REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	**NOT** REPORTABLE
(2)	**NOT** OF INTEREST TO OTHER IUDGES

CASE NUMBER: A45004/2023

DATE: 12th January 2024

In the matter between:

AVARIS GROUP (PTY) LIMITED Appellant

and

DU PLESSIS, JOHANNES HENDRICUS N O

(In his capacity as Joint Liquidator of
Beth and Bev Packaging Products CC) First Respondent

FORTEIN, KAREN N O

(In her capacity as Joint Liquidator of
Beth and Bev Packaging Products CC) Second Respondent

Neutral Citation: *Avaris Group v Du Plessis NO and Another (A45004/2023)* **[2024] ZAGPJHC ---** (12 January 2024)

Coram: Adams J *et* Thupaatlase AJ

Heard: 09 November 2023

Delivered: 12 January 2024 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 12 January 2024.

Summary: Appeal from the Magistrates Court – Close Corporation – winding up – property of liquidated company – property passing to liquidators – warrant to search for and take possession of company's property – property concealed or otherwise unlawfully withheld from liquidators – warrant may be issued by Magistrate if there are reasonable grounds for suspecting that property belonging to the insolvent estate is concealed or unlawfully withheld from the liquidators – Insolvency Act 24 of 1936, s 69(3) –
Appeal dismissed with costs.

ORDER

On appeal from: The Kempton Park Magistrates Court (Magistrate Mammburu sitting as Court of first instance):

(1) The appellant's appeal is dismissed with costs.

JUDGMENT

Thupaatlase AJ (Adams J concurring):

[1]. This is a Full Bench appeal relating to the validity of a search and seizure warrant issued by the learned Magistrate in the Kempton Park Magistrate's Court ('the Magistrates Court') in terms of section 69 (3) of the Insolvency Act, Act 24 of 1936 ('the Act'). The first and the second respondents[1], who are the joint liquidators of Beth and Bev Packaging CC (in liquidation) ('Beth and Bev'), obtained a warrant from the Magistrate on the basis of a reasonable belief that assets belonging to the liquidated Beth and Bev, a close corporation in liquidation, were being dissipated and/or concealed.

[2]. The application to issue the warrant as contemplated by the Act was served on the appellant[2] who proceeded to oppose the issuing of such a warrant to search and seize. Despite the opposition by the appellant, the

[1] First and Second Applicants in the Magistrates Court

[2] The respondent in the Magistrates Court.

learned magistrate issued the warrant as applied for by the joint liquidators. It is that order, authorising the issue of the search and seizure warrant, which is the subject of this appeal.

[3]. The notice was served on the basis of the majority decision in *Cooper NO v First National Bank of SA Ltd*[3], where it was held that a warrant under section 69(3) should not be issued without notice to any and all person/s affected, save where the items to which the warrant relates have allegedly been concealed in the sense that they had been hidden with a view to denying or preventing their recovery.

[4]. *Cooper NO (supra)* endorsed an earlier decision in *Putter v Minister of Law and Order and Another NO*[4], where it was held that the *audi alteram* rule should be applied where a person holding property openly and maintaining that such possession is lawful, since the issuing of a warrant would prejudicially affect the rights of such person.

[5]. Based on certain information and reports, the respondents deposed to a founding affidavit and subsequently an answering affidavit. Both founding and answering affidavits were deposed to by the first respondent and confirmed by the second respondent, who deposed to a confirmatory affidavit.

[6]. The respondents (as the Liquidators of the CC) asserted in the papers in the Magistrates Court that the assets of the close corporation had been dissipated, alienated, concealed or subsumed as the assets of the appellant, Avaris Group (Pty) Ltd. This was vehemently denied by the appellant during the hearing before the magistrate. The appellant sought to show that any assets that previously belonged to Beth and Bev were lawfully acquired, through cash purchases. Needless to say, the assertion was rejected by the magistrate.

Grounds of Appeal

[7]. The main point raised on appeal by the appellant relates to whether the magistrate had reasonable belief that assets were being dissipated or concealed as alleged by the joint liquidators. The appellant submitted that the

---

3 *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA).

4 *Putter v Minister of Law and Order and Another NO* 1988 (2) SA 259 (T).

magistrate wrongly relied on hearsay evidence in issuing a warrant contemplated by section 69 (3) of the Act.

[8]. It was further stated that the magistrate erred in law in finding that a reasonable suspicion as required by section 69(3) could be formed based on inadmissible hearsay evidence. Additionally, so the appellant contends, the magistrate erred in finding that the appellant was concealing the assets of the Beth and Bev as the liquidators had an inventory of all the assets and were acutely aware where the assets were situated.

[9]. It was further submitted by the appellant that the learned magistrate erred in drawing inferences to justify the suspicion that the appellant was concealing assets, as such an inference was not the most probable inference that could be drawn on the proven facts.

The Law

[10]. The gravamen of the criticism of the magistrate on the papers and during argument centred around the jurisdictional requirements of section 69 (3) of the Act. The following provisions of the section are relevant here:

‘(2) If the trustee has reason to believe that any property or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to the insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate’s jurisdiction, he may issue a warrant of search for and take possession of that property, book or document.

(4) Such a warrant shall be executed in a like manner as a warrant to search stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.’

[11]. A reasonable suspicion as envisaged under s 69(3), so the magistrate concluded, was established and as such a warrant of search and seizure was issued.

[12]. The appellant is challenging that finding, hence this appeal to the Full Bench of this Division. As indicated above, the validity of the warrant is challenged on several grounds. The principal objection being that the magistrate could not have found that there are reasonable grounds because the information was derived from inadmissible hearsay evidence. The other ground was that it was unnecessary to obtain a warrant as the respondents knew where the goods were stored and there was no case to suggest that there was concealment of any of the goods.

[13]. The judgment of the magistrate shows that he was indeed satisfied that there was a reasonable suspicion that acts contemplated in the subsection were taking place. He dealt with the issue of ownership of some of the property that were allegedly bought from the close corporation. The court found no merit in the appellant's allegations that certain assets which form the subject matter of the warrant, were acquired by the appellant with money emanating from an independent source.

[14]. The appellant argued that the learned magistrate erred in making a finding regarding ownership of the property. It is trite that the magistrate's decision to issue the warrant is not dispositive of any ownership rights.

[15]. In *Cooper (supra)* at para 4 of the minority judgment it was held that:

'The decision to issue a warrant is in no sense an adjudication of any substantive issue, existing or potential, between the trustee and the third party or between the insolvent and the third party. Success in obtaining a warrant and success in its execution brings the trustee no more than provisional physical possession of the relevant asset. The trustee's continued possession is open to challenge in the courts and the customary gamut of remedies (review proceedings, prohibitory interdicts, vindicatory actions, declaration of right, etc.) is available to the third party. A successful challenge will bring an end to the trustee's possession.'

[16]. In *Naidoo and Others v Kalianjee NO and Others*[5], the court quoted with approval the minority judgment regarding the underlying purpose of the section. At para 25 it held as follows:

'The underlying purpose of a seizure in terms of s 69 of the Act is fundamentally different. As stated by Marais JA in *Cooper*:

---

[5] *Naidoo and Others v Kalianjee NO and Others* 2016 (2) SA 451 (SCA).

"[11] It is to disable the insolvent and anyone else who may be physically in possession of such assets from alienating or encumbering them to the prejudice of creditors. The purpose is achieved *inter alia* providing for the trustee to have physical possession of them in the case of movables or, in case movables under attachment or immovables, by having the relevant functionaries place caveats against assets.

[12] Despite all that, but for s 69, there would remain a window of opportunity for a third party in possession of a movable asset, the ownership of which is vested in the trustee, to alienate it in such that it could not be vindicated by the trustee…. The longer the third party can resist handing over the asset, the more extensive the opportunities of alienating the asset to another for value to the prejudice of creditors of the insolvent may be…Hence the need for a provision such as s 69".'

[17]. The argument by the appellant that section 21 of the Criminal Procedure Act, Act 51 of 1977 ('the CPA') is akin to s 69 is misplaced and cannot be sustained. In *Minister of Safety and Security v Van der Merwe and Others*[6], the court described the overall purpose of s 21 of CPA as being to find and seize evidence of the commission of a crime which may be preserved for use, should a prosecution follow. It was held that the section is an important weapon 'designed to help the police to carry out efficiently their constitutional mandate of, amongst others, combating and investigating crime'.

[18]. *Naidoo* further provided lucid clarity on the differences between s 21 and s 69(3). At para 26 of the judgment the following is stated: -

'In the light of these fundamental differences, a warrant under s 69 can neither be construed as being akin to a warrant issued under s 21 of the Criminal Procedure Act, nor necessarily subject to the same limitations and restrictions attendant upon criminal warrants. In any event, a distinction must be drawn between the issue of a warrant on the one hand, and its execution on the other. As s 69(4) only requires a warrant to be executed and not issued in a like manner as a warrant to search stolen property, the provisions relating to the issue of warrants in criminal proceedings are of no relevance to a s 69 warrant'.

[19]. Having dealt with the distinction between the two sections, I now turn to deal with the purpose of s 69. The matter was dealt with in the case of *Bruwil Konstruksie (Edms) Bpk v Whitson NO and Another*[7], which described the section as draconian and proceeded to state the following at page 711:

---

6 *Minister of Safety and Security v Van der Merwe and Others* 2011 (2) SACR 301 (CC).

7 *Bruwil Konstruksie (Edms) Bpk v Whitson NO and Another* 1980 (4) SA 703 (T).

'It seems to me that the purpose of the section is clearly to enable the liquidator or trustee to obtain speedy possession of goods belonging to an estate which he suspects, or believes on reasonable grounds, to be assets of the estate. The safeguard to the ordinary public lies in the words "reasonable belief" or "reasonable grounds" for suspecting. … whether the words "reasonable grounds" imply that it should amount to a *prima facie* case in a court of law. Unfortunately, there is no guidance or precedent on this particular section but, in my view, it contemplates a lesser burden than *prima facie* in a court of law, otherwise there would be hardly any purpose in the section. The section is obviously designed to enable a liquidator or trustee to obtain possession of assets speedily and to place the onus on the person in possession to prove his ownership or right of possession, and to remove the burden from an estate instituting action first and discharging the onus of proving that the estate is the owner. If this is so, it seems to me that it would be wrong to equate the duty resting on a liquidator or trustee under this section with that of a litigant in proving a *prima facie* case. It seems clear that sometimes less would suffice. However, he can never be free of a burden before he applies to the magistrate and makes the statement that he had reasonable grounds for suspecting that these are assets belonging to the estate.'

[20]. The court further held at page 711E as follows:

'It seems to me that the words "reasonable grounds" imply an investigation of some kind. The question is how far does he have to go in his investigation? It seems clear that the reasonable suspicion which must exist must be objective and not a subjective one, as far as the particular liquidator or trustee is concerned.'

Duty of a Magistrate in terms of section 69(3) of the Act

[21]. A magistrate, to whom application is made by a trustee or liquidator of a company for a warrant to search for and seize an insolvent's property in terms of s 69(3) of the Act, has a duty to insist on the facts being placed before him/her on which he/she could then make a decision to issue a warrant. The magistrate is required to consider all the facts that are deemed appropriate to determine whether there are reasonable grounds that a warrant of search should be issued or not.

[22]. The question to be considered is whether a Magistrate can rely on hearsay evidence to determine whether a search and seizure should be issued.

[23]. As indicated elsewhere in this judgment, a considerable amount of time was spent on this issue. The learned magistrate also spent some time dealing with the admission of hearsay evidence. The magistrate has to rely on the

evidence provided by the liquidator or trustee as the case may be. It is also important to note that one of the most important duties of the liquidator is to establish what the assets of the estate are, whether they can be found and then ensure that the assets are properly secured, stored and insured, where applicable.

[24]. The affidavit of the respondents shows that they acted on information received and that the veracity of the information was confirmed when they conducted further investigations. It is not denied by the appellant that a substantial portion of the assets of Beth and Bev are currently being used to conduct a business of the same nature. The business is being conducted from the same premises as the liquidated Beth and Bev and by the same people who traded under the name and style of Beth and Bev.

[25]. It is apparent that the premises are the same that Beth and Bev rented to conduct its business before applying for voluntary sequestration. The answering affidavit does not explain if it entered into a new lease agreement with Eight Nine Delville CC, which is the owner of the premises.

[26]. The manner in which the assets of Beth and Bev were acquired is also strange and rather peculiar, and in itself was more than enough reason to raise eyebrows. The property was allegedly sold to the appellant by payment of cash. It is not explained by the appellant what were the source of such cash. Whilst that may have been an innocent transaction, the timing thereof can justifiably lead to an inference that assets were being dissipated or subsumed into the new entity.

[27]. In order to draw that inference the chronology of events is telling. The CC, Beth and Bev, was placed under provisional sequestration on 26 May 2022. In the meantime, the appellant had bought assets worth R5 727, paying the purchase price in cash on the same day. The appellant had previously paid R172 500 to acquire assets on 16 February 2022 and another asset was bought on 04 April 2022 for R57 500 and a month earlier on the 04 March 2022 for R218 500. Other assets were sold to the appellant on 12 May 2022. This was for a purchase price of R109 500. The company under which the assets are

currently housed was acquired as a shelf company on 24 March 2022. It is not unreasonable to look at the aforegoing, especially the cash transactions for substantial sums of money, possibly implicating the provisions of the Financial Intelligence Centre Act, with a great deal of suspicion.

[28]. The respondents filed the founding affidavit before the learned magistrate and attached an application by the member of Beth and Bev for voluntary surrender. In the application the member disclosed that the close corporation has not operated a business since 2020 and that at the same time it laid off all its staff. This is of course contrary to the assertion by the appellant's deponent that he stayed on until 2022 to train new staff. His affidavit was deposed to on 12 May 2022. The inconsistency in the appellant's case, which, in my view, is material, is instructive and iterated the suspicion already aroused by the somewhat questionable cash transactions in terms of which the assets of the liquidated CC was supposedly sold to the appellant at a time, which, at the very least, seems rather suspicious. Little wonder then that the first and the second respondents became suspicious.

[29]. It was submitted on behalf of the appellant that the fact that the liquidator stated that 'whilst fulfilling our statutory duties imposed on us as liquidators of Beth and Bev in collecting the debts due to the insolvent estate, it came to our attention that the former member of Beth and Bev and her daughter, with her husband, Paul Roux Dreyer, are operating the same business under the style and name Avaris Group (Pty) Ltd (appellant), with the assets of Beth and Bev', amounts to hearsay evidence.

[30]. The argument is that based on this statement, the magistrate erred in issuing a warrant to search and seize. The argument is misplaced for various reasons. As required by law, the liquidators conducted further investigations in order to verify the information so received. The liquidators were able to establish the creditors of the insolvent estate and they were also able to establish that the property of Beth and Bev was judicially attached by way of automatic rent interdict. They attached the application by the Beth and Bev for voluntary surrender.

[31]. This was with a view to demonstrating to the court that their suspicion was reasonable. It is worth noting that except for the appellant attacking what it alleged is an incorrect application of the hearsay evidence rule, there was no attempt to deal with the requirements of section 69(3). In that regard the submissions by the appellant were, to say the least, of very little assistance to this court. This much is regrettable. There is enough case law that deals with the s 69(3) requirements and its purpose and the duty of a magistrate dealing with the said provision. If the appellant had engaged with those issues sensibly, the appeal would probably have been rendered unnecessary. The appellant's focus in this appeal on the supposed inadmissibility of hearsay evidence was misplaced and ill advised.

[32]. The learned magistrate dealt with section 3(1) (c) of the Law of Evidence Amendment Act 45 of 1988.

[33]. The appellant criticises the learned magistrate for dealing only with factors 1 to 4. The submission is that all factors ought to have been considered. The affidavit of the respondents (the liquidators) deals with the proof of what they found upon the investigation of the information received.

[34]. As I understand the reasoning of the learned magistrate, he was satisfied that, whilst the respondents may have relied on information which can be characterised as hearsay, that is not the do all and the end all of the matter. By the time the respondents approached the court they had done their own investigations to verify that information. The learned magistrate was not asked to make a decision whether or not to issue a warrant based on hearsay, but rather on the outcome of the 'investigations' that the respondents had conducted.

[35]. The learned magistrate commented on the nature of the evidence. As stated above, reasonableness contemplates a lesser burden than *prima facie* proof in a court of law. The learned magistrate commented and correctly held that the issue of the warrant was not dispositive of the matter. And finally, the fact that the reasonable suspicion as contemplated by section 69 (3) requires much less standard of proof than the civil standard of proof. It follows that the

nature of evidence and the probative value cannot be the standard envisaged by section 3(1) (c) of Act 34 of 1988. I am satisfied that the conclusion of the learned magistrate cannot be faulted.

[36]. The issue of inferences in the context other than criminal cases was discussed in *Skilya Property Investments (Pty) Ltd v Lloyds Underwriting*[8] and the court held as follows:

'Where more than one inference is possible on the objective proved facts, the Court may by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not only the reasonable one. And in this context "plausible" has the connotation of "acceptance, credible, suitable".'

[37]. On the basis of the evidence presented to him, the learned magistrate made concluded that on the available evidence, which was plausible, there could be and indeed was a reasonable belief that the assets of the estate were being concealed or unlawfully held by the appellant.

[38]. This is hardly surprising if one takes an objective view of the transactions that took place between the application for voluntary surrender and the supposed 'cash sale' transactions that took place between Beth and Bev and the new entity, Avaris Group (Pty) Ltd. The acquisition of these assets made it possible to commence the same business and even on the same premises. The plausible inference is that the appellant operated an *alter ego* of Bev and Beth. The same premises, same management personnel and same premises. The magistrate's reasoning in that regard cannot be faulted.

[39]. For all of these reasons, the appeal to the Full Bench should fail.

[40]. As for costs, there is, in my view, no reason to deviate from the general rule that the successful party in legal proceedings should be awarded costs.

Order

[41]. Accordingly, the following order is made: -

(1) The appellant's appeal is dismissed with costs.

---

[8] *Skilya Property Investments (Pty) Ltd v Lloyds Underwriting* 2002 (3) SA 765 (T) at 780G -781B.

T THUPAATLASE
Acting Judge of the High Court,
Gauteng Division, Johannesburg

HEARD ON:	9th November 2023
JUDGMENT DATE:	12th January 2024
FOR THE APPELLANT	Advocate Sias B Nel
INSTRUCTED BY:	Brazington & McConnel Attorneys, Hatfield, Pretoria
FOR THE FIRST AND THE SECOND RESPONDENTS:	Advocate W C Carstens
INSTRUCTED BY:	Hartzenberg Attorneys, Hatfield, Pretoria