IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 7186/2013

In the matter between:

EUGENE NEL N.O	**FIRST APPLICANT**
HUSSAN GOGA N.O	**SECOND APPLICANT**
JOHNINE MADDOCKS N.O **(acting in their capacities as liquidators** **in the estate of REGENT FACTORS (PTY) LTD** **(in liquidation)**	**THIRD APPLICANT**

And

GERBRAND BOTHMA	**RESPONDENT**

Order:

The application is dismissed with costs.

JUDGMENT

Delivered on: 14 November 2014

PLOOS VAN AMSTEL J

[1] The applicants in this matter are the joint liquidators of Regent Factors (Pty) Ltd (in liquidation). I shall refer to it as 'Regent' or 'the company'. They seek an order for the sequestration of the respondent's estate. In the period leading up to the liquidation he was the sole director of the company, which was in the business of debtor financing and factoring. It was provisionally liquidated on 28 June 2012 and the order was made final on 27 November 2012.

[2] The basis of the application is that Regent has a claim against the respondent for an amount of R15 485 000 and that he is insolvent.

[3] The alleged basis of the claim is that the respondent misappropriated monies from Regent by way of payments to himself, family members and companies controlled by him, ostensibly in respect of management, administration and marketing fees. The respondent admits most of the payments but claims that they were made legitimately and pursuant to written agreements. He denies that he misappropriated any money. It was accepted before me that if the claims are not valid then it cannot be found on the papers that he is insolvent.

[4] In terms of section 10 of the Insolvency Act 24 of 1936 the validity of the claim and the insolvency of the debtor have to be established on a prima facie basis. Where the application for a provisional sequestration order is opposed the necessary prima facie case is established only when the applicant can show that on a consideration of all the affidavits a case for sequestration has been established on a balance of probabilities. [1]The situation where there are factual disputes on the papers was stated as follows by Brand J, with reference to *Kalil v Decotex*, in *Payslip Investments Holdings CC v Y2K TEC Ltd*[2]:

> 'According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted…With reference to the disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by the respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities'.

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[1] Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (AD) at 978D-E.
[2] 2001 (4) SA 781 (C) para 7.

[5] The dispute relates to the validity of the agreements pursuant to which the respondent says the various payments were made, and whether he personally misappropriated money.

[6] It is trite that an applicant must make its case in its founding papers. In certain circumstances a court will allow the case to be supplemented or expanded on in the replying affidavit, but this depends very much on the particular circumstances of the case and considerations of fairness and prejudice. There is a more fundamental difficulty in the founding affidavit, which is replete with allegations, such as one finds in pleadings, which do not qualify as evidence.

[7] The deponent to the founding affidavit is Mr Eugene Nel, one of the joint liquidators of Regent. He says the following:

> 'The facts and allegations contained herein are, save where otherwise stated, or where the converse appears from the context, within my own personal knowledge and belief, and are true and correct'.

In another paragraph he says:

> 'I have control over and access to the information relating to the involvement of the respondent in and with the affairs of Regent. I am fully acquainted with the respondent's conduct in regard to the indebtedness owed by him to Regent. As such, I have personal knowledge of the allegations contained herein.'

[8] In his answering affidavit the respondent admits that Mr Nel has access to Regent's records but denies that he has personal knowledge of all the facts stated in the founding affidavit. In his replying affidavit Mr Nel responds to this as follows:

> 'I attended at the insolvency enquiry. I read the application for the winding-up of Regent. I am involved intimately in this matter and I have gained the personal knowledge referred to, which is true and correct, by virtue of my appointment as, initially, the provisional liquidator and thereafter, the liquidator of Regent'.

[9] This is tantamount to a person saying that he has personal knowledge of something because he personally read about it. This is not what personal knowledge means in the context of the law of evidence.

[10] Hearsay evidence is defined in section 3(4) of the Law of Evidence Amendment Act 45 of 1988 as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. A person has personal knowledge of a fact if its probative value depends on his own credibility. It is plain from Mr Nel's founding affidavit that most of its content falls within the definition of hearsay evidence. In many instances he does not even disclose the source of his information.

[11] The assertions made in the founding affidavit include the following:

(i) The respondent is indebted to Regent in the sum of R15 485 000, arising out of an unlawful misappropriation by him of funds during his tenure as its sole director.

(ii) The respondent did this through various payments of management, administration and marketing fees to companies controlled by him in amounts and during periods which the deponent specifies.

(iii) In addition, the respondent unlawfully misappropriated an amount of R2 million from Regent for his own benefit.

(iv) Regent's bank accounts show the movement of funds which were unlawfully utilised by the respondent for his own benefit.

(v) The respondent gained access to Regent's bank account and his misappropriations from the account reveal a wholesale plundering of it.

(vi) The respondent was responsible for the extensive unauthorised transfer of funds to companies in the Tactic Group which were owned or controlled by him. This depleted Regent's bank accounts.

(vii) The respondent wrongfully excluded other members of the management team and denied Khula Enterprise Finance Ltd (the major creditor) access to Regent's books of account and records.

(viii) Khula attempted to interdict the unauthorised payments pending the winding-up application. The respondent opposed the

application and at the same time cleared Regent's bank account of all the remaining funds.

(ix) The respondent used Regent's money for his own benefit.

(x) The management agreements concluded by Regent with companies in the Tactic Group were contrived in order to enable the respondent to misappropriate Regent's funds.

(xi) The respondent took over control of Regent and paid large amounts of money to himself, his wife, his sister and other staff members, without any justification.

(xii) The respondent paid himself a fee of 1% of Regent's book, knowing full well that such a fee was inappropriate, excessive and constituted a fraudulent payment.

(xiii) The respondent signed a host of agreements with his wife, on behalf of Tactic Capital, in order to dissipate Regent's remaining funds and in an attempt to legitimise the funds misappropriated by him. Each of these agreements was a sham.

(xiv) The respondent instructed employees of Regent to pay an amount of R2, 5 million into accounts opened with Standard Bank and Mercantile Bank, ostensibly to obtain better a better rate of interest, but it ultimately found its way into his estate.

(xv) The respondent's family trust is his alter ego.

(xvi) The respondent lives a lavish lifestyle and travels freely between Johannesburg, Durban and Botswana by using Regent's funds.

[12] It is plain that Mr Nel does not have personal knowledge of these matters. Nor does he say that he has information to this effect and what the source of his information is. He merely makes allegations. This is particularly important with regard to the validity of the various agreements and the alleged misappropriation of money. The only evidence of misappropriation in the founding papers is that of Mr Van der Merwe, relating to a sum of R10 000, which the respondent denies. This claim is in any event not large enough to render him insolvent.

[13] In terms of section 3 (1) of the Law of Evidence Amendment Act hearsay evidence is inadmissible unless it is admitted on one of the grounds set out in the section. None of those grounds finds application in this matter.

[14] On the respondent's version the applicants have no claim against him. He maintains that the agreements which provided for the payment of management and administration fees and the payments to his wife and sister were valid agreements and that the services contemplated in those agreements were rendered.

[15] The management agreements for the appointment of Tactic Financial Services (Pty) Ltd, and later Tactic Capital (Pty) Ltd, form part of the applicants' papers. They set out the services which were to be rendered, which were comprehensive. There is no evidence that these services were not rendered. It is true, as counsel for the applicants pointed out, that the management fee increased substantially to some R840 000 per month. The respondent however says that this included expenses paid on behalf of Regent, including salaries. On 23 November 2010 Mr Van der Merwe, on behalf of TFS, wrote to Mr De Jager, who was then the Chief Risk Officer at Khula. He said they noted that the transaction between Khula and TFS in respect of Regent, as contained in the term-sheet, was reflected in Khula's annual financial statements as having been concluded and implemented. He referred to the proposed administration agreement with Tactic Capital, in terms of which the fee for the first year would be R850 000 per month. And on 15 April 2011 Mr Booth sent Regent's management accounts for March 2011 to Mr de Jager, which reflected a management fee for that month of R840 000. This seems to fly in the face of the allegation by Mr Nel that Khula did not know about the fees.

[16] If the management fees were excessive the respondent may possibly be held liable for Regent's debts in terms of section 424 of the Companies Act of 1973, or conceivably some of the payments may be set aside as voidable dispositions in terms of the provisions of the Insolvency Act. This is however not the case made in this application. The applicants contend that Regent has a claim against the respondent for the misappropriation of money and that the agreements pursuant to which the payments were made were fraudulent and designed to give the payments the appearance of legitimacy. The applicants' difficulty is that there is no evidence to this effect, other than the say-so of the deponent to the founding affidavit, who has no personal knowledge of this. Counsel for the applicants urged me to find that the schedule prepared by the respondent, annexure GB 44, provides evidence of the large scale flow of money from Regent to the respondent and the companies

which he controlled, and that the respondent's explanation for this does not hold water. The respondent explained these payments at length in his answering affidavit. Nothing in his evidence justifies an inference of misappropriation. I am of course not saying that the respondent did not misappropriate money from Regent. I am saying that I cannot find on the papers before me that he did. The position may be different in a trial after viva voce evidence and cross-examination. The payments and loans reflected in the schedule may well acquire greater significance in proceedings in terms of section 424.

[17] Counsel for the applicants submitted that because the funding of R54 million which was contemplated in the term-sheet never materialised the respondent was not entitled to raise a management fee. The term-sheet provided that it was not intended to create binding obligations, but it contemplated the conclusion of binding agreements. There is nothing in the management agreements which made them conditional on the introduction of capital by the respondent or any of the companies in the Tactic Group.

[18] Counsel for the applicant relied heavily on the affidavits by Mr Van der Merwe and Mr Booth, which were filed in reply. He contended that they remedied any deficiency which there may have been in the founding affidavit.

[19] Van der Merwe disputes several statements made by the respondent in his answering affidavit. He represented Regent when the management agreements were concluded, including the later one which provided for a much increased management fee. This raises a question mark with regard to his assertion that the respondent unilaterally raised the fee. The fact that the term-sheet was not intended to be a binding agreement does not detract in itself from the validity of the subsequent management agreements. Van der Merwe says the respondent instructed him to employ his sister, but the respondent denies this. He also alleges that the respondent instructed him that in the event of Regent being placed in liquidation all funds in its accounts should be transferred to the Tactic companies. This allegation was made for the first time in reply, which is not permissible. He says the management and administration fees were not 'legitimate transactions', but does not explain why he signed those agreements. Nor does he say that the services contemplated in those agreements were not rendered.

[20] Booth was the executive of finance at Regent until October 2011, having joined it as a consulting accountant in March 2009. Although he says he thought the management fees were excessive, he does not say that the agreements were a sham or that the services were not rendered. His evidence may be material in proceedings under section 424, but his affidavit does not establish theft.

[21] It was accepted before me that if the claim by Regent is not established then it cannot be said that the respondent is insolvent. I am not persuaded on the evidence before me that the claim has been established. The respondent's obligation to show that he disputes the claim on bona fide and reasonable grounds does not arise until the claim has been established prima facie, that is, on a balance of probabilities. The founding affidavit appears to have been drafted without regard to the law of evidence and does not contain sufficient admissible evidence to make out a prima facie case.

[22] Counsel for the respondent asked me to make a punitive costs order, on the basis that the applicants proceeded without evidence and that the application was not the appropriate remedy. Sequestration proceedings are not ordinarily intended for the recovery of disputed claims, perhaps more so where claims for damages are involved and the facts are known to be in dispute. Reckless trading and voidable dispositions do not necessarily amount to theft. Nevertheless, the applicants' real difficulty was that there was insufficient admissible evidence in the founding papers. I do not think that this warrants a punitive order.

[23] The application is dismissed with costs.

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Ploos van Amstel J

Appearances:

For the Applicants	**:**	Adv. A.J. Farber
Instructed by	**:**	FSE Attorneys c/o Berkowitz Cohen Wartski Durban
For the Defendant	**:**	Adv. F.H. Terblanche SC
Instructed by	**:**	Grant & Swanepoel Attorneys c/o Venns Attorneys Durban
Date of Hearing	**:**	7 November 2014
Date of Judgment	**:**	14 November 2014 0