Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case Nr: 1260/2006
Case Heard: 23/05/2008
Date delivered: 13/06/2008

In the matter between:

Janet Conradie — 1ST APPLICANT
Eben Conradie — 2ND APPLICANT

and

Master of the High Court: Kimberley — 1st RESPONDENT
Johan Schoon NO — 2nd RESPONDENT
Abraham Johannes Swanepoel NO — 3rd RESPONDENT

JUDGMENT

Olivier J:

1. The first applicant, mrs Janet Conradie, was married to mr Hendrik Christoffel Conradie ("*the testator*"). Two sons were born of their marriage, mr Eben Conradie (the second applicant) on 14 October 1985 and mr Ryno Conradie on 14 December 1987.

2. In a combined will the first applicant and the testator stipulated the following:

2.1. Upon the death of the first deceased a trust (named the ER Trust) would be established.

2.2. The remaining portion (after certain bequests) of their joint estate would go to the ER Trust to be administered in accordance with a particular trust deed.

2.3. The surviving spouse (in this case the first applicant) would be an income beneficiary.

2.4. The two sons would be both income and capital beneficiaries.

2.5. During the lifetime of the surviving spouse no capital would vest in their sons without the written consent of such spouse.

2.6. The surviving spouse would be a trustee.

3. The relevant provisions of the trust deed were the following:

3.1. A relatively wide range of powers were granted to the trustee/s, including the power to appropriate and utilize not only the income of the ER Trust, but also its capital.

3.2. No capital would vest in any of the capital beneficiaries before they reached the age of 25 years.

3.3. A trustee whose estate was sequestrated, would immediately cease to be a trustee.

3.4. The trustee/s could at any time in their discretion, subject only to the provisions of the will, terminate the ER Trust, and provision was made for what would be done with the capital of the trust in such an event.

4. The ER Trust was established upon the death of the testator on 30 July 1996 and the first applicant was duly appointed as trustee on 6 March 1997.

5. On 18 January 2002, and upon the application of the first applicant, the surrender of both her estate and the estate of the ER Trust was accepted and both the estates were sequestrated.

6. The first applicant was rehabilitated on 2 June 2006.

7. After all the creditors of the ER Trust had been paid in full there remained a surplus amount of R138 335,72. The Master (the first respondent herein) has paid the amount into the Guardians' Fund in terms of section 116(1) of the Insolvency Act, 24 of 1936.

8. The second and third respondents are the co-trustees in the administration of the estate of the ER Trust. They do not oppose the application. The Master also does not oppose the application, but has furnished the Court with reports containing his input and recommendations.

Mr Coetzee appeared as counsel for the applicants. Mr Schreuder became involved as counsel **amicus curiae** and the Court is indebted to him for his efforts and arguments.

ORIGINAL NOTICE OF MOTION

9. In the notice of motion in its original form the applicants moved for an order "*Dat die eerste respondent gemagtig en gelas word om enige gelde in die voogdyfonds gehou ter krediet van die ER Trust, aan die eerste applikant te betaal*".

10. In my view there is no legal basis for such an order. The provisions of section 116(1) of the Insolvency Act read as follows:

"If after the confirmation of a final plan of distribution there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall immediately after the confirmation of that account, pay that surplus over to the Master, who shall deposit it in the Guardians' Fund and ***after the rehabilitation of the insolvent*** *shall pay it out* ***to him*** *at his request."*
(The emphasis is my own)

11. The first applicant can clearly not be regarded as "*the insolvent*" for the purposes of the sequestration and administration of the estate of the ER Trust.

12. Mr Coetzee conceded that section 116(1) does not provide for the payment of such surplus to anyone other than the particular insolvent, but submitted that such an order can nevertheless be

made in the exercise of a discretion which he argued this Court would have in circumstances like these.

13. Mr Coetzee could not, however, direct me to any authority for this proposition and I am not aware of any legal basis for the exercise of such a discretion.

14. Even if the assets of a trust are for practical purposes deemed to vest in its trustee/s (see **Kohlberg v Burnett NO and Others** 1986 (3) SA 12 (AD) at 25H) that could never mean that a trustee would in his/her personal capacity be entitled to any part of such assets. The first applicant in any event ceased to be a trustee of the trust when her own estate was sequestrated.

15. The first applicant is furthermore not a capital beneficiary of the ER Trust and the surplus amount would clearly be part of the proceeds of the realization of the capital of the trust.

16. Even if the intention had been that the income of the trust would be used for the maintenance of the two sons, the fact that the first applicant has been supporting them from her own funds (since the sequestration of the ER Trust's estate) would not simply now entitle her to the surplus amount.

AMENDED NOTICE OF MOTION

17. In his initial report the Master recommended that an order be made authorising the Master to appoint a trustee or trustees and to pay over the surplus to the newly appointed trustee/s.

18. The applicants have filed an amended notice of motion and are now seeking relief along the lines suggested by the Master.

19. In making this recommendation the Master adopted the attitude that the ER Trust remained in existence when its estate was sequestrated and in my view this is indeed the correct legal position.

19.1. Nowhere in the trust deed is it provided, or even suggested, that the trust would cease to exist upon the sequestration of its estate.

19.2. The Trust Property Control Act, 57 of 1988, similarly contains no provisions to this effect.

19.3. In view of the surplus and the fact that the trust had apparently been solvent when its estate was sequestrated, it could also not be argued that the trust had ceased to exist due to the fact that it no longer had any assets (compare **Ex parte Voortman et Uxor** 1919 OPD 53).

19.4. Even if the trust had lost all its assets in the administration process (and even if it did not even have an asset in the form of the surplus that remained in this case) it would not in my view, automatically and because of this alone, have ceased to exist as a legal entity (compare **African National Congress and Another v Lombo** 1997 (3) SA 187 (AD); as will be seen below, the Insolvency Act also envisages the continued existence of an insolvent whose estate has been sequestrated and administered).

19.5. Nothing would, for instance, have prevented the trust from proceeding to build up a new estate (see, for example, **section 23(3)** of the **Insolvency Act** and **Insolvency Law**, Meskin, 5-44(1)).

19.6. Should it be accepted that the trust ceased to exist when its estate was sequestrated, it would mean that the testator would have to be deemed to have died intestate as far as the surplus is concerned (see **Honoré's South African Law of Trusts**, Cameron **et al**, 5th ed, p551), and there is a presumption against partial intestacy (see **Tolond NO v The Master** 1990 (1) SA 801 (D) at 805E-F and **Honoré's South African Law of Trusts, supra**, at 551).

It is quite clear that the testator and the first applicant intended the remainder of their joint estate, and therefore the capital of the ER Trust, to eventually go to their sons, and the joint will contains no residual provisions for a contingency such as this.

19.7. I was unable to find any authority to the effect that a trust is automatically terminated by the sequestration of its estate.

19.8. Even if it could be argued that the sequestration of a trust's estate would eventually lead to it termination, such a trust would at the very least have to continue to exist for the duration of the administration of its sequestrated estate (compare **Ex parte Buttner Brothers** 1930 CPD 138 at 144-145), of which

process the payment of such a surplus would then obviously form part.

The fact that an insolvent has various obligations in the process of the administration of a sequestrated estate, would in itself militate against an argument that any insolvent could cease to exist when the final sequestration order is made (see **The Law of Insolvency**, Smith, 3rd ed, p106).

19.9. Although there is obviously a clear distinction between a trust and a company it is of interest to note that there is ample authority for the proposition that a company does not cease to exist when it is wound up (see **R v Heyne en Andere** (3) 1958 (1) SA 614 (W), **Letsitele Stores (Pty) Ltd v Roets and Others** 1958 (2) SA 224 (T) at 227H, **Ex parte Provisional Liquidator Hugo Franco (Pty) Ltd** 1958 (4) SA 397 (W) at 400G-401B and **O'Connell Manthe & Partners Inc v Vryheid Minerale (Edms) Bpk** 1979 (1) SA 553 (T) at 557H, but compare **Attorney-General v Blumenthal** 1961 (4) SA 313 (T)).

20. The question would then be what the correct procedure would be to have the surplus released from the Guardians' Fund and in this regard there are three possibilities to consider:

20.1. In the first place there is the possibility suggested by the Master (and adopted in the amended notice of motion) that the Master simply (and apparently without the rehabilitation of the ER Trust) appoints a

trustee or trustees and pays over the surplus to the newly appointed trustee/s.

20.2. As a second possibility it must be considered whether a trust can be rehabilitated in accordance with the provisions of the Insolvency Act, in which case the surplus can be dealt with in terms of section 116(1); again after the appointment of the trustee/s.

20.3. A last possibility which has to be considered is the setting aside of the sequestration order in terms of section 149(2) of the Insolvency Act.

PAYMENT OF SURPLUS TO TRUSTEE/S

21. The provisions of section 116(1) of the Insolvency Act were clearly intended to provide for the temporary preservation of a surplus, until such time as the insolvent is rehabilitated.

22. In view of the fact that the trust has not been rehabilitated, the Master would therefore quite clearly not be able to rely on section 116(1) to pay the surplus to a newly appointed trustee.

23. I am not aware of any other basis upon which the Master would be entitled to pay the surplus to an unrehabilitated insolvent and I cannot see (all the more so in view of what follows) how this Court could have the discretionary power, as suggested by mr Coetzee, to order the Master to act in contravention of the clear provisions of section 116(1) of the Insolvency Act.

24. It would in any event make no sense that the legislature would insist that a natural person be rehabilitated before he/she re-

enters the commercial arena without the supervision of a trustee, but would be quite happy to allow a trust of which the estate has been sequestrated, but which has continued to exist (possibly even with the same trustee/s), to do so without having been rehabilitated.

THE REHABILITATION OF THE TRUST

25. The question that then arises, and in respect of which the Master has requested guidance in view of the increasing number of sequestration orders in respect of trusts, is whether it is legally possible and competent to rehabilitate a trust.

26. The author Meskin (**Insolvency Law, supra**, at 14-2) is of the view that a trust cannot be rehabilitated. He argues that those provisions of the Insolvency Act that deal with rehabilitation, apply only to "*a natural person who, after sequestration, continues in existence and is able to accumulate a new estate*".

27. I am, with respect, unable to agree with this argument. I have already come to the conclusion that a trust, like a natural person, continues to exist despite the sequestration of its estate (unless it is otherwise provided in the trust deed).

28. I can see no reason why, if the provisions of the Insolvency Act apply to a trust for the purposes of the sequestration of its insolvent estate, the provisions that would enable an insolvent who is a natural person to accumulate a new estate would not apply to a trust.

29. I also do not agree with the suggestion that only a natural person can be rehabilitated.

30. Section 124(1) of the Insolvency Act entitles "*An insolvent*" to apply for an order of rehabilitation. The word "*insolvent*" (when used as a noun) is defined in section 2 of the Act as meaning "*a **debtor** whose estate is under sequestration …*".

31. It is trite that a trust is regarded as a "*debtor*", as defined in section 2 of the Insolvency Act, for the purposes of the sequestration of its insolvent estate (see **Ex parte Milton**, NO 1959 (3) SA 347 (SR) and **Magnum Financial Holdings (Pty) Ltd (In liquidation) v Summerly and Another NNO** 1984 (1) SA 160 (WLD); I cannot see why there should, for this purpose, be a distinction between trusts **inter vivos** and testamentary trusts).

32. There is in my view no reason why a trust should not also be regarded as a "*debtor*" for the purposes of the definition of the noun "*insolvent*", and therefore for the purposes of section 124(1) of the Insolvency Act.

33. Considerations of fairness and practicality militate against an interpretation of the Insolvency Act that, while the estate of a trust can be sequestrated, the trust cannot be rehabilitated.

34. Such an interpretation would mean that, while other insolvents are entitled to the positive and beneficial effects of rehabilitation (see **section 129(1)** of the **Insolvency Act**), trusts are not and will indefinitely remain burdened with the consequences of sequestration, or at least until the termination of such trusts. There is quite simply no legal basis or need for such a discriminatory interpretation of the Insolvency Act.

35. The fact that the legislature chose to provide that "A *partnership whose estate has been sequestrated shall not be rehabilitated*" (see **section 128** of the **Insolvency Act**), can in no way justify the inference or interpretation that, because a trust is similarly not a natural person, it can also not apply for its rehabilitation.

36. In this regard it is important to bear in mind, in the first place, that although there was difference of opinion in this regard, the practice of rehabilitating even partnership estates was accepted and applied by some Courts until the coming into operation of the present Insolvency Act, and of section 128 thereof (see **Ex parte Buttner and Others, supra**, **Ex parte Ranchod** 1949 (4) SA 352 (SR) at 354 and **The Law of Insolvency, supra**, at p 304). Although it turned out not to be necessary to decide this point, a Court of this division was prepared to assume that it would have been competent to grant such an order (see **Ex parte Blake** 1925 GWLD 45).

37. There are, in any event, fundamental differences between the legal concepts of a partnership and a trust.

37.1. Partners are personally liable for the debts of a partnership and their personal estates are also liable to be sequestrated in the event of the sequestration of the estate of the partnership (see **section 13(1)** of the **Insolvency Act**). The combination of partners (and their estates) that formed the partnership prior to its estate being sequestrated will then no longer exist like before or be able to apply for a rehabilitation order (see **The Law of South Africa**, 2nd ed, Joubert, vol 19, at p268-269).

In the case of a trust a trustee is not personally liable for the debts of the trust, his/her estate will therefore not be sequestrated as a result of the sequestration of the trust's estate and he/she will therefore in the normal course of events remain a trustee and as such be competent to lodge an application for rehabilitation on behalf of the trust. Even if the trustee would for some reason lose his/her office, the Master would simply appoint a new trustee or trustees (see **section 7** of the **Trust Property Control Act**).

37.2. In any event a partnership is in common law dissolved when its estate is sequestrated (see **Cassim v The Master and Others** 1962 (4) SA 601 (DCLD) at 606D-E) and even if it was possible, it would therefore serve no purpose to entertain an application for the rehabilitation of such a partnership. The same does not apply to a trust.

37.3. The fact that the legislature has, despite the **dicta** in the **Milton** and **Magnum Financial Holdings** cases referred to above, chosen not to amend the Insolvency Act so as to rule out applications for the rehabilitation of trusts (as was done in respect of partnerships), is in itself an indication of an intention that the rehabilitation of a trust would be competent.

37.4. To accept that a trust can apply to be rehabilitated need not present any practical difficulties. The required affidavit can be deposed to by a trustee (if need be, a newly appointed trustee) and, insofar as

any of the provisions of the Insolvency Act might on the face of it appear to envisage a natural person as the insolvent, this can be easily overcome by applying all the applicable provisions as best as practically possible in the circumstances (compare **Ex parte Buttner Brothers, supra**, at 143). The Master has, however, not drawn my attention to any potential problems in this regard. Formal defects can in any event be condoned in terms of section 157(1) of the Insolvency Act.

38. The conclusion to which I have therefore come is that a trust can be rehabilitated.

SETTING ASIDE OF THE SEQUESTRATION ORDER

39. A final sequestration order will only be set aside where there are special and extraordinary circumstances justifying such an order (see **The Law of Insolvency, supra**, at p 310-312 and **Storti v Nugent and Others** 2001 (3) SA 783 (WLD) at 806A-807C).

40. In this regard the following considerations are relevant:

40.1. The estate of the ER Trust had in fact been solvent at the time of its sequestration. Although the first applicant does not explain how this happened, it is not in dispute that she had surrendered the estate of the trust while she was under the **bona fide**, but mistaken, impression that it was insolvent.

40.2. The creditors of the trust have been paid in full.

40.3. As already mentioned, neither the co-trustees nor the Master have opposed the application and it would therefore appear as though they are not interested in the surplus and would have no objection to it being paid over to either the applicant or to newly appointed trustees in the ER Trust.

41. I am of the opinion that, despite the fact that the ER Trust would be entitled to apply for its rehabilitation and then to obtain payment of the surplus in terms of section 116(1), the circumstances of this matter are sufficiently exceptional to justify the setting aside of the sequestration order at this stage.

42. I have been given the assurance by the Master that such an order would not have the effect that the whole process of the administration of the estate will have to be reversed. That would quite clearly not be an option in this case. The immovable properties of the trust have been sold and the creditors have, as already mentioned, been paid in full.

43. In **Ex parte Belcher: In re Die Boven Ko-operatieve Molen Maatschappy Beperkt v Belcher** 1939 WLD 39 the fact that the estate of the applicant had been liquidated was not regarded as a bar to the setting aside of the sequestration order.

44. Although it was regarded as relevant in **Ex parte Patterson** 1931 TPD 374 at 377, it was only one of several considerations which led to the refusal to set aside the sequestration order.

45. In view of the fact that the setting aside of the sequestration order in the estate of the ER Trust was not sought in the original

or amended notice of motion, I have afforded both counsel, the Master and the second and third respondents the opportunity of responding to the possibility of such an order as a mechanism to enable the Master to pay out the surplus to the new trustee/s of the trust, without the need for an application for rehabilitation.

46. I received no response from the co-trustees. Mr Schreuder is of the view that there are no exceptional circumstances which would justify the setting aside of the sequestration order. In his response the Master has also expressed the opinion that "*hier* (is) *geen buitengewone redes vir die wysiging en tersydestelling van die sekwestrasiebevel nie, anders as om die surplus fondse in die Voogdyfonds te onttrek nie.*"

47. In view of what has already been stated above I disagree. The attitude adopted by mr Schreuder and the Master loses sight of the fact that the creditors have been paid in full and, of even more importance, that the trust had in actual fact not been insolvent.

48. As a further reason why the sequestration order should not be set aside, the Master stated that an order of rescission would mean "*dat die eerste applikant 'n verkeerde sekwestrasie aansoek geloods het, net omdat daar nou 'n surplus in die boedel is …"*. This is not correct. It is not in dispute that the first applicant had been under the mistaken impression that the trust was insolvent when she applied for the surrender of its estate. The sequestration order would therefore not be wrong merely because of the surplus, but indeed because it was sought and granted on the basis of incorrect information.

49. In his supplementary heads of argument mr Coetzee has now expressed the view that the setting aside of the sequestration order would be competent, and would be an equitable order to make in the circumstances, and he has requested an amendment to the amended notice of motion to insert therein, as para 1.3, the following:

"Alternatiewelik dat beveel word dat die aanvaarding van die ER Trust se boedel op 18 Januarie 2002 tersyde gestel word."

50. I am of the view that an order setting aside the sequestration order would be competent and justifiable in the circumstances, and that the Master should for the sake of clarity nevertheless be authorised to appoint trustee/s and to pay out the surplus, and in the premises the following orders are made:

1. **The amended notice of motion dated 23 November 2006 is amended by the insertion therein of paragraph 1.3, which reads as follows:**

   "Alternatiewelik dat beveel word dat die aanvaarding van die ER Trust se boedel op 18 Januarie 2002 tersyde gestel word."

2. **The order of 18 January 2002, accepting the surrender of the estate of the ER Trust and sequestrating it, is set aside.**

3. **The Master is authorised and ordered to appoint a trustee or trustees for the ER Trust and to pay out the surplus, held in the Guardians' Fund and**

remaining in the administration of the estate of the ER Trust, to such trustee/s.

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C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

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