<u>IN THE HIGH COURT OF SOUTH AFRICA</u>

(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-12-03

In the matter between:

Case Number: 42316/10

KAREN KEEVY N.O.	First Applicant
RISCHARD CASSIM N.O.	Second Applicant
LEBOGANG MICHAEL MOLOTO N.O.	Third Applicant

in their capacities as joint liquidators of

CENTRAL LAKE TRADING 256 (PTY) LTD (IN LIQUIDATION)

and

BORN FREE INVESTMENTS 364 (PTY) LTD	Respondent

and

Case Number: 42315/10

KAREN KEEVY N.O.	First Applicant
SOLOMON STANLEY ISAKE BOIKANYO N.O.	Second Applicant
LEBOGENG MICHAEL MOLOTO N.O.	Third Applicant

in their capacities as joint liquidators of

SUMMER SEASON TRADING 49 (PTY) LTD (IN LIQUIDATION)

and

BORN FREE INVESTMENTS 364 (PTY) LTD	Respondent

JUDGMENT

SOUTHWOOD J

[1] In each application the applicants seek, in accordance with section 26(1)(b) of the Insolvency Act 24 of 1936 read with section 340(1) and (2) of the Companies Act 61 of 1973, an order setting aside the cession by the relevant company (now in liquidation) to the respondent dated 6 June 2009 of the company's claims and rights of action arising out of agreements with Firstrand Bank ('FRB') or misrepresentations made by FRB.

[2] Section 26(1)(b) of the Insolvency Act provides –

> 'Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –
>
> (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities.'

The relevant parts of section 340(1) and (2) of the Companies Act provide –

> '(1) Every disposition by a company of its property which, if made by an individual, could, for any reason be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.
>
> (2) For the purpose of this section the event which shall be deemed to correspond with the sequestration order in the case of an individual shall be –
>
> (a) in the case of a winding-up by the Court, the presentation of the application …
>
> (b) in the case of a voluntary winding-up, the registration in terms of section 200 of the special resolution to wind up the company.'

[3] Accordingly, the applicants will be entitled to the relief sought if the following requirements are satisfied:

(1) the company has been wound up (either by the court or voluntarily in terms of the Companies Act);

(2) the company is unable to pay all its debts;

(3) the company made a disposition of property;

(4) the disposition was not made for value;

(5) the disposition was made within two years of liquidation; and

(6) the respondent is unable to prove that, immediately after the disposition was made, the assets of the liquidated company exceeded its liabilities.

[4] It is not in dispute that the companies in respect of which the applicants were appointed the liquidators have been wound up (Central Lake Trading 256 (Pty) Ltd ('Central Lake') was wound up by the court on 1 September 2009 and Summer Season Trading 49 (Pty) Ltd ('Summer Season') was wound up by special resolution on 18 September 2009); that the companies are unable to pay their debts; that the companies made the dispositions alleged (on 6 June 2009 each company ceded to the respondent its claims and rights of action against FRB arising out of agreements between the company and FRB and FRB's breach of the agreements and/or arising out of misrepresentations made by FRB); that such disposition was made within two years of the liquidation of the company and that the respondent has not attempted to prove that immediately after the disposition was made the company's assets exceeded its liabilities. The only apparent dispute is whether the disposition was not made for value. The respondent alleges in respect

of each disposition that it was made for value because the parties to the cession agreed that the cession of the claims and rights of action was made for a value to be determined by the company's auditor. This is not reflected in each written memorandum of cession and it is disputed by the applicants.

[5] The applicants seek final relief on notice of motion and where there are disputes of fact the principles set out in ***Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A)** at 634E-635C must be applied. Thus, where the denial of a fact by the respondent does not raise a real, genuine or *bona fide* dispute of fact the relief may be granted. So too where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. See ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)** paras 12 and 13: ***National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)** para 26.

[6] The applicants have to establish that the dispositions made (i.e. the cessions on 6 June 2009) were not made for value. They have attached to each founding affidavit a copy of the relevant cession. With the exception of the name of the cedent the cessions are identical. The Central Lake cession reads as follows:

'Memorandum van

SESSIE
(‘hierdie sessie’)

deur

CENTRAL LAKE TRADING 256 (EDMS) BPK
(‘die sedent’)

aan

BORN FREE INVESTMENTS 364 (EDMS) BPK
(‘die sessionaris’)

1. BOEKSTAWINGS

Die sedent beskik oor vorderingsregte en eise teen Firstrand Bank Bpk (‘FRB’) voortspruitend uit ooreenkomste tussen die sedent en FRB en laasgenoemde se verbreking daarvan, en/of voortspruitend uit wanvoorstellings deur FRB.

2. SESSIE

Die partye plaas op rekord dat die sedent alle en enige van sy vorderingsregte en eise teen FRB aan die sessionaris sedeer het op 6 Junie 2009, wat sodanige regte en eise aanvaar het.

PRETORIA: 6 JUNIE 2009

____

D. PERKINS
vir sedent

____

D. PERKINS
vir sessionaris'

D Perkins signed each cession on behalf of the cedent and the cessionary and *ex facie* each document the cession was concluded on 6 June 2009 and no value or *quid pro quo* (or method of establishing value or a *quid pro quo*) for the claims and rights ceded is referred to.

[7] In the affidavits it is common cause that the cessions were executed by Perkins, acting on behalf of Central Lake and Summer Season, and on behalf of the respondent, on 6 June 2009; that each cession recorded that the company concerned (i.e. Central Lake and Summer Season) was possessed of certain 'vorderingsregte en eise' against FNB arising from the breach of an agreement between the company and FNB and/ or misrepresentation by FNB and that the company had ceded all and any of its rights and claims against FNB to the respondent who accepted such cession of rights and claims.

[8] On this evidence no value was given for the cessions. However, in the respondent's answering affidavits (deposed to by a former director of the companies) the respondent alleges that the cession documents do not reflect the whole agreement of cession and that an agreement was reached that value would be given for each cession, that the value would be determined once there was more clarity as to the nature of any action to be instituted in pursuit of the claim ceded and that the

company's auditor would determine the value. The respondent annexes to its answering affidavits an affidavit by Perkins in which he says –

> '1. I am an adult male and director of the respondent. I am duly authorised to depose hereto.
>
> 2. The facts to which I depose herein fall within my personal knowledge save where otherwise indicated and are both true and correct.
>
> 3. I confirm that the respondent opposes this application and that the respondent's answer to this application is contained in the affidavit of Jacobus Cornelius Reyneke to which this affidavit is attached.'

The question is whether these affidavits create a real, genuine or *bona fide* dispute of fact on the issue of whether value was given for the disposition.

[9] In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)** the court considered how a real, genuine and *bona fide* dispute of fact arises:

> '[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion

of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers:

…

[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty

> imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter'.

[10] The salient facts pertaining to the cessions are that they were entered into on 6 June 2009 and that Perkins concluded the cessions on behalf of both cedent and cessionary and that Perkins' affidavit says nothing about what was agreed on 6 June 2009 (or at any other time) about giving value and how value was to be determined. In these circumstances the respondent has not even raised a bare denial of the applicants' allegations that the dispositions were made for no value.

[11] The background to the cessions can be set out briefly. Jacques Reyneke and his brother Petrus Johannes ('Pierre') Reyneke were the directors of Central Lake and Summer Season from 12 August 2006 until 12 March 2009 when they resigned. They were also the directors of the respondent until 12 March 2009 when they resigned. On that date Perkins was appointed the sole director of all three companies. Through their family trusts Jacques and Pierre Reyneke held all the shares in a group of companies including Central Lake and Summer Season. The Reyneke brothers and their companies were involved in property development. In terms of a Commercial Loan Facility Agreement entered into with FRB on 27 February 2008 FRB undertook to lend and advance to Central Lake the sum of R23 210 000 which

was repayable over a period of 18 months. In terms of a similar agreement entered into on 6 June 2007 FRB undertook to lend an advance to Summer Season the sum of R98 300 000 repayable over a period of 14 months. In January 2009 companies in the Reyneke group, including Central Lake and Summer Season, instituted an action against FRB, First National Bank Ltd and Rand Merchant Bank. In this action Central Lake claimed payment of damages in the sum of R69 828 193,64 for breach of contract and Summer Season claimed damages in the sum of R118 306 214,49 on the same grounds. Both companies alleged breaches of the Commercial Loan Facility and other agreements which the companies had entered into with the defendants. The defendants successfully excepted to the companies' particulars of claim and on 21 May 2010 the Reyneke companies, including Central Lake and Summer Season, withdrew their action.

[12] According to Jacques Reyneke he was 'instrumental in taking the decision to cede the claim to the respondent'. (He does not explain how this was possible if he resigned as director on 12 March 2009 and the cession was effected on 6 June 2009). Jacques Reyneke says that when the decision was taken to cede the claim (he does not say when this was if it was not 6 June 2009 and he does not say who took the decision if it was not Perkins) he and Pierre Reyneke were convinced that the merits of the claim were good but that the value of the claim at the time of the cession (i.e. 6 June 2009) would be extremely difficult to calculate. (By then the two companies had already instituted an action

against FRB claiming damages for breach of contract: Central Lake claimed about R69 million and Summer Season claimed about R118 million). He does not explain why this would be. Jacques Reyneke says that he and Pierre Reyneke were mindful of the effect of dispositions without value: they were in agreement that value would be given for the cession but at the time of the recordal of the cession (i.e. 6 June 2009) they did not have clarity as to the commercial value of the claim ceded and how it should be determined (despite the fact that the companies had formulated very large claims in their particulars of claim). Jacques Reyneke says that in these circumstances they agreed that the value would be determined once there was more clarity as to the nature of any claim (in pursuit of the claim) to be instituted. (This makes no sense as the summons containing the claims had already been drawn up, issued and served). They therefore agreed that the value would be determined by the auditor of the company (in liquidation). (Significantly, he does not say precisely when or where the agreement was reached and he does not say who was to determine the value and when he was to do so.). Jacques Reyneke claims that the details of the cession were agreed 'well prior to the resignations of Pierre and I as directors'. (He does not say when this was and he does not explain why the claim was not ceded then. He also does not explain why the details of the cession were not immediately recorded.) Jacques Reyneke says that against that background their attorney was 'instructed to prepare a brief written recordal of the fact of the cession'; they 'did not instruct him on the details of the cession' and the memorandum of cession 'simply reflects the fact of the cession and not the agreement as a whole'. (If, as alleged by Jacques Reyneke, he and his brother were concerned about making a disposition without value and had entered into an agreement as to how value would be determined, it is inconceivable that:

(1) they would not have recorded the agreement as to value immediately;

(2) they would not have informed the attorney about this agreement and instructed him to record the full agreement in the memorandum – this could have been done in one or two short sentences;

(3) they would not have informed Perkins about their agreement;

(4) Perkins would not have known about the agreement regarding value and would not have insisted on this being recorded in the memorandum.)

[13] In these circumstances the respondent's version simply cannot be true and must be rejected on the papers. Furthermore, the version as a whole is 'inherently and seriously unconvincing' and it is averred in a manner which is, in the circumstances 'needlessly bald, vague or sketchy' – see ***Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226**

(T) at 227G-228F. Accordingly, even if Jacques Reyneke's evidence was relevant, it would not constitute a real, genuine or *bona fide* dispute of fact.

[14] In view of the conclusion that the respondent's evidence does not create a real, genuine or *bona fide* dispute of fact with regard to the question of whether the company (Central Lake or Summer Season) made a disposition for no value it is unnecessary to decide whether the evidence given by Pierre Reyneke and Perkins at the section 417 enquiry held in respect of Central Lake is admissible against the respondent. For purposes of this judgment that evidence has not been taken into consideration and the respondent's version has been considered on its own merits.

[15] The applicants are therefore entitled to the relief which they seek and the following orders are made:

I Under case number 42316/10

1. The cession by Central Lake Trading 256 (Pty) Ltd to the respondent on 6 June 2009 of Central Lake Trading 256 (Pty) Ltd's claims and rights of action against FRB is set aside.

2. The respondent is ordered to pay the costs of the application.

II <u>Under case number 42315/10</u>

1. The cession by Summer Season Trading 49 (Pty) Ltd to the respondent on 6 June 2009 of Summer Season Trading 49 (Pty) Ltd's claims and rights of action against FRB is set aside.

2. The respondent is ordered to pay the costs of the application.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 42316/10 and 42315/10

HEARD ON: 17 November 2010

FOR THE APPLICANT: ADV. D. VETTEN

INSTRUCTED BY: Mr. G. Oertel of Edward Nathan Sonnenbergs

FOR THE RESPONDENT: ADV. MvR POTGIETER SC

INSTRUCTED BY: MP Koekemoer Attorneys

DATE OF JUDGMENT: 3 December 2010