THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 536/05

In the matter between:

D H S SMITH	**APPELLANT**
and	
G P PORRITT	**1st RESPONDENT**
SYNERGY MANAGEMENT (PTY) LTD	**2nd RESPONDENT**
L F PERREIRA, NO; **B PIETERSEN, NO** **The Liquidators in EBN Trading (Pty) Ltd** **(In Liquidation)**	**3rd RESPONDENT**
L F PERREIRA, NO; **B PIETERSEN NO** **The Trustees in the Awethu Trust** **(In sequestration)**	**4th RESPONDENT**
THE MASTER OF THE HIGH COURT PIETERMARITZBURG	**5th RESPONDENT**

CORAM:	**SCOTT, STREICHER, BRAND, PONNAN *et* COMBRINCK JJA**
DATE OF HEARING:	**8 MARCH 2007**
DATE OF DELIVERY:	**23 MARCH 2007**

Summary : Insolvency – application to set aside subpoena to attend creditors meeting – defence of *res judicata* not available to sequestrating creditor whose claim is challenged by the trustee.

Neutral citation: This judgment may be referred to as *Smith v Porritt and others* [2007] SCA 19 (RSA)

SCOTT JA/…..

SCOTT JA:

[1] The appellant, a superintendent in the SAPS, was subpoenaed to attend a meeting of creditors in EBN Trading (Pty) Ltd (in liquidation) and, on a different day, a meeting of creditors in Awethu Trust (in sequestration). The subpoena to attend the former was issued by the Master in terms of the provisions of s 414 (2) read with s 415 (2) of the Companies Act 61 of 1973. The subpoena to attend the latter was issued by the Master by virtue of his powers in terms of s 64 of the Insolvency Act 24 of 1936. (The subpoena refers incorrectly to s 414(2) of the Companies Act but no issue was made of this.) The appellant applied to the High Court, Pietermaritzburg, for an order setting aside the subpoenas. The application was heard by Msimang J who dismissed it with costs but granted the appellant leave to appeal.

[2] The first respondent is Mr Gary Porritt. I shall refer to him by name. The second respondent is Synergy Management (Pty) Ltd ('Synergy'). Porritt is one of its directors. The third and fourth respondents are the liquidators and trustees respectively of EBN Trading (Pty) Ltd (in liquidation) and Awethu Trust (in sequestration). I shall refer to the former as EBN and to the latter as Awethu. The fifth respondent is the Master. No relief was sought against the third, fourth and fifth respondents in the court below.

[3] Final orders of liquidation and sequestration were granted by Theron J against EBN and Awethu respectively on 4 February 2004. The applicant in those proceedings was PSC Guaranteed Growth Ltd (in liquidation). I shall refer to it as PSC. The applications were strenuously opposed by both EBN and Awethu. Both denied indebtedness to PSC. After hearing oral evidence the court found that the respondents were indebted to PSC and that the latter accordingly had *locus standi* to seek the orders in question. Porritt is a former director of EBN and a former trustee of Awethu.

[4] Porritt is a creditor of EBN. Synergy is a creditor of Awethu. The subpoena in the EBN matter was issued at the instance of Porritt and the subpoena in the Awethu matter at the instance of Synergy. In terms of the former the appellant was required to produce at the meeting 'the books, records and documents' or copies thereof, relating to the claim proved by PSC in his possession or under his control. They were further identified by reference to the persons or entities from whom the appellant would have received them. The subpoena in the Awethu matter was in similar but not identical form. The documents

sought were those ‘relating to Awethu and the claim proved by PSC against Awethu’. Both subpoenas required the presence of the appellant ‘in order that [he] may be examined’.

[5] In his founding papers the appellant sought to have the subpoenas set aside essentially on two grounds. The one was that the documents were privileged. The other was that the issuing of the subpoenas amounted to an abuse of the process in that they were issued with the ulterior motive of prematurely obtaining information relevant to ongoing criminal investigations involving Porritt and others. Porritt, it appeared, had been arrested but released on bail as long ago as 14 December 2002.

[6] The appellant in his founding affidavit referred at some length to the allegations of criminal conduct involving Porritt and others which he was in the process of investigating. Much of this evidence was irrelevant. What was relevant related to Porritt’s alleged conduct in relation to PSC. Shortly stated, it was this. In April 2000 Porritt and others established PSC, an investment company, which was to compete in the unit trust industry. Contrary to representations contained in the prospectus, funds received by it from investors were channelled to entities controlled by Porritt, including EBN and Awethu. The claims subsequently relied upon by PSC (then under provisional liquidation) in its application for the liquidation and sequestration of EBN and Awethu respectively, were for the repayment of the amounts so paid to EBN and Awethu which were said to have been loans. The claim against EBN was for some R104m and against Awethu for R51m.

[7] In his answering affidavit, Porritt denied that the documents sought were privileged and that the subpoenas amounted to an abuse of the process. He said that by virtue of his involvement in the transactions he knew that the true position was that PSC’s debtor was Synergy, not EBN and Awethu, and that Synergy had subsequently ‘settled its debt to PSC by the acquisition of shares for and on behalf of PSC’. He said that the books and records of PSC that would establish the truth of his assertion had been removed by the appellant from the custody of the provisional liquidators (who were not the same as the liquidators who were finally appointed) and their attorney, Mr Alec Brooks, as well as from PSC’s auditors and its former chairman, Mr Jack Milne. Porritt contended that these books and records included monthly loan statements sent by Synergy to PSC as well as the auditors’ working papers and other documents, all of which reflected that Synergy, not EBN and Awethu, was PSC’s true debtor. He said he needed the documents to persuade the third, fourth and fifth respondents to reject PSC’s claim against EBN and Awethu or, failing that,

to substantiate an objection in due course to third and fourth respondents' distribution accounts. In letters dated 3 March and 10 March 2005 (copies of which were annexed) Porritt requested the Master to issue the subpoenas in question to enable PSC's claim to be properly examined. In the same letter he recorded that the head liquidator of PSC, Mr Ivor Van Diggelen, had similarly been unable to obtain the records and books of PSC and accordingly unable to proceed with the business of winding-up the affairs of PSC. Van Diggelen, himself had earlier written a letter to the Master (a copy of which was similarly annexed to Porritt's affidavit) in which he had expressed doubts as to the validity of PSC's claim against EBN and Awethu and indicated that there was evidence to suggest that the assets of PSC may be elsewhere.

[8] Whether Porritt's contentions regarding PSC's claims will ultimately prevail need not and cannot be decided on the papers. He does, however, present an obvious case for the production of the documents specified in the subpoenas. Counsel for the appellant, nonetheless, argued that Porritt's true motive was to obtain information relating to the criminal investigation against him prematurely. The reason for this inference, he said, was that the documents could not assist Porritt in his contention that PSC's claims against EBN and Awethu were invalid because this issue had already been decided by Theron J in the liquidation and sequestration proceedings and in the absence of an appeal the judgment was binding on the third and fourth respondents.

[9] In *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (AD) at 945B Trengove AJA said:

'A trustee or liquidator is not privy to the insolvent or the company in liquidation. He is not bound by any judgment against the insolvent or the company to which he was not a party, and a plea of *res judicata* cannot be raised against him in respect of such a judgment because he does not derive his authority from the insolvent or the company; he has an independent right of action under the Act.'

Relying on a passage in Meskin *Insolvency Law* para 4.20 in which the learned author comments on the above statement, counsel for the appellant submitted that a trustee or liquidator was privy to the insolvent or company in liquidation (and hence bound by any judgment) save only in relation to rights afforded to the trustee or liquidator by virtue of his or her office whether under the Insolvency Act or the common law. This understanding of the learned judge's statement, I think, is undoubtedly correct. An example of a right under the Act would be the right to attack a transaction as being an undue preference; an example of a right at common law would be the right to attack a judgment procured collusively and in fraud of creditors. (See eg *Shokkos v Lampert* NO 1963 (3) SA 421 (W).)

Counsel argued that the third and fourth respondents had no such rights in the present case and accordingly could not set aside PSC's claim. But the judgment which it is contemplated would be binding on the trustee or liquidator is a judgment in respect of which a plea of *res judicata* could be raised. What must be decided is whether the judgment of Theron J is such a judgment in relation to PSC's claims against EBN and Awethu.

[10] Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank BPK* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case by case basis. (*KBI v Absa Bank supra* at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals'.

[11] In seeking a final order of liquidation and sequestration against EBN and Awethu respectively, PSC was obliged to establish on a balance of probabilities that it had the necessary *locus standi.* That in turn involved establishing that it was a creditor of both. (In the case of the Awethu application, it would have had to establish no more than that it had a liquidated claim of not less than 'fifty pounds'.) Theron J found in favour of PSC on this issue and granted final orders. But the determination of this issue, ie the issue of *locus standi*, did not require a final determination of the extent of PSC's claims. To this extent, at

least, it did not, therefore, amount to a final determination of PSC's claims as would have been the case had the judgment been one in pursuance of claims sounding in money. But there is, in my view, another sound reason for not holding a liquidator or trustee bound by the court's acceptance of the applicant creditor's claims in liquidation or sequestration proceedings for the purpose of establishing *locus standi*. Were the liquidator or trustee to be so bound he would be precluded from challenging the claim regardless of any information that may come to light in the course of winding-up the affairs of the company or estate. He could not appeal the judgment, nor could he seek to have it set aside; his *locus standi* is dependent on it. He could, as a consequence, be compelled to prepare a distribution account which he knew wrongly favoured the applicant creditor and prejudiced the other creditors. The undesirability of such a result need hardly be stressed. In practice so-called 'friendly' sequestrations and liquidations are common place. The motive of the creditor instituting proceedings in such cases is more often than not simply to assist the insolvent or company. To preclude a liquidator or trustee from reassessing the claim of a creditor who had obtained the liquidation or sequestration order would inevitably result in unfair distributions and prejudice to the other creditors. Such a result would clearly be contrary to the interests of justice. While it is undoubtedly so that the requirements of *eadem res* and *eadem petendi causa* are not immutable requirements of the *exceptio rei judicata* and may be relaxed in appropriate circumstances, no such relaxation would be appropriate in circumstances such as the present. In other words, a creditor such as PSC, in my judgment, is not entitled to rely on the defence of *res judicata* based on a judgment granting a final order of liquidation or sequestration in the event of the liquidator or trustee subsequently challenging the validity or extent of the creditor's claim.

[12] It follows that if the third and fourth respondents were to be persuaded that PSC's claims are without merit they would not be precluded from seeking to have them rejected. I should add that even if they were not so persuaded, Porritt and Synergy would still be free to object to their final distribution accounts in terms of s 111 of the Insolvency Act. Porritt and Synergy were not parties to the liquidation and sequestration proceedings in their capacity as creditors. Should they object to the accounts in that capacity the defence of *res judicata* could *a fortiori* not be successfully raised against them.

[13] As previously indicated, Porritt succeeded in making out a case on the papers that the documents which the appellant is required to produce in terms of the subpoenas could assist him in showing that PSC's claims are ill-founded. There is accordingly no basis for setting aside the subpoenas on the grounds that the documents would serve no purpose;

nor is there anything in the papers to justify the inference that Porritt's true motive was to obtain access to the documents prematurely.

[14] A further ground advanced in support of the contention that the subpoenas should be set aside as constituting an abuse of the process of the court was that they required the personal attendance of the appellant at the meetings 'in order that [he] may be examined in terms of the provisions of s 415(1) of the [Companies] Act'. (In the Awethu matter the reference should have been to s 65 of the Insolvency Act.) The appellant's case was that he had no knowledge that could have assisted Porritt and Synergy in persuading the third and fourth respondents to take steps to have the claims of PSC expunged and that the real object of having him examined was to obtain information regarding the police investigation. Once again, I do not think the inference the appellant seeks to draw can be justified. The appellant could presumably be of assistance regarding such matters, for example, as the completeness of the books and records in his possession and the possible whereabouts of other relevant documents. In any event, should questions be put to him relevant only to the criminal investigation he would be free to object on the grounds of privilege or irrelevancy and seek a ruling of the presiding officer to that effect. It follows that in my judgment the appellant failed to establish that the issuing of the subpoena's constituted an abuse of the process.

[15] With regard to the objection based on privilege, it will be re- called that the documents in question were limited to 'books, records and documents' relating to PSC's claims against EBN and Awethu. The reference in the subpoenas to their origin made it clear that they were either the books and records of PSC or the working documents of PSC's auditors. The only ground upon which it was suggested that they were privileged was that the appellant had taken possession of them in the course of his investigation into Porritt's alleged criminal conduct and that they therefore 'formed part of the police docket'. Having regard to the nature of the documents, that fact alone cannot, in my view, render them privileged. Indeed, counsel was constrained to concede that they could not be withheld from the liquidators of PSC and EBN or the trustees of Awethu who required them to complete their task of winding-up the affairs of those entities. In my view the concession was well made and the reliance on privilege must fail. The position would have been otherwise had the documents comprised witnesses' statements or other documents directly concerned with the criminal investigation.

[16] The appeal is accordingly dismissed with costs.

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D G SCOTT
JUDGE OF APPEAL

CONCUR:

STREICHER JA

BRAND JA

PONNAN JA

COMBRINCK JA