IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 10318/10 &
10350/10

In the matter between:

MARTIN JAMES VAN SCHALKWYK — Intervening Creditor

In the application of

THE TRUSTEES FOR THE TIME BEING OF THE ANTHERU BELEGGINGS TRUST — Applicant

and

FIDENTIA HOLDINGS (PTY) LTD
(Registration no: 2001/022355/07) — 1st Respondent in case no: 6655/10

and

BRAMBER ALTERNATIVE (PTY) LTD
(Registration no: 2000/024137/07) — 1st Respondent in case no: 6656/10

and

FIDENTIA ASSET MANAGEMENT (PTY) LTD
(Registration no: 1998/024863/07) — 1st Respondent in case no: 6657/10

DINES CHANDRA MANILAL GIHWALA N.O. — 2nd Respondent

GEORGE PAPPADAKIS N.O. — 3rd Respondent

EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD 4th Respondent

JUDGMENT DELIVERED ON 11 OCTOBER 2010

YEKISO, J

[1] On 1 April 2010 the Antheru Beleggings Trust ("the Trust") launched three separate applications out of this Court under case numbers 6655/2010, 6656/2010 and 6657/2010 for the winding up of Fidentia Holdings (Pty) Ltd ("Fidentia Holdings"), Bramber Alternative (Pty) Ltd ("Bramber"), and Fidentia Asset Management (Pty) Ltd ("FAM"), each one of the aforementioned companies being cited as the first respondent in the aforementioned applications. Dines Chandra Manilal Gihwala and George Pappadakis ("the Curators"), in their capacities as Curators of Fidentia Holdings, Bramber and FAM have each been cited as the second and the third respondent respectively, whilst the Executive Officer of the Financial Services Board ("FSB") has been cited as the fourth respondent in each such application.

[2] The Trust is a trust duly registered as such by the Master of this Court under reference IT1128/2002 and has its principal place of business

at 3 Bugu Close, Plattekloof, Cape Town. The Trust seeks to have the aforementioned companies wound up ostensibly on the basis that each one of the aforementioned companies are unable to pay their respective debts, in the ordinary course of their business, as and when these become due and payable. The winding up order is further sought on the basis that it is just and equitable that a winding up order in respect of these companies be made.

[3] On 1 February 2007, somewhat three years before the institution of the winding up proceedings, Fidentia Holdings, Bramber and FAM were placed under provisional order of Curatorship (per Louw J). The provisional order of curatorship was confirmed on 27 March 2007 (per Fourie J).

[4] All the three applications referred to in paragraph [1] were launched on urgency basis and were enrolled for hearing in the Third Division of this Court on Friday, 23 April 2010. Prior to the hearing of the matter on the aforementioned date, the fourth respondent gave notice of its intention to raise and argue a point *in limine* in all the applications concerning Fidentia Holdings and Bramber. The point *in limine* was based on a contention that

the Trust is neither a creditor nor a member of Fidentia Holdings and Bramber and that, therefore, the Trust lacks the necessary *locus standi* to bring about an application for the winding up of Fidentia Holdings and Bramber. The judge presiding on 23 April 2010 declined to deal with the point *in limine* and all three applications relating to the winding up of Fidentia Holdings, Bramber and FAM were consequently postponed to 2 August 2010 for hearing with a directive having been given relating to a timetable for the filing of further affidavits and exchange of heads of argument.

SEPARATION OF ISSUES

[5] It appears on the basis of the record that no steps were taken by the Trust to address the issues that gave rise to the point *in limine* and, consequently, so it would appear, the second and the third respondents joined cause with the fourth respondent and launched applications in the Fidentia Holdings and Bramber matters seeking the following relief, namely:

[5.1.] an order that the issue relating to the Trust's *locus standi,* in which is incorporated the issue as to whether Jan Joubert van Blerk ("Van Blerk"),

the deponent to the founding affidavit of the Trust in each application, had the necessary authority to institute winding up proceedings against Fidentia Holdings, Bramber and FAM on behalf of the Trust in the absence of such decision having been taken by both the Trustees of the Trust, be determined first and in advance of all other issues in the matters concerned;

[5.2.] an order dismissing the applications for the winding up order in the event it being found that the trust lacks the necessary *locus standi* and Van Blerk not having had the necessary authority to bring about the applications for orders for the winding up of Fidentia Holdings, Bramber and FAM. The order for the separation of the issues was sought in terms of Rule 33(4) of the Uniform Rules of Court.

[6] The applications for separation of issues, both at the instance of the first respondent in each such application, the second and the third respondents and the one at the instance of the fourth respondents, served before Olivier AJ on Friday, 21 May 2010. The applications were opposed by the Trust, it having filed its answering affidavit on the morning of the hearing. Simultaneous with the filing of the Trust's answering affidavit in

the applications for separation, there was filed on behalf of one Martin James van Schalkwyk ("Van Schalkwyk") an application for leave to intervene as a creditor in the Fidentia Holdings and the Bramber matters on the basis that he is a creditor of those companies, thus joining cause with the Trust in the relief sought in respect of those companies. After hearing argument, Olivier AJ ordered that the interlocutory applications that served before him on 21 May 2010 be postponed for hearing on 2 August 2010 simultaneously giving a directive for the further filing of affidavits and exchange of heads of argument. Olivier AJ ordered that all questions of costs to stand over for later determination. Thus the issues to be determined on 2 August 2010 were the merits of the applications for the separation of issues as well as the application by Van Schalkwyk for leave to intervene as a creditor in the matters of Fidentia Holdings and Bramber.

ARGUMENT IN THE SEPARATION APPLICATIONS

[7] As pointed out in paragraph [5.2] of this judgment the order for the separation of issues is sought in terms of rule 33(4) of the Uniform Rules of Court which, on the face of it, appears to relate only to pending actions. In *New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 SCA para [15] at p252 the Supreme Court of Appeal held that the power of

a court to allow a separate determination of issues does not only relate to pending actions but that it also applies to motion proceedings. This approach was confirmed by the Constitutional Court in *Minister of Health v New Clicks SA (Pty) Ltd & Others* 2006(2) SA 311 at 356 para [56] where Chaskalson CJ made the observation that the contention by the appellant that the Supreme Court of Appeal erred in refusing to separate the issue of jurisdiction from the application for leave to appeal and in requiring the matter to be dealt with in accordance with the directions given earlier, ought to be rejected.

[8] In *S v Malinde & Others* 1990(1) SA 57 (AD) at 68 B-D the then Appellate Division held that substantial grounds should exist for the exercise of power to grant an order for the separation of issues. The Court went on to observe that the basis of the power to grant an order of separation is convenience – the convenience not only of the parties but also the convenience of the Court concerned. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the court would normally

grant the order of separation. Clearly, therefore, a matter of consideration and the granting of an order for the separation of issues in motion proceedings, in the light of the authorities cited in the preceding paragraph, is not without precedent.

[9] In the instance of this matter, it is contended on behalf of the Fidentia companies (Fidentia Holdings, Bramber and FAM) and FSB that it would be convenient that the matters relating to *locus standi* on the part of the Trust and the issue of authority on the part of Van Schalkwyk be disposed of separately from the other issues, which are contended to be complex and wide ranging; that those complex and wide ranging issues would inevitably give rise to factual disputes which, in turn, would require costly and time consuming expert input. Finally, it is contended on behalf of the applicants in the separation applications that should the issue of *locus standi* and authority be upheld, they will be dispositive of the applications for the winding up order in each application in their entirety. In order to determine these issues, I shall first deal with the issue of *locus standi* followed by the issue of authority on the part of Van Blerk.

THE ISSUE OF *LOCUS STANDI*

[10] Section 346 of the Companies Act, 61 of 1973 provides for the category of persons who may bring about an application for the winding up of a company. These categories are listed as the company itself; one or more of its creditors (including contingent or prospective creditors); one or more of its members or jointly by any or all of the persons referred to in paragraphs (a), (b) and (c) of subsection (1) to section 346 of the Companies Act.

[11] The applicant's claim is set out in paragraphs 39 to 43 of the founding affidavit in each application. In paragraph 39 of the founding affidavit, Van Blerk states that the Trust conducts the business of an Investment Trust and that it invested substantial sums of money with the Fidentia Group (without specifying any specific company or companies within the Fidentia Group of companies it invested these substantial sums of monies) including FAM during the period 2002 and/or 2003 until about 2006. In paragraph 40 the deponent to the founding affidavit states that FAM is indebted to the Trust in an amount in excess of R27,929,772-08 which is claimed to be long overdue and payable. In neither of paragraphs 39 to 43 is there any specific reference to an entity within the Fidentia

Group of companies other than FAM which is alleged to be indebted to the Trust.

[12] In paragraph 10 of the founding affidavit Van Blerk states that the assets and liabilities of all three companies have been pooled and/or intermingled to the extent that it is difficult to differentiate between them. The deponent goes on further to state that this migration of resources between these companies included funds invested by the Trust and assets purchased from funds invested by the Trust. Evidence seems to suggest that the Trust invested funds on behalf of several investors with FAM at the time when FAM was a registered financial services provider in terms of the provisions of the Financial Advisory and Intermediary Services Act, 37 of 2002.

[13] There is evidence to suggest that funds invested with FAM on behalf of several investors, including those investors who may have entrusted their funds with the Trust for investment purposes, were advanced by the corporate governors of FAM to Fidentia Holdings and Bramber to purchase or acquire interests in private equity companies and other fixed property and that these assets are held by Bramber and

Fidentia Holdings in their respective names. In this regard *Mr Khan,* for the Trust, makes a point in his submissions and indeed in oral argument before me that once the investors' funds were advanced by the corporate governors of FAM to Bramber and Fidentia Holdings to acquire equity in private companies and fixed properties, and once such equity and assets were acquired, Bramber and Fidentia Holdings merely held these assets and equities as nominees for the investors which would include the Trust. And its investors Based on this contention *Mr Khan* submits further on behalf of the Trust that because Bramber and Fidentia Holdings held such assets and equity in private companies as nominees for several investors including those investors who invested in the Trust, the Trust thus became the creditor of Bramber and Fidentia Holdings and, as such, does have the necessary *locus standi* to bring about an application for the winding up of those entities.

[14] In paragraph [12] of this judgment, I made a point that at the time the Trust invested funds with FAM, the latter was a registered financial service provider in terms of the Financial Advisory and Intermediary Services Act. As such FAM was at the time entitled to receive and deal with the investors' funds. As correctly pointed out by *Mr Mitchell* SC in his

submissions, the activities of FAM in this regard were subject to and regulated by the provisions of the Financial Institutions (Protection of Funds) Act, 28 of 2001. Once a registered financial services provider, such as FAM at the time, receives funds from the investors for purposes of investments, the funds so received constitute trust property as contemplated in the definition of the term "trust property" in section 1 of the Financial Institutions (Protection of Funds) Act. Such funds, being trust property as they should have been, enjoy protection from creditors as opposed to funds invested with a non-registered entity which do not enjoy such protection.

[15] FAM, as a registered financial services provider, could make use of a nominees company to hold funds or assets in the name of the investors. But for such funds to enjoy protection from creditors of such a nominee company, they ought and should be held in the names of the investors concerned. For a company to qualify as a nominee company, it has to comply with the provisions of section 1, read with section 4 of the Financial Institutions (Protection of Funds) Act. The term "nominee company" is defined in section 1 of the Financial Institutions (Protection of Funds) Act, which defines the term "nominee company" as follows:

"'**nominee company'** means a company, controlled by a financial institution, which-

(a) is incorporated under the provisions of the Companies Act, 1973 (Act 6 of 1973);

(b) has as its principal object to act as nominee for, or representative of, any person in the holding of any property in trust for such person or persons;

(c) is precluded by its memorandum of association from incurring any liabilities other than those to the persons on whose behalf it holds assets, to the extent of their respective rights to, and interest in, such assets; and

(d) has entered into an irrevocable written agreement with a financial institution which controls the company, and in terms of which such financial institution has undertaken to pay all the expenses of, and incidental to, its formation, operations and liquidation;"

[16] Section 4 of the Financial Institutions (Protection of Funds) Act imposes obligations on registered financial services providers and their nominee companies in dealing with invested funds. A registered financial services provider, such as FAM at the time the funds were invested with it, may not cause such funds (trust property) to be invested otherwise than in a manner directed in any instrument regulating the investment of such funds or any agreement relating to the investment of such funds; in the

absence of any instrument or agreement regulating the investment of such funds (trust property), such funds may not be invested otherwise than in the name of the principal investor concerned; to invest such funds in the name of the financial institution concerned in its capacity as administrator, trustee or agent of the principal investor in respect of the funds so invested; or in the name of a nominee company provided the nominee company has as its principal object to act as nominee for, or representative of, any person in the holding of any funds or property in trust for such person or persons. In short, the nominee company has to comply with all those requirements set out in paragraph (a) to (d) in the definition of a nominee company.

[17] There is no evidence on record to suggest that Bramber or Fidentia Holdings were nominees of FAM in its capacity as the registered financial services provider or, for that matter, that Bramber and Fidentia Holdings complied with all those requirements that would qualify them to be a nominee company. Consequently, whatever funds were advanced by FAM to Bramber and Fidentia Holdings did not enjoy the protection afforded to investors such as the Trust, more so, that whatever equity or fixed property may have been acquired out of such investor funds, was not

acquired in the name of the investors concerned, including the Trust but, were acquired, instead, in the names of Bramber and Fidentia Holdings.

[18] In the light of the exposition of the legal position as set out in paragraphs [14] to [17] above, there is no merit in the contention by *Mr Khan* in his submissions and argument in Court that Bramber and Fidentia Holdings acted as nominees of several investors and the Trust when they acquired equity and fixed property out of the investors' funds. This is because both FAM, on the one hand, and Bramber and Fidentia Holdings, on the other hand, did not comply with the statutory regime as provided for in section 1, read with section 4, of the Financial Institutions (Protection of Funds) Act when such funds were advanced to Bramber and Fidentia Holdings. Moreover, there is no evidence on record to suggest any contractual relationship between the Trust, on the one hand, and Bramber and Fidentia Holdings, on the other hand. Bramber and Fidentia Holdings are not "nominee companies" as defined, nor were whatever equities purchased from private companies or fixed assets acquired, acquired in the names of the investors concerned or in the name of the Trust.

[19] The Trust invested its investors' funds with FAM. Whatever contractual relationship there could have been was between the Trust and FAM with which it invested its investors' funds. The Trust thus cannot, simply because there is evidence to suggest that Bramber and Fidentia Holdings utilised the investors' funds, advanced to these entities by FAM, to acquire equity and fixed property, that, purely on that basis, it is the creditor of both Bramber and Fidentia Holdings and, further on that basis, claim to have *locus standi* to bring about an application to have those entities wound up. It therefore follows that the applications of the Trust to have both Bramber and Fidentia Holdings wound up should be dismissed on the basis that the Trust is not a creditor of the aforementioned entities and, as such, lacks the necessary *locus standi* to have the aforementioned entities wound up.

AUTHORITY OF VAN BLERK

[20] The authority of Van Blerk to bring about applications for the winding up of Bramber, Fidentia Holdings and FAM was challenged from the inception of all those applications. The authority of Van Blerk formed part of the issues that were to be determined separately and in advance of all other issues in the interlocutory applications that were enrolled for

hearing on 2 August 2010. However, on 4 August 2010, being the second day of argument, a resolution was produced by the Trust to the effect that Herman Heydenrych ("Heydenrych"), a co-trustee of the Trust, authorised the launching of the winding up applications at the instance of the Trust. The production of this resolution, belated as it was, brought to an end the point *in limine* that the Trust did not have the necessary authority to proceed with the applications for the winding up of the relevant companies. Obviously, had the requested evidence of Van Blerk's authority been produced at the outset, or when called for, the point *in limine* would not have been pursued.

THE INTERVENTION APPLICATION

[21] Now that I have found, in paragraph [19] of this judgment, that the Trust's application for the winding up of Bramber and Fidentia Holdings cannot succeed, and as correctly pointed out by *Mr Daniels* SC in his submissions and in argument before me, Van Schalkwyk, as an intervening creditor, must make out a case for the winding up of Bramber and Fidentia Holdings. Van Schalkwyk's claim, based it is on an alleged employment contract, is heavily disputed as correspondence exchanged between the Curator's attorneys (letter dated 20 August 2007) and Van Schalkwyk's

then attorneys (letter dated 27 August 2007) tend to show. The dispute appears to have been known to Van Schalkwyk prior to the institution of the intervention applications if the evidence of Van Schalkwyk on 12 August 2009 in the insolvency enquiry of JAW Brown ("Brown") is anything to go by. At that enquiry Van Schalkwyk said in his evidence that he would have had to issue summons against Fidentia in order to recover what was owed to him.

[22] As pointed out in the preceding paragraph, the existence or otherwise of Van Schalkwyk's employment contract is in dispute. Van Schalkwyk is unable to provide either the original or a copy of the disputed employment contract. All that Van Schalkwyk says in his evidence about the whereabouts of the employment contract is that he gave it to the Compliance Officer within the Fidentia Group for safekeeping. He does not say in his evidence precisely when and where was such a contract concluded; he does not say in whose presence nor does he indicate the identity of witnesses to such a contract; no proof has been produced, in the form of an affidavit by the Compliance Officer concerned, to confirm that the employment contract was indeed given to him for safekeeping; no affidavit of any person who may have had knowledge of the existence of

the employment contract has been produced other than a passing reference to the existence thereof in the confirmatory affidavit of Brown deposed to on 20 May 2010; Van Schalkwyk does not state, either in his founding affidavit or in his replying affidavit, who the draftsman of the employment contract was.

[23] No person other than JAW Brown, within the Fidentia Group, has any knowledge of the existence of the employment contract Van Schalkwyk relies on. Andrew Herbert Tucker ("Tucker"), an attorney in the employ of the Fidentia Group at the time, and who, in the normal course of his duties, would have drawn the employment contract, has no knowledge of the existence of the employment contract that Van Schalkwyk relies on. Tucker states in his affidavit that he was never informed by Van Schalkwyk of his entitlement to any payment based on commission; according to Tucker, he (Tucker) was materially involved in the discussions relating to the sale of shares in Boland Rugby and that Van Schalkwyk was not responsible for the conclusion of the agreement in terms of which shares in Boland Rugby were sold to Fidentia Holdings. Sandra Burger, who was prior to the curatorship of the Fidentia Group employed in the accounts department, states in her affidavit that she never received an instruction to record an indebtedness of Bramber or Fidentia Holdings towards Van

Schalkwyk. There is no cogent evidence on record to indicate what meaningful steps Van Schalkwyk took in order to recover what allegedly was due to him.

[24] As has already been pointed out, the very basis of Van Schalkwyk's claim is a subject of a dispute. None of the persons employed within the Fidentia Group, other than Brown, has any knowledge of the existence of the employment contract Van Schalkwyk relies on. Van Schalkwyk's alleged claim, which otherwise would have vested him with the necessary *locus standi* to intervene as a creditor, is the subject matter of what appears to me to be a dispute on reasonable and *bona fide* grounds. Liquidation proceedings are not designed for the resolution of disputes as to the existence or otherwise of a debt. Based on the facts pertaining to Van Schalkwyk's alleged claim and the dispute relating to the existence or otherwise thereof, I am unable to exercise my discretion in granting the relief sought by Van Schalkwyk. Van Schalkwyk relies on a contract of employment in an attempt to enforce his claim. It is trite that a party who relies on an agreement must prove the agreement and the terms thereof. In the instance of this matter, Van Schalkwyk has failed to do so.

[25] I am thus unable to find, in the light of the dispute of facts before me, which can only be resolved by oral evidence, that Van Schalkwyk was in the employ of either Bramber or Fidentia Holdings and that he is a creditor of either of those entities as he claims. It therefore follows that the applications by Van Schalkwyk to intervene as a creditor, in both the matters of Bramber and Fidentia Holdings, ought to fail. In the light of this finding, it is not necessary for me to determine whether Van Schalkwyk's claim has become prescribed as contended by the respondents. The applications for striking out at the instance of the second and third respondents, was not pursued in argument so that it is similarly not necessary for me to determine that issue nor, for that matter, the issue of winding up on just and equitable grounds. To the extent that Van Schalkwyk and the Trust complain about the conduct of the Curators in the course of the curatorship, their remedy does not lie in the winding up procedure but, rather, in sections 5(8) and 5(9) of the Financial Institutions (Protection of Funds) Act.

[26] In as far as the applications for the separation of issues in the matters of Bramber and Fidentia Holdings is concerned, in my view, there is merit for the separation of the issue concerned in that the issue

concerned, namely, *locus standi,* is dispositive of the entire applications in the aforementioned matters. Consequently, the applications for an order for the separation of the issue of *locus standi,* in both the matters of Bramber and Fidentia Holdings, should and is hereby granted.

[27] In the result, the following order is made:

[27.1.] It is hereby determined, and it is accordingly so ordered, that the issue of *locus standi,* in both the matters involving Fidentia Holdings (Pty) Ltd under case no: 6655/2010 and Bramber Alternative (Pty) Ltd under case no: 6656/2010 be determined in advance of all other issues.

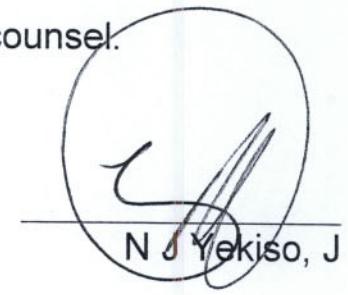
[27.2.] Arising from such determination the applications of the Trustees for Time Being of the Antheru Beleggings Trust, for the provisional winding up order of Fidentia Holdings (Pty) Ltd under case no: 6655/2010 and of Bramber Alternative (Pty) Limited under case no: 6656/2010 are hereby dismissed.

[27.3.] The Antheru Beleggings Trust is ordered to pay the respondents' costs (Applicants in the separation applications) in the applications for separation of issues in the matters of Fidentia Holdings (Pty) Ltd, case no:

6655/2010 and Bramber Alternative (Pty) Ltd, case no: 6656/2010 on a party and party scale, duly taxed or as agreed.

[27.4.] In the case of the Fourth Respondent, the costs order referred to in paragraph [27.3] of this Order shall include costs consequent upon employment of two counsel.

[27.5.] The applications of Martin James Van Schalkwyk to intervene as a creditor in both the matters of Fidentia Holdings (Pty) Ltd, case no: 6655/2010 and Bramber Alternative (Pty) Ltd, case no: 6656/2010, are dismissed with costs on a party and party scale, duly taxed or as agreed, and, in the case of the Fourth Respondent in both such matters, such costs to include costs consequent upon employment of two counsel.



N J Yekiso, J