



IN THE HIGH COURT OF

SOUTH AFRICA,

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 9904/2017

In the ex parte application of :

KURT ROBERT KNOOP N.O

Applicant

In re Insolvent Estate

and

SAGADAVA NAIDOO

Master's Reference No: N637/2000

First Intervening Party

SIVARAJ NAIDOO

Second Intervening Party

ORDER

1. Sagadava Naidoo is granted leave to intervene as a party to the application brought by the applicant;
2. Sivaraj Naidoo is granted leave to intervene in the re-consideration application brought by Sagadava Naidoo;
3. The ex parte order granted in favour of the applicant on 18 September 2017 against Sagadava Naidoo, is reconsidered and set aside;
4. Each party is to pay its own costs.

JUDGMENT

Chetty J:

[1] The applicant launched an urgent application, ex parte, on 18 September 2017 for an order in the following terms:

- '3.1. that the Master's insolvent file Estate: Sagadava Naidoo ('the insolvent'), Master's Reference No.637/2000, be re-opened;
- 3.2. that insofar as may be necessary, all of the powers which the firm, Schoerie and Hayes, previously enjoyed *qua* trustees, be re-vested in the Applicant and the firm, Mancini Knoop Financial Services, including but not limited to:
 - 3.2.1 bringing or defending in the name and on behalf of the creditors any action or other legal proceeding of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings, including any urgent legal proceedings for the recovery of outstanding accounts;
 - 3.2.2 compromising or admitting any claim or demand against the insolvent estate including an unliquidated claim;
 - 3.2.3 making any arrangement with creditors, including creditors in respect of unliquidated claims;
 - 3.2.4 selling any movable and immovable property found to be the property of the insolvent estate by public auction, public tender or private contract and to give delivery thereof;
 - 3.2.5 performing any act or exercise any power for which I am not expressly required by this Act to obtain the leave of the Court;
 - 3.2.6 engaging the services of attorneys and counsel in respect of litigation to be instituted and arising from the normal management of the estate, to agree such fees, agreeing such charges and costing and make payment in the normal course of the litigation and that costs thereof shall be regarded as costs in the administration;
 - 3.2.7 authorizing and empowering me to investigate any apparent voidable or undue preference and/or dispositions of property and taking whatever steps necessary including instituting of legal action and intervening in any pending litigation concerning assets of the insolvent estate and appointing attorneys and counsel, to have these set aside or determined;
 - 3.2.8 ratifying any prior steps taken by the Applicant in relation to the re-vesting of the insolvent estate in the Applicant.
- 4. That the costs of the application be the costs in the sequestration.'

[2] In proceeding to lay a basis for the ex parte application, the applicant ('Knoop') contends that inasmuch as this court granted an order placing the insolvent ('Sagadava') under sequestration, pursuant to a 'friendly sequestration', it retained jurisdiction in matters pertaining to Sagadava's insolvent estate. By way of background, in 2000 Knoop was a partner at the firm Schoerie and Hayes. Mr Schoerie was appointed, in his personal capacity, as the trustee in the insolvent estate of Sagadava. Schoerie has since passed away but Knoop contends that he was entrusted with the administration of the estate and had personal knowledge of all matters relating to it. It is common cause that the insolvent was rehabilitated on 1 November 2010 and that the Master's file, in respect of the insolvent estate under reference number N637/2000, was closed. Knoop contends that on account of fraud committed by the insolvent, the Master's file should be re-opened by order of this Court and that 'he and his firm' be 'revested' with the powers and obligations of a trustee so that he can fulfil his obligations to creditors in the estate. The ex parte application brought by Knoop on was granted on 18 September 2017.

[3] The application presently before court is an application by Sagadava in terms of uniform rule 6(12)(c) to reconsider the ex parte order. As will become apparent from what follows below, the reconsideration application challenges Knoop's authority to bring the ex parte application, as well as the authority of the Court to grant an order appointing a trustee to an insolvent estate. In addition, Sagadava contends that there are no creditors in whose interest Knoop purports to act and that he has never liaised with any of the original creditors in the estate prior to bringing his application. The second intervening party, Sivaraj Naidoo ('Sivaraj') is Sagadava's brother. It is contended by Sagadava that Knoop is acting with an ulterior motive to favour the interest of Sivaraj, with whom Sagadava is embroiled in lengthy litigation over assets which were concealed during the insolvency enquiry in a stratagem devised by the two brothers to the prejudice of creditors. The scheme entailed, on Sagadava's version, that certain assets would be held by Sivaraj as a nominee, thereby still allowing Sagadava to retain beneficial ownership. As a result of the assets being hived off to Sivaraj, Sagadava was able to plead an inability to pay maintenance to his wife and children in the course of divorce proceedings. According to him, this scheme was hatched with the collusion of an attorney. The plan entailed that once Sagadava was

rehabilitated, the property would be returned to him. However, litigation between Sagadava and Sivaraj ensued when the latter refused to return ownership of the properties to his brother in accordance with their plan.

[4] The scheme between the two intervening parties came to the fore when Sagadava brought an application against Sivaraj, under case number 1722/2013, for an interdict to restrain Sivaraj from disposing of any member's interest in the close corporations being Odora Trading CC, Multibrand Logistics CC and Acrita CC. In addition, Sagadava sought to interdict the transfer or hypothecation of the immovable properties situated at 53/54 Wick Street, Verulam; Lot 12 and 13 Redcliff, as well as the delivery of licence discs in respect of five vehicles. Chili AJ (as he then was) delivered a judgment on 3 March 2014 dismissing the application and ordering the applicant (Sagadava) to pay costs on an attorney and client scale. He made the following remarks at paragraphs 16 and 20 of his judgment:

‘[16] I am expected to close my eyes to the applicant's fraudulent schemes which in all probabilities put him in the position in which he presently finds himself, and treat him as an innocent litigant who approached the court with clean hands. I am not inclined to do that. What the applicant did amounts, in my view, to a gross violation of the *uberrima fides* rule which places a duty on a litigant who approaches the court in *ex parte* applications to disclose every circumstance which might influence the court in deciding to grant or refuse the relief sought. Although he also sought to suggest that the ownership of the assets mentioned in the relief was a matter for determination by the trial court, he created an impression that he was the legitimate owner of such assets, the factor which was very influential in the court's decision. In the process he deliberately withheld or suppressed extremely vital information regarding his interrogation at an insolvency enquiry into his estate.

. . . .

[20] I am of the view that the interests of justice demand that the conduct of the applicant and his accomplices be investigated by the relevant authorities. For that reason, I recommend that the record of these proceedings be forwarded to the Master of the High Court, the trustees who handled the applicant's insolvent estate and the office of the Director of Public Prosecutions.’

[5] Undeterred by the dismissal of the application, Sagadava instituted an action against Sivaraj claiming the return of the movables and immovable which he alleged were concealed during the insolvency enquiry and which were placed with Sivaraj as

a nominee owner. These trial proceedings are currently part-heard before Steyn J in this division.

[6] Sagadava then launched a further application on an urgent basis citing Sivaraj and a number of the close corporations as respondents. The close corporations are those in which various immovable properties are registered. The ownership of these properties also forms the basis of a dispute between Sagadava and Sivaraj. In addition, Knoop was cited as the ninth respondent in the application. The explanation tendered by Sagadava for so doing is that he assumed that Knoop was a trustee of his insolvent estate.

[7] It appears from the judgment of Nkosi J, delivered on 18 July 2014 (also under case number 1722/2013) that the purpose of the application was to protect certain property, which formed part of the stratagem of concealment between Sagadava and his brother, from being disposed. The court pointed out that the application was based on substantially the same set of facts, and for the identical relief as that which was brought before Chilli AJ, and against which, leave to appeal had been granted.

[8] Nkosi J had the following to say regarding the application in para 23:

‘[23] The applicant by his own admission gave conflicting versions regarding these assets under oath. By his own account, he previously stated in the sequestration proceedings as well as in the Rule 43 application relating to his divorce that the assets which he now claims belong to him, were not his. The extracts from those proceedings show that he did so repetitively. Although now recanted, the correct and honest version of the applicant cannot be determined on the applicant’s own affidavit. I am not persuaded by the presence of his erstwhile attorney, Mr Maniklall’s supporting affidavit regarding the existence of the division agreement that he has now been purged of a lie. The determination of the truth of one version and the discarding of another version can only be determined at trial. The applicant seems to lie when it suits him. Before the actual and accurate version of the applicant is established the applicant, in my view, cannot claim to have established a *prima facie* right, not even open to some doubt. That reason alone suffices to dismiss the application.’

The court accordingly dismissed the application with costs.

[9] It follows therefore that on two occasions prior to the present application, Sagadava failed to convince the court that he had made out a case for the relief which he sought, particularly against the backdrop that he admitted to engaging in a stratagem with his brother to shield assets from his wife, with whom he was embroiled in a divorce. In short, Sagadava gave false evidence and perjured himself at the insolvency enquiry. Knoop contends that in light of him having been cited as a respondent in the application which served before Nkosi J, he was obliged to engage counsel to appear on his behalf. Although those papers were not placed before me, what does appear from the judgment of Nkosi J is that no relief was sought against Knoop. Nkosi J stated in his introductory paragraph that ‘the second to fifteenth respondents are cited purely in the various specified interests in the matter and no relief is sought from them.’ Notwithstanding, Knoop sought to participate in the proceedings.

[10] The issue which is pivotal in this application is the interest, if any, that Knoop had in bringing the application for him to be re-vested with the powers of a trustee in the insolvent estate of Sagadava. In light of his involvement in the third interdictory application by Sagadava, Knoop approached the Master of the High Court on 14 June 2017 with the request that the file at the Master’s office be reopened on the basis that, in terms of section 129(1)(b) of the Insolvency Act 24 of 1936 (‘the Act’), where an insolvent has committed fraud, his debts in the insolvent estate are not discharged.

[11] Knoop contends that it was in the interest of the creditors that he be allowed to ‘commence to recover all of the hidden assets’¹. According to him, the Master provisionally approved of his appointment but indicated that only the court could order the re-opening of the insolvent estate and re-vest him with the powers of a trustee. That the insolvent acted in a manner to defraud and conceal assets from his creditors during the course of his insolvency is a matter which the insolvent himself concedes. This conduct would have included the transfer of properties to his brother, which would fall under the category of a disposition without value or collusive dealing. According to Knoop he was advised by the Master’s office, represented by a Mrs Padayachee, to launch the ex parte application. However, a perusal of the Master’s report, dated 11

¹ Applicant’s Founding Affidavit, para 41.

September 2017, does not quite support the contention by Knoop. The Master says the following:

- ‘5. My advice to the applicant to approach this court is based on Section 112(a) of the Insolvency Act 24/1936, *albeit* it refers to confirmation of the account but the effect thereto is that once the Master has confirmed the account it shall be regarded as final and the Master shall have no authority to re-open it.
6. Similarly in this case I do not believe I have the authority to re-vest the powers to the trustee.
7. I know of no facts which would justify the court in postponing or dismissing this matter.
8. I abide by this Honourable court[’s] decision.’

[12] In addition to the fraud committed during insolvency, Knoop alludes to other unlawful and fraudulent conduct of the insolvent, who he ascertained had failed to disclose an amount of over R1,5 million in gold shares in the year 2000, when he was sequestered. As stated earlier, the insolvent failed to disclose his allocation of shares into property owning companies, namely RGN Farms (Pty) Ltd and Rockhill Investments (Pty) Ltd.

[13] In light of this background, Knoop approached court *ex parte*, on an urgent basis, on the grounds that Sagadava was in the process of dissipating his assets and that he engaged in an elaborate scheme to defraud his creditors including the South African Revenue Service (‘SARS’). As the trial between Sagadava and Sivaraj was set down for hearing in November 2017, Knoop brought the application in September 2017 to enable him to intervene in those proceedings. On these grounds it was submitted that substantial redress would not be achieved at the hearing of the matter in due course, and Knoop sought, as a matter of urgency, to be furnished with all such necessary extended powers to enable him to intervene in the trial.

[14] In summary, Knoop contends that Sagadava proceeded to apply for his sequestration knowing that he was not in fact insolvent and that he had sufficient hidden assets which could have been used to satisfy the claims of his creditors. Knoop submits that the ‘re-vesting of [his] powers’ is necessary to unravel the unlawfulness of the insolvent’s fraudulent conduct, and that the interests of justice would be best served by his re-appointment.

[15] Sagadava brought an application to re-consider the grant of the ex parte order as he contends that he has a direct interest inasmuch as the relief that Knoop secured results in a reversion of his status from that of a rehabilitated insolvent. He describes Knoop's obtaining of the ex parte order as an 'ambush tactic'² as no notice was given to him despite the basis of the application being based on irregularities in the granting of the order for his sequestration. I am satisfied that Sagadava is entitled in terms of uniform rule 6(12)(c) to approach this court for a reconsideration as the relief obtained by Knoop directly affects him and his estate. Both Knoop and Sivaraj (who also intervened in the proceedings) are in tandem that there is no basis for the ex parte order to be set aside.

[16] Mr *Harpur* SC, who appeared for Sagadava, contended that Knoop was embarking on a frolic of his own in circumstances where out of the five proved creditors in his insolvent estate, four, including his ex-wife and three children, have indicated in writing, the waiver of their claims. Whatever may have brought about that position is not relevant to these proceedings. There is nothing before me to gainsay that version. That leaves SARS as the only remaining creditor in the insolvent estate. According to Sagadava, SARS originally proved a claim of R372 508.23 against his estate, of which a dividend of R19 558.46 was paid. Counsel submitted that Sagadava is not liable for any amounts to SARS and they do not consider him to have any outstanding liability to it. In this regard I was referred to a letter from SARS dated 19 January 2018 bearing the name of 'S Naidoo 0576884266' confirming that on the basis of the information available to it, the taxpayer has complied with all the requirements as set out in the Tax Administration Act 28 of 2011.

[17] Mr *Redman* SC who appeared for Knoop, submitted that the document relied on by Sagadava should be treated with caution as, he submitted, Sagadava approached SARS to register as a new taxpayer in 2018 and was issued with what appears to be a 'clean slate' in respect of his tax affairs. Much was made of the difference in the tax reference numbers pertaining to Sagadava's insolvent estate and that which features on the letter from SARS extinguishing all liabilities to it. The nub of the issue, as Mr *Harpur* submitted, is that in the absence of any interest by creditors,

² Affidavit by Sagadava Naidoo as Party/Intervening Party, para 8.

in whose interest can Knoop claim to be acting in bringing the ex parte application? In the reconsideration application, Knoop bears the onus of proof and where there is a dispute of fact, on the basis of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), the matter must be decided on the version of Sagadava.

[18] On 18 September 2017, on the basis of the ex parte application, the court appointed Knoop as a trustee to the re-opened insolvent estate of Sagadava. It gave to Knoop all the powers which the firm Schoerie and Hayes previously enjoyed as trustees. The order served to vest in Knoop and his firm Mancini Knoop Financial Services the role played formerly by Schoerie and Hayes. Mr Harpur submitted that the court has no power to appoint a trustee since this power is, in terms of s 18 of the Insolvency Act, vested solely in the Master. In support of this submission the decision in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motale NO & others* 2012 (3) SA 325 (SCA) which affirms *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP), para 11, where the court clearly stated that s 18 of the Act provides that the Master appoints provisional trustees and trustees to insolvent estates of individuals. As part of the rule *nisi* which was issued by Bertelsmann J in *Ex parte the Master*, interested parties were called upon to show cause why a declarator should not be issued stating that the Master of the High Court of South Africa is the only official authorised to appoint trustees and provisional trustees of sequestrated and provisionally sequestrated estates, and more importantly, as it pertains to the ex parte order of 18 September 2017, that:

‘no judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to in par 1, nor to make any recommendations to the master in respect of any appointment to any of these positions.’³

The court’s ruling was informed by its reasoning that the Master’s office, rather than the court, is possessed of:

‘. . . the institutional knowledge and expertise to apply policy, and to assess the ability and integrity of trustees and liquidators, and is therefore able to judge whether or not individuals are duly qualified to be appointed, either at all or to a specific estate.’⁴

The court also reasoned that:

³ *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) at 327B-C.

⁴ *Ex Parte The Master* para 26.

'The master's office is also more likely to be aware of any potential or actual conflict of interest a candidate might have in a particular instance that would prevent her or his appointment.'⁵

The court concluded that:

'It must therefore be held that, as a matter of law, the master is the only functionary entitled to appoint provisional trustees, liquidators and judicial managers and, taking into account creditors' directives, trustees, liquidators and judicial managers.'⁶

[19] More recently in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper & others* 2018 (4) SA 71 (SCA), para 32, the Supreme Court of Appeal pointed out the following in relation to the appointment of liquidators, which I am of the view is equally apposite to the appointment of trustees to insolvent estates:

'... s 367 of the 1973 Act makes it clear that the Master appoints liquidators for the purpose of conducting the winding-up of a company. The Master's office, which controls every stage of the administration of companies under winding-up, from the launching of liquidation applications to the deregistration of companies, has the institutional knowledge and expertise to apply policy and assess the ability and integrity of liquidators who may wish to be appointed. Although the South African insolvency system is creditor-driven and the majority of creditors have the right to elect liquidators, their choice of liquidator is subject to the Master's approval and the performance of the functions of liquidators is subject to the Master's control.'

[20] On this basis it was submitted by Mr *Harpur* that the Court had no authority to appoint Knoop a trustee, and consequently such appointment is a nullity and of no force and effect. This much was emphasised in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO* (supra) where the court at para 14 said:

'In my view, as I have demonstrated, Kruger AJ was not empowered to issue, and therefore it was incompetent for him to have issued, the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect (*Schierhout v Minister of Justice* 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary.'

⁵ *Ex Parte The Master* para 27.

⁶ *Ex Parte The Master* para 33.

[21] The subsequent appointment by the Master in the Certificate of Appointment of 17 October 2017 is not saved either, and is itself a no force and effect as it flowed from the ex parte order of 18 September 2017, which as explained above, was a nullity. Neither Mr *Redman SC* nor Mr *Solomon SC*, who appeared with Ms *MacManus* for Sivaraj, sought to disagree with these contentions. On that score alone, the order of the court appointing Knoop as a trustee cannot stand.

[22] There is a further reason why Knoop's appointment is tenuous. It was contended by Mr *Redman* that Knoop's deceased partner, Mr Schoerie, was appointed *de jure* the trustee of Sagadava's insolvent estate, but Knoop was the person who was *de facto* the trustee. In support of the argument that Knoop's appointment should stand, it was submitted that it was Sagadava who joined Knoop in the various applications, and even from his own understanding, considered or believed that Knoop was the trustee of his insolvent estate. The fact of the matter is that the trustee was Mr Schoerie, not his firm nor his partner, Knoop. An error on the part of Sagadava or his attorneys does not rescue the situation for Knoop, nor can it serve to clothe him with a mantle that was never bestowed on him. Mr *Harpur* submitted that a corporate body, in terms of Section 55(h) of the Act, is precluded from acting as a trustee. On that basis, it was not possible to re-vest Knoop and his firm with powers that Schoerie and Hayes purportedly held. The late Mr Schoerie was appointed trustee, not his firm. Where the sole trustee has died, as Mr Schoerie did in March 2013, the procedure would have been for the Master, in terms of section 62(2) of the Act, to convene a meeting of creditors to elect a new trustee. This was never complied with. For this reason as well I am satisfied that the order appointing Knoop or his firm as trustees, cannot stand.

[23] Sagadava's next challenge against the ex parte order is that a consequence of rehabilitation was to put an end to his sequestration, particularly as the creditors in the insolvent estate were paid a dividend. As I understand the provisions of s 112 of the Act, where a dividend has been paid (in this case to SARS), and confirmed in the final liquidation and distribution account, that is the end of the matter and it is not permissible to re-open the account. Consequently, upon the effluxion of the 10 years after his estate was sequestrated, Sagadava's estate re-vested in him. It was

submitted that it is only if he wilfully concealed assets from the reach of the insolvency enquiry that an aggrieved creditor whose claim was *not settled* in terms of a dividend would have locus standi to bring an application against the insolvent.

[24] Where an application has been brought ex parte, the applicant is under a duty to the court to show the utmost good faith. A failure to disclose fully and fairly all material facts known to the applicant may lead, in the exercise of the court's discretion, to the dismissal of the application on that ground alone.⁷ An applicant who approaches the court ex parte must disclose all facts known to him or her, however prejudicial they may be to the applicant's case.

[25] Against this backdrop it was submitted that the application brought by Knoop was intended to bolster the pending trial between Sagadava and Sivaraj, with the allegation being that Knoop was doing the latter's bidding. It was also contended that Knoop has refused to disclose on the papers who has funded the ex parte application. It is clear that none of the original creditors authorised Knoop to bring the application nor has he set out any wider or public purpose in doing so. In my view Knoop has no reason to resist disclosure as to the funding of the present litigation, particularly as the application has not been brought at the instance of any of the creditors of the insolvent estate, nor at the instance of SARS. He was not originally appointed as the trustee to the insolvent estate of Sagadava, even though he may have been familiar with the affairs of the insolvent. Against this backdrop, his locus standi and motive for bringing the application then become questionable. The same concerns appear to have occupied the attention of Bertelsmann J in *Ex parte The Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) in deciding that the Master rather than the court would be best placed to appoint an individual as a trustee based on that person's integrity and honesty.

[26] The high-water mark of the purpose of Knoop's application is to be found in a letter from SARS to Knoop's attorney dated 8 January 2018 in which the author of the letter says:

'The South African Revenue Services confirm our concurrence with your client's approach in the matter of Sagadava Naidoo.

⁷ *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).

South African Revenue Service, herewith, requests that should there be any legal costs involved that would be payable by SARS, written authority must be obtained first before the costs are incurred.’⁸

[27] The court was not privy to the letter written by Knoop’s attorney which generated the above response from SARS. In the circumstances, the letter referred to does not assist Knoop in so far as explaining the basis on which he brought the application for ex parte relief or whether SARS still has a claim against Sagadava. The failure of Knoop to explain the basis on which he brought the application, or whether he did so in some wider public interest, raises questions as to his intentions. If so, this was a further ground that would disqualify him to be appointed as a trustee.

[28] What is clear from the papers is that the letter addressed to Knoop’s attorney from SARS bears the tax reference number 3541779207. When Sagadava went to the SARS offices on 18 January 2018 he was issued with an ‘acknowledgement of service’ reflecting the same tax number but, but with the words ‘insolvent’ written in manuscript on the document. The following day when he visited the offices of SARS it would appear that the tax reference number 3541779207 was deleted and a new number of 0576884266 was generated. The court cannot speculate as to the reason for the new tax number, save to record that as at 19 January 2018, Sagadava is recorded as being a taxpayer of ‘good standing’⁹ with SARS.

[29] Mr *Solomon SC* submitted that the purpose for Sivaraj’s intervention in this matter is the suggestion by Sagadava that Knoop brought the ex parte application to bolster Sivaraj’s case in the pending trial before Steyn J. Precisely what interests Knoop would have sought to advance is unclear. Counsel’s further task was to ensure that this court did not make any adverse findings against Sivaraj, to the extent (I assume) that this would be brought to the attention of the trial court. It is not necessary for the purpose of this application to make any finding on the dispute in which the two intervening parties are engaged. That is a matter for the trial court to unravel, after hearing the evidence of both parties. What is apparent from the affidavit of Sivaraj, however, is that he aligns himself with the stance taken by Knoop in resisting the

⁸ Annexure ‘A’ to Applicant’s Supplementary Affidavit.

⁹ Annexure ‘MN7’ to Opposing Affidavit of Sagadava Naidoo.

reconsideration application and setting aside the ex parte order. In the main, Sivaraj disputes allegations that he engaged in a stratagem with Sagadava to conceal assets during the latter's divorce proceedings and from the insolvency enquiry. It is common cause that Knoop has also brought an application to be joined in the action between the intervening parties. Much was made of a draft consent order in case number 1722/2013 in which Sagadava appears to recognise Knoop as being the 'former trustee' of his insolvent estate. As a matter of law and fact, that concession was improperly made. In any event, the draft consent order cannot be equated to an order of this court. It remains just that – a draft. Nothing further can be sourced from this draft and I am not in agreement with the contention that the draft order evidences prima facie Knoop's interest in the matter. The contentions advanced by Knoop regarding the assets concealed by Sagadava during the insolvency enquiry will no doubt assist Sivaraj in defending the action brought by Sagadava seeking a return of these properties. This is apparent from the submission on behalf of Sivaraj that he wishes 'to avoid at all costs a situation whereby the reconsideration application succeeds and the Trustee is left powerless to act prior to the recommencement of the Trial proceedings. . .'¹⁰. It is therefore not surprising that Sivaraj has thrown his weight behind Knoop's appointment pursuant to the ex parte order.

[30] Mr *Redman* submitted that the ex parte order of 18 September 2017 did not appoint Knoop as a trustee, and that the court only ordered the 're-opening' of the insolvent file. The appointment of the trustee, so the argument went, was by the Master on 17 October 2017. This, with respect, is an overly simplistic approach to what transpired on 18 September 2017. In the ex parte application, Knoop sought an order to re-open Sagadava's insolvent file. He then sought that the powers which were previously vested in the former trustee be 'revested' in him and his firm Manci Knoop Financial Services, and to be given all of the powers that would ordinarily be granted to a trustee in terms of the Act. Knoop did not ask the court merely to re-open Sagadava's insolvent estate file. He went further and asked to be clothed with powers that are accorded to a trustee. As a fall-back position, counsel for Knoop suggested that even if I find that the court erred in granting the ex parte order, I nonetheless have a discretion in reconsidering the order to amend it to the effect that it does not

¹⁰ Sivaraj Naidoo's Heads of Argument in the Reconsideration Application, para 39.

effectively appoint Knoop as a trustee, but rather be worded in a manner that ultimately vests the appointment in the hands of the Master. I am not persuaded by this argument as it was not the basis on which Knoop approached the court on 18 September 2017. To do as counsel has suggested would be to *ex post facto* remedy an order which was a nullity. I am also not persuaded that the Master made an independent decision when issuing the certificate appointing Knoop as trustee. The court, when granting the *ex parte* order, effectively made this decision for the Master. I am not persuaded by any of these arguments, which fall to be dismissed.

[31] It was further submitted that Knoop did not deceive the Master in the appointment of him as trustee. Rather, he first approached the Master on 14 June 2017 requesting that the insolvent's estate file be re-opened on the basis that Sagadava perpetrated a fraud in attempting to have his debts discharged. Knoop's approach to the Master was on the premise that it would be 'in the interest of the creditors that [he] commence to recover all of the hidden assets'¹¹. What is apparent from the affidavit of Sagadava is that Knoop did not approach any of the original creditors prior to launching the *ex parte* application and that none of them authorised him to approach the Master. Whatever information was conveyed to the Master by Knoop about the affairs of Sagadava, the inescapable fact is that he (Knoop) had never been appointed to deal with the matter, irrespective of whatever role he had provided to the former trustee, Mr Schoerie. It is also immaterial that Sagadava may have incorrectly construed Knoop's prior involvement in the insolvent estate as being akin to those of a trustee. Schoerie was the person entrusted with the powers of a trustee.

[32] The next argument advanced on behalf of Knoop relates to Sagadava's tax liability to his creditors, particularly SARS, in respect of which no explanation has been provided as to how a liability of approximately R372 000 was extinguished despite a dividend of only approximately R19 000 having been paid from the estate. As alluded to earlier, it was contended that no weight should be attached to Sagadava's version that SARS has issued a letter confirmation that his tax affairs are in order. On the contrary, it was submitted that Sagadava is unable to account for the change in the

¹¹ Applicant's Founding Affidavit, para 41.

tax reference numbers used by SARS and this was indicative of his fraudulent behaviour, to which he has already admitted. Notwithstanding the potential hurdles posed by the manner in which the ex parte order was obtained, counsel submitted that Knoop ought to get ‘some relief’ from the Court.

[33] The underlining contention for this argument to come to Knoop’s assistance is Mr *Redman*’s assertion of the maxim that ‘fraud unravels all’, meaning that in light of Sagadava’s admitted fraudulent conduct, the court should be loath to come to his assistance. In these circumstances, Knoop should succeed in preserving the ex parte order, alternatively that it be allowed to stand with certain amendments. Reliance was placed on the recent decision of *De Villiers & others v GJN Trust & others* 2019 (1) SA 120 (SCA), para 17, where the court held:

‘In terms of s 408 of the Act the confirmation of a liquidation and distribution account by the Master “shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.” Therefore, save possibly in the case of fraud, a confirmed account may only be reopened before distribution in terms thereof commences. Even then, reopening will only be ordered on grounds for *restitutio in integrum* such as justus error or dolus.’

[34] Counsel for Sagadava however submitted that the final liquidation and distribution account has not been shown to have infringed on any of the provisions of s 151 of the Act, despite the uncovering of Sagadava having concealed assets from the trustee of his insolvent estate. In the matter of *Gilbery Distillers & Vintners (Pty) Ltd and others v Morris NO and another* 1991 (1) SA 648 (A), which was applied in *De Villiers* (supra), the court held that despite fraud, the accounts were held to be ‘duly confirmed’¹² and could only be re-opened in the circumstances provided for in section 112 of the Act. As stated earlier, none of the circumstances set out in s 112 have been shown to be present, especially as a dividend was paid to SARS and the remaining creditors waived their claims.

¹² *Gilbery Distillers & Vintners (Pty) Ltd and others v Morris NO and another* 1991 (1) SA 648 (A) at 656D-E.

[35] To the extent that Knoop relies on Sagadava's fraudulent non-disclosure of his assets during the insolvency enquiry and their concealment from his ex-wife in the course of their divorce proceedings, Mr *Harpur* disputed the reliance on the proposition that 'fraud unravels all'. As persuasive as it may be to dismiss Sagadava's submissions because of his prior concealment, counsel submitted with reference to *Absa Bank Ltd v Moore and another* 2017 (1) SA 255 (CC), para 39 where Cameron J pointed out the following:

'And Brusson cannot avoid being bound by relying on its own fraud to invalidate the loan agreement. Still less can a third party – the Bank – disregard the loan agreement because of Brusson's fraud. The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.'

[36] The 'victims' who would have suffered as a result of Sagadava's concealment would have been the original creditors in the insolvency – his ex-wife, children and SARS. None of those creditors were consulted by Knoop before the ex parte application and none of these 'victims', including SARS, sought to be joined as interested parties to the litigation. Sagadava has put up proof that the individual creditors have waived their claims and SARS has certified that his tax affairs are in order. Knoop's contention of the fraud perpetrated by Sagadava does not assist him in proving his *locus standi* for bringing the ex parte application, or for any wider purpose in bringing the application. Moreover, the court in *Central African Building Society v Pierce* NO 1969 (1) SA 445 (RA) held that:

'... the confirmation of a distribution account has the effect of final sentence; it has precisely the same effect as a judgment of a court, and, before another court can go behind such a judgment, application must be made to have it set aside'.

[37] In the final analysis, I am satisfied that the reconsideration application must succeed. The ex parte order granted was a nullity in as much as the Master and not the court has the power to appoint trustees to an insolvent estate, albeit this case concerned the re-opening of an insolvent estate. Knoop was re-vested with powers he never originally had. His basis for bringing the application, no matter how opprobrious the conduct of the insolvent may have been, does not clothe him in law

with authority to bring the application, especially where there is no basis to do so under s 112 of the Act. For all of these reasons, the order secured by Knoop should be set aside. I am not persuaded that I should grant any relief to amend the ex parte order.

[38] As regards costs, Sagadava has been successful in the reconsideration application as a result of which the ex parte order must be set aside. As a general rule, costs should follow the result, which would result in Knoop and Sivaraj being liable for Sagadava's costs. All of the parties in this matter appear to be mired in controversy. Sagadava and his brother Sivaraj are embroiled in a bitter dispute over certain immovable property which appears to have passed ownership under circumstances best described as dubious. Knoop has been accused of initiating this application to bolster the strength of Sivaraj's case in his litigation against Sagadava. This court still has no clarity as to why Knoop elected to bring the urgent application on an ex parte basis for his appointment as trustee and for the re-opening of the insolvent estate file. The authorities indicate that even though the liquidation and distribution account may be closed, precluding the re-opening, this does not prevent a damages claim arising from fraud which may have been subsequently discovered. In the exercise of my discretion, I am of the view that each party should bear their own costs.

[39] I make the following order :

1. Sagadava Naidoo is granted leave to intervene as a party to the application brought by the applicant;
2. Sivaraj Naidoo is granted leave to intervene in the re-consideration application brought by Sagadava Naidoo;
3. The ex parte order granted in favour of the applicant on 18 September 2017 against Sagadava Naidoo is reconsidered and set aside;
4. Each party is to pay its own costs.

Appearances

For the Applicants:	NPG Redman SC
Instructed by:	Beaumont Incorporated Durban North
Tel:	031 942 2864
Email:	tanusha@beaumontinc.co.za
For Sagadava Naidoo :	Harpur SC and S Dayal SC
Instructed by:	Vishal Junkeepsad & Company 304 African Palm Building, Umhlanga
Tel:	031 566 4274
Email:	vishals@sai.co.za
For Sivaraj Naidoo :	RA Solomon SC and A MacManus
Instructed by:	Dwarika Naidoo and Company 320 Dr Pixley Ka Seme Street Durban
Tel:	031 306 4809
Email:	cpillay@dwarikanaidoo.co.za
Date reserved:	30 August 2019
Date delivered:	31 October 2019