, avoid conflicts of interest and act impartially. A liquidator has to, *inter alia*, show that he is a “fit and proper person”.283 The “fit and proper” requirement aims to ensure the public’s confidence in liquidators and to maintain market assurance. Australia has a Code of Professional Conduct promulgated by the Insolvency Practitioners Association of Australia, as well as a Statement of Insolvency Standards. Therefore, as seen in the English system, there is a structure of interwoven rules, regulations, codes and guidelines which augment the statutory basis of the insolvency law. This system of certainty, transparency, accessibility and predictability is one that should be emulated in our law.

2.6 Extending the focus of the liquidator’s duties

A significant difference in focus between the South African and English systems is the fact that the official receiver is tasked with the duty not only to determine and realize the assets of the insolvent company, but also to investigate and report on the cause of the failure of the company. In South Africa the overarching purpose of the section has consistently been interpreted by our courts to be for the acquisition of information. This does not accord with the aims of modern insolvency law. Keay notes that one of the aims of insolvency is to determine the reasons for the insolvency and to provide mechanisms whereby the conduct of those involved can be examined.284 It is noted that this aim is designed to support the maintenance of commercial morality. South African insolvency law would be enhanced if the focus of

283 Corporations Act section 1282(2).
the examination is extended to include an investigation into the cause of the failure of the company. There is a greater awareness of the interdependence between companies and the society in which they function and there should be an increased responsibility in the insolvency process on reasons why companies have failed.

3. Conclusion

In conclusion, it is submitted that section 417 is one that is vital to retain in a new insolvency regime. The accessibility of the section to liquidators, the inquisitorial nature of the proceedings, the wide scope of the section and the effective sanctions should examinees not comply, together combine to make a formula that has over the years proved impervious to circumvention. The sheer regularity with which private examinations are sought to be challenged in our courts is indicative of the effectiveness of the section. In recent times alone the section has been challenged on the authority of a liquidator and a provisional liquidator to bring the action, the constitutionality and the administrative correctness of the section. It is hard not to draw the inference that it is particularly those with something to hide that are mostly desirous to evade the examination. The court in Podlas stated it thus: “It is difficult to see why an insolvent who has made a clean breast and has nothing to hide should shirk an interrogation such as the one the applicant objects to...A person who is sequestrated effectively sacrifices his or her right to privacy in regard to, at the least, pre-sequestration patrimonial matters. The rights of a creditor enjoy preference over those of an insolvent.” It is submitted that this section must remain part of our future insolvency legislation as it clearly fulfils a function, and does so with prudent efficiency. This submission is strengthened the fact that the Constitutional Court after careful consideration has kept sections 417 and 418 wholly intact, with the exception of those parts that infringed on the rule of self-incrimination.

285 Bertelsman et al Mars The law of insolvency (2008) 419 notes that “With the arrival of a Bill of Rights the statutory threat of being forced to incriminate oneself was challenged repeatedly in a number of cases...”

286 Podlas v Bryden NO n18 which dealt with a private examination in terms of section 152 of the Insolvency Act.
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