IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case nos: 50522/2021 & 29020/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ✓

In the applications of:

PREMIER FMCG (PTY) LTD Applicant in both applications

and

FARHAAD JOOSUB ABOO BAKER Respondent under case no 50522/2021

and

FARHAAD DISTRIBUTORS (PTY) LTD Respondent under case no 29020/2022

JUDGMENT

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[1] This judgement relates to two applications to strike out material in affidavits (and to strike out annexures to those affidavits), brought as interlocutory applications by the respondents in respectively a sequestration and a liquidation application, on the basis that the offending material constitutes inadmissible evidence.

[2] In what follows, I will refer to the two striking-out applications (which were heard as one) as either "the applications" or "the striking-out applications", and to the sequestration and liquidation applications as such, i.e. as "the sequestration application" and "the liquidation application".

[3] The parties bringing the applications are the respondents in the sequestration and liquidation applications, viz respectively Mr Farhaad Joosub Aboo Baker ("Mr Baker") and Farhaad Distributors (Pty) Ltd ("Distributors"). The respondent in the applications is the applicant in the sequestration and liquidation applications, Premier FMCG (Pty) Ltd ("Premier").

[4] Before me, Mr Baker and Distributors were represented by Mr Van der Merwe SC, and Premier was represented by Mr Lourens.

[5] The background to the applications is essentially this:

[5.1] Premier applied for the sequestration of Mr Baker's estate on 7 October 2021, under case no 50522/2021.

[5.2] The founding affidavit in the sequestration application relied extensively on the evidence of Premier's former senior credit controller, a certain Ms Van Zyl, given at an enquiry that was held in terms of sections 417 and 418 of the Companies

Act 61 of 1973 into the affairs of ABC Fire Projects (Pty) Ltd (in liquidation), a company in which Ms Van Zyl had an interest.

[5.3] Mr Baker filed notice to oppose the sequestration application, and on 15 November 2021 filed a three-page "Provisional Answering Affidavit", in which he briefly denied the validity of Premier's claim against him and indicated the following (I quote from paragraph 5 of Mr Baker's affidavit):

> I intend bringing an application to strike out the bulk of the founding affidavit, as the Applicant unlawfully utilised evidence procured at an insolvency enquiry other than my own evidence. This is plainly inadmissible. That inadmissible evidence has been interwoven into the merits of the matter. I will bring a substantive … application to strike those allegations.

[5.4] Premier filed a replying affidavit in the sequestration application on 2 December 2021, protesting that there is no procedural provision for a provisional answering affidavit, and that Mr Baker hadn't answered the allegations against him.

[5.5] On 27 May 2022, Premier applied for Distributors' liquidation, under case no 29020/2022. The founding affidavit in the liquidation application also relied extensively on Ms Van Zyl's evidence at the enquiry. Distributors filed notice of intention to oppose.

[5.6] On 26 July 2022, Distributors' attorneys indicated in a letter to Premier's attorneys that they intended filing a similar provisional answering affidavit in the liquidation application, and similarly applying for a striking-out in that application (apparently, no such provisional answering affidavit has as yet been filed in the liquidation application; but nothing turns on that).

[5.7] This led to an impasse between the parties, which was resolved at a case management meeting before the Deputy Judge President relating to both matters (sequestration and liquidation) on 8 August 2022, at which (a) Mr Baker and Distributors repeated their intention to apply to strike out and added that they required this to be resolved and, in addition, required extensive discovery from Premier, before they could file proper answering affidavits, and (b) the case direction was given that Mr Baker's and Distributors' threatened striking-out (and now also discovery) applications were to be launched within a certain time.

[5.8] Mr Baker and Distributors then each brought the striking-out applications on 5 September 2022, to which Premier answered.

[5.9] I pause to mention that the striking-out applications also each included an application for discovery in terms of Rule 35(13). But that part of the applications has fallen away because Premier did provide documentation, and so I am only asked to make an agreed order in respect of that component to the effect that the costs of thereof are to be costs in the main application, which is what I will do below.

[6] The two sides' stances in the striking-out application, both in their affidavits and in their heads of argument, can fairly be described as follows:

[6.1] Mr Baker and Distributors' stance is that there is firm case law (*Langham & Ano NNO v Milne & Others* 1961 (1) SA 811 (N); *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N); *O'Shea NO v Van Zyl and Others NNO* 2012 (1) SA 90 (SCA)) to the effect that evidence procured at an enquiry is admissible only

against the party who gave evidence (in this case, Ms Van Zyl or her company), and not against a third party (in this case, Mr Baker and Distributors).

[6.2] On that basis, Mr Van der Merwe for Mr Baker and Distributors argues that the material in question offends against this firm rule, and should be struck out now rather than later, so that when they come to file their answering affidavits they have only to deal with evidence that is admissible against them.

[6.3] Premier, on the other hand, argues that these are matters that should not be decided now. They should be decided as part of the main application. Mr Baker and Distributors should file proper answering affidavits, and the striking-out applications can then properly be decided at the main hearing, in the light inter alia of the content of those proper answering affidavits.

[7] I asked Mr Van der Merwe at the outset whether the striking-out applications were brought in terms of Rule 6(15) (material which is scandalous, vexatious or irrelevant), or simply in terms of the common law, as an objection to inadmissible evidence. As I understood him, Mr Van der Merwe said that the applications were brought on the latter ground, in accordance with Rule 6(11) ("interlocutory ... applications incidental to pending proceedings may be brought on notice ... and set down at a time ... as directed by a judge"). In this, I think, Mr Van der Merwe was correct.

[8] That being so, I also put to Mr Van der Merwe my concern, based on *Theron and Ano NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA) para 26 and *Louis*

Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others 2019 (3) SA 97 (SCA) para 33, both to the effect that, to quote Wallis JA in *Theron*,

> [i]n general, ... the desirable course to be followed in application proceedings, where the affidavits are both the evidence and the pleadings, is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing.

[9] Mr Van der Merwe conceded the force of my concern and that the DJP's direction referred to above did not mean that I was bound to decide the striking-out applications. But he contended that the inadmissibility was so clear that this was an appropriate case for interlocutory relief.

[10] In so arguing, Mr Van der Merwe very fairly referred me to what I think remains the leading case on the topic, Price J's judgement in *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W), in which the learned judge dismissed an interlocutory application to have passages in replying affidavits struck out on the basis that they contained irrelevant and hearsay evidence, saying the following on pp 176-177 (needless to say, Mr Van der Merwe referred me to the case whilst steadfastly maintaining that it is entirely distinguishable):

> I think that the application to strike out is premature. Such an application must, in my opinion, be made to the Court that tries the application at the time the application is before the Court for a decision on the merits. The course now taken of [applying] ... in a preliminary application to strike out would lead to the very greatest inconvenience and difficulty.
>
> After all, what is the real nature of the objection? This is not an objection to a pleading, it is an objection to evidence which is proposed to be tendered to the Court that hears the application. How can a Court which is not hearing the application disallow evidence which it is proposed to tender later

on as irrelevant to the merits of the dispute? The Court which ultimately decides the application may have quite a different view as regards the relevancy of some of the passages when all the evidence is presented to it and the matter has been fully argued.

A great waste of time, energy and expense is involved in the procedure which Mr Miller has followed. First of all, there must be a full-dress argument or, at any rate, very considerable argument on the merits in order to enable the Court to decide whether the passages objected to are or are not relevant. Then a decision as regards the relevancy of various passages must be given .... I do not agree that Mr Miller's client is entitled, at this stage, to a decision on this issue. It is evident that what the petitioner is really seeking is legal advice from the Court. The Court asked Mr Miller why he himself could not advise his client to ignore those allegations which he considered were irrelevant or based on hearsay evidence, and he indicated that if his advice turned out to be erroneous his client would be at a disadvantage. The petitioner wishes to be told by this Court that he need not deal with certain facts alleged, but this Court is not trying the merits of the dispute and those facts may turn out to be important when all the evidence is before the Court.

[11] In my view, common sense and the authority of *Elher*, *Theron* and *Louis Pasteur* is in favour of the proposition that an interlocutory application to strike out material in affidavits in application proceedings on the basis of inadmissibility should very rarely (if ever) be granted – such relief should be restricted to the very clearest cases of inadmissibility, where there is no possibility of the court in the main application arriving at a different conclusion (and, of course, if the case is so clear, then there seems no good reason why that clear decision shouldn't be left for the court in the main application).

[12] So that brings me to the question of how clear and incontrovertible Mr Baker's and Distributors' objection to the evidence is? See what follows.

[13] I hope I am not doing a disservice to either Mr Van der Merwe or Mr Lourens (both of whom handled their arguments with aplomb) if I say that I think that, much like our law in this regard (see the developments which I sketch in paragraphs 14.3 to 14.6 below), the question of the precise basis for the rule as outlined in the cases on which Mr Van der Merwe relied only crystallised in the context of these applications in the course of the argument.

[14] In this regard:

[14.1] Firstly, it is indeed so that as Mr Van der Merwe argues, *Langham*, *Gilbert Hamer* and *O'Shea* are clear authority in favour of the inadmissibility of the evidence of Ms Van Zyl (not that of Mr Baker; his and Distributors' legal team has never argued the contrary) and any material which is based thereon.

[14.2] But what is the basis of that inadmissibility? Is it a rule relating to insolvency enquiries? Or is it broader than that?

[14.3] That question was approached, but not firmly answered, by Rogers AJ (as he then was) in *Engelbrecht NO & Others v Van Staden & Others* [2011] ZAWCHC 447 (6 December 2011).

[14.4] The circumstances of *Engelbrecht* were similar to those of *Langham*, *Gilbert Hamer* and *O'Shea*. In essence, the liquidators of various companies sought to utilise admissions made by employees of those companies in the course of an insolvency enquiry against the family trust which controlled the companies, but which neither employed the employees nor authorised their testimony. Rogers AJ pointed

out that the only conceivable basis for inadmissibility appeared to be the hearsay objection, and that the modern law regarding the admissibility of hearsay evidence as regulated by section 3 of the Law of Evidence Amendment Act 45 of 1988 ("the Hearsay Act") wasn't in force at the time of any of the decisions other than *O'Shea*, and hadn't been raised in *O'Shea*. On that basis, he arrived at the *obiter* conclusion that the basis for inadmissibility is indeed the rule against hearsay, and that (paragraph [21])

> I am ... inclined to think that a court may in appropriate cases permit a litigant to rely on evidence given by X at a s 417 enquiry for purposes of making out a case against Y provided that would be in the interests of justice, having regard to the requirements laid down in s 3 of Act 45 of 1988.

[14.5] Much the same conclusion as that of Rogers AJ in *Engelbrecht*, on much the same *obiter* basis and in much the same circumstances, was subsequently reached by Griesel J in *Von Wielligh Bester NO and Others v Merchant Commercial Finance (Pty) Ltd and Others* [2014] ZAWCHC 16 and by Binns-Ward J in *Van Zyl & Ano v Kaye NO & Others* 2014 (4) SA 452 (WCC).

[14.6] Binns-Ward J's judgement in this regard in *Van Zyl* was fully reasoned. He concluded as follows in paragraph [44]:

> I agree with the opinion expressed by Rogers AJ in *Engelbrecht* that the exclusion ... would appear to have been founded on the hearsay rule. For all these reasons I have concluded that the evidence adduced at the enquiry is amenable to being introduced in the current proceedings in terms of s 3(1)(c) of Act 45 of 1988, subject, of course, to the requirements of that provision being satisfied.

[15] In the event, although the courts in *Engelbrecht*, *Von Wielligh Bester* and *Van Zyl* all concluded (with varying degrees of tentativeness) that the basis for inadmissibility is the rule against hearsay evidence and not something more specific to enquiries, in all three of those cases they went on to consider whether the evidence should be admitted in terms of the Hearsay Act and they decided against such admission (in *Engelbrecht* and *Van Zyl* that the interests of justice didn't justify it; in *Von Wielligh Bester* that the applicants hadn't actually asked for hearsay-admissibility).

[16] Let me, then, add my voice to the chorus: our law is a law of principle and not of casuistic development: the recent cases cited by me above are correct in their conclusion that the basis for inadmissibility is indeed the rule against hearsay, with the result that a court must, when asked, consider whether the evidence should not be admitted in terms of the provisions of the Hearsay Act.

[17] I did not understand Mr Van der Merwe to in the least dispute this conclusion of mine.

[18] That, in my view, is sufficient to dispose of the striking-out applications – for so long as the objected-to evidence *might* be admitted by a court having regard to all of the factors outlined in section 3(1)(c) of the Hearsay Act, it would be inappropriate for me to bind a later court by ruling otherwise now. The situation falls squarely within Price J's reasoning (with which, for what it is worth, I fully associate myself) in *Elher*.

[19] Mr Van der Merwe sought to persuade me otherwise. He pointed out that Mr Lourens hadn't (yet) asked for hearsay-admissibility in terms of the Hearsay Act, he

argued that in those circumstances this is as clear-cut a case as I postulated in paragraph 11 above is necessary, and he suggested that *Von Wielligh Bester* had been decided in relatively similar circumstances, viz the raising of a point of inadmissibility of evidence *in limine* where the party which should ask for hearsay-admissibility didn't do so.

[20] Mr Lourens countered by arguing that the time for him to decide whether to seek hearsay-admissibility in terms of the Hearsay Act has not yet arrived. He suggested (tongue firmly lodged in his cheek, I have no doubt) that when he comes to file his answering affidavits (both in personal capacity in the sequestration application, and on behalf of Distributors in the liquidation application), Mr Baker might well admit everything Ms Van Zyl says, in which event the admission will take the evidence out of the realm of hearsay. At the least, he said, he is not obliged to take that decision now, and Premier's tendering of the hearsay evidence in any event implies that it will if necessary seek admission in terms of the Hearsay Act.

[21] I think Mr Lourens has the better of the argument in this regard. Whilst I agree with Mr Van der Merwe that it is advisable for deponents whose affidavits tender hearsay evidence to record that they will to the extent necessary apply for admissibility thereof in terms of the Hearsay Act (which didn't happen here), it would in my view be inappropriately technical for me to make a ruling merely because of the absence of such an allegation, and in the final analysis I agree with Mr Lourens that the time for him to take a decision, and the time for him to (if so advised) apply for hearsay-admissibility in terms of the Hearsay Act, is at the main application (I think in this regard that it follows from the provisions of section 3(1)(c) that such an

application need not be a substantive application – indeed, generally won't be – but might be in that form, if for example Premier should want to bring forth evidence in terms of for example section 3(1)(c)(v) ("the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends").

[22] As for Mr Van der Merwe's reliance on *Von Wielligh Bester* (see paragraph 19 above), valiant though it was, I think that the differences are obvious. In particular, *Von Wielligh Bester* didn't involve an interlocutory application such as this – it involved the taking of a point *in limine* at the main hearing, when everything was supposed to be ready for argument.

[23] To summarise, then, once one realises that the basis for cases like *Gilbert Hamer* and *O'Shea* is hearsay and that the terrain relating to hearsay has changed since the Hearsay Act's coming into effect, it follows that the considerations relating to whether or not the offending evidence will be admitted (assuming for present purposes that Premier will in due course apply for such admission – as I am sure they will) are so wide-ranging that there is simply no way that I should seek to bind the court which hears the main application. For example (as Mr Van der Merwe was constrained to concede, whilst not abandoning his main plank that Premier hasn't as yet applied for hearsay-admissibility), I am sure that one of the considerations that a court will take into account in considering hearsay-admissibility will be the content of Mr Baker's fuller answering affidavits.

[24] What Mr Baker and Distributors should have done is to follow the advice of MT Steyn J in Wiese v Joubert en Andere 1983 (4) SA 182 (O) at 197, which is to bring a Rule 6(11) application *for hearing with the main application*.

[25] In the event, I am satisfied that the relief which Mr Baker and Distributors seeks from me cannot be granted. The decision must be left for the court hearing the sequestration and liquidation applications.

[26] I have for obvious reasons deliberately refrained from expressing any view on the strength of Premier's claim for hearsay-admissibility should such claim be made. To the extent that anything I have said might suggest a view in this regard, that would be mistaken – I have no view.

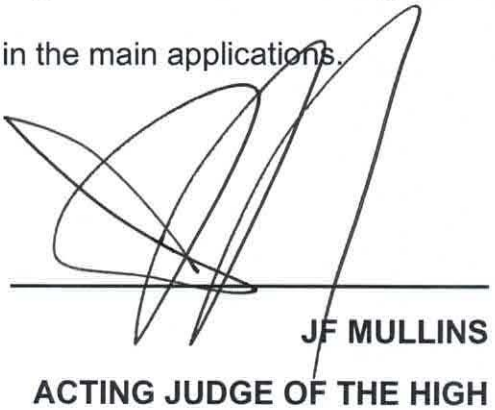
[27] I add that the implication of my ruling in this regard is obviously that Mr Baker (in the sequestration application) and Distributors (in the liquidation application) would now be well advised to file proper answering affidavits, therein doing what Price J said in *Elher* and MT Steyn J said in *Wiese* they must do, which is to take care to decide which allegations to respond to, and which not. But beyond this comment I express no further view on the matter, including on whether Mr Baker and Distributors would be entitled without more to file such further affidavits.

[28] As far as the costs of the striking-out applications are concerned, all concerned were agreed that these should be reserved. Whilst one might think that costs should follow the result, and that the result was the one Premier favoured, the fact is that the court which hears the main applications might side with Mr Baker and with Distributors, and strike out the evidence. And then, even if the main result goes against them, they might be entitled to those costs, in the discretion of the court.

[29] In the circumstances, I make the following order, applicable to both matters:

1. Insofar as the Rule 35(13) applications are concerned, the costs thereof are to be costs in the cause of the two main applications.

2. It is directed that the striking-out applications brought under case numbers 50522/21 and 29020/22 shall be heard and determined simultaneously and together with the main applications pending under those case numbers, and the costs relating to the striking-out applications, including the costs of the hearing on 24 January 2023, are reserved for later determination in the main applications.



JF MULLINS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

PRETORIA

Appearances:

Counsel for the applicant for striking-out:	**MP Van der Merwe SC**
Counsel for the respondents in the application for striking-out:	**P Lourens**
Attorneys for the applicant for striking-out:	**MacRobert Inc, Pretoria**
Attorneys for the respondents in the application for striking-out:	**Adams & Adams, Pretoria**
Date of hearing:	**24 January 2023**
Date of judgement:	**27 January 2023**