REPORTABLE **CASE NO 7392/2007**

IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

In the matter between

NEDBANK LIMITED Applicant

and

ROBIN PATRICK THORPE Respondent

Delivered :
26 September 2008

J U D G M E N T

LEVINSOHN DJP :

[1] In these proceedings the applicant seeks in the first instance an order provisionally sequestrating the estate of the respondent.

[2] The case made out by the applicant's deponent, one Natalie Backman, in its founding affidavit is summarised as follows.

[3] The applicant avers that as at 20th June 2007 the respondent is indebted to the applicant in an amount

of R6 093 748,50. This debt arises out of various advances made by the applicant's predecessors to a trust represented by the respondent and in respect of which the respondent assumed liability as a surety and co-principal debtor. The judgment in question became final in 2003 when the Supreme Court of Appeal dismissed his appeal. Since that time the respondent has made no effort to discharge this indebtedness.

[4] The applicant makes the case that the respondent has established various family trusts which he effectively uses to insulate his wealth from creditors and thereby to frustrate the efforts of his creditors to recover the debts owed to them.

[5] The applicant accordingly submits that if his estate is sequestrated and a trustee is appointed such trustee will be able to fully investigate the business affairs of the respondent, effectively pierce the veil of trusts and nominees, to locate assets which in reality belong to the respondent personally.

For that reason the sequestration will be for the benefit of the respondent's creditors.

[6] The deponent proceeds to set out the history of the indebtedness to the applicant's various predecessors in title. It is in my view unnecessary to summarise this save perhaps to focus on the **Wentworth Trust** case. According to the applicant this case commenced in 1998 and was finalised in September 2003.

[7] The factual background was the following. A company, Eastshore Development (Pty) Ltd, wished to develop certain properties in the St Francis Bay area of the Eastern Cape. NBS Bank Ltd (one of the applicant's predecessors in title) advanced funds by way of separate loans to the three shareholders. One of them was a trust, namely the Wentworth Trust. The respondent stood surety for the debt of the Wentworth Trust in respect of monies that were advanced to it. By October 1997 the Wentworth Trust was in arrears with its instalments. The property development company was subsequently liquidated.

[8] Action was instituted against both the Wentworth Trust, that is to say, its respective trustees, and the respondent personally in his capacity as a surety and co-principal debtor. Ultimately after unsuccessful appeals to the Natal Provincial Division and to the Supreme Court of Appeal the respondent stood indebted in terms of a judgment of the Court for the amount of R2 816 891,68 together with interest from 7th March 2000 to the date of payment and costs. As at 20th June 2007 the respondent's liability arising from the said judgment amounts to R6 093 738,50. No payments whatsoever have been received from the respondent in respect of this judgment.

[9] The respondent contends that he is possessed of no assets, no income and does not have the means to settle the debt. This carries with it the admission that the respondent is indeed insolvent. The applicant in the year 2004 moved for the provisional sequestration of the respondent. This application came before McCall J and was unsuccessful.

[10] Following upon this the applicant instituted an inquiry into the respondent's financial position in terms of section 65 of the Magistrates Court Act, No 32 of 1944. The respondent was questioned at some length at this inquiry and as I understand the position it has not been concluded. A transcript has been annexed to the applicant's founding affidavit.

[11] The applicant has ascertained the following facts : -

[11.1] The Robin Thorpe Family Trust was established in 1985.

[11.2] This trust changed its name to the Banavie Trust on 4th July 2002.

[11.3] The income beneficiaries of the trust are the respondent, his wife and two children.

[11.4] The respondent has no immoveable properties registered in his name.

[11.5] He resides at 8 Ferndale Avenue, Morningside, Durban. This property was previously owned by the Robin

Thorpe Family Trust. It was transferred out of the trust into the name of the respondent's wife, Mrs Helen Thorpe.

[11.6] The respondent had the use of a 2005 Bentley Continental GT sports car valued at R2 500 000. This motor vehicle was purchased by the Banavie Trust for the respondent's personal use. The Banavie trust was the registered owner of the vehicle. It was purchased in February 2005. The said trust paid the monthly instalments on the vehicle in an amount of R20 820 a month. The respondent personally negotiated the acquisition of the vehicle and provided his personal suretyship in favour of the bank which financed the transaction.

[11.7] A search of the records of the Registrar of Companies revealed that

> the respondent was either a director or member of at least seven companies and close corporations.

[12] The founding affidavit then goes on to traverse certain facts relating to the respondent's occupation.

[13] Up to the end of 1999 the respondent's occupation was that of a short-term insurer broker. His business was Thorpe Insurance Brokers (Pty) Ltd. It appears that the respondent owned shares in Thorpe Insurance Brokers (Pty) Ltd. At some stage the shares in the latter company were transferred to the respondent's family trust, namely, the Banavie Trust. In 1999 the Registrar of Short-Term Insurance sought and obtained an interdict against both the latter company and the respondent personally which prohibited them from continuing to act as short-term insurance brokers. Thereafter Thorpe Insurance Brokers (Pty) Ltd was put into liquidation.

[14] According to the applicant the respondent, notwithstanding the interdict, continues to operate a short-term insurance brokerage. The applicant avers that the subpoena in terms of section 65 was served at

a short-term broking firm called Insurance on Line at Fourth Floor, Hampdon Court, Hampdon Road, Morningside, Durban. The applicant avers that "Insurance Online" is the trading name of a South African company called County Capital (Pty) Ltd.

[15] In his evidence at the section 65 inquiry the respondent testified that during 1998 or 1999 he had disposed of his shares in County Capital (Pty) Ltd to an offshore company. He has thus not been involved as a director or otherwise in the business of the company. According to the respondent the Banavie Trust provides certain "consulting services" to Insurance Online. The respondent personally does not do so.

[16] In response to a subpoena the representative of the Standard Bank produced certain documents at the section 65 inquiry. It appears that in May 2003 the respondent completed an application form in which he stated that he was the "owner" of the business called Insurance Online. In the same document he reflected his work email address as robint@insonline.co.za.

[17] The applicant also avers that the respondent personally put up rental guarantees to the landlord in respect of the premises occupied by County Capital (Pty) Ltd.

[18] The applicant annexes the affidavit of Mr Mark Farrer. Farrer testifies that he was employed by Insurance Online during the period 2002 to 2005. He states and I quote : -

> "During my period of employment I was in absolutely no doubt that ROBIN THORPE was the owner and *de facto* benefactor of the business COUNTY CAPITAL (PTY) LIMITED t/a as INSURANCE ONLINE."

[19] The applicant also annexes an affidavit by one Ernst Schwartz. Mr Schwartz too was also employed by County Capital (Pty) Ltd. He says that it was absolutely clear to him that the respondent controlled the business.

[20] The founding affidavit also deals with the fact that respondent's children hold membership interests in 22 property-owning close corporations. The purchase price of these properties total R4 539 000,00. The respondent at the section 65

inquiry said that these close corporations had been set up by him for the benefit of his children.

[21] The deponent to the applicant's founding affidavit then proceeds to traverse in some detail facts pertaining to the Banavie Trust. She testifies that the respondent is a trustee of the trust. The beneficiaries of the trust are the respondent, his wife and various descendants. The income-generating or asset-holding companies of which the respondent is a director are all companies whose shares are held by the Banavie Trust. In the year 2005 the trustees of the Banavie Trust including the respondent himself allocated an amount of R700 000 to the respondent. The allocation of funds by the trustees is done on a purely discretionary basis. In fact the identity of any income recipient is determined at the end of a relevant tax year. The allocation also depends on whether it is tax-efficient or not to do so.

[22] As at 28th February 2006 the respondent and his fellow trustees resolved that they would not allocate any benefits to the respondent himself so that he (the

respondent) would not become a target of his creditors especially the applicant herein.

[23] The applicant avers that despite not formally receiving benefits from the trust he was nevertheless benefiting therefrom. As an example he had the use of the Bentley motor vehicle and had travelled overseas on three occasions during the year 2005.

[24] The applicant's deponent makes the point that whatever funds or assets the respondent received in his personal capacity he transfers these to the Banavie Trust and this trust benefits from all business operations that he engages in.

[25] The applicant avers that notwithstanding the respondent's alleged inability to satisfy the judgment debt there is reason to believe that the respondent is possessed of considerable financial assets which a trustee will uncover and this will be to the benefit of creditors. More particularly it is averred that the respondent continues to engage in his insurance business under the guise of Insurance Online. The assets of this business could be realised for the benefit of creditors.

[26] It is further alleged that the use of the Banavie Trust as a vehicle for the respondent's business activities constitutes an abuse of the institution of a trust and is simply a mechanism to shield his personal assets from creditors. According to the applicant the Banavie Trust is "the *alter ego*" of the respondent.

[27] I now turn to summarise in brief outline the respondent's reply to the applicant's case.

[28] The respondent admits the indebtedness. He admits he has no assets and that he is insolvent. He draws attention to the previous application for his provisional sequestration which was dismissed. He says that this issue has been determined by the Court in a final judgment and is *res judicata.* The applicant cannot resurrect these issues and seek the same relief in a second application.

[29] The respondent points out that he is a discretionary beneficiary of the Banavie Trust. He says that he did on occasions drive the Bentley motor vehicle but did not have exclusive use thereof. He

denies that he receives income from any source whatsoever.

[30] In regard to the affidavits of Farrer and Schwartz the respondent avers that while they may have had the mistaken belief that he was the owner of County Capital (Pty) Ltd he was not in fact the owner.

[31] The respondent says that the Banavie Trust was set up to care for his family : -

> "…. so as to ensure an independent source of income outside my estate to guard against the possibility that a financial disaster may befall me, as is common cause happened. That was a perfectly lawful and prudent thing to do and it was initiated more than 20 years ago when the Trust was formed."

[32] The respondent says that while he is a beneficiary of the Banavie Trust he is simply a discretionary beneficiary and there is evidence that the trustees had decided not to allocate him any further income in their said discretion.

[33] The respondent submits in conclusion that there is no basis for the allegations that he is possessed

of considerable assets or that his sequestration will be for the benefit of creditors.

[34] The applicant delivered a replying affidavit. Much of this was taken up with new matter in the sense that the applicant sought to put in a report compiled by the Inspector of Financial Services in regard to the respondent's short-term insurance activities. This evidentiary material was the subject of an application to strike out on various bases, notably that the evidence constitutes inadmissible hearsay as well as opinion.

[35] There is much to be said for this. The conclusions of the Inspector have no evidentiary weight. Insofar as these conclusions are based on facts, these must be admissible in accordance with well-established rules of evidence. That includes the admissibility or otherwise of hearsay evidence. In my opinion a proper foundation for adducing the hearsay evidence contained in the report has not been established. I would accordingly strike out paragraph 6 to 21 of the said replying affidavit.

[36] I now turn to consider the merits of the application.

[37] Section 10 of the Insolvency Act, No 24 of 1936 provides as follows : -

> "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
>
> (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,
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> it may make an order sequestrating the estate of the debtor provisionally."

[38] The issue *in casu* is whether I am of the opinion *prima facie* that there is reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated. These words in the subsection have been authoritatively interpreted by our Courts in several past decisions. The leading

case is ***Meskin & Co v Friedman*** 1948 (2) SA 555 (W) at 558 – 559 where Roper J said the following and I quote extensively : -

> "What is the nature of the 'advantage' contemplated in these two sections? Sequestration confers upon the creditors of the insolvent certain advantages (described by DE VILLIERS, J.P., in *Stainer v Estate Bukes* (1933 OPD 86 at p. 90) as the 'indirect' advantages) which, though they tend towards the ultimate pecuniary benefit of the creditors, are not in themselves of a pecuniary character. Among these is the advantage of full investigation of the insolvent's affairs under the very extensive powers of enquiry given by the Act. In *Awerbuch, Brown & Co v Le Grange* (1939 OPD 20), it is suggested that this right of inquisition is in itself an advantage such as is referred to in the sections, so that it is sufficient to make out a reasonable case for enquiry without showing that any material benefit to the creditors is likely to result from the investigation. With great deference I venture to think that this states the position more favourably to the petitioning creditor than is justified by the

language of the sections. **As the 'advantage' of investigation follows automatically upon sequestration, the Legislature must, in my opinion, have had some other kind of advantage in view when it required that the Court should have 'reason to believe' that there would be advantage to the creditors. The right of investigation is given, as it seems to me, not as an advantage in itself, but as a possible means of securing ultimate material benefit for the creditors in the form, for example, of the recovery of property disposed of by the insolvent or the disallowance of doubtful or collusive claims. In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets.** Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient (see e.g., *Pelunsky & Co v Beiles and Others* (1908, T.S. 370); *Wilkins v Pieterse* (1937 CPD 165 at p. 170); *Awerbuch, Brown & Co v Le*

> *Grange* (*supra*); *Estate Salzmann v van Rooyen* (1944 OPD 1); *Miller v Janks* (1944 TPD 127))."
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> (My emphasis).

[39] ***Meskin***'s case, *supra*, was cited with approval by the Supreme Court of Appeal in the case of ***Comissioner, SARS v Hawker Aviation Partnership and Others*** 2006 (4) SA 292 at 306 (footnote 23).

[40] In this inquiry in regard to advantage to creditors an important principle has been laid down by Hathorn JP in ***Amod v Khan*** 1947 (2) SA 432 N at 438 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, recognising 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 should 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."

[41] ***Amod***'s case, *supra*, was quoted with approval by Leveson J in ***Hillhouse v Stott; Freeban Investments v Itzkin; Botha v Botha*** 1990 (4) SA 580 at 585. The same learned judge in a subsequent case ***Dunlop Tyres (Pty) Ltd v Brewitt*** 1999 (2) SA 580, after quoting from ***Meskin***'s case, *supra*, said the following : -

> "Taking that passage as my starting point, it will be seen that in the case of an arm's length transaction a sequestrating creditor does not have to set out in its founding affidavits the detail and intensity of averments required when the nature of the claim is under scrutiny ….. It will be sufficient if the creditor in an overall view on the papers can show, for example,

> that there is reasonable ground for coming to the conclusion that upon a proper investigation by way of an equity (*sic*) under s 65 of the Act a trustee may be able to unearth assets which might then be attached, sold and the proceeds disposed of for distribution amongst creditors."

[42] The above two cases have once again been cited with approval by the Supreme Court of Appeal in the ***Hawker Aviation*** case, *supra*, at footnote 23.

[43] On the facts of this case the question that arises is whether the applicant has met the required threshold. Mr *Kemp*, who appears for the respondent, has strenuously argued that the applicant has not and its attempt to sequestrate the respondent for the second time is plainly misconceived. 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 applicant's submission. The present application is substantially different to the first one insofar as the evidentiary material contained therein is concerned. The question is whether on this evidence I ought to be satisfied *prima facie* that there is

reason to believe sequestration will be to the advantage of creditors.

[44] One thing is manifestly clear in this case and that is that the respondent over the years has conducted his business on the basis of using either trusts or corporate entities to conduct his business. That much is demonstrated by the various transactions entered into by his trusts, one of them particularly giving rise to the substantial indebtedness in this case. The second thing which is of significance is that the respondent has seemingly with confidence and without hesitation bound himself as a surety and co-principal debtor for the obligations of these entities and where the potential financial implications are substantial.

[45] Commonsense dictates that banks and other financial institutions will not accept the guarantee of a man of straw. It will investigate the financial position of any proposed guarantor, particularly one who is the driving force behind the proposed principal debtor whether it be a company or a trust.

[46] In my view the respondent's financial position at the time when he entered into the agreements of suretyship is a useful starting point for any investigation.

[47] The pattern is perpetuated even subsequent to the incurring of the indebtedness *in casu*. The Banavie Trust acquires a Bentley motor vehicle for a purchase price of some R2.5 million rand. The monthly instalments are R20 000,00 a month. This vehicle was ostensibly for the respondent's personal use. The respondent's evasive denial in his answering affidavit that the vehicle was not for his exclusive use has a very hollow ring to it. According to the respondent at the section 65 inquiry the trust purchased the vehicle and he negotiated the transaction. Once again one asks the question if to his knowledge he has no assets and is a man of straw, why does he guarantee the Trust's liability?

[48] It all seems to point in the direction of the respondent having no hesitation in binding himself as a co-principal debtor for a substantial potential liability knowing full well that if the liability does

in fact occur, the particular creditor will have no recourse whatsoever against him.

[49] This circumstance by itself creates the strong suspicion that the respondent is simply conducting his personal business through the trust and that the trust is simply the vehicle to do so. The impression is created that the remaining trustees while notionally independent persons may simply be doing the respondent's bidding. The acquisition by the trust of a luxury motor vehicle points in that direction and raises pertinently the issue proffered by Cameron JA in ***Land and Agricultural Bank of South Africa v Parker and Others*** 2005 (2) SA 77 at 90 – 91, where the learned judge of appeal said the following : -

> "[37] The courts will themselves in appropriate cases ensure that the trust form is not abused. The courts have the power and the duty to evolve the law of trusts by adapting the trust idea to the principles of our law (*Braun v Blann and Botha NNO and Another*). This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the

> reasonable expectations of outsiders who deal with them. This could be achieved through methods appropriate to each case.
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> ……
>
> [37.3] It may be necessary to go further and extend well-established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of business 'as before', and that the assets allegedly vesting in trustees in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where trustees of a family trust, including the founder, act in breach of the duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced in the interests of creditors."

[50] It appear from the affidavits that the applicant's efforts to investigate the affairs of the Banavie Trust were thwarted, firstly by counsel raising objections during the section 65 hearing and

thereafter launching an application in the High Court (which is still pending) to interdict the magistrate from hearing evidence in regard to the affairs of the trust. In my view the objection is a spurious one. The affairs of the trust are integrally entwined with the respondent personally. There is evidence that he received at one stage an amount of R700 000,00 from the trust. He says quite glibly that it is for the trust (meaning himself and the remaining trustees) to turn the tap on or off depending on the exigencies of the situation. In my opinion a forensic examination of the assets of the trust, their acquisition, cash flows and the respondent's loan account in the trust should be the subject matter of close scrutiny. In my view there is a real prospect of such examination showing that the trust is a mirage used by the respondent for his own commercial ends.

[51] A further issue in relation to the respondent's credibility is his declaration in the Standard Bank application form that he is "the owner" of Insurance Online. It is difficult to see how he could have made a mistake when that information was furnished.

It 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 insurance brokerage business. There is corroboration of this in the evidence of both Schwartz and Farrer. The respondent's denials once again have a very hollow ring. A further feature which points in that direction is the fact that the respondent personally procured a rental guarantee to the landlord of the premises occupied by County Capital (Pty) Ltd trading as Insurance Online.

[52] His allegation that the Banavie Trust provided consultancy services to Insurance Online in my opinion merits extensive investigation. Here again the books and records of the Banavie Trust and the cash flows will be highly relevant to that issue. Finally interrogation of the other trustees and in particular whether realistically it can be said they played or are playing a part in the actual management of the affairs of the trust will be highly necessary.

[53] It follows from the foregoing that I am satisfied that the applicant has met the threshold set forth by Roper J in the ***Meskin*** case, *supra*, and read with ***Amod'***s case, *supra*. In my opinion there is a *prima facie* case that there is a reasonable prospect that investigation and interrogation under the Insolvency Act will yield a not negligible pecuniary benefit to creditors.

[54] In the result the application succeeds and I make the following order : -

(1) That the estate of Robin Patrick Thorpe, an adult businessman, identity no 5304285019007, with date of birth 28th April 1953, be and is hereby placed under provisional sequestration in the hands of the Master of the High Court, Natal Provincial Division.

(2) That a rule *nisi* do issue, calling upon the respondent and any other interested party to show cause, if any, before this Honourable Court on the 19th day of November 2008 at 9.30 am or so

soon thereafter as the matter may be heard, why the estate of the respondent should not be finally sequestrated.

(3) That a copy of this order and the application papers be served forthwith on the South African Revenue Service.

DATE OF JUDGMENT : SEPTEMBER 2008

DATE OF HEARING : 30 MAY 2008

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