

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

CASE NO : 7392/2007

In the matter between :

NEDBANK LIMITED

Applicant

and

ROBIN PATRICK THORPE

Respondent

J U D G M E N T

K PILLAY J

[1] On 26 September 2008, *Levinsohn DJP*, made an order for the provisional sequestration of the Respondent's estate.

[2] The Applicant now seeks an order for the final sequestration of the estate of the Respondent in terms of *section 12 of the Insolvency Act, 24 of 1936*.

[3] Having perused the summary of facts in the judgment of *Levinsohn DJP*, I believe it will be a task of supererogation to repeat same.

[4] I will therefore devote this judgment to a determination of what I believe to be the sole issue herein, namely, whether or not this court can be satisfied that there is reason to believe that sequestration will be to the advantage of creditors of the Respondent if his estate is sequestrated.

[5] It is not in dispute that the judgment debt arose out of various advances made by the Applicant's predecessors to a trust represented by the Respondent. The Respondent assumed liability as a surety and co-principal debtor of the trust. The Respondents appeal to the Supreme Court of Appeal was dismissed in 2003 and since then the Respondent has made no effort to discharge this indebtedness.

(6) *Section 12(1) of the Insolvency Act 24 of 1936* provides that:

“If at the hearing pursuant to the aforesaid rule nisi the court is satisfied that:

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and*
- (b) the debtor has committed an act of insolvency or is insolvent; and*
- (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,*

it may sequester the estate of the debtor.

.....

[7] It has not been disputed that the requirements of *sub-section 12(1)(a) and (b)* are met.

[8] In his statement of Assets and Liabilities, Annexure ‘M’ the Respondent claims to have no assets. He is therefore on his own version, insolvent.

[9] In addition the statement of assets and liabilities which he submitted to the Applicant at a *section 65* enquiry also amounts to an act of “*insolvency*” in terms of *section 8(g) of the Insolvency Act, 24 of 1936* and accordingly meets the alternative requirement of *section 12(1)(b) Act 24 of 1936*.

[10] It is incumbent upon the Applicant to show that there is “*reason to believe*” that sequestration will be to the advantage of creditors (See *Meskin & Co v Friedman 1948(2) SA 555 (W) at 559*).

[11] *Roper J at 558 in Meskin v Friedman (supra)* considered the meaning of the phrase “*reason to believe*”. He stated:

“The phrase “reason to believe”, used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the court must be “satisfied”, it is not satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so.”

[12] The standard of proof differs in respect of a provisional and final order. For as *Jansen J*, correctly stated in *London Estates (Pty) Ltd v Nair* 1957(3) SA 591 N @ 593.

“.....the standard of proof differs in respect of a provisional and final order (cf. Sacks Morris (Pty) Ltd v Smith, 1951(3) at p. 170 (0). This must relate to the proof of the facts giving rise to the belief – not to the degree of conviction the belief engenders. In both cases the facts must show that there is a reasonable prospect – not necessarily likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. But in the case of a provisional order there need only be prima facie proof of those facts; in the case of a final order the Court must be satisfied that those facts exist, presumably on a balance of probabilities. This must be the case whether the applications are opposed or not.”

[13] In addition, the Applicant is obliged to demonstrate that there are reasonable grounds for concluding that, upon a proper investigation of the debtor's affairs, a trustee may discover (or recover) assets which might be realized for the benefit of creditors (*Dunlop Tyres (Pty) Ltd v Brewitt* 1999(2) SA 580 (W) at 583.)

[14] In dealing with the issue whether there is an advantage to creditors the Applicant contends, as it did in the provisional sequestration proceedings, that the Respondent has embarked on considerable lengths to insulate from his own personal estate the income which he generates both from his own activities and from various investments as well as funds and assets to which he has access.

[15] The Applicant submits that, in doing so, the Respondent has abused the institution of a registered trust and dishonestly made use of nominees so as to disguise his ownership of assets.

[16] To illustrate this Applicant avers that the trust deeds of the **Wentworth Trust** (the principal debtor in respect of the debt, *in casu*) and the **Banavie Trust** (which changed its name from the **Robin Thorpe Family Trust**) are practically in identical form.

[17] The trustees are replaced from time to time; however, it is noteworthy that the Respondent remains a trustee throughout (and cannot be removed).

[18] What is apparent is that it is the Respondent who controls the trust and access to the funds held by the trust.

[19] Significantly Applicant has made out the case that when income due to the Respondent in his personal capacity was received into his personal banking account, he religiously caused any material credit balance to be transferred to the **Banavie Trust**.

[20] The Respondent's improbable explanation for this is that he would have received from the trust more than the trustees wished him to receive, hence an obligation to make repayment, or that he erroneously received money that was in fact due to the trust.

[21] It would appear from the following transcript of the *Section 65* enquiry, that the Respondent (and his co-trustees) determined that he should no longer receive any benefits from the trust, specifically because of his involvement in this matter.

“Did I understand you correctly, for the tax year 2006 you received approximately R700 000 from the Banavie Trust? Is that correct? --- That would have been for the year ending February 2006.

Okay. And what have you received from the trust since the 1st of March? --- Nothing.

And why is that? --- As I understand it at the moment, the trustee’s have exercised their discretion in making a distribution to me as a beneficiary.

With the greatest of respect that’s a bit of gobbledygook to me. I don’t exactly understand what you’re saying there. What do you mean? --- Well, any income that I receive from the trust is completely at the discretion of the trustees.

You are one of those trustees. --- I happen to be one of four trustees, that’s correct.

Okay, yes, ja, and ...(intervention) --- And as things stand at the moment, in exercising that discretion, they’ve elected not to hand over any amount to me since the 1st of March.

And do you know why? --- I think that it largely stems from the fact that I’m involved in this particular hearing.”

[22] However, notwithstanding the determination to exclude the Respondent from the receipt of income from the trust, the Respondent was not in anyway deprived e.g. although he claims that since February 2006, he received no benefit from the trust, it was the trust that financed his overseas travel during April 2006.

[23] His claim that he has only ever received “discretionary” income as determined by the trustees is not supported by his tax return for the tax year ended February 2006, which records that neither he nor his children are beneficiaries of any trust. In a tax return prepared by co-trustee and

accountant, he declares his income as “*trustee remuneration*”. He later gives the disingenuous explanation that this was done in error.

[24] As correctly pointed out, the **Banavie Trust** allowed the Respondent to enjoy an affluent lifestyle. The trust purchased a new 2005 model Bentley Continental GT motor vehicle at a cost of R2.5 million at monthly instalments of approximately R20 000.00 for the Respondent’s use. It was the Respondent who had arranged for its acquisition (and bound himself as surety for the liability of the trust in connection with the transaction).

[25] The Respondent makes every effort to distinguish himself from the trust. However, as correctly pointed out, his proverbial slip of the tongue reveals the contrary. For instance during the section 65 enquiry, he replied to a question as follows:

“At one stage I had considered, and when I say I, I’m really talking on behalf of the trust, Investment in the Point Road Development, or for the Point Development. And it had been something that had been mooted, and again it’s something that never came to fruition.”

[26] It appears from the Respondent’s answers during the *section 65* enquiry, that bank officials dealing with the Respondent in connection with his personal banking arrangements, appear to labour under the impression that the Respondent is able to give undertakings with regard to the income of the **Banavie Trust** or the income of companies owned by the trust.

[27] It is indeed probable that the true and complete control of the trusts vests in the Respondent. There is in my view enough evidence to suggest that the **Banavie Trust** is the alter ego of the Respondent and is utilized by

him for the purposes of receiving income generated from his various activities and at the same time insulating his assets and wealth from his creditors.

[28] I am satisfied that, on the above evidence, a trustee, duly appointed to his estate, would be in a far better position than the Applicant to fully investigate the way in which the Respondent has used the institution of trust to shield his wealth from his creditors. That is quite apparent from a reading of the record of the section 65 enquiry that the greater powers of investigation accorded to a trustee will be required to fully investigate the Respondent's financial position, particularly in relation to the **Banavie Trust**.

SHORT TERM INSURANCE BROKING BUSINESS

[29] It is common cause that the Respondent's primary occupation was that of a short term insurance broker and that he conducted business as the principal broker of **Thorpe Insurance Brokers (Pty) Ltd**.

[30] Owing to certain alleged malpractices the Registrar of Short Term Insurance obtained an order in September 1999, interdicting the Respondent (and the legal entities through which he operated) from directly or indirectly, continuing to engage in broking and related activities.

[31] The Applicant makes the case that despite the order of the High Court, the Respondent continued his insurance broking activities using **County Capital (Pty) Ltd** trading as **Insurance Online** as the vehicle for those activities. The evidence in support of this contention is the following:

31.1 *A subpoena served upon him in connection with the proceedings in terms of section 65 of the Magistrate's Court Act was served at the office of **Insurance Online**.*

31.2 *The evidence of former employees of "**Insurance Online**", namely Mark Farrer (who was employed for a three year period from 2002 to 2005 and was a director of County Capital (Pty) Ltd for two of those years) and Mr Ernest Ken Schwartz (who was employed by **Insurance Online** for 18 months from 2002 to 2004) confirms that the Respondent effectively managed and ran the short term insurance business and left them in no doubt but that he owned the business.*

[32] An application made by the Respondent to Standard Bank relating to an application for a personal banking facility – and signed by the Respondent – records:

32.1 *his work email address as robint@insonline.co.za (an e-mail address of the short terms insurance broking business); and*

32.2 *under "your business details", that the Respondent is employed by **Insurance Online** and, in relation to the "department", that he is the "owner".*

[33] The Respondent arranged for his personal bankers to provide a rental guarantee to the landlord of **County Capital**.

[34] The evidence of Lalini Armoogam demonstrates that the Respondent was actively involved in the business of **Insurance Online**, to the extent of dealing with bank officials with regard to the placing of insurance for clients of **Insurance Online**.

[35] One of the Respondent's family trusts (the **Banavie Trust**) is remunerated for "*consultancy*" and other services provided to **Insurance Online** by that family trust.

[36] Applicant has in my view, correctly submitted that the Respondent's reply to the evidence referred to above is both evasive and contradictory, as is demonstrated hereunder:

36.1 He does not deal at all with the substance of the evidence contained in the affidavits of Farrer and Schwartz, merely suggesting that they are "*mistaken*" and that the share register of the company could somehow provide a conclusive answer to their evidence. A share register quite patently does not deal with their evidence at all. In his further affidavit, he sought to amplify his response to the affidavit of Mark Farrer. This response similarly does not deal with the substance of Farrer's evidence. It amounts to little more than a personal attack on Farrer's character.

36.2 Having testified on oath that he personally has had nothing whatever to do with the operation of **Insurance Online** (the **Banavie Trust** merely providing the "*payroll services*"), he explains his dealings with Ms Armoogam on the basis that he offers advice because he wishes the **Banavie Trust** to be successful.

36.3 He makes no effort at all to explain the entries (his “*business details*” given as “**owner of Insurance Online**” and his work e-mail address being that of **Insurance Online**) in the application to Standard bank, admittedly signed by him, contenting himself with the assertion that the information contained in the application form signed by him is factually incorrect.

[37] The High Court interdict of 1999 precluded the Respondent simply vesting the short term insurance business in one or other of his family trusts. Indeed, it was not merely a matter of utilizing some legally recognised vehicle to insulate the business from the personal estate, but required that his true interest in the brokerage be hidden from the authorities and from the court which had granted the interdict. Hence the birth of “**Insurance Online**”.

[38] In my view the evidence referred to above establishes that there is reason to believe that the Respondent is being dishonest in denying his beneficial interest in, and involvement in the operation of, County Capital (Pty) Ltd trading as Insurance Online. Levinsohn DJP was fully justified in concluding that this evidence:

“all points in one direction and that is that the Respondent despite having been interdicted was the beneficial owner (either through shareholding, trusts or otherwise) of a substantial brokerage business”.

[39] *Levinsohn DJP* was equally justified in recording that:

“the Respondent’s denials once again have a very hollow ring”.

[40] There are not in truth any real disputes of fact which exist with regard to the evidence of the Respondent’s beneficial ownership of the business ***“Insurance Online”***.

40.1 He does not dispute having signed an application form for finance in which he is described as the **owner** of Insurance Online. He simply says that the information is wrong and that he signed it without reading the document. No possible source of the information other than the Respondent himself is suggested and there is no endeavour at all to explain the entries in the form. It is a classic bare denial.

40.2 The evidence of Farrer and Schwartz is similarly dealt with by reference to what is, upon analysis, no more than a bare denial.

40.3 The involvement of one of the Respondent’s family trusts, the Banavie Trust, in deriving income from Insurance Online, is an admitted fact. So too is the fact that the Respondent personally provided a rental guarantee to the landlord for the premises occupied by Insurance Online.

OTHER COMPANIES AND CLOSE CORPORATION

[41] The Applicant, correctly points out that in the course of testifying under oath in the proceedings in terms of *section 65* of the Magistrates' Court Act, and in dealing with companies in which he was a director, the Respondent gave untruthful evidence.

41.1 With regard to Brightmore CC and Holdthor Life and Pension Brokers CC, he testified on 30 May 2006 that he had disposed of his interests, claiming that his membership interest in the former had been sold some years previously, to a purchaser whose identity he did not recall.

41.2 That information was false. He was in fact still the sole member of both close corporations when he gave that evidence. What he in fact did was to dispose of those interests to a close associate, Barbara Gail Shaw, acting once again as trustee of a trust, and did so only on 13 June 2006, two weeks after he had testified.

41.3 The Respondent's response to this evidence is evasive. He claims that the Applicant is being "*unfair*" to him and records that he refutes the "*innuendo*" (but, significantly, not the facts which give rise to it).

41.4 It also means that the Respondent's written statement of his assets as '*nil*' was inaccurate.

[42] There is also the matter of the investments in properties effected through close corporations of which the Respondent's minor children are the members (and were the members when still at school).

[43] The Applicant submits that viewed in isolation it might be said that the tender age of his children at the time is not evidence that the Respondent has any direct or indirect interest therein, despite the Respondent having provided his personal suretyship in respect of the loans advanced to the close corporations. Those investments cannot, however, be viewed entirely in isolation. In the light of the other evidence referred to above, those property investments provide an additional basis for concluding that the trustee may usefully investigate the acquisitions and that the sequestration of the estate of the Respondent will be to the benefit of creditors in the sense described above. I agree fully with the above submissions.

THE PRIOR APPLICATION FOR SEQUESTRATION

[44] On 12 July 2004, the Applicant brought an application to sequester the estate of the Respondent. This application was dismissed with costs by McCall J on 19 January 2005.

[45] The Respondent contended in his answering affidavit, that:

- (a) the same issues arise in this application;
- (b) that it is not open to the Applicant to resurrect these issues and *"harass him"*.

[46] Having considered the evidence before him, *McCall J* stated as follows:

“There are two possibilities, namely that the application should be dismissed with costs, or that the Applicant should be given leave to amplify its papers. In my view, insufficient care was devoted to the preparation of the papers in the first instance, and the Court should not allow the Applicant to attempt to repair the inadequate case presented to the Court. The serious prejudice can be occasioned to the Applicant if it has to proceed de novo, if necessary after having issued a fresh, properly prepared writ, or after having pursued the other possible means I have suggested for obtaining an order against, or further information from the Respondent....”

[47] *Levinsohn DJP*, correctly, in my judgment, rejected the Respondent’s contention in this regard as follows:

“Counsel for the Applicant however submits that the dismissal of the first application did not debar the launching of the present one. I agree with counsel for the Applicants submission. The present application is substantially different to the first one insofar as the evidentiary material contained therein is concerned..”

[48] Indeed there were a number of deficiencies in the application papers before *McCall J*. *McCall J*’s comments (*supra*) make it clear that he intended his order, dismissing the application, to have the effect of absolution from the instance, entitling the application to proceed anew if the deficiencies in its application could be remedied.

[49] The Respondent’s opposition to the application is grounded in the submission that the relief claimed against the Respondent is the most drastic and invasive relief possible in civil proceedings. It is contended therefore

that it is therefore a constitutional imperative that full force and effect must be given to *section 12*.

[50] Notwithstanding the above submission, the Respondent accepts that on the case law, it suffices that the duly established facts must allow an inference that there is a reasonable prospect that sequestration will result in a pecuniary advantage otherwise not available to the creditor/s. It is accepted further that the inference need not elevate the prospect to a likely one but it must be significant.

[51] An important principle in regard to the issue of “advantage to creditors, quoted with approval by *Levinsohn DJP* in the provisional sequestration application, was that laid down in *Amod v Khan 1947(2) SA 432 N @ 438* where *Hathorn JP* stated as follows :

“A debtor knows all about his own affairs and can easily prove the advantage of the creditors. On the other hand, the creditor has normally little knowledge of the exact position of the debtor; he probably does not know what creditors he has, nor the amounts he owes, nor the assets he possesses. Consequently, it is difficult for him to provide satisfactory proof that the sequestration of the debtor’s estate will be to the advantage of the creditors. Yet that is what the Insolvency Act, 1916, demanded. The various Courts in South Africa, recognizing the creditor’s difficulty – and here I speak in a very general way – were inclined to accept, as proof, very little evidence that sequestration would be to the advantage of the creditors. The legislature knowing this, and knowing also that the advantage of the creditors is, and always has been, a consideration of great importance in relation to the question whether a debtor’s estate would be sequestrated, altered the position in 1936, and made it much easier than it had been for the creditor to make a case in relation to the benefit of the creditors.”

[52] In *Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha* 1990 (4) SA 580 (W), Leveson J stated:

“.....a Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression “reason to believe” means “good reason to believe”. The belief itself must be rational or reasonable and, in my opinion, to come to such a belief the Court must be furnished with sufficient facts to support it. In a broad sense it seems proper to say, on the basis of the cases, that “advantage to creditors” ought to have some bearing on the question as to whether the granting of the application would accrue some useful purpose. I express it thus because Roper J has shown in the Meskin case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and enquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors.”

[53] Indeed the case made out by the Applicant, especially the manner in which the Respondent has been conducting his business affairs; his evasiveness and obfuscation, compel me to the conclusion that an investigation and enquiry under the relevant provisions of the Act might indeed unearth assets which could benefit the Applicant herein.

I accordingly make the following order:

(1) *The rule nisi granted on 26 September 2008 by Levinsohn DJP is hereby confirmed.*

(2) *The respondent’s identity number is recorded as 5304285019080.*

K PILLAY J

Date of Judgment : 16 SEPTEMBER 2009

Counsel for Applicant : **ADVOCATE S R MULLINS SC**
ADVOCATE K C McINTOSH

Instructed by : **DE VILLIERS, EVANS & PETIT.**
Applicant's Attorneys
c/o **AUSTEN SMITH**
Walmsley House
191 Pietermaritz Street
PIETERMARITZBURG

Counsel for Respondent : **ADVOCATE K J KEMP SC**
ADVOCATE M F MOOSA

Instructed by : **BEALL CHAPLIN & HATHORN**
Respondent's Attorneys
c/o **STOWELL & COMPANY**
295 Pietermaritz Street
PIETERMARITZBURG