IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 8318/2011

In the matter between:

RYNO ENGELBRECHT NO	First Applicant
ENVER MOHAMMED MOTALA NO	Second Applicant
MOHAMMED ISMAIL PATEL NO	Third Applicant

and

JOHANNES ERASMUS VAN STADEN NO	First Respondent
MARIA NAOMI VAN STADEN NO	Second Respondent
LEON KNOETZE NO	Third Respondent

Court: ROGERS AJ

Heard: 19-20 September and 25 November 2011

Delivered: 6 December 2011

COUNSEL FOR APPLICANTS:	Adv S Olivier SC
INSTRUCTED BY:	De Klerk & Van Gend (Mr CA Albertyn)
COUNSEL FOR RESPONDENTS:	Adv RJ Stransham-Ford
INSTRUCTED BY:	Tarr Spencer Malan Geyer Attorneys (Mr S Tarr)

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JUDGMENT

ROGERS AJ

Introduction

1. This is an opposed application for the final sequestration of the estate of a trust. The applicants are the liquidators of Indo-Atlantic Group Holdings (Pty) Ltd ('Holdings'). The first and second respondents, Mr JE Van Staden ('Van Staden') and his wife, are the current trustees of the Sword Fish Trust ('the Trust'). The Trust's beneficiaries are members of the Van Staden family.

2. The applicants' case in the founding papers is in summary [a] that the Trust owes Holdings at least R8 million in respect of monies lent and advanced [b] that the Trust is insolvent in that its liabilities exceed its assets, ie that it is factually insolvent [c] that because the Trust's assets are the Van Stadens' sole source of funds, the Trust has probably made dispositions to them to the prejudice of creditors and thus committed acts of insolvency in terms of s 8(c) of the Insolvency Act 24 of 1936 ('the Act'). In the replying papers the applicants have added a further alleged act of insolvency in terms of s 8(c), namely a cession by the trust of all its assets to a firm of attorneys, Colin Geoffrey Inc. All these allegations are disputed.

3. Van Staden was the driving force behind a group of companies referred to in the papers as the Indo-Atlantic group and comprising Holdings, Indo-Atlantic Seafoods (Pty) Ltd ('Seafoods') and Indo-Atlantic Shipping Ltd ('Shipping'). Seafoods and Shipping, like Holdings, are in liquidation on the basis of an inability to pay their debts. Seafoods is a wholly-owned subsidiary of Holdings. Shipping is a sister company of Holdings, having identical shareholders. Who those shareholders are is not clearly stated in the papers. It appears that 50% (or possibly more) of the shares in Holdings and Shipping are held either by the Trust or by Van Staden personally.

4. The three Indo-Atlantic companies were placed in provisional liquidation in late 2008 with final orders following shortly thereafter. The petitioning creditor in respect of Holdings, Rollex (Pty) Ltd ('Rollex'), obtained an order in November 2008 for an enquiry into Holdings' affairs in terms of ss 417 and 418 of the Companies Act 61 of 1973. The enquiry began in early December 2008, Rollex being represented in the interrogation by counsel Mr Louis Olivier. Holdings' liquidators later obtained orders for similar enquiries into the affairs of Seafoods and Shipping. For convenience I shall refer to these enquiries collectively as the s 417 enquiry.

5. On 12 December 2008 and by way of an *ex parte* application the National Director of Public Prosecutions ('the NDPP') obtained a provisional restraint order in terms of s 26(1) of the Prevention of Organised Crime Act 121 of 1998 ('POCA') against the property of Van Staden and related persons and entities, including the Trust. The restraint order related to fraud charges against Van Staden and others. These fraud charges, which apparently include the making of allegedly false VAT claims in the Indo-Atlantic group, have not yet come to trial. A Mr Leon Knoetze of Deloitte & Touch ('Deloittes') was appointed in terms of POCA as the curator *bonis* of the assets of the Trust and of other affected parties. The provisional restraint order remained in place for well over two years until on 9 March 2011 it was discharged by Blignault J on the basis that in obtaining the order the NDPP had not acted with scrupulous fairness towards Van Staden and had failed to act with the utmost good faith to the court. Blignault J dismissed the NDPP's application for leave to appeal. A petition to the Supreme Court of Appeal for leave to appeal is pending.

6. The existence of the provisional restraint order over the period 12 December 2008 to 9 March 2011 is said by the applicants to explain why the present sequestration application was launched only on 18 April 2011. They say that during the subsistence of the provisional restraint order Mr and Mrs Van Staden

were divested of control over the Trust's assets and the recovery of funds or assets by Holdings' liquidators from the Trust was rendered impossible.

7. The provisional order of sequestration was granted by Desai J on 26 May 2011. At that stage the respondents had not filed answering papers.

8. In order for the applicants to obtain a final sequestration order it is necessary that they satisfy the court on a balance of probability of their *locus standi* (in the form of Holdings' alleged claim against the Trust) and that the Trust is factually insolvent or has committed one or more acts of insolvency. The applicants were required to make the necessary allegations and to provide the supporting evidence in their founding papers. For the reasons that follow I consider that the applicants have failed to make out their case on these fundamental elements.

9. Since the applicants seek final relief the usual rule in motion proceedings applies, namely that where there is a factual dispute the respondents' version prevails unless such version is so untenable or far-fetched that it can be rejected on the papers (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635C). The applicants did not ask for a referral to oral evidence.

10. It is common cause that the accounting records of the Indo-Atlantic group and the Trust were not properly maintained. No audited financial statements of the companies or the Trust were apparently produced for any period relevant to this case. The unsatisfactory state of the accounting information, even if a finger in that regard can be pointed Van Staden (though he says he left this to others), does not justify an approach of accepting whatever construction of the facts is favourable to the applicants and adverse to Van Staden and the Trust.

Holdings' alleged claim

11. The premise of Holdings' claim against the Trust for monies lent and advanced is that the Indo-Atlantic group was the source *'most, if not all'* the funds with

which the Trust bought its assets. These assets included one or more farms, game, vehicles and a Baron aircraft. The applicants allege that Holdings was the only Indo-Atlantic company with a bank account and that the funds flowed from Holdings to the Trust.

12. In his answering affidavit Van Staden accepts that the Trust bought its assets with monies having their source in the Indo-Atlantic group. He does not admit, however, that the funds came *from Holdings*. He says that Seafoods and Shipping, which were the trading companies, also had bank accounts. He denies in any event that any funds were lent by Indo-Atlantic companies *to the Trust*. He alleges that the group's contractual relationship was with him personally, that he was entitled to monies which were credited to him as dividends, bonuses and salary, and that he in turn capitalised the Trust.

13. The founding papers are vague as to what precisely was paid by Holdings to the Trust and when the monies were allegedly paid. In paragraph 17 there is an assertion that the Trust is indebted to Holdings in an amount of at least R8 million in respect of monies lent to the Trust at the latter's specific instance and request *'for the purchase of, inter alia, the farm'*. The *'farm'* is not identified at this point, though four farm properties are listed in paragraph 32 of the founding affidavit. The body of the affidavit does not provide any evidence as to when the sum of R8 million was paid and for which of the farms it was supposedly paid. In paragraph 47 of the founding affidavit the applicants refer to the evidence given by one Gary Newmark ('Newmark') at the s 417 enquiry, where he apparently said that either Holdings or Shipping had paid for *'two farms'*. In paragraph 48 the applicants purport to summarise evidence given by Van Staden himself at the enquiry, including evidence that the Trust obtained the money to buy the farms by way of loans from the Indo-Atlantic group; and that he could not say from which company the loans were made *'but later had to concede that, as Holdings had the only operative bank account and most funds*

were paid into this account, all payments were made out of the bank account of Holdings'.

14. In paragraph 43 of the founding affidavit, and with reference to the evidence of a Mr B De Vries ('De Vries') given at the s 417 enquiry, the applicants allege that Holdings has a claim of R1.8 million against the Trust in respect of monies lent to fund the Trust's purchase of the Baron aircraft.

15. In paragraph 47 of the founding affidavit, and with reference to Newmark's evidence at the s 417 enquiry, the applicants say that R880 000 was paid by Holdings to the Trust since May 2008 by electronic transfers in order to fund the purchase of vehicles and other movables for the farm.

16. If monies were paid by Holdings to the Trust, this should be reflected in Holdings' bank statements. The applicants did not annex any bank statements to their papers in order to provide evidence of the flow of funds. No deeds of sale relating to the farms or other assets of the Trust were adduced.

17. The applicants' case in respect of Holdings' claim against the Trust is not only vague; it also rests mainly if not exclusively on evidence of questionable admissibility. In *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) a full bench (*per* Harcourt J at 911F-922D) held that a person testifying at an liquidation enquiry in terms of s 155 of the Companies Act 46 of 1926 did so in his personal capacity and that his answers were not admissible evidence against his employer or principal. In that case this led to a finding that the evidence of a company's managing director at an insolvency enquiry was not admissible in proceedings against the company. The full bench thus upheld the decision given on this point at first instance by Henochsberg J (reported at 1962 (2) SA 487 (N), particularly at 490H-496G).

18. In *O'Shea NO v Van Zyl NO & Others* [2011] ZA (SCA) 156[1] the Supreme Court of Appeal approved the statement of general principle laid down in *Gilbert Hamer* and applied it to the case where one of several trustees of a family trust testified at a s 417 enquiry (paras 17-25). The *O'Shea* case was similar to the present one. The applicants there were liquidators who were applying for the sequestration of a family trust. In order to establish the company's claim and thus its *locus standi* the liquidators relied on the evidence given at an earlier s 417 enquiry by the appellant's husband who was her co-trustee (though he had resigned by the time the sequestration application was instituted). Heher JA pointed out that trustees have to act jointly unless the trust deed otherwise provides. In the *O'Shea* case there was no evidence that Mr O'Shea had testified as an authorised representative of the trust rather than in his personal capacity. His evidence was thus held to be inadmissible to establish the liquidators' claim against the trust. This conclusion was reached despite the fact that Mr O'Shea was available to the trust as a witness and filed an affidavit in the sequestration application.[2]

19. These principles are applicable in the present case. Van Staden testified in his personal capacity. There is nothing to show that he was giving evidence with the authority and speaking on behalf of the trustees. De Vries and Newmark obviously were not testifying on behalf of the Trust. It is so that the Trust in its answering papers did not object to the admissibility of the s 417 evidence nor in his main heads of argument did Mr Stransham-Ford, who appeared for the Trust, refer to or rely on the principles laid down in *Gilbert Hamer* (*O'Shea* had not yet been decided). However by the time of the further argument before me on 25 November 2011 there was such an objection. In any event, the duty of a court is *mero motu* to decide a case only with reference to admissible evidence (see *Langham & Another NNO v Milne NO & Others* 1961 (1) SA 811 (N) at

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[1] Although *O'Shea* was decided after the completion of the main argument before me on 20 September 2011, the parties made brief submissions thereon during the hearing of the applicants' application for leave to adduce further evidence. That hearing was on 25 November 2011.

[2] The fact that Mr O'Shea made an affidavit is not stated in Heher JA's judgment but appears from paragraph 27 of the court *a quo*'s judgment.

817A-C and cases there mentioned; *President of RSA v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) para 105). During the main argument I raised of my own accord with Mr S Olivier SC, who appeared for the applicants, the issue of admissibility and the implications of the *Gilbert Hamer* judgment.

20. *Gilbert Hamer* and *O'Shea* at least decide that evidence given in the circumstances dealt with in those matters and which would ordinarily be inadmissible hearsay when adduced against any person other than the witness himself is not rendered admissible by provisions such as s 65(5) of the Insolvency Act. What is less clear is whether they also decide that such statements may never be received into evidence against a third party, for example under the modern law regarding the admissibility of hearsay evidence as regulated by s 3 of the Law of Evidence Act 45 of 1988. The latter Act was not in force when *Gilbert Hamer* was decided. In *O'Shea* the possibility of receiving the evidence as hearsay in terms of Act 45 of 1988 appears not to have been raised. In order for Act 45 of 1988 to be inapplicable one would have to conclude that provisions such as s 65(5) of the Insolvency Act, by expressly rendering the evidence admissible against the witness himself, impliedly render the evidence absolutely inadmissible against any other party (an *inclusio unius exclusio alterius* argument). *O'Shea* does not say so in terms. The references in *Gilbert Hamer* and *O'Shea* (and in the authorities reviewed therein) to privity of interest and the circumstances in which admissions made by an agent are admissible against his principal suggest that the conclusion that the evidence was inadmissible rested on the fact the evidence was hearsay, which in modern law is not an absolute bar to receiving the evidence. Moreover in *Gilbert Hamer* Henning J, in a judgment concurred in by the other members of the court, addressed as a separate issue the question whether the same evidence that Harcourt J had held inadmissible was nevertheless rendered admissible by virtue of s 2 of the Evidence Act 14 of 1962 (the predecessor of the current s 34 of the Civil Proceedings Evidence Act 25 of 1965). The latter provision provides a

limited exception to the hearsay rule. Although Henning J found that the requirements laid down in s 2 of Act 14 of 1962 were not satisfied, the analysis undertaken by him would have been quite unnecessary if the effect of Harcourt J's judgment had been that the evidence given at the insolvency enquiry was by a necessary implication of the statute absolutely inadmissible. There is the further consideration that although s 65(5) of the Insolvency Act contains (as did s 155(2) of the 1926 Companies Act) an express provision regarding admissibility in later proceedings (including civil proceedings), the provisions of s 417 of the Companies Act 61 of 1973 (as they have read since their amendment in 2002) deal expressly only with later criminal proceedings. The admissibility or inadmissibility of such evidence in civil proceedings thus appears to rest on general principles of the law of evidence rather on than the terms of the Companies Act.[3]

21. I am thus inclined to think that a court may in appropriate cases permit a litigant to rely on evidence given by X at a s 417 enquiry for purposes of making out a case against Y provided this would be in the interests of justice, having regard to the requirements laid down in s 3 of Act 45 of 1988. However I do not need to express a firm view on this issue. The applicants did not at any stage explicitly ask the court to act in terms of s 3. Since De Vries and Newmark were at no stage trustees of the Trust and since no explanation was furnished by the applicants for not obtaining an affidavit from De Vries, the case for receiving their s 417 evidence as hearsay would in any event be weak. In Van Staden's case the argument for receiving his s 417 evidence on a hearsay basis is stronger, since he was and is a trustee, the other trustee being his wife. He appears *de facto* to have been the dominant decision-maker in the affairs of the Trust. He was available to the Trust as a witness and in fact made several affidavits in the proceedings.

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[3] In *Mia's Trustee v Mia* 1944 WLD 102 Schreiner J appears to have accepted that the applicants could have attached and relied on the insolvent's evidence at an enquiry in their case against the respondent provided that the stricter rules then in force in regard to hearsay evidence were satisfied.

22. Be that as it may, and even if I were to treat all the attached extracts of the s 417 evidence as admissible under s 3 of Act 45 of 1988, I do not consider that the applicants have established Holdings' claim against the Trust. The evidence at the s 417 enquiry was equivocal and contains some material that tends to support Van Staden's assertion that any monies used by the Trust to buy assets were lent by the Indo-Atlantic group to him personally, not to the Trust. Furthermore, two of the three witnesses on whose s 417 evidence the applicants rely have made affidavits in the sequestration application. To the extent that the s 417 evidence by these witnesses is at odds with their affidavits, one can in terms of the *Plascon-Evans* rule only disregard the version in their affidavits if it is so untenable and far-fetched that one is entitled to reject it in favour of the evidence given at the enquiry.

23. In assessing the evidence it is necessary to bear in mind that the existence of a loan by Holdings to the Trust is not established merely by showing that money flowed directly from Holdings to the Trust or directly to a third party in a way that benefited the Trust. It is a very common occurrence for a loan to be implemented by payment from the lender to a third party nominated by the borrower. The applicants rely on money lent and advanced by Holdings to the Trust at the latter's specific instance and request. The applicants must show on a balance of probability that a loan agreement was concluded between Holdings and the Trust.

24. The trust deed, which the applicants have annexed to their founding affidavit, did not entitle Van Staden to act alone in administering the affairs of the Trust. In order for there to be a quorum at a trustees' meeting the majority of the trustees must be present (clause 4.7). In the event of disagreement the decision of the majority prevails (clause 4.10). Although Van Staden and his wife are the only current trustees it appears from the restraint order granted by Traverso AJP on 12 December 2008 and from the judgment of Blignault J delivered on 9 March 2011 that at some stage after the Trust was established in March 2004 a

Mr Marc Schoeman was added as a trustee and that he was still a trustee at the time of the proceedings before Blignault J. To judge by the extracts of the evidence attached to the applicants' affidavits, the question as to what Mrs Van Staden or Schoeman knew and intended in regard to the funding of the Trust was not explored at the enquiry and there is no other evidence in that regard apart from Mrs Van Staden's confirmatory affidavit in which she has affirmed her husband's version (namely that the Trust itself did not borrow any monies from the Indo-Atlantic group). There is also no evidence of any resolutions by the Trust to borrow money from the Indo-Atlantic group.

25. There is no documentary evidence that the boards of any of the Indo-Atlantic companies resolved to lend money to the Trust or even believed that they had lent money to the Trust. The only documents which the applicants adduced regarding Holdings' financial affairs were two versions of an unaudited balance sheet as at 31 October 2008 ('RE15' and 'RE16'). In paragraph 45 of the founding affidavit the applicants say that these two documents *'appear to be the balance sheet of Holdings as at 31 October 2008'* but they do not say anything about the provenance of the documents. In each version a number of loan accounts are listed, some reflecting monies owed by Holdings, others reflecting monies owed to Holdings. In neither version is there a loan account in the name of the Trust. In both versions Holdings is reflected as being indebted to Van Staden personally on loan account in an amount exceeding R120 million. In one of the versions ('RE16') there is a second Van Staden loan account in which he is reflected as being indebted to Holdings in an amount of R44 476 869,79. On this version of the balance sheet, the net position on loan account between Holdings and Van Staden would be that Holdings owed Van Staden about R75,8 million as at 31 October 2008.

26. The applicants allege in paragraph 46 of the founding affidavit that according to De Vries' s 417 evidence the second Van Staden loan account *'represents, at least in part, the indebtedness of the Trust'*. The extracts from De Vries'

evidence (annexed to the replying affidavit) do not contain any explicit statement to this effect. I have not found it easy to make sense of the transcript of his evidence. As far as I can discern, De Vries said that the later and thus 'correct' version of the balance sheet is 'RE15' (record 426), even though 'RE16' bears a later date. He said that in the earlier version ('RE16') the second Van Staden loan account *'verteenwoordig die Shipping, die Sword Fish Trust en dan Bross en Collier'* but he immediately went on to say that he received instructions (it is unclear from whom) to allocate the monies in the second loan account to Shipping, Seafoods and another company called Southern Oceans (record 425). Annexure 'RE15' may be a reworking along these lines, because it shows substantial amounts owing to Holdings by Shipping and Seafoods and a substantial claim on loan account by Southern Oceans, none of which appeared in 'RE16'.

27. De Vries was asked during the enquiry why the money that was used for the Trust's benefit was not reflected as one of the loan accounts in these balance sheets. His reply appears from the following extract:

'MNR OLIVIER: Nou sê vir my hoekom is Swordfish Trust nie hier in onder die 'loan accounts' nie?

MNR DE VRIES: Alles is onder Van Staden gewys, want Van Staden het die geld getrek, nie vir Swordfish nie. Hy het dit net getrek; en dan as ons nie weet waarnatoe die inskrywing gaan nie allokeer ons dit na sy leningsrekening toe.

MNR OLIVIER: So hy sit daarso dan gooi hy stukkies papier in die lig op, dan sê hy die wat op die tafel val skryf dit Seafoods toe, en die wat op die grond val skryf dit Shipping toe en die wat by die venster uitwaai, hulle gaan na Swordfish Trust toe. Is dit hoe dit werk?

MNR DE VRIES: Nee, alles wat ons kan allokeer na Mnr Van Staden, is na Mnr Van Staden se leningsrekening toe. Waar ons duidelik weet dit is Shipping of enige ander maatskappy is dit soontoe geallokeer.'

28. A short while later De Vries testified that a sum of about R1.8 million to fund the Trust's purchase of the Baron aircraft had come from Holdings (to which he referred as *'Groep'* in his evidence). It was put to him by Mr Olivier that the Trust must then owe Holdings the money, to which proposition he agreed. The proposition was, however, legally erroneous and De Vries' affirmative answer does not appear to accord with 'RE15' and 'RE16'. A little later in his evidence he said that he thought there was at one stage a loan account in the name of the Swordfish Trust *'maar... hy is oorgedra na Van Staden se rekening toe maar ek sal dit moet gaan seker maak'* (record 429). The transcript does not reflect any further evidence as to whether a loan account in the name of the Trust ever existed.

29. The applicants offered no explanation in their papers for why they were seeking to rely on De Vries' evidence at the enquiry rather than filing an affidavit by him. There is nothing to indicate he was unavailable. Van Staden in his answering affidavit was critical of De Vries. Van Staden described him as having been *'a shockingly delinquent CFO'* (para 88) and said that his evidence should be viewed with a high degree of caution as he had been induced by the State to provide information against an offer of immunity from prosecution which had then been withdrawn in September 2009 (para 200 – the withdrawal of immunity would have been after De Vries testified at the s 417 enquiry). I cannot say whether these criticisms of De Vries are valid but I am certainly not satisfied that the transcript of De Vries' evidence provides reliable evidence for a conclusion that an agreement of loan was ever concluded between Holdings and the Trust.

30. Since Newmark has made an affidavit in these proceedings, a consideration of his evidence should start there. He is an attorney and was a director of Holdings. He says that the monies used to fund the Trust comprised approved salaries, bonuses, dividends and loans to Van Staden and were discussed by the board as being remittances against entitlements due to Van Staden in a context where De Vries, the financial director, had failed for three years to produce audited

financial statements. He added that there would have been no basis for the board to have agreed to advance money *to the Trust* and that the board would not have agreed to do so.

31. Newmark did not annex any extracts from board minutes to corroborate his version. Given that Holdings and its records are under the applicants' control, Newmark may not have had access to board minutes for this purpose. Conversely, though, and as I have previously mentioned, the applicants have produced no minutes to suggest that the directors ever intended to lend money to the Trust.

32. In his evidence at the s 417 enquiry Newmark said that Shipping and Seafoods had their own bank accounts though the group was advised by its auditors to use a single bank account for ease of control. Holdings' bank account was thus used as a *'conduit'*. Holdings was not, however, a trading company (record 436-443). He said that Van Staden had a loan account in Holdings which he believed to be large (record 444-445). He was not asked, and never said, that the Trust had a loan account in Holdings or was indebted to Holdings.

33. In regard to the purchase of the farm Bambata (which seems to have comprised several properties), he was unable to recall the precise price though he put it in the region of R7.5 million to R8 million (record 449). The money was paid into his trust account by electronic transfer (presumably for onward transmission to the seller against transfer). He could not recall whether the money had been transferred into his trust account from Holdings' bank account or from Shipping's bank account – it would have been one or the other (record 450). He said he had raised an objection when Van Staden wanted to use group founds to pay for the farm (this was some time after the Trust had concluded the purchase agreement). He raised these objections verbally with his co-directors, including De Vries (record 462). He did not know who had actually caused the money to be transferred into his trust account but said that any one of Van Staden, De

Vries or the financial manager Mr Botha could have accessed the electronic system to make the transfer.

34. There is nothing in Newmark's s 417 evidence to indicate that Holdings lent money to the Trust. Newmark was not asked that question. The evidence that one of the Indo-Atlantic companies transferred money to his trust account in respect of the purchase of the Bambata farm does not in itself justify the conclusion that the said company lent money to the Trust. Newmark has specifically stated under oath that this was not Holdings' intention.

35. I have already summarised the version given by Van Staden in his affidavit. To this may be added the following. He denied that Holdings operated a central bank account for the group as a whole. He alleged that Shipping and Seafoods, which were the two operating companies, also had bank accounts (paras 30 and 31). In regard to the Trust's operating expenses he said that the Trust had its own bank account, *'paid its own way'* (para 32) and had an independent income (para 87). Regarding his loan account claim against Holdings of R120 million (as reflected in 'RE15' and 'RE16'), Van Staden said that this was De Vries' computation. He said that he did not believe that his entitlement against Holdings was as large as R120 million but that he did indeed have a substantial entitlement against which he drew funds (paras 62-63; 74-75). He stated that he could not give more explicit documentary support for this contention because all his files and documents as well as his computers had been confiscated by SARS or SAPS (para 81). He complained that the incompleteness of the Indo-Atlantic group records is attributable to the fact that its records were *'seized and restrained and never analysed and have not been returned'* and that De Vries was a *'shockingly delinquent CFO'* (para 88).

36. There are certainly points of criticism of Van Staden's version. He has not explained how the Trust was administered or when and how the Trust agreed to borrow money from Van Staden. He has also not explained how the Trust was

able to generate income and to pay its own way from an operational perspective. However, he was facing allegations of a very bald and vague nature.

37. Regarding his s 417 evidence, Van Staden said in his affidavit that the extracts annexed to the founding affidavit were incomplete and did not present a balanced picture (para 52.1). If proper regard were had to his s 417 evidence as a whole, the conclusions drawn by the applicants were *'demonstrably incorrect and unfounded'* (para 30). In their replying papers the applicants annexed further extracts from Van Staden's evidence though the full record was not produced. Van Staden himself did not seek to place any other extracts before court.

38. The annexed extracts of Van Staden's evidence begin with the funding of the farms. He was asked where the Trust got the money to buy the farms. He replied that if he remembered rightly the Trust had a loan account with the Indo-Atlantic group in the region of R40 million which he had seen in a document in one of the liquidation applications (he presumably had in mind 'RE16'). However he immediately corrected himself and said that the said loan account was in *his* name. He accepted that the money had come from one of the Indo-Atlantic companies but could not say which (record 342). In his mind, the money must have been lent by one of the operating companies, Seafoods or Shipping (record 343-344). In the context of the latter aspect, the Commissioner (erroneously referred to in the transcript as *'die Arbiter'*) asked which Indo-Atlantic company he had intended should be the lender to the Trust. Van Staden's answers suggest an acceptance by him that the Trust borrowed money from one or other Indo-Atlantic company (record 342-343; 358). However, in context the focus of the questions and answers was not the identity of the borrower but of the lender. The same is true of the later questions in similar vein asked by counsel, Mr Olivier (record 346-347; 354). Van Staden said that Shipping had an active bank account while Seafoods had a call account (record 344; 354). Although at one point he said that all money came out of Holdings (record 344-346) he could not say that all funds necessarily flowed from

Shipping and Seafoods to Holdings (record 345) or that the money for the farms had been transferred to Newmark's trust account out of Holdings' bank account (record 347, 354, 366-367).

39. Van Staden said at the s 417 enquiry that his answers regarding the funding of the farm applied also to the vehicles. He said nothing should have come from Holdings *'want Holdings het nie 'n dag se werk gedoen om 'n inkomste te generate nie'* (record 348). He said that the whole financial set-up in the group was *'die grootste gemors wat ek in my lewe gesien het'* and that he could not understand why everything had been reflected in Holdings (record 348-349). He put the blame on De Vries, saying that for three years he (Van Staden) had been pressing for proper financial statements (record 350). He disputed that Holdings had the only bank account or that payment for the vehicles must have come from the Holdings account. He said that many internet banking transactions were done on Shipping's current and call accounts. He was uncertain whether transactions were also done on Seafoods' account (record 390-392).

40. He was then asked questions about the repayment terms applicable to the Trust's loans from the group (record 367-368). He said that no terms were specifically agreed. The questions were asked on the assumption that the Trust was the borrower because it had received the benefit of the monies. Van Staden may have been brought under the misapprehension that this was indeed the position by the way the questions were put to him by the Commissioner and by Mr Olivier. What was not specifically explored with him was whether it was the Trust or he personally who had concluded a loan agreement with the group. He was later asked, in a different context, about his loan account of R120 million as reflected in 'RE16', for which he had submitted a claim against Holdings' liquidators. He said he did not know how De Vries had arrived at the figure of R120 million (record 371-373). He was not asked why loan accounts were reflected in his name but not in the name of the Trust. If he had been asked, the distinction relevant to the present case might have been brought to light and elucidated.

41. Van Staden said that the price of the Baron aircraft had definitely come from the Holdings bank account – Mr Botha had done the transfer (record 394). The aircraft was used principally for group business. He was asked about repayment terms without specific reference to the identity of the borrower (record 394-398). He said, once again, that no specific repayment terms were agreed.

42. Van Staden's s 417 evidence comes the closest to providing evidence that the Trust borrowed money from the Indo-Atlantic group and that at least the sum of about R1.8 million in respect of the aircraft came specifically from Holdings. If Holdings has a loan claim of R1.8 million against the Trust, that would naturally suffice to give the applicants *locus standi* to seek the Trust's sequestration. But as I have explained, Van Staden's evidence at the s 417 enquiry did not focus on the critical question, namely whether the Trust or Van Staden personally was contractually the borrower nor was the anomaly raised with him that the unaudited balance sheets ('RE15' and 'RE16') reflected loan accounts in his name but not in the Trust's name. The s 417 evidence in its entirety (including the evidence of De Vries and Newmark) does not to my mind provide a sufficient basis, in terms of the *Plascon-Evans* rule, to reject as untenable or far-fetched the version given under oath by the Van Stadens and by Newmark in their affidavits.

43. For all these reasons I conclude that the applicants have failed to establish that Holdings has a claim against the Trust for monies lent to the latter. If this conclusion is right, the application must fail.

Factual insolvency

44. In case the above conclusion is wrong I shall deal with the remaining questions of factual insolvency and acts of insolvency.

45. The founding affidavit contains no tabulation of the Trust's assets and liabilities and their respective values. Paragraph 49 simply alleges that it is an inescapable conclusion from the evidence at the s 417 enquiry that the Trust is indebted to

Holdings in respect of the price of the assets of the Trust and the expenses incurred by it; and that because the value of the assets, such as the motor vehicles, has decreased and expenses have been incurred and paid without the Trust having generated an income, Holdings' claim exceeds the value of the Trust's assets; and that the Trust is thus factually insolvent.

46. This assertion rests on the s 417 evidence. If that evidence is inadmissible the foundation for the conclusion of insolvency is absent. However I shall again assume in favour of the applicants that the s 417 evidence is admissible.

47. Even on this assumption, the allegation in paragraph 49 of the founding affidavit is hopelessly deficient. It was incumbent on the applicants to set out their version as to what the assets and liabilities were at the time of launching the sequestration application. I invited Mr Olivier to provide me with his best analysis of the assets and liabilities of the Trust as at April 2011 (when the sequestration application was launched), based on such evidence as there was in the record. I should mention that Mr Olivier was not on brief at the time the founding and replying affidavits were prepared. In his written replying submissions he provided the analysis I had requested.

48. Mr Olivier's analysis rested heavily on annexure 'RE14' to the founding affidavit, being an extract from a report by Knoetze to court setting out the Trust's assets and their values. In his answering affidavit Van Staden says that the said report is *'an inaccurate and flawed document the veracity of which I have long rejected and criticised in other uncontroverted court papers'*.

49. Annexure 'RE14' comprises pages 17 to 20 of a longer document. The annexed extract does not bear a date nor is the date of the report stated in the founding or replying affidavit. I infer that annexure 'RE14' is an extract from the interim report made by Knoetze to court pursuant to paragraph 1.21 of the provisional restraint order of 12 December 2008 ('RE13'). In terms of paragraph 1.21 of the restraint order the said interim report had to be filed by 30 January 2009. It thus appears likely that the information in 'RE14' predates the launching of the

sequestration application by well over two years. This naturally calls into question the relevance of the report as a guide to the value of the Trust's assets in April 2011.

50. Particularly since the respondents have challenged the accuracy of 'RE14', I do not think the court can place reliance thereon in the absence of an affidavit from Knoetze and from the valuers who performed the valuations to which reference is made in Knoetze's report. There is nothing to indicate that the deponent to the founding affidavit has personal knowledge of the matters in question or the expertise to value the assets nor did he purport to confirm the accuracy of Knoetze's report. Furthermore, the extract is even incomplete in respect of the matters with which it deals, in that the pages containing the comments in paragraphs 2.1.5.2 to 2.1.5.4 of the report (as referred to in the table in paragraph 2.1.5) have not been placed before the court.

51. However, and even taking 'RE14' at face value, there is considerable difficulty in deriving from the said document and the other evidence a reliable picture of the value of the Trust's assets and liabilities as at April 2011.

52. The first assumption Mr Olivier asked me to make was that the fourth column in the table in 'RE14' (headed *'Current Market Value and Source of Valuation'*) reflects, contrary to the said wording, the purchase price paid by the Trust for the assets in question. The next assumption one has to make is that the Indo-Atlantic group paid for *all* the assets listed by Knoetze. There was no evidence at the s 417 enquiry that the group had paid for the La Rouge sectional title unit.[4]

53. Nevertheless, and on the assumptions I was asked to make, the loans would on my analysis comprise [a] R6 340 000 in respect of immovable property[5] [b] R1.55 million in respect of Matikulu movables[6] [c] R397 000 in respect of

[4] In this regard, items 68 and 69 of Knoetze's report suggest the existence of two La Rouge units. This was contested by Van Staden in his answering affidavit. It seems that there is only one unit and a linked garage and that the price of R590 000 has probably been erroneously duplicated by Knoetze.

[5] Items 65-68. The farm referred to in item 64 was not ultimately acquired and item 69 duplicates item 68.

[6] Although the purchase of the Matikulu farm fell through, Knoetze says in note 2.1.5 .1 that R1.55 million was paid for movables by way of a separate agreement.

game[7] [d] R2 159 616 in respect of vehicles[8] [e] and R2 340 000 in respect of the Baron aircraft.[9] This gives a total loan indebtedness in respect of the Trust's acquisition of assets of R12 786 616.

54. Mr Olivier's analysis of the loans used to acquire assets differs from mine. His total for liabilities, based on the Knoetze schedule, was only R8.877 million, which would reduce to R8 287 000 after deducting the double-counting of the La Rouge purchase price. The difference of R4 499 616 between my figure of R12 786 616 and his figure of R8 287 000 is attributable to the fact that he omitted to reflect the price of the vehicles or to add the price of the aircraft.

55. To these liabilities Mr Olivier said that I needed to add the following further amounts, namely [a] R400 000 in respect of occupational interest for the farm Matikulu (five months at R80 000 per month until the sale of the said farm fell through) [b] R1.75 million in respect of a claim by Colin Geoffrey Inc in respect of legal fees (as secured by the cession of 9 March 2011) [c] living expenses of R390 000 (R65 000 per month x 6) [d] and payment of operational expenses of the farm of R880 000. This would give total liabilities (based on my earlier analysis) of R16 206 616.

56. I do not think that the item in respect of the indebtedness to Colin Geoffrey Inc should be included. This figure is derived from the deed of cession which was handed up only during argument. The cession was not annexed to the founding or replying papers nor was there any allegation in the papers of a quantified indebtedness by the Trust to Colin Geoffrey Inc. Furthermore, the claim seems to relate to litigation in which, pursuant to Blignault J's judgment of 9 March 2011, Van Staden has obtained a costs order against the NDPP. The relationship between the Trust's liability to Colin Geoffrey Inc for legal fees and Van Staden's claim for costs against the NDPP has not been ventilated in the evidence (since the issue was not squarely raised in the founding papers) but it

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[7] Item 70.

[8] Items 72-89. For a number of vehicles Knoetze has *'unknown'* in the columns reflecting the price and current value. Like Mr Olivier, I shall omit these vehicles from the analysis.

[9] Item 90.

does not seem reasonable to include a liability in respect of costs which appears to be recoverable, at least in part, by a related party (Van Staden) under a court order.

57. This reduces the liabilities to R14 456 616. It can hardly be said that this figure is capable of being readily derived from the papers. Apart from the figures in 'RE14', one has to trawl through a not altogether lucid transcript of the s 417 evidence (most of which was annexed only in reply) or make speculative assumptions in order to derive the additional liabilities which Mr Olivier has asked me to add. For example, Mr Olivier's figure of R390 000 for living expenses is based on an assumption that the Trust incurred a liability of R65 000 per month from April to September 2011 to fund the Van Staden's living expenses. The figure of R65 000 he asked me to derive from paragraph 38 of the founding affidavit read with paragraph 47 of the answering affidavit. Most of the six-month period he used for the calculation post-dates the launching of the sequestration application. Furthermore, since the Trust was provisionally sequestrated on 26 May 2011, it is not apparent how the Van Stadens could have caused the Trust to run up liabilities (or realise Trust assets) after that date. Another assumption that has to be made is that the Indo-Atlantic group lent the Trust the money to buy La Rouge. Regarding the purchase prices supposedly reflected in 'RE14', the amount of R2.3 million stated in respect of the Baron aircraft is considerably higher than the amount of R1.8 million referred to in the founding affidavit and in De Vries' s 417 evidence.

58. Regarding the assets, the Knoetze extract reflects the following market values, namely [a] R9.735 million for the Bambata farm and game and for the La Rouge sectional title unit [b] R1.565 million for the motor vehicles [c] and R2.2 million for the Baron aircraft. This gives a total of R13.5 million. (Once again, Mr Olivier gives a lower figure, namely R9.735 million, because he has omitted the value of the vehicles and the aircraft.)

59. Mr Knoetze's market value of R13.5 million[10] does not appear to include the Matikulu movables for which the Trust (according to Knoetze) paid R1.55 million. Knoetze's report does not indicate that the value of these movables has been included in his values for the Bambata farm. It is difficult to comprehend how the Trust could have paid R1.55 million for movables (and have a corresponding liability in that amount to the Indo-Atlantic group) without having received any assets in return. Note 2.1.5.1 to Knoetze's report indicated that the circumstances surrounding the various aspects of the Matikulu transaction were under investigation. What became of those investigations has not been revealed. As will appear hereunder when I deal with the affidavit of Mr CP Van Zyl, there do indeed appear to be other movable assets which may not be reflected in the Knoetze extract.

60. Nevertheless, and on the assumption that the assets are limited to those on which Knoetze placed a value of R13.5 million, the Trust's liabilities only exceed the assets by R956 616. It will be recalled that Knoetze's report was probably given in late January 2009. In the two and a quarter years that passed before the sequestration application was launched the farm and La Rouge properties may well have increased in value by an amount substantially in excess of the R956 616 shortfall, and game may have multiplied. Of course, the vehicles may have decreased in value. However, I am unable to conclude that the liabilities of the Trust probably exceeded the value of its assets in April 2011. Given the wholly inadequate way in which the case on insolvency was presented in the founding papers and that the respondents were thus not presented with a clearly articulated case to which they could respond, the applicants cannot expect the court to make benevolent assumptions in their favour. Our courts have frequently stressed that clear and admissible evidence of actual insolvency should be provided in the founding papers; the court should not be left to conjecture (see *Ohlosson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50;

[10] In paragraph 39 of the founding affidavit Mr Engelbrecht for the applicants quotes something said by Van Staden in an affidavit in earlier proceedings. In that passage Van Staden said that Knoetze's interim report had valued the Trust's assets at R16.6 million. I have not been able to derive that figure from the extract attached to the founding affidavit. Perhaps it appeared elsewhere in the interim report. This merely adds to the confusion.

Trade Discount Co v Steele 1949 (4) SA 121 (O) at 123; *Hoffman v Hoffman* 1959 (2) SA 511 (E) at 512D-513B).[11]

61. There are various confusing factual disputes about what has become of some of the Trust's assets since the provisional restraint order was granted in December 2008. In his answering affidavit Van Staden says that Knoetze disposed of most of the vehicles and has failed to account for them (para 42). He also says that Knoetze rendered the aircraft unairworthy by recklessly lending it contrary to Van Staden's advice (para 42; see also para 2.7.9 of Van Staden's business plan at record 273).

62. Regarding the game, Van Staden says that criminal and civil proceedings are being actively investigated (ie presumably by him and the Trust) against the applicants, Deloittes and their agents for the alleged theft of the Trust's assets, *'including the Black Impala project'* (para 18). In this regard he refers to an attached affidavit by one Ranier Prinsloo, who describes himself as a nature and marine conservationist and helicopter test pilot. The precise import of this affidavit is not altogether clear. Prinsloo says that he was engaged in May 2010 to capture various items of game in connection with the sale of game from the Trust (represented by Knoetze) to KGB & HVR Game. He says, further, that in March 2011 he was asked by Mr Andrew Schofield, who was apparently managing the farm under Knoetze's curatorship, to capture and select 60 impala, apparently in connection with the sale of the said impala for R500 000, with payment to be made before the impala were captured. Of this price, Schofield required R150 000 to be paid into his own bank account. When Prinsloo visited the farm to see whether the impala were actually there, Schofield and Mr Du Preez (apparently another farm manager) were very secretive. Prinsloo could not see any black impala from the vehicle. Du Preez and Schofield were reluctant to allow him to do a fly-over to survey the impala. Ranier says that he came to the conclusion that Deloittes were bluffing him (he used a stronger term,

[11] To the extent that some of the cases require the court to be left *'in no doubt'*, this is, of course, not to be understood as requiring more than proof on a balance of probability.

inappropriate in court proceedings) and notified Van Staden – this was round about 28 March 2011. Although not altogether clear, it seems to be Van Staden's complaint that under Knoetze's curatorship a number of impala, including valuable black impala rams, went missing.

63. In Van Staden's business plan dated 27 March 2011 (which was very shortly before he was contacted by Prinsloo about the impalas) he stated that there should be an abundance of game on the farm worth about R4.33 million, assuming the game to have been properly cared for during Knoetze's curatorship. Van Staden stated in the plan that he would only be able to determine the exact number once he returned to the farm and did a game count (record 266). From this it seems that although the restraint order was discharged on 9 March 2011 the farm was not immediately returned to the respondents' control.

64. The answers to these allegations are contained in the affidavit of Mr CP Van Zyl, one of the provisional trustees of the Trust's insolvent estate. Van Zyl was appointed on 15 June 2011. This affidavit was filed together with the applicants' replying papers.

65. Van Zyl states that Knoetze was unable to locate all of the vehicles when he took curatorship of the Trust's assets (this would have been on or after 10 December 2008). Van Zyl goes on to say that when the deputy-sheriff attached the Trust's assets in the latter part of July 2011in terms of s 19 of the Insolvency Act, he was unable to attach 11 vehicles because they could not be located (presumably the provisional trustees had given the deputy-sheriff a list of vehicles they expected to find). Van Zyl says that it appears that the majority of these vehicles were those placed in storage by Knoetze and later released to the Van Stadens. I find it impossible to reconcile Van Zyl's list of vehicles in paragraph 27 with Knoetze's list of vehicles in 'RE14'. As far as I can see, seven out of the 11 vehicles that Van Zyl lists as *'unknown'* (ie the 11 vehicles which he says the deputy-sheriff was unable to locate) are not reflected in Knoetze's list at all, so I

do not understand how Knoetze could have had them in storage. The remaining four vehicles that the deputy-sheriff was unable to attach were also listed by Knoetze as *'unknown'* and it is thus unclear whether Knoetze himself ever located them. What is even more confusing is that Van Zyl's list of vehicles in paragraph 27 includes a number of vehicles not contained in Knoetze's list. In other words, the deputy-sheriff in July 2011 was able to find a number of vehicles which Knoetze apparently never found. Furthermore, the deputy-sheriff's inventory (record 507) lists a number of other movable assets which the provisional trustees attached but which are not mentioned in Knoetze's report.

66. Van Zyl's allegations as to what he was told by Knoetze and as to what vehicles Knoetze supposedly stored and later released to the Van Stadens are of a hearsay nature. Knoetze himself did not depose to an affidavit. Accordingly I cannot find that the disappearance of vehicles occurred after they had been returned to the respondents' control. At best for the applicants there is a dispute of fact on that point. If Van Staden's version is right, the Trust may have claims against Knoetze and Deloittes in respect of missing vehicles.

67. As regards game, Van Zyl avers (para 15) that Knoetze told him that he (Knoetze) had been unable to undertake a proper and accurate count of the game. Apart from the fact that this too is hearsay, there is no explanation as to why Knoetze could not cause a proper game count to be undertaken. From Ranier's affidavit it seems that a game count is something that a person such as Ranier could do by helicopter. According to Ranier, the first occasion on which he was asked to perform a game count was on 4 March 2011, just a few days before the provisional restraint order was discharged. Whether anyone else was requested by Knoetze to do a game count at an earlier time does not appear.

68. In paragraph 29 of his affidavit Van Zyl says that 721 head of game were returned to Van Staden's control after the discharge of the restraint order, in support whereof he annexes a schedule 'E4'. He does not explain the source of the schedule. The information therein cannot be a matter within Van Zyl's

personal knowledge. Presumably it derives, once again, from Knoetze and is of a hearsay nature. Furthermore, and since 'E4' purports to be based on a game count, its contents are difficult to reconcile with Knoetze's report to Van Zyl that he had been unable to do a proper and accurate game count.

69. According to the deputy-sheriff's return (record 506), Van Staden reported that there was not much wild life left on the farm. Van Zyl seems to infer from this that most of the 721 head of game has disappeared (assuming that 721 head had been restored to the Van Stadens by Knoetze, a fact not properly established on the evidence). The deputy-sheriff himself did not do a game count. I do not know whether Van Staden would have regarded 721 head of game as a lot or a little (from his business plan it seems he may have been expecting to find an abundance of game) and I thus cannot know whether one can infer from his remark to the deputy-sheriff in July 2011 that there were more or less than 721 head of game on the farm. Be that as it may, Van Staden's version is that some game disappeared before the release of assets to the respondents.

70. The further information relayed to Van Zyl by Knoetze as set out in paragraph 17 of Van Zyl's affidavit is likewise of a hearsay nature. From Ranier's affidavit it seems that the Trust must have traded during Knoetze's curatorship since game was being sold and hunting was taking place. (If such trading has continued since the release of the farm to the respondents, it is possible that this has provided a source of income for the Trust and the Van Stadens.)

71. I thus do not consider that on the papers I can find that the respondents have done away with the Trust's assets since they were released to them. If any assets are missing, the responsibility for the disappearance is a matter of dispute. Van Zyl's affidavit does not make good the deficiencies in the applicants' case regarding factual insolvency.

72. It will be apparent that Van Staden has made some serious criticisms about Knoetze. Although Knoetze was cited as a respondent he did not oppose the application, and as result he only received the founding papers. He has not had

an opportunity of answering the respondents' allegations against him. I express no view whatsoever as to the truth of the respondents' allegations.

Acts of insolvency

73. I will not burden an already lengthy judgment with a detailed discussion of the alleged acts of insolvency. The allegation that the respondents caused the Trust's assets to be used to fund the Van Stadens living expenses[12] is speculative, as already noted. There could not have been much opportunity for this to occur because the restraint order was only discharged on 9 March 2011 and the sequestration application was launched on 18 April 2011. The applicants do not allege when the Trust's assets were *de facto* released to the respondents' control, though it seems that this had not yet occurred as at late March 2011.

74. In any event, in the absence of proof by the applicants that the Trust is factually insolvent it is not apparent on what basis I can find that the use of the Trust's assets to fund the living expenses of the beneficiaries (assuming this occurred) had the effect of prejudicing the Trust's creditors as contemplated in s 8(c) of the Insolvency Act (see *Standard Bank of South Africa v Sappeur-Fleury* 1925 SWA 7 at 10; cf *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) at 675E-677G).

75. The other act of insolvency, raised in the replying affidavits, fastens on paragraph 8 of Van Staden's affidavit, where he says that on 9 March 2011 (ie the day on which the restraint order was discharged) the Trust ceded all right, title and interest in its assets and rights to Colin Geoffrey Inc and that the latter should have been joined in the sequestration application. In paragraph 5 of the replying affidavit the applicants say that this was an act of insolvency in terms of s 8(c).

76. It appears from the transcript of the proceedings that took place before Desai J on 26 May 2011 (when the provisional order was granted) that the deed of

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[12] Founding affidavit paras 38-41.

cession was in the possession of the applicants' legal representatives by that date. If the applicants wished to rely on the cession as a further act of insolvency I think they should have sought leave to supplement their papers on or shortly after 26 May 2011. They should not have waited until filing their replying papers on 16 August 2011. Although the respondents could, in terms of my order of 23 August 2011, have filed a supplementary answering affidavit dealing with this aspect, my order did not have the effect of condoning the inclusion of new matter in the replying papers. I do not think in the circumstances of this case that the applicants should be permitted to rely on this belated allegation, particularly since the facts relating to the alleged act of insolvency are far from clear.

77. The cession was handed to me during argument. It is a cession *in securitatem debiti* in respect of the Trust's indebtedness to Colin Geoffrey Inc for legal fees. I have already alluded to the fact that these fees appear to overlap with fees in respect whereof Van Staden has obtained a costs order against the NDPP. The extent to which Colin Geoffrey Inc would need to rely on the security is at this stage unclear, assuming the security to be valid and effective.

78. In paragraph 5 of the replying affidavit the applicants say, correctly in my view, that the cession is of no effect in relation to *'assets'* (ie corporeal property) as distinct from *'rights'* (incorporeal property). What they say is that by way of the cession the Trust disposed of its *'rights'* to the prejudice of creditors. Whether on a proper interpretation thereof the cession was intended to apply to corporal property is by no means clear to me. Although clause 2 refers to the cession *inter alia* of *'assets'*, the rest of the document seems to be concerned only with rights of action. In clause 9 reference is made to *'any asset document or instrument of debt evidencing any claim in [the Trust's] favour against any of its debtors'*. In terms of clause 10 the cessionary's right, upon the Trust's default, is to give notice of the cession to debtors and to recover the debts. No provision is made in the document for the cessionary to take possession of corporeal property. The cessionary, a firm of attorneys, was presumably aware that

cession is a means of transferring incorporeal rights, not corporeal property, and that a pledge of corporeal property unaccompanied by delivery is ineffective.

79. If, as the applicants allege, the disposition hit by s 8(c) is a disposition only of the Trust's *'rights'* as distinct from corporeal property, reliance on this particular alleged act of insolvency would in any event fail, in my view, on the simple basis that there is no evidence that the Trust was or is possessed of non-corporeal property. Certainly no such property has been identified in the papers. The analysis of the Trust's actual solvency focused entirely on corporeal property.

Other grounds of opposition

80. The respondents raised a number of preliminary defences of a technical and procedural nature. In view of my conclusion on the matters of substance it is unnecessary to deal with them save to say that in my opinion they were uniformly without merit.

Respondents' application to adduce further evidence

81. In terms of my order of 23 August 2011 I postponed the application to 19 September 2011 and afforded the respondents the opportunity to file further affidavits, if any, by 7 September 2011. Although my order did not specifically say so, I had in mind that the respondents might consider that the applicants' replying papers contained new matter or that they might wish to place further extracts from the s 417 record before the court. Be that as it may, the respondents did not file any further affidavits by 7 September 2011. However, on the day of the resumed hearing (19 September 2011) Mr Stransham-Ford for the respondents applied for leave to file a lengthy additional affidavit and for condonation in regard to its late filing. I declined to receive the new affidavit at that stage but was handed an affidavit made in support of the application for condonation. Because the condonation affidavit did not summarise the import of the new evidence and its relevance to the case I invited Mr Stransham-Ford from the bar to summarise the essence of the new affidavit and what it would

contribute to the case. He said that the new affidavit [a] set out grounds for a lengthy postponement of the sequestration application in order to allow the criminal proceedings against Van Staden to be finalised, apparently for the reason that if the criminal proceedings resulted in his conviction the State might have a right to claim forfeiture of the Trust's assets [b] set out further grounds for a postponement, based on a proposed review of the s 417 proceedings, alternatively for the striking out of the s 417 transcripts attached to the applicants' papers, on the basis that the s 417 proceedings were tainted by the involvement of Adv L Olivier (who allegedly had a conflict of interest) and one of the liquidators, Mr Enver Motala (who has allegedly been recently removed from the panel of liquidators) [c] explained that SARS might have a preferent claim, depending on the alleged VAT fraud.

82. The condonation affidavit itself should properly have explained the essence of the additional evidence and why it was relevant. Based on Mr Stransham-Ford's summary given from the bar, I was firmly of the view that there was no merit in delaying the sequestration application by allowing the respondents to adduce the late affidavit (which would inevitably have entailed a further postponement). The matters which the respondents wished to advance in the new affidavit appeared to me to be either irrelevant or to raise points with no prospects of success. Furthermore, the matters in question were not in response to anything new contained in the applicants' replying papers. If the respondents had wanted to raise these matters, they could have dealt with them in the answering papers filed on 18 July 2011. There was no satisfactory explanation in the condonation affidavit for this failure. I thus refused the condonation application. Any costs associated with that application must be borne by the first and second respondents.

83. In the course of the applicants' application to adduce further evidence (more on this hereunder) Van Staden in an answering affidavit annexed the further affidavit that I had on 19 September 2011 declined to receive (there were in fact three such affidavits, all signed by Van Staden and all dated 18 September

2011[13]). My brief survey of their contents reinforces my view that I rightly refused to receive the new material. Their contents do not in all respects accord with the summary that Mr Stransham-Ford gave me. *Inter alia*, the main new affidavit contains an altogether impermissible traversal of the applicants' replying affidavit, a repetition of and elaboration upon matters already raised in the earlier answering affidavit, extensive argumentative matter and scurrilous allegations against all and sundry.

Applicants' application to adduce further evidence

84. On 11 October 2011, after judgment had been reserved, the applicants delivered an application for leave to adduce a further affidavit. In this affidavit the applicants sought to establish [a] that the Trust had committed a further act of insolvency by purporting on 14 September 2011 to sell the Baron aircraft and its engine (which were apparently at separate locations, both under attachment in terms of s 19 of the Insolvency Act – for convenience I shall refer to these items collectively as 'the aircraft') for R200 000; and [b] that, with reference to the question of factual insolvency, the purported sale showed that the aircraft was worth only R200 000 and not the figure of R2.2 million reflected in Knoetze's report. Since the parties could not come to terms on how this application to receive further evidence should be dealt with I gave directions on 8 November 2011 for the filing of papers and ruled that the matter should be argued before me on 25 November 2011.

85. The approach to be followed by a court when faced with such an application was summarised with reference to authority in *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 617B-F. I accept that the evidence could not have been adduced as part of the founding papers nor indeed before the completion of argument, given that it only came to the applicants' attention thereafter and concerned events that occurred in the second

[13]These affidavits appear at pp 74ff, 211ff and 227ff of the record in the applicants' application to adduce further evidence.

half of September 2011. I have nevertheless come to the conclusion that the application to receive the further affidavit should be refused.

86. Firstly, for the reasons set out earlier I do not think the applicants have established their status as a creditor. This alone is fatal to their main application, and the new affidavit would not cure that difficulty.

87. Secondly, I consider that the applicants' case on factual insolvency and acts of insolvency in the founding papers is so deficient that it would not be right at this very late stage to allow them to retrieve the situation, particularly since they now seek to rely on conduct which occurred after the sequestration application was launched and indeed after the Trust has been place under provisional sequestration.

88. Thirdly, the additional light that the further evidence casts on the Trust's factual insolvency is far from decisive. Whether the new evidence provides reliable evidence of the aircraft's current value is by no means obvious, given that Van Staden may simply have been trying to raise quick money. And even if one accepts that the aircraft's current value is R200 000, this would only be of assistance in determining the Trust's overall solvency if one had reliable and admissible evidence of the Trust's other assets and liabilities. Such evidence, as explained earlier, is lacking.

89. Finally, the question whether the new evidence establishes an act of insolvency presents both legal and factual problems. Legally, there is the question whether a debtor who is under provisional sequestration and who attempts to sell an asset that has vested in his provisional trustee in terms of s 20(1)(a) of the Act can be said to have attempted to dispose of or remove *'any of his property'* within the meaning of s 8(c) or s 8(d) (my emphasis). *Prima facie* this phrase refers to property belonging to the debtor, which is also the context that the lawmaker would have had in mind (since acts of insolvency are a precursor to sequestration and thus in general precede the vesting of assets in the trustee). Factually, the question is whether Van Staden's conduct in trying to sell the aircraft is

attributable as an act of insolvency to the Trust, given the absence of any evidence that Mrs Van Staden knew anything of the attempted sale (cf *O'Shea supra* para 27). I do not say that a court may never permit an applicant for sequestration to introduce evidence of an act of insolvency committed after the application was issued (as was allowed in *Joosub v Soomar* 1930 TPD 773 at 778-779) or even after the respondent has been placed in provisional sequestration (of which *Schlemmer v Mehnert* 1908 SC 782 appears to be an example).[14] However, the question whether the late introduction of such evidence should be permitted is a matter of discretion to be exercised judicially, and for the reasons briefly stated above I have concluded that I should not exercise my discretion in the applicants' favour.

90. The material placed before me in the application to adduce further evidence neverthless discloses a very disturbing sequence of events. The Trust was provisionally sequestrated on 26 May 2011 and at that point ownership of the aircraft vested in the Master and then the provisional trustees (s 20(1)(a) of the Act). The fact of the provisional sequestration was obviously known to Van Staden, his attorney Mr Spencer Tarr and his counsel Mr Stransham-Ford. The vesting of the aircraft in the provisional trustees was not dependent on attachment in terms of s 19.[15] As a fact, though, the aircraft was attached on 22 July 2011 and the engine on 17 August 2011, and the sheriff's returns were served on or emailed to Tarr. Furthermore the attachment of the aircraft was averred in, and the return annexed to, the affidavit of one of the provisional trustees Van Zyl, which affidavit was duly served on the respondents' attorneys on 16 August 2011 as part of the replying affidavits. According to an affidavit made by Van Staden on 18 September 2011 he had read the replying papers, including the affidavit of Van Zyl.[16]

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[14] *Berrange NO v Hassan & Another* 2009 (2) SA 339 (N) at 366I-368A seems to be a case where the alleged act of insolvency was committed before the application was issued but only came to the petitioning creditor's knowledge afterwards. Although only reported in 2009, this case was decided in 2005 and was upheld in an apparently unreported judgment of the Supreme Court of Appeal listed on the SAFLII database as *Samsudin & Another v De Villiers Berrange NO* [2006] ZASCA 79.

[15] This is clear from the statute but if authority is needed see *Sagorsky's Trustee v Joffe* 1916 TPD 661 at 663.

[16] See para 4 on p 228 of the record in the applicants' application to adduce further evidence.

91. From the affidavit ('the condonation affidavit') made by Van Staden on 18 September 2011 in support of the Trust's application for leave to file its late affidavit it appears that Van Staden had personally received the replying papers by 25 August 2011, that an initial consultation with Mr Stransham-Ford in regard to a possible further response by the Trust was held on 6 September 2011 and that a further consultation in that regard took place with Tarr on 8 September 2011. According to another affidavit made by Van Staden on 18 September 2011 (one of the late affidavits that the Trust wanted to file)[17], Mr Stransham-Ford was with Van Staden on the farm where the latter resides on 15 September 2011 for the purpose of finalising the new affidavits.

92. When Van Staden said in his condonation affidavit that the applicants would suffer no prejudice if the return day of the provisional sequestration were further postponed to allow the late affidavit to be received, he and those who drafted the affidavit for him must have meant the court to understand that because the Trust was under provisional sequestration and because the Trust's assets thus vested in the provisional trustees, the interests of the applicants and other possible creditors of the Trust were safeguarded. It will also be recalled in this regard that one of the contentions raised in the late affidavit that the Trust was seeking permission to file was that there should be an indefinite postponement of the return day of the provisional sequestration.

93. Notwithstanding all of the foregoing, Van Staden on 14 September 2011, purporting to act on behalf of the Trust as seller, signed the Trust's acceptance of an offer by Money Aviation (Pty) Ltd (represented by Angus Money – 'Money') to buy the aircraft for R200 000. The sequestration application was argued before me on 19 and 20 September 2011. On the second of these days (20 September 2011) Van Staden by email authorised Money to pay the price of R200 000 into Tarr's trust account, details of which he furnished. Van Staden copied his letter to Tarr and to Mr Stransham-Ford. Van Staden's letter to Money stated that the aircraft had been released from restraint by Blignault J's

[17] See paragraph 5.1 on p 212 of the record in the applicants' application to receive further evidence.

order of 9 March 2011. Van Staden indemnified Money against any legal consequences that might arise from the Trust's sale of the aircraft to Money's company. The letter did not disclose that the Trust was under provisional sequestration and that the aircraft vested in the provisional trustees.

94. On 21 September 2011 Tarr sent an email to Money confirming what Van Staden had said in his letter of the previous day. He asked Money to fax or email proof of payment. This letter, copied to Van Staden and to Mr Stransaham-Ford, again did not disclose to Money the existence of the provisional sequestration.

95. It appears that Money required an invoice before transferring the purchase price. On 23 September 2011 an invoice in the Trust's name and authorising payment into Tarr's trust account was emailed to Money from Mr Stransham-Ford's email address, the covering note bearing the name of a Ms Rosanne Trollope, described as Mr Stransham-Ford's *'Research and Administration Assistant'*. In response, Money emailed to say that he also required to be furnished with a certain transfer of ownership form. This form was faxed to Money. That evening Van Staden sent an email to Money, copied to Mr Stransham-Ford, complaining that the amount of R200 000 had not yet been deposited into Tarr's account, that he now had a better offer of R300 000, and that Money should thus advise of his (continued) interest.

96. The next morning (24 September 2011) Money replied to Van Staden (with copies to Tarr and Mr Stransham-Ford among others) that he had received the necessary documents and that he had been in the process of transferring the funds when he learnt that the aircraft was under attachment. From the affidavit of the applicants' attorney Mr Brendan Olivier it appears that on 23 September 2011 Olivier had been contacted by a person at the warehouse where the aircraft's engine was stored and under attachment. This person advised Olivier that a Mr Angus Money was making enquiries about the engine. This led to direct communication between Olivier and Money during which Olivier

informed Money of the Trust's provisional sequestration, a fact of which Money had previously been ignorant. In Money's email to Van Staden of 24 September Money said he would like to go ahead with the purchase but needed *'comfort'* from Van Staden's attorney that the Trust was entitled to sell the aircraft. Tarr was naturally unable to give such comfort and so the transaction died.

97. Van Staden's attempt in his affidavit to explain this transaction strikes me as unsatisfactory. It appears to me to be quite clear that he did not disclose the provisional sequestration to Money and that the purported sale was not (as he claims) conditional upon the Trust's discharge from provisional sequestration. Apart from the absence of any reference to such a condition in the contemporaneous documents, the proposition is entirely at odds with the fact that Van Staden knew that the Trust was going to be asking the court on 19 September 2011 to receive further affidavits which had as their object *inter alia* the obtaining of a lengthy postponement of the provisional sequestration.

98. On the face of it, Van Staden's conduct in attempting to dispose of the aircraft was an attempt to commit the offence defined either in s 132(d) or in s 142(1) of the Act[18] or was an attempt to commit theft, while the non-disclosure to Money was a fraud on the latter. The sale itself was contrary to the proviso in s 23(2). Regrettably it appears that Van Staden's attorney (Tarr) and his counsel (Mr Stransham-Ford) were aware of the Van Staden's conduct and lent their assistance. A question naturally arises as to whether they did so because the sum of R200 000 was earmarked for the payment of their legal fees. It is not possible nor would it be appropriate for me to make any findings in this regard. However I would be failing in my duty if I let matters rest. I thus intend to direct the registrar to furnish a copy of this judgment to the National Prosecuting Authority, to the Law Society of the Northern Province and to the Johannesburg

[18] See s 256 of the Criminal Procedure Act 51 of 1977 regarding the crime of attempt. Section 142(3) of the Insolvency Act provides that the offences defined in ss 142(1) and (2) do not apply to the insolvent himself in respect of any property belonging to his own insolvent estate. Van Staden's counsel argued in a supplementary note that the attempted sale of the aircraft was not an act of the Trust but of Van Staden acting alone. If that is so he personally could be guilty of this offence. If on the other hand the attempted disposition was by the Trust, s 132(d) would be appear to be applicable.

Society of Advocates for such further investigation and action as they may consider appropriate. (Needless to say, the seriousness of the matter and the possibility that a criminal offence has been committed are not in the least affected by the fact that the provisional sequestration order is now to be discharged. The Trust was under provisional sequestration when the relevant events occurred.)

Concluding matters

99. In assessing whether the applicants have established that Holdings has a claim against the Trust, I have in this judgment confined myself to the two competing contentions put up by the parties, namely that the borrower was the Trust or that the borrower was Van Staden personally. I should perhaps say that these are not the only possibilities (though they are the only ones calling for a decision in this case). Although the application as presented must in my view fail for the reasons I have given, the way in which the affairs of the Indo-Atlantic group and the Trust were conducted appear to do Van Staden no credit. It is far from clear to me that the money that flowed out of the Indo-Atlantic group to fund the purchase of the Trust's assets was the subject of valid loan agreements at all. It is possible (though I express no opinion thereon) that the companies' funds were simply appropriated by those who controlled the companies. It would not be right for me to express any view as to what remedies against what parties would lie if this were to have been the case.

100. Another matter which may call for consideration is whether the use of the Trust's name in the acquisition of assets gave rise to a genuine separation of estates between Van Staden and the Trust. An *inter vivos* trust, like other legal arrangements, may be found to be a sham. A person who purports to acquire assets in the name of a trust may on analysis be found to be the beneficial owner of the assets (see the warnings sounded by Cameron JA against the abuse of the trust form in *Land and Agricultural Bank of SA v Parker & Others* 2005 (2) SA 77 (SCA) paras 19-37). There is some hint of this in paragraph 30.5 of the

founding affidavit, where the applicants say that the Trust is simply Van Staden's *alter ego* and that he set about building personal wealth in the guise of the Trust from proceeds received from Holdings authorised by Van Staden himself. Again, I express no opinion as to whether the use of the Trust in the present case was a simulation and, if so, what remedies might follow.

101. Since I intend to discharge the provisional sequestration order, the applicants will have to pay the first and second respondents' costs. The costs associated with the earlier appearance before me on 23 August 2011 are covered by the order I made on that date. The application previously served before Dlodlo J on 28 April 2011 and before Yekiso J on 5 July 2011. In both instances they ordered costs to stand over. I have not heard any argument specifically directed to these reserved costs. *Prima facie* these reserved costs, together with those associated with the hearing before Desai J on 26 May 2011, must follow the result and I intend so to order, but on the basis that either party may give written notice within two weeks of this judgment that they wish to have those aspects of the costs order reconsidered. The respondents must bear the costs associated with their abortive application on 19 September 2011 to file further affidavits. Regarding the applicants' unsuccessful application to adduce further evidence, I believe that the parties should bear their own costs: firstly, because the respondents themselves quite inappropriately sought to renew their attempt to file the further affidavits I had previously rejected; and secondly as a mark of the court's disapproval of Van Staden's conduct as disclosed in the unsuccessful application.

102. My order is thus as follows:

(a) The provisional order of sequestration granted on 26 May 2011 is discharged and the application for the sequestration of the estate of the first and second respondents in their capacities as trustees of the Swordfish Trust is dismissed.

(b) The first and second respondents in their said capacities are directed to pay the applicants' costs associated with the their application of 19 September 2011 to file further affidavits.

(c) The parties shall bear their own costs in respect of the applicants' application dated 11 October 2011 to adduce further evidence, including the costs of the hearing before me on 25 November 2011.

(d) Save as aforesaid, the applicants are directed to pay the costs of the first and second respondents in their said capacities, such costs to include those:

(i) of the hearing before me on 19 and 20 September 2011(subject to (b) above);

(ii) of the hearings on 28 April 2011, 26 May 2011 and 5 July 2011,

save that in respect of the costs referred to in (ii) either party may, within two weeks of this order, deliver written notice that they wish the court to reconsider the said costs order after receiving further submissions thereon.

(e) The registrar is directed to furnish a copy of this judgement to the National Prosecuting Authority, the Law Society of the Northern Province and the Johannesburg Society of Advocates for such further investigation and action as they may consider appropriate in regard to the matters discussed in paragraphs 89 to 97 of the judgment.

ROGERS AJ

6 DECEMBER 2011