FINAL SEQUESTRATION CASE NO. 6266/2001

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

CAPE TOWN: Friday 3 May 2002

Before the Honourable Ms Justice Knoll

In the matter between:

TELECOM NAMIBIA LTD **Applicant**

And

LUTCHMAN IVAN GANES **First Respondent**
LYNNETTE GAYLE GANES **Second Respondent**

Both Residing at
6 Grace Road
CLAREMONT
Cape

Having heard the Legal Representative for the Applicant and having read the documents filed of record;

IT IS ORDERED:

a) That the rule nisi granted on 12 July 2001 is made absolute and First and Second Respondent's estate is placed under Final Sequestration.

b) That the costs incurred by the applicant in prosecuting this application, including the costs of all interlocutory applications, hearings and postponements which stood over, are to be costs in the sequestration and are to include the costs incurred by reason of the employment of two counsel.

BY ORDER OF THE COURT

COURT REGISTRAR
42 Fairbridges
CAPE TOWN
/avz

213(a)

IN THE HIGH COURT OF SOUTH AFRICA

CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 6266/01

In the matter between:

TELECOM NAMIBIA LTD Applicant

and

LUTCHMANAN IVAN GANES First Respondent

LYNETTE GAYLE GANES Second Respondent

RULING 29/10/01

Leave to appeal refused: when?

OOSTHUIZEN A.J.:

The parties are agreed that there are two matters which should be disposed of at the outset and before argument is presented on the balance of the issues in dispute between them. The first of these matters pertains to the question of whether the applicant had established that the instant application was authorised by it. (a)

Where an application is launched by a company or other juristic person, it is necessary to show that the litigation was authorised by the juristic person in question. Ordinarily, the principal founding affidavit will contain an allegation that the deponent thereof is duly authorised. An applicant will not necessarily be entitled to cure any such omission in the replying papers. Where allegations are raised in reply in an attempt to remedy the inadequacies in the founding affidavit on the issue of authorisation, such replying allegations should be carefully scrutinised. The aforegoing reasoning formed the basis of the decision in **Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd, 1972 (4) SA 249 (C)**. The deponent to the founding affidavit in that matter had relied on the mistaken assumption that his position as the managing director and majority shareholder of the applicant company *per se* amounted to the requisite authorisation. An attempt was made to remedy that shortcoming in the replying affidavit, but the allegations contained in the replying affidavit in themselves raised further difficulties. The Court held that the applicants had not made out a case on the issue of authorisation and dismissed the application.

The applicant need do no more, in the founding papers, than allege that authorisation has been duly granted. Where that is alleged, it is open to the respondent to challenge the averments regarding authorisation. When the challenge to authority is a weak one, a minimum of evidence will suffice to establish such authority (**Tattersall & Another v Nedcor Bank Ltd, 1995 (3) SA**

213(c)

222 (A) at **228 J - 229 A**).

In the instant case, the founding papers consist of various affidavits, one of which is the affidavit of one Hanke. Paragraph 1 thereof contains two separate allegations, namely:

(A) That he is employed by the Applicant as its Director: Finance and Administration;

(B) That he is duly authorised and able to depose to the affidavit, the contents whereof are within his personal knowledge save where otherwise indicated by the context;

Although the title attaching to Mr Hanke's position might create some confusion, he does not allege that he is a director of the Applicant in the normal sense of the word, ie. a member of the Applicant's Board of Directors. No allegation to such effect is found elsewhere in the Applicant's founding or replying papers. The Respondent points out that Mr Hanke is not a member of the Board of Directors (which fact appears to be common cause) but accepts that his job title is that of Director: Finance and Administration.

As regards the allegation that Mr Hanke is duly authorised, the First Respondent

213(d)

states the following in the replying affidavit:

> "*Respondents have no knowledge as to whether Hanke is duly authorised to depose to the founding affidavit on behalf of the Applicant, do not admit same and put Applicant to the proof thereof.*"

The challenge is, therefore, to use the phrase employed in **Tattersall v Nedcor Bank** *supra*, a weak one and the minimum of evidence will suffice to rebut such challenge.

The facts of this case are very much on all fours with those confronting the court in **Tattersall v Nedcor bank**, *supra*. Firstly, Mr Hanke states that he is duly authorised. In **Tattersall v Nedcor Bank**, *supra*, Nestadt JA pointed out that due weight must be given to such an allegation on oath, particularly where the Respondent is unable to gainsay the allegation that the deponent is duly authorised. Secondly, an affidavit forming part of the founding papers deposed to by one Kurz, a partner in the firm of attorneys representing the Applicant, contains the following allegation:

> "*Fairbridges are the duly appointed attorneys of record for Telecom Namibia Limited, the Applicant in this application*".

213(e)

That allegation in unchallenged. It therefore serves as independent confirmation that the Applicant has authorised the proceedings (**Tattersall v Nedcor Bank**, *supra* at **229 C - D**).

Thirdly, it is manifestly clear from the papers that Mr Hanke was the person who was primarily responsible for investigating the transactions giving rise to the instant sequestration proceedings, on the Applicant's behalf. He moreover was a party to various of the discussions which are of material importance, in regard to the claims or alleged claims which the Applicant now relies on. He is the party to whom the First Respondent addressed his letter of resignation dated 2 July 2001, which letter contains an undertaking that "*I shall provide the company with a separate statement concerning the allegations of fraud and theft*". Mr Hanke's position is, in this regard, comparable to that of Mr Spencer, the party who deposed to the founding affidavit in **Tattersall v Nedcor Bank Ltd** and who alleged that he had been authorised to do so. The court commented as follows in regard to Mr Spencer's position:

> "*... the probabilities are that the bank (regarding the amount as due) wished to take steps to recover what is, after all, a large sum. And if this is so, Spencer would surely be the person who would act on behalf of the bank.*"

In all the circumstances, I find that there is sufficient proof that the instant proceedings are duly authorised. The objection raised in *limine* by the Respondents in relation to the issue of authority is dismissed.

The Respondent furthermore applies for the striking out of certain passages in the replying affidavit. A notice of application to strike out was delivered by the Respondents shortly prior to the hearing. For present purposes, I am asked to deal only with paragraph 4 thereof. The basis upon which the averments are challenged may, in my view, conveniently be divided into two categories. Firstly, the Respondents' complaint regarding paragraph 12.3 of Hanke's replying affidavit is that the allegations therein contained constitute a cause of action entirely different from that in the founding papers. In the founding papers the Applicant seeks to make out a case that the Respondents are factually insolvent. In paragraph 12.3 of the replying papers, the Applicant for the first time raises allegations to the effect that the Respondents allegedly committed an act of insolvency by taking steps to place assets beyond the reach of creditors and by making a disposition to one of the Respondents' creditors, one Eberle, with the intention to prefer Eberle above the Respondents' other creditors.

An applicant cannot make out a particular cause of action in the founding papers and then abandon that claim and substitute, in the place thereof, a fresh and completely different claim based on a different cause of action in the replying

papers. (**Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd, 1984 (2) SA 87 (T) at D - E**; **Director of Hospital Services v Mistry, 1979 (1) SA 626 (A)**). Mr van Riet who, together with Mr Sholto-Douglas, appeared for the Applicant, contended that this was not what the Applicant had done by raising the averments contained in paragraph 12.3 of the replying papers. Mr van Riet submitted that the cause of action throughout was insolvency and that there was no deviation from that cause of action in regard to the allegations under attack. I am not persuaded by that submission. A cause of action ordinarily means "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court*". (**MacKenzie v Farmers Co-Operative Meat Industries Ltd, 1922 AD 16** at **23**; **Evins v Shield Insurance Co Ltd, 1980 (2) SA 815 (A)**). A party who relies on factual insolvency is setting up a particular cause of action different from that of the various acts of insolvency created by section 8 of the Insolvency Act. Similarly, each of the separate acts of insolvency created by section 8 constitutes a distinct cause of action. The cause of action in the instant case being the Respondents' alleged factual insolvency, the Applicant cannot seek to introduce a new cause of action in reply (**De Wet v Le Riche, 2000 (4) All S.A. 25 (T)** at **30 b - d**). The application to strike out paragraph 12.3 of the replying papers must succeed.

The other category of complaint raised in paragraph 4 of the notice to strike out stands on a different footing. In the founding affidavit Hanke averred that the

213(h)

First Respondent had accepted payment of unlawful and unauthorised commissions from an entity, Dresselhaus Scrap CC, with which the Applicant had business dealings. The Applicant had moreover adverted to the fact that the First Respondent had acquired certain assets which the First Respondent could not have financed from the income which the First Respondent received as an employee of the Applicant. The Applicant alleged that the acquisition of such assets was suspicious and required investigation in order to establish whether commissions improperly received by First Respondent had been used to fund the acquisition of those assets. In the First Respondent's answering affidavit, the First Respondent denied that he had received commissions from Dresselhaus or any other entity, and denied the suggestion that the acquisition of the assets referred to indicated any irregular conduct on his part.

In the replying affidavit, the Applicant seeks to introduce averments relating to evidence given by the First Respondent at an enquiry convened in terms of the provisions of section 152 of the Insolvency Act, which allegedly show that the aforesaid denials in the First Respondent's answering affidavit are untruthful. Ordinarily, an applicant would, in the replying papers, be entitled to raise allegations in reply to any factual averment or denial contained in the respondent's answering papers (**Lane & Another NNO v Magistrate, Wynberg, 1997 (2) SA 869 (CPD)** at **886 G - H**). I accordingly do not regard the paragraphs complained of as impermissible new matter which should, on that

213(E)

basis, be struck out. I am also not persuaded by the Respondents' contention that the material complained of constitutes a new cause of action. As already pointed out, the cause of action originally relied upon was the factual insolvency of the Respondents. If information comes to light subsequent to the delivery of the founding affidavits which has a bearing on the solvency or insolvency of the Respondents, there is no reason why such information cannot be placed before the Court in the replying affidavits. An application for a provisional order is frequently placed before the Court as a matter of urgency in the interest of the applicant, the respondent's creditors and the public generally. Often the applicant will have incomplete information at his disposal when launching the proceedings. It would be inappropriate and impractical to require of an applicant in sequestration proceedings to include, in the founding papers, all allegations and information pertaining to the financial position of the respondent and to preclude the applicant from supplementing such information in the replying papers. (**Uys & Another v Du Plessis (Ferreira Intervening), 2001 (3) SA 250 (C) at 253 C - F**).

Even if my aforementioned view is incorrect, and it were to be accepted that the allegations which the Respondents seek to raise do constitute new matter, a Court has a discretion to permit new matter in the replying papers. Such discretion is exercised the more readily where the facts sought to be adduced were not known to the Applicant when the founding papers were drawn

213(2)

(**Kleinhans v Van der Westhuizen**, *supra*; **Cohen NO v Nel, 1975 (3) SA 963 (W)** at **966 F**; **Knox D'Arcy Ltd & Others v Jamieson & Others, 1995 (2) SA 579 (W)** at **586 J - 587 B**; **Shepherd v Mitchell Cotts Sea Freight SA (Pty) Ltd, 1984 (3) SA 202 (T)** at **205 F**). In exercising a discretion to permit new material the court will obviously seek to achieve fairness and will, where appropriate, give the respondent the opportunity to deal with such new matter in a second set of answering affidavits (**Dawood v Mahomed, 1979 (2) SA 361 (W) at 364 E**; **Bowman NO v De Souza Roldao, 1988 (4) SA 326 (T)** at **327 H**).

In the instant case the material sought to be introduced was not known to the Applicant at the time that the founding affidavits were finalised. Moreover, the Applicant has adopted the stance that the Respondents should be given an opportunity of dealing with the material introduced in the replying affidavits. In the circumstances, and if the material complained of is new matter, I am of the view that I should exercise my discretion and allow the averments in question to stand, affording the Respondents an opportunity to deal therewith.

I accordingly make the following order:

(1) The point *in limine* regarding the authorisation of the Applicant is dismissed;

213(k)

(2) Paragraph 12.3 of the replying affidavit is struck out;

(3) The application for the striking out of the paragraphs and annexures referred to in paragraph 4 of the application to strike out, save for paragraph 12.3, is dismissed. The Respondents are, however, afforded an opportunity of filing further affidavits dealing with the matters raised in the said paragraphs and annexures, such affidavit to be filed on or before 12 November 2001;

(4) The costs of the proceedings on 23 October 2001 stand over for later determination.

A C OOSTHUIZEN