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

Case No: 15012/21

In the matter between:

NEIL GORE N.O. First Applicant

CHRISTINE MARIA VERSTER N.O. Second Applicant
(in their capacities as the joint liquidators of
UKHANA PROJECTS CC (in liquidation)

and

ANELE HAMMOND (FORMERLY NGADI) N.O. First Respondent
(identity number: [....])

NINA HAMMOND N.O. Second Respondent
(identity number: [....])
(in their capacities as the Trustees for the time being of the
HAMMOND & HAMMOND TRUST (Trust No 1769/2010 (G))

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 7 April 2022.

JUDGMENT

DE WET, AJ:

INTRODUCTION:

[1] During September 2021 the applicants launched an application for the provisional sequestration of the Hammond and Hammond Trust ("the H & H Trust") of which the first and second respondents are the trustees. The application was opposed.

[2] Voluminous papers were filed in the application as well as various further and supplementary affidavits deposed to by both the applicants and the respondents. Counsel acting for the parties requested that the court allow the affidavits and have regard thereto. Consequently, the affidavits were admitted.

[3] A provisional order was granted on 23 February 2022. A copy of the order is attached hereto marked "X" for ease of reference. These are the reasons for the order granted.

RELEVANT COMMON CAUSE FACTS:

[4] The applicants are the joint liquidators of a close corporation called Ukhana Projects CC (in liquidation) ("Ukhana"). The application for the winding up of Ukhana was issued on 9 March 2021 and a provisional winding-up order was granted on 13 April 2021. The order was made final on 7 June 2021.

[5] Ukhana carried on business as a construction company and was awarded a building contract by the Bitou Municipality for the construction of 169 top structures in Qolweni, Plettenberg Bay ("the Qolweni building contract") after a public procurement process as envisaged by the relevant legislative framework.

[6] Prior to entering into the Qolweni building contract and in 2017, Ukhana concluded a deed of pledge and cession in favour of Nedbank Limited ("Nedbank") in terms whereof it ceded to the bank as security "all debts now owing or which may

hereafter become owing to [Ukhana]". In terms of this agreement Ukhana's book debts are non-transferrable[1]. At the date of the winding up of Ukhana it was indebted to Nedbank in the sum of R 4 102 056.78.

[7] On 4 June 2019 Ukhana, contrary to the aforesaid agreement, executed a further cession of its book debts to Standard Bank of Southern Africa Limited ("Standard Bank").

[8] On 9 October 2020 Ukhana purported to cede the Qolweni building contract to a company called Hammond & Hammond Incorporated ("H & H Inc"), a non-profit company of which the first and second respondents are directors, in its entirety and as soon as it was awarded by the Bitou Municipality.

[9] On 1 December 2020 the Qolweni building contract was awarded to Ukhana by the Bitou Municipality.

[10] On 7 December 2020 Ukhana again purported to cede the Qolweni building contract to H & H Inc followed by a further agreement between the same parties on 22 January 2021 which was called a "Cession and Subcontract Agreement". In terms of this agreement Ukhana transferred all its rights in the Qolweni building project to H & H Inc. I will return to the terms of this agreement later.

[11] The Bitou Municipality paid into the bank account of the H & H Trust, in respect of the Qolweni building project, the amount of R 1 553 661.83 on 26 February 2021, the amount of R 1 296 320.21 on 25 March 2021 and the amount of R 930 365.54 on 25 May 2021. In total an amount of R 3 780 347.58 was paid during the period 26 March 2021 to 25 May 2021 of which an amount of R 2 226 685,75 was paid after commencement of the winding-up of Ukhana.

[12] The H & H Trust was not a party to the agreements between H & H Inc and Ukkana.

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[1] Clause 21 of the Nedbank cession agreement stipulated as follows: "I/we will not be entitled to cede, assign, make over and pledge to anyone else or to realise, alienate, receive or exercise, or in any other manner deal with the security or any interest, dividends, rights (including voting rights), income and benefits however named or described without any exception arising from the security, without first obtaining Nedbank's written consent."

[13] Shortly after receipt of the aforesaid payments, the H & H Trust purchased two immovable properties in Plettenberg Bay being Erf 3738 in the amount of R 1.8 million and unit 9, SS Monks View in the amount of R 999 000. These properties were bought by the H & H Trust from the previous directors of Ukhana, Mr and Mrs Le Roux on 16 March 2021 and an amount of R 1 million was also paid by the H & H Trust to a company called Engadin Developers NPC ("Engadin"), being one of the public benefit organisations which falls under the umbrella of the Practical University in Formation which is controlled by the first respondent according to her opposing affidavit.

SUMMARY OF ARGUMENTS:

[14] It is the applicants' case that a liquidated amount of R 3 780 347.58 which was paid to the H & H Trust was owing to Ukhana, that the respondents have committed an act of insolvency as contemplated in s 8(c) of the Insolvency Act 24 of 1936 (the "Act") and that there is reason to believe that some advantage would accrue to creditors if the H & H Trust is sequestrated. It was further the applicants' case that as the requirements set out in s 10 of the Act were met, the respondents were obliged to set out facts as to why this court should not exercise its discretion in favour of the applicants and grant a provisional order.

[15] The respondents submitted that the applicants do not have *locus standi* to launch the application as there was no amount owing by the Bitou Municipality to Ukhana, as it did not perform any services. The applicants therefore, according to the respondents, also have no liquidated claim against the respondents.

[16] The respondents further contended that a fraud was committed upon them and the Bitou Municipality by Ukhana due to the non-disclosure of the Nedbank cession. This, it was argued, has an influence on the amount claimed by the applicants as it is subject to legal dispute at the instance of the Bitou Municipality and hence the applicants do not have a liquidated claim as alleged.

[17] It was further the respondents' case that the purchase of the properties and payment to Engadin did not amount to dispositions of property as meant in s 2 of the Act and hence no act of insolvency was committed.

[18] The respondents also stated that the H & H Trust was in any event able to pay any amount that may be owing to the applicants, tendered a statement of assets and liabilities to substantiate the financial position of the H & H Trust and contended that it would be to the advantage of only Ukhana's creditors if a provisional order was granted whilst it would be to the detriment of the creditors of the H & H Trust. The tendered statement of assets and liabilities never saw the light of day.

LEGAL FRAMEWORK:

[19] In terms of s 10 of the Act, an applicant in an application for the provisional sequestration of a debtor, needs to satisfy the Court on a *prima facie* basis that:

19.1. The applicant has a liquidated claim against the respondent;

19.2. The respondent has committed an act of insolvency or is in fact insolvent; and

19.3. There is reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated.

[20] In sequestration proceedings the question of whether the requirements are met on a *prima facie* basis is determined by assessing whether the balance of probabilities on the affidavits favour the applicant's case.[2] The test can be traced back to the well-known judgment of Corbett JA (as he then was) in *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A) wherein he held that a Court can hardly decide an application for the provisional winding-up of a company without reference to the respondent's rebutting evidence. He explained that the term "*prima facie case*" means that the balance of probabilities on all the affidavits should favour the granting of the application for provisional liquidation (or sequestration).[3]

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[2] *Investec Bank Ltd v Hugo Amos Lambrechts N.O. & Others* Case Number: 6570/2014 (unreported Judgment delivered by Rogers J on 27 November 2014) at para 15.

[3] *Kalil* at 979A

[21] On the question as to whether an applicant has a claim against the respondent the SCA further held in *Kalil supra* that the onus is on a respondent to show that the indebtedness is disputed on *bona fide* and reasonable grounds.[4] This is known as the *Badenhorst* rule.[5]

[22] I was referred to the matter of *Firstrand Bank v Evans* 2011(4) SA 597 (KZD) where Wallis J confirmed that "..Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for such an order, the court has a discretion whether to grant the order"[6] and "It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour"[7], but was mindful of the views expressed by Rogers J in the matter of Investec Bank Ltd v Lambrechts NO v Others 2019 (5) SA 179 (WCC).

ANALYSIS:

[23] Clause 21 of the Nedbank cession amounts to a *pactum de non cedendo* and had the effect that the rights in respect of Ukhana's book debts were non-transferrable[8].

[24] The Qolweni building contract was awarded to Ukhana by the Bitou Municipality and the right of Ukhana to obtain payment from the Bitou Municipaliy was ceded to Nedbank in 2017. Ukhana's cession to Nedbank was a cession *in securitatem debiti* and afforded Nedbank the power to obtain payment from the Bitou Municipality. This right was explained in the matter of Bank of Lisbon & South Africa Ltd v The Master & Others 1987 (1) SA 276 (A) at 294C-D as follows: "When book debts are ceded *in securitatem debiti*, as in the cession to Nedbank, the cedent cedes to the cessionary the exclusive right to claim and receive from the existing and future 'book debtors' the amounts owing by them. The amounts so collected by the

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[4] *Kalil* at 980B – D
[5] With reference to the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348B.
[6] See par 27
[7] See par [27] at F read with Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitires 1989(3) SA 820 (A) at 833 C-F
[8] See Bornfree Investments 364 (Pty) Ltd v Firstrand Bank Limited [2014] 2 All SA 127 (SCA)

cessionary are credited to the account of the cedent. Any amount collected in excess of the cedent's debt belongs to the latter." Consequently, the further session by Ukhana to Standard Bank and H & H Inc are invalid and of no force and effect. Whether or not the respondents were aware of the prior session(s), is irrelevant.

[25] In the event of insolvency the right to collect payment on a ceded right vests in the insolvent estate and the liquidator or trustee as the case may be, has the right to collect and administer the proceeds.[9]

[26] The applicants, being the joint liquidators of Ukhana, therefore have the necessary *locus standi* in these proceedings.

[27] On the issue of whether the applicants have established a liquidated claim by Ukhana against the H & H Trust, the following relevant facts appear from the papers:

> 27.1. In the so-called Cession and Subcontract Agreement between H & H Inc and Ukhana, it was agreed that Ukhana would be solely responsible for the construction of the 169 structures in terms of the tender awarded to it, whilst the payments from the Bitou Municipality would be made to H & H Inc as Ukhana's agent. The account number provided to the Bitou Municipality for H & H Inc was however that of the H & H Trust who is not mentioned in any of the agreements nor a party to any agreement;
> 27.2. It is common cause that a total amount of R 3 780 347.58 was paid into the bank account of the H & H Trust;
> 27.3. This amount was paid into the bank account of the H & H Trust by the Bitou Municipality in full and final settlement of all outstanding monies due to Ukhana as at 24 May 2021. The payments were based on approved payment certificates issued by the principal agent, Messrs Chauke Quantity Surveyors after invoices were rendered by Ukhana.
> 27.4. In a letter dated 21 August 2021, the Bitou Municipality confirmed that it had intended to pay these amounts into the account of H & H Inc who they perceived to be the representatives of Ukhana.

[9] See Millman NO v Twiggs & Another 1995 (3) SA 674 (A) at 676H-I

[28] The only inference that can be drawn from the aforesaid facts, is that the payments by the Bitou Municipality, which were intended for Ukhana, were unlawfully diverted to the bank account of the H & H Trust. There can consequently be no dispute that the applicants have a claim in the liquidated amount of R 3 780 347.58 against the H & H Trust.

[29] It was further contented by the respondents that Ukhana was not entitled to the payments by the Bitou Municipality as it did not perform any work. This contention must be rejected for the following reasons:

29.1. In the so-called Cession and Subcontract Agreement dated 22 January 2021 between Ukhana and H & H Inc, it was recorded and agreed that "TLC [H & H Inc] is a Public Benefit Organisation, and hereby formally accepts the cession of the Contract from Ukhana in its entirety, as part of a wider project to re-establish Qolweni as a Smart-City. TLC will fund and manage the entire Contract, with particular focus on financial management and is hereafter referred to as the "**The owner of the Contract**"";

29.2. In the addendum to the Cession and Subcontract Agreement, it was specifically further recorded that Ukhana would be solely responsible for the construction of the 169 top structures as appointed per tender SCM/2020/54/COMM and that Ukhana would remain liable to perform all the functions in terms of the tender awarded to it and that all payments made to H & H Inc would be shared between Ukana and H & H Inc as agreed between them. The aforesaid agreement makes sense as neither H & H Inc (a non-profit organization) nor the H & H Trust would have had the infrastructure or capacity to undertake substantial construction work as was required in terms of the Qolweni building contract;

29.3. It further appears from clause 5.1 of the trust deed of the H & H Trust that its primary object is to generate income to fund all the financials needs of the foundation in addition to chosen projects that support vulnerable population towards social justice. It further only acted as the caretaker and project manager of entities such as Endagin and H & H Inc;

29.4. In a letter from Ukhana's director, Mr Le Roux, to Bitou Municipality dated 4 December 2020, it was confirmed that Ukhana would focus all its

attention on the construction and the civil components of the project whilst H & H Inc will take over the financial management of Ukhana's projects;

29.5. The first respondent on a letterhead of Ukhana advised the principal agent on 7 April 2021 as follows:

> "*3. Notwithstanding, these imposed constraints, Ukhana works seven days a week to progress the project under very difficult circumstances.*
>
> *4. We categorically informed all parties a month ago already that we have purchased materials for all 169 units and begged the Municipality for a clean site to start building. …*
>
> *5. We worked through the entire Easter weekend (as we do every weekend) begging resisting residents to please move to new units, then demolishing their old shacks and cleaning the site. …* "

29.6. The payments made by the Bitou Municipality to H & H Inc, which were diverted into the bank account of the H & H Trust, were made pursuant to certificates issued for work done by Ukhana.

[30] Over and above the aforesaid, and as confirmed by Savage J in the judgment dated 11 August 2021, Ukhana could not legally cede and assign the rights and obligations under the Qolweni building contract to another entity such as H & H Inc as such process is contrary to the Local Government Municipal Finance Act, 56 of 2003 and section 217 of the Constitution.

[31] The respondents further contended that in terms of an initial investment agreement between the Bitou Municipality and H & H Inc, the Bitou Municipality made payments into the bank account of the H & H Trust as "reimbursements of monies the Trust had already invested and spent at the behest of Bitou Municipality" for "decanting" and cleaning the site in preparation for the Qolweni building contract to be executed in the amount of R 4 263 802.00. The monies spent by the H & H Trust since November 2020 in terms of this agreement, according to the first respondent, included *inter alia* the establishment of an office in the amount of R 999 000.00, the purchase of office furniture in an amount of more than R 260 000.00, the purchase of tools and machinery of almost R 1.2 million and staff salaries of almost R 900 00.00 for a 4-month period. According to the first respondent it was agreed between her and the Bitou Municipality that the investment would be

reimbursed monthly. In support of this averment, she attached certain bank statements of the H & H Trust and Engadin. Suffice to say, the bank statements do not support the alleged initial investment and further reflects various loans to Engadin after payment of the sums from the Bitou Municipality were received into the bank account of the H & H Trust. It certainly raises serious concerns as to how the money earmarked for Ukhana was transferred.

[32] The applicants, in response hereto and to other statements made by the first respondent, filed two notices in terms of Rule 35(12) requesting *inter alia* copies of documents wherein the first respondent and or H & H Inc was requested to "decant the site"; proof of payment of insurances and guarantees; proof of purchases in respect of tools, machinery and uniforms; proof of payment of staff salaries, security bills and sub-contractors; invoices and claims submitted to the Bitou Municipality for payment. In reply to these notices it was stated that the first respondent was unable to produce most of the documents requested as "*the First Respondent was robbed of all her files and electronics at gun-point, suspiciously after reporting Ukhana Projects CC ("Ukhana") and Bitou Municipality to the Hawks for corruption and intimidation"*.

[33] This answer is simply mind boggling. The first respondent, if she was robbed of all her information, could have obtained the information requested to prove the exorbitant amounts allegedly expended on request of the Bitou Municipality, which does not appear from the bank statements, from the various service providers and or the Bitou Municipality. She did not. The first respondent's averments are further contradicted by her own statements, on Ukhana's letterhead, to the principal agent. The version of the first respondent is far-fetched and rejected as a fabrication. The payments by the Bitou Municipality into the bank account of the H & H Trust were in terms of payment certificates and intended to be payments to Ukhana. The H & H Trust knew it was not entitled to retain or use such funds.

[34] It appears from the 2020 financial statements of Ukhana that it previously held substantial assets including property, plant and equipment, construction projects and accounts receivable. After Ukhana became involved with H & H Inc and the H & H Trust, substantial assets were disposed of or transferred out of Ukhana to these

entities. The director of Ukhana for example purported to cede the Qolweni building contract to H & H Inc as aforesaid and its vehicles worth more than R1.3 million to the H & H Trust. This clearly resulted in Ukhane being denuded of its assets and business to the prejudice of Ukhana's creditors.

[35] Furthermore, and as pointed out by the applicants, the transfer of Ukhana's assets and business occurred less than six months prior to the commencement of the winding up proceedings and is therefore void in terms of s 34 of the Act.

[36] It would appear and was not disputed in the answering affidavit that the H & H Trust utilised part of the payments received from the Bitou Municipality to pay the purchase price and transfer costs of the properties purchased from the previous directors of Ukhana. It is also not disputed that during March 2021 the H & H Trust paid R 1 million to Engadin which is controlled by the first respondent.

[37] In this regard it was argued on behalf of the H & H Trust that the purchasing of the properties did not amount to a disposition and that the properties were assets in the estate of the H & H Trust which could be recovered for the benefit of creditors. The respondents failed to deal in any of the affidavits with the R 1 million that was paid to Endagin without any justification.

[38] In terms of s 2 of the Insolvency Act a disposition means a transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor. Property means movable or immovable property. Section 8(c) of the Insolvency Act provides that a debtor commits an act of insolvency: "(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring on creditor above another;".

[39] In light of the transfer of funds as reflected in the bank statements of the H & H Trust and especially the R1 million, I find, on a balance of probabilities, that the H & H Trust made dispositions which had the effect of prejudicing its creditors.

[40] I now turn to deal with the issue of advantage to creditors.

[41] The long-established principle that it is sufficient for an applicant to demonstrate that there are reasonable grounds for concluding that upon a proper investigation a trustee may discover or recover assets for disposal to the benefit of creditors finds application in this matter.[10]

[42] A trustee would in my view be in the position to investigate the serious misappropriation of funds and allegations of fraud. He or she would also be able to investigate the allegation raised in a further affidavit filed by the first respondent dated 21 November 2021 that the one property, Erf 3787, Plettenberg Bay, which was bought by the H & H Trust, was not worth R 1.8 million but only R 280 000.

CONCLUSION:

[43] It was not in dispute that service of the application was effected on all relevant parties; that the required security had been furnished; and that the Master had filed a report stating that there are no facts to his knowledge that will justify dismissal of the application.

[44] I was satisfied that the applicants had established on a *prima facie* basis the requirements for a provisional order and the respondents have failed to set out circumstances which would warrant me to exercise my discretion in favour of the H & H Trust.

[45] In the circumstances, a proper case for a provisional order of sequestration was made out, which was granted in terms of the order attached hereto.

A De Wet
Acting Judge of the High Court

Coram: De Wet AJ

[10] See Dunlop Tyres (Pty) Ltd v Brewitt 1999 (2) SA 580 (W) at 583 and Stratford and Others v Investec Bank Ltd 2015 (3) SA 1 (CC)

Date of Hearing: 27 January 2022

Date of Order: 23 February 2022

Date of Reasons: 7 April 2022

Counsel for the Plaintiff:	Adv Woodland SC gww@capebar.co.za
Attorneys for the Plaintiff:	Edward Nathan Sonnenbergs lkatz@ensafrica.com
For Defendant:	Adv Dzakwa Sdzakwa@capebar.co.za
Attorneys for Defendant:	Hammond & Hammond Transactional Law Clinic Anele@hHammondlaw.co.za