

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3797/2022

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED: NO
Signature  Date... 18/7/2022	

In the matter between:

ADRIAAN WILLEM VAN ROOYEN N.O
(In the capacity *nomine officio* as the duly
appointed joint liquidators in the insolvent
estate of Tumi Mokwena Incorporated)

FIRST APPLICANT

MMABATHO SHELLY MOTIMELE N.O
(In the capacity *nomine officio* as the duly
appointed joint liquidators in the insolvent
estate of Tumi Mokwena Incorporated)

SECOND APPLICANT

and

MOKGADI FRANCINA MOKWENA N.O
(In her capacity as trustee of the Dikwenanyana
Trust IT 255/2017L)

FIRST RESPONDENT

JUDGMENT

MAKGOBA JP

[1] The Applicants launched an urgent application against the Respondents seeking an order in the following terms¹:

1. That the non-compliance with the Rules be condoned and that the matter be heard as urgent in terms of Rule 6(12)(a);
2. That the Dikwenanyana Trust (IT 255/2017L) ("the Trust") be, and is hereby, provisionally sequestrated returnable on a date to be determined by the Registrar of this Honourable Court, on which date the Respondents, or any interested party, should show cause why the Trust should not be finally sequestrated;
3. That it be declared that the Trust veneer of the Trust be pierced and that the assets allegedly vesting in the Trust, or the trustees of the Trust, vest in the Trust, the estate of Morapedi Roy Mokwena and the estate of Tumi Mokwena Incorporated, jointly, and be applied to the satisfaction of the

¹ Notice of Motion, page 2 of the paginated papers.

debts of the Trust, Morapedi Roy Mokwena and Tumi Mokwena Incorporated;

4. That the costs of this application be costs in the administration of the estate of the Trust;
5. Further and/or alternative relief.

[2] In essence the Applicants, in their capacities as liquidators of the insolvent estate of Tumi Mokwena Incorporated ("TMI") of which Morapedi Roy Mokwena ("Mr. Mokwena") was the sole director, launched the present application for the sequestration of the Dikwenanyana Trust ("the Trust") and piercing of the Trust veneer because the Trust is the alter ego of Mr. Mokwena and TMI.

It is alleged that the Trust is indebted to TMI in an amount in excess of R 7 400 000.00. That TMI is the creditor of the Trust as the Trust was funded, entirely, and without any valid *causa*, by TMI.

[3] The application is opposed by the Trust and Mr. Mokwena. They contend that the relief sought is incompetent in that the entire application is based on a vehemently disputed indebtedness for an illiquid debt or unliquidated amount of money. That to exacerbate matters, there was no demand for payment made to the Trust. The Trust became aware for the first time about the claim through the present application.

- [4] Furthermore, the Trust contends that the founding affidavit of the liquidators is marred with opinions and conclusions drawn from the Applicants' interpretation of the documents obtained from the Section 417 and 418 enquiry² sanctioned into the affairs of TMI.

That these opinions and conclusions constitute irrelevant opinions that should be disregarded in the adjudication of this matter.

A further attack on the founding affidavit is that the allegations made against Mr. Mokwena are based on the excerpts of a transcription of the inchoate insolvency proceedings which took place more than a year ago, from 31 March 2021 to June 2021. It is contended on behalf of the Trust that the Applicants or liquidators also rely on inadmissible hearsay evidence which ought to be disregarded.

- [5] At the core of this application are the allegations by the Applicants/liquidators that the Trust improperly benefited from unlawful funds originating from TMI. As indicated above, the alleged indebtedness is disputed and has not been determined by any Court of law.

- [6] In the expansion of this narrative, the liquidators allege that TMI Trust funds were irregularly transferred to the Trust and as such the Trust's property is tainted rendering the Trust invalid and liable to sequestration.

² Inquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973.

The Trust contends that the alleged indebtedness of the Trust is based on innuendos of an abandoned inquiry in terms of section 417 which was left incomplete and that no report has been issued by the Commissioner, retired Justice Bertelsman. The transcribed record relied upon by the Applicants in the present proceedings is that of an incomplete inquiry.

- [7] At the end of the day the issue for determination is that the Applicants, as liquidators of TMI, have to establish the necessary *locus standi* to apply for the sequestration of the Trust as a creditor. They need to prove that TMI is a creditor who has a liquidated and undisputed claim for not less than one hundred rands.³

Factual Background

- [8] Tumi Mokwena Incorporated ("TMI") was registered during 2005 and traded as an attorneys practice focusing on a variety of litigation matters. Mr. Morapedi Roy Mokwena ("Mr. Mokwena") was the sole director of the law firm and was the controlling mind behind it.
- [9] During December 2019 TMI was liquidated as a result of its alleged inability to pay money deposited by a client, namely Majola Trust. This alleged inability to

³ Insolvency Act 24 of 1936, section 9(1).

refund Majola Trust funds was regarded as a trust shortfall on TMI's trust account.

The Applicants in this matter were duly appointed as liquidators of the insolvent estate of TMI on 12 December 2019.

The Respondents deny that the alleged inability of TMI to refund Majola Trust's money should be regarded as a trust shortfall on TMI's trust account and state that even during the liquidation proceedings the Court has not pronounced on such indebtedness.

The Respondents state that the deposit of funds by Majola Trust into TMI related to a separate business deal concerning a separate entity known as Tumi Mokwena Productions ("TMP") and not as a client of TMI. That the said deposit never found its way into the TMI trust account.

[10] Furthermore, the Respondents state that the liquidation proceedings themselves were founded on a settlement agreement concluded by TMI pertaining to its business funds and unrelated to trust funds.

If the said indebtedness was related to TMI trust funds, any shortfall on trust funds would result in a claimant being entitled to claim from the Attorneys Fidelity Fund, which the Majola Trust never attempted to do and never claimed that the funds constituted trust funds claimable under the Fidelity Fund.

- [11] In an effort to establish the indebtedness of the Trust to TMI, the Applicants alleged in the founding affidavit that from the financial investigations of TMI it appears that most of the TMI trust funds were irregularly transferred *sine causa* either directly from the trust account to Mr. Mokwena and the Trust, or from the trust account to the business account and from there to the Trust and Mr. Mokwena.

These allegations are denied by the Respondents as being without factual or legal basis.

The Respondents state that such investigations are incomplete and no report has been issued by the Commissioner, retired Justice Bertelsman in the section 417 enquiry. That the transcribed record attached to the present proceedings is that of an incomplete enquiry.

- [12] The Applicants allege that they have, since their appointment, discovered that there is a trust shortfall in TMI, and that most of the funds were paid to Dikwenanyana Trust. They further allege that according to the auditors of the Legal Practice Council, the shortfall in the TMI trust account is at least R 16 000 000.00 and that this amount is likely to increase as the investigations into TMI progress.

These allegations are refuted by the Respondents as being an attempt to insinuate that the Trust received the shortfall funds from the trust account of TMI and that they are simply disingenuous.

The Dikwenanyana Trust was only formed in 2017 as is apparent from the Trust Deed Annexure "FA4". The Legal Practice Council ("LPC") investigations referred to herein related to the trust account of TMI as at 2016, before the Trust was formed.

The suggestion that the LPC investigation has any bearing on payments made to the Trust by TMI is, according to the Respondents, therefore unfounded as the two are unrelated.

- [13] The Trust, so the Applicants allege, was established for the sole purpose of being a conduit vehicle through which Mr. Mokwena could syphon TMI trust funds to purchase properties and other assets for his personal benefit and to conceal assets from his personal creditors and that of TMI.

The Respondents deny these allegations as baseless and unsubstantiated.

The Insolvency Inquiry of TMI

- [14] On or about 2 February 2021 the Applicants obtained the necessary authority to convene an insolvency enquiry ("the enquiry") into the affairs of TMI as contemplated in sections 417 and 418 of the Companies Act 61 of 1973.

The Commissioner of the enquiry, retired Judge Bertelsmann as well as the Master of the High Court have consented to the publication of the transcription of the enquiry for purposes of the current application.

However, the Commissioner did not finalise the enquiry in the sense that no final report on its findings was prepared and issued by retired Judge Bertelsmann.

- [15] Ms. Mokgadi Francina Mokwena ("First Respondent"), Mr. Floyd Legodi ("Legodi") and Ms. Diseree Chuene ("Chuene") were subpoenaed to testify at the enquiry. The First Respondent and Legodi completed their testimony at the enquiry whilst Chuene testified on 31 March 2021 but could not return to complete her testimony on the scheduled date of 24 June 2021. Mr. Mokwena was subpoenaed to testify on 24 June 2021 but the proceedings never took place since then.

For all intents and purpose the enquiry is inchoate in the sense that other subpoenaed parties did not complete their evidence and the Commissioner did not prepare and issue a final report of the enquiry.

- [16] The First Respondent testified that:

- 16.1. Mr. Mokwena made all decisions relating to the day-to-day management of the Trust;
- 16.2. Mr. Mokwena was the controlling mind of the Trust;
- 16.3. She has no explanation as to how the Trust obtained the vast amount of funds to purchase the properties;

- 16.4. Any funds that were received into the Trust was collected by Mr. Mokwena;
- 16.5. Mr. Mokwena was in control of the banking and financial affairs of the Trust;
- 16.6. There were no proper meetings of trustees nor was there any proper corporate governance to record the decisions of the Trust nor resolutions adopted;
- 16.7. The Trust never conducted any business nor issued any invoices to TMI for services rendered; and
- 16.8. She merely signed the documentation presented to her by Mr. Mokwena in good faith.

[17] Furthermore, Chuene testified that:

- 17.1. She was a trustee since inception of the Trust in 2017;
- 17.2. The sole purpose of the Trust was to establish an inheritance for the children of Mr. Mokwena;
- 17.3. She resigned from the Trust late 2020 or early in 2021;
- 17.4. She delivered all the financial documents of the Trust upon her resignation to Mr. Mokwena;
- 17.5. The Trust did not have regular trustee meetings as required nor was there proper corporate governance of the Trust;

- 17.6. There was no relationship between TMI and the Trust which would justify the payments from TMI to the Trust;
- 17.7. She does not know where the Trust obtained the funds to purchase the properties, but knows that Mr. Mokwena provided some funds the origin of which is unknown to her;
- 17.8. There were no financial statements of the Trust presented to the trustees;
- 17.9. Mr. Mokwena personally dealt with all the financial aspects of the Trust himself and also attended to all applications for credit facilities in respect of the Trust;
- 17.10. Mr. Mokwena personally arranged the property acquisitions;
- 17.11. Certain properties in the Trust were purchased in "cash" or paid-off swiftly without the need for a mortgage bond, the origin of the funds whereof remain unknown to her;
- 17.12. The Ten on Lane properties were all purchased more or less at the same time;
- 17.13. She does not understand the role of a trustee in the management of a trust and the duty of care required of a trustee;
- 17.14. Mr. Mokwena had free reign in the Trust to do as he pleases and would withdraw funds from the Trust's bank accounts on his own volition without consulting the other trustees;
- 17.15. Mr. Mokwena therefore regarded the trust property as his own;

[18] Legodi testified that:

- 18.1. He was requested to serve as a trustee at the behest of Mr. Mokwena;
- 18.2. Several of the Ten on Lane properties were bought with cash;
- 18.3. Once the cash was all spent, the remainder of the properties were purchased with mortgage bonds;
- 18.4. Mr. Mokwena dealt with all finance applications on behalf of the Trust and never consulted Legodi in this regard;
- 18.5. Mr. Mokwena then bought trucks with cash for a company of his known as Tshepang Vervoer (Pty) Ltd;
- 18.6. TMI did not render services to the Trust nor delivered invoices for payment;
- 18.7. The Trust did not conduct any business during his tenure as trustee;
- 18.8. There were no resolutions for the Trust to conduct business nor were there trustee meetings to discuss certain decisions before they were put into action;
- 18.9. There is no minute book for the meetings and decisions of the Trust;
- 18.10. There were no financial statements compiled for the Trust during his tenure as trustee;
- 18.11. Mr. Mokwena and Chuene controlled the bank accounts of the Trust.

- [19] In the current application the Applicants did not obtain confirmatory affidavits of First Respondent, Legodi and Chuene and attach same to their founding affidavit. The Applicants attached copies of the transcription of the enquiry to their founding affidavit and also set out a summary thereof in the founding affidavit.

On the basis of the evidence of the three parties (First Respondent, Legodi and Chuene) at the enquiry the Applicants contend that the Trust improperly received TMI trust funds that must be repaid to the estate of TMI, and that the Trust – as a matter of law- incurred liability towards the TMI trust creditors in this regard.

- [20] The Respondents deny that the Trust is the alter ego of Mr. Mokwena. Furthermore, the Respondents contend that the evidence based on the extracts of transcripts of the insolvency enquiry cannot be competently relied upon in the present proceedings for reasons, that it constitutes hearsay evidence and that same was obtained in clear breach of the confidentiality rule applicable between attorney and own client as indicated later in this judgment.

It is the Respondents' further contention that Mr. Mokwena is the founder of the Trust and that the overly criticisms of his active role in the Trust and securing contributions on behalf of the Trust are unjustified and flawed.

Admissibility of evidence given at the Insolvency enquiry

[21] At the hearing of this matter on 30 May 2022 I raised with Counsel the issue of the admissibility of evidence given at the insolvency enquiry into the present proceedings.

The parties were invited to provide the Court with additional or supplementary heads of argument on the admissibility of the transcribed record of evidence of the First Respondent (as trustee of the Trust) Chuene (also as trustee of the Trust at some times) Legodi (also as trustee of the Trust at some times) given at the enquiry into the affairs of TMI, which enquiry was convened in terms of the provisions of sections 417 and 418 of the Companies Act 61 of 1973.

I am indebted to both Counsel for having obliged and submitted helpful heads of argument in this regard.

[22] The opposing Respondents contended that the application should fail because most of the evidence upon which the Applicants had purported to rely was inadmissible, being derived from the transcript of proceedings at the TMI enquiry. The ground of inadmissibility is that such evidence constitutes hearsay evidence.

The Applicants contend that the evidence is not hearsay and that same should be admitted in the present proceedings. Furthermore the Applicants sought to meet the challenge by applying for the admission of the evidence in terms of

section 3 (1)(c) of the Law of Evidence Amendment Act 45 of 1988. Section 3 (1)(c) permits the Court to admit otherwise inadmissible hearsay evidence if, having regard to the factors set out in subparagraphs (i) - (vii) of the provision, it is of the opinion that such evidence should be admitted in the interest of justice.

Section 3 (2) of the Act restricts the effect of section 3 (1) by making it clear that the provisions of subsection (1) "shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence".

[23] I proceed hereunder to deal with the appropriate authorities relating to the admissibility of the evidence given at the insolvency enquiry.

[24] It is trite law since time immemorial that the evidence of a witness at an insolvency enquiry is admissible only against such witness. This is evident from the case of ***Simmons NO v Gilbert Hamer & Co Ltd***⁴ where the Court held that:

"That evidence given by an examinee at an examination is not admissible against any person other than the examinee himself".

⁴ ***Simmons NO v Gilbert Hamer & Co Ltd*** 1963 (1) SA 897 (N).

The Court therein went on to state that this is in accordance with the general principle that evidence given by one person cannot be used against another unless it is given before a tribunal at which the person against whom it is sought to be used had the opportunity of cross-examining the deponent.

The above position was also confirmed in the matter of ***Cordiant Trading CC v Daimler Chrysler Financial Services***⁵, where the Court held that the record of the evidence may be produced in any such proceedings against the witness who actually gave the relevant testimony. It was further held that the Court has a discretion to allow sections 417 and 418 evidence at subsequent civil proceedings (at 397 G – D).

- [25] At the hearing of this matter Counsel for the Applicants handed up a copy of the judgment in the matter of ***A Melamed Finance (Pty) Ltd (in liquidation) v Jeffrey Harris [2017] ZAGPJHC 188***, an appeal judgment of the full Court of the Gauteng Local Division, Johannesburg, under case number 2016/A5028. The following was, *inter alia*, held in that case regarding the transcript of evidence of witnesses before an insolvency enquiry:

*“there is no controversy that testimony of a witness in section 417 proceedings can be used against that witness in the subsequent proceedings”.*⁶

⁵ 2005 (4) SA 389 (D) at 397 G.

⁶ Paragraph [9] of the judgment.

[26] In the matter of ***O'Shea NO v Van Zyl and Others***⁷ ("O'Shea case") the Supreme Court of Appeal confirmed its earlier judgment in ***James Brown & Hamer (Pty) Ltd v Simmons NO 1963 (4) SA 656 (A)*** at 661H – 662A where it was held that "The evidence given by an examinee at a private examination is not admissible against any person other than the examinee himself (at 918 B-E)".

In the context of the present case it means that the evidence given by the First Respondent, Chuene and Legodi at the section 417 enquiry is only admissible against the trio personally and not against the Trust.

[27] The ***O'Shea case***, which is on all fours with the present case, sets out the law clearly on this aspect and as such I find it appropriate to relate the facts of the case hereunder.

[28] The facts of the case are as follows:

The liquidators of a company organized an enquiry under section 417 of the Companies Act 61 of 1973. They questioned O, a trustee of a trust. O stated the company had made a loan to the trust. The liquidators later applied to sequester the trust. Their evidence that they were a creditor was O's statement at the enquiry.

⁷ ***O'Shea NO v Van Zyl and Others*** 2012 (1) SA 90 (SCA).

The issue on appeal was whether the statement made at the enquiry was admissible at the later sequestration proceedings. The SCA held that it was not. It was held further that there was no evidence the co-trustees had authorized O to speak for them at the enquiry. That authority was against the later admission of the statement of O. That the speaker on oath spoke for himself, and not on behalf of another; and gave evidence because he was summoned to, and not for another; and that the party against whom the statement was made had no right to be present at the enquiry and to cross-examine the deponent.

- [29] Bringing the above facts into the context of the present case, it is clear that the testimony of the three witnesses who testified before the insolvency enquiry is only admissible against such witnesses and cannot be used against the Trust. The Trust was not the subject of the enquiry and the testimony, including that of the First Respondent cannot be construed to bind the Trust. There is no evidence that the First Respondent was duly authorized by her co-trustees to testify on behalf of the Trust.

It is noteworthy that at the time of examination before the enquiry Chuene and Legodi were no longer trustees of the Trust and as such could not be said to be acting on behalf of the Trust or purport to bind it. Even if they were still trustees at that time, they still need the authority or mandate of their co-trustees to bind the Trust.

[30] Of importance the following was said by the Court in the O'Shea matter:

"[18] Mr O'Shea testified under subpoena. There is no suggestion that in doing so he was authorized to represent the Trust nor was there any need for him to do so since the purpose of the enquiry was purely to establish facts that the liquidators could use to establish the position of the company and recover assets to which it was entitled. The liquidators also did not lead any evidence which directly proved his authority to speak on its behalf.

[19] In any event the evidence given by Mr O' Shea was inadmissible against the trust."

Therefore, the Court concluded in the O'Shea matter that:

"[25] For all these reasons it is clear that the statements made by Mr O'Shea before the commissioner were inadmissible against the Trust in the sequestration proceedings in the absence of their confirmation under oath by him in those proceedings. The result is that the liquidators were, in the application to sequester the Trust, entirely without evidence of their alleged status as a creditor of the Trust."

[31] It is apparent from the judgments referred to earlier, that the effect of allowing the use of sections 417 and 418 enquiry evidence at subsequent civil proceedings has thus far been that the evidence has been permitted to be used only against the examinee as a party or a witness in such subsequent proceedings. The effect of those judgments is to make it clear that the evidence given at the section 417 enquiry, which the Applicants have sought to employ in the current proceedings, is inadmissible against the Respondents or the Trust.

That much is impliedly conceded by the Applicants, hence their application in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988.

[32] The First Respondent, Chuene and Legodi testified at the enquiry under subpoena. There is no suggestion that in doing so they were authorised to represent the Trust nor was there any need for them to do so since the purpose of the enquiry was purely to establish facts that the liquidators could use to establish the position of TMI and recover assets to which TMI was entitled. The liquidators also did not lead any evidence which directly proved the authority of First Respondent, Chuene and Legodi to speak on behalf of the Trust.

[33] For the above reasons, the evidence given by the First Respondent, Chuene and Legodi at the insolvency enquiry is inadmissible against the Trust.

In ***Simmons NO v Gilbert Hamer & Co Ltd 1963 (1) SA 897 (N)*** the Court ruled as inadmissible similar statements or evidence given at a section 417 and 418 enquiry. The basic considerations that Harcourt J in his judgment pinpoints are these:

1. The persons against whom statements are made in such proceedings do not generally have a right to be present during such testimony nor are they afforded the right to cross-examine the deponent. To allow a liquidator to rely on such statements without calling the witness would be inimical to the law of evidence (at 916G – 918B).
2. The evidence given by an examinee at a private examination is not admissible against any person other than the examinee himself (at 918B – E).

[34] It is trite that trustees must act jointly unless the trust deed provides otherwise (***Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA)***). In the present case the deed of trust does not.

There is no reason to believe that the trustees of Dikwenanyana Trust delegated to First Respondent or Chuene or Legodi authority to speak on their behalf at the section 417 enquiry before the Justice Bertelsman. When the trio gave evidence at the hearing no investigation was conducted into whether they spoke as the authorized representatives of the Trust rather than in their personal capacity.

Whether the evidence adduced at the sections 417 and 418 enquiry should be admissible in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988

[35] Counsel for the Applicants submitted that considering the provisions of section 3 (1)(c) of the Law of Evidence Amendment Act, and in the event of this Court finding that the transcript of evidence before the sections 417 and 418 enquiry is not admissible in terms of the principle laid down in the **O'Shea case**, it should be admitted on the basis that it would be in the interest of justice to do so.

[36] Counsel relied heavily on the case of **Van Zyl and Another NNO v Kaye NO and Others**⁸. It is appropriate to set out the facts of that case in order to put Counsel's argument in context.

[37] The factual matrix and the decision of the Court in the **Van Zyl** matter are as follows:

The applicants applied to a Court for the piercing of a trust veneer in order to give effect to what they said was the true situation. They alleged that the trust was the alter ego of one K. They contended that following from this, that the

⁸ *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC).

assets of the trust ought to be regarded as those of K. The applicants relied in their papers on the evidence given by K at an enquiry under section 417 of the Companies Act 61 of 1973.

The respondents objected to its admissibility on the ground of it being hearsay. The applicants responded by applying for its admission in terms of section 3 of the Law of Evidence Amendment Act. The Court held that section 3 allowed the use of evidence in a subsequent civil proceeding provided that the requirements of section 3 were satisfied. Here, though, those requirements had not been met and the evidence was thus inadmissible.

- [38] It is significant to note that in the ***Van Zyl*** case the evidence was sought to be used against the examinee himself, that is K. This case should therefore be distinguished from the present case where the evidence is sought to be used against a third party, being the Dikwenanyana Trust and Mr. Mokwena.
- I am therefore of the view that the provisions of section 3 (1)(c) of the Law of Evidence Amendment Act cannot be applied in the present case. The rule against hearsay evidence should therefore be maintained.

[39] The broad principles laid down in the ***Van Zyl*** case appear to be the following⁹:

- 39.1. that there is nothing in the provisions of section 417 (save as expressly provided in section 417 (2)), that militates, in principle, against the use of evidence as adduced at such enquiry in other proceedings to the extent that ordinary rules of evidence would allow;
- 39.2. that evidence given by an examinee is admissible as evidence against that examinee and would not contravene that hearsay rule;
- 39.3. that the exclusion of the wider use of the evidence (therefore the use against persons other than the examinee) appears to have been founded on the mentioned hearsay rule;
- 39.4. that evidence adduced at the enquiry may be introduced against any person in terms of section 3 (1)(c) of the Law of Evidence Amendment Act 45 of 1988, subject, of course, to the requirement of that provision being satisfied.

⁹ ***Van Zyl*** supra at paragraph [44].

Whether the provisions of section 3 (1)(c) of the Law of Evidence Amendment Act have been satisfied

[40] Despite what I stated in paragraph [38] hereinabove that the provisions of section 3 (1)(c) are not applicable in the present case, I still find it appropriate to make a finding as to whether the Applicants, in any event, have satisfied the requirements of section 3 (1)(c).

[41] Section 3 (1)(c) of the Law of Evidence Amendment Act 45 of 1988 provides:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the Court, having regard to:

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

- (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
- (vi) *any prejudice to a party which the admission of such evidence might entail; and*
- (vii) *any other factor which should in the opinion of the Court be taken into account;*

is of the opinion that such evidence should be admitted in the interest of justice.”

Section 3 of the Law of Evidence Amendment Act created an alternative highly flexible, avenue for admission of hearsay evidence on the basis that it is in the interests of justice to do so, even if it might be inadmissible under other law or common law.

[42] Section 3 requires a Court to consider the seven factors listed in paragraph (c) so that a failure to take into account all of those factors is improper.

See **Zeffertt et al: The South African Law of Evidence, at page 369.**

For reasons that follow, I am of the view that the Applicants have failed to satisfy some of the seven factors that the Court is enjoined to consider.

[43] It is apparent from the transcripts of the enquiry presented to this Court that the nature of the evidence sought to be relied upon by the Applicants comprises of incomplete and untested testimony of the three witnesses and Mr. Mokwena who was subpoenaed to appear before the enquiry has not been provided with an opportunity to present his testimony and also cross-examine such witnesses' averments. As regards the testimony of Chuene, it has not been concluded¹⁰. Mr. Mokwena has not been afforded the opportunity to test and refute the testimony of Legodi, which in any event breached the principle of attorney and client privilege. More about this aspect later in this judgment.

It is noteworthy that at the time of examination before the enquiry Chuene and Legodi were no longer trustees of the Trust and as such could not be said to be acting on behalf of the Trust or purport to bind it. Their testimony does not even prove that the Trust is indebted to TMI or that the Trust is unable to pay its debts.

[44] Counsel for the Respondents submitted that the further defect as a result of the incompleteness of the testimony presented before the insolvency enquiry which is lethal to the Applicants' case relates to the fact that this Court is denied an opportunity to make a judicious decision concerning this evidence because it does not have the full evidence before it for consideration, including that of Mr. Mokwena who was a trustee of the Trust and the person again whom most

¹⁰ See paragraphs 50 and 51 of the First Respondent's affidavit & paragraphs 21 to 24 of Mr. Mokwena's affidavit.

of the allegations have been made at the enquiry. I agree. It is trite that the person against whom the evidence is tendered is entitled to have such evidence considered as a whole, including parts of it favourable to him. This is so because one portion of evidence may modify another and it would be misleading to use one portion without looking at the rest, as this might result in it being understood in a sense in which it was never meant.

See *R v Valachia*¹¹ and

R v Vather 1961 (1) SA 350 (A) at 353 – 354.

[45] Based on the above principle I make a finding that these extracts from transcript of an incomplete enquiry fail to provide a complete record for this Court to independently make a judicious decision. Section 3 (1)(c) of the Act prescribes that hearsay-evidence is inadmissible unless a Court is of the opinion that such evidence should be admitted in the interest of justice having regard to a cumulative consideration of all of the above factors set out in subparagraphs (c)(i) to (vii) of section 3 (1)¹².

¹¹ *R v Valachia* 1945 AD 826 at 837.

¹² See *Executor Estate late Phillips and Others v Government of the Republic of South Africa and Another* [2003] 3 ALL SA 575 (C).

[46] The Court is enjoined to consider the probative value of the evidence as prescribed in subparagraph (c) (iv). Based on what is set out above, the evidence arising from the transcripts of the enquiry and reports annexed by the Applicants to the present application, their probative value depends on other persons other than the liquidators and therefore constitute inadmissible hearsay evidence.

[47] Another factor to be considered is “the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends” as prescribed in subparagraph (c) (v) of section 3 (1) of the Act.

The Applicants in the present case failed to obtain and attach confirmatory affidavits of Chuene and Legodi to the founding affidavit. These two persons are “the persons upon whose credibility the probative value of such evidence depends”. The large number of exceptions that exist to allow for the reception of evidence of a person since deceased suggests that death would be the most compelling of the possible explanations. In the present case Chuene and Legodi are still alive and available for the Applicants to obtain their direct evidence in the form of confirmatory affidavits, repeating what they had said before the enquiry.

In *Padongelukkefonds v Van den Berg en 'n ander*¹³ the evidence was held to be inadmissible. In that case certain allegations in the applicant's founding

¹³ 1999 (2) SA 876 (O).

affidavit contained hearsay evidence furnished by someone with whom the applicant's legal representative had consulted but no reasons were given as to why no statement from that person had been included in the papers.

See also *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) at 524 B – C.

- [48] One more factor that needs to be considered is “Any prejudice to a party which the admission of such evidence might entail”. (Subparagraph (c) (vi)).

In the present application Mr. Mokwena, who is painted as an orchestrator of the alleged irregularities by the Trust, has not been afforded an opportunity to present evidence at the enquiry which was unceremoniously terminated by the liquidators and the Commissioner. He has not been afforded any opportunity to challenge such testimony or cross-examine the witnesses whose evidence is relied upon by the Applicants in the present application.

Furthermore, Mr. Mokwena is not joined in these proceedings and yet the opinions of the Applicants and their conclusions based on the evidence adduced at the enquiry gravely affect his constitutional rights in terms of section 34 of the Constitution, to have serious allegations of irregularities made against him and the Trust and the alleged indebtedness of the Trust decided by the application of law in a fair public hearing before a Court. I accordingly come to a conclusion that the admission of the evidence adduced at the enquiry will be prejudicial to Mr. Mokwena and the Trust.

[49] In the light of what is set out above, I make a finding that the Applicants have failed to make out a case why this hearsay evidence should be admitted as evidence in the present application. The Applicants do not meet the requirements of the exception set out in section 3 (1) of the Law of Evidence Amendment Act, and in particular the interests of justice do not permit this hearsay evidence to be admitted.

The legal professional privilege

[50] The Respondents contend that the testimony of Legodi at the section 417 enquiry is protected under the professional privilege principle concerning evidence and discussion between attorney and own client. The basis of such privilege is that Legodi was the legal representative of Mr. Mokwena and TMI in all litigation by and against the Majola Trust, on whose account TMI was liquidated and the insolvency inquiry convened.

[51] It is common cause that Legodi gave evidence in the enquiry into the affairs of TMI. At a particular time Legodi was also a trustee of the Dikwenanyana Trust. His testimony at the enquiry purports to implicate Mr. Mokwena and the Trust.

[52] It is trite that communications between a lawyer and a client may not be disclosed without the client's consent and that this legal professional privilege is central to fair legal process. The legal professional privilege was described as a fundamental right¹⁴.

[53] In the matter of **Waymark NO v Commercial Union Assurance Co Ltd**¹⁵ the Court had to decide on the crisp question on whether a witness who was called to give evidence at an enquiry in terms of section 417 of the Companies Act 61 of 1973 may claim immunity from disclosure of certain facts on the basis of legal professional privilege. The Court decided the question in the affirmative and with reference to the case of **S v Sefatsa and Others 1988 (1) SA 868 (A)** quoted the judgment in the High Court of Australia in **Baker v Campbell (1983) 49 ALR 385 at 4425** where Dawson J said:

"The law came to recognize that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them..."

¹⁴ See **Euro Shipping Corporation of Monrovia v Minister of Agriculture, Economics and Marketing and Others 1979 (1) SA 637 (C)**.

¹⁵ [1992] 4 ALL SA 169 (Tk).

[54] In the light of the above it is my view and finding that the testimony of Legodi before the insolvency enquiry is in breach of the legal professional privilege. On this ground also, the evidence of Legodi is inadmissible against Mr. Mokwena and the Trust.

Whether the Trust veneer be pierced

[55] The Applicants pray for an order that the Trust veneer be pierced. Their claim herein is based on the alleged trust form abuse by Mr. Mokwena.

This Court must vigilantly examine the facts of this case to determine allegations of trust form abuse. If such abuse is established, the Court is entitled to pierce the trust veneer. As explained in **Van Zyl NO v Kaye NNO**, supra, paragraph 22, piercing the trust veneer is:

“... An equitable remedy... one that lends itself to a flexible approach to a fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation.”

[56] An enquiry into the affairs of TMI has been established in terms of sections 417 and 418 of the Companies Act 61 of 1973. The evidence led thus far at the enquiry purport to provide the foundation for the Applicants' case in the current proceedings. The Respondents contend that the evidence is inadmissible for the purpose the Applicants seek to employ it.

[57] Much was made by the Applicants of the allegations that the Trust is Mr. Mokwena's "alter ego" in the sense that he dealt with the Trust's property as if it were his own and that his co-trustees were merely his puppets. The Applicants sought substantiation for these allegations in the answers given by the First Respondent, Chuene and Legodi (the erstwhile co-trustees) at the aforementioned section 417 enquiry into the affairs of TMI.

But, in any event, as mentioned, the Respondents objected to the admissibility of the evidence adduced at the enquiry proceedings on the basis, amongst other reasons, of its hearsay character. The Applicants responded by applying, in terms of section 3 (1)(c) of the Law of Evidence Amendment Act 45 of 1988, for the admission of the transcript of the entire evidence given by the trio at the enquiry.

[58] I have already decided hereinabove that it would not be in the interest of justice to admit that evidence.

In the result the prayer by the Applicants that the Trust veneer be pierced is doomed to fail.

Whether Applicant's claim is *bona fide* disputed

[59] It is trite that winding up or sequestration proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed by the respondent on reasonable grounds; the procedure for winding up or sequestration is not designed for the resolution of disputes as to the existence or non-existence of a debt. See ***Badenhorst v Northern Construction Enterprises (Pty) Ltd***¹⁶. This has become known as the "Badenhorst rule".

Hiemstra J in ***Badenhorst*** at 347 H – 348 C said the following:

"Die maatskappy betwis die geldigheid van die vordering van £120, en wanneer 'n skuld te goeder trou betwis word, moet 'n likwidasie aansoek geweier word. Hierdie proses is nie bedoel vir die beslissing van twyfelagtige skulde nie".

¹⁶ 1956 (2) SA 346 (T).

See also *Laeveldse Koöperasie Bpk v Joubert* 1980 (3) SA 1117 (T) at 1120 H – 1121 E.

[60] In *Kalil v Decotex (Pty) Ltd and Another*¹⁷ it was stated that:

“As in the present case, the disputes which arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether proper grounds for winding-up have been established. In regard to locus standi as a creditor, it has been held, following certain English authority that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds.”

¹⁷ 1988 (1) SA 943 (A) at 980 B – H.

The guidelines laid down in ***Kalil*** as to how factual disputes regarding the respondent's indebtedness in an application such as the present should be approached, were stated thus by Brand J in ***Payslip Investment Holdings CC v Y2kTec Limited***¹⁸:

"With reference to disputes regarding the respondent's indebtedness, the test is whether it appears on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general."

[61] A party challenging an application for winding-up of a company or sequestration as an abuse of the process of the Court on the grounds that the applicant's claim against the respondent is disputed must show –

- (a) that the claim is disputed;
- (b) that it is *bona fide* disputed; and
- (c) that the grounds for disputing the claim are reasonable.

¹⁸ 2001 (4) SA 781 (C) at 783 H – I.

The authorities are clear that it does not have to be established, even on the probabilities, that the respondent would, as a matter of fact, succeed in any action which the applicant might bring to enforce the disputed claim. The Court need merely be satisfied that the grounds upon which the claim is disputed are not unreasonable. To do that it is not necessary that the actual evidence which would be relied upon at a trial be adduced on affidavit or otherwise. It is sufficient, provided it is done *bona fide*, to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the respondent.

See ***Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd*** 1998 (4) SA 208 (CPD).

- [62] In ***Hülse-Reutter and Another***, supra, at 219E – 220A Thring J commented as follows on the nature and extent of the onus of proof:

“I think it is important to bear in mind exactly what it is that the trustees have to establish in order to resist the application with success. Apart from the fact that they dispute the applicants’ claims, and do so bona fide... what they must establish is no more and no less than the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be

brought against it by the applicants to enforce their disputed claims. They do not... have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable... it seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide... to allege facts which, if proved at a trial, could constitute a good defence to the claims against the company."

See also: ***Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd***
(1030/2015) [2016] ZASCA 168 (24 November 2016)

wherein this principle was set out that winding-up proceedings are not designed for the enforcement of disputed debts.

[63] The respondent in an application for winding-up or sequestration is not required to prove the truth of his defence. However, it is necessary for the respondent to place sufficient facts to show that the debt is *bona fide* disputed on reasonable grounds.

[64] In their application for sequestration the liquidators rely for their status as creditor of the Dikwenanyana Trust, upon an alleged amount of about R 7 400 000.00 paid out from TMI trust account by Mr. Mokwena to the Dikwenanyana Trust.

They rely mainly upon the evidence of First Respondent, Chuene and Legodi (all being trustees of the Trust at some time) during interrogation at the liquidators' instance at an enquiry into the affairs of TMI in terms of section 417 and 418 of the Companies Act 61 of 1973.

[65] I have made a finding that the evidence of First Respondent, Chuene and Legodi at the aforesaid enquiry is inadmissible against the Trust (Respondents herein) earlier in this judgment.

The consequence of my finding in relation to the evidence at the enquiry is that the liquidators (Applicants herein) failed to prove their status as a creditor of the Trust.

[66] In view of the alleged indebtedness being disputed, where there is a material dispute of facts in motion proceedings, such disputes ought to be resolved through action proceedings and equally, the purported indebtedness by the Trust cannot be decided in this sequestration proceedings. There is a *bona fide* dispute of the indebtedness of the Trust.

[67] In an effort to show that the Trust is indebted to TMI, the Applicants attached to their founding affidavit a report by Jan Dekker Auditors who were apparently appointed to investigate the financial affairs of TMI. The said report shows money flow from TMI trust banking account to Mr. Mokwena's banking account, the TMI business banking accounts and also to the Dikwenanyana Trust banking account.

It is on this basis that the Applicants allege or contend that Mr. Mokwena made exorbitant withdrawals from TMI trust and business accounts to the Trust, himself or both.

[68] The money flow as alleged by the Applicants does not take their case any further in establishing the Trust's indebtedness to TMI. The onus rests on the Applicants to prove that the aforesaid money flow transactions from one banking account to the other was done *sine causa* and unlawfully.

It happens always in the course of attorneys practice that money is transferred from trust banking account to the business banking account and vice versa.

Such transfers from an attorney's trust account is justified when fees earned by a legal practitioner are so transferred to the firm's business account. Furthermore, payments to the firm's trust creditors or clients are now and then being made out of the firm's trust banking account.

Hence, the alleged money flow as set out in Jan Dekker Auditors report does not take the Applicants case any further.

Conclusion

[69] On the conspectus of the evidence considered in this matter, I come to a conclusion that it has not been established that the Trust is either factually insolvent or that it had failed to pay its debts as they fall due. It is common cause that the liquidators have never made any demand for payment of the alleged indebtedness from the Trust.

Accordingly, there is no basis for contending that the Trust has failed to pay its debts or that it is liable to be sequestrated.

The application for the sequestration of the Dikwenanyana Trust brought by the liquidators of TMI should not succeed.

[70] In the result the application is dismissed with costs, including the costs of senior counsel.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT,
LIMPOPO DIVISION

APPEARANCES

Heard on	: 30 May 2022
Judgment delivered on	: 18 July 2022
For the Applicants Instructed by	: Adv. R Raubenheimer : Coombe Commercial Attorneys Inc. c/o Becker Attorneys
For the Respondents Instructed by	: Adv. L Sigogo SC : Kutullo Kgafane Attorneys