Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)

Case No: 1110/14

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THOMAS CHRISTOPHER VAN ZYL N.O.	First Applicant
NOMACHULE OLIPHANT N.O.	Second Applicant
(in their capacity as provisional trustees of the insolvent estate of Denis Henry Kaye)	

and

BERNICE KAYE N.O.	First Respondent
IGOR VUKIC N.O.	Second Respondent
(First and Second Respondents cited in their capacity as trustees of the JGN Trust, T618/1993)	
AND SEVEN OTHER RESPONDENTS	Third - Ninth Respondents

JUDGMENT: DELIVERED: 15 APRIL 2014

BINNS-WARD J:

[1] The applicants, who are the provisional trustees of the insolvent estate of Denis Henry Kaye ('Kaye'), have applied for orders declaring that two immovable properties, one in Constantia, Cape Town, and the other in Plettenberg Bay, or the proceeds of any sale of such properties, may be treated as assets in the insolvent estate. The Cape Town property is registered in the name of the JGN Trust ('the Trust') and the Plettenberg Bay property as the property of a company, Bella Densel 176 (Pty) Ltd. The two properties are the only assets of the Trust and the company, respectively. The trustees of the Trust have been joined as the first and second respondents in the application. The company is the fifth respondent. The

applicants seek the invocation by the court of its power under the common law to disregard 'the veneer' of the Trust, or 'go behind' it, for the relief sought in respect of the Cape Town property. They rely on the provisions of s 20(9) of the Companies Act 71 of 2008[1] for the relief sought in respect of the Plettenberg Bay property.

[2] The insolvent estate is the subject of a final order of sequestration, but there has not yet been a first meeting of creditors and final trustees have thus not yet been appointed. The applicants have thus also applied *pari passu*, in terms of s 18(3) of the Insolvency Act 24 of 1936, for authorisation to bring the proceedings.

[3] The Cape Town property has been sold by the Trust to the fourth respondent and transfer to the purchaser is pending. The Plettenberg Bay property is the subject of a pending sale in execution. Merchant Commercial Finance (Pty) Ltd, trading as Merchant Factors, which was joined as the sixth respondent, holds security bonds over both properties. There is also an application for an interim interdict prohibiting the firm of attorneys appointed to attend to the transfer of the Cape Town property (the third respondent) from paying any of the proceeds of the sale to the Trust, or to Merchant Factors. The interim prohibitory interdict is sought pending the determination of an application that the applicants might bring to have the registration of the mortgage bond over the Cape Town property set aside as a voidable disposition in terms of the relevant provisions of the Insolvency Act on the basis of having been an allegedly collusive transaction.

[4] It is conceded by the applicants that they will have standing to impeach the mortgage bond transactions only if they succeed in obtaining the declaratory relief described in para 1, above. In other words, the contemplated impeachment of the mortgage contracts would be predicated on the treatment of the dispositions concerned as dispositions by Kaye of *his* property, rather than as dispositions by the Trust and the company, respectively, of *their* property. Their standing to obtain interim relief against Merchant Factors must necessarily rely on the same premise.

[5] Merchant Factors moved to meet the application, insofar as the interdictal relief against it was concerned, by tendering an irrevocable undertaking that should any court of final instance set aside the mortgage bonds registered in its favour over the immovable properties, it would repay any amount that it had received from the Trust or the company pursuant to the realisation of its security. The tender was refused by the applicants, who

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[1] The provisions of s 20(9) are set out in para [32], below.

indicated that they were prepared to accept it only upon additional terms that were unacceptable to Merchant Factors.

[6] Some background facts are needed to contextualise the application. Kaye had been the sole director of a company called Sarepta Trading (Pty) Ltd, which was a wholly owned subsidiary of Seamo Investments 35 (Pty) Ltd, of which Kaye and his wife had been the directors. Kaye had stood surety for Sarepta's debts to Kempston Finance, which was the entity that had sequestrated Kaye's estate and obtained a winding up order against Sarepta. An enquiry into the affairs of Sarepta has been established in terms of ss 417 and 418 of the Companies Act 61 of 1973. The evidence led thus far at the enquiry provided the foundation for the applicants' case in the current proceedings; more particularly, that given by Kaye, Mrs Kaye and an attorney, Mr Igor Vukic, concerning how the affairs of the Trust and Bella Densel were managed. Merchant Factors contends that the evidence is inadmissible for the purpose the applicants seek to employ it. I shall elaborate on that aspect of the matter presently.

[7] The Trust is a so-called 'family trust'. It was founded for the purposes of acquiring and holding the Cape Town property, which has served as the Kayes' family home since 1994. The current trustees are Kaye's wife and an attorney. Prior to his sequestration, Kaye had also been a trustee. Mr Anthony Cotterell, the managing director of Kempston Finance, who made a supporting founding affidavit in the application, had become a co- trustee of the Trust shortly after its establishment and he retained that capacity for several years. Cotterell had also stood surety for the Trust in favour of the Board of Executors, which had provided mortgage finance to the Trust for the acquisition of the Cape Town property. Kaye testified at the enquiry that he had paid the bond repayment instalments personally.

[8] The beneficiaries of the Trust are Mr and Mrs Kaye and their descendants. In terms of clause 9.11 of the trust deed, the trustees of the Trust are empowered to guarantee debts owing by any party '*provided that such party is a beneficiary or a corporation or undertaking in which the Trust and/or one or more beneficiaries have a direct or indirect interest which in the opinion of the Trustees is material*'.

[9] The shares in Bella Densel are owned by another trust of which Kaye, his wife and Vukic had been the trustees until Kaye's sequestration. Kaye had been the sole director of the company, and, according to his evidence at the Sarepta enquiry, it was being arranged that his wife would replace him in that capacity. He admitted at the enquiry that, as his replacement as director, his wife would probably 'do his bidding'.

[10] Kaye's evidence at the Sarepta enquiry concerning the circumstances in which the mortgage bonds in favour of Merchant Factors had come to be registered was far from clear. He testified that the Trust had agreed to the registration of a mortgage bond over the Cape Town property in favour of Merchant Factors to provide security for a loan extended by the latter to Sarepta for the purpose of acquiring the shares in Sarepta held by Cotterell or the entities which Cotterell represented, and for which the Trust had undertaken a suretyship obligation. According to Kaye there had also previously been a bond registered over the Cape Town property in favour of Equicap, apparently a subsidiary of Rand Merchant Bank. The bond had provided security in respect of a loan by Equicap to Sarepta. The funds borrowed by Sarepta had been applied for the benefit of Taxi Trucks Logistics (Pty) Ltd, another business entity controlled by Kaye. Merchant Factors had subsequently advanced funds to Sarepta to settle Equicap's claim. This resulted in the cancellation of the bond in favour of Equicap and the registration of a further bond in favour of Merchant Factors.

[11] In its answering papers, however, Merchant Factors gave a detailed account of its dealings with Sarepta and the other entities controlled by Kaye. The account had been furnished previously in Merchant Factors' answering affidavit in pending litigation in case no. 16211/13, in which Kempston Finance, litigating in the name of the liquidators of Sarepta, has applied, in terms of s 31 read with s 32(1)(b) of the Insolvency Act, to have a disposition by Sarepta to Taxi Trucks Logistics (Pty) Ltd, in which Merchant Factors is alleged to have played a fraudulently collusive role, set aside. Merchant Factors' answering affidavit in that matter was annexed to its answering affidavit in the current matter, and the relevant part thereof, which set forth Merchant Factors' account of the history of its transactions with Sarepta, Kaye, Seamo Investments 35 (Pty) Ltd, Wellpick Properties (Pty) Ltd, Taxi Trucks Logistics, the Trust and Bella Densel, was incorporated by reference into its answering affidavit in the current matter. It would unduly burden this judgment to go into the detail. Suffice it to say that the account is unrebutted and on its face records what appear to be *bona fide* arms' length business transactions with Merchant Factors. The mortgage bonds registered over the two immovable properties in issue appear from that account to have been registered to provide security for Merchant Factors' exposure qua creditor of Sarepta and Taxi Trucks Logistics in terms of the principal transactions between Merchant Factors and those companies. The Trust and Bella Densel had stood surety for the principal debtors in those transactions. There has been no suggestion that Sarepta and Taxi Trucks Logistics are

not corporations in which Kaye could properly be said to have a 'direct or indirect interest' in the sense contemplated by clause 9.11 of the Trust's trust deed.[2]

[12] Kaye also admitted at the enquiry that he had paid certain expenses in respect of the upkeep of the Plettenberg Bay property. He conceded that these would have resulted in Bella Densel being indebted to him in the amounts concerned, but stated, opaquely, that these loans were 'consolidated' in the loan accounts of Seamo Investments.

[13] The evidence adduced at the Sarepta enquiry - to the limited extent that it is comprehensible without insight into all the accounting records concerned – suggests that financial transactions might have been recorded in the books of the various entities over which Kaye exercised control in a manner that did not result in a correct or accurate representation of the flow of funds. So, for example, it was not apparent, and Kaye was unable to explain, why the Trust's financial statements for the year ended 28 February 2011 reflected *him* to be indebted to the Trust in the sum of nearly R3 million. It is not necessary to go into the detail, but it is apparent from an analysis by a chartered accountant commissioned for the purpose by Merchant Factors' attorneys, a copy of which was annexed to Merchant Factors' answering papers in the current matter, that the accounting records of the Trust do not bear scrutiny. It is also apparent that the accounting records of the Trust and the company show that their finances were accounted for as if they were part of a group of business entities over which Kaye had apparently effective personal control.

[14] The essence of the applicants' case in respect of the main relief is articulated in paragraph 13 of the founding affidavit as follows:

> In this application, the applicants essentially seek to "*look behind*" the Trust and Bella Densel and to "*lift the veil*" so as to give effect to the true situation namely that the Trust and Bella Densel have at all times been nothing more than the *alter egos* of Kaye and wholly under his control and have acted at all material times solely according to his whim. In the result, the applicants contend that the assets of the Trust and Bella Densal fall to be regarded as, and incorporated into his insolvent estate to be utilised for distribution to his general body of creditors, according to the legal order of preference.[3]

[15] The undisguised object of the application, insofar as 'going behind' the Trust is concerned, is to obtain standing to apply for the setting aside as a voidable disposition of the transaction in terms of which the Trust's asset was mortgaged in favour of the sixth respondent. In order to achieve that end the Cape Town property must fall to be regarded as

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[2] See para [8], above.

[3] In the applicants' heads of argument, their case was articulated thus: '*The basis for the main relief is the contention that the Trust and Bella Densel were the alter ego or instrumentality of Kaye, that the Constantia and Plettenberg Bay properties were treated by Kaye as his personal assets and used to further his business interests without regard to the separate identity of the Trust and Bella Densel*'.

an asset not of the Trust, but of Kaye's personal estate in insolvency. The only ways in which that object can be achieved are by showing that the Trust should be treated as a sham; in other words, declared to be non-existent, or by showing that as a matter of fact the property did not vest in the Trust.[4] If the Trust were a sham, the original trustees would be seen as having acquired the Cape Town property as agents of Kaye, and it would thus have been acquired for him as their principal.

[16] Indeed, the applicants' approach renders it necessary to highlight that establishing that a trust is a sham and 'going behind the trust form' entail fundamentally different undertakings.[5] When a trust is a sham, it does not exist and there is nothing to 'go behind'. In my view, the applicants have confused and conflated the concepts in their founding papers. As I shall endeavour to explain, 'going behind' the trust is not an available remedy on the alleged facts.

[17] The purpose of establishing the Trust was plainly so that the Kayes' family home could be held separately from Kaye's personal estate. As a matter of financial prudence and estate planning there was nothing untoward about that. Indeed, the wisdom of making such a provision was highlighted by the fact that Kaye was an unrehabilitated insolvent at the time. There was also nothing exceptionable about Kaye personally paying the mortgage bond debt and maintenance expenses in respect of the property held in the Trust. That these advances to the trust were not accounted for properly, resulting in a purported loan account in one of the companies controlled by Kaye, rather than in the accounts of the Trust, as obviously should have been the case, affords no reason to disregard the Trust. All that it does is call into question the fitness of the trustees to hold office, and possibly also the quality of the professional accounting services of which they availed. The incorrect allocation of Kaye's claims against the Trust does not prevent the applicants, as trustees of his insolvent estate, from pursuing them against the actual debtor. The applicants are entitled to act on the true state of affairs. They are not bound by incorrectly stated accounts.

[18] The allegedly delinquent discharge by trustees of their responsibilities in the current case, thereby allegedly giving Kaye sole and unfettered *de facto* control of the Trust's asset,

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[4] Cf. e.g. *Brunette v Brunette and Another NO* 2009 (5) SA 81 (SE) and *Nedbank Limited v Thorpe* [2008] ZAKZHC 72 (26 September 2008).

[5] An illuminating analysis of the distinction is given in an article by Professor Marius de Waal, '*The abuse of the trust (or: "Going behind the trust form")*', (2012) 76 *The Rabel Journal of Comparative and International Private Law* 1078, which is accessible at:

http://scholar.sun.ac.za/handle/10019.1/85023 .

gave rise to the accusation by the applicants in their founding papers that the trust was a 'sham'. While the description is understandable in loose terms, it lacks cogency in a legal sense in the face of the valid creation and continued existence of the trust. The maladministration of an asset validly vested in a properly founded trust does not afford a legally cognisable basis to contend that the trust does not exist, or that the asset no longer vests in the duly appointed trustees. Thus, for the applicants to be able to establish that the Cape Town property does not vest in the Trust they have to prove that the Trust was a sham.

[19] Holding that a trust is a sham is essentially a finding of fact. Inherent in any determination that a trust is a sham must be a finding that the requirements for the establishment of a trust were not met, or that the appearance of having met them was in reality a dissimulation.[6]

[20] There is no reason to hold, and it was not contended by the applicants, that the Trust had not been legitimately founded, or that the Cape Town property had not been validly vested in it.[7] Significantly, Mr Cotterell, who made a supporting founding affidavit in the application, and who, it will be recalled, was a trustee of the Trust for about ten years from soon after its establishment, did not suggest that he had been party to a sham, or that upon assuming office he had not in fact taken joint ownership of the Cape Town property qua co-trustee.

[21] Going behind the trust form, on the other hand, entails accepting that the trust exists, but disregarding for given purposes the ordinary consequences of its existence. This might entail holding the trustees personally liable for an obligation ostensibly undertaken in their capacity as trustees, or holding the trust bound to transactions ostensibly undertaken by the trustees acting outside the limits of their authority or legal capacity as such; cf. *Van der Merwe NO v Hydraberg Hydraulics CC and Others*.[8] Those cases will generally be manifested by trustees seeking, usually dishonestly, to use their formal non-compliance with the terms of the trust deed opportunistically to evade liability to a third party. Such cases are most likely to present in the context of an absence of the dichotomy between responsibility

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[6] The judgment of Moloi J in *Khabola NO v Ralitabo NO* [2011] ZAFSHC 62 (24 March 2011) affords an example of a sham trust, notwithstanding that the term is not used. *Brunette v Brunette and Another NO* supra, which was decided on the basis of a quasi-exception in the form of an objection to the joinder of the trustees of certain trusts to a divorce action on amended particulars of claim, appears to instance an example of a case in which the plaintiff would seek to establish that property purportedly vested in the trusts had in fact been the property of a business partnership between the spouses. Cf. also *BC v CC and Others* 2012 (5) SA 562 (ECP).

[7] In his replying affidavit the first applicant confirmed (at para 88) that '*It is not contended by the applicants …that that JGN Trust was "conceived in deceit"*'.

[8] 2010 (5) SA 555 (WCC), at para 32-42.

and interest that constitutes the 'core idea' of the legal concept of a trust;[9] in other words, in a context in which the trustees treat the property of the trust as if it were their personal property and use the trust essentially as their *alter ego* – an all too frequent phenomenon in certain family and business trusts in which the trustees are both the effective controllers as well as the beneficiaries.[10] The remedy might entail the making of a declaration that a trust asset shall be made available to satisfy the personal liability of a trustee, but it does not detract from the character of the asset as one of the trust and not that of the trustee; the existence of the trust remains acknowledged.

[22] Going behind the trust form (or 'piercing its veneer', as the concept is sometimes described) essentially represents the provision by a court of an equitable remedy to a third party affected by an unconscionable abuse of the trust form. It is a remedy that will be afforded in suitable or appropriate cases. The notion of the provision of such a remedy has been postulated as a desirable development in our law; see *Parker*.[11] I suspect that, rather like the position with 'piercing of the corporate veil' in the case of companies, closely defining the applicable principles in the cases in which it is afforded or withheld may prove elusive. That is why I consider it appropriate to describe it as an equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation.

[23] I am not aware of any matter in which a South African court has yet 'pierced the veneer' of a trust or gone behind it, although the court came close to doing so in *Van der Merwe*.[12] The applicants' reliance in support of their approach on the Supreme Court of Appeal's judgment in *Badenhorst v Badenhorst*[13] is misplaced. *Badenhorst* did not entail any disregard by the court of the trust involved in that case.

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[9] See *Land and Agricultural Development Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA), [2004] 4 All SA 261, at para 19 and 26.

[10] Cf. *Nieuwoudt NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA), [2004] 1 All SA 396, at para 17.

[11] Note 9, above, at para 37.

[12] See the discussion on *Van der Merwe* in Prof A. van der Linde's article, *Debasement of the core idea of a trust and the need to protect third parties* 2012 (75) THRHR 371, in which it was argued that the court might have found other ways (assuming that the evidence allowed it) to avoid the obstacle posed by the formalities prescribed in the Alienation of Land Act 68 of 1981 in order to go behind the trust in that matter.

[13] 2006 (2) SA 255 (SCA), [2006] 2 All SA 363.

[24] The issue in *Badenhorst* was a just and equitable distribution of assets between spouses in terms of s 7(3) of the Divorce Act 70 of 1979.[14] Mr Badenhorst had contended with success before the trial court in his wife's action for a divorce that no regard should be had for that purpose to the value of the assets held in a trust that he had caused to be founded and over which he was able to exercise full control. Having regard to the control that Mr Badenhorst enjoyed over the trust in question, as well as the circumstances in which it had been founded and the manner in which it was managed, the appeal court considered that it would be just and equitable to have regard to the value of the trust's assets for the purposes of determining the amount of the contribution by way of a monetary payment, rather than a transfer of assets, that he should have to make to Mrs Badenhorst upon the termination of their marriage by divorce. The effect of the court order was not to hold that the trust was a sham, or to make the assets of the trust the property of Mr Badenhorst. The court also did not go behind the trust form. The decision in *Badenhorst* went to the application of sub-secs 7(3)-(5) of the Divorce Act,[15] rather than to any remedy for abuse of the trust form. It was left to Mr Badenhorst to decide how to make payment in terms of the court order. The

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[14] Subsection 7(3) of the Divorce Act provides insofar as was relevant in *Badenhorst*:

> *A court granting a decree of divorce in respect of a marriage out of community of property-*
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> *(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or*
>
> *(b) …*
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> *may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.*

[15] Subsections 7(4) and (5) of the Divorce Act provide insofar as was relevant in *Badenhorst*:

> *(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner.*
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> *(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account-*
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> *(a) the existing means and obligations of the parties, including …;*
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> *(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;*
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> *(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and*
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> *(d) any other factor which should in the opinion of the court be taken into account*.

judgment did not go against the trust, or render its assets exigible at the instance of Mrs Badenhorst.[16] (However, if I am wrong in my analysis of the judgment in *Badenhorst*, and the court did indeed go behind the trust in that matter, it would seem that it did so on the premise of the respondent's resort to the trust's existence in that case as an unconscionable means to evade the obligations attendant on the dissolution of his marriage. On any approach the case remains distinguishable from the current matter.)[17]

[25] Much was made by the applicants of the allegation that the Trust was Kaye's 'alter ego', in the sense that he dealt with the Trust's property as if it were his own and that his two co-trustees were merely his puppets. The applicants sought substantiation for these allegations in the answers given by Kaye and his erstwhile co-trustees at the aforementioned s 417 enquiry into the affairs of Sarepta. They identified the particular extracts from the transcript of evidence at the enquiry on which they relied in a supplementary founding

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[16] In this respect the judgment in *Badenhorst* is starkly distinguishable from some of the examples cited by Lord Sumption in his compelling analysis in *Prest v Prest & Ors* [2013] UKSC 34, [2013] 4 All ER 673, [2013] BCC 57 of how the Family Division of the High Court of England and Wales had been given, misdirectedly, in several judgments to piercing the corporate veil by making asset transfer orders in terms of 24(1)(a) of the Matrimonial Causes Act, 1973 against companies in which one of the spouses had an interest. In that regard para 37-38 of the judgment bear quoting in full because they assist, I think, to a proper understanding of the approach adopted by the Supreme Court of Appeal in *Badenhorst*:

> *37. If there is no justification as a matter of general legal principle for piercing the corporate veil, I find it impossible to say that a special and wider principle applies in matrimonial proceedings by virtue of section 24(1)(a) of the Matrimonial Causes Act 1973. The language of this provision is clear. It empowers the court to order one party to the marriage to transfer to the other "property to which the first-mentioned party is entitled, either in possession or reversion". An "entitlement" is a legal right in respect of the property in question. The words "in possession or reversion" show that the right in question is a proprietary right, legal or equitable. This section is invoking concepts with an established legal meaning and recognised legal incidents under the general law. Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere. It is right to add that even where courts exercising family jurisdiction have claimed a wider jurisdiction to pierce the corporate veil than would be recognised under the general law, they have not usually suggested that this can be founded on section 24 of the Matrimonial Causes Act. On the contrary, in Nicholas v Nicholas [1984] FLR 285, 288, Cumming-Bruce LJ said that it could not.*
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> *38. This analysis is not affected by section 25(2)(a) of the Matrimonial Causes Act 1973. Section 25(2)(a) requires the court when exercising the powers under section 24, to have regard to "the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future". The breadth and inclusiveness of this definition of the relevant resources of the parties to the marriage means that the relevant spouse's ownership and control of a company and practical ability to extract money or money's worth from it are unquestionably relevant to the court's assessment of what his resources really are. That may affect the amount of any lump sum or periodical payment orders, or the decision what transfers to order of other property which unquestionably belongs to the relevant spouse. But it does not follow from the fact that one spouse's worth may be boosted by his access to the company's assets that those assets are specifically transferrable to the other under section 24(1)(a).*

[17] *Jordaan v Jordaan* 2001 (3) SA 288 (C), on which the applicants also relied, appears to me to have been decided on essentially the same basis that the SCA decided *Badenhorst*. The order in that matter also did not go against the trusts, or render their assets exigible.

affidavit filed before the respondents had delivered their answering papers. I must say that on my reading of the transcript the evidence did not carry the unequivocal effect that the applicants sought to attribute to it.

[26] But, in any event, as mentioned, the first, second and sixth respondents objected to the admissibility of the evidence adduced at the enquiry proceedings on the basis, amongst other reasons, of its hearsay character. Their objection gave rise to an application by Merchant Factors to strike out significant portions of the applicants' papers. The applicants responded by applying, in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, for the admission of the transcript of the entire evidence given by Kaye, his wife and Vukic at the enquiry as evidence in the main application. The applicants' counsel (Mr *Mundell* SC, assisted by Ms *Davis*) conceded that if this evidence were not to be admitted, the main application could not succeed.

[27] I shall deal with the Evidence Act and striking out applications presently, but it seems to me that even assuming in favour of the applicants that the evidence should be admitted, it does not support the relief sought. An *ex hypothesi* consideration of the case on this basis is useful because the matters to which I would need to have regard in considering the application for the admission of the evidence include, amongst others, the nature of the evidence, the purpose for which it is tendered and its probative value. The ultimate conclusion required for the admission of the evidence is that it would be in the interests of justice to admit it.

[28] The expressions 'alter ego trust' and 'sham trust' are often used interchangeably and with confusing effect. So, for example, I think it is reasonably clear in *Rees and Others v Harris and Others* 2012 (1) SA 583 (GSJ) that when the court weighed whether to hold that the Aljebami trust had been proven by Harris to be Rees's 'alter ego', it was actually considering whether the evidence had established that the trust was a sham. The lack of clarity concerning the effect of the use of the expressions is not peculiar to this jurisdiction. It was discussed by Robertson J in the New Zealand Court of Appeal's judgment in *Official Assignee v Wilson*,[18] where the learned judge, having observed that two earlier New Zealand High Court judgments had employed the expressions without making the distinction 'if any' between the concepts apparent, went on to point out that the notion of 'alter ego' trusts

[18] [2008] NZCA 122; [2008] 3 NZLR 45 at para 63-74. My attention was drawn to the judgment in *Wilson* courtesy of the Rhodes University master's degree thesis of R.B. Stafford, *A Legal-Comparative Study of the Interpretation and Application of the Doctrines of the Sham and the Alter-Ego in the context of South African Trust Law: The Dangers of Translocating Company Law Principles into Trust Law* (December 2010), which can be accessed at http://eprints.ru.ac.za/2123/1/STAFFORD-LLM-TR11-36.pdf .

appeared to have been received into New Zealand jurisprudence from Australia, where, in matrimonial cases, the courts 'looked through' trusts for the purposes of making property distribution orders in cases in which a spouse's *de facto* control of a trust was held to have overridden the discretion of the trustees and made the trust property 'in reality' the *de facto* property of the controller. Robertson J held that while that approach might be supportable in the context of s 79 of Australia's Family Law Act 1975 (Cth), it was not borne out by common law principles. He concluded:

> [69] *The assumption of factual control by someone other than a trustee (or a sole trustee if there is more than one trustee) or by someone without legal right to exercise such power cannot of itself invalidate a trust. As noted by Jessica Palmer* [*Dealing with the Emerging Popularity of Sham Trusts* [2007] NZ Law Rev 81] *at 89:*
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> > *The alter ego, as factual control, should be an impotent, meaningless concept. In the eyes of the law, factual control has no effect on legal ownership. Indeed a stranger who takes control of trust assets will be considered a trustee de son tort and be liable to account for the property of beneficiaries. Factual control of trust property cannot justify recognition that the controller thereby owns the trust assets.*
> >
> > *...*
> >
> > *The alter ego concept, as it relates to factual control, serves to attribute an individual's actions to those of the organisation that he is controlling. It is not a mechanism whereby an individual can appropriate property to him or herself by virtue of the control that he or she exercises.*
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> [70] *Actual control alone does not provide justification for looking through/invalidating a trust. The uptake of control by someone other than an authorised person cannot be sufficient to extinguish the rights of the beneficiaries under a trust. It is difficult to see the alter ego trust operating in New Zealand as an independent cause of action.*
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> [71] *Factual control of a trust by someone other than those authorised to have such power is not an irrelevant consideration. Such control may give rise to a claim for breach of trust. Evidence of such control may be relevant to the question of whether a trust is a sham in that it may evidence a lack of true intention to form a trust. That is not to say that an alter ego trust is the same as a sham. A finding of effective control may help establish that a trust is a sham if it indicates that it was not intended that the trust take effect according to its terms. To establish a sham, the intention to mislead must be shown to have existed from the inception of the trust (or from the time when particular property was disposed to the trust). Evidence of effective control of the trust post settlement may be used to infer the requisite intention.*
>
> [72] *We are satisfied that Chisholm J's treatment of the alter ego trust argument was correct. Alter ego trusts are not an independent cause of action, nor are they the same as shams. In the trust context, alter ego arguments are confined to evidence to help establish a sham, which is how he treated the matter.*

In my view (and astute to the difference between our law and that of England and New Zealand concerning the character of the interest of beneficiaries in trust property), these conclusions hold equally true in the South African legal context. Indeed, the learned judge's observations at para 71 of his judgment are entirely consonant with the views expressed by Cameron JA in *Parker* at para 37.3.[19]

[29] Even if it were to be accepted that Kaye administered the Trust without proper regard to his fiduciary duties and in a sense treated it as his 'alter ego', that does not, in itself, make

[19] Note 9, above.

the trust a sham. It might have given cause for Kaye's removal from office as a trustee, or the appointment by the Master of an independent co-trustee,[20] and it might render Kaye personally liable for transactions concluded by him ostensibly on behalf of the Trust, or even delictually liable to the beneficiaries, but the evidence as to his alleged conduct does not vest a claim against the Trust in the applicants, nor does it give them a right, qua trustees of Kaye's insolvent estate, to ownership of the Trust's asset. In short, the evidence does not derogate from the fact that the Cape Town property is that of the Trust, not Kaye; nor does it show that Kaye has used the Trust to evade any obligation that the applicants or Kaye's creditors might, or should be able to, enforce. If Kaye's estate does have a claim against the Trust, as would appear to be quite likely, it is for the applicants to pursue it. If the claim is not satisfied, they might consider sequestrating the Trust, and only then, and if the facts justify such a course, would the voidable disposition remedies be available to them.

[30] In my judgment, the applicants' attempt to go behind the Trust in the circumstances has been misconceived. They have not shown that the Trust was used dishonestly or unconscionably to evade a liability to them or Kaye's creditors. As explained earlier, in the factual context of the case, they could succeed in obtaining the relief they sought, which in reality had nothing to do with piercing the Trust's veneer or going behind it, only by showing that it was a sham or that the fixed property had not really been vested in the Trust. They failed to do either of these things.

[31] Similar considerations apply in respect of the application concerning Bella Densel's property. The fact that the application in this connection is expressly founded on s 20(9) of the Companies Act 71 of 2008 implicitly entails an acceptance by the applicants that the Plettenberg Bay property properly vests in the company.

[32] Section 20(9) provides:

> If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-
>
> (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

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[20] See s 7(2) of the Trust Property Control Act 57 of 1988.

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)

In *Ex Parte Gore and Others NNO*[21] it was held that the provision was supplemental to, rather than substitutive of the common law. It has been accepted generally that the approach at common law has not been clearly defined, but its essence is, I think, captured in the following dictum of Corbett CJ in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*:

> It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.[22]

As stated in *Gore*,[23] s 20(9) of the 2008 Companies Act 'brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced'.

[33] The applicants have failed to show that the company was used in a manner that constituted an unconscionable abuse of its corporate personality. The fact that it may have been controlled by Kaye and that its property was consequently used to secure the obligations of other companies in which Kaye had a controlling interest did not constitute an abuse of Bella Densel's corporate personality. There is no evidence, even if one takes account of the parts of the record of the s 417 enquiry proceedings on which the applicants rely, to indicate that there was anything unconscionable or fraudulent about the company encumbering its property in favour of Merchant Factors to provide security for the performance of its contingent obligation under the suretyship it had given in respect of the former's claims against Sarepta. The fact that a person, such as a shareholder or a director, might have full and effective control over a company affords no basis, by itself, to disregard the separate personality of the company; cf. *Nel and Others v Metequity Ltd and Another*.[24]

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[21] 2013 (3) SA 382 (WCC) at para 34.

[22] 1994 (1) SA 550 (A) at 566C – F.

[23] At para 34.

[24] 2007 (3) SA 34 (SCA), [2007] 2 All SA 602, at para 11.

[34] I find accordingly that on any approach the applicants are not entitled to the primary relief that they have sought in the current application. It follows that they have not established any right, even *prima facie*, amenable to protection by interim interdictal relief against Merchant Factors. In the latter regard, I might mention that even had the applicants satisfied the requirement of establishing a right in the relevant sense necessary to obtain interim interdictal relief, I should nevertheless probably have declined to grant an interim interdict. In the context of the sixth respondent's tendered undertaking[25] and its evidently undisputed ability easily to meet any claim that the applicants might be able to assert to repayment of any money paid to the sixth respondent, qua mortgagee, from the proceeds of the fixed properties concerned, it seems unlikely, were the interdicts denied, that the applicants would have been exposed to irreparable harm. There is also the consideration that the furthest the applicants were able to take their case on the papers was that, if vested with the necessary standing to do so, they would explore the *possibility* of having the mortgage contracts set aside as voidable dispositions. They were unable to even attempt a demonstration of any probability of success in the vaguely mooted proceedings to avoid the dispositions. That would have afforded a further consideration weighing against the exercise of the court's discretion in their favour.

[35] As mentioned, however, the opposing respondents contended that the application should fail because most of the evidence upon which the applicants had purported to rely was inadmissible, being derived from the transcript of proceedings at the Sarepta enquiry. The respondents relied on the appeal court's decisions in *O'Shea NO v Van Zyl NO and Others*[26] and *James Brown & Hamer (Pty) Ltd v Simmons NO*[27] in support of their challenge to the admissibility of the evidence. As already noted, the applicants sought to meet the challenge by applying for the admission of the evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act. Section 3(1)(c) permits the court to admit otherwise inadmissible hearsay evidence (as defined[28]) if, having regard to the factors set out in sub-paragraphs (i)-(vii) of the provision, it 'is of the opinion that such evidence should be admitted in the interests of justice'. Section 3(2) of the Act restricts the effect of s 3(1) by making it clear that '[t]he

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[25] See para [5], above.

[26] 2012 (1) SA 90 (SCA); [2012] 1 All SA 303.

[27] 1963 (4) SA 656 (A).

[28] Section 3(4) of the Law of Evidence Amendment Act provides insofar as relevant:

> *For the purposes of this section-*
> *'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence*.

provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence'.

[36] To the extent relevant in the current case, the judgment in *O'Shea* merely reiterated the court's earlier decision in *Brown & Hamer*, approving the decisions of the Natal courts in *Simmons NO v Gilbert Hamer & Co Ltd*, at first instance,[29] and thereafter on intermediate appeal to the full court.[30] The judgments speak for themselves and it would be a supererogation to rehearse their relevant content at any length. Suffice it to say that their effect is to make it clear that the evidence given at the Sarepta enquiry, which the applicants have sought to employ in the current proceedings, is inadmissible against the respondents. That much is impliedly conceded by the applicants, hence their application in terms of the Evidence Act.

[37] The applicants sought to distinguish the effect of *O'Shea* and the judgments that preceded it, relying for that purpose on the obiter remarks of Rogers AJ (as he then was) in *Engelbrecht NO and Others v Van Staden and Others*,[31] which queried, but did not decide, whether evidence that was inadmissible by reason of the principles applied in the *O'Shea* and *Gilbert Hamer* cases might not be admitted in terms of the Law of Evidence Amendment Act. In that regard the learned judge stated (at para 20-21):

> What is less clear is whether they [i.e judgments in *O'Shea* and *Gilbert Hamer*] 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

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[29] 1962 2 SA 487 (D).

[30] 1963 (1) SA 897 (N).

[31] [2011] ZAWCHC 447 (6 December 2011), at para 17-21.

> 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.
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> 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.

In a recent judgment in a case closely related to the current matter, *Von Wielligh Bester N.O. and Others v Merchant Commercial Finance and Others*[32] (the abovementioned case no. 16211/13[33]), in which the admissibility of evidence adduced at the Sarepta enquiry was also in issue, Griesel J was prepared to accept for the purposes of argument the correctness of the obiter dicta in the passage from *Engelbrecht* quoted above, but held that he did not have to decide the point because there was no application in terms of the Evidence Act before him.

[38] Mr *Dickerson* SC, who appeared with Mr *Smalberger* for Merchant Factors, submitted that 'public policy' considerations afforded a discrete basis, quite apart from the hearsay rule, for the inadmissibility of the evidence. Ms *Bernstein*, who appeared for the first and second respondents, aligned herself with Mr *Dickerson*'s submission. If the argument were sound, it would point to the court not being able to admit the evidence in terms of s 3(1) of the Law of Evidence Amendment Act by reason of the aforementioned limiting effect of s 3(2) thereof.[34]

[39] As I understood his argument, Mr *Dickerson* relied on the provisions of s 417 and 418 of the 1973 Companies Act as implicitly providing, in themselves, a prohibition on the use by the applicants of the evidence adduced before the commissioner at the Sarepta enquiry. He placed special emphasis on s 417(2)(b), which, subject to the safeguards provided therein,

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[32] [2014] ZAWCHC 16 (18 February 2014).

[33] See para [11], above.

[34] See para [35], above.

abrogates the substantive law right of a witness to refuse to answer self-incriminating questions and also on the privacy provision in s 417(7). In addition, he emphasised the *sui generis*, and in some senses potentially draconian, nature of an examination in terms of the provisions.

[40] The nature of and historical background to such examinations and their equivalent in terms of the Insolvency Act were discussed in considerable detail and with extensive comparative reference to foreign jurisprudence in the Constitutional Court's judgments in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[35] and *Bernstein and Others v Bester NO and Others*.[36] The terrain having been well charted, it is not necessary for present purposes to revisit the territory.

[41] Section 417(2) in its current form was enacted to address the issues of constitutional incompatibility inherent in the abrogation of the right against self-incrimination.[37] I do not think that the subsection has any bearing on civil proceedings.

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[35] 1996 (1) SA 984 (CC), 1996 (1) BCLR 1.

[36] 1996 (2) SA 751 (CC), 1996 (4) BCLR 449.

[37] Section 417(2) of Act 61 of 1973 currently provides:

> *(2)* *(a) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.*
> *(b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.*
> *(c) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to-*
> *(i)* *the administering or taking of an oath or the administering or making of an affirmation;*
> *(ii)* *the giving of false evidence;*
> *(iii)* *the making of a false statement; or*
> *(iv)* *a failure to answer lawful questions fully and satisfactorily.*

Prior to its substitution, in terms of ss 9(c) and 11(a) and (b) of the Judicial Matters Amendment Act 55 of 2002, the sub-section read as follows:

> *(2)* *(a) The Master or the Court may examine any person summoned under ss (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them.*
>
> *(b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.*

[42] The history and rationale for the embargo on the use of the evidence, other than with the leave of the court, master or commissioner, as the case might be, were described in depth by Nicholas J in *S v Heller*.[38] It is plain that the provisions for secrecy in s 417(7), and the resultant limitation on the use of the evidence, are to promote the achievement of the objects of the enquiry proceedings[39] and not for any other policy purpose. Once that purpose has been served, or to the extent that the earlier release and use of the evidence will not prejudice its attainment, the basis and the need for such secrecy fall away. The record of any such enquiry is required in any event as a matter of law to be filed in the office of the Master. There can be no doubt that at that stage, at the latest, it qualifies as the record of a public body within the meaning of the Promotion of Access to Information Act 2 of 2000, and is thus amenable to the wide right of access provided in terms of s 11 of that Act. As there is no bar against such availability, why should any restriction on the use of the information be implied? I am unable to conceive of a plausible reason. In the current matter the commissioner had consented to the use of the record.

[43] I find nothing in the provisions, save as expressly provided in s 417(2), that militates in principle against the use of the evidence adduced at such enquiries in other proceedings to extent that the ordinary rules of evidence would allow. This conclusion appears to find support in the observation of Ackermann J in *Bernstein*[40] that the use of compelled testimony in civil proceedings is not prohibited or held to be unconstitutional in other open and democratic societies based on freedom and equality.

[44] As apparent from the judgments referred to earlier, the effect of allowing the use of the evidence at subsequent civil proceedings has thus far been that the evidence has been permitted to be used only against the examinee as a party or a witness in such subsequent

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[38] 1969 (2) SA 361 (W) (with reference to s 155 of the 1926 Companies Act, the statutory predecessor of s 417 of the 1973 Companies Act). The Winding Up Rule 14 referred to in *Heller* has its equivalent under the 1973 Companies Act in reg. 4 of the Winding-Up and Judicial Management of Companies Regulations.

[39] As to which, see, for example, *Bernstein v Bester* supra, at para 16.

[40] Supra, at para 120. See also the learned judge's observation in *Ferreira* supra, at para 154, that '*In the applicants' written argument and in the oral argument on their behalf in this Court, fleeting reference was made to the fact that section 417(2)(b) was also inconsistent with the Constitution to the extent that it permitted incriminating testimony to be used in a subsequent civil trial against the examinee. The argument was not pressed or developed and no authority, academic, judicial or otherwise, from any jurisdiction, was cited in support of the contention. Nor was any specific provision in the Constitution relied upon in this regard. I am unaware of any authority which would support such a submission. It is therefore unnecessary to express any view on it at this stage, particularly since the issue was raised and more fully argued in the Bernstein case supra. If there is any merit in the argument it will be dealt with in the Bernstein judgment*'. Compare also *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (4) SA 389 (D) at 393B-397 I.

proceedings. I agree with the opinion expressed by Rogers AJ in *Engelbrecht*[41] that the exclusion of its wider use would appear to have been founded on the hearsay rule. For all these reasons I have concluded that the evidence adduced at the enquiry is amenable to being introduced in the current proceedings in terms of s 3(1)(c) of Act 45 of 1988, subject, of course, to the requirements of that provision being satisfied.

[45] The applicants' counsel submitted that the requirements of s 3(1)(c) had been met. Counsel for the respondents argued, that assuming their contention that the provision did not apply did not prevail, its requirements had not been satisfied. In view of the conclusion adverse to the applicants at which I have arrived assuming *ex hypothesi* in their favour that the evidence was admissible, I do not believe, especially in the context of motion proceedings, that I need to grapple with the question in any detail. It cannot be in the interests of justice exceptionally to admit evidence that is *prima facie* inadmissible if its admission would not cure a fatal evidential deficiency in the case of the party that seeks its admission. The Evidence Act application will therefore be dismissed. I also find it unnecessary to treat with particularity of the sixth respondent's application to strike out, with which the first and second respondents associated themselves. It was by and large the opposite side of the coin in the context of the applicants' endeavour to have the hearsay evidence admitted, being directed essentially at excluding the evidence that the applicants sought unsuccessfully to introduce. For that reason I think it would be fair that the costs of both applications should follow the result of the Evidence Act application.

[46] It remains to determine the application by the applicants in terms of s 18(3) of the Insolvency Act for authorisation to have instituted these proceedings. The editors of Meskin et al, *Insolvency Law* (LexisNexis) have ventured that '[i]n the case of motion proceedings… it is competent for the provisional trustee to seek simultaneously both authority to bring such proceedings and the substantive relief'.[42] I have no quarrel with that postulate. The approach does, however, carry the risk that should the application fail the provisional trustees may be personally exposed to the adverse costs consequences. No doubt in most cases a prudent provisional trustee would only take such a course after having obtained a suitable indemnity from one or more of the insolvent's creditors.

[47] It was held by Van Oosten J in *Warricker and Another NNO v Liberty Life Association of Africa Ltd*,[43] that '[a]n applicant seeking the authority of the Court in terms of

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[41] Note 31, above.
[42] *Op cit* at §6.6.1.
[43] 2003 (6) SA 272 (W) at 276H-J.

the subsection must satisfy the Court, on good cause shown, that a departure from the normal course of events provided for in the Act is warranted. Where the institution of proceedings to enforce a claim is contemplated, to be entitled to an order the applicant must satisfy the Court, first, that some degree of urgency exists; secondly, that the cause of action which is to become the subject-matter of the proceedings is *prima facie* enforceable; and, thirdly, that the interests of creditors in the insolvent estate will not be prejudiced by the earlier institution of proceedings'. The applicants have failed to satisfy me in respect of the second of the aforementioned requirements. The application in terms of s 18(3) of the Insolvency Act therefore also falls to be dismissed.

[48] In the result the following orders are made:

1. The application for the admission of hearsay evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 is dismissed with costs, including the costs of two counsel, where such were employed, and also the sixth respondent's costs in respect of its application to strike out.
2. The application for relief in terms of paragraphs 1, 3, 4, 5 and 6 of the notice of motion is dismissed with costs, including the costs of two counsel where such were employed.

A.G. BINNS-WARD

Judge of the High Court

Before:	**Binns-Ward J**
Dates of hearing:	**11-12 March 2014**
Date of judgment:	**15 April 2014**
Applicants' counsel	**A.R.G. Mundell SC**
	D.M. Davis
First and second	
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Sixth respondent's counsel	**J.G. Dickerson SC**
	A.M Smalberger
Applicants' attorneys:	**Korbers Inc.**
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