

**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)

1 Introduction

*"Though this be madness, yet there is method in't."
Hamlet quote (Act II, Scene II)*

As the bulk of the law of insolvency is procedural it is by nature a rights-based law, for the rules of procedure are premised on the principles of the law of natural justice. Bankruptcy laws have traditionally been procedural statutes providing a means by which a debtor and all his or her creditors may readjust their relationship when the debtor becomes insolvent (*cf* Plank "The Constitutional Limits of Bankruptcy" 1996 *Tennessee Law Review* 487 495).

In *Gumede v Subel NO* (2006 3 SA 498 (SCA)) the issue the Supreme Court of Appeal had to decide was whether the right to privacy entrenched in section 14 of the Constitution of the Republic of South Africa Act, 1996 (hereinafter "the Constitution") entitled the appellants to refuse to produce documents as summoned by the commissioner in an enquiry in terms of section 417 read with section 418 of the Companies Act (61 of 1973) (unless otherwise stated, all references to sections are references to this Act). Before discussing and commenting on the decision in *Gumede* it is necessary to first provide a brief summary of the facts and judgment of the case.

2 Facts and judgment

The first respondent, a member of the Johannesburg Bar, was appointed by the Master of the High Court (hereinafter "the Master") as a commissioner in an enquiry in terms of section 417 read with section 418 of the Act into the affairs of an insolvent company, Acquired Card Technologies (Pty) Ltd (in liquidation) (hereinafter "the ACT"). During the course of the enquiry the commissioner ordered Mr Gumede, the first appellant and executive director of the Gijima Group, and the Gijima Group itself, to produce certain documents relating to the business affairs of ACT. The documents related to a tender by ACT to Telkom for the manufacturing of phone cards which formed the main business of ACT. Subsequently the tender was awarded to a company in the Gijima Group (as opposed to ACT), thereby raising the question of a possible diversion of a corporate opportunity by the executive director and the Gijima Group. The appellants objected to the disclosure of

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