REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/35648

DATE:21/04/2011

NOT REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

HANNOVER REINSURANCE GROUP AFRICA (PTY) LTD First Applicant

HANNOVER REINSURANCE AFRICA LIMITED Second Applicant

and

SHAUN GUNGUDOO First Respondent

AYESHA GUNGUDOO Second Respondent

J U D G M E N T

TSOKA, J:

[1] On 20 August 2009, the Applicants', on urgent basis, sought an order for provisional sequestration of the joint estate of the Respondents. The application was opposed.

[2] On 23 August 2010 the matter was argued before Willis J, who reserved judgment. The judgment was delivered on 31 August 2010, granting a provisional order of sequestration returnable on 2 November 2010. On 2 November 2010 the provisional order was extended to 16 November 2010. As it was envisaged that the argument would be longer than five hours, the matter was allocated as a special motion. On 16 November 2010, the matter once again came before Willis J. The Respondents applied for Willis J's recusal as they were of the opinion that the Judge would be biased. The Judge acceded to the request. The provisional order was again extended to 30 November 2010 on which day the order was extended to 22 March 2011, the date allocated by the Deputy Judge President for argument. This is the application before me.

[3] The Applicants seek confirmation of the provisional order of sequestration. The Respondents oppose the application and seek an order discharging the provisional order on the basis that the Applicants have failed

to satisfy the requirements of section 12 of the Insolvency Act 24 of 1936 ("*the Act* ").

[4] The Respondents raised a point *in limine* that they have seven employees who have not been served with the application for provisional sequestration contrary to the peremptory provisions of section 9(4A)(a) and (b) of the Act.

[5] Section 9(4A)(a) and (b) of the Act provides as follows –

> *"(4A) (a) When a petition is presented to the court, the petitioner must furnish a copy of the petition-*
>
> > *(i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and*
> >
> > *(ii) to the employees themselves-*
> >
> > > *(aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or*
> > >
> > > *(bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;*
> >
> > *(iii) to the South African Revenue Service; and*
> >
> > *(iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.*
>
> *(b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition*

which sets out the manner in which paragraph (a) was complied with."

[6] The Respondents contend that the Applicants did not serve Respondents' employees with the application prior to the granting of the provisional order. The contend further that no attempts were made by the Applicants to serve the application on the trade union representing the employees. They say as a result the Applicants' attorney's affidavit, in terms of the provisions of section 9(4A)(b) of the Act, is insufficient, insofar as it does not state how service on Respondents' employees and the employees' trade union was effected.

[7] The Applicants contend that having been appraised of the existence of the employees, they served the application and the provisional order on the said employees, though this was done after the granting of the provisional order of sequestration.

[8] Prior to dealing with the provisions of section 9(4A)(a) and (b) of the Act, it is crucial to sketch the relationship between the parties and how the issue of employees arose in order to appreciate the significance of the provisions of section 9(4A)(a) and (b) of the Act in the context of this matter.

[9] The Second Applicant is a wholly owned subsidiary of the First Applicant. The Second Applicant is a registered insurer under the Short-term Insurance Act 53 of 1998 and carries on business in the field of re-insurance. The First Applicant is cited in its capacity as the parent company of the

Second Applicant. In this matter, the Second Applicant is the creditor. For convenience I refer to the First and Second Applicants as "Applicants" unless the context suggests otherwise.

[10] The First Respondent who is married in community of property to the Second Respondent has been in the employment of the Applicants since 1986. At the time, the First Respondent was employed as a clerk. During April 1995 he was promoted to the position of Investment Manager. With effect from 1 July 2002 he became the Senior Manager of the Investment Unit of the First Applicant, the position he held until his sudden resignation on 4 August 2009. It is Applicants' case that the cause of action arose during First Respondent's employment with themselves and that First Respondent's indebtedness must be understood in this context.

[11] During July 2009 the First Applicant's audit committee was advised by Mr Quintin Landman, Applicants' Executive Manager: Finance, that there were certain investment trades with Barnard Jacobs Mellet ("*BJM*"), a Stock Broking Firm, which could not be reconciled with Second Applicant's records. On two occasions during July 2009, the First Respondent was asked for explanation as to the discrepancies but was unable to furnish any satisfactory explanation. Further investigations were carried out by the Applicants. The Applicants' internal auditors together with a team from Deloitte and Touche: Risk Advisory, were instructed to conduct a forensic investigation. Suddenly, on 4 August 2009, the First Respondent, without any reasons, tendered his resignation. The Applicants, on receipt of the letter of resignation, put the

First Respondent on special leave. That the First Respondent had no employees until he was placed on special leave, is obvious.

[12] On 20 August 2009, pursuant to discovering the First Respondent's indebtedness to them in the sum of R 10 582 000, the Applicants launched the present application which was served on the First Respondent on the same day at 102 Rama Krishna Avenue, Claudius, the address described in the Sheriff's return of service as First Respondent's place of residence. Service was effected on a security guard. On the same day, the Sheriff attempted to serve the application on the First Respondent at his second address 289 Simla Street, Claudius, but service could not be effected as there was no 289 in Simla Street, the highest number in that street being 97. For the same reason, the Second Respondent could not be served with the application at 289 Simla Street, Claudius.

[13] On 26 August 2009, the Respondents filed a Notice of Intention to Oppose. On 31 August 2009 the Respondents filed their Answering Affidavit. Subsequent to Applicants' replying affidavit being filed, the Respondents filed further affidavits. In the answering affidavit and the further affidavits filed, and during argument for the hearing of the provisional sequestration, the Respondents did not raise the issue of employees. There was no suggestion at all that the Respondents have employees. It was only in the further affidavit deposed to on 26 October 2010, two months after Willis J had granted the provisional order, that, suddenly, the Respondents allege that they have seven employees who have not been served with the application

prior to the granting of the provisional order of sequestration. The seven employees have filed affidavits in confirmation of their employment with the First Respondent.

[14] It is common cause that the provisions of section 9(4A)(a) and (b) are couched in peremptory language. In terms of this section, the Applicants were obliged to serve the application on the entities specified in the section, prior to the hearing of the application. In terms of the provisions of section (9)(4A)(b), Applicants' attorneys were obliged to file an affidavit, either before or during the hearing of the application, wherein the steps taken by the Applicants in compliance with the provisions of section 9(4A), are set out.

[15] In the present matter, it is undisputed that the Applicants served the application on the South African Revenue Service ("*SARS*") and the Respondents. It is further undisputed that Applicants' attorney of record filed an affidavit setting out steps taken in serving the application on SARS and the Respondents. The application was launched sixteen days after the First Respondent's resignation. The First Respondent was Applicants' employee who resigned, and was placed on compulsory leave. Consequently, the Applicants did not serve the application on the employees. At no stage was there indication that the Respondents have employees, As a result the Applicants' attorney could not file an affidavit in terms of paragraph (b) of section 9(4A) of the Act with regard to such employees.

[16] An observation needs to be made prior to discussing the provisions of section 9(4A)(a) and (b) of the Act. The wording of this section is identical to the wording of section 346(4A) of the Companies Act 61 of 1973 as amended ("*the Companies Act*"). In respect of the provisions of section 346(4A) of the Companies Act, the debtor, whose estate is being wound up, is invariably a company or a corporate entity such as a Close Corporation. Such a debtor, necessarily, carries on business and the question of such a debtor's insolvency arises in the conduct of its business. It is in this context, in my view, that the legislature speaks of trade union and employees and that service of an application for winding-up should be served on a trade union, where applicable, and employees of such a debtor. It is unthinkable in the case of a company, that such a company could conduct business without employees. The reference to employees is a reference to the employees of such a debtor company. This observation is fortified by the use of two words 'notice board' on the front gate of the premises where the company 'conducts its business at the time of the application'.

[17] With regard to the provisions of section 9(4A)(a) and (b) of the Act, the legislature speaks of employees of a debtor although reference is still made to a 'trade union' and 'a notice board' at the debtor's premises. It is difficult to appreciate the meaning of 'employees' as referring to domestic workers, gardeners, security guards and so forth, whose employment has nothing to do with the business of the respondents. I, however, proceed on the basis that 'employees' in terms of the provisions of section 9(4A)(a) and (b) of the Act mean, amongst others, domestic workers, gardeners and security guards.

[18] In the present matter the Applicants' cause of action, amongst others, is the alleged fraud and theft. The facts reveal that the alleged fraud and theft perpetrated by the First Respondent occurred while the First Respondent was in the employment of the Applicants and while he acted, ostensibly in the course of employment. It is therefore not unreasonable for the Applicants to have assumed that the First Respondent did not have employees in relation to his activities whilst in their employment. When the Respondents filed their answering affidavit one would have expected that they would have brought the existence of the employees to the attention of the Applicants. This was not done. When the Respondents filed further affidavits prior to 27 October 2010, they again did not disclose the existence of the employees to the Applicants. That fact was also not argued before Willis J on 23 August 2010, in spite of the fact that the Respondent vigorously opposed the application.

[19] According to the First Respondent, his seven employees have been in his employment for years. According to him, his residential address is 85 Simla Street, Claudius. One assumes that domestic workers, drivers and security guards would be based at this address. However, according to the employees' affidavits filed in this matter, their work address is stated as 161 19th Avenue, Laudium, Pretoria. Mr Shamendram Pillay, the First Respondent's bookkeeper, does not disclose his work address. He, however, states his residential address as 287 Saski Avenue, Claudius, Centurion, Gauteng Province.

[20] In the circumstances of this matter, I am unable to fault the Applicants for not having served the application on the employees, whose work address seems to be 'unknown' to the First Respondent. As the Applicants served the application on the Respondents and SARS, and the Applicants' attorney of record filed the necessary affidavit with regard to such service, the Applicants were entitled to obtain a provisional sequestration order against the Respondents.

[21] Is the provisional sequestration order susceptible to be discharged once the existence of First Respondent's employees is disclosed? In my view, the answer is no.

[22] In the present matter, once the Applicants were appraised of the existence of the employees, the Applicants served the application on them. The employees and SARS were also served with the provisional sequestration order whereafter Applicants' attorney of record, again, filed an affidavit of service in compliance with the provisions of section 9(4A)(b) of the Act.

[23] The Respondents contend that as the provisions of section 9(4A)(a) and (b) of the Act are peremptory, non-compliance therewith prior to, or compliance after the granting of the provisional sequestration order, vitiates the provisional order with the result that such order ought to be discharged and the application be dismissed. I was referred to several decided cases as authority for this contention. I deal with the said cases below.

[24] In the unreported case of *Peter Wayne Roberts v The Taylor of Buchingham CC and Others*, Case no. 21864/2008 (W), Blieden J found that non-compliance with the provisions of section 346(4A) of the Companies Act would disentitle an applicant from obtaining a provisional order of winding-up.

[25] The facts in *Roberts* are distinguishable from the facts in the present matter. In that matter the debtor was a close corporation, probably with employees, who had not been served with the application prior to the hearing thereof. In the present matter, the Respondents are natural persons. The First Respondent was Applicants' employee at the time Applicants' cause of action arose. It is common cause that none of the parties was aware prior to the granting of the provisional order or during argument of the application,that there were employees entitled to receive notice of the application.

[26] Counsel for the Respondents further relies on *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) as authority that non-compliance with the provisions of section 9(4A) and the subsequent filing of the necessary affidavit by Applicants' attorney of record, necessarily, vitiates the application.

[27] The submission by Counsel is based on the misreading of the judgment. In *Standard Bank,* the employees were not served with the application. It appears to have been common cause that the respondents, in that matter, had employees. While knowing very well that the employees

were not served with the application, the applicant's attorney furnished a false affidavit that the provisions of section 9(4A)(a) had been complied with. This is apparent from the reading of paragraph (27) of the judgment where Dlodlo J, said the following –

> *"[27] In the absence of proof that the matrimonial regime between the two Respondents is that brought about by a marriage in community of property, I am in law precluded from finding that, in the first place, it was proper to cite the second Respondent in these proceedings. I have reiterated that I have not been addressed on the Muslim law in this regard. The rule nisi cannot, in my view, be confirmed in any event against the second Respondent. As far as the First Respondent is concerned, I have come to the finding that the Applicant has not established that the First Respondent has committed an act of insolvency or is actually insolvent. It has neither been proved that there is reason to believe that it will be to the advantage of creditors of the First Respondent if his estate is sequestrated. I return to the aspect of s 9(4A) of the Act referred to above. I find it very disturbing that an attorney (an officer of this Court) preferred to tell an untruth leading the Court to believe that there has been proper compliance with the peremptory provisions of the Act. This conduct on the part of an attorney is viewed in a serious light. If Courts can no longer place reliance on assertions made under oath by its own officers, then clearly the administration of justice is under threat of collapse. Information which is false by its very nature is extremely dangerous per se. The Applicant did not therefore comply with the peremptory provisions of s 9(4A) of the Act. By tendering a false affidavit in this regard, the Applicant showed, in my view, mala fides. This failure alone, in my view, vitiates this application.*
>
> *I am therefore not positioned to exercise my discretion in favour of the Applicant nor order the final sequestration of the First Respondent either."*

[28] In the present matter, the affidavit of service by Applicants' attorney relates to service of the application to both the Respondents, the Master of the High Court and SARS. The affidavit did not state or suggest that the application was served on the trade union or employees. In this context, there

cannot be any falsehood on the part of the Applicants' attorney. Counsel's reliance on paragraph (27) in the *Standard Bank* matter is misplaced.

[29] Counsel for the Respondents further relies on the unreported judgment of *Elrich, Amos and two Others v Ideal Diamond Co (Pty) Ltd*, Case No. 2005/14823 (W) as authority that non-compliance with the peremptory provisions of section 346(4A) is fatal to an application for provisional winding-up. In that matter, Kuper AJ, was dealing with a company debtor, which in the normal course of events, in the conduct of its business, would have employees. In that matter, again, non-compliance with regard to service on the employees was prior to the service of the application. In the present matter the provisional order had already been granted, unbeknown to the parties that there were employees in Respondents' employment.

[30] I understand the submissions of Counsel for the Respondents, to be that, prior to the issuing of the application, the Applicants, in the circumstances where they were bringing an application against their employee, should first have made enquiries from the First Respondent whether he has employees and, if so, to which trade union such employees were affiliated.

[31] Counsel's submission is, in my view, wrong. Compliance with the peremptory provisions of section 9 (4A)(a) and (b) presupposes knowledge of the existence of employees. If there is no knowledge on the part of an applicant, there must at least be reasonable grounds to suspect in the

circumstances of a particular matter, that there may be employees. Even where there are reasonable grounds, the best an applicant, in such circumstances can do, is to state that he is unable to state whether there are employees and if so, whether such employees are unionised or not. If the circumstances in each particular case are such as in the present matter, where it appears that it was common cause until 27 October 2010 that the Respondents had no employees, that the debtor whose estate was to be sequestrated was an employee of the Applicants, and there was no evidence to suggest that the Applicants deliberately failed to comply with the provisions of section 9(4A), there can be no obligation on the part of the Applicants to comply with the provisions of the section.

[32] Counsel's further submission, that the Applicants ought to have foreseen that the First Respondents, whose salary was over R 800 000 per annum, inclusive of bonuses, would have employees and therefore should have served the application prior to the granting of the provisional sequestration, is incorrect. The salary of the First Respondent could not, in my view, have suggested to the Applicants that the First Respondent has employees that deserve to be heard prior to the granting of the application. This inference, is not the only reasonable inference to be drawn. It is not unusual for persons earning more than R 800 000 per annum to have no employees. Again, it is not unusual that persons earning more than R 800 000 per annum engage the services of independent contractors rendering house services such as domestic work, gardening and security services. Accordingly, the fact that a debtor is highly remunerated, does not suggest

that such debtor has employees. In this matter, in any event, the employees in their affidavits state their address as being different to the residential address of the Respondents. In this context, it is unclear whether the said employees are Respondents' employees or that of his Close Corporation, Shaneil Financial Management CC, in particular having regard to the affidavit of Shamendram Pillay, First Respondent's bookkeeper. Any bookkeeping services the First Respondent would have required as an employee of the Applicants, would have been rendered by the Applicants' employees.

[33] It is now common cause that the employees have been served with the application and the provisional order of sequestration. The employees were given the right to be heard. Other than filing affidavits confirming their employment with the First Respondent, they have not filed any affidavit that should be considered whether to discharge or confirm the provisional order. In this matter, they evidently elected not to be heard.

[34] Counsel submits further that the Applicants' service of the application and the provisional order is defective in that the Sheriff's return of service does not state what enquiries the Sheriff made in establishing whether the employees are unionised or not. Furthermore, it is Counsel's submission that the provisional order served still reflected the return date of the order as 2 November 2010 while the order was served on 16 February 2011.

[35] In my view, the employees were informed of the nature of the application against the Respondents that resulted in the provisional order being granted. This order was served on them. If they had any interest in this matter, they whould have enquired from their employer, the First Respondent, of the day on which the provisional order was extended. In any event, the submission raises a formal defect which in terms of section 157 of the Act, may be condoned. The omission of the next return date, when the order was served on 16 February 2011, is a formal defect. It is condoned.

[36] That the provisions of section 9(4A)(a) and (b) are peremptory is without doubt. What is not obvious, however, is that the provisions are cast in stone. That the provisions are not cast in stone is borne out by Davis J's remarks in *Moodliar N.O. and Others v Hendricks N.O. and Others* [2009] JOL 24459 (WCC) in paragraph [28] of the judgment where the learned Judge said the following –

> *"[28] To sum up, a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties which are specified in section 346(4A). I do not consider that the inherent jurisdiction would extend the power of the court.* ***But a court may, in my view, determine whether the Applicant has been in substantial compliance with each of these sections. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met."*** [My emphasis]

[37] In *Sutter v Scheepers* 1932 SA 165 (AD) the Appellate Division reasoned that the words "must", although peremptory, ought to be interpreted contextually to establish whether they do not convey any other meaning but "must". At page 174 the Court said the following –

> *"(3) If, when we consider the scope and object of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or no sanction is added, then the presumption is rather in favour of the provision of being directory"*

[38] In the context of this matter, the peremptory provisions of section 9(4A) (a) and (b) ought to be regarded as directory, rather than peremptory. In the circumstances of this case, I find that there was no obligation on the Applicants to have served the application on the employees prior to the granting of the provisional order of sequestration. The provisions of section 9(4A) are peremptory where it is either common cause or there are facts suggesting the existence of employees. In circumstances such as in the present matter, where after the granting of the provisional order of sequestration, it is disclosed that there are employees that should have been served with the application, the court, in my view, is entitled, in terms of section 9 of the Act, to extend the order so that the necessary service could be effected and the necessary affidavit be filed. This is what was done in this matter. The point *in limine* has no merit. It is dismissed.

[39] The Respondents applied for striking out of the applicants' alleged raising of new cause of action in its replying affidavit, as well as the filed provisional trustees' report which was filed without being attested to.

[40] The Applicants launched the application after a forensic audit was undertaken. The forensic audit was prompted by certain investment trades

with BJM which were irreconcilable with Second Applicant's records and first Respondent's sudden resignation without reasons. The Applicantion was launched in terms of the provisions of Section 10 of the Act. The applicants, based on the interim forensic audit report, realized that the First Respondent was indebted to them. They realized further that on the information then available, the Respondents were insolvent, and that to proceed to obtain a provisional order of sequestration would be in the interest of the creditors. They thus launched the application for provisional sequestration of the Respondents' estate.

[41] The interim trustees' report alludes to the fact that more investigations need to be carried out to determine the extent of Applicants' loss. The further losses stated by the Applicants are as a result of the further revelations found by the forensic investigations. This is not a new matter. In the event that this is found to be a new matter, I find that no prejudice is occasioned to the Respondents, who filed affidavits dealing with all the further losses uncovered by the Applicants.

[42] With regard to the trustees' report, the Respondents' complaint is that the report is not under oath and is only signed by one trustee. The trustees were appointed by the Court. There is, therefore, no basis to reject their report on the basis that same has not been attested to or that it is signed only by one trustee. Counsel was unable to furnish me with authority for this submission. In any event, this court often receives Master's reports as well as

trustees' reports without such reports having been attested to. The application for striking-out has no merit. It is refused.

[43] Turning to the merits of the application, the Respondents contend that the order should be discharged as the Respondents resist confirmation thereof on bona fide and reasonable grounds.

[44] Counsel for the Respondents relied on the so-called *Badenhorst-rule* in terms whereof a court hearing an application for provisional winding-up should refuse such an application where the debt is disputed on bona fide and reasonable grounds. The rule emanates from *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (TPD). In that matter, the court, correctly in my view, pointed out that the process for winding-up is not meant to decide doubtful debts.

[45] In *Kalil v Decotex (Pty) Limited and Another* 1988 (1) SA 943 (AD), the Court reasoned that the *Badenhorst-rule* is not inflexible. At 982E the Court reasoned that departure from the *Badenhorst-rule* is called for '…*even though it might not be said that Decotex's indebtedness to the appellant is disputed on bona fide and reasonable grounds*…' as the creditor did not resort to winding-up proceedings to enforce a disputed debt.

[46] In *Helderberg Laboratories v Sola Technologies* 2008 (2) SA 627 (CPD) the Court, dealing with the evidential burden on a respondent, in paragraph [23] of the judgment, said the following –

> *"[23] I am in respectful agreement with the aforesaid dictum of Milne J, which has been approved by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another (1988 (1) SA 943 (AD)) at 980E. It therefore appears to me that it would be preferable to refer to this duty, of a respondent to show that the alleged debt is disputed on bona fide and reasonable grounds, as an evidential burden and not an onus. Be that as it may, it should be borne in mind, as explained by Thring J in the Hülse-Reutter case (Hülse-Reutter and Another v Hey Consulting Enteprises (Pty) Ltd (Lane and Fey NNO Intervening, 1988 (2) SA 208 (C)) at 219F - G, that a respondent merely has to satisfy the court that the grounds which are advanced for its disputing the debt are not unreasonable. The learned judge further emphasised that it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it would rely at a trial. It is sufficient if the respondent bona fide alleges facts which, if proved at a trial, would constitute a good defence to the claim made against it."*

[47] Do the Respondents dispute the Applicants' claims on reasonable and bona fide grounds? Examination of Respondents' various affidavits filed, provide an answer to this question.

[48] In the main, the First Respondent denies being indebted to the Applicant. According to him, the losses that were suffered by the Applicants were not as a result of the alleged fraud or theft by the First Respondent but because of short trades that the First Respondent carried out on behalf of the Applicants. According to the First Respondent, the Applicants suffered trade losses which are in the nature of short trades which the First Respondent was authorised to engage in. The losses being trade losses, so contends the First Respondent, must be borne by the Applicants.

[49] To appreciate the First Respondent's contention, is essential to briefly sketch the relationship between the different parties in this matter as well as

the short trades that the First Respondent conducted on behalf of the Applicants.

[50] The First Respondent was employed by the Applicants for 23 years. At the time of the alleged fraud and theft, he was the senior investment manager entrusted with assets to the value of R3,4 billion to trade on the Johannesburg Stock Exchange ("*JSE*"). He is an intelligent and successful investor. He was the only person in Applicants' business who dealt with the stock brokers, although he reported to the Applicants' investment committee. As a result of his success in the stock market, even the senior employees of the Applicants entrusted him with their personal assets for investment on the JSE. It appears that he had *carte blanche* in dealing with Applicants' assets. He interacted with the stock brokers on a regular basis. In this context, he was the face of the Applicants, if not himself seen as the Applicants.

[51] It is common cause that short trades take place when an investor believes that a particular share is over-priced and wishes to take advantage of the expected decline in the share price, he would then sell the share short. This means such an investor would sell a share that he does not own with the intention of purchasing it later at a lower price. Such an investor would typically borrow the share from another investor through a stock broker, to sell the share in the market and subsequently replace it at a price lower than the price at which such a share was sold. The investor who lends the share utilises the proceeds of the sale as collateral and can invest the proceeds in short-term interest free securities. The loan may, however, be terminated at

any time upon notice. For the investor to make profit, the share must fall in value. Should the value of such share rise, the investor will sustain a loss. No short sales may take place without a Security Borrowing Agreement in place. This is the requirement of the JSE. The object of the agreement is to lend credibility and integrity to short trades as an investment tool.

[52] It is also common cause that the First Respondent is an investor who engages in short trades on behalf of his alter ego, Shaneil Management Services CC ("*Shaneil*"). The First Respondent is the sole member of Shaneil. All the investments of Shaneil are conducted by the First Respondent. In this capacity, he interacts with the stock brokers on regular basis. Shaneil is also expected to have a Security Borrowing Agreement in place before conducting any short trades.

[53] It is against this backdrop that the Applicants' *locus standi* and Respondents defence should be assessed.

[54] Initially, Applicants' *locus standi* was based on three claims plus the fourth claim being a contingent loss of R23 million. The fourth claim, as I understand the Applicants' contention, was not, unsurprisingly, pursued with any vigour, as the Applicants' *locus standi* cannot be premised on a contingent liability but only on a liquid claim.

[55] The Applicants' claim must be understood as having been provisional in the sense that the investigations were ongoing and at the time the

application was launched, the Applicants' claim was thought to be a loss of R10 582 000. As at the hearing of the application for the provisional sequestration of Respondents' estate on 23 August 2010, Applicants' claim had escalated to R41 million. According to the Applicants, the said loss is made up as follows –

> 55.1 R9,5 million arising out of a loss suffered by the Applicants as a result of unauthorised short trades which were implemented by the First Respondent;
>
> 55.2 R25 million which was unlawfully transferred from various Applicants' stock broker accounts to the account of Shaneil;
>
> 55.3 R6,5 million in respect of three share transfers from Applicants' stock broker accounts to the account of Shaneil and to the account of other third parties on the authority of the First Respondent.

[56] On 31 August 2010, Willis J, having been satisfied that the Applicants made a prima facie case in terms of section 10 of the Act, granted the provisional order of sequestration.

[57] The Applicants seek an order for confirmation of the order. To succeed the Applicants must prove, on a balance of probabilities, that the requirements of the provisions of section 12 of the Act, have been met. Section 12 provides that –

"12(1) If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that-

(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 sequestrate the estate of the debtor.

(2) If at such hearing the court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not sine die."

[58] There is no onus on the Respondents but an evidentiary burden on them to show that the provisional order is resisted on bona fide and reasonable grounds. If the Respondents succeed in doing so, the provisional order should be discharged and the application dismissed.

[59] It seems to me that the Applicants' reliance on the amount of R9,5 million is tenuous. The claim is based on breach of mandate by the First Respondent in not adhering to the Applicants' Investment Guidelines in terms whereof the First Respondent was prohibited from engaging in short trades on behalf of the Applicants. This breach of mandate is disputed by the First Respondent. In this context, it is my view that this amount is not liquid as

evidence is required to prove whether the First Respondent breached the investment mandate or not.

[60] With regard to the R25 million, it is undisputed that the Applicants' shares in Anglo American, Sappi and Harmony were transferred from the Applicants to Shaneil on the First Respondent's instructions. The explanation proffered by the First Respondent is that Shaneil was the beneficial owner of these shares which were lent to the Applicants for purposes of short trades. This explanation is implausible. Firstly, Shaneil had no Security Borrowing Agreement entitling it to engage in short trades. Secondly, there is nothing on the papers that suggests that Shaneil was ever the beneficial owner of these shares other than the say so of the First Respondent.

[61] In argument, Counsel for the Respondents relied on a document titled "ISLA" – Global Master Securities Lending Agreement, as authority for Shaneil to conduct short trades. This document appears on page 1094 of the paginated papers. It is not a Security Borrowing Agreement. It is a draft authority for Shaneil to engage in short trades on the stock market with an entity described only as "Party A". Other than being initialled by the First Respondent who signed it on the last page, it is unsigned by the undefined "Party A'. It is illogical to describe this document as an agreement. In fortifying its contention that Shaneil had the authority to engage in short trades, the First Respondent relied on a document that appears on page 1082 of the paginated papers. This document contains the particulars of Shaneil. It appears to have been signed on 16 October 2000 by the First Respondent.

Attached to this document is another document headed: “MATERIAL OBLIGATIONS OF BUYERS AND SELLERS OF LISTED SECURITIES”. As the heading of this document suggests, it sets out the duties and obligations of buyers and sellers of listed securities. It is not a Security Borrowing Agreement as contended by the First Respondent. What is fatal to First Respondent’s contention that this document is a Security Borrowing Agreement, appears in clause 4 of the same document. In terms of this clause, prior to a bear sale order, that is a short trade, being entered into, a broker is obliged to ensure that a Security Borrowing Agreement is in place for the full quantity of securities to facilitate settlement. There is no such Security Borrowing Agreement that Shaneil entered into with Applicants’ stock brokers. In the result, I find that Shaneil had no authority to engage in short trades on the JSE as it had no Security Borrowing Agreement with any of the stock brokers utilised by the Applicants. The movement of these shares from Applicants’ accounts to Shaneil’s account through the conduct of the First Respondent amounts to misappropriation of these shares.

[62] The First Respondent’s explanation of Applicants’ loss of R25 million is neither bona fide nor reasonable. On this ground alone, I find that the Applicants, have succeeded in establishing, on a balance of probabilities, that the Respondents are indebted to them in the said sum of R25 million. The threshold of R 100 or R 200 in aggregate, in respect of two creditors, having been satisfied, it is unnecessary to determine whether the Applicants have, on a balance of probabilities, proved the other claims. I will return to the other claims when dealing with the factual insolvency of the Respondents.

[63] The bona fides of the First Respondent is determinative of whether his opposition to the granting of a final order is reasonable or not.

[64] The First Respondent filed not less than five affidavits in resisting the granting of the final order of sequestration. In the affidavits in spite of having seven employees, some of them since 1994, the First Respondent did not mention them in the affidavits. During the hearing of the application for the granting of the provisional order of sequestration, which was heavily contested, nothing is said about the employees. The raising of the question of employees at the very late stage of the application is, in my view, tactical. This fact reveals that the First Respondent is not bona fide and the raising of non-compliance with the provisions of section 9(4A) is unreasonable in the circumstances of this matter.

[65] Although the First Respondent was not the director of either of the Applicants, in my view, his position as a senior investment manager entrusted with assets to the value of R3,4 billion, demands of him the utmost good faith in dealing with his employers' assets. He was implicitly trusted by not only the Applicants, but by its directors as well. While being in full-time employment with the Applicants, earning a substantial salary, he competed with his employers through Shaneil, his alter ego. To this end, he was unafraid to change documents to misrepresent that Shaneil not only is a close corporation but also that it is a public company, and that it is a subsidiary of the First Applicant. Well-knowing that Shaneil could not engage in short

trades with various stock brokers, he, in his own hand-writing, amended the face of the Security Borrowing Agreement that the Applicants had with Finsettle Services (Pty) Ltd ("*Finsettle*"), to include Shaneil as part of the First Applicant's subsidiary companies. This facilitated Shaneil in engaging in short trades using Applicants' assets at his disposal.

[66] The First Respondent's explanation that he unthinkingly described Shaneil as a company, and a subsidiary of the First Applicant, is not true. If one has regard to the contents of the Security Borrowing Agreement that the Applicants had with Finsette, a 'borrower' means 'Hannover-Re' (*the applicants*) being the borrower of loaned securities and 'Hannover-Re' means any one of First Applicant's subsidiary companies including SHL Financial Management Limited. In his evidence, the First Respondent, in justifying 'unthinkingly' describing Shaneil as a public company, explains that Finsette prepared the Security Borrowing Agreement with the result that he is unable to explain the inclusion of Shaneil as a borrower and one of First Applicant's subsidiary companies.

[67] The portrayal of Shaneil as a public company and as one of First Applicant's subsidiary companies was made with the deliberate intention to facilitate Shaneil, a close corporation with no Security Borrowing Agreement in place, to engage in short trades with the stock brokers utilized by the Applicants. It is in this context that the First Respondent and Shaneil were able to engage in short trades to the prejudice of the Applicants. Whenever a loss occurred, the First Respondent and Shaneil would pass the loss to the

Applicants' account. However, whenever profit was made, this was passed unto Shaneil's account. That Shaneil and the First Respondent were never financially exposed, is without doubt. The First Respondent's attempts to explain the losses suffered by the Applicants as trade losses, is not bona fide and is not reasonable. Even if the First Respondent was authorized to engage in short trades on behalf of the Applicants, it makes no sense that the Applicants would use Shaneil, an unrelated close corporation solely owned by the First Respondent, to trade on their behalf with their securities, to their detriment.

[68] The First Respondent's attempt to justify his unauthorized activities as short trades carried out in his normal duties as an investment manager of the Applicants would not make his explanation bona fide and reasonable. His reliance on William Henry Kirkham's ("*Kirkham*") opinion evidence is misplaced. Although Kirkham's opinion is that wherever the narratives such as 'loan position closed'; or 'loan returned by you'; or 'script loan received'; or loan due from you'; or 'loan returned by you'; or 'collateral delivered', suggest short selling transactions, this opinion is diluted by the fact that the First Respondent's Attorney of record had not provided him with several material documents, such as Broker Notes, Broker Statements and P.Stats reports which are produced daily by the JSE, with the result that he was unable to 'track any of the transactions forming the subject matter of the dispute between the parties in their entirety'.

[69] That Shaneil was not authorized by the Applicants to trade on their accounts with either BJM or SPI, is beyond doubt. Shaneil could only trade on Applicants' securities through the deliberate misrepresentation made by the First Respondent that Shaneil was a public company and a subsidiary of the First Applicant as stated in the Security Borrowing Agreement the Applicant had with Finsette. Even on Kirkham's opinion, the short trades conducted by Shaneil cannot be elevated to be short trades by the Applicants. The activities of both the First Respondent and Shaneil, in my view, appear to be fraudulent. The activities resulted in Applicants' loss.

[70] On 23 April 2003, James Campbell ("*Campbell*") of Finsette, in an email sent to the First Respondent, requested the First Respondent to transfer an amount of R1,5 million to BJM to top-up Shaneil's account. Should the First Respondent so wish, the email continues, Campbell can move more funds from Hannover-Re, the First Applicant, to Shaneil. Again on 5 May 2003, Campbell repeated the same request to the First Respondent. The funds involved, this time, were R9 million. No plausible explanation is proffered why, Shaneil, which is unrelated to the Applicants would benefit from the assets of the Applicants. This is, in my view, misappropriation of Applicants' assets. It is cold-comfort for the First Respondent to allege that the Security Borrowing Agreement the Appplicants had with Finsette was signed by Mr Bill Skirving ("*Mr Skirving*"), Applicants' compliance officer.

[71] It is undisputed that Mr Skirving signed the agreement on behalf of the Applicants. Mr Skirving takes responsibility for the signing. He, however,

explains that the First Respondent, in whom the Applicants, including Applicants' Senior Personnel, had implicit trust, handed him the agreement, which, without any hesitation, he signed. It is logical to guess that had Skirving been aware that Shaneil was reflected in the agreement as a borrower and a subsidiary of the First Applicant, he would have queried this with the First Respondent, unless Skirving colluded with the First Respondent. This, however, is not First Respondent's contention.

[72] During 2004 in an attempt to comply with the Financial Intelligence Centre Act 38 of 2001, the First Respondent submitted a document to BJM marked as "FA16", representing that Mr A Klennert, the Group Managing Director of the First Applicant, was a director of Shaneil. In this document, Mr M Akoob, the Applicant's erstwhile Chief Financial Officer is also reflected as a director of Shaneil, a close corporation. That a close corporation cannot have directors could not have escaped the First Respondent.

[73] During 2005 the Applicants divested themselves of one of their subsidiary companies known as Goodall and Bourne Assurance (Pty) Ltd ("*Goodall and Bourne*"). In spite of this, the First Respondent continued to trade on behalf of this company, purportedly, on the authority of one Mr Garth Curry ("*Curry*") who was employee of Sanlam Private Investments (Pty) Ltd ("*SPI*"). However, on 6 August 2009, Curry telephonically requested the First Respondent to confirm First Respondent's authority to trade on Goodall and Bourne's account. This does not make sense and is also illogical as it is the First Respondent who should have requested Curry's authority, not the other

way round. The explanation is a implausible. It is mala fide and is tendered in an attempt to justify the unauthorized trading in Goodall and Bourne's securities using Applicants' Security Borrowing Agreement with SPI to engage in short trades on his own behalf or on behalf of Shaneil. This illogical explanation is belied by the affidavit of Mark Sinclair Paton ("*Paton*"), the Chief Executive Officer of Conduit Risk and Insurance Holdings (Pty) Ltd ("*CRIH*") who purchased Goodall and Bourne from the Applicant during 2005. Paton states that CRIH was unaware that the First Respondent was purporting to act on behalf of CRIH and that CRIH did not at any time authorize the First Respondent or anyone else to trade on the SPI account on behalf of Goodall and Bourne.

[74] The First Respondent was dealing in Applicants' securities and engaging in short trades with himself for the benefit of himself and Shaneil. It is inexplicable therefore for the First Respondent, who was the only person dealing with either SPI or BJM on behalf of the Applicants, not to give reasonable and plausible explanation of his conduct. However, I find it reasonable and plausible that the Applicants, without information from the person who was entrusted with their investment, were unable to determine, at the launching of the application the extent of their loss. In the result I find, on the conspectus of the evidence before me, that the Respondents' defence to the granting of the final order is mala fide and unreasonable.

[75] I now turn to the issue of Respondents' factual insolvency. According to the First Respondent, he is a wealthy man whose estate is worth over R12

million. He has a substantial pension with the Applicants. The Respondents contend that taking into account the value of their estate, First Respondent's pension and his equity in Shaneil, their joint estate is not factually insolvent.

[76] As pointed out above, I did not deal with Applicants' other claims. According to the Applicants, the First Respondent is indebted to them in the following amounts –

76.1 R27 307 847 in respect of cash or shares unlawfully transferred from the Applicants' accounts with BJM and SPI to Shaneil;

76.2 The First Respondent's admitted liability in the amount of R5 613 251;

76.3 Unexplained transfers of cash from the Applicants' accounts by the First Respondent in the sum of R1 971 496;

76.4 Shares misappropriated by the First Respondent from the Applicants' accounts with BJM and SPI, in the sum of R6 500 000, destination unknown;

76.5 The alleged shortfall in refunding the value of Applicants' Absa shares by Shaneil. The shortfall amounts to R3 687 392.09;

76.6 The unlawful transfer of 10 000 Applicants' shares in Goldfields during 2007 by the First Respondent into Shaneil's account. The total value in respect of these shares is R1 212 100;

76.7 The unexplained transfer of 1 million Cape Empowerment Fund Shares from the Applicants' account with SPI, to persons unknown to the Applicants. The total value of the shares is R1 560 000;

76.8 A contingent liability of R23 million which liability is subject of a pending litigation.

[77] On this basis the total amount of Respondents' indebtedness to the Applicants' is over R 70 million.

[78] If one has regard to the value of Respondents' estate and Applicants' claims against the Respondents, it is obvious that the Respondents' liabilities far exceed the value of their estate. The Respondents' estate is accordingly insolvent. If one takes into account the trustees' interim report that reflects the value of Respondents' estate as R1,3 million against the liability of R50 million, that the Respondent's estate is indeed insolvent, is beyond doubt.

[79] The web of unauthorized dealings weaved by the First Respondent in dealing with Applicants' assets appears to be far-reaching and complex. It requires further investigations. The fact that after the launching of the

application, the First Respondent disposed of some of his assets is worrisome. In my view, the granting of a final order of sequestration will be to the advantage of the creditors.

[80] The applicants were authorised to launch the application on an urgenct basis, in order to obtain a provisional order of sequestration to bring a *concursus creditorium*. The matter was urgent having regard to the unexplained discrepancies which were discovered in Second Applicant's trading records, and the person responsible for keeping such records, refuses to shed light on such discrepancies and, suddenly, resigned without reasons.

[81] In the result I find that the Applicant has proved on a balance of probabilities that they are suited to obtain a final order of sequestration of Respondents' estate which is factually insolvent and that the granting of the final order of sequestration will be to the advantage of the creditors.

[82] The following order is made –

82.1 The provisional order is confirmed and the Respondents' estate is finally sequestrated;

82.2 The Respondents are ordered to pay the costs of the application which costs shall include costs consequent upon engaging the services of two counsel.

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M TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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