Republic of South Africa

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

Case number: 8237/19

Before: The Hon. Mr Justice Binns-Ward

Hearing: 16 November 2020
Judgment: 18 November 2020

In the matter between:

DEALTRY DAVID PICKFORD First Applicant
CAREY ANN PICKFORD Second Applicant

and

RYNO ENGELBRECHT N.O. First Respondent
YUSUF EBRAHIM N.O. Second Respondent
MAGISTRATE DONALD GROBLER N.O. Third Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN Fourth Respondent

JUDGMENT
(Delivered by email to the parties and release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on 18 November 2020.)

BINNS-WARD J:

[1] The applicants were the trustees of the St Leger Trust (IT 953/2008). The Trust was sequestrated in early 2016. The first and second respondents are the co-trustees of the sequestrated estate of the Trust. An inquiry into the affairs of the Trust was conducted in terms of s 65 of the Insolvency Act 24 of 1936 between May 2016 and October 2018. The applicants were required, in terms of s 64 of the Insolvency Act, to produce documentation in their possession concerning the affairs of the Trust and to submit to interrogation at the inquiry. The presiding officer at the inquiry was the third respondent, who at all material times was a magistrate at the Wynberg district court. The applicants were assisted by an attorney during their appearances at the meetings at which the inquiry was conducted.

[2] The trustees of the sequestrated estate have instituted action proceedings against the applicants in this Court under case no. 3372/2019, in which they claim payment of the amount of R18 696 392 as damages arising out of alleged 'breaches of trust' by the applicants. The applicants have not delivered a plea in the action, notwithstanding having been placed under notice of bar by the first and second respondents.

[3] In the current proceedings the applicants seek the following relief:

'... an Order in the following terms:

1. Interdicting and restraining the First and Second Respondents from making use, directly or indirectly, of any recording or transcript thereof, or part thereof of the Inquiry Proceedings conducted at the Wynberg Magistrates Court in relation to the insolvent Estate of the St Leger Trust with the Third Respondent as the presiding officer, ("the Inquiry Proceedings'') whether in the proceedings under Case Number 3372/2019 of the above Honourable Court or in respect of any other proceedings of any nature.
2. Setting aside the inquiry proceedings.
3. Directing the Respondents to pay the costs of this application jointly and severally.

(Notwithstanding the all-embracing reference to the 'the Respondents' in para 3 of the notice of motion, costs were in fact sought only against the first and second respondents and any other respondent opposing the application. The third and fourth respondents did not play an active part in the proceedings and it may be assumed that they abide the judgment of the court.)

[4] The bases upon which the applicant seek the aforementioned relief were argued by their attorney, Mr van Huyssteen, under three headings; viz. (i) that the proceedings of the inquiry had not been recorded in the manner prescribed in terms of s 65(3) of the Insolvency Act, (ii) the irregular conduct of the hearing by the presiding officer and the attorney who interrogated the applicants at the inquiry at the instance of the first and second respondents and (iii) that the identity of the documents referred to in the course of the applicants' evidence at the inquiry was not recorded in the manner prescribed and that the documents concerned were not available.

[5] Section 65 of the Insolvency Act provides as follows in the respects material for the purposes of this application:

> (1) At any meeting of the creditors of an insolvent estate the officer presiding thereat may call and administer the oath to the insolvent and any other person present at the meeting who was or might have been summoned in terms of subsection (2) of section sixty-four and the said officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person so called and sworn concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his or her spouse: Provided that the presiding officer shall disallow any question which is irrelevant and may disallow any question which would prolong the interrogation unnecessarily.
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> (3) The presiding officer shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section: Provided that if a person who may be required to give evidence under this section made to the trustee or his agent a statement which was reduced to writing, or delivered a statement in writing to the trustee or his agent, that statement may be read

> by or read over to that person when he is called as a witness under this section and if then adhered to by him, shall be deemed to be evidence given under this section.

[6] It is also germane, in the context of the applicants' complaints about the manner in which the inquiry was conducted insofar as their interrogation was concerned, to have regard to s 66(3) of the Insolvency Act, which provides:

> (3) If a person summoned as aforesaid, appears in answer to the summons but fails to produce any book or document which he was summoned to produce, or if any person who may be interrogated at a meeting of creditors in terms of subsection (1) of section sixty-five refuses to be sworn by the officer presiding at a meeting of creditors at which he is called upon to give evidence or refuses to answer any question lawfully put to him under the said section or does not answer the question fully and satisfactorily, the officer may issue a warrant committing the said person to prison, where he shall be detained until he has undertaken to do what is required of him, but subject to the provisions of subsection (5).

Subsection 66(5) provides:

> (5) Any person committed to prison under this section may apply to the court for his discharge from custody and the court may order his discharge if it finds that he was wrongfully committed to prison or is being wrongfully detained.

The 'court' referred to in s 66(5) is the provincial or local division of the High Court having jurisdiction over the sequestration in issue; see the definition of 'court' in s 2 of the Act.

[7] Section 65(3) falls to be construed with reference to the relevant rules of the magistrate court providing for the recording of evidence in civil cases. The parties were ad idem that the relevant rule is rule 30. Mr *Rogers*, who appeared for the first and second respondents, submitted that only rule 30(4) was applicable, whereas Mr van Huyssteen argued that the rule pertained in its entirety.

[8] Rule 30 is a lengthy provision consisting of 12 subrules. Many of the subrules are plainly not applicable, for they regulate matters of *court* administration and procedure. An inquiry under

s 65 of the Insolvency Act, while it is often presided over by a magistrate, is not a court proceeding. I agree with Mr *Rogers* that the only part of the rule that is relevant by virtue of the reference in s 65(3) of the Insolvency Act is subrule (4), and then only in regard to *manner of recording*; viz. by way of shorthand or by mechanical, electronic or digital means. It is not disputed that the inquiry proceedings were mechanically recorded by an employee of Veritas, a division of a company then named EOH Legal Services (Pty) Ltd.

[9] Subrule 30(2) requires 'the court' to mark each document put in evidence and note such mark on the record. That is not, in my judgment, a provision governing the manner of *recording* the evidence.

[10] Nevertheless, it is implicit in the purpose of keeping a record of the inquiry that the presiding officer should ensure that any documentary evidence used in the context of the interrogation of any witness should be identifiable on the record of proceedings. I am unable on the material before me in the current case to determine whether the third respondent did that or not. If the presiding officer was remiss in ensuring that an altogether coherent record was kept of the proceedings, I am also unable, without sight of the record itself, to determine how prejudicial the effects of any oversight or omission on his part in this regard might be.

[11] It was also contended by the applicants that the mechanical recording of the proceedings by Veritas at the instance of the trustees rendered the proceedings non-compliant with s 66 because subsection (3) thereof required the recording to be done by the presiding officer or caused by him or her to be done. In this matter the trustees' attorneys engaged Veritas to record the proceedings. There was nothing in the point.

[12] The undisputed evidence was that it is the practice for the party at whose instance the inquiry is conducted to arrange the recording facilities and that the magistrates who sit as

presiding officers at such inquiries will not proceed with the inquiries in the absence of such arrangements. In my judgment, the practice described satisfies the statutory requirement that the presiding officer shall cause the proceedings to be recorded; cf *Lazurus v said & Roos NO* 1958 (4) SA 757 (E), which treated of the comparably worded provisions of s 180 *ter* (3) of the 1926 Companies Act, and in which De Villiers JP (Jennett and Van der Riet JJ concurring) held that the words *'... "shall reduce to writing or cause to be reduced to writing" simply mean that the presiding officer shall take the necessary steps to ensure a written record of the evidence*'. The learned Judge President proceeded '*It is left to the presiding officer's discretion as to what steps he will take to produce that result*'. The presiding officer bears the ultimate responsibility for the recording that is made for he or she is required in terms of s 39(3) of the Insolvency Act to certify the record of proceedings.

[13] If I understood Mr van Huyssteen correctly, he appeared to contend that any shortcoming by the third respondent in what he contended were the 'peremptory' injunctions of s 65(3) of the Insolvency Act rendered the inquiry proceedings ineffectual and essentially legally void and excluded any reliance on any recording or transcript of the inquiry in any other proceedings. There is no merit in that argument.

[14] Even assuming some degree of irregularity in the recording of the proceedings, the extent and practical effect of such deficiencies would determine whether and to what extent cognisance might properly be had to the record in any other proceedings in which a party might seek to employ it. As the Constitutional Court observed in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO South African Social Security Agency and Others* [2013] ZACC 42 (29 November 2013), 2014 (1) SA 604 (CC), 2014 (1) BCLR 1 (CC), at para 30, the 'strictly mechanical approach' sometimes adopted in the past in drawing 'formal distinctions' between

'peremptory' provisions on the one hand and 'directory' ones on the other has been discarded. The proper approach is to ascertain whether or not the object or purpose of the statutory provision has been achieved by what was done in purported compliance with it. Without access to the record of proceedings and precise knowledge of the circumstances in which anyone might seek to employ it, I am not qualified to make the required assessment concerning any alleged shortcoming in the recording of the evidence given at the inquiry, or of what the consequences of any deficiency should be.

[15] I put to Mr van Huyssteen during his address in argument that I found it puzzling that the transcript of proceedings at the inquiry, such as it might be, had not been placed before the court by the applicants. The absence of the record bedevilled not only any ability by this court to assess the alleged deficiency in the recording of the inquiry proceedings; it bore adversely also on the court's ability to assess the applicants' complaints that the presiding officer and the trustees' attorney had behaved in an inappropriately threatening and intimidating manner towards them. The applicants suggested that the manner in which they had been treated at the inquiry would render it unfair for any reliance to be had to their testimony at the inquiry in proceedings before any other tribunal.

[16] Their complaint was that the presiding officer had inappropriately threatened to issue a warrant for their incarceration when they or one or other of them had difficulty in answering some of the questions put to them. It was pointed out that the second applicant had an especially poor memory and that in any event the matters they were being asked to address in evidence concerned issues that were founded in events that had occurred several years prior to them giving their evidence.

[17] The respondents have admitted that their attorney on three occasions had requested the presiding officer to remind the applicants of their potential exposure to incarceration for failing to answer questions put to them fully or satisfactorily. This happened once during the evidence of the first applicant (on 2 June 2016) and twice during the evidence of the second applicant (on 15 September 2016 and 12 July 2018) It was also admitted that the third respondent had on one occasion during the interrogation, on 12 July 2018, issued a warrant for second applicant's detention and caused a detail of the court's security detail to be in close attendance to be able to execute it. The warrant was not executed. The first and second respondents have averred that the applicants' attorney (not Mr van Huyssteen or any member of his firm) did not raise any objection to the conduct of the presiding officer or the interrogating attorney. They deny that there was anything inappropriate about the conduct of the presiding officer or the interrogating attorney.

[18] I have no difficulty in appreciating that the prospect of committal to prison would have an unsettling effect on any witness. That is indeed the intended object of the machinery provided in terms of s 66(3) of the Insolvency Act. The prospect or reality of imprisonment for failing to conscientiously cooperate in the inquiry is a statutorily provided device that is available to motivate conscientious cooperation by reluctant or recalcitrant witnesses.

[19] It was therefore within the powers of the presiding officer to warn witnesses at the inquiry of their susceptibility to imprisonment should they refuse to answer to relevant questions or fail to answer them fully and satisfactorily. Any determination of whether the power was being abused or not in a particular instance would require reference to the context.

[20] There is also nothing notionally untoward about an interrogator at an inquiry requesting the presiding officer to remind or caution an apparently recalcitrant witness of his or her

potential exposure to imprisonment in terms of s 66 of the Act. In that case too, any assessment of whether the request was justified or not, and whether or not it was an abusive tactic, would require reference to the context. A transcript of the proceedings would be the most obviously relevant way in which to provide the necessary contextual evidence to support the allegations of misconduct on the part of the presiding officer and the interrogating attorney.

[21] Mr van Huyssteen argued that it was for the respondents to have produced the transcript. He submitted that I should draw an adverse inference from their failure to have done so. In this regard he submitted that I should apply the approach commended in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6 (10 March 2008), [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13. In my judgment, however, one is not treating in this matter of the type of situation to which Heher JA was referring in *Wightman* at the place cited. The learned judge of appeal was positing the position of a party with exclusive knowledge of information pertaining to disputed facts that contented itself with a bald denial of the other side's allegations. He held that a bald denial by such a party in such circumstances would often not give rise to a genuine dispute of fact on the papers.

[22] That is not the position in the current case.

[23] A transcript of the inquiry proceedings was made available to the applicants. It is true that the first and second respondents' attorney of record, who was also the interrogating attorney at the inquiry, initially declined to make the transcript available because at the stage it was first requested he was concerned the applicants might use it to tailor the further evidence they were required to give at the inquiry. But, in a letter dated 28 November 2018, nearly six months before the institution of the current application, on 14 May 2019, the respondents' attorneys advised the applicants' attorneys as follows in respect of the transcript:

3. Transcripts need to be checked (proof read) by the transcribers to correct typing, spelling and other patent transcription errors. The transcribers will then provide a transcript certified by them as accurate. The certified transcript will then form part of the record. In terms of section 39(3) of the Insolvency Act, the presiding officer himself must certify the record of proceedings at the conclusion of the meeting.
4. Your clients testified at the first meeting of creditors during 2016, that meeting was closed. They have since then testified briefly at a new meeting convened in July 2018 . That meeting is not closed.
5. The transcript of the evidence at the first meeting of creditors runs to 607 pages. The transcript of their evidence at the further meeting runs to 73 pages.
6. A copy of the unchecked and uncertified transcripts are (sic) available for collection by you from our officers upon payment of the cost of copying (R3.50 per page) of R2 737.00 inclusive of VAT.

[24] Moreover, after the delivery of the first and second respondents' answering papers and before the delivery of the applicants' replying papers, the applicants made a demand in terms of Uniform Rule 35(12) for the production of numerous documents that had been mentioned in the answering papers. The demand included (in item 13) '[t]*he transcripts of the recordings of the inquiry proceedings referred to ...*' and (in item 17) '[t]*he documents and exhibits which were put to the Pickfords (the first and second applicants), referred to ...*'. In para 7 of their response to the notice in terms of rule 35(12), the first and second respondents stated '*Where in what follows documents are said to be available for inspection, the trustees will permit the making of copies or transcriptions thereof.*' In para 37 of the response, the respondents stated ('Ad Item 13'), '*The transcripts are available for inspection*' and in para 41 ('Ad Item 17'), '*The documents and exhibits are available for inspection*'.

[25] The applicants bore the onus of establishing their entitlement to the relief sought. In order to even begin to attempt to make out their case they were required to show that the inquiry proceedings or the recording thereof were materially non-compliant. By failing to provide the transcript, at least in the form it was made available to them, they incapacitated themselves from

being able to show what they needed to do. As it is, however, and as I shall now proceed to explain, there were in any event even more fundamental obstacles in their path to obtaining the relief sought. Those obstacles concerned matters of principle.

[26] Insofar as the applicants sought an order setting aside the inquiry proceedings, I consider that such a remedy is not available in principle. An inquiry in terms of s 65 of the Insolvency Act does not, in itself, result in any decision affecting any person who testifies at the inquiry. It is only an information gathering exercise. The role of the presiding officer is essentially procedural. It is to see to it that the proceedings are properly and effectively conducted. The presiding officer's substantive duty is to report to the Master at the conclusion of the inquiry whether it appears from any statement made at an interrogation in terms of s 65 that there are reasonable grounds for suspecting that the insolvent (in this case the trustees of the insolvent Trust) has committed any contravention of the Act. The information gathered at the inquiry and the record of the inquiry proceedings may well be used in subsequent proceedings, in which event their admissibility as evidence in such proceedings is subject to the applicable law of evidence. The forum in which questions of admissibility fall to be decided is the forum in which such subsequent proceedings are prosecuted.

[27] Mr *Rogers* directed my attention to the judgment of Galgut J in *Muller and Another v The Master and Others* 1991 (2) SA 217 (N) in support of his submission that the relief sought in terms of para 2 of the applicants' notice of motion was incompetent. That case concerned an application by two insolvents, who were husband and wife, for the review and setting aside of two rulings made by the Master at an interrogation held in terms of s 152 of the Insolvency Act. The headnote to the published report adequately summarises the import of the relevant part of the judgment (which is at p. 220G-I). It reads as follows: '*An interrogation in terms of s 152 (2)*

of the Insolvency Act 1936 is only a fact- or information- gathering process. It is not in the nature of a court hearing, in particular because no decision or ruling can ever follow it. All that can possibly happen is that, as a result of such facts or information as are gathered, some or other civil or criminal process might be set in motion. The point is, however, that, unlike in the usual situation, during an interrogation in terms of s 152, or at the end of it, no ruling or decision is made as a result of the proceedings. No matter what the record of proceedings may disclose, therefore, the proceedings themselves cannot be set aside, and there will be no formal ruling or decision which follows the proceedings, so that no ruling or decision will exist which can be set aside.' Mr *Rogers* submitted, with justification in my view, that no valid point of distinction fell to be drawn for present purposes from the fact that the inquiry in *Muller*'s case occurred in terms of s 152 and in the current matter in terms of s 65 of the Act. I say that conscious of the differences between an examination under s 152 and one under s 65, which are usefully analysed in *Stadler en Andere v Wessels NO en Andere* 2000 (4) SA 544 (O).

[28] In the circumstances, the application for relief in terms of paragraph 2 of the notice of motion will be dismissed.

[29] As to the relief sought in terms of paragraph 1 of the notice of motion, I have already mentioned that the admissibility of any part of the recording or transcript of the inquiry in any future proceedings, including in the action instituted by the trustees against the applicants under case no. 3372/2019, is a matter that, if it arises, will fall to be decided in those proceedings. Even if the applicants were able to establish that the conduct of the inquiry was unlawful in some or other way, that would not, of itself, necessarily result in the exclusion of the use of the recording or transcript in such proceedings. The judge or presiding officer in the forum in which anyone sought to use the recording or transcript would have to determine whether it would be

fair to allow its use notwithstanding the illegality involved in obtaining or recording the evidence recorded or transcribed therein; cf. *Key v Attorney-General, Cape Provincial Division and Another* 1996 (4) SA 187 (CC) at para 10-14 and the earlier Constitutional Court jurisprudence referred to there. As the dicta of Kriegler J in para 14 of *Key* make clear, the admissibility of allegedly unlawfully procured evidence depends on whether it would be fair to allow it to be used. Fairness cannot be determined in the abstract. Whether something is fair or not depends on the nature of the circumstances in which it is proposed to use it.

[30] It would in any event be wholly inappropriate for me to purport to encroach on the functions of another forum by determining in advance what evidence should be admissible or inadmissible in proceedings before such forum. That would be to improperly usurp the functions of the judge or presiding officer in such forum. Quite apart from questions of comity, I am just not qualified to make any such determination competently. Only a decision-maker fully apprised of the peculiar context in which it is sought to deploy the evidence would be competent to decide on the permissibility of the use of the recording or transcript of the inquiry. It is for that reason that there is no merit in the submission by Mr van Huyssteen that considerations of convenience militate in favour of the issue being decided in these proceedings.

[31] If the relief sought in terms of paragraph 1 of the notice of motion is to be determined on the principles applicable to final interdicts, for that is the manner in which it is couched, the application cannot succeed because the applicants have not made out a case in support of such relief. They have not shown a relevant right or the infringement thereof and, for the reasons that I have discussed, there can be no question of them reasonably apprehending irreparable harm in the event of the interdictory relief that they seek not being granted. Their appropriate remedy lies elsewhere.

[32] The application will therefore be dismissed with costs, including the wasted costs incurred in respect of the aborted hearing on 9 November 2020 when the application was not heard because of the late filing of the applicants' replying papers and heads of argument. The first and second respondents sought costs on a punitive scale, but I am not persuaded that the circumstances warrant such exceptional relief.

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

1. The application is dismissed.
2. The applicants shall be liable to pay the first and second respondents' costs of suit, including the wasted costs incurred in respect of the aborted hearing on 9 November 2020.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's attorney:	**Mr K.J. van Huyssteen** **Fluxmans Inc.** **Rosebank, Johannesburg**
	Fairbridges Wertheim Becker **Cape Town**
First and Second Respondents' counsel:	**John Rogers**
First and Second Respondents' attorneys:	**Biccari Bollo Mariano Inc.** **Cape Town**