IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 09/35648

DATE: 31/08/2010

REPORTABLE

In the matter between:

HANNOVER GROUP REINSURANCE (PTY) LTD	First Applicant
HANNOVER REINSURANCE AFRICA LTD	Second Applicant

and

GUNGUDOO: SHAUN	First Respondent
GUNGADOO: AYESHA	Second Respondent

JUDGMENT

WILLIS J:

[1] This is an application for a provisional order sequestrating the joint estate of the respondents.

[2] The Second Applicant is a wholly owned subsidiary of the First Applicant and is a registered insurer under the Short-term Insurance Act, 53 of 1998.The second applicant carries on business in the field of reinsurance.

[3] The first respondent was employed by the second applicant from 1986 to August 2009. From July 2002 the first respondent had been the senior manager of its investment unit. He was specifically mandated and entrusted to manage its assets valued at approximately R3.4 billion. A significant portion of the assets managed by him were invested in listed equities and corporate bonds. In practice, the fist respondent was the only person authorised to instruct stock brokers with regard to the investment of these funds. The second applicant alleges that the first respondent indebted was to it in the sum of at least R41 million. This claim arises as follows:

(i) R9.5 million from out a loss suffered by second applicant due to unauthorised short trades which the first respondent implemented;

(ii) R25 million which was unlawfully transferred by the first respondent from various Hannover stock broker accounts to the account of Shaneil Financial Management CC ("Shaneil") trading as SHL Financial Management, a close corporation of which the first respondent is, and was at all material times, the sole member ;

(iii) R6.5 million in respect of a further three share transfers from the second applicant's broker accounts, effected into the accounts of third parties and Shaneil.

[4] Furthermore, the applicants contend that, in addition to the above liabilities, they have a potential claim against the first respondent in an

approximate amount of R23 million arising out of false representations made by the first respondent to Sanlam Private Investments (Pty) Ltd ("SPI") regarding the use of the second applicant's assets as collateral on the so-called "Goodall account". This aspect will be dealt with in more detail later.

[5] The application for a provisional order of sequestration was served on the respondents more than a year ago. They are married in community of property. Since then, there have been a number of postponements. In addition to founding, answering and replying affidavits, both parties have filed various "further" and "supplementary" affidavits. There has been much protracted legal wrangling to secure a date for the hearing. In the result, the court, during the hearing before me, came to look as though a stampede of horses had raced through a stationery shop, colliding with shelves of files and papers.

[6] The applicants allege that during July and August 2009 they discovered that the first respondent had taken a number of "short positions" in the equity markets which resulted in a loss to the second applicant of R9.5 million. "Short positions" occur where persons sell financial securities (normally shares) which they do not have in the expectation that when the time for delivery takes place, they will be able to do so by buying up that security at an even lower price than that at which they have sold. Of course, "the best laid schemes o' mice an' men gang aft a-gley". [1] For this reason, "short selling" is highly regulated and controlled. According to the applicants, the first respondent was not authorised to take these "short positions" in the equity market. When confronted with these trades, the first respondent tendered written notice of his resignation. At the time he provided no reason for having conducted these short trades. Not only do all

1 These lines are taken from Robbie Burns' poem "To a Mouse". As I have been criticised in the press for providing explanatory footnotes on nursery rhymes, perhaps I should record that I accept that, as with Humpty-Dumpty, everyone is familiar with this poem and that the footnote may hardly be necessary.

the applicants current and previous executives claim that the first respondent was not authorised to take short positions in the equity markets but also none of these so-called "short trades" executed by the first respondent were ever recorded in the second applicant's system in the period leading up to 4 August 2009, when the first respondent resigned.

[7] Consequent upon the applicants' discovery of these "short positions", they appointed Deloitte and Touche to conduct a forensic audit. This report reveals, *inter alia*, that the first respondent falsely represented to SPI who operated a trading account for Goodall and Bourne Assurance (Pty) Ltd that Goodall and Bourne Assurance (Pty) Ltd was a subsidiary of the first applicant when, in fact, in 2005, the first applicant had sold its shares to Conduit Risk and Insurance Holdings (Pty) Ltd. Furthermore, the first respondent falsely represented to SPI that the first applicant would guarantee any losses on the "Goodall account". As a result of these representations, SPI allowed the first respondent to trade on the "Goodall account". As a result of various "short positions" implemented by the first respondent, the "Goodall account" has suffered a loss of some R23 million for which SPI may hold the applicants liable.

[7] It is common cause that it would appear that, at least by using the assets of the applicants as collateral, the first respondent conducted a number of trades to the benefit of Shaneil Financial Management CC of which he is the sole member. Furthermore, it seems clear that these transactions were disguised by the careful use of encryption codes such that it appeared that "Shaneil" was a public company that was a subsidiary of one or both of the applicants.

[8] The first respondent was earning about R800 000-00 per annum at the time of his resignation. The applicants allege that their diligent searches at the Deeds Office and the registrar of companies and close corporations reveal that the first respondent is an extraordinarily wealthy man for

someone earning such a salary, even if his bonuses are taken into account. On the other hand, his wealth is not such that he appears to be able to pay the large amount for which he is indebted to the applicants by reason of his alleged fraudulent transactions. The applicants allege that the first respondent is thus unable to pay his debts.

[9] There is a welter of detail in the papers before the court. The account above is a mere summary of the applicants' case. A summary of the respondents' case is the following:

(i) the "short trades" were authorised by the second applicant;

(ii) one must properly understand how "short trades" are undertaken and, although there may have been losses, there were profits for the second applicant as well, which profits must be taken into account in determining, whether, overall, the second applicant can truly be said to have suffered a loss;

(iv) the potential claim by SPI is conditional and therefore unliquidated;

(v) the forensic report by Deloitte and Touche is mere hearsay;

(vi) there was no intention to disguise the trades for Shaneil – it was a mistake made "unthinkingly";

(vii) the first respondent resigned because of the intention of the applicants to "embark on a witch hunt rather than to resolve the queries which they had raised".

(viii) the applicants have failed to show that the respondents are factually insolvent;

(ix) the respondents dispute the applicants' case on *bona fide* and reasonable grounds.

[10] Section 10 of the Insolvency Act, 24 of 1936 ("the Insolvency Act") provides as follows:

> 10. Provisional sequestration –
>
> If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –
>
> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may make an order sequestrating the estate of the debtor provisionally.

[11] Counsel for both sides relied on the case of *Kalil v Decotex (Pty) Ltd*[2] and

2 1988 (1) SA 943 (A)

more particularly on the cases of *Badenhorst v Northern Construction Enterprises*[3] and *Provincial Building Society v Du Bois*[4] both of which were referred to, in general terms, with approval in the *Kalil v Decotex* case. Nevertheless, the reasoning in the *Badenhorst* case, as will be seen shortly, did not receive unqualified approval in the *Kalil* case.

[12] In the *Badenhorst* case, Hiemstra AJ (as he then was) said that where a respondent disputes liability for a debt "*bona fide* en op redelike gronde"... "dan moet die aansoek afgewys word". In the *Kalil* case, Corbett JA (as he then was), referred to this as the "*Badenhorst* rule".[5] Corbett JA then went on to say:

> Whether the *Badenhorst* rule should be accepted then as an exception to the general approach relating specifically to the *locus standi* of an applicant as creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the procedure by using it as a means of putting pressure on the company which is *bona fide* disputed(see the English case of *Mann and Another v Goldstein and Another* [1968] 2 All ER 769 at 775C-D) need not however be decided in this case. The point was not argued before us and, as I shall now show, it seems to me that for various reasons the *Badenhorst* rule should not be applied here.[6]

[13] In *Badenhorst*, Hiemstra AJ justified his decision to dismiss the application by referring to Buckley on *Companies* where Buckley says that a winding-up petition is not to be used as a means of enforcing a debt which is in *bona fide* dispute and that "if there is no reason to believe that the

3 1956 (2) SA 346 (T)
4 1966 (3) SA 76 (W)
5 At 980F
6 At 980G-I

debt, if established, would not be paid, the petition would be dismissed".[7] In the present case, I regret to say that there is nothing before me to indicate that the debt claimed, if established, will be paid. The respondents have been vague, sketchy and unhelpful when it comes to addressing the applicants' allegations in this regard. In this respect, the present case is very different from that of *Payslip Investment Holdings CC v Y2K TEC Ltd.*[8] Furthermore, the facts of the present case are very different from those in *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd*[9]. In that case, the *bona fides* of the respondent were not even in issue. I accept that in the present case one is not considering affidavits resisting summary judgment but, nevertheless, in the present case, the applicants have, in their founding affidavit, established *prima facie* (a) that a debt is owing and (b) that the respondents will not be able to pay it. That case has to be met by the respondents in an adequate and reasonably convincing manner in order that the dispute can be said to be *bona fide* and predicated on reasonable grounds. After all, the respondents do have to show that the alleged indebtedness is disputed on *bona fide* and reasonable grounds. [10] Having said that, I accept that there is no *onus* upon the respondents to establish either that (a) their defence is "good" or (b) that, in the event of the applicants' claim being proven, the respondents will be able to meet it. This is clear from the *Kalil* case.[11] In the *Kalil* case, Corbett JA dealt with the difficulties of what is meant by the term *prima facie* in section 10 of the Insolvency Act but it seems that he considered the approach of Trollip J (as he then was) in the *Provincial Building Society v Du Bois* case to be correct: the court must do its best to decide the probabilities by taking into account the full conspectus of allegations and denials as they appear in the affidavits, read as a whole, which are placed before it. [12] Not only should referrals to oral evidence be rare in applications for provisional orders of sequestration but also a court must bear in mind that refusal of a

7 At 348A-B.
8 2001(4) SA 781 (C) at 788A-B.
9 1998 (2) SA 219 (C).
10 At 980C
11 At 980C
12 At 976C-980A

provisional order is final against an applicant and may, as such, result in an injustice. [13]

[14] The judgment of Trollip J in the *Provincial Building Society v Du Bois* case is of particular assistance in deciding this case. In that case the following appear clearly:

(i) *Viva voce* evidence should ordinarily not be heard in deciding whether or not to grant a provisional order of sequestration;

(ii) Quite apart from other difficulties, such as the loss of time and expense which the hearing of *viva voce* evidence may entail, the hearing of *viva voce* evidence at a provisional stage in proceedings may result in credibility findings which would be unfairly prejudicial to a litigant;

(ii) The Insolvency Act intended that the procedure for obtaining a provisional order should be simple;

(iii) The procedure should be speedy;

(iv) The object of the procedure should not be stultified;

(v) It should always be borne in mind that the order, although it may have serious consequences for a respondent, is provisional only;

(vi) A court will exercise greater caution when it comes to making the order final. [14]

13 At 979E-980A
14 At 78A-80F.

[15] Counsel for the respondents submitted that, in the event that there is doubt about the applicants' case, the court has no discretion in the matter and must dismiss the application for provisional sequestration. I am far from convinced that this is correct. There are three reasons for my not accepting this argument:

(i) the very word "provisional" entails the notion that greater clarity and certainty will be obtained later; [15]

(ii) although, as is apparent from the *Kalil* case, a precise understanding of the meaning of the expression *prima facie* is not without difficulty, it embraces a sense of inconclusivity, a sense that, pending certain happenings in the future, the *facta probanda* remain open to doubt, a sense of there being a process on the road to greater certainty; [16]

(iii) one cannot escape a sense, from what Corbett JA had to say in the *Kalil* case, that in applications for provisional orders of this kind, where there is doubt as to (a) whether the indebtedness is disputed on *bona fide* and reasonable grounds and (b) whether the respondent is, in fact, insolvent, then a court, like a bateleur, must perform a difficult balancing act.[17] This balancing act, in the end, requires the exercise of a judicial discretion, after having taken everything into account. This, it seems to me, follows as a matter of logic. That there is an overall discretion where there is a residual doubt as to the issues in (a) and (b) immediately above seems, in my respectful opinion, also to be implicit in Corbett JA's *discursus* in the *Kalil* case.[18]

[16] That this balancing act is sometimes indeed difficult to perform is, in my respectful view, well illustrated by Stegmann J's *cri de Coeur* in *Reynolds NO v Mecklenberg (Pty) Ltd.*[19] Nevertheless, it needs to be borne in mind that the ballet of a bateleur is not the inevitable judicial ordeal of

15 See, for example, *The Oxford Dictionary.*
16 See, for example, *Salmons v Jacoby* 1939 AD 588 at 592-4. See, also, *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 105A.
17 At 976A-982G.
18 At 78A-80F.
19 1996 (1) SA 75 (W) at 78G-83I.

every application for a provisional order of sequestration. Where the applicant is abusing the process of application for a provisional order of sequestration, it will often not be difficult for a respondent to show this: the respondent demonstrates, in a reasonably convincing way, that even if the applicant's claim is proven, the surplus of the respondent's assets over liabilities can comfortably meet the claim. Further clues will be provided where the *quantum* of the uncertain portion of the applicant's claim, relative to the surplus of the respondent's assets over liabilities, suggests that justice will best be served by leaving the claim to be played out in its usual course. Of course, there will be rare instances where the applicant's claim is so patently ridiculous that this, in itself, will justify a dismissal of the application. None of these considerations as to the obviousness of the direction to take apply in the present case.

[17] Counsel for both sides agreed with me that, in applications of this nature, there are only four options available to a court:

(i) dismiss the application;

(ii) refer the application to oral evidence;

(iii) postpone the application on other appropriate terms and conditions;

(iV) grant the provisional order.

[18] I have carefully considered these four options in the present case. My conclusions are the following:

(i) the applicants have presented far too convincing a case for the interests of justice to be served by dismissing the application;

(ii) in the light of the history of this matter and the highly technical and complex nature of the detail of the factual issues in dispute, justice will not be served by referring the dispute to the hearing of *viva voce* evidence;

(iii) the history of repeated postponements in this matter and the absence of any useful purpose being served by any further

postponements, are strongly indicative that another postponement should not be granted;

(iv) if one balances the cases presented by the respective parties, their competing interests and the lack of any other suitable options, the appropriate order to grant is one of provisional sequestration.

[19] I am mindful of the fact that the result is less than perfect. Nevertheless, justice is not a "cloistered virtue".[20] Furthermore, in South Africa, the arena of commerce and industry is hardly monastic: the playing fields of justice in commercial litigation cannot resemble the lawns upon which gentlefolk engage in a game of bowls. Due allowance has to be made for the robust rock-face of prevailing realities.

[20] In the light of the above, a provisional order of sequestration, placing the joint estate of the respondents in the hands of the Master, is granted; returnable on 2nd November, 2010.

DATED AT JOHANNESBURG THIS 31st DAY OF AUGUST, 2010.

N.P. WILLIS

JUDGE OF THE HIGH COURT

20 The expression was made famous by John Milton in his *Areopagitica*.

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Date of hearing: 23 August, 2010.
Date of judgment: 31 August, 2010.