IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EASTERN CAPE, PORT ELIZABETH)

Case No.: 138/10
139/10
140/10
141/10

Date heard: 29 April 2010
Date delivered: 14 June 2010

In the matter between:

STANDARD BANK OF SA LIMITED Applicant

and

MEMOAK NO 6 CC
(Case No 138/2010) Respondent

MEMOAK NO 7 CC
(Case No 139/2010) Respondent

SHERYL JEANETTE WRIGHT
(Case No 140/2010) Respondent

SHERYL JEANETTE WRIGHT N.O.
(Case No 141/2010) Respondent

JUDGMENT

KROON, J:

Introduction

[1] The four applications with which this judgment is concerned are interrelated. They have, as their common denominator, Mrs Sheryl Jeanette Wright. She is, in her personal capacity, the respondent in case no.140/2010 and, in her capacity as sole trustee of the Capricorn Trust, the respondent in case no. 141/2010 (the trust). She is also the sole member of the respondents in case nos. 138/2010 and 139/2010, two close corporations styled, respectively, Memoak No 6 CC and Memoak No 7 CC (Memoak 6 and Memoak 7, respectively).

[2] The applicant, a commercial bank, seeks orders for the provisional liquidation of the two close corporations referred to and for the provisional sequestration of the estates of Mrs Wright and the trust. All the applications were opposed.

[3] Mrs Wright appeared in person and as representative of the trust. She was also permitted to present the argument on behalf of the two close corporations.

The applicant's locus standi

[4] It is not in dispute that Memoak 6 incurred indebtedness with the applicant in respect of monies lent and advanced, alternatively

disbursed, by the applicant to it, including bank charges, ledger fees, commission on cheques and interest debited. The applicant alleged that as at 13 September 2009 the indebtedness amounted to R3 666 832,82 plus interest thereon at the rate of 10.5% per annum calculated daily and compounded monthly in arrears as from 25 August 2009 until date of payment.

[5] It is not in dispute that Memoak 7 incurred indebtedness of a similar nature with the applicant. The applicant alleged that as at 13 September 2009 the indebtedness amounted to R89 656,91 plus interest as set out in the preceding paragraph.

[6] It is not in dispute that the trust incurred similar indebtedness with the applicant, the amount allegedly owing on 13 September 2009 being R1 749 103,66, plus interest calculated as aforesaid. The trust became further indebted to the applicant, by incurring liability as surety and co-principal debtor in favour of the applicant in respect of the indebtednesses of Memoak 6 and 7, respectively, to the applicant.

[7] It is not in dispute that Mrs Wright incurred indebtedness with the applicant she having incurred liability as surety and co-principal debtor in favour of the applicant in respect of the indebtedness of Memoak 6, Memoak 7 and the trust, respectively, to the applicant.

[8] The applicant brought the present applications in its capacity as creditor in respect of the aforesaid alleged liquidated claims.

[9] The extent to which the alleged indebtedness referred to above was placed in dispute will be set out later.

The applicant's cause of action

[10] The applications for liquidation of the two close corporations were based on the averment that each is factually insolvent and unable to pay its debts. The applications for the sequestration of the estates of the trust and Mrs Wright were similarly based on the averment that each is factually insolvent and on the further averment that *prima facie* the sequestration in each case would be to the advantage of creditors.

Formal requirements

[11] The formal requirements stipulated in the relevant legislation were complied with in each application, the necessary certificates and reports by the Master and the necessary returns of service having been filed.

The defences raised

[12] Two main defences were raised. The first related to the application for the liquidation of the two close corporations. It was alleged that they were no longer indebted to the applicant. The allegation was based on the contention that an arrangement was made

with the applicant in terms of which the trust would take over the debts of the close corporations and there would be one consolidated debit owing by the trust. In short, there had been a novation of the debts owing by the close corporations to the applicant. (To the limited extent that the application against Mrs Wright was founded on her suretyships for the debts of the close corporations this defence would also be relevant).

[13] The second defence related to the applications for the sequestration of the personal estate of Mrs Wright and that of the trust. In essence it was averred that both she and the trust had, prior to the institution by the applicant of the present proceedings, applied in terms of the National Credit Act 34 of 2005 (the NCA) to be placed under debt review and that in each case the magistrate's court thereafter, on 26 April 2010, issued a debt re-arrangement order. The contention was that the issue of those orders precluded the applicant from proceeding with its application for an order placing the estates of Mrs Wright and the trust under sequestration.

[14] The papers filed on behalf of the respondents reflect that certain other defences were raised by Mrs Wright and on behalf of the trust in the applications against them. To the extent that it is necessary these defences will be considered later.

The alleged novation

[15] Mrs Wright alleged that pursuant to discussions with certain of the applicant's officials agreement was reached on 7 November 2007 that the trust would assume responsibility for all the accounts held by various entities with the applicant, including Memoak 6 and 7. In support of the allegation she adverted to a letter of 7 November 2007 penned by a Mr Spence and addressed by the applicant to the 'trustees' of the trust. The first page of the letter read as follows:

'OVERDRAFT AND OTHER BANKING FACILITIES

We refer to our recent discussions and are pleased to confirm our agreement to the following facilities, which would be subject to the terms and conditions on the reverse of this page, and those indicated elsewhere in this letter.

1 Type of facility	Limit
Capricorn Trust Overdraft	R1,100,000
Standard Bank Vehicle and Asset Finance – Liquidating Credit Facility	R437,000
Medium Term Loan(s) * see below	R360 000 R1,900,000
Blueline Truck Repairs Close Corporation Overdraft	R25 000
Memoak No 7 Close Corporation Overdraft	R350 000
Standard Bank Vehicle and Asset Finance – Liquidating Credit Facility	R61 000
Memoak No 6 Close Corporation Overdraft	R1,000,000
Business Revolving Credit Loan(s) **see below	R65 000

Mrs Wright signed a copy of the letter on behalf of the trust and the close corporations and returned same to the applicant.

[16] The replying affidavits filed on behalf of the applicant, deposed to by Spence, firmly denied the assertion that the novation contended for ever occurred. In short, it was averred that there was no more than

an arrangement reached in respect of new facilities granted to the various entities concerned.

[17] I have little difficulty in holding that the test applicable, whether the applicant has *prima facie* established the indebtedness in question, has been satisfied. In the first place, conspicuous by its absence was any reference in the letter to, or even an indication of, a novation of any indebtedness of the close corporations to the applicant and a consolidation thereof with the indebtedness of the trust to the applicant. One would have thought that, had the parties intended something as important as a novation, that would have been spelt out explicitly or at least that the language of the letter would have clearly implied same. As will be shown below, the language of the letter in fact reflects the contrary, that no novation was intended.

[18] In making the above comments I have not lost sight of the following comments in *Proflour (Pty) Ltd and Another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping and Another*[1] (quoted in Mrs Wright's papers):

> 'Consequently, it appears on the basis of this dictum that in order to establish whether a novation has occurred, the Court is entitled to have regard to the conduct of the parties, including any evidence as to their intention. This enquiry is not limited in the same way as the limitation imposed upon the interpretation of the terms of a contract. I comprehend that the reason for this is that whether one agreement has been novated by another, cannot be found solely within the parameters of the agreements themselves, where the enquiry is whether the terms of the new agreement are inconsistent with the continued existence of the original right. This is because the essence of the enquiry is to determine the intention which accompanies the conclusion of the new agreement.

[1] Case No 14397/2009, KZND, 15 December 2009, unreported, at paragraph [12].

> "It is more likely that a creditor who has an enforceable right, **will intend**, when he enters into a new arrangement in regard thereto, to reinforce rather than destroy that right and accept something else in its place" (emphasis mine). *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 307D-G.

It is therefore necessary that the circumstances of the case be examined, including the conduct of the parties and evidence of their subjective intention. This would be admissible evidence in this context.'

[19] Mrs Wright sought to make capital out of the fact:

(a) that the letter referred to was addressed to the trust (as well as the covering letter dated 23 November 2009, to which the earlier letter was attached and which read as follows:

> 'Enclosed please find a copy of your facilities letter in duplicate. We shall be pleased if you would indicate your acceptance by initialling each page as well as the reverse of the first page, and signing the last page of the letter. Please bear in mind that the signature(s) should conform to specimens/mandates as held by the Bank. Kindly return the signed copy to ourselves as soon as possible and retain the duplicate with your records.
>
> We draw your attention to the conditions and/or covenants mentioned on page 3 and look forward to receiving these from you.)'

(b) that paragraph 7 of the letter read as follows:

> <u>'7 Arrangement fee</u>
>
> A facility arrangement fee is charged to cover the costs incurred in arranging or reviewing your overdraft facility, the credit evaluation process, the preparation of the documentation and the administrative functions. The facility arrangement fee is an annual fee, charged at the time of the establishment or review of your overdraft facility.
>
> The initial fee for arranging your overdraft facility is R5,643 (inclusive of VAT).
> We may vary this fee from time to time. If we do so, we will advise you.
>
> By signing this letter you are granting us permission to debit your current account (080168272) with the facility arrangement fee.'

(The arrangement fee was in fact debited to the trust's bank account with the applicant on 3 January 2008).

[20] However, Spence stated, acceptably in my view, that the reason why the letter was addressed to Mrs Wright (as trustee) and why all the facilities in question were included in one letter, was that Mrs Wright was the sole trustee of the trust and the sole member of the close corporations referred to in the letter. It is to be inferred that it was for the sake of convenience that a single composite arrangement fee was debited to the trust's bank account. The fact that the letter refers to 'your overdraft facility' and the covering letter to 'your facilities letter' is in my view neither here nor there, in the light of what is stated in the paragraphs that follow.

[21] The letter, on page 1, clearly differentiates between the various (and separate) facilities for the different entities in the group controlled by Mrs Wright. This is made the more clear in paragraph 2 of the letter which recorded that the facilities referred to earlier were 'secured by the following collateral'. There then followed *inter alia* a separate tabulation of the collateral operative in respect of each account referred to on page 1 (ie the account of Capricorn Trust, the account of Blueline Truck Repairs Close Corporation, the account of Memoak 7 and the account of Memoak 6). Included in the collateral listed were the following: on the account of the trust, unlimited suretyship and cession of claims by Memoak 7 and Memoak 6; on the account of Memoak 7, unlimited suretyship and cession of claims by the trust; on the account of Memoak 6, unlimited suretyship and cession of claims by both the trust and Memoak 7. Amongst the collateral still to be

obtained was the following: on the account of Memoak 7, unlimited suretyship and cession of claims by Memoak 6. Clearly, separate overdraft facilities for the respective entities were intended and recorded. The contents of the letter cannot be reconciled with the consolidation and novation contended for.

[22] In case no. 141/2010 Mrs Wright annexed to her answering affidavit an E-mail addressed to her by Spence on 12 April 2007. In essence, the communication canvassed the unsatisfactory conduct by Mrs Wright of the various facilities granted by the applicant to the entities controlled by her, the discontent of the applicant's credit section thereanent and suggested steps to be taken and information to be furnished to address the situation. One sentence in the letter read as follows:

> 'I think we have also agreed that you will have to consolidate now and while it is a feather in your cap that you are often given more business because of your excellent reputation, it does not necessarily mean that the Bank will increase facilities to accommodate this.'

The argument, if I understood it correctly, was that the use of the word 'consolidate' in the sentence lent support to the contention of Mrs Wright that in November 2007 the facilities of the trust and the close corporations referred to were consolidated into one facility in the name of the trust.

[23] I am satisfied, however, that Mrs Wright's seizing upon the word 'consolidate' was opportunistic and disingenuous. In the context of the whole letter, what was conveyed was an exhortation that Mrs Wright take steps to consolidate the financial position of her various business

enterprises and address the unsatisfactory manner in which the various facilities granted by the applicant were being conducted.

[24] Mrs Wright further attached to her answering affidavit (in case no 138/2010) an E-mail addressed to her by Spence on 16 March 2009 on the subject: 'Overdrafts Memoak Numbers 6 and 7', which read as follows:

> 'Thanks for the various conversations around the accounts of Memoak numbers 6 and 7.
>
> The reason for our various conversations was to inform you that these accounts are some R3 772 000 over their limits, (number 6 by R2 364k and number 7 by R1 408k) basically due to debit runs on Ashleys Transport being dishonoured because you did not know that he had closed his bank account. You have however recovered the fuel delivered to him which income together with debtors will be used to reduce the accounts within their limits. Have discussed this with our local credit people and in order to rectify this by the end of march 2009 at the latest, you will continue depositing all your income as in the past to the accounts in our books. From our side we are dishonouring all debits that come through the accounts until the accounts are back within their limits. If either numbers 6 or 7 reduce to within the limits, any available amount will be transferred to the other account until such time as both are within their limits. The same applies to the Cheque account of Capricorn Trust. If there is money available on Capricorn, it will be transferred to the accounts of Memoak numbers 6 and 7 until they are within their limits.

> This excess position must still be reported up the line to our Senior Credit people in Cape Town, so it is possible that this email will be followed by another.
>
> Please also keep us updated regarding your negotiations with Caltex regarding them reducing your credit limit by R3m.'

However, contrary to what Mrs Wright contended (that the letter is further evidence that the applicant viewed 'all the Capricorn Trust facilities to be a single facility') this letter underscores the fact that the facilities granted to the trust, Memoak 6 and Memoak 7, respectively, were separate and discrete facilities, and the applicant was merely signifying its intention to put in place steps to be taken to ensure that each account was kept as far as possible to its limits. There is no suggestion that Mrs Wrights responded to this letter and took issue with its contents.

[25] On 9 December 2009 the applicant's attorneys addressed the following letter to Memoak 6:

> '**Re: NOTICE IN TERMS OF SECTION 69(1)(a) READ WITH SECTION 68(c) OF THE CLOSE CORPORATIONS ACT NO 69 OF 1984: STANDARD BANK OF SOUTH AFRICA LIMITED / MEMOAK NO 6 CC**
>
> We act on the instructions of Standard Bank of South Africa Limited.
>
> Our client has informed us that you are indebted to it in the sum of R3 666 832.82 being in respect of an overdraft facility on your current account held with our client. Notwithstanding various requests by our client you have failed, refused and/or neglected to settle the amount due to date.
>
> We have accordingly been instructed to serve this demand in terms of Section 69(1)(a) of the Close Corporations Act No 69 of 1984 on your offices in terms of which we have been instructed to demand from you payment of the sum of R3 666 832.82 with further interest to be added thereto within a period of three weeks from date of delivery of this letter failing which we hold instruction to proceed with an application for your liquidation on the basis that Memoak No 6 CC is clearly deemed to be unable to pay its debts.

> Take note further that payment should be made directly in our Nedbank Trust Account the details of which are the following:
>
> ……………..'

A similar letter was addressed on the same date to Memoak 7.

[26] There was no response to these letters. The letters underline the consistency of the stance of the applicant that the close corporations themselves were indebted to it (the sums in the letters being those relied upon in the respective applications for orders of provisional liquidation) and the unacceptability of Mrs Wright's conflicting averment that the indebtedness was no longer that of the close corporations, but had been transferred to, and taken over by, the trust.

[27] In its replying papers in case no's 138/2020 and 139/2010 the applicant annexed the annual financial statements of Memoak 6 and Memoak 7 for the year ending 29 February 2008. These were prepared by the auditors of the close corporations and were approved by Mrs Wright, she having appended her signature (as the sole member) to the statements at the appropriate places on 31 July 2008.

The balance sheet of Memoak 6 reflected as one of the current liabilities an overdraft in the sum of R989 187,00 and that of Memoak 7 an overdraft in the sum of R249 752,00.

[28] During argument Mrs Wright confirmed that these overdrafts were with the applicant bank. When she was requested to explain why, in the light of her claim that the close corporations were not indebted to the applicant (but only the trust was, pursuant to the novation contended for), the overdrafts were reflected in the balance sheets as current liabilities of the close corporations, she stated as follows: the overdrafts were those that had been granted to the trust, but had been 'utilised in the close corporations', the trust having been allowed by the applicant to do so; when the financial statements were prepared the applicant, which had been 'very lax' on this score, had not yet furnished her with the documentation the auditors required, ie the 'new agreements of November 2007'; the auditors told her that the overdrafts would have to 'stay there' (ie in the balance sheets of the close corporations) until she received a signed letter from the applicant. There was, however, no evidence placed before me that she had pursued this issue with the applicant and she did not suggest in argument that she had. The proffered explanation has only to be stated to carry its own refutation.

[29] In the Grahamstown High Court (case no. 2935/2009) Mrs Wright (as applicant) sought an order for the compulsory liquidation of Memoak 6. She made a similar application in case no. 2933/2009 in respect of Memoak 7. Both applications were launched on 22 July 2009. Mrs Wright was the deponent to the founding affidavit in each case. The cause of action invoked in both cases included the allegations that the close corporation had ceased trading (Memoak 6 in

June 2009 and Memoak 7 in July 2009) and was insolvent and unable to pay its debts. The applicant was listed as a creditor of Memoak 6 in the sum of approximately R3 600 000, 00 and of Memoak 7 in the sum of approximately R100 000, 00. The applications were, however, subsequently withdrawn.

[30] In her replying affidavit in case no 138/2010 Mrs Wright stated as follows:

> 'The liquidation application as referred to, in The High Court of Grahamstown, for the Respondent Close Corporation, to be placed under provisional liquidation, was withdrawn before the final order was granted, as prior to the application the Respondent was placed under undue pressure by the credit providers that being The Applicant and Chevron SA (Pty) Ltd, leading it to believe that they were dealing with the Respondent.
>
> After the fact, and consulting with a debt councillor, it was discovered that the credit providers were indeed transacting with The Capricorn Trust and not the Respondent as was being alleged.'

Similar allegations were made by Mrs Wright in case no 139/2010, save that there was no reference to Chevron SA (Pty) Ltd. No elucidation of these allegations was proffered, nor did the response deal specifically with the fact that in the founding papers in the two earlier applications she had made the allegations that the two close corporations were indebted to the applicant (clearly in respect of moneys loaned and advanced), allegations inconsistent with her allegations in the present proceedings.

[31] On a similar tack the applicant recorded in case no. 141/2010 that on 22 July 2009 Mrs Wright's husband launched proceedings (under case no. 2935/2009) in the Grahamstown High Court for an order for the sequestration of the trust. He recorded that he was employed as the trust's general manager and that it was indebted to him in the sum of R840 000,00 in respect of remuneration. He referred to the fact that Mrs Wright was at the same time in the process of launching the applications for the liquidation of Memoak 6 and Memoak 7. The cause of action invoked by him was the alleged *de facto* insolvency of the trust. Amongst the liabilities of the trust listed by him were the two short term loans advanced to the trust by the applicant in the sums of R360 000,00 and R1 900 000,00 reflected in the schedule set out in the letter of 7 November 2007 quoted in paragraph 15 above. The only other liability to the applicant listed was that of *surety* for the indebtedness of Memoak 6 and Memoak 7. Suffice it to point out that these allegations do not square with the novation and consolidation contended for by Mrs Wright. The application for the sequestration of the trust was also subsequently withdrawn.

[32] The response of Mrs Wright to these allegations was simply that the application for the sequestration of the trust was withdrawn before the final order was granted, as prior to the application the trust 'and others' were placed under undue pressure. This unsatisfactory unelucidated answer did not seek to proffer any explanation for the allegations in that application relating to the nature of the trust's

indebtedness to the present applicant, which were inconsistent with her claim of a novation and consolidation.

[33] There is no reason suggested on the papers why the applicant would have been prepared to agree to the novation contended for; on the contrary, the probabilities are overwhelmingly against the proposition, regard being had to the parlous financial position of the trust.

[34] I am persuaded, at least *prima facie*, that the denials that the close corporations are indebted to the applicant do not raise a real, genuine or *bona fide* dispute of fact, that there is inherent credibility in the applicant's factual averments and that the denials are far-fetched and clearly untenable. At the very least therefore the applicant has *prima facie* established that it has the requisite liquidated claims against the close corporations.

The effect of the debt reviews in respect of Mrs Wright and the trust on the applications for orders for their sequestration

[35] There was some debate at the Bar concerning the question whether the NCA applied to the agreements in terms of which Mrs Wright and the trust became indebted to the applicant, with reference to such issues as the juristic personality of the trust, its annual turnover, the categorization of the agreements (eg whether they were large agreements) and whether a suretyship agreement fell within the

contemplation of the Act; in short, whether they were 'credit agreements' within the meaning of the Act. Fortunately, it is not necessary for me to canvass these issues, and I will proceed on the basis that the NCA does apply to the agreements. The question is whether, in terms of the NCA, the applicant is precluded by the debt reviews from seeking the sequestration of Mrs Wright and the trust in the relevant applications.

[36] The decision of *Trengove* AJ in *Investec Bank Ltd and Another v Mutemeri and Another*[2] is instructive on this score. The respondents in that case (like Mrs Wright and the trust in the present matter) applied to a debt counsellor for the review of their debts in terms of s 86 of the NCA. In due course application was made to a magistrate's court for an order restructuring their debts in terms of ss 86 and 87 of the NCA. That application was pending when the applicants in the case launched proceedings for the sequestration of the estate of the respondents (who were said to be married in community of property). (In the present matter, as already recorded, the magistrate, on 26 April 2010, granted a debt re-arrangement order in respect of each of Mrs Wright and the trust).

[37] It was common cause in that matter that the applicants had substantial liquidated claims against the respondents and that the latter were in fact hopelessly insolvent. It was also common cause that the indebtedness invoked by the applicants arose out of agreements as contemplated in the NCA. At issue was the contention of the

[2] 2010 (1) SA 265 (GSJ).

respondents that the applicants were precluded by the NCA from seeking their sequestration in the application.

[38] Reliance was placed on the provisions of s 130(1) of the NCA which bar a credit provider from approaching the court 'for an order to enforce a credit agreement' unless certain pre-requisites were satisfied. The court assumed in favour of the respondents that the applicants did not meet the requirements. It was held, however, that the question to be answered was whether an application for sequestration of a consumer's estate that is based on the applicant's claim against the consumer in terms of a credit agreement, is an application for an order to enforce a credit agreement.[3]

[39] After referring to authority[4] that there is little doubt that a sequestrating creditor's motive in applying for the sequestration of its debtor, may be, and often is, to obtain payment of its debt, the learned judge stressed that the question whether an application for sequestration constitutes an application for 'an order to enforce a credit agreement' within the meaning of s 130(1) depended on the nature of the relief the creditor seeks and not on the creditor's underlying motive in bringing the application.[5]

[40] The learned judge next referred to authority[6] which explained why it could not be said that an application for sequestration was a proceeding by which one party sued another for something, or claimed

[3] Ibid at para [26].
[4] *Estate Logie v Priest* 1926 AD 312 at 319.
[5] *Investec*, note 2 above, para [28].
[6] *Collett v Priest* 931 AD290 at 299.

something from another, and authority[7] in which it was held that an application for a winding up order was not a proceeding 'for the recovery of a debt'.[8] Applying the reasoning in these cases the learned judge proceeded as follows:[9]

'It seems to me that the rationale of these judgments is equally applicable to the proper interpretation of s 130(1) of the NCA, which applies only to an application to court 'for an order to enforce a credit agreement'. It does not apply to an application by a credit provider for the sequestration of a consumer's estate based on a claim in terms of a credit agreement between them. Such an application is not one for an order enforcing the credit provider's claim against the consumer. Section 9(2) of the Insolvency Act indeed makes it clear that the sequestrating creditor's claim need not even be due, that is, need not yet be enforceable. An application for sequestration may be made on the strength of a claim which is not yet enforceable, because a sequestration order is not an order for enforcement of the claim. Its purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to the claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim.

I conclude that an application for sequestration is not an application for enforcement of the sequestrating creditor's claim and is thus not subject to the requirements of s 130(1) of the NCA.'

[7] *Prudential Shippers SA Ltd v Tempest Clothing (Pty) Ltd* 1976 (2) SA 856 (W) at 863D-865A.
[8] *Investec,* note 2 above, paras [29] and [30].
[9] Ibid, at para [31].

[41] The judgment further proceeds as follows:

'[32] The respondents, however, submitted that, whether or not an application for sequestration is subject to s 130(1), it is in any event subject to s 130(3) which is not limited to applications for the enforcement of credit agreements, but extends to 'any proceedings commenced in a court in respect of a credit agreement'. The relevant provisions of this section read as follows:

> '(3) Depite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –
>
> *(a)* In the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with ….'

[32] The respondents submitted that an application for sequestration is a proceeding 'in respect of a credit agreement' within the meaning of s 130(3) and that it thus rendered such an application subject to the requirements of s 129 of the NCA. But s 130(3) does not extend the scope of s 129. It merely provides that, in proceedings (already) subject to the requirements of s 129, the court must be satisfied that there has been compliance with those requirements. One accordingly has to turn to s 129 to determine whether its requirements apply to applications for sequestration. The only relevant requirements are those laid down by s 129(1)(b), but they also apply only to 'legal proceedings to enforce' credit agreements. I have already concluded that applications for sequestration are not proceedings of that kind. They are accordingly not subject to the requirements of s 129(1)(b) and thus do not have to comply with those requirements in terms of s 130(3).

[34] The respondents lastly invoked s 88(3) of the NCA. It provides, inter alia, that a credit provider, who receives notice of a consumer's application for debt review in terms of s 86(4)*(b)*(i), 'may not exercise or enforce by litigation or other judicial process any right or security' under a credit agreement between the credit provider and the consumer, until certain conditions have been met. But, for the reasons already mentioned, an application by a credit provider for the sequestration of a

consumer does not constitute litigation or other judicial process by which the credit provider exercises or enforces any right under the credit agreement between itself and the consumer. The credit provider may rely on its claim in terms of a credit agreement to qualify as a creditor with standing to bring the application for the sequestration of the consumer. But it does not exercise or enforce its right under the credit agreement by doing so. Such an application is accordingly also not precluded by s 88(3).

[35] I conclude that the respondents' defences under the NCA cannot be upheld. None of the provisions upon which they rely precludes an application by a credit provider for the sequestration of a consumer, based on a claim under the credit agreement between them.'

[42] *In casu*, if I understood her correctly, Mrs Wright sought to distinguish the present case from *Investec* on the basis that the magistrate had in fact issued a debt re-arrangement order in respect of both her and the trust (ie in terms of either s 87 or s 86(9) read with (7)(c) of the NCA). She, too, sought to invoke s 88(3). Suffice it to state that the fact of the magistrate's order does not import a distinguishing feature and that the reasoning set out in *Investec* remains applicable.

[43] It was not contended that any other section of the NCA could operate to bar the present proceedings for the sequestration of Mrs Wright and the trust. The defence of a reliance on the provisions of the Act must therefore fail.

Remaining issues

[44] Memoak 6

The papers disclose that the close corporation is commercially and actually insolvent, it failed to respond to the letter of demand, it has closed its doors, it has, at least, assets in the form of vehicles valued (in the earlier application brought by Mrs Wright for its sequestration) at R380 000,00, liquidation would prevent further legal costs or any preferences to other creditors, and the affairs of the corporation would be the subject of investigation. In the circumstances it would be proper for an order for the provisional liquidation of the close corporation to issue.

[45] Memoak 7

Similar comments apply to this close corporation save that its assets appear to be worth R77 000,00 (if Mrs Wright's allegation that the amount owing on a particular motor vehicle exceeds its value, is correct). Again, an order for provisional liquidation would be proper.

[46] Mrs Wright

(a) On her own showing Mrs Wright is hopelessly insolvent. She did not respond to the applicant's letter of demand.

(b) Spence alleged that as far as he is aware her only source of income was the three businesses, ie the two close corporations and the trust.

Mrs Wright claimed, however, that she has income 'as disclosed in the debt review'. That income has not been revealed in the present application.

(c) Mrs Wright owns an erf at Colchester purchased by her in 2006 for R1 500 000,00. It is common cause that the present value of the plot is approximately R2 000 000,00, but that it is mortgaged for sums in excess of that figure. There is therefore no equity available in the property.

(d) It is common cause that she is possessed of certain policies, the surrender value of which is R152 000,00. The policies have, however, been ceded to the applicant.

(e) In her answering affidavit she reflected that her assets include one motor vehicle valued at R280 000,00 (which is 'secured' by a credit agreement). She, however, referred to four bank vehicle finance agreements, involving a much higher total (one of which agreements may relate to a trust vehicle). In a supplementary answering affidavit motor vehicles involving three bank finance agreements were mentioned (the amounts owing, a total of R598 572,00, exceeding the alleged value of the vehicles by some R85 500,00), plus three other bank vehicle finance agreements relating to vehicles owned, apparently, by the trust. However, Spence annexed to his replying affidavit a balance sheet as at November 2008 signed by Mrs Wright, which reflected a Mercedes Benz motor vehicle, a Jaguar motor vehicle and a boat, having a total value of R852 000,00. On the other hand, the balance sheet reflected a liability of R653 000,00 on instalment sale agreements, which, presumably, related to the vehicles, and possibly the boat. Mrs Wright has not explained what happened to the assets reflected in her balance sheet.

(f) In her answering affidavit Mrs Wright claimed that her only other personal assets (ie furniture, etc) were worth R8 000,00. In the supplementary answering affidavit she detailed personal assets having a total value of R42 500,00, which, she contended, constitutes the free residue in her estate. On that basis she contested that her sequestration would be to the advantage of creditors, as any dividend payable would allegedly be negligible. (She put her total liabilities at some R9½ million and her total assets at some R2,7 million, as opposed to the figures of some R3½ million and R2½ million, respectively, reflected in her first answering affidavit. In fact, the applicant put her liabilities at some R19 million). However, in the balance sheet referred to above she reflected personal assets valued at R400 000,00 and cash of R10 000,00. The fate of those personal assets and cash was not revealed by her.

(g) The balance sheet also reflects that she owned a property in Sherwood valued at R850 000,00 on which, apparently there was a mortgage bond of R430 000,00. In her supplementary affidavit she alleged, somewhat cryptically, that the property was sold for its market value and the mortgage bond settled. What the net proceeds were and the fate thereof was not revealed.

(h) The inference is strong that Mrs Wright has been somewhat coy about her assets and it seems likely that a trustee in her insolvency, after a proper investigation, will uncover assets additional to those which she has disclosed. *Prima facie* there is a reasonable prospect that cognizably more than a negligible dividend to creditors will result.

(i) I am therefore satisfied that *prima facie* there is reason to believe that it will be to the advantage of creditors for the estate of Mrs Wright to be sequestrated. Accordingly, it would be proper for an order for the provisional sequestration of Mrs Wright to issue.

[47] The trust

(a) That the trust is hopelessly insolvent and cannot pay its debts is not in dispute. It did not respond to the applicant's letter of demand. The debt re-arrangement order issued by the magistrate reflects that the trust's total indebtedness is some R15 million. That figure, however, includes sums which, in terms of my earlier finding, are owed to the applicant by the close corporations, but for which the trust is in any event liable as surety. In the application by Mrs Wright's husband for the sequestration of the trust the latter's debts were reflected at some R21 million and the assets at some R4,8 million. On behalf of the applicant Spence accepted this latter figure, but he gave a slightly lesser figure in respect of the debts. In her answering affidavit Mrs Wright put the debts at some R21 million and the assets at approximately R4 ½ million. The latter figure does not, however, take account of various motor vehicles which are the subject of certain bank vehicle finance agreements, the amounts owing thereunder being listed as liabilities. She has also allocated markedly lower figures as the values of four residential erven owned by the trust than the figures alleged in the application launched by Mr Wright, and accepted by Spence. She explained this approach by reference to a forced sale in the present economic climate. There is no reason why at this stage Mrs Wright's figures should be accepted. What is not dealt with by Mrs Wright is the remainder of the assets, valued at approximately R1 million, referred to in the application of Mr Wright. The inference is once again that Mrs Wright has been less than candid with regard to the assets of the trust, no doubt to bolster her contention that sequestration 'will only deliver up very little in the rand'.

(c) In my judgment it has been established *prima facie* that a cognizable dividend will accrue to creditors and that there is a likelihood of further assets being discovered pursuant to an investigation by a trustee in insolvency into the affairs of the trust, in regard to which it may be added that according to Mrs Wright the trust is earning rental of R15 000,00 per month.

(d) *Prima facie* therefore sequestration would be to the advantage of creditors, and it would be proper for an order for the provisional sequestration of the trust to issue.

Orders

[48] In the result, the following order will issue:

(1) In case 138/2010:

1. That the respondent close corporation be placed in provisional liquidation in the hands of the Master of the High Court in terms of the provisions of the Close Corporations Act 69 of 1984;

2. That a rule *nisi* be issued calling upon all interested persons to show cause, if any, to this Court on Tuesday, 13 July 2010 why

(a) a final order of liquidation should not be granted;

(b) the applicant's costs of this application should not be costs in the liquidation;

3. That service of this order be effected as follows:

3.1 by the sheriff of this Court on the respondent at its registered office at 26 Centenary Road, Lorraine, Port Elizabeth;

3.2 by the sheriff of this Court on the offices of the South African Revenue Services, Port Elizabeth;

3.3 by the sheriff of the Grahamstown High Court by affixing a copy to the front door of the respondent's premises at corner of Victoria Road and Orsmond Terrace, Grahamstown;

3.4 on all known creditors of the respondent by way of registered mail;

4. That this order be published once in the Eastern Province Herald and Die Burger (Oos-Kaap) newspapers.

(2) In case no. 139/2010

1. That the respondent close corporation be placed in provisional liquidation in the hands of the Master of the High Court in terms of the provisions of the Close Corporations Act 69 of 1984;

2. That a rule *nisi* be issued calling upon all interested persons to show cause, if any, to this Court on Tuesday, 13 July 2010 why

(a) a final order of liquidation should not be granted;

(b) the applicant's costs of this application should not be costs in the liquidation;

3. That service of this order be effected as follows:

3.1 by the sheriff of this Court on the respondent at its registered office at 26 Centenary Road, Lorraine, Port Elizabeth;

3.2 by the sheriff of this Court on the offices of the South African Revenue Services, Port Elizabeth;

3.3 by the sheriff of the Grahamstown High Court by affixing a copy to the front door of the respondent's premises at corner of Victoria Road and Orsmond Terrace, Grahamstown;

3.4 on all known creditors of the respondent by way of registered mail;

4. That this order be published once in the Eastern Province Herald and Die Burger (Oos-Kaap) newspapers.

(3) In case no. 140/2010:

1. That the estate of the respondent be placed in provisional sequestration in the hands of the Master of the High Court;

2. That a rule *nisi* be issued calling upon all interested persons to show cause, if any, to this Court on Tuesday, 13 July 2010 why:

   (a) a final order of sequestration should not be granted;

   (b) why the applicant's costs of the application should not be costs in the sequestration;

3. That service of this order be effected:

3.1 by the sheriff of this Court on the respondent personally;

3.2 by the sheriff of this Court on the offices of the South African Revenue Services, Port Elizabeth;

4. That this order be published once in the Eastern Province Herald and Die Burger (Oos-Kaap) Newspapers.

(4) In case no. 141/2010:

1. That the estate of the respondent trust be placed in provisional sequestration in the hands of the Master of the High Court.

2. That a rule *nisi* be issued calling upon all interested persons to show cause, if any, in this Court on Tuesday 13 July 2010 why:

(a) a final order of sequestration should not be granted;

(b) why the applicant's costs of the application should not be costs in the sequestration;

3. That service of this order be effected:

(a) by the sheriff of this Court on Sheryl Jeanette Wright personally;

(b) by the sheriff of this Court on the offices of the South African Revenue Services, Port Elizabeth;

(c) by the sheriff of the Grahamstown High Court by affixing a copy to the front door of the respondent's premises at corner of Victoria Road and Orsmond Terrace, Grahamstown;

4. That this order by published once in the Eastern Province Herald and Die Burger (Oos-Kaap) newspapers.

____
F KROON
Judge of the High Court

Appearances:

For the Applicant:

RG Buchanan instructed by
Pagdens Attorneys
Pagdens Court
18 Castle Hill
Central
Port Elizabeth
P O Box 132, PE, 6000
(Tel: 041 585 2141)
(F Vienings/In/STA 118/0143)

For the Respondents

Mrs Wright, in person
Port Elizabeth