IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO.: 844/2011

Date heard: 23 June 2011

Date issued:

In the matter between:

CORPLO 358 CLOSE CORPORATION Applicant

and

MICHAEL HENRY CHARTERS Respondent

JUDGMENT

GROGAN A.J.:

[1] This is an application for the provisional sequestration of the estate of the respondent, a businessman residing in the vicinity of Maclear, Eastern Cape Province. In their written heads of argument, counsel were in agreement that the matter should be dealt with as an application for a final order. However, Mr *Paterson SC*, for the applicant, pointed out when the matter was argued that a final order for sequestration cannot be granted without a provisional order first having been made. This is correct: *Moch v Nedtravel (Pty) Ltd t/a*

American Express Travel Service 1996 (3) SA 1 (A) at 9J-10B; *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W) at 81E-G. That being the case, the applicant needs to make out only a *prima facie* case for the relief claimed—namely, that the applicant has *locus standi* in the form of a liquidated debt, that the respondent has committed an act of insolvency or is insolvent, and that sequestration may benefit creditors.

[2] A preliminary point has been raised by the respondent. This is that the deponent to the founding affidavit, Mr L Wicks, lacks authority to act on behalf of the applicant close corporation. If this is correct, the application must fail on that basis alone. I accordingly deal with the authority issue at the outset.

[3] Mr Wicks states in the founding affidavit that he annexes a "Resolution by the Applicant indicating that I am duly authorised to launch this application on behalf of the Applicant". The annexed document ("LC1") is signed by Mr Wicks, and purports to be an "extract of the minutes of the members". It indicates that the members have resolved that Mr Wicks is authorised "to act on behalf of the CC in the matter between the CC and Michael Henry Charters". The document is dated 18 March 2011, the same day as he swore to the founding affidavit in Grahamstown. The respondent takes issue with this document in the answering affidavit. He denies that it constitutes a resolution and that it authorises Mr Wicks to launch the application on the applicant's behalf. The respondent points out, correctly, that the document does not disclose the identity of the applicant's members, the date on which the resolution was passed or, indeed, the capacity of the person who signed the document. To this, Mr Wicks declares, somewhat airily, in reply that he is "advised by his legal representatives that the Resolution is perfectly in order,

the usual Resolution for matters of this nature, that the points raised by the Respondent "have no merit whatsoever", and that he is "in any event" employed as the managing member of the Applicant and attend(s) to all its business activities".

[4] Mr *Paterson* contends that the "general challenge" mounted by the respondent is insufficient to undermine a deponent's averment of authority. He relies in this regard on *Baeck & Co SA (Pty) Ltd v Van Zummeren & another* 1982 (2) SA 112 (W) and *NahrungsmittelGMbH v Otto* 1991 (4) SA 414 (C). As Mr *Boswell*, who appears for the respondent, points out, these judgments are distinguishable. *Baeck* concerns whether an initial absence of proof of authority may be retrospectively cured by filing proof of authority in reply. In this case, the applicant did not seek in reply to confer authority with retrospective effect. The deponent merely stuck to his original claim that he has authority. In *Otto*, the applicant went so far as to file, with the court's leave, a supplementary affidavit dealing with authority. Conradie J (as he then was) remarked that "in motion proceedings by an artificial person it is not absolutely necessary to attach the resolution authorising institution of the proceedings to the founding affidavit". However, the learned judge added, with reference to *Baeck*, that "[w]here there is a challenge to a deponent's authority, which should be more than a bare complaint that he failed to annex an empowering resolution, it would usually be prudent for an applicant to produce the resolution in reply" (at 418C-D). Mr *Boswell* relies on *J & K Timbers (Pty) Ltd t/a TEGS Timbers v G L & S Furniture Enterprises CC* 2005 (3) SA 223 (N). That case is also distinguishable from the present matter, dealing as it does with the authority of members to bind a close corporation to

a settlement agreement.

[5] We are accordingly left with the question whether the document annexed to the founding affidavit together with the averment in reply that Mr Wicks is employed as the applicant's managing member is sufficient proof of his authority to institute action on behalf of the applicant. Judgments on the sufficiency of proof of authority to act are not harmonious. It seems to me, however, that the leading case in this regard is *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (A), in which the authority of a bank manager to launch proceedings on behalf of the bank was placed at issue. The court held (at 228G-H)"

> "A copy of the resolution of a company authorising the bringing of an application need not always be annexed. Nor does s 242(4) of the Companies Act 61 of 1973 (to the effect that a minute of a meeting of directors which purports to be signed by the chairman of that meeting is evidence of the proceedings at that meeting) provide the exclusive method of proving a company's resolution (*Poolquip Industries (Pty) Ltd v Griffin and another* 1978 (4) SA 353 (W)). There may be sufficient *aliunde* evidence of authority (*Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at 352A)."

[6] On the facts, the court found sufficient evidence *aluende* of authority (at 228I-229A):

> "What Spencer alleges in the founding affidavit is (i) that he is duly authorised and (ii) that such authority appears from PS1. The appellants' denial is an ambiguous one; it is not clear whether they dispute (i) or (ii) or both. Moreover, the denial is a bare one. Not only is there no explanation as to how they are able to gainsay Spencer's assertion that he is authorised, but no evidence is tendered in support of what is now argued, viz. that Spencer was not authorised. It would

seem that the denial was what may be called a tactical one. The tactic must fail. This is a case in which the approach adopted in *Mall's* case (at 352B), namely that when the challenge to authority is a weak one, a minimum of evidence will suffice, applies. Weight must be given to the use by Spencer of the word 'duly' (authorised). It is an indication that the authority conferred on him was properly conferred (*Mall's* case at 352D)."

[7] While this case may differ on the facts, it seems to me that the principle to be extracted from this passage applies. The respondent's denial of authority may be somewhat more than bare, in the sense that it points to clear deficiencies in LC1. However, there is no positive averment that Mr Wicks actually lacks authority, or that he was not in fact authorised to bring the application. While the respondent was entitled to raise the point, it appears to have been raised "tactically". I am prepared to accept that Mr Wicks had the necessary authority to launch the application on behalf of the applicant. The respondent's point *in limine* accordingly fails.

[8] This brings me to the merits. The applicant avers that the respondent became indebted to it in the following circumstances. While Mr Wicks was on holiday in East London in January 2010 the respondent cashed a series of 11 cheques at the applicant's store in Maclear to a total value of R669 000.00. The cash was paid out by the cashier, without Mr Wick's knowledge or, as it transpired, the knowledge of the store manager. A further cheque for R67 000.00 was cashed soon after by the respondent at another of the applicant's businesses, owned by another close corporation under his control, in Ugie. It is common cause that all these cheques were drawn on the accounts either of MJ Beef (Pty) Ltd or the Mike Charters Family Trust, and

that all were dishonoured when presented for payment. These entities were subsequently liquidated and sequestrated.

[9] The applicant avers that the respondent is personally liable to it for repayment of the amount paid out on the cheques because he knew when he presented them that there were insufficient funds in the accounts of MJ Beef and the trust to honour them—in short, that "the cash obtained was handed to the Respondent and the Respondent personally appropriated it, and did deliberately and in dishonest acts (*sic*) commit fraud solely for his own interests and purposes as Director and shareholder of the aforesaid entities which makes him personally liable". To this, the respondent replies with a categorical denial that he knew that there were no funds in the accounts. He states:

> "In these instances and during the period in question, the entities were expecting substantial funds from sales and services rendered, which would have been collected by my staff and deposited into the banking accounts of the entities, or deposited directly [in]to the banking accounts of the respective entities by various debtors. This was the usual arrangement between the entities, debtors and staff of the entities to ensure that there were funds in the respective accounts to meet the cheques cashed by the Applicant."

[10] The respondent also claims that the cashing of cheques in this manner had been a regular practice (this is common cause), and that when cashing cheques he usually approached the chief cashier directly without first informing the manager or Mr Wicks (which is not common cause). The respondent also denies that he personally appropriated the cash, and claims that the allegation that he committed fraud is "unsubstantiated and

defamatory". The respondent also claims that, in several respects, averments in the founding affidavit constitute hearsay evidence, and should accordingly be disregarded.

[11] I accept that if the respondent indeed fraudulently appropriated the money by cashing cheques in the name of MJ Beef and the trust he would be personally indebted to the respondent and may be sequestrated on that basis (see (*Kleynhans v Van der Westhuizen NO* 1970(2) SA 742 (A); *Premier Western Cape v Parker & Mohamed* [1999] 1 All SA 176 (C)). If he was not guilty of fraud, however, the debtors would be the respective entities, not the respondent himself, since they are separate legal *personae*. It is accordingly incumbent on the applicant to prove (which means for present purposes to make out a *prima facie* case) that the respondent was aware when he cashed the cheques that there were insufficient funds in the bank accounts of the respective entities to satisfy the amounts drawn on the cheques (see *R v Myers* 1948 (1) SA 375 (A), which confirms (at 382) that fraud extends to the making of a false representation "recklessly, carelessly of whether it be true or false").

[12] Mr *Paterson* argues that the cashing of cheques where there are inadequate funds creates an evidential onus on the party so acting to show that he was not acting in at least the manner aforesaid. Mr *Boswell* contends that the onus remains on the applicant, and that the pleadings should be treated according to the well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634. The strength of Mr *Boswell's* point is considerably diluted by the fact, with which he now agrees, that we are not

dealing in this instance with an application for a final order. We are dealing with an application for a provisional sequestration order, which is treated for evidentiary purposes on the same basis as any application on notice of motion for interim relief (i.e. the applicant must make out a *prima facie* case, even if open to some doubt). The overall onus remains on the applicant to prove that the respondent was, at the very least, reckless of the possibility that the bank would not satisfy the amounts drawn on the cheques. But, if he succeeds in establishing at least a plausible inference in the founding papers, the respondent is obliged to advance more than a bare denial.

[13] I agree with Mr *Paterson* that the respondent has done little more than that. His defence amounts to no more than a claim that the entities in whose names the cheques were cashed were "expecting" substantial inflows of funds. That claim might have been persuasive had one or two cheques been cashed. But, standing alone, its credibility diminishes with each further cheque proffered, especially in the relatively brief period in which the succession of cheques was presented in this case. The claim that funds were "expected" comes close to a concession that the respondent knew at the time that there were insufficient sums in the respective bank accounts to cover the cheques. To be credible, the expectation would have had to strengthen exponentially with the cashing of each successive cheque. I note further that on 15 January 2010, the respondent assured Mr Wicks in an e-mail that "[s]hould any of the funds due to us materialise, we will immediately pass on these funds to you". This indicates that such expectation as the respondent may have held at the time did not come close to conviction.

[14] Even accepting that the respondent did not seize on Mr Wicks' absence on

holiday, it was in my view incumbent on him to give some indication, at the very least, of the sources of the inflow of funds he claims to have anticipated, and their values. The respondent provides absolutely no detail in that regard, even though he acknowledges that MJ Beef and the trust were each on the brink of insolvency. It is also noteworthy that the respondent deposed to the answering affidavit more than a year after he cashed the cheques. Had the anticipated inflows of cash occurred, they could have been substantiated by the entities' bank statements. However casual commercial arrangements between trading entities may be, they would be potentially ruinous if a party could deny personal liability on "dud" cheques on an unsubstantiated averment that it was "expected" that cash would flow in to cover the cheques. Insofar as this is relevant, the same applies to the respondent's denial that he personally appropriated the cash. If that is indeed so, it was incumbent on him to disclose how the cash was used. He did not. The fact remains that the applicant suffered loss as a result of the respondent's conduct.

[15] In the light of the above, I find and hold that the applicant has the requisite *locus standi* to apply for provisional sequestration of the respondent's estate.

[16] The next requirement is that the respondent is actually insolvent, or has committed an "act of insolvency" as contemplated by the Act. Mr *Paterson* disavowed the applicant's reliance on the alleged acts of insolvency set out in the founding affidavit and on a further *nulla bona* return referred to in a further affidavit admitted by agreement. The former were conversations between Mr Wicks and the respondent in which the respondent allegedly stated *inter alia* that "we have big trouble here" and acknowledged his current inability to

repay the money, and an e-mail and letter to the applicant's then attorney (LC8 and LC9), in which the respondent gave further assurances that he was attempting to resolve the "embarrassing" situation. This disavowal is in my view somewhat generous, being based, apparently, on acceptance of the respondent's tenuous submission that he was writing on behalf of MJ Beef and/or the trust, and did not state that the respondent could not pay the debt in his personal capacity. In my view, this correspondence is at the very least relevant to the submission on which the applicant now relies—that the respondent was factually insolvent at the time the present action was instituted.

[17] In that regard, the respondent relies solely on the alleged contradiction between the assessment of "the respondent's assets" in the founding affidavit and the averment that the respondent "is in insolvent circumstances, and is unable to pay his debts to the detriment of his creditors". That contradiction, so argues Mr *Boswell*, is sufficient to justify the respondent's reply that he need go no further than to assert that, on the applicant's own version, he is not in insolvent circumstances. I am not persuaded by this argument. The applicant submits that the respondent has "carefully sought to ensure that liability invests (*sic*) in the name of his numerous companies, and Trusts, and not in his personal name". Mr Wicks then attempts to list the respondent's assets. He includes the claims that the respondent holds "numerous shares" and is a director of a number of companies, that he owns several vehicles, that he and trusts over which he has control have claims against the liquidator of Copelands Beef (Pty Ltd amounting to more than R8m and that the applicant has "numerous investments". This list ends with the assertion by Mr

Wicks that he has been advised that the assets of Copelands Beef "are such that there is every prospect of the respondent and his Family Trust being paid a significant dividend on that liquidation".

[18] While the relevant paragraphs of the founding affidavit suggest that the respondent is a man of means, they do not go so far as to state in terms that he is able to realise his assets to pay his debts. Indeed, a further affidavit deposed to by the applicant's attorney of record indicates that judgment has been taken against him, also by consent, by Sign & Seal Trading 206 (Pty) Ltd for the amount of R650 000.00, that the vehicles are subject to hire purchase agreements, the outstanding balance of which exceeds their value, and that in February 2008 the respondent made a donation of furniture valued at R50 000.00 to the "NAM trust", which furniture could not be attached pursuant to a writ of execution against the respondent's wife. It is so that, apart from quantifying the respondent's indebtedness to it, the applicant does not attempt to assess the total claims against the respondent's estate. However, it is clear that in the circumstances, the applicant is simply unable to do so. Nor is it necessary that it should do so. As was said in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and others* 1993 (4) SA 436 (C) at 443D-F:

> "Even, however, where a debtor has not committed an act of insolvency and it is incumbent on his unpaid creditor seeking to sequestrate the former's estate to establish actual insolvency on the requisite balance of probabilities, it is not essential that in order to discharge the onus resting on the creditor if he is to achieve this purpose that he set out chapter and verse (and indeed figures) listing the assets (and their value) and the liabilities (and their value) for he may establish the debtor's insolvency inferentially. There is no

exhaustive list of facts from which an inference of insolvency may be drawn, as for example an oral admission of a debt and failure to discharge it may, in appropriate circumstances which are sufficiently set out, be enough to establish insolvency for the purpose of the prima facie case which the creditor is required to initially make out. It is then for the debtor to rebut this prima facie case and show that his assets have a value exceeding the sum total of his liabilities. See Mars *The Law of Insolvency in South Africa* 8th ed. at 108; *Mackay v Cahi* 1962 (4) SA 193 (O) at 194F-H, 195C-E, 204F-H." (My underlining.)

[19] In my view, the applicant has made out a *prima facie* case that the respondent was unable to personally repay the debt he had incurred by the cashing of the cheques in question. Even accepting that when he subsequently wrote to the applicant he was purporting to do so in the name of MJ Beef and the trust, the tenor of those letters indicates that he would, if he could, have settled the debt. Instead, the respondent simply fell back on repeated disavowals of personal liability. By so doing, he has failed to discharge the onus of rebutting the *prima facie* case established by the applicant by showing that his assets have a value exceeding the total of his liabilities. It follows that the applicant has for purposes of this application made out a sufficient case to establish actual insolvency.

[20] The reasons for the finding just made dispose of the respondent's claim that the applicant has failed to make out a case that the provisional sequestration of the respondent's estate will be of advantage to creditors. Mr *Boswell* contends in this regard that the applicant has not particularised the respondent's state of indebtedness because it has failed to list other creditors the respondent may have. The short answer to this emerges from the dictum

from *Rhebokskloof supra* just quoted: the applicant is not obliged to do so. In supplementary heads submitted in anticipation of the admission of the further affidavit referred to above, Mr *Paterson* refers to *Meskin & Co v Friedman* 1948 (2) SA 555 (W) at 559, which confirms that even if no pecuniary benefit may flow to creditors by a sequestration, it may be of sufficient advantage to creditors if "there are reasons for thinking that as a result of inquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient". This approach was approved in *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and others* 2006 (4) SA 292 (SCA), in which Cameron JA (as he then was), put the test thus (at 306D):

> "[A] Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and inquiry assets might be unearthed that will benefit creditors".

I believe that this is such a case.

[21] It follows that the applicant has made out a sufficient case to obtain a provisional sequestration order against the respondent.

[22] The following orders accordingly issue:

1. The estate of the respondent, Michael Henry Charters (Identity no.) is hereby placed under provisional sequestration in the hands of the Master of the High Court.

2. The respondent may show cause, if any, in this Court on 4 August 2011, or as soon thereafter as counsel may be heard, why a final order of sequestration should not be granted.

3. The costs of this application shall be costs in the sequestration.

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J G GROGAN

ACTING JUDGE OF THE HIGH COURT

For applicant:	Mr T J M Paterson SC, instructed by Wheeldon, Rushmere & Cole.
For respondent:	Mr B L Boswell, instructed by Leon Keyter Attorneys.