IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 9543/2009

In the matter between:

STEVEN PALMER AND OTHERS	Applicants
And	
RYNO ENGELBRECHT	1st Respondent
CJ PRETORIUS	2nd Respondent
MI PATEL N.O	3rd Respondent
MAGISTRATE DE BEER	4th Respondent

JUDGMENT

MATOJANE, AJ

Introduction

[1] The applicants, who are employees of Absa Bank Limited, seek an order that:-

1. The order granted by fourth respondent on 8 April 2009, authorizing the warrants of arrest in respect of the applicants, be set aside;

2. Any warrant that had been issued in pursuance of such order, be set aside;

3. First, second and third respondents be interdicted from issuing any warrant of arrest pursuant to such order.

[2] In addition, the applicants seeks costs order de *bonis propriis* against first respondent, alternatively against first, second and third respondents, jointly and severally, as between attorney and own client. This order is being sought on the basis that the liquidators ought to have realized that they were not properly authorized and mandated to hold an enquiry, in particular after having been alerted thereto by Absa's attorney.

[3] First, second and third respondent do not oppose the relief sought against fourth respondent's order pertaining to the warrants of arrest and abide the decision of the Court, they however oppose the cost order sought and in turn seek a cost order against the applicants. Fourth respondent has also indicated that he will abide the decision of the Court.

[4] The first, second and third respondent are duly appointed joint liquidators of a company called Eveology Network (Proprietary) Limited which was placed under provisional and subsequent final liquidation on 8 June 2005, at the instance of one Sharon Holmes, a director and 50% shareholder of the company.

[5] The undisputed facts, as they appear from the affidavits filed, are shortly as follows. Eveology was indebted to Absa in an amount R2 704 800.21 arising from certain money lending transactions concluded between those two parties. Absa instituted an action against Sharon Holmes and one Linda Remke, in their capacities as sureties in respect of the indebtedness of Eveology towards Absa for the payment of the said amount. Holmes and Remke defended the action, and instituted a counterclaim against Absa. This claim was based on alleged cession by Eveology of a claim for damages against Absa, arising from Absa's alleged breach of contract concluded between Eveology and Absa.

[6] Absa contended that, prima facie, this cession constituted an improper disposition and a collusive transaction, which should be set aside. The cession had allegedly been effected verbally, one

month before the provisional liquidation of Eveology. This view was shared by the liquidators.

[7] The liquidators at the instance of Absa Bank caused a meeting of creditors to be convened on the 19th of August 2008 for the purpose of investigating the circumstances surrounding the cession of the damages claim against Absa to Holmes and Remke prior to the company's liquidation. It was agreed that the costs of the enquiry would be paid by Absa and Absa's attorneys, Sandenbergh Nell Haggard would be appointed and instructed to conduct such an enquiry.

[8] At this meeting, an affidavit deposed to by one Barnaschone, an attorney who alleged that he represented certain proved creditors, was placed before the presiding officer and an application was made in support of the closing of the meeting, without the enquiry being conducted, on the basis that, first of all, creditors that Barnaschone represented wished to instruct the liquidators to appoint different attorneys based on Sandenberg Nel Haggard conflict of interest and, secondly, to request the liquidators to convene an enquiry in terms of section 415 of the Company's Act, 1973 to interrogate various applicable Absa Bank employees in relation to Absa contribution to the demise of Eveology.

[9] A special general meeting of creditors of the company was convened on the 22 October 2008 to prove claims and adopt resolutions empowering the liquidators among other things, to have the disposition set aside and to conduct an enquiry. The liquidators, instructed by the creditors whom Barnaschone purported to represent, requested the meeting to be postponed to 8 April 2009 with a view to conducting an enquiry. It is common cause that the subpoenas were properly issued and served. Applicants failed to attend the meeting and fourth respondent authorized the warrants for their arrest as no explanation was provided for their failure to appear. Although the warrants of arrest had been authorized, they were never issued pursuant to that authorization and have in fact lapsed as the attendance was only required for the meeting of the 8th of April 2009 which has already taken place. This should have been the end of the matter.

The authority of the Liquidators to issue subpoena

[10] In terms of the arguments presented in court and those advanced in the heads of argument of the applicant, counsel for applicant argued that the liquidators, when they sought to convene that meeting and to obtain subpoenas for the purposes of the interrogation ought to have disclosed to the presiding officer that Sanderbergh contended on behalf of particular witnesses that the

liquidators lacked necessary authority to apply for those subpoenas to be issued. Section 386(1)(d) of the Companies Act, effectively disposes of this contention, the liquidator is in terms of this section empowered to summon any general meeting of the company or its creditors for the purpose of interrogating applicants. Thereafter, it is magistrate's duty to issue a subpoena if he or she is satisfied that the person to be interrogated can give material information as envisaged by section 414(2) of the Act. The liquidator does not require authority or a mandate from creditors to request the magistrate to issue a subpoena. It is a statutory power that he has. See **Firstrand Bank Limited v Magistrate Germiston 2004(2) All SA 629 at 640.**

[11] The magistrate is authorized by Section 414(2)(a) of the Companies Act to subpoena any person:-

(a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company , or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting , including any such meeting which has been adjourned, for the purpose of being interrogated.

[12] It is for the presiding officer to form the opinion that the proposed witness "may be able to give material information concerning the company or its affairs" before he could subpoena any person. In his reasons for his ruling it is clear that the magistrate met the requirements of section 414 of the Companies Act. The magistrate was entirely within his rights to issue a subpoena and based on the return of service, to issue a warrant of arrest in terms of section 66(1) of the Insolvency Act.

[13] It is obvious from the reading of the respondent's affidavit that prior to the subpoenas being issued, Sanderbergh was told on the 25th of March 2009 that there was to be a meeting of creditors where Absa employees would be interrogated, he knew that they would be subpoenaed and wanted advance notice, in my view, the liquidators were under no obligation to give notice of the subpoenas to Sanderbergh as the subpoenas were validly issued and the warrants properly authorized.

[14] In prayer 2 of the notice of motion, applicants seeks an order that any warrant of arrest that had been issued be set aside. As correctly stated by Mr Woodland SC for the respondents, this being

a review of the Magistrate, the applicant should have brought himself within the ambit of the Promotion of Administrative Justice Act 3 of 2000 as it was solely the statutory function of the presiding officer.

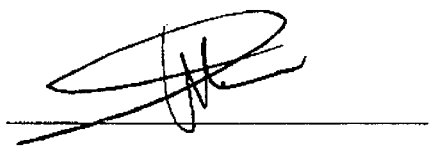
[15] Counsel for applicant amended prayer 3 in his argument by saying that the liquidators should be ordered not to cause the warrant to be issued. Section 66(1) of the insolvency Act which applies through section 416 of the Companies act provides that if a person summoned under section 64 fails to appear at a meeting of creditors in answer to the summons, the officer presiding at such meeting may issue a warrant authorizing any member of the police force to apprehend the person summoned and bring him before the presiding officer. It follows that the liquidators do not have the statutory power to cause the warrants of arrest to be issued.

[16] In view of my finding that the relief that applicant seeks is not competent against the liquidators, I find no possible basis upon which they can be ordered to pay the special punitive costs order prayed for by the applicants.

[17] In the result the following order is made;

1. The application is dismissed with costs

2. The fourth respondent's order authorizing the issue of the warrants of arrest in respect of the appellants is set aside.



MATOJANE J