IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Reportable
CASE NO: 19784/2009 16798/2009

In the matter between:

INVESTEC BANK LTD Applicant

and

JOHAN CHRISTOFFEL JANSE VAN RENSBURG
(Born on, having identity number
married in community of property to

Berendina Elizabeth Janse Van Rensburg) **(First Respondent** in case no. 16798/2009)

BERENDINA ELIZABETH JANSE VAN RENSBURG
(born on, having identity number and
being married in community of property

To Johan Christoffel Janse van Rensburg) **(Second Respondent** in

MORNe JANSE VAN RENSBURG

(Identity no) (Address:) (Marital status: Married
out of community of propertyto Janine
Janse Van Rensburg, Identity number:) **(First Respondent** in case no. 19784/2009)

JANINE JANSE VAN RENSBURG
(Identity number)(Address:) (Marital status: Married out
of community of property to Morne Janse van

Rensburg, identity number) **(Second Respondent** in case no. 19784/2009)

coram:	**m davis j**
judgment:	**by davis j**
for the applicant:	**adv d fisher sc**
instructed by:	**edward nathan sonneberg**
for respondent:	**adv a oosthuizen sc**
instructed by:	**schnetler's inc**
date of hearings:	**13 september 2010**
date of judgment:	**11 october 2010**

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

CASE NO: 19784/2009 & 16798/2009

In the matter between:

INVESTEC BANK LTD Applicant

and

JOHAN CHRISTOFFEL JANSE VAN RENSBURG
(Born on, having identity number
married in community of property to

Berendina Elizabeth Janse Van Rensburg) **(First Respondent** in

BERENDINA ELIZABETH JANSE VAN RENSBURG
(born on, having identity number and being married in
community of property To Johan Christoffel Janse van Rensburg) **(Second Respondent** in

MORNe JANSE VAN RENSBURG

(Identity no) (Address:) (Marital status: Married
out of community of property to Janine
Janse Van Rensburg, Identity number:) **(First Respondent** in
case no. 19784/2009)

JANINE JANSE VAN RENSBURG
(Identity number) (Address:) (Marital status: Married
out of community of propertyto Morne Janse van Rensburg,
identity number) **(Second Respondent** in
case no. 19784/2009)

JUDGMENT: 11 October 2010

Introduction

[1] First respondent ('Hekkie') in case no. 16798/2009 is a property developer. To the extent that is relevant to the present dispute, he engaged in four property developments: "The Hills" near Pretoria, Le Grand in George and Hartenbos Landgoed I and Hartenbos Landgoed II.

[2] In each case, the development took place through a company: The Hills development, in the name Bluecore Investments (Pty) Ltd; Le Grand through Broad Brush Investments 19 (Pty) Ltd and Hartenbos Landgoed I through Hartenbos Landgoed (Pty) Ltd. Hartenbos Landgoed II had not yet been developed, at the time the papers were served but, to the extent that it was intended to so develop this land, the developing company was Greentee Properties (Pty) Ltd.

[3] Applicant advanced loans for the three developments in respect of which construction had already commenced. The loans were secured by mortgage bonds over the alienated development land. In addition, it secured its loans by way of suretyships which were furnished by Hekkie, third respondent his wife, Berendina and son, being second respondent (Morne) together with Greentee. They were all listed as sureties and co-principal debtors *in solidum.* The papers indicate that Hekkie accepted that, as a result of what he considered to be adverse business conditions, all of the companies defaulted on their obligations under the development loans. The sureties have also failed to comply with the demands of applicant to settle the outstanding indebtedness.

[4] Pursuant thereto, a provisional winding order was granted in the South Gauteng High Court against Bluecore, Investments (Pty) Ltd and a provisional order was granted against Hartenbos Landgoed

(Pty) Ltd in this court, with a returnable date of 30 March 2010. On 16 March 2010, Binns-Ward J granted an order in terms of which Broad Brush Investments 19 (Pty) Ltd was provisionally wound-up, and a further order, placing the joint estate of Hekkie and his wife under provisional sequestration in the hands of the Master. In the case of Morne, the application was postponed for a later hearing.

[5] When the matter was heard by this court, the opposition to the granting of a final winding-up order against Greentee Properties (Pty) Ltd (case no. 19783/2009) Broad Brush Investments 19 (Pty) Ltd and Hartenbos Landgoed (Pty) Ltd were withdrawn. In each case, a final order was granted on an unopposed basis. This left the court to consider whether a final order should be granted against Hekkie and his wife as well as a provisional order against Morne. It is to these matters that I must now turn.

The case for a final order against Hekkie

[6] The only real dispute in this matter is whether a benefit to the creditors has been shown by applicant. In his careful and considered judgment, Binns-Ward J said the following:
"The assets and liabilities disclosed by Mr Hekkie van Rensburg show an excess of assets over liabilities of just under R4,5 million. This, on the face of it, suggests that a very paltry dividend of only a few cents in the Rand would be available to creditors. The applicant contends that there is a reasonable prospect that an investigation into the affairs of Mr and Mrs van Rensburg's estate would reveal hidden assets resulting in a significantly altered picture." Accepting applicant's argument, Binns-Ward J then held:

> *" The assets consist primarily of luxury and exotic motor vehicles. The liabilities consist*

primarily of the outstanding debt owed in respect of the acquisition of these vehicles. It seems to me improbable that anyone who was the 'guiding mind' behind the substantial property developments involved in this case and who, by his own account, has a long history of successful investment in property development should have so little to show in his personal estate. It might well be that Mr van Rensburg has ordered his affairs so as to ensure that assets that might otherwise have been owned by him directly are held instead by companies or in trusts, but one would then expect the existence of substantial loan account claims in his estate in respect of the funding of such entities for the purpose of their acquisition of the assets in question." (at para 27)

[7] In arriving at this conclusion, Binns-Ward J relied on the approach adopted by Cameron JA (as he then was) in CSARS v Hawker Services (Ptv)Ltd 2006 (SA) 292 (SCA) at para 29:

"The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a Court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and inquiry assets might be unearthed that will benefit creditors."

[8] Ms Fisher, who appeared on behalf of the applicant, submitted that the disclosed assets, primarily consisting of luxury and exotic motor vehicles, was itself a pro-pointer in favour of a conclusion that there was reason to believe that further assets might be unearthed as a result of an investigation by a trustee.

[9] In support of this submission Ms Fisher pointed to Hekkie's answering affidavit in whichthe following is stated:

"The understanding was always that the money required to repay the Applicant would be generated by the sale of properties in the said three developments. I might add that I am in the process of selling certain of the properties and vehicles owned by my family trust and/or members of any family utilising the monies generated by such sales to pay the creditors of Bluecore and Broad Brush."

According to Ms Fisher, the family trust, to which reference was made, could be the Great White Trust which owns *inter alia,* the shares in Greentee. Applicant has apparently applied for the sequestration of the Great White Trust. To date, applicant has no knowledge as to the nature and extent of the assets and investments held by that trust nor by any other trust of which Hekkie may have been the settlor.

[10] Significantly, in his supplementary replying affidavit, Mr Smith, on behalf of the applicant, does reveal the following about the Great White Trust:

> *"The Great White Trust is the owner of at least five immovable properties in Cape Town. The properties are bonded but it appears that there will be a relatively substantial amount of equity in the properties once the mortgage bondholder (the applicant and Nedbank Limited) have been paid, this equity being in an amount of approximately R2 030 000. Where there are loan claims (as one would expect, the Great White Trust not having generated any income itself with which to have paid for its assets), this equity will flow to the insolvent estate once a duly appointed trustee has taken steps to recover same. I point out that in the answering affidavit under case number 13361/2010, it is averred that the Great White Trust has only two creditors - a loan creditor in an amount of R1.5 million and Greentee in an amount of R23 000. I respectfully*

submit that, as the trust is clearly vested with substantial assets and does not trade or earn income, this appears to be unlikely."

[11] Ms Fisher also placed considerable emphasis on documentation which Hekkie had generated with Mr Fernando Rueda, in which Hekkie informed Mr Rueda on 19 May 2009 that he was about to receive R5 million as a result of a development deal. An earlier email of 6 April 2009 indicated that Hekkie expected to receive R1.7 million, that is additional to the payment of the R5 million.

[12] Some measure of debate took place between counsel concerning the evidence given by Hekkie at an enquiry conducted in terms of section 417 of the Companies Act 61 of 1973 into the affairs of Hartenbos Landgoed (Pty) Ltd.

[13] Ms Fisher referred in particular to the following passage:
"MR VAN RENSBURG: I wouldn't say that I received the amount of R5 million. I could have done business with somebody and get a R5 million profit from it, or get a R5 million commission from it. MS FISHER: You said you will receive your R5 million outstanding from these type of deals. What do you mean by 'these type of deals'? MR VAN RENSBURG: I cant remember. Ms Fisher: What type of deals? MR VAN RENSBURG: I can't remember." In Ms Fisher's view, this exchange illustrated that Hekkie had simply been evasive in refusing to explain the source of significant amounts of money: R5 million and R 1.7 million respectively.

[14] A further piece of evidence which was invoked by Ms Fisher in support of the application was that Hekkie had been listed as being a member, former member, director or former director of fifteen

corporate entities, a number of which was not in liquidation.

[15] Mr Oosthuizen, who appeared on behalf of the respondents, submitted that, after the section 417 enquiry, a formal tender had been made, to the effect that all relevant accounting records pertaining to both Hartenbos companies, Broad Brush, Bluecore, Greentee and the Great White Trust would be made available by Hekkie. In short, it was incorrect to conclude that Hekkie had been obstructive, had unreasonably refused to answer questions put to him or endeavoured, for no good reason, to limit the ambit of the section 417 enquiry. Furthermore, Hekkie had been questioned extensively on a wide range of issues. He had answered the questions put him to the best of his ability but he had stressed that he had not, for the purposes of the enquiry, prepared himself on the details of transactions relating to other companies. However he had volunteered to produce documents and, had he been afforded the opportunity, he would provide any of the information sought by applicant pertaining to the other companies.

[16] Mr Oosthuizen submitted that the term 'to the advantage of creditors' meant to the advantage of the general body of creditors. The advantage of the general body of creditors did not equate necessarily to the advantage of one or a majority of them. Amod v Khan 1947 (1) SA 150 (N). Accordingly, what might have been to an advantage to the applicant was not necessarily despositive of the case. Furthermore, it had to be shown that the sequestration would result in a pecuniary benefit to creditors which was not immaterial. Thus, if the phrase 'to the advantage to creditors' consists of a right which the trustee would have to examine the affairs of the insolvent estate, facts would have to be put up showing that such an examination was at least likely, to result to the pecuniary benefit of the creditors.

[17] Mr Oosthuizen further submitted that there was no reason to assume that the holding of an insolvency enquiry by a trustee would procure any information or achieve some end which could not be obtained or acquired in terms of a section 417 enquiry. On the facts available, it was clear that the Hartenbos enquiry could be resumed at any stage. Further, both Hekkie and Berendina had been subpoenaed to attend the Bluecore enquiry which was to commence on 27 September 2010. The liquidators of the other companies, namely Broad Brush and Greentee could also, if they so wished, convened enquiries and summon the respondents to appear at those enquiries. The ambit of questions which could be put at such enquiries was wide and could include questions regarding the personal assets and finances of the various respondents.

Evaluation

[18] In my view, the fact that there may be enquiries held in terms of section 417 of the Companies Act which dealt with the affairs of the various companies, through which the designated developments were to take place, cannot, by itself, constitute an adequate defence to the question as to whether there is an advantage to creditors in the granting of an order of sequestration against a person who may have utilized these companies for his/her development purposes. As soon as possible after his or her appointment, the trustee must take into his or her possession and under his or control all movable property, books and documents which belong to the estate of the insolvent. Section 69(1) of the Insolvency Act 24 of 1936 ('Act'). In terms of section 23(12) of the Act, the insolvent is required to assist the trustee to the best of his or her ability in collecting, taking charge of or realising property belonging to the estate. These are powerful weapons in the hand of a trustee who seeks to locate assets, the realization of which may be to the advantage of creditors.

[19] Mr Oosthuizen submitted that the fact that the Hartenbos enquiry had not unearthed any further assets was itself an indication that the appointment of a trustee of Hekkie's estate might be an exercise in futility.

[20] It must be accepted that the assets disclosed on the papers, on their own, would not be sufficient to justify a conclusion that it was to the advantage of creditors to order the sequestration of Hekkie and Berendina. But, this case is one which particularly highlights the importance of the *dicta* in the Hawker Aviation Partnership *supra.* In order to explicate upon the *dictum* of Cameron JA, it is useful to briefly examine the earlier judgments which the learned judge of appeal cited in support of the approach set out in Hawker Aviation Partnership case. In Meskin v Friedman 1948 (2) SA 555 (W) at 559 Roper J defined the applicable test as follows:

"In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient."

In Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin 1990 (4) SA 580 (W)

at 585 Leveson J said:

"[t]he Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that that will be so. That in turn, in my opinion, leads to the conclusion that the expression "reason to believe" means "good reason to believe". The belief itself must be rational or reasonable and, in my opinion, to come to such a belief, the Court must be furnished with sufficient facts to

support it.... In a broad sense it seems proper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the application would secure some useful purpose. I express it thus because, as Roper J has shown in the Meskin case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and inquiry under the relevant provisions of the Act might unearth assets thereby benefiting creditors."

See also Dunlop Tyres (Pty) Ltd v Brewitt 1999 (2) SA 580 (W) at 585; Epstein v Epstein 1987 (4) SA 606 (C) at 609

[21] Mr Oosthuizen also referred to Mamacos v Davids 1976 (1) SA 19 (C), a judgment of Burger J of this Court in order to support a more restrictive interpretation to the phrase 'advantage of creditors'. The learned judge said the following with reference, in particular, to an earlier decision in Wilkens v Pieterse 1937 CPD 165 at 169:

"The learned Judge clearly had in mind that there was a fair prospect that assets might be revealed and that his would result in some financial advantage to creditors. This is no authority for the proposition that creditors can insist on the sequestration of a debtor by merely alleging that he should be examined. It seems to me that a petitioning creditor must go further and allege facts which indicate that such an examination has some prospect of revealing additional assets, e.g., where it is shown that shortly before the debtor had valuable assets of which he has now disposed, or that there was a large number of transactions which could be challenged. When the time comes for the appointment of a trustee, the creditor must know whether an examination could result in some financial advantage to him; otherwise he would probably not file a claim." In my view, the judgment in Mamacos can be read as being congruent with the approach developed in Hawker Aviation Partnership *supra* which, in any event, is binding on this court. To the extent that the *dictum* in Mamacos was invoked to interpret the

approach adopted by Cameron JA in a narrower way than that which has been set out above, I cannot agree. In the first place, as Cameron JA noted in his judgment, this approach has been articulated in a number of decisions to which I have already made reference. In summary, it is sufficient if an applicant sets out reasonable grounds to support a conclusion that the granting of the application has a plausible prospect of working to the advantage of the creditors.

[22] This case clearly is illustrative, in my view, of the commercial pragmatism which underlines this test. In his judgment, which culminated in the provisional order,

Binns-Ward J found that a case had been made out that Hekkie may have secreted assets away from the immediate guise of the creditors. This conclusion is justified on the basis of Hekkie's startling inability to explain large transactions of which he boasted in emails, in the amounts of R1.7 million and R5 million which took place within but a year of the section 417 enquiry. Hekkie would have the court accept that a plausible inference was that he had apparently completely forgotten about these large transactions when he was examined at the Hartenbos enquiry!

[23] The applicant has shown, by reference to the answering affidavit that substantial assets are owned by the family trust the beneficiaries of which are members of Hekkie's family. Further, there is reason to believe that further amounts might be owed to Hekkie by the Great White Trust, which is the owner of at least four immovable properties in South Africa has. The trust apparently had not generated any income to be able to acquire these properties, save by way of loans made to it by Hekkie and others.

[24] The law of insolvency needs to be commercially realistic. People who cannot pay their debts, particularly in cases where the debts run to many millions of rands, are tempted to divest themselves of their significant assets so as to alleviate the pressure of a sum or suretyship agreement into which they entered in better economic times. Once an applicant puts up a plausible case, to the effect that there is a reasonable prospect that, as a result of an investigation by an independent trustee, assets might be unearthed to the benefit of creditors, the law of insolvency should be congruent with this reality. It is precisely within this context that the *dictum* set out by Cameron JA in the Hawker Aviation Partnership case should be viewed.

[25] In my view therefore, the applicant has made out a case sufficient to justify the granting of a final order of sequestration against both the estates of both Hekkie and Berendina.

The case for a provisional order against Morne

[26] Applicant's claim against Morne arises from the fact that the latter bound himself as a surety and a co-principal debtor for the debts of his father and certain corporate entities in the group of companies controlled by his father. He and his wife Janine are married out of community of property; hence the need to bring an application to join Janine as a respondent in terms of Practice Note 30 of this Court. Morne is at present 27 years old. He concedes that he was appointed as a director of Bluecore, Broad Brush and Hartenbos. When he was 23 years old, he executed a written deed of suretyship, in terms whereof he bound himself as surety and co-principal debtor for the debts which these companies owed to applicant. He now finds himself in a position where three companies, on his own papers, owe the applicant an amount of approximately R327 million.

[27] What is undisputed is that Morne owns no fixed property, that his own assets are of a nominal value and that, at the time that his answering affidavit was completed, his sole source of income was monthly remuneration of R40 000, earned from the property companies.

[28] Ms Fisher submitted that Morne was a beneficiary of the Great White Trust, that his father remunerated him and other family members generously and that he had driven a Ferrari which had once been funded out of the property developments. It was however common cause that the Ferrari had been sold. Furthermore, Ms Fisher contended that there was no explanation as to why in June 2009, Morne had transferred membership in Bronzetique Tanning Studio CC to his wife. Ms Fisher also referred to the fact that Morne had an interest in Boundary Developments (Pty) Ltd, an active company. No explanation had been provided by Morne as to the value of this company.

[29] Mr Oosthuizen submitted that recourse to the Hartenbos enquiry revealed that Morne had testified that Bronzetique Tanning Studio CC 'owned his wife's business,' that Greentee had loaned money to this business and that there were initially four members of the close corporation. In June of the previous year, three of the members had relinquished their interest in the business, making Morne's wife Janine, the only member of the corporation. Morne explained that the reason for this transaction was that the business was not doing well. None of this information was apparently challenged at the enquiry.

[30] In testifying about his own current position, Morne stated that, since January 2010, he had not been in possession of any funds with which to generate a monthly income and that, consequently he

had been living from loans received from friends and a small profit generated from his wife's business. This evidence was not effectively challenged.

[31] Unlike the case of Hekkie, the submissions made in support of the provisional sequestration of Morne are either entirely speculative or open to significant doubt, such as the arguments, for example, sought to be made out against the so called Bronzetique transaction.

[32] While I accept that, when an amount of R327 million constitutes the sum of the outstanding debt, even a few million rand, if unearthed by the trustee, would be of advantage to creditors. But no significant sum can reasonably be divined from the arguments which has been put up by applicant or on the papers prepared by applicant in support of the provisional order. At best, there is a remote but certainly not a reasonable prospect that some meaningful pecuniary benefit will be detected by a trustee. Speculation without any plausible evidential substantiation of a benefit does not, of itself, pass muster.

[33] In the result therefore, the following order is made:

1. A final order is made, placing the joint estate of Johan Christoffel Janse van Rensburg and Berendina Elizabeth Janse van Rensburg under sequestration in the hands of the Master.
2. The application for the provisional sequestration of Morne Janse van Rensburg is dismissed with costs.

DAVIS, J