

IN THE NORTH CAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: (REPUBLIC OF SOUTH AFRICA) ☒ YES ☐ NO

(3) REVISED. ☒

27/2/12 DATE

SIGNATURE

CASE No. 52120/2010

In the matter between:-

PAUL DANEEL KRUGER N.O	First Applicant
THEODOR WILHELM VAN DEN HEEVER N.O	Second Applicant
PHILLIP DAVID BERMAN In their capacities as the joint liquidators of Spitskop village properties Limited (In Liquidation)	Third Applicant
PAUL DANEEL KRUGER N.O	Fourth Applicant
ERNEST LODEWYK BESTER N.O	Fifth Applicant
ADEL DOREEN McQUARRIE N.O In their capacities as joint provisional judicial managers of Copper Moon Trading 248 (Pty) Ltd (Celtis Plaza)	Sixth Applicant
P J MARYN VAN STADEN N.O	Seventh Applicant
JUANITO MARTIN DAMON N.O	Eighth Applicant
PHILLIP DAVID BERMAN N.O In their capacities as the joint provisional liquidators of Blue Dot Properties 1330 (Pty) Ltd	Ninth Applicant

and

HENDRIK CHRISTOFFEL LAMPRECHT	Respondent
-------------------------------	------------

CASE No. 61907/2009

In the matter between:-

PAUL DANEEL KRUGER N.O	First Applicant
PHILLIP DAVID BERMAN N.O	Second Applicant
THEO W VAN DEN HEEVER N.O In their capacities as the joint liquidators of Spitskop Village Properties Limited (In Liquidation)	Third Applicant

In Re:

PAUL DANEEL KRUGER N.O	First Applicant
PHILLIP DAVID BERMAN N.O	Second Applicant
THEO W VAN DEN HEEVER N.O In their capacities as the joint liquidators of Spitskop Village Properties Limited (In Liquidation)	Third Applicant

and

H C LAMPRECHT	First Respondent
J J VAN ZYL	Second Respondent
H C LAMPRECHT N.O In his capacity as Trustee of the HCL Familie Trust IT No. 190/04	Third Respondent
LADIKELA GAME LODGE (PTY) LTD	Fourth Respondent
CORNELIUS ASPLIN DE KLERK N.O (In his capacity as Trustee of the CA Family Trust TMP 3927)	Fifth Respondent

- Page 3 -

ROSA DE KLERK N.O (In her capacity as Trustee of the CA Family Trust TMP 3927)	Sixth Respondent
JACOB JOHANNES VAN ZYL N.O (In his capacity as Trustee of the Jozymiel Family Trust IT 194/97)	Seventh Respondent
MARINDA VAN ZYL N.O (In her capacity as Trustee of the Jozymiel Family Trust IT 194/97)	Eighth Respondent
RUDOLF JOHANNES BRITS N.O (In his capacity as Trustee of the Jozymiel Family Trust IT 194/97)	Ninth Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

- [1] There are two applications before me, namely -
- (a) firstly, an application for the confirmation of a provisional order of sequestration granted against the Respondent under Case No. **52120/2010** by Webster J on 5 October 2010; and
- (b) secondly, an application for the confirmation of a so-called *Mareva injunction* in so far as it was granted against the Respondent (cited as the First Respondent) under Case No. **61907/2009**) by Molopa J on 13 October 2009.

- Page 4 -

(I may mention that I was informed by counsel that the *Mareva injunction* has, as far as it was also granted against the Second to Ninth Respondents, become irrelevant since -

- (a) the matter has in respect of the Second, Fifth, Sixth, Seventh, Eighth and Ninth Respondents in the meantime been settled; and
- (b) the Third and Fourth Respondents were in the meantime, respectively, sequestered and liquidated.

[2] At the commencement of the hearing I was informed by counsel appearing on behalf of the Applicants that he will, in relation to the issues in the application under Case No. **52120/2010** ("*the sequestration application*"), restrict the Applicants' case to one issue only, namely, whether the "*Blue Dot claim*" against the Respondent (dealt with, particularly, in **paragraphs 17.4, 17.5 and 41 of the founding affidavit, record pp. 12 and 68** to which I will refer in detail below) falls within the ambit of the provisions of section 226(4) of the Companies Act, 1973 (Act 61 of 1973).

[3] I was, furthermore, informed by the parties that they are in agreement that the outcome of the application under Case No. **61907/2009** ("*the Mareva application*"), in so far as it relates to the Respondent, will depend on the outcome of my finding on the first of the foregoing issues.

[4] Before dealing with, particularly, the issues, in sequestration application, the matter calls for a brief exposition of the history of the events leading up to the

application for the sequestration of the Respondent's estate.

Brief history of events which had given rise to this application

[5] Since about the middle of 2006 Spitskop Village Properties Proprietary ("*Spitskop*") embarked on a property development scheme (also referred to as a syndication scheme) to solicit investments from the public which was promoted by a company known as Bluezone Property Investment (Pty) Ltd ("*Bluezone*"). The authorized share capital of Spitskop was R425 000 made up in 425 000 units, each unit consisting of one ordinary par value share of R1 and one secured debenture of R999 irrevocably linked together. The scheme was intended to raise R425 million on the aforesaid 425 000 units. The Respondent was at the time a director and chief executive officer of Spitskop and the driving force behind the syndication scheme.

[6] Bluezone obtained investments of approximately R350 million from 1213 investors.

[7] A property, portions 6 and 7 of the farm known as Spitskop 333, registration division KT, Mpumalanga, situate in the Steelpoort area measuring approximately 198 hectares, formed the subject matter of the syndication scheme.

[8] The property was purchased by a company known as Blue Dot Properties 1330 CC ("*Blue Dot*") for the sum of R1 057 000 on 23 April 2003 and registered in its name on 23 September 2003. The Respondent was at the time the sole member of Blue Dot.

Blue Dot was converted into a company during 2007 with the Respondent and a certain Mr. J J van Zyl, a non-practising attorney at the time, as its only directors.

[9] Blue Dot sold the property to Spitskop for an amount of R118 300 000 (plus VAT) in terms of a written agreement dated 3 July 2006 signed by the Respondent on behalf of Spitskop and by Mr. Van Zyl, who was at the time also the legal adviser of Spitskop, on behalf of Blue Dot. It would appear that the property was, apart from the establishment of a rough access road to the property, at no time since it was purchased three years earlier by Blue Dot improved at all. An application for the establishment on the property of a township was lodged in May 2007.

[10] The purchase price was paid out to Blue Dot before the registration of the property into the name of Spitskop and before the application for township development was lodged. It also appears that various other amounts were paid out of investors' moneys, apparently contrary to the provisions of General Notice 459 of 30 March 2006 issued in Government Notice 28690 of that date under section 12(6) of the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988), such as, administration fees of approximately R9,9 million, audit fees of R480 000, a due diligence study of R1,2 million, a feasibility study of R2,7 million, travelling and accommodation fees of R1,2 million, unspecified professional fees of R6 million, unspecified services of R1,1 million, commission to Bluezone of R32 million and interest to investors of R15,8 million.

[11] As is apparent from, particularly, the founding and replying papers, it is the Applicants' case, that the scheme was an illegal one, because, *inter alia*, Spitskop failed

to disclose the minimum information to be contained in a property syndication document prescribed in the aforesaid Government Notice 459 of 13 March 2006 in that it failed to disclose to its investors, *inter alia* -

- (a) that their funds will prior to finalization be deposited into a trust account of a registered estate agent, a legal practitioner or its chartered accountant who controls the funds in that account;
- (b) that the funds shall only be withdrawn from the trust account in the event of transfer of the property into the syndication vehicle, ie., Spitskop;
- (c) that there was a pending land claim over the property where township development was in the offing and that mining rights were registered over the property in favour of Anglo American, being encumbrances at the time over the property as it rendered township development at the time as a non-starter.

[12] It was, furthermore, contended that the moneys taken from its investors constituted deposits which was contrary to the provisions of the Banks Act, 1990.

[13] Ismail J, in a judgment handed down on 22 September 2011, held that there were a deliberate breach of the Unfair Business Practice Act and the Banks Act by the directors of Spitskop to the detriment of the investors and declared the scheme to be an illegal one. I have been informed that there is currently a pending application for leave to appeal against this finding.

[14] Bertelsmann J, having held that Spitskop has lost its substratum and, in addition, that it no longer being able *"to finalize the intended development"* and that *"no realistic opportunity to allow the investors to reclaim part of their capital has been established on the papers"*, granted an order finally liquidating Spitskop on 21 August 2009.

[15] It would appear that shortly after receipt of the purchase price of R118 300 000 over a period commencing on 14 August 2006 an amount of at least R80 003 000 (**Annexure L, record p. 275**) was paid by Blue Dot to the Respondent.

[16] The Blue Dot claim can now be considered against the background of the foregoing brief history.

The Blue Dot claim against the Respondent

[17] The Seventh, Eighth and Ninth Applicants are the joint liquidators of Blue Dot which was finally liquidated on 23 February 2011.

[18] As already indicated, it is their case (**paragraph 41, record p. 68**) that Blue Dot has in terms of section 226(4) of the Companies Act, 1973, a claim against the Respondent for an amount of R56 720 461,37 in terms of a loan account set out in a detailed ledger of Blue Dot for the period 1 March 2006 to 28 February 2007 (**Annexure Z1, record p. 308**).

[19] Section 226(4) of the Companies Act, 1973, reads as follows:

.../...

- Page 9 -

"(4) Any director or officer of a company who authorizes, permits or is a party to the making of any loan or the provision of any security contrary to the provisions of this section, shall -

- (a) be liable to indemnify the company and any other person who had no actual knowledge of the contravention, against any loss directly resulting from the invalidity of such loan or security; and*
- (b) be guilty of an offence."*

In terms of subsection (1) of the said section 226 a company is in compelling terms prohibited from making any loan, directly or indirectly, to, *inter alia*, any director of the company

[20] It is not in dispute that the Respondent was at all relevant time a director and shareholder of Blue Dot.

[21] The only question in issue is whether the aforesaid amount of R56 720 461,37 constitutes a loan made to the Respondent by Blue Dot.

[22] On this issue I was referred by the Applicants to the following:-

[23] **Firstly**, the detailed ledger of Blue Dot (**Annexure Z1, record p. 308**), referred to by the Applicants in their founding papers, which shows, as an indication that Blue Dot made a loan or loans to the Respondent, that Blue Dot owed the Respondent on loan an amount of R13 539 020,66 on 2 March 2006 which ended up with an amount of R56 720 461,37 on 28 February 2007. According to the ledger various entries of drawings and payments were during this period made, obviously by the Respondent.

[24] **Secondly**, the balance sheet prepared and purportedly signed by the Respondent in respect of the Respondent's personal affairs as on 30 September 2007 (**Annexure M, record p. 276**) which reflects no such loan owing to him, but in a further balance sheet of the Respondent as at 31 (*sic*) September 2007 (**Annexure P, record p. 278**), likewise purportedly signed by the Respondent, shows a liability of R57 662 000 giving a nett asset value of R56 112 000 owed by him to Blue Dot. A note at the end of the document states that "*the liabilities amount of Blue Dot Properties 1330 is a loan acc of Mr. H C Lamprecht and not an amount due to any institution*". In notes to his financial statement for the period ending 30 September 2007 (**Annexure N, record p. 279**) the following note appears under the heading "*Bluedot Properties 1330 (Pty)*":

*"This company owned 198 hectares of land in Steelpoort which was sold in 2006 for R118 million to Spitskop Village Properties Ltd. Hennie Lamprecht owned the majority of the shares (80%) in this company and was paid out an amount of R94,4 million in the form of a dividend from (*sic*) sale proceeds. These funds were in turn invested in the HCL Familie Trust as a loan account. Hennie's loan account now stands at R99 million. After the sale of the Steelpoort property this company is left with no assets of consequences and no debt."*

[25] **Thirdly**, a balance sheet, purportedly signed by the Respondent on 19 May 2009, in respect of Respondent's personal affairs as at 31 March 2009 (**Annexure Q, record p. 279**) which do not reflect any loan account with liability to Blue Dot., but a further balance sheet of the Respondent's affairs as at 31 March 2009, purportedly signed by the Respondent on 23 September 2009 (**Annexure R, record p. 280**), shows a liability of R63 832 064 to Blue Dot.

Respondent's responses to these allegations

[26] In relation to the first of the foregoing allegations, ie. the evidence contained in the ledger of Blue Dot) , the Respondent failed to respond (**record p. 464, para 22**).. However, in a supplementary affidavit (**record p. 843, para 9**) filed, incidentally without leave of this Court, on 9 September 2011, the Respondent denies that Blue Dot has a claim against him and states that he received an amount of approximately R90 million from Blue Dot which, according to him, represents his share of the profits derived from the purchase agreement between Blue Dot and Spitskop,.

[27] In relation to the contents of **Annexures M, N, P, Q and R**, the Respondent explains in his supplementary affidavit (**record pp. 846 to 848, para 13**) -

- (a) that he has no independent recollection of these annexures and that he has not had any insight therein as the Applicants have, apparently under the *Mareva injunction*, seized all his documents;
- (b) that his signature was pre-scanned into Blue Zone's financial electronic system which was available to "*relevant personnel nationwide*";
- (c) that the Annexures do not make sense and are not recognized balance sheets

[28] He, furthermore, contends that he "*cannot see how it can make any sense for (him) to instruct personnel in (his) company to draft two completely different statements on the same day, only for (him) to sign ninety days and six months later respectively*".

[29] The Respondent's response in this regard is in my opinion for various reasons clearly untenable and stand to be rejected on the papers.

[30] Firstly, he offers no explanation as to why amount of R56 720 461,37 is reflected in Blue Dot's ledger as a loan.

[31] Secondly, it is apparent that the three signatures on each of **Annexures M, P, Q and R** differ to such an extent that it is obvious that they could not have been scanned as one signature.

[32] Thirdly, in the *Mareva*-application (**record p. 479, para 23**) the Respondent in dealing with the financial statements filed in this application as **Annexures M and P**, did not deny, as he has done in this matter, having been the author of those statement and merely submitted that "*die een balansstaat meer opgedateer is as die ander (d)aar is niks sinisters daaraan nie*".

[33] Fourthly, in relation to the financial statement which was purportedly signed by the Respondent on 19 May 2009 (**Annexure Q**) Pretorius J (as is apparent from the papers filed in the *Mareva* application (**record p. 828**) held in the application under Case No. 18271/2010 for the final sequestration of the H C L Familie Trust on 23 February 2011 as follows:

"The financial statements drafted on behalf of Mr. Lamprecht and the respondent did not reflect the true facts. This can be gleaned from the e-mail by the accountant to the CEO of the Bluezone Group dated 23 September 2009:

.../...

*'Goeiemore Johan, ontvang asseblief hiermee die balansstate van Hennie. **Let wel, die balansstaat gedateer 19 Mei (2009) sluit uit sekere negatiewe leningsrekeninge van Hennie soos bv. Die Blue Dot Properties en Althenta trustrekeninge.** Die rekeninge is nou ingesluit in die weergawe wat vandag onderteken is deur Hennie. Die rede vir hierdie verskille is as gevolg van Hennie wat my gevra het om sy laste te verminder vir 'n leningsaansoek by onderskeie banke vroeër hierdie jaar. Ek glo jy vind dit in orde.'*

Bearing in mind that this judgment was handed down on 23 February 2011 and the supplementary affidavit deposed to on 9 September 2011, it is difficult to understand why the Respondent failed to deal with the e-mail or the judgment.

[34] I in any event fail to understand how he as a director of Blue Dot could have shared in the profits without it being paid to him as a dividend or as director's remuneration. The Respondent failed to show on what basis he, as a director or shareholder, could otherwise have been entitled to the amount. The amount was obviously a profit in the hands of Blue Dot in respect of which Blue would have been liable to income tax. Similarly the Respondent would also have been so liable to tax. It would accordingly appear that the only way to avoid tax was to provide the amount to the Respondent as a loan. It was argued on behalf of the Respondent that I should, notwithstanding the loan account in the books of Blue Dot, not regard it as a loan as it was never intended to be recovered. This submission is not supported by the entries in the ledger (**Annexure Z1**) which shows that over the period 14 June 2006 to a date in 2007 various repayments were indeed made to such an extent that, for example, the account has on 28 August 2006 turned into a debit account.

[35] In view of the foregoing it is clear that the Respondent's explanations are obviously untruthful and is accordingly rejected.

[36] I am accordingly satisfied that the Applicants on all the probabilities proved that Blue Dot made, in contravention of section 226 of the Companies Act, 1973, a loan to the Respondent as a director of that company and that he is liable to indemnify Blue Dot and its creditors against any losses they may have suffered resulting from the invalidity of such loan.

[37] This brings me to the question of the Respondent's **factual insolvency** or whether he committed a deed of insolvency.

Insolvency of Respondent

[38] It is common cause -

- (a) that in a matter between the Industrial Development Corporation ("IDC") and the Respondent and five others the defendants were, as is apparent from the court order, **Annexure FF, record p. 310**) on 6 August 2009 ordered to pay, jointly and severally, the one paying the other to be absolved, to the IDC an amount of R30 million and an amount of R3 million, together with interest, on or before 4 December 2009; and
- (b) that those amounts remained unpaid which, bearing in mind the interest payable

on those amounts, may have increased to and amount in excess of R80 million.

[39] In his supplementary affidavit (**record p. 844, para 10**) the Respondent concedes that such a judgment was obtained against him as surety, but contends that he has a counterclaim against IDC in an amount of more than R70 million and he could, because of his provisional sequestration not yet proceed with that claim.

[40] There would appear, if regard is had to the objective facts as they are apparent from the papers, to be no merit in this contention.

[41] **Firstly**, no information relating to his counterclaim is provided.

[42] **Secondly**, as is apparent from paragraphs 3 and the court order itself, the defendants withdrew their counterclaim against the IDC and agreed they will not have any claims against each other in respect of the matters referred to in the order.

[43] **Thirdly**, no such claim is reflected in any of the Respondent's balance sheet.

[44] It follows that the Respondent's contentions stand to be rejected.

[44] Having rejected the Respondent's defence in this regard, it must follow that his debts amount to at least R137 million.

[45] It would appear, looking at his financial statements, **Annexures Q and R**, that

the Respondent has insufficient assets to meet these liabilities.

[46] It, furthermore, appears on his own version (**record p. 699, para 5**) that he has further debts of about R4,6 million in respect of credit cards and overdrafts.

[47] Furthermore, he indicated, as is apparent from **Annexure OO, record p. 344**), that, in relation to a transaction in regard to Afropulse 6 (Pty) Ltd, in which he, as reflected in **Annexure Q**, has an interest in excess of R2,8 million, he is likely to lose a lot of money.

[48] The H CL Familie Trust and Bluezone which, according to his financial statement (**Annexures Q and R**) are indebted to him in an amount of R48 million and R25 million, respectively, have been sequestrated and liquidated.

[49] The Respondent elected not to respond in his answering affidavit or even in his supplementary affidavit to these contentions all raised in the founding affidavit.

[50] In argument it was, however, argued on behalf of the Respondent that if regard is had to the Respondent's answering affidavit (**record p. 466, para 22.5.3.1**), his assets amount to R464 375 447,69.

[51] This argument in so as it relates to the Respondent's contentions in this regard is, if regard is had to the founding affidavit (**record p. 46, para 10.18 and p. 48, para 10.20**), with respect an opportunistic one.

[52] A scrutiny of the aforesaid paragraphs contained in the founding affidavit, shows that those paragraphs simply constitute a listing of the Respondent's balance sheets, **Annexures M and P** which differ substantially from each other in so far as the Respondent's assets are reflected therein.

[53] By way of example, in the one statement in respect of the period ending 30 September 2007 a loan in an amount of R659 149 (see: **record p. 46, para 10.18.1**) is reflected in respect of a company known as Mystic Blue Trading 161 (Pty) Ltd whilst in the other statement (see: **record p. 48, para 10.20.9**) in respect of the same day and the same company a loan of R10 260 000 is reflected. Having added the amounts referred to in those paragraphs, even, the duplications, he created an absolute false perception of what his assets amount to.

[54] It is accordingly clear that the Respondent elected, instead of providing this Court with particulars of his assets and liabilities, to rather rely on misleading information.

[55] In this application the Applicants rely on the Respondent's most recent balance sheet (**Annexure R**) signed on 23 September 2009 reflecting his total nett assets as either R96 407 747 (in which he omitted his indebtedness to Blue dot in an amount of R63 832 064) or R41 323 531.

[56] In the result I am satisfied that the Applicants have on a balance of probabilities shown that the Respondent is factually insolvent.

- Page 18 -

[57] This brings me to the question whether the Respondent committed an act of insolvency.

The act of insolvency in terms of section 8(g) of the Insolvency Act, 1936

[58] In view of my finding that the Respondent is indeed factually insolvent, i do not find it necessary to deal with this issue.

[59] This brings me to the question of advantage to the creditors.

Advantage to creditors

[60] On his own version the Respondent has assets to the value of at least R41 million.

[61] Bearing in mind that the Respondents has debts totalling at least R137 million, I am satisfied that there is a reasonable prospect of a not negligible dividend.

Compliance with statutory requirements

[62] I am satisfied that the Applicants have indeed complied with all the statutory requirements (see: record p. 86, para 55).

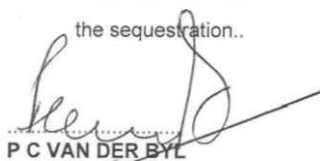
Conclusion

[63] I am, in the exercise of my discretion, satisfied that it is clearly necessary to recover the loan account and that the assets which may have been squirrelled to away to trusts and, perhaps, to his wife should be investigated.

Order

In the result the following order is made:-

1. In the application launched under **Case No. 52120/2010**, the provisional order for sequestration of the estate of the Respondent granted on 5 October 2010 is confirmed and the estate of the Respondent is finally sequestrated.
2. In the application launched under **Case No. 61907/2009**, paragraphs 1 and 2 of the Rule *nisi* granted on 13 October 2009, in so far as those paragraphs applied to the Respondent, are confirmed and the interim order is made final.
3. The costs of the applications referred to in paragraphs 1 and 2, including the costs attendant upon the employment of two counsel, are ordered to be costs in the sequestration..


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

- Page 20 -

ON BEHALF OF APPLICANTS

ADV D M LEATHERN SC
ADV J HERSHENSOHN

On the instructions of:

SCHABORT INCORPORATED
590 Jorisson Street
Sunnyside
PRETORIA
Ref: K Schabort/L6/10(K)
Tel: (012) 343 0702

ON BEHALF OF RESPONDENT

ADV N M DAVIS SC
ADV J GOUWS

On the instructions of:

LOMBARD & PARTNERS ATTORNEYS
278 Charles Street
Brooklyn
PRETORIA
Ref: Oosthuizen/uv/
Tel: 012 346 6969

DATE OF HEARING

9 February 2012

JUDGMENT DELIVERED

27 February 2012