IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 6474/2010

DATE: 13 OCTOBER 2010

In the matter between:

MICHAEL JOHN LANE 1st Applicant

JOHAN APPIES 2nd Applicant

THEMBA BASIWE 3rd Applicant

and

MOHAMED RASHAAD KHAN Respondent

J U D G M E N T

BLIGNAULT, J:

This is an application for the provisional sequestration of the Erf 1957, Sunset Beach Trust (the respondent trust). The application was brought jointly by two insolvent trusts, the first is the C A M Brown Family Trust (the CAM Trust), represented by its provisional trustees in insolvency, Mr Michael Lane (described as first applicant). Mr Johan Appies (described as second applicant) is the trustee in insolvency of the S L Brown

Family Trust (the SL Trust), represented herein by its provisional trustees in insolvency, first applicant and Mr Themba Basiwe, described as the trustee in insolvency of the SL Trust as third applicant. Both applicant trusts were provisionally sequestrated on 23 September 2009.

Mr Mohamed Rashaad Khan, at the stage when this application was brought, was the sole trustee of the respondent trust and he was cited in that capacity as the respondent. The application was launched on 31 March 2010. The founding affidavit was deposed to by first applicant. He explained first that applicants require authority in terms of section 18(3) of the Insolvency Act 24 of 1936 (the Act) to bring this application.

First applicant provided some background relating to the two applicant trust. Both were registered in 2003. He provided information in regard to the beneficiaries under each of the trust deeds and the trustees, prior to the sequestration of the two trustees.

During December 2002, the two applicant trusts purchased the beneficial interest and the loan accounts in the respondent trust from Mr Hans and Ms Rosemary Runz. The respondent trust was the registered owner of Erf 19571, Milnerton. First

applicant stated that the two trusts are joint creditors of the respondent trust in an amount of not less than R2 131 276,00. He attached a letter from Mr Runz, in which he confirmed, as at 27 May 2003, that his loan account in the respondent trust was valued at this amount. The purchase price for the beneficial interest and loan accounts of the sellers was R5 000 000,00. Upon cession of the loan account, the two applicant trusts became joint creditors of the trusts in the sum or R2 131 276,00.

Erf 19571 was the family home of the Brown family. It is the only immovable asset of the respondent trust. During late June 2009 it was discovered that the respondent trust had sold Erf 19571 for R4 000 000,00 and the movable assets for R987 225,00 to Mr Imraan Moosa and Mr Yakub Amanjee. Mr Khan was appointed as sole trustee of the respondent trust in 2008. In his capacity as attorney, he had represented Brown in various opposed matters. The trustees of the Brown estate launched an urgent *ex parte* application to secure the proceeds of the sale of Erf 19571 and the movable assets. Mr Khan refused to give an undertaking that he would not dispose of the proceeds of the sale.

On 23 July 2009, the Court granted an order in an *ex parte* application, interdicting Mr Khan from disposing of the

proceeds and directing him to retain the proceeds in a trust account with the attorneys for the joint trustees in insolvency in the Brown estates. On 4 August 2009, Mr Khan addressed a letter to Attorneys Cliffe Dekker Hofmeyer, who at that stage was representing certain of the entities involved in the group of companies and trusts involved and who are at present the attorneys of record for the applicants in this matter. In this letter, dated 4 August 2009, he said *inter alia* that the proceeds of R4 000 000,00 had been used by him towards the payment of his fees and disbursements for the past year in terms of a special agreement between the former trustees and guardians of the beneficiaries entered into during 2008.

In respect of the amount R987 256,00, he said, the last payment was R42 000,00 in and during June 2009. The balance of the purchase price was not paid as Mr Moosa requested an extension and Mr Khan subsequently advised him not to make any further payments until he received notification from him. The sum of R42 000,00 was also disbursed by Mr Khan in and during 2009. Mr Khan then said that there are therefore no monies held in trust. The transaction was based on the purchaser being allowed to pay off the purchase price, but to allow Mr Khan to utilise the funds prior to transfer on a loan basis.

In an answering affidavit in the *ex parte* application, Mr Khan explained that although the purchase price had been paid by the purchasers, transfer had not yet been registered. He said that he had full authority from the purchaser to utilise the funds in the manner which he did. On 23 September 2009, the order in that application was made final.

First applicant contended in the founding affidavit in the present application that Mr Khan had used the proceeds of the sale for payment of the fees owing to him as Brown's attorneys. He thus committed an act of insolvency in terms of section 8(c) of the act ad the disposition of property would have had the effect of prejudicing the creditors of the respondent trust. Applicants maintain that the market value of Erf 19571 is R9,5 million. The movable property of the respondent trust was sold for R928 225, but the purchase price has not been paid to the respondent trust. This was confirmed by Mr Khan. Mr Brown also testified, however, that the movable property was worth only some R100,00 to R2 000,00.

The liabilities at this stage, according to applicants, are (1) the amount owing to applicants, (2) an amount of about R19 000,00 owing to Cape Town City Council and (3) the claim of R4 000 000,00 for the repayment of the purchase price by the purchasers in the event of the sale being set aside.

Applicant contended that there are various aspects to investigate which could have beneficial results for creditors. I shall revert to that hereunder.

The respondent trust gave a notice of opposition and on 16 April 2010 an order was made providing for the postponement of the matter to 12 October 2010 and the filing of further affidavits. The respondent trust did not file any answering affidavit in the application in terms of the agreed timetable. On 28 September 2010, counsel for applicants' heads of argument were filed. They were drawn on the assumption that the application was unopposed.

On 11 October 2010, that is the day before the hearing, a number of documents found their way into the court file. The first is an affidavit by first applicant, advising that he had been informed by Mr Johannes Klopper and Mr Craig McLean Hathorne that they had been appointed as joint trustees of the respondent trust by the Master. On 8 October 2010 he had been advised by Klopper that a trustees' meeting took place on 8 October 2010. Mr Khan did not attend the meeting. At the meeting it was decided to terminate the mandate of Mr Khan to represent the respondent trust and to withdraw the opposition to the application.

The second document is an affidavit made by Klopper. He explained the recent developments. He said that attempts were made to secure the attendance by Mr Khan at the meeting in question, but Mr Khan did not respond to his attempts. On 8 October 2010, he and Hathorne met and passed certain resolutions. Two resolutions were taken, which have been referred above. Klopper pointed out that the resolutions were probably invalid as Mr Khan had not been given proper notice of the meeting in terms of the provisions of the trust deed. Klopper said that he wished it to be placed on record that he and Hathorne believed that a proper case had been made out for the sequestration of the respondent trust and that they did not oppose the application. Hathorne filed a confirmatory affidavit.

The third document, filed on or shortly before the hearing, is an application brought by Mr Khan in his purported capacity as trustee of the respondent trust, for leave to file an answering affidavit in the sequestration application. Mr Khan's explanation is that he had been busy with other litigation and that he had been ill in July and August. He only realised with horror on 8 October 2010 that the respondents' answering affidavit had not been filed. As a result of the other litigation in which he was involved, which, he said, caused extreme pressure, he became confused. On the evening of 7 October

2010 he met with counsel and he was then told that he had not filed an answering affidavit. On checking the file the next day, he realised that this was indeed so.

The application was in any event not ripe for hearing, he said, for the following reasons. I quote from paragraph 22.1 of this application:

> "1. The surreptitious application and appointment of the additional trustees. The unauthorised and surreptitious resolution which purported to withdraw by opposition to the application, both of which have been effectively attacked in the pending review application.
>
> 2. The additional trustees to the main sequestration have not been joined in same. This non-joinder means that the application cannot proceed until such time ad the additional trustees have been so joined.
>
> 3. The application for the review of the decision by the Master to appoint the additional trustees aforesaid, is pending and requires to be decided before the main sequestration application can proceed."

In Mr Khan's proposed answering affidavit, he raised and purported to incorporate the papers in an interdict application

brought by applicants under case number 6475/2010. He attacked applicants' *locus standi* on the basis that the alleged loan account had been settled and paid in full by Mr and Ms Runz. He also advances a contention that applicants' alleged claim had become prescribed. He further replied *seriatim* to applicants' founding affidavit.

The fifth document is a review application in which Mr Khan sought a temporary interdict staying the sequestration application and a review and setting aside of the Master's decision to appoint Klopper and Hathorne as trustees. In this application applicant was described as Mr Khan, in his representative capacity, as a trustee of the Erf 19571, Sunset Beach Trust. The hearing of the matter commenced on 12 October 2010 and stood over until today 13 October 2010.

Mr Philip Daniels SC appeared on behalf of the applicant trusts. Mr Paul Tredoux, assisted by Mr Cutler appeared on behalf of Mr Khan. They act on instructions of Mr Khan as attorney. Advocate Richard Goodman SC acted on behalf of Klopper and Hawthorne. As foreshadowed in Klopper's affidavit, his role was, in the main, to convey Klopper and Hathorne's attitude with respect to the application, to the Court.

The first question that arose *in limine*, was whether the respondent trust was indeed represented at this hearing. It is trite law that trustees must act jointly in representing the trust in litigation, unless the trust deed provides otherwise. See Honore's Law of Trusts, 5th Edition, page 419. In the present case the trust deed provides, in clause 12 thereof, that the trustees shall meet and otherwise regulate their business, as the trustees shall from time to time resolve, subject to a quorum of two trustees attending the meeting.

When this application was launched, Mr Khan was the sole trustee and in that capacity he decided to oppose the sequestration application. On 27 August 2010, Klopper and Hathorne had also been appointed by the Master as trustees to act together with Mr Khan. From that date onwards, the trust had three trustees. One of the matters that required urgent attention was this pending sequestration application. At that stage the application had *de facto* become unopposed and the trustees had to decide whether to oppose it or not. Klopper and Hathorne held the meeting on 8 October 2010 in the circumstances described above. It seems, however, that inadequate notice of the resolution to be adopted had been given to Mr Khan. Klopper and Hathorne decided *de facto* not to oppose the sequestration application, but their resolution appears to be invalid and it is now under attack in their review

application, as is, as I have pointed above, their appointment as trustees itself.

The result is that the respondent trust has been unable, and still is unable, to decide how to approach the present sequestration application. Mr Khan nevertheless proceeded to act as if he was the sole trustee. In that capacity he brought the condonation application, deposed to the proposed answering affidavit and brought the review application, all purporting to act on behalf of the respondent trust. The problem, however, that it is not clear at all whether he had authority to act on behalf of the respondent trust.

Mr Tredoux sought to overcome this difficulty by arguing that Khan was the sole trustee when the sequestration application became opposed and that the appointment of Klopper and Hathorne was invalid and was being attacked in the review application. Mr Tredoux relied in this regard on what he called the continuity principle. As I understand the application of this principle, the decision taken by Mr Khan as sole trustee to oppose the application, continued to be effective until amended or terminated. In the presence case it was never validly amended or terminated. The respondent trust thus remained bound by Khan's original decision and his authority was never revoked.

In my view these arguments are faced by a number of problems. The conduct of any litigation, including the opposition to this application, necessarily requires constant attention as it is necessary to take decisions in regard to its conduct on a continuous basis. Thus in the present case, all three trustees were authorised and indeed obliged as trustees to consider the application and to decide whether to continue opposing the sequestration application or not, and if so, on what grounds. The second problem faced by Mr Khan is that the appointment of Klopper and Hathorne as trustees is valid until set aside by a court. Until then they remain trustees and they must carry out, to the best of their ability, their duties as trustees. The mere fact that an application had been brought attacking their appointment, has in itself no effect in law.

Turning to the principle of continuity referred to by Mr Tredoux, I must say first that I am not aware of any such legal principle. It seems to me, however, to be fundamentally inconsistent with the performance of a trustee's duties as trustee and the continuous nature thereof. Mr Tredoux did not cite any authority in support of this principle or the application thereof. The principle does not, in any event, assist Mr Khan. He took certain recent decisions on behalf of respondent, to which I referred above, *inter alia*:

1. To persist in opposing the application.

2. To instruct himself as attorney to give effect to that opposition.

3. To apply for condonation for the filing of the late answering affidavit.

4. To prepare such affidavit as the object of the condonation application.

5. To authorise the appointment of counsel to act for the respondent trust.

6. To launch the review application in his capacity as trustee.

In my view, not one of these decisions was valid or binding on the respondent trust, for the reasons that I have given above. The result in law is that the recent affidavits filed by Mr Khan and his opposition to the application, are unauthorised and do not bind the respondent trust.

There are ways and means of dealing with the deadlock

situation that has arisen and the Court's powers in this regard appear to be wide. It will, however, give rise to a further litigation which may extend for years. It is not necessary for me to intervene at this stage in order to attempt to resolve this deadlock.

The *de facto* result of the present dispute between the respective trustees which, I may mention, as appears from the papers placed in the court file, to raise issues which are wide ranging. As I said the *de facto* result is that the trust cannot, at this point in time, function at all. It cannot *de facto* support the sequestration application, it cannot oppose the application and it cannot agree to the postponement thereof. There are, as I have said, ways in which a Court can resolve this situation, but that will take time.

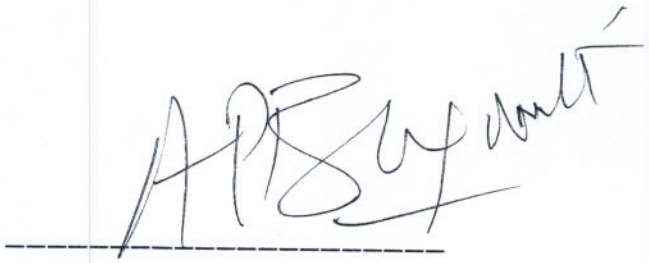
In the present case, however, there is an obvious immediate solution to these problems, namely the sequestration of the respondent trust. The merits of the sequestration application, on the basis of the applicants' founding affidavit, do not have to detain me for long. They are fully canvassed in applicants' heads of arguments and need not be repeated here. The issue of advantage to creditors is one that has been queried by Mr Tredoux in argument. This question was dealt with in paragraphs 88 to 103 of the founding affidavit. I do not intend

to repeat the content of these paragraphs save to say that applicants have shown, on a *prima facie* basis, that there is reason to believe that it would be to the advantage of creditors, within the meaning of section 10 of the Act, to sequestrate the respondent trust.

In the present circumstances, for the reasons already given, it seems to me in any event necessary and equitable and to the advantage of creditors, that the provisional trustees take control of the affairs of the respondent trust as soon as possible. Apart from preserving the assets of the trust, there are the various matters which require to be investigated, as mentioned in applicants' founding affidavit. These matters require immediate attention and some of them concern Mr Khan himself in his personal capacity. In this regard I wish to point out, without making any findings, that there appear to be serious conflicts of interest which may affect the suitability of the existing trustees of the respondent trust to act as trustees. For that reason I propose to bring this judgment to the attention of the Master of this court.

I have not heard any arguments in regard to costs regarding this application. They will in any event stand over for determination on the return date of the order which I am about to grant.

In the result I grant a provisional order of sequestration with the usual directions as to service. The advocates are invited to agree upon a return date and to prepare a draft court order for submission to me. The applicants in this matter are authorised to have brought this application in their capacity as trustees in insolvency. In the matters of 13890 and 13891 I make an order in terms of the drafts presented to me.



BLIGNAULT, J