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51/92

Case NO 259/90

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE FRANCIS GEORGE HILL FAMILY TRUST	Appellant
and	
THE SOUTH AFRICAN RESERVE BANK	1st Respondent
PHOENIX CHEMICALS (PTY) LTD	2nd Respondent
THE HAHN FAMILY TRUST	3rd Respondent

CORAM: HOEXTER, HEFER, KUMLEBEN, JJA et NICHOLAS, HARMS AJJA

HEARD: 21 February 1992

DELIVERED: 30 March 1992.

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

The appellant is the Francis George Hill Family Trust ("the Hill FT"). The Hill FT is the registered holder of half the issued shares in the second respondent, which is a private company known as Phoenix Chemicals (Pty) Ltd ("Phoenix"). The remaining half of Phoenix's issued shares are owned by the third respondent, which is the Hahn Family Trust ("the Hahn FT"). The first respondent is the South African Reserve Bank ("the Reserve Bank").

By a written notice of attachment ("the notice") the Reserve Bank on 10 May 1989 attached 50% of the moneys deposited by Phoenix in various accounts with the Trust Bank of Africa Ltd. On notice of motion dated 19 September 1989 the Hill FT launched an application in the Transvaal Provincial Division ("the court a quo"). Citing respectively the Reserve Bank, Phoenix and the Hahn FT as respondents in its application the Hill FT sought the following relief: (1) leave to proceed in

the application "by derivative action" on behalf of Phoenix; (2) an order reviewing and setting aside the notice; and (3) an order directing the Reserve Bank (and the Hahn FT in the event that the latter should oppose the application) to pay the costs of the application. In fact neither Phoenix nor the Hahn FT opposed the application; and no affidavit on behalf of either was filed. The application was, however, resisted by the Reserve Bank.

Voluminous affidavits having been filed by both the Hill FT and Reserve Bank, the opposed application came before **McCreath J.** The learned judge dismissed the application with costs, including the costs consequent upon the employment of two counsel. The judgment of the court **a quo** has been reported: **Francis George Hill Family Trust v South African Reserve Bank and Others** 1990(3) SA 704 (T). With leave of **McCreath J** the Hill FT appeals to this court against the whole of the judgment of the court **a quo.**

Sec 9 of the Currency and Exchanges Act 9 of 1933 ("the Act") empowers the State President to make regulations in regard to any matter relating to currency, banking or exchanges. The regulations may provide, **inter alia**, for the attachment by the Treasury of money, irrespective of the person in whose possession it may be, if such money is suspected of having been involved in any act or omission which is suspected of constituting a contravention of the regulations. In pursuance of this power the Exchange Control Regulations 1961 ("the regulations") were promulgated. They have been amended from time to time. Reg 22E provides that the Minister of Finance may delegate the powers conferred and assign the duties imposed upon the Treasury by any provision in the regulations to any person. The Minister of Finance has so delegated his said powers and assigned its said duties to, **inter alios**, any Deputy Governor of the Reserve Bank. The attachment in question was signed by a Deputy Governor of the Reserve Bank.

In terms of reg 22D -

> "...any person who feels himself aggrieved by the attachment of money ....."

under various paragraphs of regs 22A or 22C (which include those paragraphs in terms whereof the Reserve Bank attached the moneys of Phoenix) -

> "....may bring an application in a competent court for the review of any such attachment ....and any such court may set aside such attachment .... on the grounds set out in the provisions of paragraph (d)(i) or (iii) of section 9(2) of the Act."

In terms of the trust agreement creating the Hill FT the donor is Mr A A Bassil ("Bassil"). The present trustees are Mr D J F Evans ("Evans") and Mr A Tugendhaft, the latter being an attorney and a director of Moss-Morris Mendelow Browde ("MMMB"). MMMB are the attorneys acting for the Hill FT. The present trustees of the Hahn FT are Mr P N Bird, Mr F C Fabrie, and Mr P W Wentzel, the last-mentioned being a partner in the firm of Biccari and Wentzel ("B & W"). B & W are the attorneys acting for the Hahn FT.

Phoenix has the following four directors: Bassil and Mrs L Hill (both appointed to the board by the Hill FT); and Mr M D Hahn and his wife, Mrs J Hahn (both appointed to the board by the Hahn FT).

On 13 June 1989 MMMB wrote a letter to B & W in which the latter were asked to confirm -

> ".... that your clients will support an application to the Reserve Bank for the cancellation of the order made in terms of the notice, and should the Reserve Bank fail to agree to the cancellation, an appropriate application to court in terms of section 22D of the Exchange Control Regulations to set the order aside."

To the above letter B & W made no formal reply. On 18 September 1989 MMMB informed B & W by fax that:-

> "....if you do not advise us by 5:00 pm tomorrow that your client is prepared to have Phoenix apply to court to set aside the attachment order, our client will proceed derivatively."

On the following day, 19 September 1989, B & W wrote to MMMB a letter in the following terms:-

> "1. We refer to your facsimile of 18 September 1989 and advise that we have, on behalf of

the Hahn Family trust approached the South African Reserve Bank to obtain clarity with regard to the attachment by them of 50% of the funds of Phoenix.

2. We have been informed informally that the attachment relates solely to the 50% interest of the Hill Family Trust and, as such, our client would appear to have no interest in supporting your client in any application to have the attachment order set aside.

3. We are, however, awaiting a formal reply to our enquiry from the South African Reserve Bank and as soon as same is received by us we will revert to you."

Without receiving any further communication from B & W the Hill FT on the same date (19 September 1989) launched its application in the court **a quo**.

In the application the founding affidavit was deposed to by Evans. Evans alleged that in view of the Hahn FT's -

"....baseless and unlawful refusal to permit Phoenix to bring this application...."

it was being brought derivatively on behalf of Phoenix. Further on Evans averred that in view of the refusal of the Hahn FT "and

the directors nominated by it" to have Phoenix take steps to set aside the attachment, the Hill FT -

> ".... had to bring this application in order to safeguard the assets of Phoenix."

In the court a **quo** the Reserve Bank contended that on the papers the Hill FT had not established that it was legally entitled to approach the court by way of a derivative action. **McCreath J** found it unnecessary to decide this particular issue. The learned judge assumed in favour of the Hill FT (see 705 E-F of the reported judgment) that if the attachment was unjustifiable the Hill FT would be entitled to bring the application on behalf of Phoenix -

> "....notwithstanding the absence of any resolution by the latter which would have enabled the application to have been brought by that company in its own name."

In regard to the matter of his client's **locus standi** counsel for the Hill FT in his argument before this court departed somewhat from the stance taken up in the founding

affidavit. As his main argument counsel urged upon us that as a 50% shareholder in Phoenix the Hill FT was a "person who feels himself aggrieved" by the attachment within the meaning of reg 22D. Counsel informed us that only if this main contention should not be upheld he would, in the alternative, contend that the Hill FT was entitled to proceed on behalf of Phoenix by way of a derivative application.

It is convenient to dispose at once of the alternative contention. For two reasons it appears to me to be untenable. The first is that the Hill FT has failed entirely to establish that Phoenix's board of directors had decided, at any time before it launched its application in the court **a quo**, that Phoenix itself would not take legal action to have the attachment of its assets set aside. From a reading of the founding affidavit it is plain that the allegation made by Evans that "the directors nominated" by the Hahn FT had "refused" to let Phoenix take such legal steps is no more than inference based on the correspondence

between MMMB and B & W to which reference has already been made. Such correspondence cannot, in my view, sustain the inference drawn by Evans. Moreoever, the bald allegation is unsupported by any proper documentary evidence derived from the company records of Phoenix. So far from producing any admissible evidence of a binding resolution passed thereanent at a properly constituted meeting of the board of directors of Phoenix, the founding affidavit does not go to show that at the relevant time the matter in issue had even informally engaged the attention of Mr and Mrs Hahn.

Apart from these practical deficiencies in the founding affidavit there is further a matter of principle which, so it seems to me, entirely precludes recourse by the Hill FT to a derivative action. It is trite that a company with limited liability is an independent legal person and separate from its shareholders or directors. In general, therefore, when a wrong is alleged to have been done to a company the proper plaintiff to

sue the wrongdoer is the company itself.In English law a derivative action constitutes an exception to that general rule. The exception is recognised when (1) the wrong complained of involves conduct which is either fraudulent or **ultra vires** and (2) the wrong has been perpetrated by directors or shareholders who are in the majority and so control the company. See, for example: **Burland and Others v Earle and Others** (1902) AC (JC) 83; **Edwards v Halliwell** (1950) 2 All ER 1064 (CA) at 1066-7; **Prudential Assurance Co Ltd v Newman Industries Ltd and Others (No 2)** (1982) 1 All ER 354 (CA). The principle underlying the exception to the general rule is expounded thus by **Lord Denning MR** in **Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2)** (1975) 1 All ER 849 (CA) at 857 D - F:

> "If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in **Foss v Harbottle.** The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who

> control its affairs - by directors who hold a majority of shares - who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."

Turning to the facts of the present matter one notices that the assertion that the Hill FT is entitled to proceed derivatively on behalf of Phoenix is founded on the assumption that the Hahn FT and the directors appointed by it have groundlessly refused to authorise legal action by Phoenix against the Reserve Bank. However, assuming for purposes of argument such improper refusal on the part of the Hahn FT or the directors nominated by it, what is at once apparent is that in the present situation neither the shareholders nor the directors of Phoenix can be said to fit the role of the "wrongdoer" postulated by the exception to the **Foss v Harbottle** rule. In seeking relief in

the court **a quo** the cause of action upon which the Hill FT relied was the alleged illegality of the attachment of the assets of Phoenix. On the case put up by the Hill FT the "wrongdoer" contemplated by the exception to the rule in **Foss v Harbottle** is not any insider who may control Phoenix but the Reserve Bank. Had the board of directors of Phoenix in fact voted in favour of legal action to set aside the attachment they would not, of course, have been authorising proceedings to be taken against themselves. It follows that the facts of the case do not fall within the exception in English law to the rule in **Foss v Harbottle.** This finding renders it unnecessary to consider the further point, which was not raised in argument before us, whether (apart from the statutory remedy provided by sec 266 of the Companies Act 61 of 1973) the common law exception to the rule in **Foss v Harbottle** forms part of South African law.

I proceed to examine the validity of counsel's main argument that on the strength of its shareholding in Phoenix the

Hill FT was itself "a person who feels himself aggrieved" by the attachment of the money in the bank accounts of Phoenix. The words "person .... aggrieved", in various combinations, are not uncommon in statutory enactments, and they have been the subject of many decisions. In trying to decide what meaning is to be assigned to these words in reg 22D it is useful to bear in mind the precept of **Lord Hewart CJ** that -

> ".... there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions in different statutes which have been enacted alio intuitu."

(See: **Sevenoaks Urban District Council v Twynam** (1929) 2 KB 440 at 443.) On the other hand some solace may be drawn from the following words of **Lord Parker CJ** in **Ealing Corporation v Jones** (1959) QB 384 at 390 -

> "It seems to me easier to say what will not constitute a person aggrieved than it is to say what 'person aggrieved' includes."

Mr **Southwood**, who argued the appeal for the Reserve Bank, contended that in the context of the regulations an

"aggrieved person" is someone who has a legal grievance in the sense that his legal rights have been invaded or infringed. In support of his argument that on the facts of the present case the Hill FT was not an "aggrieved person" counsel relied upon a definition of these words stated in **Ex Parte Sidebotham** (1879) 14 Ch D 458 (CA), a decision involving the provisions of the Bankruptcy Act, 1869. A court had refused to act upon a report by the Comptroller that a trustee had been guilty of neglect resulting in loss to the estate. It was held that neither the bankrupt nor any creditor was entitled to appeal from such refusal. In the course of his judgment **James LJ** remarked (at 465):-

> "It is said that any person aggrieved by an order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something."

To the above-quoted passage, often cited in later decisions on the topic, I shall in what follows refer as "the Sidebotham dictum".

At this juncture it is necessary briefly to survey a number of decisions of our courts in which the meaning of the words "person aggrieved" has received judicial consideration. In **Neuhaus v The Master of the High Court and Another** 1932 SWA 30 the applicant was an attorney who had been appointed by one Mayer to represent her at meetings of creditors in an insolvent estate; to file and prove her claim against the estate, and to vote for her in the election of a trustee. At a meeting the Master rejected Mayer's claim; and in consequence the applicant lost a vote which would have ensured his appointment as a co-trustee. The applicant contended that he was a "person aggrieved" by the ruling of the Master, and he sought to review it under sec 151(3) of the Insolvency Ordinance 7 of 1928 (SWA). In dismissing the review application **BOK** J observed

(at 32):-

> "Now although the expression 'every person aggrieved' in that section is very wide I think that it cannot mean that every person who feels annoyed or hurt at a ruling of the Master is entitled to bring such ruling under review. For example if Bertha Mayer has a creditor he also might feel aggrieved because her claim against the insolvent estate was rejected by the Master; he may even be said to be interested because if she were to succeed in obtaining a substantial dividend from the estate, his prospects of being paid by her might be improved. But I doubt whether any one would contend that such a creditor would be entitled .... to bring the presiding officer's ruling under review and the reason for that, I think, is that the legal right of such a creditor would not have been affected by the ruling."

In **Estate Friedman v Katzeff** 1924 WLD 298 the trustee in an insolvent estate was held, in the particular circumstances of that case, not to be a "person aggrieved" within the meaning of sec 151(3) of the previous Insolvency Act 32 of 1916. According to article 59 of the old Transvaal Statute 13 of 1895 "every person interested" could apply to expunge the admission of any claim. Contrasting "person interested" with "person aggrieved" **Krause J** remarked (at 304):-

> "The two expressions are different and do not have, in my opinion, the same meaning."

The learned judge then proceeded (at 304-5) to approve and adopt the Sidebotham dictum.

Waja v Orr, Orr NO and Dowjee Co Ltd 1929 TPD 865 was a case involving rectification of a company register under the former Companies Act 46 of 1926. Dealing with the provisions of sec 32 of that Act **Feetham J** said (at 871 **in fin** - 2):-

> "'the person aggrieved' can, I think, in the context only mean a person whose title to a share is in some way in question, and who complains that his name is either improperly included in or improperly omitted from the register."

The matter of **locus standi** to review the Master's decision in terms of sec 151 of the Insolvency Act 24 of 1936 fell for consideration in **De Hart NO v Klopper and Botha NNO and Others** 1969(2) SA 91(T). The Master had given a decision under sec 23(1) in regard to certain property claimed by the

applicants. Having quoted the Sidebotham dictum, and after citing **Friedman's Estate v Katzeff (supra), Trollip J** ruled that the applicants before him were "aggrieved persons". At 100A the learned judge reasoned thus:-

> "....the effect of the Master's decision is that the property belongs to the insolvent's estate. Anyone, therefore, who claims to be entitled to the property, would suffer a legal grievance so long as that decision stands, for he would thereby be wrongfully deprived of his legal right to assert his claim to the property. That would apply to the present applicants ...."

In **C P Smaller (Pty) Ltd v The Master and Others** 1977(3) SA 159(T) the court had to consider whether the applicant might be an "aggrieved person" within the meaning of sec 111(2)(a) of Act 24 of 1936, **King AJ** (at 163E-164A) cited the Sidebotham dictum and, having referred to the cases of **Friedman's Estate (supra)** and **De Hart (supra)** in relation to sec 151 of the Insolvency Act, concluded that no reason existed for any different meaning to be given to the same words in sec 111 of the

Act.

Lastly there must be considered a decision of the Privy Council on which counsel for the Hill FT strongly relied for his submission that the Hill FT had a sufficient interest in the attached assets of Phoenix to bring it within the category of a "person aggrieved". The essential facts in **Attorney-General of the Gambia v N'jie** (1961) 2 All ER (PC) may be shortly stated as follows. In the Gambia the rules of the Supreme Court give the judge the power for reasonable cause to have the name of a legal practitioner struck off the roll of the Court. From any order so made an appeal lies to the Western African Court of Appeal ("the court of appeal"). The Gambia has a single judge who is the chief justice. The respondent, a barrister, appeared in a civil suit heard by the chief justice. In giving judgment the chief justice censured the conduct of the respondent; and he sent a copy of his judgment to the attorney-general. The attorney-general asked for an inquiry to be made by the chief

justice into the respondent's misconduct. Since the chief justice himself had castigated the respondent, a judge from Nigeria was imported and specially appointed a deputy judge of the Gambia for the purpose of the inquiry. The deputy judge held the inquiry and thereafter ordered that the respondent's name be struck off the roll ("the order"). The respondent appealed to the court of appeal. The court of appeal set aside the order. It held that a deputy judge had jurisdiction to represent the chief justice only in the exercise of judicial powers; and that the power to strike a barrister from the roll was not a judicial power. Against the court of appeal's setting aside of the order of the deputy judge the attorney-general petitioned the Priy Council.

The Privy Council allowed the appeal and advised that the order should be restored. It decided that in a colony a judge exercises judicial powers not only when he is deciding suits between the parties, but also when he exercises

disciplinary powers which are properly appurtenant to the office of a judge. It held that the power of a judge to strike off a legal practitioner was a judicial power which it was competent for a deputy judge to exercise.

Before the Privy Council counsel for the respondent unsuccessfully took a preliminary objection that the attorney-general had no **locus standi** to petition for special leave to appeal because he was not in terms of the relevant Order in Council -

> "....any person aggrieved by any judgment of the court ...."

In support of his objection counsel for the respondent relied upon the Sidebotham dictum. In delivering the judgment of the Board **Lord Denning** said of the Sidebotham dictum (at 510 - 511C):-

> "If this definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a lis, a controversy inter partes, and had a decision given

against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the judge, ex mero motu or at the instance of the Attorney-General or someone else, against a delinquent practitioner.

But the definition of **James LJ,** is not to be regarded as exhaustive. **Lord Esher, M.R.,** pointed out that in **Re Reed, Bowen & Co., Ex p Official Receiver** ((141) (1887) 19 QBD at p 178). The words "person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the appellant a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that, if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge or is otherwise a point in which the public interest is concerned, the Attorney-General is a 'person aggrieved' by the decision and can properly petition Her Majesty for

special leave to appeal."

I would respectfully agree with the view expressed by **Lord Denning** in the **N'jie** case **(supra)** that the definition given in the Sidebotham dictum is not an exhaustive one. An example taken from the facts of the instant appeal illustrates the point. The notice of attachment served upon Phoenix did not, without more, create any **lis** between the Reserve Bank and Phoenix. It is, nevertheless, correct to say (and in argument it was common cause) that Phoenix itself was an "aggrieved person" within the meaning of reg 22D. With deference to **Lord Denning** it seems to me that his further statement that "person aggrieved" would include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests" may be rather too widely stated. However that may be, it seems to me that in any case the interest of the attorney-general in the **N'jie** case is properly to be described as a "legal grievance". I say so because an arresting feature of the facts in the **N'jie**

case is the element of the public interest injected into the case by the significant role of the attorney-general in the colony. As the custodian of the public interest the attorney-general is invested with a duty to maintain the professional integrity of legal practitioners who practise in the courts of the colony. On any view of the facts in the **N'jie** case, so it seems to me with respect, the decision of the court of appeal in upsetting the order made by the deputy judge resulted in legal prejudice to the attorney-general in the execution of his duties in the due preservation of the public interest. The observations of **Lord Denning** in the **N'jie** case, so I venture respectfully to suggest, must be read with an eye to the rather unusual facts in the case.

Mr **Doctor**, who argued the appeal on behalf of the Hill FT, accepted that a "person aggrieved" within the meaning of reg 22D was not merely a person disgruntled at or dissatisfied with the attachment. He submitted, however, that in general those

words would embrace anybody able to assert a "substantial interest" in the assets attached; and he urged upon us that as a 50% shareholder in Phoenix the Hill FT could fairly be said to have a substantial interest in the fortunes of Phoenix and the fate of its assets.

The word "interest" comprehends a very broad concept. See the remarks of **Nicholas AJA** in **Nieuwoudt v The Master and Others NNO** 1988(4) SA 513(A) at 528 F-J. In one sense a shareholder may no doubt be said to have an "interest" in the property of the company. The shareholder may derive pecuniary benefit from an increase of such property, and he may suffer pecuniary loss from its destruction. It seems to me, however, that such interest as the Hill FT may have a shareholder in Phoenix is insufficient in law to make the Hill FT a "person aggrieved" by the attachment.

Leaving aside the significance of statutory context in particular cases, the tenor of decided cases in South Africa

points, I think, to the general conclusion that the words "person aggrieved" signify someone whose legal rights have been infringed - a person harbouring a legal grievance. The current of judicial interpretation would appear to run in the same direction in the decisions of English courts - see the remarks of **Donovan J** in **Ealing Corporation v Jones (supra)** at 392. Viewed against the background of the regulations as a whole that is the proper meaning which in my judgment should be assigned to the words in reg 22D in the present case. I have indicated my view that what was said by the Privy Council in its judgment in the **N'jie** case **(supra)** is not irreconcilable with the South African decisions which require a legal grievance before the objector can qualify as a "person aggrieved". However, if in this respect I am mistaken, and if upon a true appraisal of the **N'jie** case its tendency should run counter to the definition propounded by the South African courts, then, with respect, I would not be disposed to be guided by it in determining the issue in the present

appeal.

The critical question in the present case is whether the attachment by the Reserve Bank of the assets of Phoenix represents an invasion of the legal rights of the Hill FT. That question must be answered in the negative. The notion of a company as a distinct legal personality is no mere technicality -

> "It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members."

(per **Innes CJ** in **Dadoo, Ltd and Others v Krugersdorp Municipal Council** 1920 AD 530 at 550-1) See further: **Salomon v Salomon and Company** 1897 AC 22 (HL); **Macaura v Northern Assurance Company Limited and Others** 1925 AC 619 (HL). The antithesis between mere pecuniary interest on the one hand and actual legal right on the other is crisply stated in the minority judgment (in this connection unaffected by the **ratio decidendi** of the majority judgment) in **Stellenbosch Farmers' Winery v**

Distillers Corporation Ltd and Another 1962(1) SA 458(A) at 472A-

> "The fact that the shareholder is entitled to an **aliquot** share in the distribution of the surplus assets when the company is wound up proves that he is financially interested in the success or failure of the company but not that he has any right or title to any assets of the company."

In support of his argument that the Hill FT ranked as "person aggrieved", Mr **Doctor** tended to emphasise the magnitude of his client's shareholding in Phoenix. It need hardly be said, however, that if no single shareholder has any right to any item of property owned by the company, the precise extent of the Hill FT's shareholding in Phoenix is irrelevant to the inquiry. The legal position remains the same whether the Hill FT owns 50% or 1% of the shares in Phoenix. Mr **Doctor** also called attention to the invidious position in which the Hill FT found itself as a result of the failure of Phoenix itself to challenge the attachment by appropriate legal action. This extraneous factor in the case cannot, I consider, reinforce the claims of the Hill FT to be a "person aggrieved". The crucial stage at which the

Hill FT had to achieve that status was the very time at which the notice of attachment was served upon Phoenix on 10 May 1989. If the Hill FT did not then rank as a "person aggrieved" later events could not alter the legal position.

For purposes of the present appeal it is unnecessary to attempt any sort of comprehensive definition of what, within the meaning of reg 22D, may be said to constitute a "person aggrieved". Suffice it to say that on the facts set forth in the founding affidavit I am able firmly to conclude that the Hill FT did not in law qualify as such. The conclusion that the Hill FT lacked **locus standi** is sufficient to dispose of the whole appeal and renders superfluous any further inquiry into the legal propriety or otherwise of the notice of attachment.

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

G G HOEXTER, JA

NICHOLAS AJA)
HARMS AJA) Concur

PJb. 51a/92

259/90
/mb

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CORAM : HOEXTER, HEFER, KUMLEBEN JJA, NICHOLAS et HARMS AJJA

HEARD : 21 FEBRUARY 1992

DELIVERED : 30 MARCH 1992

J U D G M E N T

KUMLEBEN JA/...

As appears from the judgment of my Brother Hoexter, which I have had the privilege of reading, the locus standi of the appellant was challenged on two grounds. On this question, I agree that for the reasons stated in that judgment the appellant was not entitled to proceed on behalf of Phoenix by way of derivative authority. However, I respectfully differ from the conclusion that the appellant is not "a person who feels aggrieved" by the attachment.

The wide powers conferred on the Treasury in terms of reg 22A to, inter alia, attach money and goods are authorised by s 9(2)(b) of the Act. It reads as follows:

> "(b) Any regulation contemplated in paragraph (a) may provide for-
>
> (i) the blocking, attachment and obtaining of interdicts for a period referred to in paragraph (g) by the Treasury and the forfeiture and disposal by the Treasury of any money or goods referred to or defined in the regulations or

determined in terms of the regulations or any money or goods into which such money or goods have been transformed by any person, and-

(aa) which are suspected by the Treasury on reasonable grounds to be involved in an offence or suspected offence against any regulation referred to in this section, or in respect of which such offence has been committed or so suspected to have been committed;

(bb) which are in the possession of the offender, suspected offender or any other person or have been obtained by any such person or are due to any such person and which would not have been in such possession or so obtained or due if such offence or suspected offence had not been committed; or

(cc) by which the offender, suspected offender or any other person has been benefited or enriched as a result of such offence or suspected offence:

....."

The words "any person who feels aggrieved" (to which I shall refer as the "phrase") appears - with the addition of the word "himself" - in reg 22D. This phrase, by which locus standi is conferred, has its origin in the peremptory wording of s 9(2)(d)(i) of the Act, which reads as follows:

"(d) Any regulation contemplated in paragraph (a)

shall provide-

(i) that any person who feels aggrieved by any decision made or action taken by any person in the exercise of his powers under a regulation referred to in paragraph (b) which has the effect of blocking, attaching or interdicting any money or goods, may lodge an application in a competent court for the revision of such decision or action or for any other relief, and the court shall not set aside such decision or action or grant such other relief unless it is satisfied-

(aa) that the person who made such decision or took such action did not act in accordance with the relevant provisions of the regulation; or

(bb) that such person did not have reasonable grounds to make such decision or to take such action; or

(cc) that such grounds for the making of such decision or the taking of such action no longer exist;"

Thus, though we are directly concerned with the regulations, in construing the meaning of the phrase it is the intention of the Legislature which is to be ascertained.

Whenever it is intended in an enactment that certain persons should be entitled to claim - broadly stated - the reversal of a decision, the words commonly used to confer such a right are, on the one hand, "an aggrieved person" or "any person who feels himself aggrieved" by the decision concerned or, on the other hand, any person "interested in" or "having an interest in" such decision. The two pairs of phrases are correlative and the meaning of the former can only be determined by a consideration of the latter. Whether one is to be regarded as an aggrieved person in any particular case must depend upon the nature of the interest intended to serve as the qualification. Thus the enquiry must - and before us in argument did - focus on the kind of interest envisaged by s 9(2)(d) and reg 22D.

The phrase standing alone has little or no definitive content and is generally acknowledged to be

one of wide import. (See Attorney-General of the Gambia v N'jie (1961(2) All ER (PC) 504 at 511 A). The same can be said of the word "interest". (Cf. Nieuwoudt v The Master and Others NNO 1988(4) SA 513 (A) at 528 F - G.) The meaning of the phrase can, on the one hand, be limited to "someone whose legal rights have been infringed - a person harbouring a legal grievance" ("the restricted meaning"), which is the one given to the phrase in the judgment of Hoexter JA. On the other hand, it can refer to a person having a financial or proprietary interest ("the wider meaning"), that is, one falling short of a legal right. If the latter construction is placed upon the phrase, it is necessary to determine on the facts of any particular case, whether such interest is sufficiently direct and substantial to confer locus standi on the person concerned.

Examples of cases in which the phrase has been given a restricted meaning (mostly in reference to insolvency and bankruptcy proceedings) are given in the majority judgment. Others in which a wider meaning has been adopted, with reference to the phrase and its correlative, are as readily to hand. In Nieuwoudt v The Master and Others NNO (supra) 522 C - I Van Heerden JA said:

> "Ek kom nou by die vertolking van frases soos 'n belang' of 'n persoon wat 'n belang het'. Dit is duidelik dat hulle 'n baie wye betekenis kan hê en slegs uitgelê kan word met inagneming van die verband waarin hulle voorkom. Vgl Gartside and Another v Inland Revenue Commissioners [1968] 3 All ER 661 (Ch) op 665, en Bearmans Ltd and Another v Metropolitan Police District Receiver [1961] 1 All ER 384 (CA op 391. In die Woordeboek van die Afrikaanse Taal word 'belang' omskryf as onder andere 'voordeel', 'gewin', 'wat iemand raak omdat sy voordeel daarmee gemoeid is', 'iets wat aandagtige deelneming, nuuskierigheid, ens opwek'. HAT se omskrywing sluit in 'wat iemand raak'. Die Oxford English Dictionary betrek onder 'interest' onder andere
>
> 'the relation of being objectively concerned in

> something, by having a right or title to, a claim upon, or a share in';
> 'the relation of being concerned or affected in respect of advantage or detriment',
> en
> 'the feeling of one who is concerned or has a personal concern in any thing'.
>
> Die woord 'belang' het dus 'n genoegsame wye betekenis om ook 'begaandheid' in te sluit. Wanneer die woord egter in 'n statutêre bepaling voorkom, word normaalweg daaraan die enger betekenis geheg van 'n reg met betrekking tot, of 'n geldwaardige belang in, dit waarop die woord slaan. Vgl Pretoria Bill Posting Co v Hess 1911 TPD 360 op 363, waarna met klaarblyklike goedkeuring verwys is in National Trading Co Ltd v Commissioner for Inland Revenue 1943 AD 496 op 504." (I emphasize.)

(I shall return to this decision later in this judgment.) And in the decision cited in the quoted passage, National Trading Co., Ltd. v Commissioner for Inland Revenue, 1943 AD 496 the question was whether the appellant company was a public company within the meaning of s 33(2)(b) of the Income Tax Act, no 31 of 1941, that is, a company in which the Commissioner is

satisfied the general public is substantially interested. Centlivres JA at 504 said:

> "If members of the general public have a proprietary and pecuniary interest in a company, they are in my opinion 'interested in the company' within the meaning of sec. 33 (2)(b). See Smith v. Hancock (1894, 2 Ch.D. at p. 386) and Pretoria Bill Posting Company v. Hess 1911, T.P.D. at p.363). In the present case the preference shareholders are 'interested' both in the capital of the Company and the profits which the Company makes. It is not necessary in this case to decide whether a mere pecuniary interest, such as that of debenture holders, is a sufficient interest within the meaning of the section."

The wider meaning of the phrase is thus described in Ritz Hotel Ltd v Charles of the Ritz Ltd and Another, 1988(3) SA 290 (A) 308 A - B:

> "The effect of the decided cases is summarised in Kerly's Law of Trade Marks and Trade Names 11th ed in s 11-07 as follows. The persons who are aggrieved are all persons who are in some way or other substantially interested in having the mark removed from the register; including all persons who would be substantially damaged if the mark remained, and all trade rivals over whom an

advantage was gained by a rival trader who was getting the benefit of a registered trade mark to which he was not entitled." (I again emphasize.)

The reference to these decisions is in no way intended to serve as a guide to its meaning as used in s 9(2)(d) and reg 22D. They merely illustrate that the phrase, and its integral component ("interest"), can as readily be given a wide meaning. It is therefore unprofitable to attempt to discern any general trend in its interpretation by a survey of decisions in other enactments which favour one meaning above the other. The all important concern, as stressed by Hoexter JA, is the context in which the phrase is used: its meaning is to be determined ex visceribus actus. In the nature of things, the more general or ambiguous a word or phrase is, the more important this consideration becomes.

It is true that, as pointed out in the majority

judgment with reliance upon the Stellenbosch Farmers Winery case, that a shareholder has "no actual legal right" to any of the assets of the company. However, it is as plain that a shareholder is, or may be, substantially prejudiced by the attachment of such assets. The regulation, one notes, provides that "any money or goods", or for that matter all money or goods can be attached. ("Goods" by definition in the regulations includes immovables.) Such a step on the part of the Treasury, or its delegated authority, could immediately and vitally - perhaps irreversibly - affect the running of the company and the value of a member's shareholding. The potential of such harm is inherent in the authority conferred. The interests of a shareholder may thus be "substantially damaged" should the attachment remain. He has a direct financial interest - "'n geldwaardige belang" - in having it set aside. Until this takes place he would

have every reason to feel aggrieved - in the legal sense of the word.

The following considerations, as I see them, support this conclusion. Since this is a dissenting judgment, I shall state them briefly.

Section 9(2)(d)(i), which I have already quoted, sets out in paragraphs (aa), (bb) and (cc) the grounds on which application may be made to court, with reference to the facts of the present case, to set aside the attachment. But a person whose legal rights have been infringed by such an attachment, or by any of the other acts authorised in s 9(2)(d) and reg 22D, would in any event be entitled under the common law, by way of review or other appropriate action, to apply to court on those grounds without their express incorporation in the Act and regulations. This is to my mind a strong indication that the restricted meaning was not intended.

I have already commented on the harsh potential consequences of attachment and the other acts authorised. The grant of such powers without notice or an order of court is by any standards a drastic measure. If this is fully taken into account, it is reasonable to infer that the Legislature intended that this right should be offset, or the consequences of its exercise ameliorated, by conferring on a wide, rather than a restricted, range of persons a remedy by which the status quo ante may be restored.

Giving the phrase its wider meaning might in certain circumstances give rise to conflicting interests and decisions on the part of persons qualifying as "aggrieved persons". This could be a factor supporting or justifying a restricted interpretation. But it would seem that no such problem could ever arise if the phrase as used in the section and regulations is to be given the wider meaning. I

can conceive of no circumstances in which the release from attachment of the money or goods of a company at the instance of a shareholder would not enure to the benefit of all concerned (apart from the Treasury). Cf. Mc Lelland v Hulett and Others 1992(1) SA 456 (D & CLD) 467 G - H. In this regard it is to be borne in mind that an attachment for even a relatively short period of time before it is set aside could prove gravely prejudicial. I can see no reason why a shareholder should not have the right to take prompt action when it could or would involve delay to obtain a resolution of the company, resolve a deadlock, or to act in terms of s 266 of the Companies Act, No 61 of 1973.

It may be accepted that in the sense that the expressions are for present purposes to be construed, "any aggrieved person" and "any person who feels aggrieved" bear the same meaning (the latter phrase

also has nothing to do with emotion). Nevertheless the fact that the Legislature chose this phrase to express its intention is - to an admittedly limited extent - a further indication that the wider meaning was intended.

Finally, if the correct interpretation is open to doubt, the rule semper in dubiis benigniora praeferenda ought to operate. In fact it appears to me equitable and reasonable that it ought to apply in the instant case unless there are compelling reasons for deciding that the appellant ought not to be regarded as "a person who feels aggrieved".

To revert to the Niewoudt case, in brief the facts were that the insolvent sought to object to a liquidation and distribution account of a company in liquidation on the grounds that he had an interest in the liquidation of the company. The shares he held in the company on insolvency vested in his trustee. It was thus common ground that no legal right of the insolvent

had been infringed by the decision of the liquidator to exclude the claim of the trustee from his account and that his trustee was a "person having an interest in the company being wound up" in terms of s 401(1) of the Companies Act. The latter was clearly entitled to lodge an objection to the account, his interest in the company in liquidation being a legal and direct one. Nevertheless in the minority judgment it was held that the insolvent had the necessary locus standi to object by virtue of his "geldwaardige belang". The majority judgment held that the residuary financial interest of the insolvent - and nothing more could be relied upon - was insufficient to bring him within the provisions of s 407(1). The indicia which lead me to the opposite conclusion in this case (one concerned with a wholly different enactment) were absent in the Niewoudt case.

At the hearing of the appeal it was decided, with the consent of counsel, that the question of locus

standi should first be argued as a separate issue with the merits standing over to be debated at a later stage, if necessary. On the view I take of this preliminary issue, I hold that the appellant has locus standi, and I would adjourn the matter for argument on the merits.

M E KUMLEBEN
JUDGE OF APPEAL

HEFER JA - Concurs