IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

Case No: 18137/2005

In the matter between:

JACOBUS HENDRIKUS JANSE VAN RENSBURG NO First Plaintiff

PHILIP FOURIE NO Second Plaintiff

JACOB LUCIEN LUBISI NO Third Plaintiff

LILY MAMPINA MALATSI-TEFFO NO Fourth Plaintiff

ENVER MOHAMMED MOTALA NO Fifth Plaintiff

RABOJANE MOSES KGOSANA NO Sixth Plaintiff

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
30/10/09 DATE SIGNATURE

and

SAREL JOHANNES LODEWICKUS STEYN Defendant

JUDGMENT

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1 This is an application for default judgment. The plaintiffs claim to sue in their capacities as joint liquidators of the "MP Finance Group CC (in liquidation)", a proposition of dubious legal validity for no such corporation has ever existed.

2 The summons was served at the defendant's place or residence. The defendant did not give notice of intention to defend. Thus the application for default judgment.

3 The plaintiffs allege, I accept correctly, that they are the duly appointed liquidators of several corporate entities, all of which are in liquidation: MP Finance Consultants CC, Krion Financial Service Limited, Marburt Financial Services Limited and Madikor 20 (Pty) Limited.

4 They also allege that they are the duly appointed liquidators of an entity described in the summons as "M & B Co-Operative Limited Partnership". I doubt whether this allegation is good in law.

5 The plaintiffs allege that the estates of the four corporate entities named above and that of M & B Co-Operative Limited Partnership were consolidated into a single estate by an order of this court made under case number 21098/2003. The court which made the order is described, incorrectly, in the summons as the Witwatersrand Local Division but nothing turns

on this. The consolidated estate is given by the plaintiffs the name of MP Finance Group CC (in liquidation) and referred to as the "Krion Scheme".

6 The plaintiffs' cause of action is that the defendant was an investor in a fraudulent scheme which has become known as the Krion Scheme. It is not suggested that the defendant was anything but an innocent investor. The plaintiffs allege a contract between the Krion Scheme (in the sense of one or more of the entities being liquidated by the plaintiffs) and the defendant under which the defendant would give money to the Krion Scheme to hold. The defendant was to receive a return on his investment of at least 10% per month. On this basis, the plaintiffs allege, the Krion Scheme paid out to the defendant a total of R117 100 during the period December 2001 to March 2002. These amounts, the plaintiffs contend, constituted either dispositions not for value under s 26 or voidable preferences under s 29 of the Insolvency Act, 24 of 1936.

7 When this application initially came before me, I expressed concerns about the legal validity of the

causes of action pleaded. The matter stood down for several days to enable the plaintiffs to consider their position. The application is now once again before me. The plaintiffs have submitted an affidavit by their attorney setting out the background to the relief sought.

8 The Krion Scheme, the plaintiffs explain, was operated through the several entities mentioned above. The plaintiffs say that they are unable to identify the entity or entities with which the defendant made his investment or the entity or entities which paid to the defendant the sum of R117 100 claimed in this action.

9 Relying on the court order I have mentioned, the plaintiffs assert that they are entitled to treat all the entities mentioned as one close corporation. Thus the assertion that the plaintiffs litigate as the liquidators of the insolvent estate of "MP Finance Group CC (in liquidation)" which they call in their particulars of claim the "Krion Scheme".

10 Proceeding from this foundation, the plaintiffs assert that the Krion Scheme was at the relevant times insolvent, its liabilities exceeding its assets. They go further: they allege that on 28 February 2003 this court made a declaration to that effect. And, as I have said, they claim that the payments out to the defendant constituted either dispositions not for value or voidable preferences.

11 The relief sought by the plaintiffs is that usually applicable to such claims, ie orders setting aside the dispositions and directing repayment to the plaintiffs with interest and costs.

12 The history of the court order upon which the plaintiffs rely is as follows:

12.1 By notice of motion dated 31 July 2002, under case number 21098/2002 in this court, the first to fourth plaintiffs as applicants obtained a rule *nisi* calling upon anyone who wished to oppose the application to show cause on the return day why the estates of the five entities I have named above should not be

declared to be one entity known as MP Finance Group CC and why the separate estates and the various entities should not be declared to be the business of the "saamgevoegde beslote korporasie" and wound up as if they were this one notional close corporation.

12.2 Directions were given in the rule *nisi* for service and publication. It is not suggested that the present defendant was served with the application or that it came to his notice.

12.3 The justification for the relief sought was said in the founding affidavit attached to the notice of motion to be that the several estates were used as a vehicle for a scheme, conducted fraudulently and in contravention of the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988 and of the Banks Act, 94 of 1990.

12.4 Some opposition was noted and then withdrawn and ultimately the rule was confirmed by this court on 4 February 2003.

13 It bears repeating that no close corporation called MP Finance Group CC ever existed. The court order would, in its terms, confer on the plaintiffs the benefit of alleviating their difficult but voluntarily assumed burden of untangling and properly characterising the transactions which constituted the scheme conducted by the entities which the plaintiffs undertook to wind up.

14 From the evidence placed before me by affidavit, the description "M & B Co-Operative Limited Partnership" came about like this:

14.1 The guiding mind of the scheme, Prinsloo, was told that her scheme was illegal. She sought to legitimise the scheme by creating a co-operative under the Co-operatives Act, 91 of 1981.

14.2 The proposed co-operative was however never registered but Prinsloo and several of her associates traded under that name, ostensibly on behalf of the non-existent co-operative.

14.3 On the basis that this made Prinsloo and her associates agents for a non-existent principal which in turn, so it is submitted on behalf of the plaintiffs, rendered each of them liable jointly and severally for the debts of the non-existent co-operative, the plaintiffs claim that "M & B Co-Operative Limited" was a partnership whose partners were Prinsloo and her several associates and that the plaintiffs were appointed as the liquidators [*sic*] of the alleged partnership.

14.4 Thus the allegation that "M & B Co-Operative Limited Partnership" is one of the entities which the plaintiffs are required to wind up.

15 I have the gravest reservations whether the court order has any validity at all because I cannot see what jurisdiction this court can have to depart from the procedures in insolvency prescribed by the Insolvency Act, the Companies Act, 61 of 1973 and the Close Corporations Act, 69 of 1984. These measures essentially provide for the estates of individual insolvent persons, natural or juristic,

to be administered individually. The fact that partnerships properly so called and trusts, which are neither natural nor juristic persons, may under the Insolvency Act be treated if they were natural persons, is in my view of no present relevance.

16 The ground advanced as justification for the court order, that the corporate veil will thereby be lifted, seems to me to be no ground at all. The course undertaken will not lift the veil. The obscurity generated by the alleged unlawful scheme will be deepened if the web of deceit is not untangled.

17 But this is beside the point and I need come to no firm conclusion in this regard. The law requires a litigant who seeks relief under s 26 of the Insolvency Act to show that the dispositions he seeks to have reversed were made by a specific insolvent. An insolvent is defined in s 2 of the Insolvency Act to mean a debtor whose estate is under sequestration. A debtor is defined, for present purposes, as a person or partnership or the estate of a person or partnership which is a debtor

in the usual sense of the word. Section 29 of the Insolvency Act requires a plaintiff to show that the disposition in question was made by a specific debtor. A plaintiff who relies on either s 26 or s 29 is further required to show that at a decisive moment the liabilities exceeded the assets of that specific insolvent or debtor.

18 This is precisely what the plaintiffs are unable to do: this is why no such allegation is made in their particulars of claim and the evidence presented through the affidavit of the plaintiffs' attorney shows that this is why the court order was sought.

19 In my view, no court order, however wide its terms, can excuse the plaintiffs from bringing themselves within the provisions of the Insolvency Act, the very statute upon which the plaintiffs rely for relief. To put it another way, no court order can confer jurisdiction (in the sense of regsbevoegdheid) on another court to depart from the provisions of a statute.

20 The plaintiffs find themselves thus unable to make allegations which are essential to their causes of action. Their particulars of claim therefore disclose no valid cause of action.

21 The application for default judgment is dismissed.

NB Tuchten
Acting Judge of the
High Court
30 October 2009