IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 1332/2013

Date Heard: 15 August 2013

Date Delivered: 29 August 2013

In the matter between:

ABSA BANK LIMITED Applicant

and

BEN HILARIUS NYAUMWE Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant herein has launched an application for the provisional sequestration of the estate of the respondent. The application is opposed.

[2] The history leading to the financial difficulties of the respondent are not contentious. During or about 2008 a company, Auspex Property (Pty) Limited secured the advance of a considerable sum of money from the applicant to undertake the development of the Radisson Blu Hotel in Port Elizabeth. In due course, and by agreement, Auspex Hotels and Leisure Management Company (Pty) Limited (herein referred to as "Auspex Hotels") was substituted as the applicant's debtor in respect of the loans. Accordingly, on 18 September 2008 the applicant and Auspex Hotels entered into a separate loan agreement formalising this arrangement.

The respondent, as Managing Director of Auspex Hotels, was required to a sign a personal suretyship in respect of the obligations of Auspex Hotels to the applicant.

[3] The development of the Radisson Blu Hotel ran into difficulties for reasons which are not material to the application. Auspex Hotels defaulted on their loan obligations and the applicant issued liquidation proceedings against Auspex Hotels. Auspex Hotels was finally liquidated on 18 September 2012.

[4] In terms of the suretyship signed by the respondent, he bound himself as surety and co-principle debtor *in solidum* in favour of the applicant for all sums of money which may be due by Auspex Hotels to the applicant. On 12 September 2012 the applicant accordingly instituted action against the respondent, as first defendant, for the payment of the amount of R101 234 782,50, same being the amount which was owed by Auspex Hotels to the applicant. Judgment was duly taken against the first respondent on 23 October 2012 for the payment of the said sum together with interest.

[5] A writ of execution was duly served on the respondent on 12 November 2012 followed by a return of service of the acting sheriff dated 15 November 2012. It appears from the return of service that the applicant pointed out movable goods to the value of R24 530,00 and advised the sheriff that he has no further movable assets whatsoever. This prompted the application for the provisional sequestration of the respondent.

[6] It is not in dispute that the applicant has obtained judgment against the respondent in the aforesaid amount or that the respondent has committed a deed of insolvency in terms of the provisions of section 8(b) of the Insolvency Act, 24 of 1936 (herein referred to as "the Insolvency Act"). The respondent opposes the application purely on the basis that it is contended that no facts have been presented upon which a court could be of the opinion that, *prima facie*, there is reason to believe that it will be to the advantage of creditors of the respondent, as envisaged in section 10(c) of the Insolvency Act, if his estate is sequestrated.

[7] On 11 October 2012 the applicant signed a statement of assets and liabilities which was provided to the applicant purporting to reflect the respondent's financial position as at 31 August 2012. Therein the respondent reflected personal assets to the value of R5 887 865,00 made up as follows:

Residence – House Pamusha R3 000 000,00

Personal Effects – R300 000,00

Current Account - First National Bank R176 696,00

Current Account - Standard Bank R61 988,00

Credit Card - First National Bank R5 732,00

BMW X6 - R784 540,00

Chrysler Grand Voyager - R620 000,00

Loan – Kuhuni Mukanya Trust - R633 431,00

Loan – Tongai Nyaumwe Family Trust - R305 478,00.

[8] In the same statement he reflected his liabilities to amount to R1 414 445,00 made up as follows:

Finance Agreement – Wesbank R566 392,00

Finance Agreement – Wesbank R445 890,00

Credit Card – Standard Bank R76 677,00

Loan – LR Nyaumwe Family Trust R325 486,00.

[9] This statement of assets and liabilities was forwarded to the applicant under cover of letter from the respondent's erstwhile attorneys, Attorneys Pagdens, which set out an explanation in respect of certain of the assets and liabilities. The material portions of the letter record as follows:

> "2. My clients find themselves in a dire financial position. A copy of Mr Nyaumwe's statement of assets and liabilities is attached.
>
> 3. In this regard, please note that:
>
> 3.1 Although the residence is listed as an asset of R3 000 000,00 rand and does not have a corresponding liability, the property was bonded in favour of FNB as a suretyship bond for purposes of monies loaned and advanced by FNB to Auspex Properties (Pty) Ltd. This liability is reflected in the management accounts of Auspex Properties (Pty) Ltd. There is no equity in the house.
>
> 3.2 The motor vehicles, as indicated in the notes below, are reflected at cost and not at their depreciated or market values. It is estimated that the market values are

considerably less than the value as listed under assets, and in fact estimated to be less than the value as listed in the liabilities.

3.3 Further, the Kuhuni Mukanya Trust and the Tongai Nyaumwe Family Trust are trusts in which my client has a major interest and confirm that both entities are actually insolvent.

4. ...

5. From the above it is clear that Mr Nyaumwe is not in a financial position whatsoever to make any sort of meaningful offer to ABSA.

6. The Nyaumwe Family Trust owns nothing and holds no equity whatsoever."

[10] It is apparent from the explanation that the residence is bonded to First National Bank (FNB) to the full value of the residence and that the motor vehicles and loans set out in the assets are worthless. The net value of his estate as reflected in the statement of assets and liabilities, as explained, therefore amounted to R142 253,00. .

[11] In its founding papers the applicant avers that it would be to the advantage of creditors for the estate of the respondent to be sequestrated as on his own version he owned assets with a total value of R5 887 685,00 as at 31 August 2012. It is alleged that the assets reflected therein could be realised by the trustee of the insolvent estate for the benefit of creditors to the extent that they are still in existence, and to the extent that these assets have been dissipated, the trustee may investigate whether any such assets disposed without value or preferring one

creditor above another may be recovered for the benefit of his creditors. In addition it is contended that whereas the respondent pointed out assets to the value of just R24 530,00 on 12 November 2012, only one month after the submission of his statement of assets and liabilities, it is imperative that the respondent be divested of his estate and that a trustee be appointed to administer and distribute his estate in terms of the provisions of the Insolvency Act.

[12] In his answering affidavit the respondent refers to the letter of explanation which accompanied the statement of assets and liabilities and accordingly contends that the applicant was aware at all material times, and particularly at the time when the application for the sequestration was launched, that there are no disposal assets which could be utilised for the benefit of creditors, nor is there any prospect of a dividend to be received by any creditors should his estate be sequestrated. He contends that the immovable property (the residence) is realistically valued at somewhere between two and a half and three million rand. He states that the house has been on the market since early March 2013 and the agents engaged to try to sell the property have received only three enquiries since the house was placed on the market. Only one prospective purchaser viewed the property. The respondent does not however lay any basis for the estimation of the value of the property nor does he declare the asking price for which the property has been placed on the market.

[13] Insofar as the personal effects are concerned he contends himself by declaring that the sheriff may have undervalued the movable assets and states that the value placed on the movable assets by the sheriff is a clear and realistic

indication that the true value of second-hand furniture is nowhere near the replacement value which is more in line with the R300 000,00 as indicated in the statement of assets and liabilities. This explanation loses sight, however, of the fact that he had indicated in his statement of assets that he was possessed of personal effects to the value of R300 000,00.

[14] With reference to the credit in the accounts at First National Bank and Standard Bank he now contends that both these accounts are significantly overdrawn. He tenders no explanation whatsoever as to when and under what circumstances monies were withdrawn from these accounts between 11 October 2012 and 12 November 2012.

[15] In addition the respondent, in setting out his present employment, avers that he is presently employed by Meritorque (Pty) Limited t/a Thaton (herein referred to as “Meritorque”) as a manager at a net salary of R57 000,00 per month. He is also employed by Majestic Silver Trading 118 (Pty) Limited (herein referred to as “Majestic Silver”) as a manager. For these services he receives a net salary of R30 000,00 per month. The respondent emphasises that whereas he was previously a director in Majestic Silver he has now resigned such position and holds no interest whatsoever in the company and is not a shareholder.

[16] This prompted the applicant to deal with Majestic Silver and Meritorque in the replying papers where the applicant attacks the credibility of the aforestated

contentions. The applicant annexes a CIPC company report dated 17 July 2013 to its replying papers which reflects the respondent as the sole director in both Meritorque and Majestic Silver. Moreover, the applicant conducted an electronic Deeds Office search illustrating that Majestic Silver owns four immovable properties to the value of R10 900 000,00. In these circumstances the applicant's attorneys caused Ms Radloff, a professional assistant at the offices of the firm McWilliams and Elliot Incorporated to attend to the registered office of Meritorque and Majestic Silver to formally verify the directorships and shareholding in these entities. Ms Radloff states that she attended the offices of the auditors of these companies, HDP Incorporated on 19 July 2013 and was informed by one Hayden du Preez, that the respondent was at that time the sole director in these entities. She says that despite her specific request in this regard, Du Preez did not disclose the shareholding of these entities, and merely stated that he thinks that the shares are held by "trusts" and that all company information is kept at the respondent's offices. He advised Radloff that he was under strict instructions from the respondent and his attorneys not to disclose any information. Radloff was, however, undeterred and again attended upon the offices of HDP Incorporated on 22 July 2013 insisting to inspect the share register of the companies. Again no information was furnished to her and despite leaving detailed messages for Du Preez to contact her urgently he failed to respond.

[17] Radloff states, however, that she attended an enquiry in terms of the provisions of section 417 of the Companies Act, 61 of 1973 (herein referred to as "the Companies Act") in respect of the affairs of Auspex Hotels on 20 May 2013 when the respondent was summoned to be examined. A copy of the transcript of

these proceedings are annexed to the replying papers. The transcript records the following passage from the evidence of the respondent to which reference is made in the affidavits:

> "Can you just clarify for me MST is that Majestic Silver Trading 188? ---
> Uh-huh.
> Sorry, the machine does not pick up a grunt ... Whose machine?
> Is it yes? --- Yes, sorry, yes.
> MST is yes? --- Yes.
> Majestic Silver Trading 188 (Pty) Ltd is company of which you are the sole director and shareholder? --- (indistinct) shareholder, yes."

[18] Although portion of the evidence is reflected as "(indistinct)", Radloff declares on oath that it was the evidence of the respondent at the enquiry, which was held on 20 May 2013, that he was the sole director and shareholder in both Meritorque and Majestic Silver. The effect of this is, of course, that he had admitted that he was the sole owner of Majestic Silver.

[19] At the hearing of the application Mr ***Beyleveld***, on behalf of the respondent, sought leave to hand in a fourth set of affidavits in order to deal with matter raised in the replying papers. The affidavit which was handed up from the Bar by consent alleges that most of what is contained in the replying papers is new matter which should (and could) have been dealt with in the founding papers. In addition it is contended that the reference to testimony given by the respondent at the enquiry constitutes inadmissible evidence and should be struck out. In the event that such matter may not be struck out, the affidavit proceeds to deal with these matters. At

the hearing no application was made to strike out any portions of the replying affidavit. The response thereto was accordingly accepted as a fourth set of affidavits. It was, however, argued that the evidence given at the enquiry was inadmissible in evidence. I shall revert to this aspect below.

[20] As to the factual averments set out in the fourth set of affidavits the respondent acknowledges that he was previously a director of Majestic Silver Trading and reiterates his earlier statement that he has since resigned. He annexes to his papers a copy of the notice of his resignation dated 21 May 2013, the day after he was confronted in the section 417 of the Companies Act enquiry.

[21] In respect of the shareholding, the respondent denies that he instructed Du Preez not to divulge any information and records that he merely stated that any request should be made through his attorneys of record who would respond thereto. He then proceeds to record as follows:

> "In any event, I understand that there are specific provisions in terms of the Act which sets out the procedure for inspection of a share register. Inasmuch as inferentially it has been suggested that the shareholding in the two companies is being withheld because it might implicate me, I annex hereto ... copies of the share certificates which indicates that I am not a shareholder in either of these companies. I also repeat that I am not a shareholder in any other company. As is evidenced by such share certificates, I am not the shareholder therein. I have no interest directly or indirectly in the Trust that is the shareholder." *(Sic)*

[22] Three annexures are annexed in support of this protestation. The first purports to be a share certificate in Majestic Silver indicating that Nyaumwe Investment Trust held 100 shares in the company on 23 November 2011. The further annexures indicate that as at 20 January 2012 one Christian Gouws held 120 shares in Meritorque and that the Nyaumwe Investment Trust held a further 120 shares on the same date.

[23] The CIPC company report annexed to the answering affidavit indicates that 1 100 ordinary shares have been issued in Majestic Silver Trading and 1 000 ordinary shares in Meritorque. In the circumstances the annexures annexed to the fourth set of affidavits do not support the contentions raised by the respondent. In the first instance they do not deal with all the shares in the companies as reflected in the CIPC reports and in addition, at best, the share certificates indicate some shares were held by the trust on the dates reflected on the share certificates. A copy of the securities register as contemplated in section 50 of the Companies Act, 71 of 2008, remains conspicuous by its absence from the papers. This would, of course, have provided absolute clarity in respect of the shareholding at all material times.

[24] It is significant that the respondent does not deny the correctness of the transcript of the enquiry nor does he challenge Radloff's confirmation as to what was in fact said.

[25] In these circumstances, Mr ***Scott***, on behalf of the applicant, argues that if the evidence given at the enquiry is admissible, as he contends it is, then it must be accepted either that the respondent was not frank about his involvement in the companies when he testified on oath at the enquiry, or that he has divested himself of the shareholding in the companies since 20 May 2013. In either event, so it is argued, it would be to the advantage of creditors that his affairs be investigated by an independent trustee. I have recorded earlier that he does not, despite having the opportunity to do so, deny that Radloff accurately conveys what was in fact said at the enquiry. Transcript of the enquiry appears to bear her out. The frustration of her endeavours to obtain insight into the share register coupled with the failure to provide a copy of the security register in support of the respondent's denial, raises further questions about the respondent's involvement in the companies. It is not in dispute that Majestic Silver owns properties with a value in excess of R10 million. In the event that the respondent is the sole shareholder of Majestic Silver, or that he was the sole shareholder of Majestic Silver on 20 May 2013 and has divested himself thereof by means of an impeachable transaction, there is clearly a benefit to creditors. In determining the reasonableness of the prospects of there being such a benefit to creditors in sequestration, it is proper to have regard to the significance itself of the very fact of the administration in insolvency. In ***Chenille Industries v Vorster*** 1953 (2) SA 691 (O) at 699F-H Horwitz J observed that:

> "[There are] … the superior legal machinery which creditors acquire by sequestration, the right to control the collection, custody and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and

> diminish the estate, and the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds."

[26] In these circumstances, I understand Mr ***Beyleveld*** to concede that in the event that the evidence before the section 417 of the Companies Act enquiry is admissible, then it must follow that a case has been made out on the papers that there is reason to believe that there will be an advantage to creditors of the respondent if his estate is sequestrated.

[27] It is accordingly necessary to consider the admissibility of the evidence tendered at the enquiry. It has been held repeatedly that evidence given by an examinee before a private enquiry in terms of the Insolvency Act or the Companies Act is admissible in subsequent civil litigation against the person who gave such evidence. (Compare ***Simmons NO v Gilbert Hamer and Co. Limited*** 1963 (1) SA 897 (N); ***Du Plessis NO v Oosthuizen; Du Plessis NO v Van Zyl*** 1995 (3) SA 604 (O); ***Wessels NO v Van Tonder en 'n ander*** 1997 (1) SA 616 (O); and ***O'Shea NO v Van Zyl NO*** 2012 (1) SA 90 (SCA).)

[28] In ***Bernstein and Others v Bester and Others NNO*** 1996 (2) SA 751 (CC) a challenge was made to the constitutionality of section 417. Ackerman J, in writing the majority judgment, considered the purpose of section 417 and the object of an enquiry in terms of the section. He stated at 808D:

> 'As I have endeavoured to show in this judgment, the very purpose of the proceedings under ss 417 and 418 of the Act is in order to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it cannot get from its erstwhile "brain" and other "sensory organs" or other persons who have a public duty to furnish such information but are unwilling or reluctant to do so fully and frankly.'

[29] This I think accords with the conclusion to which Nicholas J came in considering the predecessor to section 417 contained in the Companies Act, 46 of 1926. In ***S v Heller*** 1969 (2) SA 361 (W) at 364E Nicholas J, after considering the history of the section concluded:

> "The effect of these cases is that proceedings under the sec. 115 of the English Act are private proceedings, the object of which is to enable the liquidator to obtain information so that he may decide what course to take in regard to litigation on behalf of the company, either contemplated or pending. The position under sec. 155 of our Act is the same."

[30] Section 417 (7) of the Companies Act, however, distinguishes a section 417 enquiry from other private enquiries in terms of the Companies Act and the Insolvency Act. It provides that:

> "(7) Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise."

[31] Section 417(7) was introduced into the Companies Act in 1985. Prior to that, however, the court had a discretion to make an order on the application by the liquidator for an enquiry under section 417 that the application and all proceedings consequent thereon be kept private and confidential. The effect of such an order, it has been held, is to deny all persons access to the application and any documents accompanying it and to the examination or enquiry itself, the record of it and to any books or papers produced at it. (Compare ***McDuff and Co. Limited v Lawn*** 1922 (WLD) 66 at 70; and ***Kotze v De Wet NO and Another*** 1977 (4) SA 368 (T) at 375.) The purpose for making such an order was to avoid a situation where the object of the enquiry is defeated. Where the object of the enquiry would not be threatened it would be appropriate for the court to relax the rigidity of its prior order. See ***Kotze v De Wet NO*** *supra* at 375B-C.

[32] I think that section 417(7) has the same purpose and effect which an order in similar terms would have had prior to the introduction of subsection (7).

[33] The subsection creates privacy and confidentiality in order to protect the integrity of the process so as not to frustrate the achievement of the goal of the liquidator (as set out earlier) in instituting an enquiry in terms of section 417. The Master, or the Court, as the case may be, has the discretion, where that purpose would not be frustrated, to make an order uplifting the confidentiality provisions, either generally or in respect of a particular person. Until and unless the Master, or the Court, relaxes the confidentiality, as they are entitled to do in terms of section 417(7), no-one may have access to the transcript or other evidence before the

enquiry. In this case the applicant has obtained a copy of the transcript and there is no suggestion that access has been improperly obtained. Once that has occurred, I consider that the record of the evidence given by any examinee at such an enquiry is placed on precisely the same footing as any other private enquiry in terms of the Insolvency Act or the Companies Act. The evidence given by an examinee will then be admissible as evidence against him in any other civil proceedings. (Compare ***NPC Electronics Limited v S Taitz Kaplan and Co.*** [1998] 1 All SA 390 (W) at 399e.)

[34] After the introduction of the Constitution of the Republic of South African certain portions of section 417 of the Companies Act came under scrutiny in ***Ferreira v Levine NO and Others; Vryenhoek and Others v Powell NO and Others*** 1996 (1) SA 984 (CC). Portions of section 417(2), as it then read, were declared to be invalid for being in conflict with the provisions of the Constitution, hence the substantial amendment to section 417(2)(b) and (c) of the Companies Act in 2002. Section 417(2)(c) was drafted expressly to limit the admissibility of evidence obtained at a 417 enquiry. It provides that any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of section 417 shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings relating to certain specified conduct. The section does not limit the admissibility of evidence in civil proceedings against an examinee in a section 417 enquiry.

[35] In all the circumstances, I think that the evidence tendered by the respondent at the section 417 enquiry where he admitted to being the sole director and shareholder in Meritorque and Majestic Silver is admissible in these proceedings. No challenge has been made to the correctness of Radloff's rendition thereof, nor to the manner in which the transcript was acquired. In the circumstances, I hold that such evidence was properly placed before me.

[36] It is, of course, not evidence that the respondent is in fact or was at the time of his evidence, the sole director and shareholder of Majestic Silver, but merely that he said so. The court has a discretion in subsequent litigation to admit the use of the record of this evidence. (See ***Du Plessis NO v Oosthuizen*** *supra* at 621C; and ***Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*** 2005 (4) SA 389 at 397D-G.)

[37] Once it is accepted that the evidence is properly before me, as I have found, then, for the reasons which I have set out earlier in this judgment, I am of the opinion that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

[38] In the result, I make the following order:

1. The estate of the respondent is hereby placed under provisional sequestration in the hands of the Master of the High Court.

2. A rule *nisi* will issue calling upon the respondent and all other interested parties to show cause, if any, to this Honourable Court on Tuesday, 1 October 2013 at 09h30 or as soon thereafter as the matter may be heard, why a final order of sequestration should not be granted against the respondent's estate.

3. A copy of this order is to be served:

   3.1 by the sheriff on the respondent;

   3.2 by the sheriff on the South African Revenue Services;

   3.3 by the sheriff on the employees of the respondent, if any;

   3.4 by the sheriff on the trade union representing the respondent's employees, if any;

   3.5 by one publication in each of the Eastern Province Herald and Die Burger (Oos-Kaap);

   3.6 on all known creditors of the respondent by registered mail.

4. The costs of the application will be costs in the sequestration.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv P Scott SC instructed by Mc Williams & Elliot Inc, Port Elizabeth

For Respondent: Adv A Beyleveld SC instructed by Gouws Incorporated, Port Elizabeth