IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 9285/2002

In the matter between:

HANNE MARGARETE SANGIORGIO NO First Applicant

DEON OLIVER NO Second Applicant

And

THEODOOR JACOB DUYN Respondent

JUDGMENT: 27 FEBRUARY 2004

VAN ZYL J:

INTRODUCTION

[1] This is the extended return day of a provisional order of sequestration granted on 13 May 2003. The applicants seek a final order of sequestration, alternatively an order against the respondent in terms of the *Vexatious Proceedings Act* 3 of 1956. Mr Vermaak appeared on behalf of the applicants and Mr Warner on behalf of the respondent. The court wishes to express its appreciation to them for the competent manner in which they presented their respective submissions.

[2] The first applicant is a liquidator in the employ of James Lane Trustees (Pty) Ltd t/a Republic Trustees and the second applicant is a liquidator practising as such under the name of Village Trustees, Kuils River. On 2 November 2001 the applicants were duly appointed as co-liquidators of Shang Ming International (Pty) Ltd ("Shang Ming"), a company placed under liquidation by this court on 5 June 2001.

[3] The respondent, a Cape Town businessman, was unsuccessful in an action against Shang Ming regarding the rights to a consignment of roller skates imported from China and held in storage pending the resolution of the dispute as to such rights. He was ordered by Moosa J to pay Shang Ming's costs, which were duly taxed in the amount of R49 002,76. He was likewise liable for the payment of storage costs which, according to the writ of execution subsequently issued against him, amounted to R66 697,60. This included the sum of R8 749,00 itemised as "additional charges", bringing the total amount owing to R115 700,36. For some unknown reason thirty cents (R0,30) of this amount fell by the wayside inasmuch as the liquidated claim relied upon by the applicants for purposes of the present application is limited to R115 700,06, for which Shang Ming holds no security.

[4] The writ of execution was duly served on the respondent, who failed to point out sufficient disposable assets to satisfy the judgment debt. This gave rise to a *nulla bona* return constituting an act of insolvency in terms of section 8(b) of the *Insolvency Act* 24 of 1936 ("the Act"). The applicants rely also on an act of insolvency in terms of section 8(c) of the Act in that the respondent allegedly disposed of a substantial quantity of his assets to the prejudice of his creditors. Finally it is alleged that the respondent is in fact hopelessly insolvent in that his debts are in excess of R5 million and his assets, wherever they may be, are of a much lower order. Nevertheless the applicants aver that it would be to the advantage of creditors should the respondent be sequestrated. They rely in this regard on his interest and shareholding in various companies and the prospect that many of his concealed assets will be recovered once a full-scale investigation is set afoot. In addition the trustees will be empowered to set aside dispositions without value.

[5] The respondent opposes the granting of a final order of sequestration on the basis that the *nulla bona* return is founded on a defective writ of execution and can hence not constitute an act of insolvency. He denies that he has disposed of his property to the prejudice of creditors and likewise denies being actually insolvent. On the contrary he alleges that he has merely experienced inhibiting "cash flow" problems. In any event his sequestration would not be to the advantage or benefit of creditors.

[6] Since the granting of a provisional order of sequestration in this matter the papers have accumulated enormously. Much of the documentation appended, however, is totally irrelevant or unnecessary. This may be attributable to the fact that the respondent has hitherto acted personally, without legal representation, on the ground that he has been unable to afford an attorney and counsel. His attempt to acquire legal aid failed, ostensibly because the Legal Aid Board was not satisfied that he had good prospects of success in the present matter. I have taken all these factors into account in considering the arguments put forward by his counsel, Mr Warner, who was appointed at a very late stage of the proceedings to argue against the confirmation of the provisional order.

[7] The provisional trustees, Mr M J Lane and Mr T Giddey, who were appointed by the Master of the High Court on 21 May 2003, have not been able to recover any assets allegedly concealed or illegally disposed of by the respondent. They are unable to say whether the body of creditors will receive any pecuniary benefit in the form of a dividend, but are nevertheless satisfied that there is good cause to sequestrate the respondent and that sufficient assets should be recovered to render it beneficial to his creditors.

REQUIREMENTS FOR A FINAL ORDER OF SEQUESTRATION

[8] In terms of section 12(1) of the Act the applicants must satisfy this court that: (a) they have established a liquidated claim against the respondent of not less than R100,00; (b) the respondent has committed an act of insolvency or is in fact insolvent; and (c) there is reason to believe that it will be to the advantage of creditors if the respondent's estate should be sequestrated. The applicants bear the *onus* of proof in respect of each of these requirements in accordance with the legal principles set forth below.

ACTS OF INSOLVENCY

Section 8(b): the Nulla Bona Return

[9] In the present case it is common cause that there is indeed a liquidated claim in excess of R100,00, namely an order as to costs in the amount of R115 700,06. It is in dispute, however, that the respondent has committed an act of insolvency in terms of section 8(b) of the Act in that, Mr Warner submitted, the sheriff's *nulla bona* return of service was invalid because the writ of execution, on which it was based, was not in strict conformity with the said order as to costs. Reliance was placed in this regard on the *dictum* of Hill AJ in *Sachs v Katz* 1955 (1) SA 67 (T) at 72D-E, namely that "a writ must be in strict conformity with the Court's order which warrants its issue".

[10] There is no merit in this argument. The relevant order of court required Shang Ming and the respondent to pay the costs of suit of the applicants in that matter, including the costs of translations, costs of postponements and storage costs. It appears from the affidavit of the first applicant in the present matter that the costs of suit were taxed in the amount of R49 002,76 and

that the storage costs amounted to R66 697,60. This included "additional charges" of R8 749,00 which, Mr Warner argued, were attributable to neither costs of suit or storage costs. He was unable, however, to suggest what the nature of these costs might have been and this court must accept that they formed part of the storage costs as deposed to under oath by the first applicant. The fact that the writ has omitted the amount of R0,30 (par 3 above) is of no consequence in view of the maxim *de minimis non curat lex* and may, for present purposes, be ignored. It follows that I am satisfied that the applicants have proved an act of insolvency in terms of section 8(b) of the Act.

Section 8(c): Disposal of Assets

[11] In regard to the act of insolvency raised by the applicants in terms of section 8(c) of the Act, there are strong indications that the respondent has indeed disposed of, or attempted to dispose of, a substantial proportion of his assets, thereby causing his creditors serious prejudice. In this regard the respondent averred that all the assets on premises situated at 70 Bree Street, Cape Town, and housing a guest-house, offices and staff quarters, were the property of Carevest 17 CC ("Carevest"), a close corporation of which he was the sole member. In terms of a deed of cession dated 18 March 1998 he authorised Carevest to transfer such assets to an offshore company on the British Virgin Islands named Hawk Investments International Ltd ("Hawk Investments"). The cession was ostensibly to operate as "continuing security" to Hawk Investments for Carevest's indebtedness to it in the amount of US $550 104 (elsewhere indicated as $650 000), but was subject to the respondent's retaining the full use and enjoyment thereof. On the same day, in his personal capacity and in his capacity as director, shareholder and member of a number of companies and a close corporation, he ceded all "right title and interest

in and to all and any debtors, both present and future", pertaining to himself and to the said companies and close corporation, to Hawk Investments as security for the repayment of the said debt. It would appear from this that he was, at all relevant times, in full control of the said entities and their assets or potential assets.

[12] There is no indication that a single cent of the money owing to Hawk Investments has been repaid, not to speak of any interest due thereon and, not surprisingly, Hawk Investments has at no stage attempted to recover the alleged debt or any part of it. Strangely enough the respondent's daughter, in an affidavit dated 18 May 2003, subsequently indicated that she was in fact "a 50% member" of Carevest which was indeed indebted to Hawk Investments in an amount in excess of R6 million. Even more strangely a substantial number of assets allegedly ceded to Hawk Investments were sold thereafter, raising a large question mark as to the genuineness of the cession. It also appears incomprehensible how the respondent's daughter could acquire, or be given, a 50% share in Carevest at a time when it was so heavily in debt to Hawk Investments.

[13] It is difficult to escape the conclusion that that the respondent has been anything but forthright in his allegations to this court. There are a vast number of other unsatisfactory aspects raised in his various affidavits which can simply not be true or which indicate that he is concealing assets on a large scale. For present purposes it is not necessary to deal with them. It is likewise not necessary to deal with the unsubstantiated averment that the provisional trustee, Mr Lane, is not independent and has allied himself with the applicants. Although I agree with Mr Warner that Mr Lane's report as provisional trustee should not have been couched in the form of a replying affidavit, there is no basis for the allegation that he has taken sides in the matter. The

respondent has clearly not given the co-operation required for purposes of identifying and uncovering his assets and liabilities. Mr Lane was also perfectly justified in criticising the respondent's attempt to produce new evidence in opposition to the application for sequestration. Suffice it to say that I am quite satisfied that the respondent has also committed one or more acts of insolvency in terms of section 8(c) of the Act.

Actual Insolvency

[14] Although there are strong indications that the respondent is in fact hopelessly insolvent with liabilities far in excess of R5 million, he has consistently averred that he is not insolvent but has merely been experiencing "cash flow problems". I have grave doubts as to the accuracy or veracity of this averment. For present purposes, however, it is not required of me to make any finding in this regard. If the respondent is indeed in solvent circumstances, as alleged by him, he will have all opportunity to demonstrate this fact in the near future.

Advantage to Creditors

[15] The only remaining issue is whether it is to the advantage of creditors for this court to grant a final order of sequestration. The first applicant initially indicated that creditors could expect a dividend of between four and five cents in the rand after payment of the administration costs. The provisional trustees (par 7 above) are not quite as optimistic, but nevertheless believe that it would be to the advantage of creditors should a final order be granted. In this regard Mr Vermaak argued that the respondent was either the owner of, or shareholder in, a number of companies and other entities involving substantial assets and which have yielded him a more than satisfactory income over a period of some years. If the respondent was indeed not insolvent,

as consistently averred by him, then he must have managed to conceal any number of assets in various ways. In addition the respondent's biggest creditor, Fedbond Participation Bonds, with a claim of R3,6 million, has pledged its full support for the present application.

[16] In considering whether there is advantage to creditors the court must, of course, have regard to the facts and circumstances placed before it in the sequestration application. Only if it is satisfied, on a balance of probabilities, that there is a reasonable prospect that creditors will receive some financial benefit, will it consider granting a final order of sequestration. See *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559, where Roper J stated:

> The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. Even if there are none at all, but there are reasons for thinking that as a result of the enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient …

See also *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591(D) at 593C-D; *Braithwaite v Gilbert (Volkskas Bpk Intervening)* 1984 (4) SA 717 (W) at B-C.

[17] In *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W), Leveson J referred to the judgment of Nicholas J in *Klemrock (Pty) Ltd v De Klerk and Another* 1973 (3) SA 925 (W) and to the *dictum* of Roper J in the *Meskin* case (*supra*) and said (at 583F-G):

> Taking that passage as my starting point, it will be seen that in the case of an arm's length transaction a sequestrating creditor does not have to set out in its founding affidavits the detail and intensity of averments required when the nature of the claim is under scrutiny as required by Nicholas J in the *Klemrock* case, although a proper case should always be made out. It will be sufficient if the creditor in an overall view on the papers can show, for example, that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an enquiry under s 65 of the Act a trustee may be able to

> unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors.

[18] If a case has been made out that there is a reasonable prospect that the sequestration of the debtor's estate will result in some advantage or benefit to creditors a court will, in general, be satisfied, in terms of section 12(1)(c) of the Act, that that there is "reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated". As pointed out by Roper J in the *Meskin* case (*supra* at 558) this does not mean that the court must be satisfied that sequestration will in fact be to the financial benefit of creditors. It need merely be satisfied that "there is reason to believe that it will be so". See also *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W) at 585C-D (*per* Leveson J):

> To return to the proposition made by Roper J in the *Meskin* case *supra*, the Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression 'reason to believe' means 'good reason to believe'. The belief must be rational or reasonable and, in my opinion, to come to such a belief, the Court must be furnished with sufficient facts to support it.

[19] When these principles are applied to the facts and circumstances set forth above, I have no hesitation in finding that there is eminently good reason to believe that sequestration of the respondent will indeed be to the advantage of creditors. There is no doubt that the respondent is still in control of or otherwise has access to substantial and considerable assets. The trustees of his estate should be given the opportunity to pierce the corporate veil surrounding his multifaceted interests in a large number of companies, close corporations and other entities, wherever they may be situated or doing business. More particularly the role and function of Carevest and Hawk Investments must be meticulously investigated for purposes of ascertaining whether these entities have simply been used as vehicles to spirit away large sums of money and

other assets belonging to the respondent. A full-scale investigation and concomitant interrogation by the trustees in accordance with their powers in terms of the Act will, in all likelihood, bring considerable assets to the fore.

[20] In view of these findings it will not be necessary to consider the alternative relief sought by the applicants in terms of the *Vexatious Proceedings Act* 3 of 1965. In the event I make the following order:

1. **The provisional order of sequestration granted on 13 May 2003 is confirmed.**
2. **Costs will be costs in the sequestration.**

D H VAN ZYL

Judge of the High Court of South Africa