NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

15209/08

In the matter between:

WILLIAM GRAEME MAXWELL **Applicant**

and

IAN JAMES HOLDERNESS **First Respondent**
TRACEY HOLDERNESS **Second Respondent**
STEENKAMP WEAKLEY INCORPORATED **Third Respondent**

JUDGMENT

GORVEN J

1. This application was launched as an urgent application requesting a provisional sequestration order against the estate of the first respondent and, as an alternative, an interdict relating to the proceeds of the sale of immovable property pending the hearing of the sequestration application. On 19 November 2008 the application was struck off the roll with costs.

2. The first respondent responded with two applications, one to strike out certain paragraphs of the applicant's founding affidavit and the other to condone the delivery of the first respondent's answering affidavit after the date set by the applicant for such delivery and that contained in the rules of court. The latter application does not appear to have been dealt with but must be granted.

3. The application is for the provisional sequestration of the first respondent. Accordingly, the provisions of sections 9 and 10 of the Insolvency Act, No 24 of 1936 (as amended) ("the Act") apply. These are, in their material parts, to the following effect:

> 9 (1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor.
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> 10 If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie-
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> (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
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> (b) the debtor has committed an act of insolvency or is insolvent; and
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> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
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> it may make an order sequestrating the estate of the debtor provisionally.

4. The essential dispute between the parties in this matter is whether or not the first respondent is indebted to the applicant. This is required for the applicant to have *locus standi* to sequestrate. The applicant bears the onus to show that the first respondent is indebted to him in a sum not less than R100.00. Since there is a dispute on the papers, at the stage of a provisional sequestration order, it is necessary to set out the approach of the courts in dealing with such a dispute.

5. The approach was summarised in *Payslip Investments Holdings CC v Y2K TEC Ltd*[1], where Brand J (as he then was) said the following:

> Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared 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.

6. Milne J (as he then was) dealt with how to go about assessing this in the following manner:

> It is apparently a well-recognised principle that,
> "winding up 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 company: the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt (*Badenhorst v Northern Construction Enterprises (Pty.) Ltd.*, 1956 (2) SA 346 (T), and cases there cited). The Court has a discretion as to whether or not a winding up order is to be made and, in a case where the creditor's claim is disputed, the Court will generally exercise its discretion against making an order at the instance of a person

[1] 2001 (4) SA 781 (C) 783 G-

claiming to be a creditor if it is satisfied that the claim is *bona fide* disputed on reasonable and substantial grounds (*Badenhorst's* case, supra at p. 348; *Meyer, N.O. v Bree Holdings (Pty.) Ltd.*, 1972 (3) SA 353 (T))."

See Henochsberg on the *Companies Act*, 3rd ed., p. 607. In the *Bree Holdings* case MARGO, J., considered various *dicta* as to the *onus* in matters of this nature, and at p. 355B said:

"Dit is dus op die kwessie van die bestaan van 'n dispuut op *bona fide* redelike en wesenlike gronde, ten opsigte waarvan die bewyslas op die respondent rus. Die bewyslas rus nie op die respondent op die kwessie van die respondent se aanspreeklikheid of die opeisbaarheid van die skuld nie. Daar rus die bewyslas op die applikante."

There are, with respect, some logical difficulties about these propositions. As ELOFF, J., pointed out in *Walter McNaughtan (Pty.) Ltd. v Impala Caravans (Pty.) Ltd.*, 1976 (1) SA 189 (W) at p. 191G:

"The point is, however, that on whatever ground the application is brought the applicant would only have *locus standi* if it was in fact a creditor (sec. 346 (1) of the *Companies Act*)."

Perhaps it may be said that if there is *prima facie* a valid claim by the applicant so as to make it a creditor within the meaning of sec. 346 (1)(b) then it is for the respondent to disturb that *prima facie* situation by showing a dispute on *bona fide* and reasonable grounds. Overall, however, it seems to me that the position must be that, in order to establish that the applicant has *locus standi* to bring the application, it must show, on a balance of probabilities, that it is a creditor (where of course that is the ground relied upon to establish its *locus standi*).[2]

7. These considerations apply equally to sequestration applications.

[2] *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening)* 1978 (1) SA 70 (D) at 72A-F

8. The case relied on by the applicant is that the first respondent is indebted to him on two grounds, *viz.* by way of rent due under a lease agreement and by way of monies lent to him by the applicant. The application papers must therefore be scrutinised to establish whether, in the first place, the applicant has made out a *prima facie* case for the indebtedness relied on. If not, the application must fail. If he does so, the papers must be scrutinised in order to assess whether this indebtedness is disputed by the first respondent on *bona fide* and reasonable grounds. If the courts finds this to be the case, once again the application must fail. If not, the remaining considerations set out in section 10 come into play for the exercise of the court's discretion.

9. In order to place these claims in context, it is necessary to briefly traverse the history of dealings which have led to this application and two related applications, one for the sequestration of the first respondent's father ("Holderness senior") and one for the liquidation of Trade Avail 138 CC ("the CC"), a close corporation of which the first respondent and his mother were, at all material times, the members.

10. On 31 August 2000 the applicant, as lessor, and Holderness senior, as tenant, concluded a lease in respect of a farm known as Yarrow Farm. Although no mention is made of this in the lease, or the extensions thereto, Yarrow Farm has, at all material times, been owned by WG Maxwell Investments (Pty) Ltd, a duly registered company of which the applicant is the sole director and shareholder ("the company"). The

applicant states that he leased Yarrow farm from the company pursuant to an oral lease which included the right to sub-lease Yarrow farm. An option to extend the lease was exercised during 2003 by Holderness senior and the lease extended to 31 August 2005. On 20 July 2004, Holderness senior requested the right to sub-lease Yarrow farm to the CC, stating that "… our dairy operation has always been in the name of Trade Avail – cc. The land bank require (sic) a sub lease agreement between myself and the cc…" The applicant responded by letter dated 20 July 2004 stating "I hereby give permission to Richard James Holderness to Sublet the farm Yarrow to TRADE AVAIL 138 C.C. No.2000/059473/23". The applicant says that this was the first intimation to him that Holderness senior was not, himself, conducting the farming operations but was doing so through the CC. During August 2004 the lease was extended in writing to 31 July 2009. Until May or June 2006 the only herd on Yarrow farm was the one by means of which the CC conducted the farming operations known as the Razzle Dazzle herd which, apart from being a dairy herd, was run as a stud herd until a certain point. The applicant or the company did not own cattle at that stage.

11. In May or June 2006 the applicant says "I purchased the Buckstone herd and equipment from Mr Michael Roberts". This herd comprised 536 jersey cattle and was described by Holderness senior and the first respondent as one of the top 15 jersey herds registered with the Jersey Dairy Society of South Africa. The applicant does not, himself, engage in active farming since he is a neurologist practising in Bryanston, Gauteng

whereas the farms are located in the Karkloof area in KwaZulu-Natal. The applicant claims that he and the first respondent concluded an oral lease agreement in terms of which the first respondent would lease the Buckstone herd, it would be merged for all intents and purposes with the Razzle Dazzle herd and run as a single operational dairy herd by the first respondent, but would be maintained in profile and number. The first respondent would be entitled to all the milk produced by the Buckstone herd and any increase in the number of animals in the herd and would pay rent to the applicant but the amount of the rent was not agreed upon. The first respondent disputes this. He says that there were discussions that the CC would lease the Buckstone herd but that this would only take place once the applicant had installed the necessary infrastructure to sustain the Buckstone herd which was never done. As a result, he says, that it was orally agreed that the CC would manage the Buckstone herd on behalf of the applicant and monies generated by sales would be used to fund the care of the herd. Since all the parties knew that the Buckstone herd was not, at the time, a profitable farming operation, the applicant would fund any shortfall where expenditure exceeded income.

12. In May 2007 the company purchased the farm adjoining Yarrow farm known as Gala farm. Whilst he acknowledges being made aware in 2004 that the CC was conducting the farming operations, he asserts that, at this stage, the farming operation on Yarrow farm was principally conducted by the first respondent. He indicates that, in respect of Gala farm, no express lease was concluded between him and either Holderness senior or the

first respondent but goes on to assert that during May 2007, "Holderness Senior, <u>alternatively</u> Holderness Junior, leased Gala Farm from me on terms and conditions similar to that of the second Yarrow Farm lease… The Gala Farm lease was concluded tacitly". He states that rental was at the same randage per hectare as for the lease over Yarrow farm. The first respondent denies that any lease was concluded over Gala farm as does Holderness senior. It is important to note that the only fact, as opposed to assertion, referred to by the applicant in support of the tacit conclusion of the Gala farm lease is that the first respondent conducted farming operations on it from the date on which the applicant obtained occupation until 12 June 2008. He does not say why it was the first respondent, personally, who conducted these operations which involved the merging of the two herds rather than the CC which, to his knowledge, was the only entity which conducted the farming operation overseen by the first respondent and Holderness senior. It is not necessary to deal in detail with this dispute since the applicant recognises the dispute and does not rely on any indebtedness arising from the Gala farm lease.

13. The first respondent began requesting monies from the applicant after the purchase of the Buckstone herd. The basis for these requests is disputed. The applicant says they were requests for loans by the first respondent in his personal capacity whereas the first respondent says they relate to the undertaking by the applicant to meet the shortfall arising from the CC's management of the Buckstone herd. In his heads of argument counsel for the applicant relied heavily on an email sent by the first respondent on 9

November 2006 in support of the applicant's contention that he loaned R130 000 to the first respondent. It is important to set out precisely what is said in the relevant parts of the email. These read as follows:

> "Due to various excessive costs including purchased feed (concentrates and roughage); medicines; building and TLB-contractor costs which we incurred together with the very low milk price the farming business made a financial loss over the past 4 months (June to September). Cash is extremely tight – we have, and are, cutting costs in the summer to turn the ship around. Indications are that we are in the black for the month of October. We have allocated the R130 000 as a loan and will be paid back in months of profit. I have funded a further R430 000 loss through a personal loan account through CRI South Africa and a portion through creditors.

14. The email is consistent with the version of the first respondent that the CC was managing the herd, losses had been incurred, these were being dealt with by way of a loan (probably, although not stated clearly, from the CC to the operation of managing the Buckstone herd and therefore the Applicant) of R130 000 which would be repaid to the CC in months of profit. It is specifically stated that "the farming business made a financial loss" over the months of June to September 2006, the first four months of the applicant's ownership of the Buckstone herd. The farming business is not specified but must relate to that of the Buckstone herd. Had the first respondent wanted to refer to his having made a loss he would doubtless have said so. It is therefore certainly not clear from this that the first respondent is asking the applicant for a loan. If he were doing so, why would he say that "we have allocated the R130 000 as a loan". Even if it

can be said that the email is one seeking a loan from the applicant, which I doubt, it is even less clear that it is the first respondent personally who seeks a loan. The email is not one which one would expect to see arising from a lease agreement over the herd. These are clearly early days, the first four months after the acquisition of the herd by the applicant, where the first respondent is reporting to the applicant. The submission in the applicant's heads that the letter refers to personal matters of the first respondent does not mean that it cannot have been written on behalf of the CC. The email as a whole certainly does not only bear the interpretation which the applicant seeks to place on it. On the contrary, the version of the first respondent may well be more probable, and may be said to raise more than a *bona fide* and reasonable dispute.

15. This applies equally to the further written communications from the first respondent. I will not deal with them in detail. They are all consistent with the first respondent's version or can at least be interpreted that way. The details of the farming operation, lists of expenses and trade creditors as well as whether it was making a profit or loss would be irrelevant and a matter of monumental indifference to the applicant if they related to a simple lease agreement. In none is a loan requested in terms, only money. The detail in annexures WG18 to WG21 and WG 23 are certainly consistent with the applicant being responsible for any expenses which exceed income. The only aspect specifically relied on by Mr van Wyk, who appeared for the applicant, apart from the alleged loan for R130 000 was a loan of R250 000. However, annexure WG23, read in the light of the

other correspondence and the version of the first respondent, shows, in all probability that the first respondent made a personal loan to fund losses for which the applicant is responsible. Annexure WG22 records that the applicant has agreed to pay R250 000.00 to CRI South Africa to liquidate this loan. Once again, the details of the farming operations dealt with in this correspondence support the version that the requests for money were made pursuant to the agreement contended for by the first respondent. If this were the case, the applicant would be entitled to reports of this nature since he was obliged to fund shortfalls and would want to know that the management was being done efficiently. In one of these emails, a production loan of the applicant with Afgri is anticipated. The applicant does not explain why he would need a production loan if he was simply leasing the herd to the first respondent. In addition, he does not say on what basis he contends for a personal lease of the Buckstone herd by the first respondent in the light of his being aware that the CC was conducting the farming operation concerning the Razzle Dazzle herd, that he was unaware that the first respondent was a member of the CC and assumed that it was "Holderness Senior's *alter ego"* and that the first respondent was, at least until February 2007 on the applicant's version, in full time employment with Co-operative Resources International South Africa (CRI) and was for a period a director of that entity. The first respondent says that from 2000 to January 2008 he was managing director of CRI South Africa and in full-time employment with it. He assisted the CC and Holderness senior who was directly involved in the operation when his employment responsibilities allowed for it and contradicts the assertion of the applicant that from June 2006 the first respondent became more actively involved in the conduct of the farming operations.

16. A third ground of indebtedness in the applicant's heads of argument bases, apart from the loans of R130 000.00 and R250 000.00, dealt with the applicant's claim that the first respondent accepted responsibility for rent for the lease of the Buckstone herd and loans to the first respondent at a meeting which took place at the OR Tambo International Airport on 25 February 2008. It is common cause that this meeting took place between the applicant, his attorney one Mr Dreyer, and the first respondent. The applicant and Mr Dreyer say that the first respondent confirmed the lease of the Buckstone herd and suggested a rental. He further confirmed that amounts had been loaned to him, that these amounts were due and that he was unable to repay them. He thereafter made a proposal relating to the formalisation of the Buckstone herd lease and arrear rental. Mr Dreyer wrote a letter dated 3 March 2008 to the first respondent recording the points covered at the meeting, indicating that the applicant had agreed to the first respondent's proposal and that an agreement reflecting those terms would be forwarded to him in due course. The first respondent replied by email on 5 March 2008 saying "This is a start but there are points that need to be corrected. Please give me one week to respond". Two letters dated 7 March and 17 March respectively were sent by the applicant's attorneys requesting the promised response. When none was forthcoming, a letter dated 26 March 2008 was sent indicating that the applicant had instructed his attorneys to

sue for monies lent and advanced, cancel the lease over the Buckstone herd and sue for damages suffered by the applicant arising from the first respondent's mismanagement of the herd. When first respondent's attorneys dealt with this letter, their letter of 31 March 2008 reserved the right to deal with the contentions contained in the letter of 3 March 2008 but focussed on an attempt to rescue the farming operation by requesting that the parties meet at the farm with a number of experts to advise them. This meeting did not take place due to disputed factors. Once again, this claim to indebtedness is disputed by the first respondent in his affidavit and, in the light of his version, is disputed on *bona fide* and reasonable grounds.

17. I am not sure that, apart from his assertions, a careful reading of the contemporaneous correspondence discloses even a *prima facie* case for the indebtedness relied on by the applicant. This is apart from the letter dealing with the meeting at OR Tambo International Airport. Even if he has made out a *prima facie* case, the first respondent has, in my view, raised a *bona fide* and reasonable dispute. This is particularly so of whether any of the actions taken by the first respondent were taken on his own behalf, as contended by the applicant, or were done on behalf of the CC, as the first respondent contends.

18. It can be seen from what I have said above that I am of the view that, at best for the applicant, his *prima facie* claims as to the first respondent's

indebtedness are disputed by the first respondent on *bona fide* and reasonable grounds. Accordingly the application must fail.

19. Due to the view I take of the main application, I shall not deal in detail with that for the striking out of the paragraphs complained of by the first respondent. I will also not accede to the request of the applicant that it be dismissed with a punitive costs order on the basis that, whilst it alleged irrelevance, it did not allege that the first respondent had been prejudiced thereby. In my view, many of the paragraphs which the first respondent seeks to have struck out are indeed irrelevant. Had I granted the relief sought by the applicant, I would in any event have disallowed the costs of certain irrelevant paragraphs. It is therefore appropriate to dismiss that application. As regards costs thereof, since I would have disallowed costs of certain of the papers in the event of the applicant having been successful and as a mark of the displeasure of the court that the papers were rendered far more cumbersome than necessary, I intend making no order.

20. In the result, I make the following orders:

    1. The application of the first respondent for condonation for the late delivery of the answering affidavit is granted.

    2. The application for the provisional sequestration of the estate of the first respondent is dismissed with costs.

3. The application by the first respondent to strike out certain paragraphs in the applicant's founding affidavit is dismissed.

Date of Hearing:	8 June 2009
Date of Judgment:	8 June 2009
For the Applicant/Plaintiff:	Mr A M van Wyk SC, instructed by Geyser, Du Toit, Louw & Kitching
For the Defendant/Respondent:	Mr G M E Lotz SC, instructed by Steenkamp, Weakley, Ngwane