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

CASE NO: 11733/2011

In the matter between:

HENRY SCOTT WALLACE **Applicant**

and

BAREND JOSEPH HENDRICKS **Respondent**

JUDGMENT DELIVERED ON: 15 MARCH 2012

GOLIATH, J:

[1] This is an opposed application for the provisional sequestration of the estate of respondent, a businessman residing in Cape Town. The grounds upon which the application is founded are:

(a) The respondent is indebted to the applicant in the sum of R7 350 000.00 in his capacity as surety for the production company Gemini Moon (Pty) Ltd and a further sum of R200 000.00 arising from a loan agreement.

(b) The respondent committed an act of insolvency in terms of sections 8(g) and 8(c) of the Insolvency Act 24 of 1936.

(c) The respondent is factually insolvent.

[2] It is common cause that Gemini Moon was to be used as the vehicle for the production of "The South African Story", a television documentary narrated by Archbishop Tutu, which had been intended to capitalise on the 2010 soccer world cup.

[3] According to respondent he was initially approached to secure funding for the project by Oryx Media Production, which is owned by Benjamin Gool and Roger Friedman (Gool and Friedman). Friedman prepared the business plan and financial projections of the production. The respondent in turn approached the applicant as a personal friend for financial assistance towards the project. The applicant agreed and various transaction documents were executed in respect of the funding to be advanced to Gemini Moon, namely heads of agreement, a shareholders agreement, a loan agreement as well as suretyship agreements. The heads of agreement concluded between Friedman, Gool, Oryx, applicant and respondent on 13 December 2002 provide an insight into the agreement envisaged, once certain matters of principle had been finalized in the shareholder's agreement.

[4] The shareholders agreement provided for four shareholders in Gemini, namely, the filmmakers Gool and Friedman, Oryx Media Productions (Oryx), applicant and respondent. Respondent owned 40 of the 120 issued shares, Gool and Friedman 20 shares each, Oryx 20 shares and applicant 40 shares. Respondent, Gool, Friedman and Oryx executed suretyships in respect of the first loan agreement in the sum of R6.5 million. By April 2010 the project funds were depleted and a further loan of R650 000.00 was advanced by applicant to Gemini Moon as recorded in the second loan agreement dated 11 April 2010. Once again respondent, Gool, Friedman and Oryx signed surety for the second loan.

[5] By August 2010 the series was complete, but the music rights for the film had not been paid. Clockwork Zoo demanded R200 000.00 for finalization of the music rights. At this stage the relationship amongst the shareholders was strained and applicant agreed to pay the sum of R200 000.00 on condition that respondent accepts personal liability for the loan. This culminated in a controversial third loan agreement which was entered into on 1 October 2010.

[6] The relationship between applicant and respondent was strained after applicant levelled serious accusations of alleged mismanagement of funds deposited in respondent's account from Gemini Moon's account. Respondent acted as the managing director of Gemini Moon with primary responsibility for its finances in terms of the shareholders agreement. Applicant discovered that the

respondent had transferred R2 322 600.00 of the loan to Gemini Moon into his own bank account shortly after the loan was deposited into Gemini Moon's account in December 2009. No accounting records were maintained by Gemini Moon. An audit of Gemini Moon revealed that the net amount misappropriated by respondent and not repaid was R769 613.00 which had accrued interest of R204 140.72 as at the end of 2010. By 10 January 2010 a balance of R27 858.64 was left of the loan.

[7] It is common cause that the respondent signed a loan certificate in support of the auditor's finding that an amount of R769 613.00 was due by him. He avers he was misled by the auditor Ms Galbraith, who advised him that his signature on the loan certificate was required solely for the purposes of finalizing the audit. Ms Galbraith subsequently made a report to the Independent Regulating Board for Auditors in which she relied on the loan certificate to report an alleged irregularity regarding the respondent's conduct in relation to the funds of Gemini Moon. Respondent subsequently instructed his attorneys to query the report and pursued his own forensic audit of the alleged irregular transactions. Respondent contends that this audit concluded that Gemini Moon is in actual fact indebted to him in the sum of R333 291.00. He accordingly denies that he misappropriated the funds or used same for his own benefit.

[8] Respondent acknowledged that monies were transferred from Gemini Moon to his account, but avers it was done with the knowledge and approval of

Gool, Friedman and Oryx. According to him the four of them agreed to disburse the R6.5 million loan, less legal fees as follows:

8.1 Approximately R2 million would be paid to respondent in respect of the following:

8.1.1 repayment of his R500 000.00 bridging loan, as recorded in clause 15.21 of the Shareholders Agreement and as agreed between the parties;

8.1.2 R500 000.00 in respect of half of the costs of Archbishop Tutu's hosting services for the project (totalling R1 million). Immediately upon receipt of these funds from Gemini Moon into his personal account, he duly paid the amount of R500 000.00, by way of a personal cheque to Archbishop Tutu;

8.1.3 R1 million for him, as paymaster, to enable him to make cash payments and disburse other funds from his personal account on behalf of the project.

8.2 R2 million to Clockwork Zoo, a production house contracted to do the production and post-production of the film. (The balance of its

fee would be paid in part from funding received (an amount of R500 000.00) after delivery of the first episode, and in part from income earned from secured sales on the basis of R100 000.00 per episode upon completion of each episode);

8.3 R2 million to Oryx in respect of the following:-

8.3.1 R500 000.00 in respect of the balance due to Archbishop Tutu for his hosting services, which would be due at the end of the production.

8.3.2 R500 000 00 towards Clockwork Zoo's fees that would become due in the future. In this regard, Gool told respondent that he wanted control of these funds so that he could ensure Clockwork Zoo did their work properly and would only be paid when he was satisfied in this regard.

8.3.3 R1 million in advance to Oryx to enable them to fulfil their responsibilities in respect of the production (although no invoices were submitted by them at the time).

[9] Respondent alleges that all the funds transferred into his personal account from Gemini Moon's account have been accounted for. By January 2010 all the

money received by applicant was transferred in respect of project expenses. Subsequently Clockwork Zoo was paid R800 000.00 which was made up of the balance of the funds plus the second loan of R650 000.00.

[10] The respondent submits that it was recorded that he had sponsored Gool, Friedman and Oryx the amount of R500 000.00 as a bridging loan in respect of production and pre-production costs and that it was agreed that Gemini Moon would forthwith repay him. Applicant disputes this since it is evident that there is no documentation on record in support of this allegation.

[11] The initial deadline for repayment of the first loan was 30 April 2010, failing which it could be called up by applicant. Despite the failure to repay the loan before this deadline, a further loan was granted to Gemini Moon on 11 April 2010 as recorded in the second loan agreement. During this period respondent was extremely optimistic about the project and his e-mails reflected revenue projections of R13 million from various sources. The world cup was imminent hence applicant proceeded to advance the second loan of R650 000.00. Thereafter the tone of respondent's e-mails to applicant changed, highlighting numerous challenges with the project. In the final analysis none of respondent's projections and undertakings materialized. Applicant concluded that he was deliberately misled by the respondent. However, respondent avers that he acted as director of Gemini Moon from January 2010 until June 2011, whereafter Friedman took over the running of the company. The failure to meet the

production deadline was due to a dispute which arose in respect of payments claimed by Clockwork Zoo. In addition to this the project did not secure the funding projected despite overwhelming interest, which was outside Gemini Moon's control.

[12] On 1 October 2010 the parties entered into a third loan agreement which provides as follows:

12.1 Applicant had the right, in the event that the full further loan of R200 000.00 had not been repaid to him by the respondent by 30 November 2010, to call up whatever the outstanding amount might be by way of two months' written notice (clause 5.3);

12.2 The respondent acknowledged that Gemini Moon was at that stage indebted to applicant in the total amount of R7.15 million and that respondent stood surety for such obligation (clause 5.5);

12.3 The respondent agreed that in the event that the full amount of R7.15 million plus interest had not been paid by him to applicant by 30 November 2010, then applicant would have the right to call up the amount outstanding 'by way of two months' notice in writing' to him (clause 5.6);

12.4 The respondent was not entitled to withhold or defer payment and was not entitled to set off any amounts that might be due to him by applicant (clause 6); and

12.5 The respondent agreed that his total loan obligations to applicant amounted to R7.35 million and agreed that, should respondent not have paid the amount of R7.15 million by 30 November 2010, then a certificate by applicant would be prima facie proof of the balance owing by him (clause 7.1).

[13] Respondent contends that a draft loan agreement was presented to him on 30 September 2010 by Mr Jeftha, an attorney who had always acted as their attorney on the project. The draft was marked as a final and corrected draft which purported to deal with the R200 000.00 loan. He raised concerns regarding the draft and requested the removal of certain provisions. After these concerns were raised Mr Jephta amended the draft agreement by extending the repayment date, removing the objectionable provisions and by inserting a number of additional terms. The additional terms included an obligation on the respondent to repay not only the R200 000.00 but also the earlier loans of R7.15 million, as well as a consent to judgment. Jephta contends that changes were made to the third loan agreement in order to "tighten up the applicant's security". The additional terms also made provision for the release of any of the sureties. According to respondent he had not agreed to these terms since they all served

to significantly prejudice his position. Jephta disputes these allegations and states that respondent was duly consulted and agreed to all the terms in the agreement.

[14] It is common cause that the agreement was finalized on an urgent basis and respondent was not furnished with a copy of the agreement. According to respondent he only became aware of the additional terms when his attorneys of record were furnished with a copy thereof. Consequently the applicant gave respondent two months written notice of his intention to call up his loan to Gemini Moon, in terms of the third loan agreement after Gemini Moon failed to repay the outstanding monies before the due date. The respondent alleges that the third loan agreement was induced by a fraudulent misrepresentation made by Mr Jephta as a result of which this agreement, which purported to negate the first and second loan agreements, is voidable at his instance.

[15] Respondent further argued that there are two further grounds upon which he should be released from his suretyship obligations:

(a) Clause 2.3 of the shareholders agreement provides that in the event of his shareholding being acquired by another shareholder, the purchasing shareholder is required to procure his release from his suretyship obligations towards Gemini Moon.

(b) Gemini Moon was obliged to apply funds received from whatever source towards the repayment of the applicant's loan in terms of the first loan agreement and the shareholders agreement.

[16] On 1 December 2010 respondent signed a share transfer form to facilitate his exit from the company. The respondent submits that the applicant had purchased his shares and consequently controls the majority shares in Gemini Moon. According to applicant the respondent resigned as a director of Gemini Moon in November 2010 and relinquished his shareholding in the company to applicant in December 2010. No consideration was paid for respondent's shares. Applicant contends that he is currently holding the shares as nominee for the Desmond Tutu Peace Foundation. The respondent avers that the applicant effectively took over control of Gemini Moon with the consent of the remaining shareholders.

[17] Respondent also takes issue with funding received from the Department of Trade and Industry DTI and argues that notwithstanding the receipt of the sum of R2 803 653.00 from the DTI and from sales of the production, the applicant has failed to apply the funds to reduce the loan of Gemini Moon. Applicant contends that the DTI rebate was obtained on 10 December 2010 after he made an additional fourth loan to Gemini Moon in the sum of R3 045 000.00, after respondent had fully withdrawn from the project on 28 September 2010. Consequently the directors and shareholders agreed that other more pressing

creditors needed to be paid before him. Furthermore, it is argued, the requirements that Gemini Moon repay him first was inserted for his benefit and he was free to wave strict enforcement of it. Respondent contends that applying funds received by Gemini Moon towards repayment of other unsecured loans was unfairly prejudicial to him and justifies his release from the suretyship. Alternatively respondent argues that even if the court finds the agreements relied upon by the applicant are valid, the quantum owing to applicant is substantially less than the amount claimed by him in view of the DTI funding received.

[18] It is not disputed that respondent repeatedly promised to repay the loans in respect of the project. Many e-mails were exchanged reflecting an inability to pay and in an e-mail dated 25 January 2011 stated the following:

> *"... it has become clear that I will not be in a position to fulfil our agreement. As I have indicated previously I have no noteworthy investment and guarantees in fact I am technical and for all intent and purposes insolvent. Although my financial situation is dire and receiving letters of demand I have already informed the bank that I am giving up my house and have already sold my cars .. At this stage here is precious little to recover as I am so flat broke that I will barely just breaking even if the bank sell the house ... If you give me the necessary time the chances of recovering your money is virtually assured ... The refinery will happen ..."*

[19] Respondent admits that he sent numerous e-mails to applicant in circumstances where he felt a huge sense of personal regret and guilt due to Gemini Moon's inability to settle the debt. His assurances arose purely out of a moral obligation to accept responsibility for the loans. According to respondent he only experienced cash flow problems at the time but in reality the value of his assets substantially exceeds his liabilities as reflected in the report verified by his auditor Mr Lakhani of Greenwoods Chartered Accountants.

[20] It is common cause that Gool and Friedman in their capacities as owners of Oryx Media Production approached the respondent for assistance with the project. Respondent in turn, persuaded the applicant to invest a substantial sum in the project. It was a legitimate project which was eventually finalized albeit not within its time limit and projected profit predictions. A substantial amount of the loan was absorbed by the production costs, payments to Gool, Friedman, Oryx and the narrator. Gemini Moon failed to keep proper accounting records and an amount of R769 613 is alleged to be unaccounted for as at January 2011. The respondent admits that monies had been transferred directly into his personal account and thereafter disbursed to the recipients. Applicant expressed the view that respondent mismanaged the project which led to the collapse in the revenue projections for Gemini Moon. He confirms that Gool and Friedman are still owed approximately R1 million for their work on the production which Gemini Moon is not in a position to repay. Respondent eventually withdrew from the project and applicant look over the running of the company.

[21] Applicant contends that the respondent's financial report is of no evidentiary value since it relies on unsubstantiated and speculative valuations placed on difficult to value shareholdings in private companies held via other private companies. I am in agreement with this view. Applicant correctly questioned the methodology used by the auditors in calculating the value of respondent's interests in the various entities. The financial statements reflect uncorroborated valuations from unexplained sources hence a court cannot attach too much weight to it. Against this background it is highly improbable that the respondent's assets exceeded his liabilities as reflected in his financial statements. I am therefore satisfied that the respondent is unable to honour his surety obligations towards the debts of Gemini Moon. In my view, the applicant has made out a *prima facie* case that the respondent was unable to repay the debt.

[22] Initially respondent accepted his surety obligations and liability to settle the debts of Gemini Moon. However, e-mail communications indicates that he experienced cash flow problems and even had to sell his assets. He informed applicant in an e-mail dated 25 January 2011 of his intention to sell his house and motor vehicles. He subsequently confirmed an inability to settle the debt and stressed that he had no assets to use as collateral, nor was his Namibia refinery project able to generate any income. One creditor obtained judgment against him.

[23] It is evident from the applicant's replying papers that applicant appointed a private investigator to investigate respondent's affairs and recorded conversations with respondent without his knowledge. The disclosure of the recordings was aimed at disproving certain allegations made by respondent. Consequently applicant contends that the respondent had lied on every material factual issue on which his opposition to this application is based, more particularly his alleged ignorance of the consent to judgment.

[24] In **Julie Whyte Dresses (Pty) Ltd v Whitehead** 1970(3) SA 218 (D) at 219 A-B **Muller, J** said the following:

> *"It is clear that section 10 of the Insolvency Act vests the Court with a discretion to be exercised judicially upon a consideration of all the facts and circumstances of the case. In proper circumstances the Court may refuse to make a provisional sequestration order, although all the requirements of section 10 have prima facie been established by the petitioner. This must be so in view of the serious consequences that flow from the making of a provisional sequestration order."*

In my view the circumstances of this case justify the exercise of my discretion in favour of respondent. The respondent holds approximately 38 directorships and will be barred from doing so if his estate is sequestrated. Only one creditor took action against him and there is no indication of other pressing creditors. He

disposed of his house and motor vehicles in a transparent manner with applicant's knowledge well in advance. There are many unexplained and contentious issues raised in this application, more particularly the circumstances surrounding the third loan agreement. Despite my reservations and finding concerning respondent's inability to pay, I am not persuaded that it would be just and equitable if respondent is provisionally sequestrated. Furthermore, the circumstances in my view, also do not justify a conclusion that the unsuccessful party should pay the costs.

[25] In the result the following order is made:

1. **The application for a provisional sequestration order against respondent is dismissed.**

2. **No order is made as to costs.**

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P L GOLIATH
JUDGE