THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 791/10

In the matter between:

SIOBHAN LEE O'SHEA N.O. **Appellant**

and

CHRISTOPHER PETER VAN ZYL N.O. **First Respondent**

BRYAN NEVILLE SHAW N.O. **Second Respondent**

HASSEN KAJIE N.O. **Third Respondent**

BRYAN NEVILLE SHAW N.O. First Intervening Applicant **(Respondent)**

DUDLEY BERNARD DAVIDS N.O. Second Intervening Applicant **(Respondent)**

ABSA BANK LIMITED Third Intervening Applicant **(Respondent)**

Neutral citation: *O'Shea N.O. v Van Zyl* (791/10) [2011] ZASCA 156 (28 September 2011)

Coram: HEHER, MHLANTLA, BOSIELO, THERON JJA and MEER AJA

Heard: 9 September 2011

Delivered: 28 September 2011

Updated:

Summary: Insolvency – compulsory sequestration – trust – locus standi to bring application as creditor of trust – reliance on admissions made by trustee during private enquiry under s 417 of Companies Act 63 of 1971 – admissibility.

Insolvency – compulsory sequestration – act of insolvency in terms of s 8(g) of Insolvency Act 24 of 1936 – what constitutes.

Evidence – admissibility – statements made by trustee during private enquiry under s 417 of Companies Act 63 of 1971 – whether admissible in subsequent proceedings against trust.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Jacobs AJ sitting as court of first instance):

1. The appeal of the appellant (the Trust) against the order of the court a quo in favour of the respondent (the liquidators) is upheld with costs including the costs of two counsel.
2. The appellant shall pay the costs of Absa Bank in the appeal.
3. Paragraphs 1 and 3 of the order of the court a quo are set aside and respectively replaced by the following:

‘1. The rule nisi granted on 11 November 2009 is discharged with costs.’

and

‘3. The costs of the third intervening applicant are reserved for decision in the application between itself and the first respondent.’

4. The costs of the application brought by the Trust in terms of s 22 of the Supreme Court Act 59 of 1959 are to be paid by the Trust on an opposed basis.

JUDGMENT

HEHER JA (MHLANTLA, BOSIELO, THERON JJA AND MEER AJA concurring):

[1] This is an appeal against an order made by Jacobs AJ in the Western Cape High Court in terms of which the court

1. finally sequestrated the estate of the O’Shea Family Trust (‘the Trust’);
2. granted leave to Absa Bank Ltd to intervene as an applicant in the sequestration application;
3. ordered that costs, including the costs of Absa Bank Ltd, be costs in the sequestration. The learned judge granted leave to appeal to this Court against his order.

[2] The Trust is represented in these proceedings by Siobhan Lee O’Shea in her

capacity as its sole trustee for the time being. I shall refer to her as 'the appellant'. Her husband, Patrick Kerry O'Shea, was a co-trustee until 5 June 2009 when his estate was sequestrated and he ceased to be a trustee.

[3] On 9 June 2009 the present first, second and third respondents in their capacities as the joint provisional liquidators of Sapphire Finance (Pty) Ltd (in liquidation) ('the liquidators') applied for the sequestration of the Trust. On 11 November 2009 a provisional order was made by Traverso DJP.

[4] By that time the first and second intervening applicants (Mr O'Shea's joint trustees, who are for unexplained reasons, cited as respondents in this appeal) had brought an application to intervene. It appears to be confirmed, in the judgment of Jacobs AJ in the application for leave to appeal, that their application was never moved and no order was made in that regard.

[5] The appellant opposed the application for the sequestration of the Trust.

[6] In May 2010 Absa Bank Ltd applied for leave to intervene in that application and for an order placing the estate of the Trust under provisional sequestration. Although Jacobs AJ duly granted the intervention he found it unnecessary to consider the merits of Absa's application for sequestration because of the success obtained by the liquidators in the main application.

The application to receive further evidence

[7] At the hearing of this appeal the appellant moved an application in terms of s 22(a) of the Supreme Court Act, 59 of 1959 to have new evidence received. That evidence comprised paragraphs 10 to 26 of an affidavit made on 2 September 2011 by the appellant together with eleven documents identified in and annexed to her affidavit. It was directed at resisting the liquidators' claim to locus standi in the sequestration proceedings before the court a quo on the ground that Sapphire Finance had ceded its debtor book to a third party before liquidation. The reception of such evidence would have no effect on the intervening application of Absa Bank.

[8] The application was opposed by the liquidators and Absa Bank, the latter

because it had incurred substantial costs in preparing for the appeal which would be wasted by a postponement of the appeal to allow the liquidators to answer the new allegations.

[9] The criteria applicable to such an application are now trite. See *Rail Commuters Action Group and Others v Transnet t/a Metrorail and Others* 2005 (2) SA 359 (CC) at 387D-389C in which it is emphasised that new evidence will only be received in exceptional circumstances. One consideration is the materiality of the evidence; it must be practically conclusive and final in its effect on the issue to which it is directed. However, at least in this Court when no constitutional issue is in question, the existence of an unanswerable case for the applicant on the papers as they stand must render the reception of further evidence on its behalf superfluous and immaterial to the outcome of the appeal. As will appear, the applicant does have such a case. There is, in the circumstances, nothing to be gained by allowing the application. I shall in due course return to the matter of who is to pay the wasted costs of the application.

[10] Although the argument in the appeal ranged over several issues, there are, in my view, only two that need to be considered in determining its outcome.

Was Sapphire Finance (Pty) Ltd a creditor of the Trust?

[11] In their application for sequestration the liquidators relied for their status as creditor of the Trust (and also for the quantum of their claim) upon an alleged loan of R2 682 000 made by Sapphire Finance to the Trust.

[12] As was to be expected the liquidators came as strangers to the affairs of the Trust. They were unable to produce any books of account or bank accounts which bore out the claim. They relied solely upon certain admissions said to have been made by Mr O'Shea on behalf of the Trust during interrogation at their instance at an enquiry into the affairs of Sapphire Finance held from April to July 2009 in terms of s 417 of the Companies Act 61 of 1973.

[13] During the sequestration application and on appeal it was contended on behalf of the appellant that the evidence of Mr O'Shea at the enquiry was inadmissible against

the Trust.

[14] Mr O'Shea gave evidence to the Commission in the following circumstances. Sapphire Finance carried on business as a finance company that inter alia furnished bridging finance to estate agents and sellers of immovable property. Mr O'Shea was such a person. He and his family occupied a property owned by the Trust. The liquidators were interested in establishing whether Sapphire Finance had claims against him in his personal capacity and against the Trust. They caused him to be interrogated. When his evidence commenced he was a director of Sapphire Finance and a trustee of the Trust. By the adjourned date in July 2009, by reason of his sequestration, he was disqualified from acting in the former capacity[1] and had automatically vacated the latter office.[2]

[15] Mr O'Shea was represented by counsel and attorneys. He was cross-examined by Mr Manca, counsel for the liquidators. Before his sequestration he testified that Sapphire Finance advanced moneys to the Trust on the strength inter alia of a bond to be registered over the Trust's properties in favour of Investec Bank. Continuing his evidence in July 2009 he backtracked, avoided repeating earlier answers and was patently obstructive in his responses. He testified that the moneys were not paid into the bank account of the Trust and were not authorised by both trustees.

[16] During the earlier part of his evidence – given while he was still a trustee – Mr O'Shea made a number of statements against the interest of the Trust. It is sufficient to refer to two passages in his testimony:

'MR MANCA: And according to Ms Geater who has added up the various amounts owing by the O'Shea Family Trust to Sapphire Finance, that comes to an amount of R2 682 000. You're a trustee of the O'Shea Family Trust, is the O'Shea Family Trust in a position to pay Sapphire Finance the R2 682 000?

MR O'SHEA: I would have to look at the affairs of the Family Trust, but again, it may be in a few

1 Section 218(1)(d)(i) of the Companies Act 61 of 1973.
2 By reason of clause 4.4 of the Trust deed.

weeks time.

MR MANCA: So again would I be correct to say that you would have to realise assets?

MR O'SHEA: Will have to realise assets to pay for the debt owing, yes.

MR MANCA: And, similarly, are you able to put a time period as to when you would be able to – O'Shea Family Trust would be able to pay the R2 682 000 to the provisional liquidators?

MR O'SHEA: Mr Manca, yes, there is possibly an offer coming on our home that could realise that value to the liquidators but I would need to see it in writing.'

and

MR O'SHEA: But the Trust has not denied that we owe that money, Mr Manca.

MR MANCA: No, I'm not investigating the Trust's indebtedness, we've established that.

MR O'SHEA: Sure.

MR MANCA: You've candidly admitted that ...(intervention)

MR O'SHEA: I just want it on record, I just want it on record Mr Manca, we're not denying the indebtedness and we've in fact made offers to the liquidator already on how to ...(intervention)'

Of this latter extract, which was quoted by Jacobs AJ in his judgment, the learned judge said that O'Shea was not only speaking on his own behalf but also on behalf of his co-trustee when he admitted that the Trust was indebted to Sapphire Finance. He found support also in a letter written by attorneys Herold Gie on 24 April 2009, shortly after O'Shea gave evidence. No attempt, the learned judge said, was made in that letter to qualify or clarify the earlier admission. The letter in question, which was the letter relied on by the liquidators as evidencing an act of insolvency in terms of s 8(g) of the Act, I shall consider more fully below.

[17] For present purposes I shall accept that Mr O'Shea did indeed admit both the indebtedness of the Trust to the company and that the moneys advanced totalled about R2,6 million. For the reasons that follow neither assumption assists the liquidators.

[18] Mr O'Shea testified under subpoena. There is no suggestion that in doing so he was authorised to represent the Trust nor was there any need for him to do so since the purpose of the enquiry was purely to establish facts that the liquidators could use to establish the position of the company and recover assets to which it was entitled. The liquidators also did not lead any evidence which directly proved his authority to speak on its behalf.

[19] In any event the evidence given by Mr O'Shea was inadmissible against the

Trust.

In *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) one of the issues confronting the court was the admissibility of admissions made by one Lea, the managing director of Consolidated Portland Cement Co Ltd, during an enquiry in relation to claims against the company in liquidation under s 155 of the Companies Act 46 of 1926 (i e the predecessor of s 417) in subsequent proceedings by the liquidators to vindicate certain fabricated steel from Gilbert Hamer & Co. In an application before Henochsberg J (reported at 1962 (2) SA 487 (D)) the learned judge struck out the affidavit of Lea as inadmissible against the liquidators. On appeal to the Full Court Harcourt J addressed the question of admissibility at some length and, the other members of the Court (Caney J and Henning J) concurring, the appeal against the striking out order was dismissed. In a further appeal to this Court that order was not attacked and, although the appeal succeeded on other grounds, this Court approached the matter on the basis that

'the cardinal fact – in the absence of any cross appeal – remains that in launching, and in persisting in, the motion proceedings the judicial manager and his advisers laboured under a fundamental error in regarding the commission evidence as admissible against the Engineering Company.' (*James Brown & Hamer (Pty) Ltd v Simmons NO* 1963 (4) SA 656 (A) at 661H-662A.)

[20] Harcourt J said (at 913A):

'In general it may be said that a person who testifies as a witness speaks for himself; he tells of what he, himself, knows and by his oath vouches for its truth. If he is an employee or agent in any respect of another and gives evidence in litigation to which that other is a party, he does so, not as an employee or agent, unless his admissions bind that party, but as a person speaking on oath to the facts to which he testifies, and this is so whether he is called as a witness by his employer or principal or by the opposing litigant. Similarly, if he gives evidence in proceedings to which his employer or principal is not a party, although in relation to matters in which the latter has been or is concerned, he speaks as an individual; he is giving evidence, not taking part in the making of a contract or the giving of an undertaking on behalf of his employer or principal. His evidence in that case is not admissible against his employer or principal in a later case in proof of the facts stated in it. If called by his employer or principal, his evidence may, as that of any other witness called by that party, be regarded as evidence for that litigant and, so far as adverse to him, redound to his disadvantage, but that is because it is

accepted as true, not because the witness is the employee or agent of the litigant.'

[21] Harcourt J then proceeded (at 916C and following) to a consideration of the scope and object of s 155 and, particularly, the nature and object of the private examination provided for in it. (The Constitutional Court has more recently undertaken a similar exercise, although in a slightly different context in *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at paras 115-124 and in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at paras 15-36.) While recognising that the purpose and scope of the procedures now fulfils a wider purpose than some of the Victorian authorities to which Harcourt J refers, his treatment of the admissibility of statements made by witnesses in such hearings in subsequent proceedings is still valid. The basic considerations that his judgment pinpoints are these:

1. The persons against whom statements are made in such proceedings do not generally have a right to be present during such testimony nor are they afforded the right to cross-examine the deponent. To allow a liquidator to rely on such statements without calling the witness would be inimical to the law of evidence (at 916G-918B).
2. The evidence given by an examinee at a private examination is not admissible against any person other than the examinee himself (at 918B-E).

[22] The learned judge (at 918E-919C) rightly, I consider found support for the inadmissibility of reliance on statements made in private proceedings in *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 223 at 225-6:

'There is a well-known rule of evidence that the admission of an agent may be evidence against his principal when made on the principal's behalf in the ordinary course of some business or transaction in which the agent acted as his representative (See *Halsbury,* vol. 13 sec. 638).

If Trevor's statements at the examination fall within that rule, they will be admissible against the bank without the plaintiffs having to rely on the provision in sub-sec. 1 of sec. 130, that any statement made in the course of such examination may be used as evidence against the person making the same.

And if Trevor's statements at the examination are not covered by that rule, in my opinion it will not avail the plaintiffs to rely on the said provision in sub-sec. (1) of sec. 130. I am of opinion

that it must be decided that neither the rule of evidence in question nor the provision in sec. 130 (1) entitled the plaintiffs to put in the evidence of Trevor. And the reason for my decision is the same in the case of both grounds, namely, that when Trevor gave evidence at the examination he was not acting on the defendant's behalf. When Trevor made statements at the examination he did so because he was summoned by the Court to give evidence, and in making any admission or statement in the course of such evidence Trevor was, in my opinion, neither acting on the bank's behalf nor in the ordinary course of his duty as the bank's agent. (See *Halsbury* sec. 455 and the cases there cited.)'

[23] Trustees must act jointly unless the trust deed provides otherwise: *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at 493E. The deed of the Trust does not. There is no reason to believe that the trustees delegated to Mr O'Shea authority to speak on their behalf at the s 417 enquiry: *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 674 (T) at 680I. When Mr O'Shea gave evidence at the hearing no investigation was conducted into whether he spoke as the authorised representative of the Trust rather than in his personal capacity. Despite his bombast there is no reason to conclude that he did. He certainly was not there to carry out any act on its behalf, not even to provide information to the liquidators. Inasmuch as the loans in question (or certain of them) had been paid into his personal bank account he and the Trust faced a conflict rather than shared a privity of interest in relation to the claims of the liquidators.

[24] Finally in this regard, Harcourt J called in aid (at 920 *in fine*) a passage from *The Rhodesian Corporation Ltd v Globe & Phoenix Gold Mining Co Ltd* 1934 AD 293 at 304 which bears repeating as apposite to the present appeal:

'It is difficult to see in principle why a distinction should be made in the case where a person calls his agent as a witness or a corporation calls its officer to testify on its behalf. The witness who enters the witness-box swears to speak the truth and is not there to represent his principal. The giving of evidence by an officer of a corporation is not an act done in the course of his employment. When once he is in the witness-box the company has no control over him. What he states in the witness-box may bind the company in that particular suit, but his evidence cannot be treated by a stranger as an admission binding on the company. No doubt in most cases the principal knows more or less on what lines the witness will give his evidence, but the witness may give his testimony in direct opposition to the interests of his principal. The fact that

he speaks about matters entrusted to him by his principal who calls him, cannot alter the fact that in the witness-box the witness represents no one but himself, though he states what he knows of his own knowledge acquired whilst he was an agent. It is always difficult to foresee all cases which may arise and therefore it may be possible that in certain special circumstances the Court may conclude that a witness was authorised to make a particular statement in the witness-box on behalf of his principal, but to hold *simpliciter* that statements in evidence made by an agent called by his principal in a suit to which the latter is a party will bind the principal as a party in a later action by a stranger is not only a violation of the general principle that the oral statements of a witness called by a party cannot be used by a stranger against such party in a subsequent trial but it may lead to the gravest injustice.'

[25] For all these reasons it is clear that the statements made by Mr O'Shea before the commissioner were inadmissible against the Trust in the sequestration proceedings in the absence of their confirmation under oath by him in those proceedings. The result is that the liquidators were, in the application to sequestrate the Trust, entirely without evidence of their alleged status as a creditor of the Trust.

Did the liquidators prove an act of insolvency by the Trust

[26] The liquidators also relied on an admission of insolvency in terms of s 8 (g) of the Insolvency Act 24 of 1936 alleged to have been made by the Trust. This took the form of a letter addressed by Herold Gie Attorneys to the liquidators' attorneys on 24 April 2009 in the following terms:

'SAPPHIRE FINANCE (PTY) LTD IN PROVISIONAL LIQUIDATION

We refer to the above and record that during the interrogation of our client, Patrick O'Shea, at the Commission of Inquiry convened in terms of Section 417 of the Companies Act, he admitted liability to the Liquidators of Sapphire Finance in the following amounts:

- In his personal capacity R2.469.900.00
- In his capacity as Trustee for the time being of the O'Shea Family Trust R2.682.000.00

We record that it is our client's intention, and he is well able, both in his personal capacity and as Trustee, to settle the above mentioned amounts which are due to the Liquidators.

We confirm that our client undertook to the Commissioner to realise certain assets in both the Trust and his personal capacity in order to fund repayment to the Liquidators and for that purpose required approximately 4 – 6 weeks to do so. Our client furthermore confirms his

undertaking to liaise with the liquidators closely in this regard and to obtain their consent prior to the disposal of any asset, although not obliged to do so by any law.'

As I have said, the court a quo treated this letter as confirmation of the admissions made by Mr O'Shea. It sought and found further confirmation of his authority to represent the Trust in relation to the content of the letter in subsequent correspondence from Herold Gie, from statements in the affidavits and from other aspects of his evidence before the Commission. But this was beside the point. The letter was unambiguous and must stand or fall as an act of insolvency on its own terms. It cannot be subject to interpretation by reference to events which occurred or knowledge which was obtained subsequent to its writing. The proper approach to determining whether a letter contains a notice of inability to pay in terms of s 8(g) is to consider how it would be understood by a reasonable person in the position of the creditor at the time he receives it taking into account that creditor's knowledge of the debtor's circumstances: *Firstrand Bank v Evans* 2011 (4) SA 597 (N) at paras 14 and 15. In this regard:

(1) the letter states that the client on whose behalf it is written is Patrick O'Shea;

(2) the letter states that the admissions at the commission were those of Mr O'Shea personally ('he admitted liability');

(3) the letter states that

'it is our client's intention, and he is well able' to settle the amounts due to the liquidators arising from his personal indebtedness and the Trust's indebtedness to the company;

(4) the undertaking to realise assets, both his own and those in the Trust, was Mr O'Shea's alone.

[27] The inability to pay immediately was unequivocally stated in the Herold Gie letter. It must have been understood by the reader to contain both an admission and undertaking by Mr O'Shea in his personal capacity to discharge his own debt and an admission and undertaking *as a trustee* as to the indebtedness of the Trust and to procure its repayment. But the last-mentioned admission carries the matter no further, for the reasons already enunciated in para 15 of this judgment. As noted earlier the letter is, in terms, written on his behalf only.

[28] Counsel for the liquidators tried to save the day by recourse to a letter attached to a replying affidavit made by the appellant. This, he said, supported his extension that

the earlier Herold Gie letter had been written with the knowledge and authority of both trustees. However the author did not depose to an affidavit and he apparently relied for the information contained in his letter on a statement made to him by a third party who also did not venture on oath.

[29] There is no basis in the letter for concluding that Mr O'Shea intended to bind the Trust to whatever he admitted at the commission or undertook to do in consequence, or that he spoke, at the commission or through his attorneys, with the authority of his co-trustee. The letter accordingly could not serve as notice by the Trust that it was unable to pay its debts for the purposes of s 8(g) of the Insolvency Act.

[30] The consequence of my findings in relation to the evidence at the enquiry and the effect of the letter from Herold Gie is that the liquidators:
1. failed to allege or prove their status as a creditor of the Trust; and
2. failed to establish an act of insolvency on the part of the Trust.

[31] For these reasons the appeal against the sequestration order made at the instance of the liquidators of Sapphire Finance must succeed.

The costs of the application to receive further evidence

[32] There is no serious dispute that at all material times during the proceedings in the court a quo the new evidence lay substantially within the company documents under the control of the liquidators. It was only subsequently brought to light by the persistent enquiries of the appellant and her husband. Before that the appellant could hardly have been aware of its existence or its significance.

[33] Inasmuch as the new evidence consists of documents which are admitted by the liquidators both as to execution and contents, the evidence is credible and requires no further proof.

[34] The appellant was fairly criticized for delay in bringing the application, a default that stretched from May to September of this year without a persuasive explanation. Nevertheless counsel for the liquidators disavowed prejudice and, understandably,

showed no interest in asking for a postponement, or in meeting the new defence with evidence of his own.

[35] The costs of the application must therefore depend on its merits. The appellant's contention is that, properly interpreted, the documents disclose an out-and-out cession to a third party, of Sapphire's debtors, including the indebtedness of the Trust.

[36] One approaches the interpretative question with the understanding that, absent a clear expression of an intention to divest the cedent entirely and finally of all his interest in the ceded property 'the default position will be that the pledge theory will apply' (*Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at 510H-I), ie the cedent acquires a right of automatic reversion in the property once the debt secured by the cession has been discharged.

[37] In this case there are three relevant agreements:

1. A cession by Sapphire Finance in favour of GBS Mutual Bank on 11 August 2004.
2. A cession by Sapphire Finance to Praesidium Structured Finance Fund en Commandité Partnership on 7 December 2006.
3. A cession by Sapphire Finance to Praesidium Capital Management on 12 December 2008.

(It would appear that the creditors in the second and third agreements are either the same entity or possessed a common interest.)

[38] It is common cause between counsel for the appellant and the liquidators that the primary intention of each agreement was a security cession. The appellant relies however on two specific clauses in the second and third agreements. These are stated as follows:

'25 I warrant that I have not ceded to anyone else any of the claims, rights of action and receivables hereby ceded. I further acknowledge and agree that, without prejudice to anything hereinbefore contained, should it nevertheless transpire that I have any time prior to the signature of this cession ceded any such claims, rights of action and receivables to any person whomsoever, this cession shall be a cession of all my reversionary rights in and to any such

claims, rights of action and receivables after payment of all amounts secured by the prior cession/s or after the cession or loss for any reason or abandonment or any of the rights of any of the cessionary/ies thereunder. For as long as any cession in favour of any prior cessionary remains in force:-

25.1 I acknowledge and agree that such prior cessionary shall hold all and any documents and securities relating to the amounts owing to me by my debtor/s on its own behalf and for and on behalf of the creditor for the respective rights and interests therein of such prior cessionary and the creditor in terms hereof and that the delivery of any such documents and securities to such prior cessionary shall be deemed also to constitute delivery thereof to and possession thereof by the creditor,

25.2 the creditor shall be entitled to receive payment directly from such prior cessionary of so much as it shall receive in excess of the amount due to it by me and which is paid to such prior cessionary,

25.3 when and if the cession in favour of such prior cessionary ceases to be of any force then this cession shall thereupon immediately operate as a first cession by me to the creditor of all of my right, title and interest in and to all claims, rights of action and receivables referred to or contemplated in 1, and which are due to me by all my debtors and not only of my reversionary right, title and interest in and to such claims, rights of action and receivables,'

and

'21.8 Sapphire warrants to PSFF that, as at the Signature Date and until the Secured Obligations have been discharged in full, it has not already ceded or otherwise created any security interests over the Subject Matter, other than pursuant to this Cession. If, contrary to this warranty, Sapphire has previously or otherwise ceded or created any security interest over the Subject Matter other than pursuant to this Cession, then (without limiting any right of PSFF arising from that breach) Sapphire cedes in security to PSFF, with immediate effect, all claims, rights of action and receivables of whatsoever nature which Sapphire now has and may at any time during the currency of this agreement have against any prior cessionary or pledgee, its remaining title to and retained interest in the Subject Matter and all Sapphire's reversionary rights to the Subject Matter, as well as Sapphire's rights to obtain re-cession to itself of the Subject Matter from any person whomsoever after payment of all amounts secured by any prior cession and/or pledge, or after the cessation or loss for any reason or abandonment of any of the rights of any prior cessionary and/or pledgee.'

[39] The submission of appellant's counsel is that Sapphire had in fact ceded its debtors to GBS in terms of the undertaking of 11 August 2004 which provided:

‘1. **Giving of cession**

I/We, Sapphire Finance (Pty) Ltd (“the Cedent”) cede to GBS Bank or anyone who takes transfer of the Bank’s rights under this cession (“the Bank”) all the Cedent’s rights in and to all book debts and other debts (“the Debts”) due and to become due to the Cedent and to all the Cedent’s rights of action arising from the Debts.

2. **Amount secured under this cession**

The maximum amount secured under this cession is unlimited.

3. **Continuing covering security**

The rights ceded by the Cedent to the Bank (“the rights”) will be continuing covering security for all amounts (including interest, legal costs, collection commission and value added tax) which the Cedent now or in the future may owe to the Bank for whatever reason whether directly, contingently, as surety or otherwise (“the indebtedness”) even if the indebtedness is temporarily settled at any time, and whether the indebtedness:

3.1 be incurred by the Cedent in own name or in the name of any firm owned by the Cedent either solely or jointly with others in partnership or otherwise; and

3.2 arises from money advanced or to be advanced, or from promissory notes or bills of exchange made or to be made, accepted or to be accepted or endorsed or to be endorsed, suretyships and the like given or to be given by the Cedent to the Bank for the debts of third parties, or guarantees given or to be given by the Bank on the Cedent’s behalf.’

Consequently, so the submission continued, Sapphire was, at the time of the cessions effected under the two Praesidium agreements, in breach of the ‘no previous cession’ clauses; the effect of those clauses was, on breach, to dispose in favour of Praesidium of all remaining rights and interest (including the dominium) in the ceded debtors – in short, an out-and-out cession.

[40] Accepting, without deciding, that such is the effect of a breach of the ‘no previous cession’ clauses, I do not think the submission can be sustained. First, the second Praesidium agreement is in substance a supersession of the first inasmuch as it brings about a retransfer of the debtors sold under the first. So it is only the terms of Clause 21.8 that require our attention. Second, in Clause 1.1.13 of the second Praesidium agreement the ‘GBS Cession’ is defined:

‘1.1.13. “GBS Cession” means a written agreement titled “Cession of book debts in favour of GBS Mutual Bank” concluded by Sapphire in favour of GBS on or about 11 August 2004 in terms of which Sapphire ceded in security all its rights in and to all book debts and

other debts due and to become due to Sapphire, and to all Sapphire's rights of action arising from such debts on the terms set out in that agreement.'

In terms of para 9 of Annexure A to that agreement ('Events of Default') there appears the following stipulation of such an event:

'Sapphire fails to make full and final settlement of the outstanding overdraft facility with GBS and/or fails to procure its release from the GBS Cession on or before 28 February 2009.'

In terms of Annexure C to the second Praesidium agreement ('General Covenants and Undertakings'):

'1. Sapphire undertakes to PSFF:

. . .

1.12 that it shall make full and final settlement of the outstanding overdraft facility with GBS on or before 28 February 2009;

1.13 that it shall procure its release from the GBS Cession on or before 28 February 2009.'

[41] Thus, in the context of the second Praesidium agreement, the cessionary was aware of the GBS cession and made provision for its termination. In these circumstances the warranty given by Sapphire in clause 21.8 could not have been breached by non-disclosure of the prior cession to GBS. The transfer of Sapphire's remaining interest and dominium in its debts was accordingly not activated. The new evidence that the appellant tendered would therefore have left unsullied the liquidators' locus standi to sue the Trust for the payment of the debt owed by it to Sapphire, and, likewise, the standing of Sapphire as a creditor, all things being equal, in the sequestration application.

[42] For these reasons the application in terms of s 228 would have had no material effect on the outcome of the appeal, and had it become necessary to do so, would have been dismissed. The Trust should therefore bear the wasted costs of the respondents in relation to the application.

[43] That does not dispose of the matter as there remains the appeal against the joinder of Absa Bank as an intervening applicant.

The application of Absa Bank for an order provisionally sequestrating the Trust

[44] Despite granting the application of Absa Bank for leave to intervene, the court a quo made no order in its favour because of the success obtained by the liquidators.

[45] The appellant, with leave of the court a quo, appealed against the order granting leave to intervene. Whether or not leave to appeal against such an order could properly have been granted (because of its possible lack of final effect) it is unnecessary to decide. The Bank appeared through counsel to oppose the appeal as it was entitled to do. The appellant did not, however, pursue this ground of appeal and although it is unnecessary to make a substantive order in that regard, the Bank is plainly entitled to its costs.

[46] Counsel for the Bank wanted more. He moved us for a provisional sequestration order in the event (as had become probable) that the order in favour of the liquidators was set aside. But, as counsel for the appellant pointed out, the Bank had noted no conditional cross-appeal against the failure of the court a quo to make an order in its favour. That shortcoming precluded relief before us: *Bayly v Knowles* 2010 (4) SA 548 (SCA) at 557G-H.

The costs of the Bank in the court a quo

[47] That court ordered that the costs of the Bank should be costs in the sequestration. Having merely joined the Bank but made no order in its favour such an order was premature.

[48] In the result the following order is made:

1. The appeal of the appellant (the Trust) against the order of the court a quo in favour of the respondent (the liquidators) is upheld with costs including the costs of two counsel.
2. The appellant shall pay the costs of Absa Bank in the appeal.
3. Paragraphs 1 and 3 of the order of the court a quo are set aside and respectively replaced by the following:

‘1. The rule nisi granted on 11 November 2009 is discharged with costs.’

and

‘3. The costs of the third intervening applicant are reserved for decision in the

application between itself and the first respondent.'

4. The costs of the application brought by the Trust in terms of s 22 of the Supreme Court Act 59 of 1959 are to be paid by the Trust on an opposed basis.

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J A Heher
Judge of Appeal

APPEARANCES

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For Third Intervening Applicant (respondent):	F S G Sievers
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