THE REPUBLIC OF SOUTH AFRICA

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

Case No.: 20498/2012

In the matter between:

VINCEMUS INVESTMENTS (PTY) LTD t/a KEMPTSON FINANCE **Applicant**

and

DENIS HENRY KAYE **First Respondent**

Date of Birth	
Identity Number	
Marital Status	Married out of Community of property
Name of Spouse	Bernice Kaye
Date of Birth of Spouse	
Identity number of Spouse	

BERNICE KAYE **Second Respondent**

Date of Birth	
Identity Number	
Marital Status	Married out of Community of property
Name of Spouse	Denis Henry Kaye
Date of Birth of Spouse	
Identity number of Spouse	

JUDGEMENT: 9 OCTOBER 2013

BOZALEK, J:

[1] This is the extended return date of a provisional order placing the estate of the first respondent ('the respondent') into sequestration. The provisional order was made on 6 February 2013 by Boqwana AJ, returnable on 12 March 2013. On that day the order was extended and an agreement was reached between the parties that the respondent would file a further affidavit and, thereafter, the

applicant would file its response thereto. These affidavits were duly filed as well as a supplementary affidavit by the applicant.

[2] At the hearing the applicant was represented by Mr Mundell SC together with Ms Buikman. The first respondent appeared in person, his attorneys of record having withdrawn shortly before the hearing.

[3] The sequestration application was initially based upon a debt of some R12mil odd owing to the applicant by Sarepta Trading (Pty) Ltd ('Sarepta'), a transportation business of which the respondent was the managing director, and which arose out of some 29 lease agreements in respect of vehicles used by the business. By September 2012 Sarepta had fallen into arrears in respect of all of the leases and its monthly payments effectively ceased from that time. The lease agreements were cancelled by the applicant. It then launched liquidation proceedings against Sarepta and sequestration proceedings against the respondent on the basis of his joint liability for the amounts owing by Sarepta pursuant to his standing surety for its obligations.

[4] The respondent opposed the granting of the provisional sequestration order on the grounds that the applicant had no liquidated claim, that he was neither insolvent nor had committed an act of insolvency and, furthermore, that an order would produce no benefit for creditors.

[5] In granting the provisional order Boqwana AJ, noted that, pursuant to cancelling the lease agreements, the applicant had a claim for damages of the order of R12mil odd against Sarepta (and the respondent). She found that

inasmuch as such claim included the amount of R1 059 744.51, being the arrears on the agreements at the time that they were cancelled, to this extent at least the applicant had a liquidated claim against the respondent and thus *locus standi vis a vis* the respondent.

[6] The learned judge found further that since the applicant was unable to find any assets registered in the name of the respondent (and the respondent's failure to set out any facts to the contrary) and in the light of his obligations in terms of the suretyship agreements, his insolvency had been sufficiently proven. Boqwana AJ had regard to evidence furnished by the applicant that the respondent was a prominent businessman with directorships in several companies and had at his disposal the use of luxurious homes in both Cape Town and Plettenberg Bay, albeit that these were registered in the names of a trust and a company respectively. In the light thereof she found that the applicant had established that it would be in the interests of creditors for a provisional order of sequestration to follow so that a trustee could investigate these matters with a view to piercing the corporate veil and realising a benefit for creditors.

[7] The additional affidavit furnished by the applicant and respondent after the provisional order returned to the issues of whether the applicant in fact had a liquidated claim as well as the issue of whether a sequestration order would produce a benefit to creditors albeit that a new tack was taken in each instance.

[8] In the first place the respondent gave full particulars of the insured values of the 29 leased vehicles which sums he used as a basis for their valuation in the total amount of R12 735 216.00. He noted that this exceeded by nearly R1.6mil

the total balance outstanding by Sarepta on the lease agreements, including the arrear rentals. The respondent stated that he had established from the applicant that it had chosen not to sell the vehicles but to retain them and in the circumstances he contended that the applicant's claim/s had been settled and that neither Sarepta nor he were debtors of the applicant.

[9] As regards the requirement of there being an advantage to creditors the respondent, for the first time, gave details of the trust and the company which held the two properties he utilised, how they came to acquire those properties and the bonds registered against them. He did this with a view to establishing that the properties could not be regarded as assets in his estate and that a trustee would have no claim to the properties in any form whatsoever. He gave further details of his role in various companies and his various interests, the net effect of which was that he enjoyed no salary from these companies nor had he any claims against them and he was, in short, possessed of no assets of any significance.

[10] In response the applicant filed detailed valuation certificates by an appraiser in terms of s(6)(1) of the Administration of Estates Act, No 66 of 1965 giving both the forced sale values and market values of each of the 29 vehicles. These totals were, respectively R5 532 000.00 and R7 532 000.00. The applicant pointed out that as 18 November 2012, the date on which Sarepta was placed in provisional liquidation, the amounts *'owing'* to the applicant in respect of the 29 vehicles leased to Sarepta was R13 064mil. The applicant explained, furthermore, that when it was eventually able to repossess the vehicles from Sarepta, it sold them to one of its group companies at the *'forced sale values'*. In these circumstances, it contended, it had established a liquidated claim for the difference between the

total amount owing under the lease agreement, namely, R13 064mil less the total forced sale prices of the vehicles i.e. R7 532 mil. In the alternative, it contended that, if the market values were attributed to these vehicles its liquidated claim against Sarepta (and the respondent) amounted to the sum of R4.990mil.

[11] The applicant took issue with the respondent's contentions that the sums for which the vehicles were insured represented their value and pointed out that even if these values were used the applicant would nonetheless retain a liquidated claim against Sarepta, and hence the respondent, in the sum of R329 000 odd. In the circumstances it contended that on any calculation it had a liquidated claim well in excess of the sum of R100.00 as required by s9(1) of the Insolvency Act.

[12] As regards the question of the advantage to creditors the applicant's deponent analysed and then took issue with the respondent's description of his financial affairs. In doing so he pointed to the improbability of the respondent having no funds or assets notwithstanding that he controlled the property-owning company ('Belladensel') and was one of three trustees of a trust in whose names respectively were registered the two valuable properties in Plettenberg Bay and Cape Town. The applicant's deponent contended that, having regard to the interrelationship between the respondent, the trust, Sarepta and Belladensel that all these entities were parties to a universal partnership and could be held liable for the debts of Sarepta and the respondent by *'piercing the veil'*. In the circumstances, the applicant contended, a final sequestration order would definitely hold an advantage for creditors in that the newly appointed trustee could, through the machinery of the Insolvency Act, investigate all relevant aspects

of the respondent's financial affairs in detail, gain access to his bank statements and the like with the real possibility that this would uncover assets which could be utilised for the benefits of the respondent's creditors.

[13] Since the additional affidavits were furnished pursuant to an agreement between the parties which was made an order of court there can be no difficulty with the court having regard to their contents in determining whether a final order should be granted or not.

[14] Finally, the applicant filed a supplementary affidavit dealing with aspects of a s417 Companies Act inquiry held pursuant to the winding up of Sarepta in which evidence was heard on 22 and 23 July 2013. It would appear the respondent, his wife (the second respondent) and his attorney, Mr Vukic, gave evidence at this inquiry as a result of which the following main points emerged:

1. The latest financial statements for the trust owning the Cape Town property utilized by the respondent valued it at R13mil whilst the financial statements of Belladensel revealed the value of the residential property in Plettenberg Bay to be R6.5mil. Prior to the provisional order of sequestration the respondent was the only director of Belladensel whilst the second respondent is now the sole director.
2. Both the trust and Belladensel have guaranteed, through deeds of suretyship, the liabilities owing to a finance company, Merchant Commercial Finance ('Merchant') by Sarepta and two other companies controlled by the respondent. Prior to the respondent's provisional sequestration Merchant had registered collateral bonds over both

properties as security for the indebtedness owing to it by the trust and Belladensel.

3. The trusts co-trustees confirmed at the inquiry that they occupy their positions as no more than figureheads and do the respondent's bidding without demur. Although the trust and Belladensel are registered and incorporated entities respectively, both are nothing more than a cover for the respondent who burdened and encumbered them in his discretion and who treated both properties as his and his family's assets. In this regard the applicant annexed an email from the respondent in which he refers to the properties as *'my house'* and *'our Plettenberg Bay home'* respectively.

[15] In addition the deponent to the applicant's supplementary affidavit stated that evidence at the inquiry had revealed that there had been collusive dealings between the respondent and Merchant so as to ensure that the latter had been secured and preferred as a creditor. In this regard reliance was placed on an alleged reversal of Sarepta's assets, or at least its encumbered assets, into a company, Taxi Logistics, also controlled by the respondent, at a time when Sarepta found itself in financial difficulties. Merchant then took a general notarial bond over these assets, secured by deeds of suretyship from the trust and Belladensel. In due course Taxi Logistics was placed into liquidation at the instance of Merchant. It is alleged that the notarial bond was perfected with a result that Merchant secured its claim to Sarepta's assets to the prejudice of that company's other creditors.

[16] The entire scheme, it is alleged, was evidence of collusive dealings between respondent in his personal capacity and as the representative of Taxi Logistics and Merchant.

[17] It was further alleged that it would be open to the liquidators of Sarepta and to the respondent's trustees, in the event that the provisional sequestration order was made final, to invoke the provisions of s31 of the Insolvency Act to set aside those transactions and seek further appropriate relief which would be in the interests of the creditors of Sarepta and the respondent.

[18] The respondent raised no objection to the furnishing of this further affidavit nor did he seek to reply thereto. Since the facts set out in this affidavit only came to light in July of this year through the s417 inquiry, and were not available at the time that the provisional order was sought, I consider that it would be appropriate for the affidavit to be admitted.

[19] In the light of the respondent's opposition to the finalisation of the provisional order and the considerable additional information which has been furnished by way of additional affidavits it is appropriate to again consider the elements which must be established by the applicant in order to obtain a final order of sequestration, namely:

1) that it has a liquidated claim in the amount of at least R100.00;

2) that the respondent is insolvent or has committed an act of insolvency;

3) that there is reason to believe that it will be to the advantage of the creditors of the respondent if his estate is sequestrated.

LIQUIDATED CLAIM

[20] It is well established that a liquidated claim in terms of s9(1) of the Insolvency Act means a claim where the amount is fixed either by agreement or by an order of Court or otherwise.[1] In *Hassan v Berrange NO* 2012 (6) SA 329 at para [35] the SCA stated that what the Legislature intended in this regard '*was that there should be certainty in connection with the amount of the claim which was not affected by the legal basis and nature thereof*'. In that case the applicant's liquidated claim was for the value of certain shares in a company allegedly misappropriated by the respondent and which had given rise to a delictual claim for damages on the part of the applicant against the respondent. The SCA held that this was a liquidated claim in that the shares were traded on the stock exchange and their market value was therefore easily determinable.

[21] The applicant in this matter similarly enjoys a delictual claim for damages against Sarepta after having cancelled a series of lease agreements. Whatever the case may have been when the sequestration proceedings were launched it would appear that on any reckoning the applicant has a claim which satisfies the requirements of s9(1) of the Act. It has now disposed of the vehicles at their forced sale values, which values were supported by formal valuations, thus leaving it with a liquidated claim, calculated as above, in the amount of R4, 990mil. Even if one employs the market value referred to in the sworn valuations or, for that matter the insured values which were relied upon by the respondent, the applicant is left with a substantial and liquidated claim.

[1] Kleynhans v Van der Westhuizen NO 1970 (2) SA 742 (A) at 749 E and 750 A - B

[22] In argument the respondent took issue with the figure of R13 064mil which the applicant utilised as the high watermark of its claim and from which it subtracted either the purchase prices it secured for the vehicles or the differing values contended for. The respondent pointed to the fact that in the founding papers the applicant relied on an amount of R12 010mil as being the total sums outstanding in terms of the lease agreement as at the date of their cancellation and hence as a measure of the applicant's damages. That sum was confirmed by a certificate of indebtedness and the working papers in respect of each lease agreement evidenced the manner in which the total liability was calculated and arrived at. However, in its affidavit in response to the respondent's supplementary affidavit the applicant utilised the increased figure of R13 064mil. The annexure on which this figure was based, however, indicates that these were the amounts owing as at 28 November 2012, a month later than the date referred to in the original certificate relied upon. Although there is no breakdown of this figure nor an explanation of the discrepancy between the two figures, a perusal of the various working documents contained in the applicant's founding papers indicate that the total monthly instalments on the 29 lease agreements approached half a million rand. Furthermore, although the respondent calls the figure of R13 064mil into question he himself produced no evidence, detailed or otherwise, to suggest that it was incorrect.

[23] Taking all these factors into account I consider that the applicant has proved on a balance of probabilities that it has a liquidated claim of at least R364 000.00.

[24] I find myself in respectful agreement with Boqwana AJ insofar as she rejected the applicant's reliance on an alleged act of insolvency on the part of the respondent. This leaves the applicant to rely on the respondent being *de facto* insolvent. An anomalous position presents itself in this regard since the respondent has declined to give any detailed account of his estate or financial position, apparently relying on the assertion that all the assets which he enjoys are owned by other entities. At no point does he suggest that he has the means to meet any claims which the applicant may have against him arising out of the suretyship agreements which he concluded. It is the applicant which contends that the respondent does have an estate and that, if the necessary investigation and enquiries are made by a trustee, assets will be discovered which will produce a benefit for creditors. In these circumstances it appears to me that this issue must be determined on the basis of the respondent's case, namely that, faced with a claim of any substance from the applicant, he is *de facto* insolvent. In the circumstances I find that this requirement has been proved by the applicant.

ADVANTAGE TO CREDITORS

[25] This leaves the requirement of there being reason to believe that any sequestration order will result in an advantage to creditors.

[26] The respondent's case that he is possessed of no assets at all is to a large extent based upon an acceptance of the legal arrangements whereby the residential property in which he resides in Constantia and the holiday home which he enjoys in Plettenberg Bay are owned respectively by a trust and Belladensel. Doubt is cast on the validity of these legal relationships, however, in the light of

the evidence heard at the s417 inquiry into the affairs of Sarepta. In terms of the applicant's summary of the evidence given at that inquiry a picture emerges of these two vehicles being, utilised by the respondent as he saw fit to advance his personal and business interests with his fellow trustees being at best, passive figures. It appears to be common course, moreover, that the respondent used those assets to finance, directly or indirectly, his business interests with the result that Merchant holds a bond over the Constantia property in the sum of R8mil and two bonds over the Plettenberg Bay property in the sum of R5mil.

[27] On the evidence led at the inquiry there is also room for the argument that there were collusive dealings between the respondent and Merchant as contemplated in s31 of the Insolvency Act arising out of the Merchant causing collateral security bonds to be registered over these properties to secure liabilities owing to it *inter alia* by Sarepta. This raises the possibility of the respondent's trustee, after the necessary investigation, bringing an action to set aside such security. If, in addition thereto, the trustee is able to establish that the trust and Belladensel are in effect respondent's alter ego the substantial assets presently vesting in the trust and in Belladensel will accrue to the benefit of the respondent and may be realised in satisfaction of his debts. In this regard the following dictum of Cameron JA in *Land and Agricultural Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA) at para [37.3] is relevant:

> *'It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust formed was a mere cover for the conduct of business "as before" , and that the assets allegedly vesting in trustees in fact belong to one or more of the*

trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust.'

[28] The respondent, on his own account, has been a very successful business man in the transport industry for at least 30 years. During this period he has established, built and sold various transport businesses worth considerable sums of money. The respondent holds directorships in other companies and appears to lead a lifestyle commensurate with these offices. He himself has provided almost no detail of his financial circumstances in these papers and is improbable that throughout all these years he has not managed to build up a significant estate even if it excludes the two properties which he utilizes.

[29] In *Commissioner, SARS v Hawker Aviation Partnerships and Others* 2006 (4) SA 292 (SCA) at para [29] the Supreme Court of Appeal held as follows:

'The question is whether the commissioner has established that sequestration would render any benefit to creditors give that the partnership is now defunct. The answer seems to lie in those decisions that have held that a court need not be satisfied that there will be an advantage to creditors in the sense of immediate financial benefit. 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.

[30] It is of course beyond this Court's remit to make any findings in regard to the lawfulness or otherwise of the various arrangements which the respondent may have utilised in dealing with the two properties in question. Should a final order of sequestration be granted legal machinery becomes available to the respondent's trustee to control the collection, custody and disposal of any asset in the respondent's estate and to inquire into and establish whether such assets exist

notwithstanding the various legal arrangements upon which the respondent relies in denying their existence. On the overall picture it appears to me that the applicant has established that there is reason to believe that, should an investigation be commenced by the respondent's trustee into his affairs using the legal machinery at his disposal, an advantage will accrue to creditors.

[31] For these reasons I am satisfied that the applicant has satisfied the test for establishing an advantage to creditors as contemplated in s10(1)(c) of the Insolvency Act and, as a result, all the requirements for a final sequestration order.

[32] In the result, for these reasons the provisional order for sequestration is made final.

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L. J. BOZALEK

JUDGE OF THE HIGH COURT