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

Case No 16211/13

In the matter between:

LAMBERTUS VON WIELLIGH BESTER N O	First Applicant
KGASHONE CHRISTOPHER MONYELA N O	Second Applicant
BETHUEL BILLYBOY MAHLATSI N O (in their capacities as joint liquidators of Sarepta Trading (Pty) Limited (in liquidation))	Third Applicant
VINCEMUS INVESTMENTS (PTY) LIMITED t/a *Kempston Finance*	Fourth Applicant

and

MERCHANT COMMERCIAL FINANCE (PTY) LIMITED t/a *Merchant Factors*	First Respondent
& 3 other Respondents	

Court: GRIESEL J

Heard: 12 February 2014

Delivered: 18 February 2014

JUDGMENT

GRIESEL J:

Introduction

[1] The fourth applicant, Vincemus Investments (Pty) Limited, trading as *Kempston Finance*, launched an urgent application, *inter alia*, against the first respondent herein, Merchant Commercial Finance (Pty) Limited, trading as *Merchant Factors*. The other parties to this litigation are the joint liquidators of Sarepta Trading (Pty) Limited (in liquidation) ('*Sarepta'*) and Taxi Trucks Logistics (Pty) Limited (in liquidation) ('*Logistics'*), none of whom played any active role in these proceedings. For convenience I accordingly refer herein to the fourth applicant and first respondent simply as the 'applicant' and the 'respondent' respectively.

[2] Both the applicant and respondent are creditors of Sarepta. The crux of the relief sought in the notice of motion is based on the provisions of s 31(1) of the Insolvency Act, 24 of 1936,[1] in support of an allegation that there has been collusive dealings between the respondent and Sarepta. Voluminous papers have been filed by the respective parties herein. The respondent applied *in limine* that certain portions of the founding affidavit (including two annexures thereto) as well as portions of the replying affidavit be struck out as inadmissible evidence. Further grounds for striking out that were advanced are that the replying affidavit impermissibly includes new matter and that some of the allegations are

[1] Sec 31(1) provides:

'After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.'

'speculative and argumentative'. This judgment deals solely with the first ground for striking out.

Factual background

[3] Sarepta was placed in provisional liquidation by order of the North Gauteng Division of the High Court on 28 November 2012, which order was made final on 24 January 2013. Pursuant to the liquidation of Sarepta, on 25 March 2013, the applicant applied for and was granted an order in terms of ss 417 and 418 of the Companies Act that a commission of enquiry be held into the trade, dealings, affairs and property of Sarepta. Adv MJ Fitzgerald SC was at the same time appointed as commissioner in terms of s 418(1)(a) of the Act.

[4] One of the aspects that fell under the spotlight at the enquiry concerned a transaction whereby the business and unencumbered assets of Sarepta were transferred to Logistics during 2012, prior to the winding up of both companies. It is this disposition that the applicant seeks to set aside in terms of s 31(2) of the Insolvency Act as having been effected in collusion between Sarepta and the respondent.[2]

[5] One of the main witnesses who testified in the course of the enquiry was one Denis Henry Kaye who, together with his wife, were directors and in effective control of both Sarepta and Logistics at the relevant time. In the course of his evidence Kaye made certain damning concessions relating to the dealings involving Sarepta and Logistics, on

[2] The application is being brought by the applicant in the name of the joint liquidators pursuant to the provisions of s 32(1)(b) of the Insolvency Act, the necessary indemnity having been furnished to the liquidators in respect of the costs thereof.

the one hand, and the respondent, on the other. The applicant relies heavily on these extracts from Kaye's evidence in support of its allegations of collusion. It is these extracts that form the subject of the application to strike out on the basis that 'it is impermissible for [the applicant] to rely on extracts from the evidence given at the commission for purposes of bolstering its alleged entitlement in this application to relief under s 31(1) of the Insolvency Act, and that such evidence is inadmissible'.[3]

Legal principles

[6] The respondent's argument was based primarily on the following formulation of the relevant principles by *Henochsberg*:[4]

> 'The evidence of a witness at an examination or enquiry is admissible only against himself, eg evidence given by a director of a company is not admissible against the company. . . . The evidence is admissible in civil proceedings and in certain criminal proceedings, ie those relating to the offences mentioned in s 417(2)(c). Such evidence is admissible to prove what the witness stated during the examination or enquiry and may be used to cross-examine him . . . ; it does not however, constitute proof of the facts revealed by the evidence . . .'

[7] Most of these principles are derived from a series of decisions arising from the judicial management of Consolidated Portland Cement Co Ltd. In *Simmons NO v Gilbert Hamer & Co Ltd*,[5] one of the issues confronting Henochsberg J at first instance was the admissibility of admissions made by one Lea, the managing director of Consolidated

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[3] Answering affidavit, Record, p 505-506 para 9.25.
[4] Meskin *Henochsberg on the Companies Act 61 of 1973*, p 894(5) (SI 33) (other case citations omitted). See also, to the same effect, Blackman Jooste Everingham *Commentary on the Companies Act* Vol 3, 14-491 (original service); and 4(3) *LAWSA* (1st reissue) para 198 at n 61 *et seq*.
[5] 1962 (2) SA 487 (D).

Portland Cement Co Ltd, during an enquiry under the predecessor of the present s 417 in relation to claims against Portland in subsequent proceedings by the liquidators to vindicate certain fabricated steel from the respondent, Gilbert Hamer & Co. Henochsberg J struck out the evidence of Lea as inadmissible against the liquidators. On appeal to the Full Court,[6] Harcourt J addressed the question of admissibility at some length and, the other members of the Court (Caney J and Henning J) concurring, the appeal against the striking out order was dismissed. In a further appeal to the Appellate Division,[7] that order was not attacked and, although the appeal succeeded on other grounds, the Appellate Division mentioned *obiter* 'that in launching, and in persisting in, the motion proceedings the judicial manager and his advisers laboured under a fundamental error in regarding the commission evidence as admissible against the Engineering Company.'[8]

[8] In *O'Shea NO v Van Zyl NO*[9] Heher JA, writing for a unanimous court, quoted with approval and at great length from the various judgments in the *Gilbert Hamer* matters (as well as certain other decisions) and concluded, for similar reasons, that the evidence given by one of the trustees of a trust before the commissioner was inadmissible against the trust in the subsequent civil proceedings in the absence of its confirmation under oath by him in those proceedings. It would be supererogatory (not to mention a waste of time, paper and ink) to repeat for purposes hereof the exercise performed by Heher JA in *O'Shea*. Instead, I gratefully adopt his summary of the relevant authorities as set out in

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[6] *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N).
[7] *James Brown & Hamer (Pty) Ltd v Simmons NO* 1963 (4) SA 656 (A).
[8] At at 661H-662A.
[9] [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) (28 September 2011).

paras 19-24 of the judgment, to which the reader is referred. What it amounts to, in a nutshell, is confirmation of the principles summarised by *Henochsberg*, in the passage quoted above.

Applicant's response

[9] In response, counsel for the applicant referred to the recent judgment in this Division by Rogers AJ (as he then was) in *Engelbrecht NO & others v Van Staden & others*.[10] In the course of his judgment, the learned judge performed a careful analysis of the various judgments in *Gilbert Hamer* and *O'Shea NO, supra,* and their respective *rationes decidendi* before concluding:

'The admissibility or inadmissibility of such evidence [i.e. evidence given at an insolvency enquiry] in civil proceedings thus appears to rest on general principles of the law of evidence rather on than the terms of the Companies Act.'[11]

[10] This conclusion led the learned judge, in an *obiter dictum,* to express the following tentative view:

'I am thus inclined to think that a court may in appropriate cases permit a litigant to rely on evidence given by X at a s 417 enquiry for purposes of making out a case against Y provided this would be in the interests of justice, having regard to the requirements laid down in s 3 of Act 45 of 1988. However I do not need to express a firm view on this issue.'[12]

[10] (8318/2011) [2011] ZAWCHC 447 (6 December 2011).
[11] Para 20.
[12] Para 21.

[11] Counsel for the applicant sought to persuade me that the present application was indeed an 'appropriate case' to permit the applicant to rely on the evidence given by Kaye at the enquiry in order to prove the impeachable transaction in issue against the respondent herein. However, accepting for purposes of the argument the correctness of the *obiter* views expressed by Rogers AJ, I am not satisfied that this is indeed such a case. The fact of the matter is that in terms of s 3(1)(c) of the Law of Evidence Act, 45 of 1988, hearsay evidence is as a general rule inadmissible *unless* the court is of the opinion, based on a wide variety of considerations, that such evidence should be admitted 'in the interests of justice'. It was thus incumbent upon the applicant to seek admission of the hearsay evidence; not for the respondent to seek its exclusion. The applicant has not sought to make out a case or to lay any basis for the admission of the evidence on this basis, with the result that I am not persuaded that the evidence in question ought to be admitted in the interests of justice.

[12] I am accordingly driven to the conclusion that the evidence given by Kaye at the enquiry is not admissible against the respondent in these proceedings. It follows that the offending portions of the record fall to be struck out, with costs following the result. (As this leaves a significant portion of the application to strike out undecided, some apportionment may have to be made on taxation to make provision for this fact.)

Order

[13] For the reasons set out above, it is ordered as follows:

(a) Paragraphs 66 (and annexure FA21), 67, 68 (and annexure FA22), 81, 82, 89, 90 and 92 of the founding affidavit, as well as paragraphs 101, 103, 141.1 and 149 of the replying affidavit are struck out.

(b) The fourth applicant is ordered to pay the costs of the application to strike out insofar as it relates to the inadmissible evidence, including the costs of two counsel.

(c) The parties are granted leave, if so advised, to approach me in chambers within ONE MONTH from the date of this judgment for directions regarding the further conduct of the main application.

B M GRIESEL
Judge of the High Court