IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 21145/2011; 21143/2011; 21144/2011

In the matter between:

INVESTEC BANK LIMITED	Applicant
and	
ANTON LOUW	1st Respondent
CONCETTA PAULINE LOUW	2nd Respondent
(Case No. 21145/2011 – "the Anton Louw sequestration application")	
INVESTEC BANK LIMITED	Applicant
and	
JOHANNES ADRIAAN LOUW	1st Respondent
CAROLA CECILE LOUW	2nd Respondent
(Case No. 21143/2011 – "the Johannes Louw sequestration application")	
INVESTEC BANK LIMITED	Applicant
and	
DEWALD LOUW	1st Respondent
ANEL LOUW	2nd Respondent
(Case No. 21144/2011 – "the Dewald Louw sequestration application")	
ANTON LOUW	1st Applicant
JOHANNES ADRIAAN LOUW	2nd Applicant
DEWALD LOUW	3rd Applicant
and	
THE MINISTER OF TRADE & INDUSTRY	1st Respondent
THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	2nd Respondent
INVESTEC BANK LIMITED	3rd Respondent
(Case No. 21144/2011 – "the counter application")	

Coram:	BOZALEK J
Judgment:	BOZALEK J
Heard:	20 – 24 AUGUST 2012 and 27 AUGUST 2012
Delivered:	12 SEPTEMBER 2012

Sequestration Application	
For the Applicant:	***Adv BDJ Gassner SC***
As instructed by:	***Edward Nathan Sonnenbergs***
	(ref: Ms C Morgan/Ms L Field)
For the Respondents:	***Adv F Joubert SC et Adv J De Vries***
As Instructed by:	***Lombard & Kriek***
	(ref: Mr JC Kriek)
Counter Application	
For the Applicant:	***Adv J de Waal***
As instructed by:	***Lombard & Kriek***
	(ref: Mr JC Kriek)
For First and Second Respondents:	***Adv RT Williams SC et Adv T Sidaki***
As Instructed by:	***The State Attorney***
	(ref: Mr L Ngwenya)
For the Third Respondent:	***Adv APH Cockrell SC et Adv Ferreira***
As Instructed by:	***Edward Nathan Sonnenbergs***
	(ref: Ms C Morgan/Ms L Field)

Enclosed is a judgment by Bozalek, J of which only the issues dealt with in:

Para's 1 – 7; para's 43 – 64 & para's 86 – 91 are reportable.

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 21145/2011; 21143/2011; 21144/2011

In the matter between:

INVESTEC BANK LIMITED	Applicant
and	
ANTON LOUW	1st Respondent
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(Case No. 21145/2011 – "the Anton Louw sequestration application")	
INVESTEC BANK LIMITED	Applicant
and	
JOHANNES ADRIAAN LOUW	1st Respondent
CAROLA CECILE LOUW	2nd Respondent
(Case No. 21143/2011 – "the Johan Louw sequestration application")	
INVESTEC BANK LIMITED	Applicant
and	
DEWALD LOUW	1st Respondent
ANEL LOUW	2nd Respondent
(Case No. 21144/2011 – "the Dewald Louw sequestration application")	
ANTON LOUW	1st Applicant
JOHANNES ADRIAAN LOUW	2nd Applicant
DEWALD LOUW	3rd Applicant
and	
THE MINISTER OF TRADE AND INDUSTRY	1st Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	2nd Respondent
INVESTEC BANK LIMITED	3rd Respondent
(case No. 21144/2011 – "the Constitutional Counter Application)	

JUDGEMENT: 12 SEPTEMBER 2012

BOZALEK J:

[1] The applicant in all three of these matters, Investec Bank Limited, seeks provisional sequestration orders against the first respondents in each case, namely Messrs Anton Louw, Johannes Louw and Dewald Louw. I shall refer to them collectively as the respondents. The second respondents in each case are their respective wives against whom no direct relief is sought since in each case they are married out of community of property.

[2] The respondents opposed the relief sought and filed voluminous answering affidavits. At the hearing of this matter only Mr Dewald Louw was represented by counsel. Neither of the two remaining respondents appeared in person or were legally represented but they continued to oppose the relief sought.

[3] Also before the Court is a so called "*constitutional counter application*" ("the counter application") in which the three respondents are the applicants whilst the Ministers of Trade and Industry and Justice are the first and second respondents respectively and Investec Bank Limited is the third respondent.

[4] In the main application Mr Dewald Louw was represented by Mr Joubert SC together with Mr De Vries, with the applicant being represented by Ms Gassner SC. In the counter application Mr De Waal appeared for the applicants together with Mr De Vries, Ms Williams SC for the first and second respondents and Mr Cockrell SC together with Mr Ferreira for the third respondent.

[5] The papers in this matter eventually comprised more than 6000 pages, albeit that a great deal thereof comprised annexures, and argument continued into a fifth day. I propose to deal firstly with the sequestration applications and then with the counter application. The issues in the three sequestration applications differ, the only substantial issue in the case of Mr Johannes Louw and Mr Anton Louw being the question of whether a sequestration order will

result in an advantage to creditors whilst in matter of Mr Dewald Louw the principal issue is whether the applicant has established its *locus standi* as a creditor which can move for an order of provisional sequestration against the respondent.

BACKGROUND

[6] The respondents are businessmen who were key figures in a construction and development business which can be loosely described as the Aslo Group of companies. In 2005/2006 the Aslo Group, through one of the companies in its stable, Dormell Properties 560 (Pty) Ltd ("Dormell"), became involved in a large property development in Knysna which was financed by the applicant. To this end Dormell entered into a loan agreement with the applicant during May 2006 for a capital amount of some R139m although an amount of less than R80m was ultimately advanced by the applicant to Dormell. As security for the repayment of the loan the applicant required a considerable number of suretyships by various persons and entities within the Aslo Group including the respondents who were amongst the principal directors within the group. In April 2006 the respondents entered into unlimited continuing suretyship agreements in favour of the applicant for monies owed or to become owing by Dormell to the applicant. Re-negotiation of the initial loan agreement took place on several occasions when Dormell was unable to repay its indebtedness to the applicant and it was ultimately placed into final liquidation on 7 February 2012. At the around the same time various other companies within the Aslo stable were similarly placed into liquidation, in some cases after business rescue applications had failed.

[7] In an effort to recover the funds advanced to Dormell the applicant instituted a range of legal proceedings including the present three sequestrations applications. They are based, in each case, upon the

agreements of suretyship concluded by the respondents and the applicant's allegation that the respondents, as sureties for and co-principal debtors with Dormell, are indebted to the applicant in amount of some R86m. Messrs Anton and Johannes Louw do not dispute their indebtedness to the applicant in terms of the suretyships although they take issue with the quantum, alleging that the applicant is not entitled to some R16m to which it lays claim.

[8] In the case of Mr Dewald Louw, however, his case is that there is no indebtedness on his part since he was released from the suretyship in terms of an oral agreement. In this regard he states that he decided to withdraw from the property development business comprised of the Aslo Group of companies in November 2007 (and also the related construction business, the Johan Louw Konstruksie (*"JLK"*) group) in order to focus solely on farming. To this end he entered into negotiations with his brothers (the two other respondents) with a view to disposing of his interests in the Aslo and JLK groups and purchasing a farm owned by the group. When the last leg of this transaction was completed in October 2008 the relevant banking institutions, including the applicant, were informed thereof and his suretyships were cancelled. More specifically with regard to the applicant, the respondent relies on a meeting between his brother, Anton Louw, and officials of the applicant sometime after 20 October 2008 when the former allegedly informed them of his [Mr Dewald Louw's] departure from the Aslo Group of companies to which their alleged oral response was that the applicant would cancel the suretyship in question.

[9] The applicant denies the conclusion of any such agreement or release but concedes, for the purposes of these proceedings, that there is a bona fide dispute regarding this and various other issues ancillary to this dispute. These are set out in affidavits filed by the applicant and are as follows:

a. whether the oral agreement relied on by the respondent to resist the suretyship indebtedness was concluded;
b. whether the respondent in fact received a letter from the applicant dated 25 March 2009 advising him that his liability in terms of the suretyship remained in full force and effect;
c. whether the applicant in fact wrote/sent the above letter to the respondent.

[10] Notwithstanding the existence of these bona fide factual disputes and the *"Badenhorst principle"*[1], which has also been interpreted in sequestration applications as precluding such proceedings for the recovery of a debt which is disputed on bona fide grounds, the applicant contends that it is nonetheless entitled to a provisional order of sequestration against the respondent.

[11] In Investec Bank v Lewis[2] it was pointed out that Badenhorst rule, as later formulated by Corbett, JA in *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A), provides that where indebtedness to the applicant is disputed the onus is on the respondent to show merely that the indebtedness is disputed on bona fide and reasonable grounds.

[12] In the present matter the applicant contends that notwithstanding the existence of the bona fide factual disputes, on a proper analysis of the issues it is entitled to a sequestration order since the respondent cannot dispute his indebtedness on bona fide and reasonable grounds. Even assuming in his favour the disputed facts, the respondent can, nonetheless, not escape liability under the suretyship because it contains a so called non-variation

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[1] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 374 – 348
[2] *Investec Bank v Lewis* 2002 (2) SA 111 (C) at 116 B – F

clause in terms of which the surety may only be released from its provisions in writing signed by both parties.

[13] The respondent contends, however, that properly interpreted, the suretyship agreement permits the release of the surety or, put differently, the cancellation of the suretyship by the applicant, other than in writing. In the alternative it is contended that should any release from or cancellation of the suretyship be required in writing, certain documentation issued by the applicant amounted to a release in writing. In the further alternative, further defences raised by the respondent are that the applicant is estopped from relying on the deed of suretyship; it has waived its rights in terms of the deed of suretyship, that the respondent is entitled to ask for specific performance of the oral agreement, namely cancellation of the suretyship and having this recorded in writing by the applicant and signed by it; alternatively, that the respondent is entitled to rely on the fictional fulfilment of a self-created formality by the applicant and, finally, that it would be against public policy to enforce the deed of suretyship.

[14] I approach the various defences on the basis that I must assume the disputed facts to be as contended on the respondent's version but that, if on that version his defences are nonetheless bad in law then it must follow that he has not discharged the onus of showing that he disputes his indebtedness on "*bona fide and reasonable grounds*". Put differently, if the respondent's defence are bad in law then by definition they can be neither *bona fide* nor reasonable.

THE INTERPRETATION OF THE DEED OF SURETYSHIP

[15] The central issue is whether the deed of suretyship, properly interpreted, requires that any cancellation of or release therefrom must be in writing. In order to consider this question it is necessary to quote portions of the agreement. It is entitled an "***Unlimited Continuing Suretyship***" and in terms of clause 1.1.1 the respondent bound himself in the applicant's favour as surety "*in solidum for and co-principal debtor jointly and severally with*" Dormell Properties 560 (Pty) Ltd:

> *"for the due and punctual payment by the Debtor of all and any monies which the Debtor may now or from time to time in the future owe to Investec from whatsoever cause and howsoever arising ..."*

and

> *"for the due and punctual performance and discharge by the Debtor of his obligations under or arising from, any contract or agreement entered into or to be entered into in the future by the Debtor, from whatsoever cause and howsoever arising."*

The agreement provides that the amount recoverable in terms of the deed of suretyship would be unlimited. Under the heading "***Additional/Continuing Security***" the agreement reads:

> *"6.1. This Deed of Suretyship is in addition to and without prejudice to any other security or suretyship (including any suretyship signed by the Surety) now or hereafter to be held from or on behalf of the Debtor and shall remain in force as a continuing security for the whole amount now due or owing to Investec or which at any time hereafter may become due or owing to Investec by the Debtor, notwithstanding any intermediate settlement or fluctuation of account or novation.*
>
> *6.2. This Deed of Suretyship shall remain in force notwithstanding the death, insolvency, sequestration, surrender, winding up, judicial management (whether provisional or final) or legal disability of the Debtor or the Surety or*

any co-sureties, until receipt by the Surety of notice in writing from Investec terminating same and until the sum or sums due or to become due, whether contingently or otherwise at the date of receipt of such notice, shall have been paid, it being recorded for the sake of clarity that the Surety will therefore not be liable for any obligation incurred after the date of receipt of such written notice of termination but that the Surety will remain liable for all obligations incurred before the date of receipt of such written notice, whether such obligation is contingent or not, including obligations which arose before receipt of such notice but are only discovered, disclosed or otherwise established or subsequently and/or which revive for any reason whatsoever thereafter." (my underlining)

[16] The crucial clause, clause 16, headed ***"Non-Variation"*** reads as follows:

> *"No variation or cancellation (whether oral, consensual or otherwise) of the terms of this Deed of Suretyship shall be of any force or effect unless it is reduced to writing and signed by the Surety and Investec. This Deed of Suretyship is and shall at all times remain Investec's property.*

[17] On behalf of the respondent Mr Joubert contended that the non-variation clause is concerned only with the variation or cancellation of specific or individual terms or conditions of the deed of suretyship and as such did not govern the situation where the deed of suretyship was cancelled as a whole and the surety thereby released from the suretyship. For this interpretation he relied on the heading of the clause, ***"Non-Variation",*** which, he submitted, excludes the concept of a general cancellation or release, and the phrase *"of the terms"* which, he submitted, underlined the distinction between the variation of one or more clauses of the deed of suretyship as opposed to its cancellation as a whole.

[18] In *Coopers and Lybrand and Others v Bryant* 1995 (3) SA 761 (AD) a clear statement of the approach to be followed in the interpretation of contracts was set out as follows at 767 E – 768 E:

"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument ...

The mode of construction should never be to interpret the particular word or phrase in insolation (in vacuo) by itself ...

The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

1) *to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...*

2) *to the background circumstances which explain the genesis and purpose of the contract , ie to matters probably present to the minds of the parties when they contracted.*

3) *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions."*

[19] Applying this approach, it seems quite clear that the agreement stipulates that any general cancellation of its provisions or release of the surety from his obligations has to be in writing and signed by the surety and the applicant. In arriving at the conclusion I bear in mind, in the first place, that by virtue of s 6 of Act 50 of 1956, no contract of suretyship is valid unless the terms thereof are embodied in a written document signed by or on behalf of the surety. It is well established that by virtue of these statutory provisions, variations of the material terms of a deed of suretyship are also invalid unless reduced to writing and signed in the prescribed manner. If, therefore, clause

16 is construed as applying only to the variation of individual clauses in the agreement it would in effect be superfluous.[3]

[20] If, however, the clause is construed as requiring the cancellation of the entire agreement or the release of the surety to be in writing then it indeed serves an important purpose. In *Tsaperas and Others v Boland Bank Ltd*[4] Harms, J summarises the relevant legal provisions applying to a situation such as the present as follows:

> *"Although a suretyship agreement requires writing and the surety's signature for validity, there are no formalities for a valid cancellation. A surety is also generally entitled to cancel by notice and unilaterally his future obligations under a continuing guarantee. If the agreement prescribes formalities for the amendment or determination of the suretyship, these are binding upon both parties. Lastly, a deed of suretyship must be interpreted restrictively and in favour of the surety. It does not mean that the agreement must not be interpreted sensibly.*

[21] The learned judge describes the object of a non-cancellation clause as *"fairly obvious":*

> *"It protects the creditor. It enables the creditor to determine its rights with the reference to the document in its possession. The creditor does not have to rely on the memory of employees or ex-employees. It protects the creditor against spurious defences and unnecessary litigation."*

[22] This point was reinforced in *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) where Scott, JA added that the need for the provision of such clause is greater:

> *"...where the creditor, as in the present case, is a large organisation comprising different divisions and employing a large number of people. The surety, on the other hand, is unlikely to be prejudiced. Institutions such as banks do not lightly release sureties while the debt of the principal debtor*

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[3] See *Morgan and Another v Brittan Boustred Ltd* 1992 (2) SA 775 (A) at 778 I

[4] 1996 (1) SA 719 (AD) at 724 B - D

remains extant. If there is a release it is in the interests of both parties that it be readily capable of proof."

[23] Mr Joubert conceded that if the words *"of the terms"* did not appear in clause 16 it could only be interpreted as requiring any cancellation of the suretyship as a whole to be in writing. But the presence of these words does not to my mind inevitably suggest that the *"cancellation"* envisaged cannot be a general cancellation or release of the surety since the phrase *"cancellation of the terms of this deed of suretyship"* quite easily expresses or encompasses, without straining the meaning of the words, the notion of a general cancellation. It is so the phrase *"of the terms"* can be seen as superfluous and there is a presumption against tautology in the interpretation of contracts. On the other hand to give the clause the meaning for which the respondent contends would render the key word *"cancellation"* tautologous, and the entire clause meaningless, since the cancellation of a particular term of a contract is encompassed by the notion of varying the terms of the deed of suretyship and, in any event, statutory law requires any variation to be in writing.

[24] In interpreting the clause I place no great importance on the use of the heading *"Non-Variation"*, as opposed for example to "*Non-Variation and Cancellation*". It seems quite clear that the phrase *"non-variation"* is a term of art which refers to the entire subject of clauses which require any variation or cancellation to be in writing in order to achieve certainty and avoid disputes. By way of illustration, in Christie's Law of Contract, ironically under the heading ***"Non-Variation Clauses"***, the author writes:

> *"When the parties impose restrictions on their own power of subsequent variation or cancellation of their contract ... they will incorporate in their contract a non-variation clause. (6th Edition at page 464). [my underlining].*

[25] A further strong indication that what the parties envisaged was a non-variation clause which gave no force to cancellations of the agreement other than in writing, are the provisions of clause 6, quoted above. It stipulates that the surety's obligation will remain in force until receipt by him *"of notice in writing from Investec terminating same"* in which event the surety still remains liable for such sums as fell due prior to such notice being received. Given the wide reach of this clause and its stringency it is not possible to sensibly interpret clause 16 as nonetheless envisaging a general cancellation or release of the surety from all liability, past or future, being effected simply by means of an oral cancellation or agreement.

[26] In reaching this conclusion I take into account the provisions of the prior loan agreement with Dormell 260 which led to the various suretyships including that of the respondent's. In terms of that agreement a very substantial loan was made as security for which the applicant stipulated that it required the joint and several unlimited continuing suretyships of a number of companies within the Aslo Group as well as its key directors including the three Louw brothers.

[27] I hold then that, properly interpreted, the suretyship agreement as a whole and clause 16 in particular, precludes the release of the surety/ a general cancellation of the suretyship agreement by the creditor (the applicant) other than where such release/cancellation is reduced to writing and signed by it and the surety.

[28] It follows, therefore, subject to the respondent's further and alternative defences, that he is not entitled to rely on an oral agreement of cancellation of the suretyship to escape liability thereunder.

WAS THERE A TERMINATION IN WRITING?

[29] I turn now to consider the alternative defences the first of which is that the applicant did in fact terminate the suretyship in writing. Here the respondent relies on the restructured loan agreement between the applicant and Dormell concluded in March 2009 which, as in the previous agreement, lists the numerous suretyships subject to which the loan finance was granted. In contrast to the original 2006 loan agreement and the restructured 2007 loan agreement, the restructured 2009 loan agreement excluded the name of the respondent as a surety. This, submits the respondent, read together with an exchange of emails between what appears to be administrative employees of Aslo Holdings and Property Developers and the applicant in August 2011, is signed notice in writing that his pre-existing suretyship was cancelled. In the email exchange the Aslo Holdings representative asks the applicant *"for audit purposes"* for a list of the sureties in respect inter alia of Dormell Properties. The reply from the applicant lists *inter alia* 15 sureties for Dormell Properties *"as per our records"* but excludes the respondent's name.

[30] In *HNR Properties CC* (supra) it was held that where a clause in a suretyship agreement requires the release of the surety to be in writing it does not mean that when construing the writing it is impermissible to have regard to background circumstances. Nonetheless, in every case the intention to release must appear from the writing itself.

> *"It may be explicit or implicit. But if the latter, the intention to release must be apparent from the writing on an ordinary grammatical construction of the words used or, stated differently, the release of the surety must be a necessary implication of the words used. It is therefore not permissible to import into the writing, whether by reference to background or surrounding circumstances or any other sources, an intention to release which is otherwise not ascertainable from the actual language of the document relied*

upon. If the position were otherwise the very object of the requirement of writing would be frustrated."

[31] Having regard to the documents relied upon by the respondent it is clear that the high water mark of his case is simply the omission of his name as a surety in the restructured agreement and in the applicant's response in the email exchange. These words clearly do not expressly release the surety and, in my view, they fall far short of impliedly indicating any intention to release. The defence that the respondent was in fact released as a surety in writing cannot, for these reasons, be sustained.

WAIVER

[32] Next, relying on the same documentation as relate to its defence based on a release in writing, the respondent argued that the applicant through these clear representations had waived its rights against the respondent arising out of the suretyship agreement. In ordinary circumstances a release may be made tacitly but this is obviously not the case if the governing contract stipulates that it must be in writing as in the present case. This situation was addressed in *HNR Properties CC* case in the following passage[5]:

"Courts have in the past, often on dubious of grounds, attempted to avoid the Shifren principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the Shifren principle, for example where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance ...

...But nothing like that arises in the present case. The appellants contend that they were released as sureties by virtue of the conduct of the bank, coupled with a consensual waiver of the provisions of clause 15. In my view, a factual basis for such a contention was not established on the evidence but even if it

[5] At 479 D – H

had been, it would have amounted, in the circumstances of the present case, to no more than a variation of clause 15 which was not in writing. This is precluded by clause 16. To hold otherwise, would be to render the principle in Shifren wholly ineffective."

[33] In my view, a similar situation pertains in the present matter. To hold that the alleged oral agreement (which must be assumed for present purposes) coupled with the documents relied on, constitutes a waiver by the applicant of its rights under the agreement, would amount to an impermissible circumvention of the provisions of clause 16, rendering the principle in Shifren nugatory. In any event insofar as the respondent relies on the 2009 restructured loan agreement and the exchange of emails as evidence of the applicant's intention to waive its rights against him under the suretyship, there is no evidence that these were ever communicated to the respondent. Nor does the suggestion that Mr Anton Louw represented the respondent in the matter and that the latter was at least aware of the 2009 loan agreement, remedy this defect. The respondent's defence of waiver lacks the essential element of a communication to him that the applicant had abandoned its rights in terms of the deed of suretyship. See *Traub v Barclays National Bank Limited* 1983 (3) SA 619 (A) at 634 G – 635 C. In any event, inter alia for these reasons set out above, both the 2009 loan agreement and the email exchange fall far short constitute of evincing an unequivocal intention by the applicant to waive its rights.

[34] Our courts have held in several cases that a defence based on an unenforceable oral agreement disguised as a waiver cannot be used to resist

the enforcement of a contractual provision governed by a non-variation/non-cancellation clause.[6]

ESTOPPEL

[35] Similar considerations reply to the next alternative defence raised by the respondent, namely, that the applicant was estopped from denying the truth of its representations to the applicant that he was released from the provisions of the suretyship since the respondent would suffer prejudice if the applicant were permitted to deny the truth of the representation made. Given the strictures of the non-variation clause in this matter there is limited room for the application of the doctrine of estoppel since to do so would be to render the principle in Shifren ineffective. As Scott, JA stated in *HNR Properties CC*:

> *"Where a release is required to be in writing, as in the present case, it may be possible, in limited circumstances to frame an estoppel in such a way as not to violate the Shifren principle. It is unnecessary to consider what those circumstances would have to be. What is clear is that an estoppel cannot be upheld when the effect would be to sanction a non-compliance with provisions in a suretyship agreement of the time contemplated in clauses 15 and 16".*[7]

[36] I do not consider that the circumstances of this matter allow of an estoppel argument in such a way as not to violate the Shifren principle. Furthermore, I can see no basis upon which respondent can claim to have acted to his prejudice on the strength of any representation made by the applicant. His case in this regard is that but for the representation (the 2009 loan agreement excluding the respondent's name as surety) Mr Anton Louw would, on his behalf, have insisted on its deletion before signing the

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[6] See *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA) at 571 D – E and *HNR Properties CC* supra at para 20, page 47

[7] Clause 16 was a reference to a non-variation/non-cancellation clause whilst clause 15 provided that the surety would not be released unless such release was granted in writing, signed by the bank

agreement on behalf of various companies party thereto. This however, takes the respondent's case no further since his name was omitted from the list annexed and yet, in terms of the Shifren principle and the non-variation clause, he remains liable in terms of the suretyship agreement.

[37] The respondent's case is made no stronger given the terms of the original suretyship which he concluded. His withdrawal from the Aslo Group's business in favour of farming did not give him, nor anyone on his behalf, any right to be released from his obligations as security, which obligations were continuing and unlimited. Furthermore, had Dormell 560 not signed the 2009 loan agreement the pre-existing loan agreement would have remained in force together with the respondent's obligations as a surety. Consequently, whichever way one looks at it, the conduct of the applicant in omitting the respondent's name from the list of sureties in the 2009 agreement, coupled with the fact that it can for present purposes not dispute an oral agreement to release the respondent from his suretyship agreement, does not in my view come close to founding a basis for the defence of estoppel on the part of the respondent.

SPECIFIC PERFORMANCE OF THE ORAL AGREEMENT

[38] The fifth alternative defence raised by the respondent is that he is entitled to ask for specific performance of the alleged oral agreement and to that end can demand that its terms be put in writing and signed by the parties thereto. In the alternative, he claims that he can rely on the fictional fulfilment of a self-created formality as a condition for the cancellation of the deed of suretyship. The respondent relies, in this argument, on *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C). There the court, faced with a Shifren clause, applied the doctrine of fictional fulfilment against the defendant but in

circumstances where that party had admitted that he had refused, after taking advice, to send a signed original document to the plaintiff despite an earlier undertaking to do so.

[39] The element of an undertaking to reduce an oral agreement to writing is absent in the present matter. The respondent did not suggest in his papers that the applicant ever undertook to confirm in writing the alleged oral agreement releasing the respondent as surety. For this reason alone the respondent cannot rely on the doctrine of fictional fulfilment or on the authority of *Avtjoglou*'s case. In the absence of any enforceable undertaking by the applicant to reduce the alleged oral agreement to writing, the defence raised is no more than a circumvention of the provisions of the non-variation clause and the Shifren principle. The same considerations apply to the respondent's submission that it is entitled to ask for specific performance of the oral agreement, more specifically that the terms thereof be put in writing and signed by the parties. Allowing a party to a contract governed by a non-variation clause such as in the present matter to compel the other party to reduce an otherwise unenforceable agreement to writing would be in fundamental conflict with a long line of authority commencing, in latter years, with *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

PUBLIC POLICY

[40] Finally, the respondent argued that the enforcement of the deed of suretyship would be against public policy. Here he relied on the applicant's claim of R80m including the levying of a R10m – R15m *"raising fee"* which, it was submitted, was not provided for in the written loan agreements, but only the product of subsequent negotiations and an oral agreement. The

respondent takes exception to the fact that, notwithstanding its own reliance on a non-variation clause to escape the consequences of its alleged oral agreement to release the respondent from his suretyship obligations, the applicant relies on an oral agreement for the *"raising fee"*, similarly in breach of the non-variation clause. The respondent complains furthermore, that the applicant has purported to claim the *"raising fee"* in various liquidation, sequestration and action proceedings notwithstanding its own alleged breach of the non-variation clause.

[41] Even assuming that this part of its claim is invalid or unenforceable, there is no reason in law or logic why, for this reason alone, the applicant should be precluded from relying on the provisions of the suretyship agreement in these or any other proceedings. The amount in dispute is but a small fraction of the various sureties' total liability and there is no question of deceit, as alleged by the respondent, since the applicant makes no secret that it relies on an oral variation of the main loan agreement to found its claim for the *"raising fee"*. In *Brisley v Drotsky*[8] the proposition was rejected that South African law recognises a separate principle of good faith in contractual disputes that would preclude a party from a relying upon a non-variation clause where it be unfair or unreasonable to do so.

> *"Wat die rol van goeie trou betref, stem ons in wese saam met die siening van Profesor Hutchinson waar volgens goeie trou nie 'n onafhanlike, of te wel 'n 'free floating' basis vir die tersyde stelling of die nie toepassing van kontraktuele bepalings bied nie. Goeie trou is 'n grond beginsel wat in die algemeen onderliggend is aan die kontrakte reg en wat uiting vind in die besondere reëls en beginsels daarvan."*

[8] 2002 (4) SA 1 (SCA)

This *dictum* applies equally in my view to the defence that, under the rubric of public policy, the non-variation clause in the present suretyship agreement should not be given effect to on the grounds contended for by the respondent.

[42] For these reasons all of the defences raised by the respondent are without merit, leaving only the counter application to be determined.

THE COUNTER APPLICATION

[43] All three respondents are party to the counter application as applicants challenging various provisions of the National Credit Act, 34 of 2005 ("the NCA"), the Insolvency Act, 24 of 1936 and the Companies Act, 71 of 2008. To this end they joined the Ministers of Trade and Industry and Justice and Constitutional Development as first and second respondents, the third respondent being the applicant in the three sequestration applications. All respondents opposed the application but in the event the challenges to the provisions of the Insolvency Act and the Companies Act were abandoned by the applicants following the liquidation of Dormell Properties, Aslo Holdings (Pty) Ltd and Rapriprop 135 (Pty) Ltd.

[44] The relief sought by the applicant's in relation to the NCA is a declaration that s 4(2)(c) and the words *"to which this Act applies"* in s 8(5) of the Act are inconsistent with s 9(1) and s1 of the Constitution and are invalid. The relevant provisions of the NCA read as follows:

> *"4 Application of Act*
>
> *1) Subjects to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except:*
>
> *a) a credit agreement in terms of which the consumer is –*

i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of s7(1); ...

2) for greater certainty in applying subsection(1) –

a) ...

b) ...

c) this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted; and ...

8 Credit Agreements ...

.....

(5) an agreement, irrespective of its form but not including an agreement contemplated in subsection(2), constitutes a credit guarantee if, in terms of the agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.

The underlined provisions are those which are impugned by the applicants.

[45] It is evident that s 4(1)(a) excludes from the reach of the NCA any credit agreement concluded by what may be termed a high worth juristic person whose asset value or annual turnover equals or exceeds a threshold value determined by the Minister, presently R1m. Section 4(2)(c) excludes from the reach of the Act any credit guarantee covering, or in respect of, a credit facility or credit transaction which is itself excluded from the reach of the Act. These exclusions in terms of s 4(1)(a) and s 4(2)(c) of the NCA may conveniently be described respectively as direct and indirect exclusions. The

effect of the provisions is that the NCA applies to a credit guarantee only to the extent that the principal debt secured by the guarantee falls within the reach of the NCA. See in this regard *Nedbank Ltd v Wizard Holdings (Pty) Ltd and Others* 2010 (5) SA 523 (GSJ) at paras 1 – 8 and *Structured Mezzanine Investments v Davids and Others* 2010 (6) SA 622 (WCC) at para 16.

[46] In the founding affidavit the applicants state that they object to the impugned positions of the NCA because they:

> *"...arbitrarily exclude(s) from the Act consumers who grant(s) a credit guarantee to a juristic person with an asset value or an annual turnover higher than R1m. The exclusion does not apply if a guarantee is granted to a natural person with a same asset value or annual turnover (or even higher), even if the guarantor of the credit guarantee is a juristic person."*

They state further, however, that they:

> *"have no difficulty with the exclusion of high value juristic persons from the protection of the NCA by s 4(1)(a).",* an assertion which was confirmed in argument. It follows then that the applicants' objection is directed at what I have termed the indirect exclusion rather than the direct exclusion.

The applicants complain thus that the NCA applies to and protects a natural person as a principal debtor but does not apply to a natural person who stands surety for a principal debt which is excluded from the NCA. This, it is argued, constitutes arbitrary differentiation between categories of natural persons.

[47] The test for a violation of the right to equality was set out by the Constitutional Court in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 53 as follows:

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is violation of s (8)(1). Even if it does bear a rational connection it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis;

i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination would have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her position.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2)

c) If the discrimination is to found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)".

[48] As far as the standard to be applied by a court in determining whether there is a rational connection between the legislative scheme and a legitimate government purpose in impugned legislation, in *Ex Parte President of South Africa and Others, in re: Pharmaceutical Manufacturers Association of South Africa and Another* 2000 (2) SA 674 (CC) at para 90, the Constitutional Court

established the test of rationality as the minimum threshold requirement for the exercise of public power. In so doing it stated as follows:

> *"The setting of this standard does not mean that the courts can or should substitute their opinion as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."*

[49] The first question which must be answered is whether the impugned provisions differentiate between people or categories of people. This issue has already become considered by this Court in *Standard Bank of South Africa Limited v Hunky Dory Investments 194 (Pty) Ltd and Another (1)* 2010 (1) SA 627 which involved a summary judgment application opposed by the defendant *inter alia* on the grounds that s 4(1)(a), s 4(1)(b) and s 4(2)(c) of the NCA were unconstitutional insofar as they did not apply to a juristic person. As in the present matter it was alleged that the unconstitutionality of the provisions lay in their breach of the right to equality contained in s 9(1) of the Constitution. Steyn, J held that there was a rational connection created by the relevant provisions of s 4 of the NCA and the legitimate government purpose behind its enactment. She found further that, even if it existed, any differentiation or discrimination was not unfair and accordingly dismissed the constitutional challenge.

[50] A similar constitutional challenge was raised some six months later in a different but similarly named case, *Standard Bank v Hunky Dory Investments (2)* 2010 (1) SA 634. In that matter the National Credit Regulator and the

Ministry of Trade and Industry were joined by virtue of the constitutional challenge. However, as Rogers AJ pointed out, precisely the same point had been raised and determined in *Hunky Dory Investments (1).* He noted that Steyn J had refused leave to appeal which refusal had been confirmed by the SCA and subsequently by the Constitutional Court, both such courts finding that there was no reasonable prospects of success in the appeal which the defendant sought. Rogers AJ was required to deal with the constitutional challenge on its merits, however, and stated that in his view *Hunky Dory (1)* was not clearly wrong. He added that even if the constitutional challenge were *res nova,* he would have arrived at the same conclusion.

[51] Mr De Waal, who appeared for the applicants, sought to distinguish the *Hunky Dory* constitutional challenges from the present matter. In my view, however, what differences can be perceived are marginal and the constitutional issue in all three matters are substantially the same, namely, the alleged differentiation between categories of natural persons ie those who are principal debtors and those who are sureties of high worth juristic persons. Be that as it may, there being no decision which binds me absolutely and bearing in mind that a refusal of a petition for leave to appeal to our higher courts does not equate to a full reasoned judgment, I turn to consider the constitutional challenge anew.

[52] I have great difficulty in seeing how the impugned provisions differentiate between people or categories of people. The scheme of the Act would appear to be to lend limited protection to low value juristic persons and no protection at all to high value juristic persons. Central to this scheme is s 4(1)(a) which excludes from the reach of the Act any credit agreement concluded by a high worth juristic person. It is as a consequence of this direct

exclusion that s 4(2)(c) and the tail piece to s 8(5) provide that any credit guarantee in respect of what may be termed an excluded transaction is not covered by the provisions of the Act. Further, as I understand the provisions of sections 4(1) and 4(2), it is possible for a low worth juristic person to furnish a credit guarantee and enjoy the protection of the NCA in respect of a credit facility or agreement provided it is not a *"large agreement"* as defined. This illustrates that the impugned provisions do not primarily differentiate between people or categories of people but between types of credit agreement by specifically excluding those concluded by high worth juristic persons. Whilst it is correct therefore that some natural persons who stand surety for the debts of another fall within the scope of the NCA while others do not, it is incorrect in my view to characterise this as differentiation between natural persons. The differentiation is, rather, between different kinds of principal debt rather than between people or categories of people.

[53] In my view then the applicants' case falls at the first hurdle ie it fails to establish differentiation between people or categories of people in accordance with the test laid down in *Harksen v Lane and Others* (supra).

ON THE ASSUMPTION THAT DIFFERENTIATION HAS BEEN ESTABLISHED

[54] Assuming, however, that I have misconceived the position and the impugned provisions of the NCA do in fact constitute differentiation between two kinds of natural persons ie those who are principal debtors and those who are sureties of high worth juristic persons, the next step in the Harksen test is to determine whether the differentiation bears a rational connection to a legitimate government purpose. But first I deal with some preliminary points

[55] The respondents made a rather faint attempt to argue that a heightened level of scrutiny must be applied in the test for rationality previously enunciated by the Constitutional Court and which I have set out above. Needless to say I am bound by the existing law in this regard and thus any submission in this regard must be reserved for a higher court.

[56] The applicants also took issue with the fact that the third respondent rather than the Minister responsible for the NCA pressed many arguments favouring the proposition that the impugned provisions indeed reveal a rational connection to a legitimate government purpose and also that these factors or arguments were not enumerated in the opposing affidavits filed on behalf of the state. In my view it is open to any party to a matter who seeks to defend the constitutionality of impugned provisions to raise arguments tending to show such a connection. Moreover the fact that these arguments or factors are not contained in the Ministers' opposing affidavits is not decisive since they might be self-evident or appear from analysis of the legislation itself. It is the weight and cogency of the arguments to be evaluated by the Court which is most relevant.

[57] The most cogent arguments in regard to a rational purpose were those initially advanced by Mr Cockrell on behalf of the third respondent. He argued that the NCA clearly distinguishes between juristic and natural persons in that it applies only to a consumer which is a juristic person in limited circumstances, namely, where that entity's asset value or turnover is less than R1m and it enters into a small or intermediate agreements as envisaged in s 9(2) and s 9(3) read with s 7(1)(b) of the Act. Even in those circumstances, where the NCA applies to a juristic person it does so to a limited extent, s 6 of the Act providing that a significant portion of the NCA

does not apply to a credit agreement in terms of which the consumer is a juristic person. It is thus evident that the bulk of the protection to credit consumers applies to natural persons but not to juristic persons.

[58] If one has regard to the overall purpose of the NCA viz *"to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market industry and to protect consumers"* and the various protective mechanisms which are set up by the Act, it is apparent that one of the chief mischiefs that the legislature sought to remedy was the danger of sophisticated credit providers taking advantage of vulnerable consumers who might otherwise be unable to adequately protect their own interests.

[59] These considerations, however, Mr Cockrell's argument proceeded, are unlikely to apply to the same extent in the case of juristic persons. The incorporation of a company, closed corporation or similar vehicle is itself indicative of a degree of sophistication and legal literacy. The use of such a vehicle carries with it the primary advantage of separate legal personality, namely, limited liability and if a credit consumer is financially sophisticated enough to use juristic personality for the conduct of his or her business it would appear that the NCA views such a person as being able to take care of his or her own interests. These observations must be read of course subject to the qualification that low worth juristic persons which conclude relatively low value credit agreements do enjoy at least some of the protections of the NCA.

[60] The same reasoning appears to underpin specific distinctions which the Act establishes between natural persons who stand surety for other natural persons or for low worth juristic persons in respect of smaller credit agreements. As was pointed out, a natural person ordinarily only provides a

credit guarantee for a juristic person in which he or she has an interest, whether by ownership or control. This being so, the person providing the credit guarantee would not ordinarily have access to, or the means to pay for, advice to protect his or her interests and would thus be in much the same position as the high worth juristic person whose debts are being guaranteed and in respect of which the legislature appears to have taken the view that such entities have the ability to take care of their own interests, unprotected by the NCA.

[61] This rationale is neatly illustrated by the circumstances of the present matter. Each of the respondents, as a director, was a central figure in the sophisticated and extended construction and development business of which Dormell 260 was but a single component. No doubt when Dormell 260 entered into the principal loan agreement it had the benefit not only of the views of its directors but of accountants and legal representatives with specialist experience in the field of finance and law. The third respondent looked to the applicants for suretyships since they were key figures in the Aslo Holdings group and, before concluding their suretyship agreements, the applicants would have had access to exactly the same expertise as did Dormell 260 and its parent companies.

[62] In my view it is this rationale which lies behind the scheme of the relevant provisions of the NCA regarding which credit transactions or consumers enjoy its protection. Furthermore, whilst one may agree or disagree with this rationale or where the line is drawn, it cannot be said that any such differentiation (which I do no more than assume) is arbitrary and does not bear a rational connection to a legitimate government purpose. That being the case, even assuming that the respondents cleared the first hurdle in

the Harksen test they do not succeed in establishing that differentiation has no rational connection to a legitimate government purpose.

[63] Notwithstanding the above finding, the (assumed) differentiation may still amount to discrimination. None of the grounds of unfair discrimination specified in s 9(3) of the Constitution are present in the impugned provisions and thus the applicants must establish objectively, that any ground of discrimination is based on attributes or characteristics which "*have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*"

[64] In my view, in the light of the above analysis of the effect and purposes of the impugned provisions, the applicants have made out no case that their effect is to threaten their human dignity, thereby establishing discrimination. There can then be no question of unfair discrimination. It follows that the counter application must fail and the only outstanding issue is the question of costs which I shall address later.

MR DEWALD LOUW

[65] I turn now to consider the individual applications. Having found that there is no merit in the special defences raised by the respondent nor in the counter application it would appear that the applicant has made out a case for a provisional order of sequestration against the respondent. I am satisfied that the applicant has established that it is a creditor with an aggregated liquidated claim not less than R200.00 against the respondent, that he is factually insolvent and that there is reason to believe that it will be to the advantage of the creditors if his estate is sequestrated.

[66] In this latter regard the applicant's case is that even on the respondent's version, on sequestration his creditors could expect a dividend of some 0.71c in the rand on the basis that he has assets of R1.3m as against liabilities of some R71m. It is further the applicant's case that there are indications that the respondent has disposed of assets by way of impeachable transactions and that an investigation by a trustee may reveal financial information which could lead to the setting aside of such transactions or the unearthing of other assets of respondent which he has failed to disclose. The respondent has chosen not to challenge, at this stage at least, that a sequestration order will result in an advantage to creditors. In the circumstances it appears to me the applicant has made out a proper case for a provisional sequestration order.

MESSRS ANTON AND JOHANNES LOUW

[67] I must now consider whether the applicant has made out a case for a similar order against Messrs Anton and Johannes Louw. It will be recalled that although both filed a full answering affidavit and also were applicants in the counter application, neither was represented at the hearing of this matter and nor did they appear in person.

[68] It follows from the findings which I have already made, the respondents' circumstances being similar in all material respects to that of Mr Dewald Louw, that they are unable to raise any defence to their liability to the applicant pursuant to the continuing unlimited suretyships which they concluded in favour of the applicant. Accordingly the only question to determine are whether, in each of their cases, their estates are insolvent and whether there is reason to believe that their sequestration will produce an advantage to creditors. I deal firstly with the matter of Mr Anton Louw.

MR ANTON LOUW

[69] According to the respondent his assets are valued at some R423 000.00 as against total liabilities of some R98m which includes liability towards the applicant reckoned at some R70m. Accepting the respondent's figures, this will produce a concurrent dividend of only 0.0739c in the rand based on a free residue of some R72 000.00 available for creditors.

[70] If this were the only advantage to creditors I would have serious doubt as to whether a sequestration order would be justified. It is not necessary for me to determine this question, however, since the applicant makes out a much stronger case for there being an advantage to creditors on a different score.

[71] By way of introduction I observe that the papers in each of these applications demonstrate that the respondents are sophisticated businessmen who created a complex web of corporate personalities and cross ownerships to conduct their dealings. The papers reveal, furthermore, that around the time that the Knysna property deal went sour, the respondents sold their primary residences to their spouses and disposed of their shareholding in various companies which were part of the Aslo Group, often at par value or for nominal sums. Many of their assets were transferred from their personal ownership into trusts of which they are either trustees or co-trustees together with members of their family or business associates. The applicant's main contention is, therefore, that a proper investigation of the respondent's affairs by a trustee is likely to bring to light further assets over and above those disclosed by the respondent. It further contends that a series of transactions

concluded by the respondent during 2008 – 2011, in terms of which he disposed of several assets held by him in his personal capacity at no or nominal values, were designed to protect his assets against claims from creditors and may be impeachable in terms of the Insolvency Act.

[72] Amongst the most important such transactions are the following:

1. At the end of 2008 the respondent transferred the family residence in Paarl to his wife for an amount of R2.5m which she in turn is alleged to have financed with the remainder of a donation which the respondent made to her in June 2007. Although the respondent asserts that at the material time he was solvent, he only does so by dint of excluding his suretyship liability to the applicant on the basis that *"the relevant entities had the necessary resources to pay these amounts"* at the time. This assumption is questionable since it is common cause that Dormell 260 was unable to meet its financial obligations to the applicant from mid-2008 onwards. On the basis of the principle laid down in *Millman and Another NNO v Masterbond Participation Bond Trust Managers (Pty) Ltd (under curatorship) and Others* 1997 (1) SA 113 (C) the respondent's suretyship indebtedness has to be included amongst his liabilities to determine his solvency for the purposes of sections 26, 29 and 30 of the Insolvency Act. It follows that the respondent may well have been insolvent when he transferred the family residence to the second respondent. For this and for other reasons which need not be listed the respondent's transfer of the family residence to the second respondent is a transaction warranting

further investigation by a trustee with a view to setting aside the disposition in terms of sections 26 and 31 of the Insolvency Act.

[73] Further dispositions of assets by the respondent which appear to justify an investigation are the transfers, in the 2011 financial year, of certain shares in trading companies which the respondent previously held in his personal capacity, to the Anton Louw Family Trust, a family trust in which he has an interest. These shares were transferred at a nominal value, allegedly after the retained income in each company had been "*wiped out*" by a nett loss. There is, however, no explanation of why the respondent considered it necessary to transfer these shares to the family trust if indeed they had no value. Furthermore, the applicant has set out circumstances indicating that the shares in two particular companies, JLK Projects and Construction and JLK Plant, had a substantial value at the date of transfer to the trust and that their disposition for a nominal value might be impeachable in terms of s 26 of the Insolvency Act. There are also indications that the family trust might be an alter ego trust used by the respondent to shield his assets from creditors' claims.

[74] There are other aspects of the respondent's financial affairs which may warrant closer scrutiny by a trustee. These include indications that the respondent failed to declare or understated dividends which apparently accrued to him from JLK Project and Construction as well as remuneration from that company and JLK Plant. There is also the question of an unexplained erosion in the respondent's personal assets over the period 2008 – 2011.

[75] In my view the applicant has made out a convincing case that there is reason to believe that there are various dispositions of assets and other

aspects of the respondent's financial affairs which may yield a benefit for his creditors after investigation by a trustee.

[76] It is well established that an advantage to creditors need not necessarily be an immediate financial benefit but may be satisfied by the possible discovery or recovery of further assets as a result of investigations or the setting aside of impeachable transactions. In *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA), Cameron JA confirmed that an absence of disclosed assets does not preclude sequestration since:

> *"(t)the court need be satisfied only that there is reason to believe – not necessarily a likelihood but a prospect not too remote – that as a result of investigation and inquiry assets might be unearthed that will benefit creditors".*

[77] I am satisfied that, from this perspective alone, the applicant has discharged the onus of establishing that there is reason to believe that there will be an advantage to creditors. The other elements necessary for the granting of a provisional sequestration order, namely, that the applicant has an aggregate liquidated claim of not less than R200.00 against the respondent and, in this case, that he is factually insolvent, justifies therefore the granting of a provisional order of sequestration.

MR JOHANNES LOUW

[78] The applicant's case against the respondent is similar in all material respects to that against the other two respondents. However, Mr Johannes Louw has appreciably more assets, on his own version, namely R2.4m, as against liabilities, estimated by him to amount to some R87m.

[79] The respondent contends that sequestration of estate will not be to advantage of creditors as they will receive only a negligible dividend of some 2.3 cents in the rand. In Meskin, Insolvency Law, the authors express the view that the authorities to the effect that the *"pecuniary benefit"* must be a *"not negligible dividend"*, are doubtful and that the correct position is that this requirement is satisfied where, *"after making allowance for the anticipated costs of sequestration there is a reasonable prospect of an actual payment being made to each creditor who proves a claim, however small such payment may be, unless some other means of dealing with the debtor's predicament is likely to yield a larger such payment."*[9]).

[80] I am not sure how far this approach can be taken where, for example, the dividend is no more than a fraction of a cent, but I have no difficulty with the envisaged dividend in the present matter. To deny the applicant a sequestration order in circumstances such as the present would, furthermore, produce the anomalous result of leaving the respondent in possession of a substantial estate notwithstanding the extensive liabilities which he has incurred. It would also give rise to the situation that large scale debtors with significant assets are *de facto* rendered immune against sequestration. In my view, in the circumstances of the present matter a dividend of 2.3cents in the rand is quite sufficient to establish an advantage to creditors.

[81] In any event the applicant also makes out a case that placing the respondent's estate into sequestration will have the further advantage for creditors that a trustee will be able to investigate a series of questionable transactions by the respondent with the possible result that such transactions may be set aside as dispositions without value or having been made by the

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[9] At page 2 - 20

respondent when he was insolvent or, indeed, further assets may be discovered.

[82] The affidavits reveal that the respondent, in similar circumstances to Mr Anton Louw, and at a time when Dormell 260 was unable to meet its obligations to the applicant, donated assets at a declared value of R3.2m to his wife. Although one such asset was apparently a vacant erf, it now appears to be the respondent's primary residence. The respondent's assertions that he was solvent at the time of the disposition are brought into question having regard to Dormell 260's dire financial position at the relevant time and to the principle in Millman's case (supra). Similar questions arise in relation to the respondent's sale to his wife in August 2011of his half share in a sectional title unit in Wellington, known as The Piano.

[83] Just as Mr Anton Louw is alleged to have done, and around the same time, the respondent transferred his shareholding in two trading companies in the Aslo Group to a family trust at par or nominal value. The applicant raises the same concerns as to the respondent's valuation and disposition of the shares. It also makes out a case that the family trust utilised by the respondent in some of these transactions may be an alter ego trust used by him to shield his personal assets from creditors' claims and that, as such, his affairs could be the subject of fruitful inquiry by a trustee with a view to bringing further assets to light for the benefit of creditors.

[84] In the circumstances, apart from a likely dividend of 2.7c in the rand, a sequestration order could very well bring the further advantage to creditors of providing the means and mechanisms for a trustee to delve into the respondent's financial affairs with a view to recovering further assets or

setting aside questionable transactions thereby ultimately enhancing the dividend payable to creditors.

[85] It follows that the applicant, having established that it has an aggregated liquidated claim of more than R200.00 and that the respondent is insolvent, a provisional sequestration order is warranted in this matter as well. In each of the three above matters there will be an order as set out in the annexures to the judgment.

COSTS IN THE COUNTER APPLICATION

[86] That leaves only the question of the costs in the counter application to be determined. The applicants argued that even if they should not succeed therein no costs order should be made against them inter alia because costs order should seldom, if ever, be made against unsuccessful litigants in constitutional challenges. In this regard they rely on the authority of *Bio Watch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

[87] The respondents argued that in such event the applicants should nonetheless bear the costs. In support of their argument they point out that two legs of the counter application, namely the challenges to the Companies Act and the Insolvency Act, had simply been abandoned by the applicants at a late stage. In their defence the applicants retorted that a relatively small part of the opposing papers had been taken up with the issue of the abandoned constitutional challenges and that the respondents should themselves have realised that these challenges would not be pursued given that the various companies in the Aslo Group had been placed into final liquidation or had been the subject of unsuccessful business rescue applications by the time that the respondents were required to file their answering affidavits.

[88] In *Bio Watch* the Constitutional Court held that it was not correct to begin the inquiry as to whether a costs award should be made with reference to the characterisation of the parties involved, for example, as a litigant acting in the public interest, and that the starting point had to be the nature of the issues. It held further that the primary consideration in constitutional litigation has to be the way in which a costs order would hinder or promote the advancement of constitutional justice; further, that what matters is not the nature of the parties or the causes they advanced, but the character of the litigation and their conduct in pursuit thereof. This means paying due regard to whether it had been undertaken to assert constitutional rights and whether there had been impropriety in the manner in which the litigation had been undertaken. Finally, it was held that private parties which had lost in constitutional litigation against the state should not as a rule be mulcted in costs. This means that when a private party sought to assert a constitutional right against the government and failed, each party would bear its own costs.

[89] Subject to these principles this Court must, of course, ultimately exercise a judicial discretion in determining what costs order should be made. Without suggesting any ranking order of importance, I consider that the following factors are material to this decision. The applicants mounted three constitutional challenges in this counter application but abandoned two of them at a relatively early stage and were tardy in formally advising the two Ministers involved that they were not pursuing such challenges. Their reasons for abandoning such challenges, namely, that they had become moot by reason of the liquidation of or unsuccessful applications for business rescue in relation to companies within the Aslo Group, had little to do with the respondents and merely served to emphasize that the challenges were

brought to protect their commercial interests. The applicants brought their challenges in their personal capacity and to protect their own interests; in short there is no suggestion that the applicants were acting in the public interest. The applicants achieved no success at all in their application. More importantly, the applicants launched their constitutional challenge well aware of the decision in this Court in *Hunky Dory (1)* to the effect that such a challenge was without any merit. That decision was in effect followed in *Hunky Dory (2)* where it was noted that both the Supreme Court of Appeal and the Constitutional Court had refused leave to appeal against the decision in *Hunky Dory (1).*

[90] In these circumstances, it appears to me, to make no costs order in respect of the counter application would border on finding that no costs order should ever be made in constitutional challenges, irrespective of the merits (or lack thereof) of the challenge or other relevant factors, a position which does not reflect the state of our law in this regard. I should add that were I of the view that a costs award against the applicants could have the effect of discouraging persons from pursuing constitutional claims in future, the so called *"chilling effect"*, I would not be inclined to make such an order. In my view, however, the circumstances of this matter are such that that the respondents are entitled to their costs in the counter application.

[91] In the result I order that the costs of the respondents in the counter application shall be costs in the applicants' sequestrated estates or, failing any such orders not being made final, shall be borne by such applicants, jointly and severally, the one paying the other to be absolved.

BOZALEK, J
JUDGE OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
BEFORE THE HONOURABLE MR JUSTICE BOZALEK

CAPE TOWN :

CASE NO: 21143/2011

In the matter between:

INVESTEC BANK LIMITED Applicant

(Registration No.)

and

JOHANNES ADRIAAN LOUW First Respondent

(I.D. No.)
(Address: 10 Du Mont Street, Paarl, Western Cape)

(Marital status: married out of community of property in terms of an antenuptial contract to CAROLA CECILE LOUW, identity number)

CAROLA CECILE LOUW Second Respondent

(I.D. No.)

(Address: 10 Du Mont Street, Paarl, Western Cape) (Marital status: married out of community of property in terms of an antenuptial contract to JOHANNES ADRIAAN LOUW, identity number)

ORDER

EDWARD NATHAN SONNENBERGS INC

C MORGAN

021 4102500

cmorgan@ens.co.za

Box 123

Having heard counsel for the applicant and having read the papers filed of record:

IT IS ORDERED THAT:

1. The estate of the first respondent is placed under provisional sequestration.

2. A rule nisi is issued calling upon the first and second respondents to show cause, if any, to this Honourable Court at 10h00 on 11 October 2012, why:

2.1. the first respondent's estate should not be placed under final sequestration; and

2.2. the costs of this application should not be costs in the administration of the first respondent's insolvent estate.

3. The order is to be served on:

3.1. the first respondent at 10 Du Mont Street, Paarl, Western Cape;

3.2. the second respondent at 10 Du Mont Street, Paarl, Western Cape;

3.3. the South African Revenue Service at 22 Hans Strijdom Avenue, Cape Town, Western Cape;

3.4. the employees of the first respondent, if any;

3.5. all registered trade unions representing the employees of the first respondent, if any.

BY ORDER OF THE COURT

COURT REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
BEFORE THE HONOURABLE MR JUSTICE BOZALEK
CAPE TOWN : WEDNESDAY, 12 SEPTEMBER 2012

CASE NO: 21144/2011

In the matter between:

INVESTEC BANK LIMITED — Applicant

(Registration No. 1969/004763/06)

and

DEWALD LOUW — First Respondent

(I.D. No.)

(Address: Klipdrif Farm, Robertson) (Marital status: married out of community of property in terms of an antenuptial contract to ANEL LOUW, identity number)

ANEL LOUW — Second Respondent

(I.D. No.)

(Address: Klipdrif Farm, Robertson) (Marital status: married out of community of property in terms of an antenuptial contract to DEWALD LOUW, identity number)

ORDER

EDWARD NATHAN SONNENBERGS INC
C MORGAN
021 4102500
cmorgan@nsco.za
Box 123

IT IS ORDERED THAT:

1. The estate of the first respondent is placed under provisional sequestration.

2. A rule nisi is issued calling upon the first and second respondents to show cause, if any, to this Honourable Court at 10h00 on 11 October 2012, why:

2.1. the first respondent's estate should not be placed under final sequestration; and

2.2. the costs of this application should not be costs in the administration of the first respondent's insolvent estate.

3. The order is to be served on:

3.1. the first respondent at Klipdrif Farm, Robertson, Western Cape;

3.2. the second respondent at Klipdrif Farm, Robertson, Western Cape;

3.3. the South African Revenue Service at 22 Hans Strijdom Avenue, Cape Town, Western Cape;

3.5 all registered trade unions representing the employees of the first respondent, if any.

BY ORDER OF THE COURT

COURT REGISTRAR