THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 379/2005
REPORTABLE

In the appeals between:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

HAWKER AIR SERVICES (Pty) Ltd Respondent

AND:

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Appellant

and

HAWKER AVIATION SERVICES PARTNERSHIP

First Respondent

HAWKER AIR SERVICES (Pty) Ltd Second Respondent

HAWKER MANAGEMENT (Pty) Ltd Third Respondent

Before:	Howie P, Streicher JA, Cameron JA, Nugent JA and Conradie JA
Heard:	Thursday 9 March 2006
Judgment:	Friday 31 March 2006

Liquidation – urgency – not an independent ground for dismissal of application – debt arising from VAT assessment – no bona fide and reasonable dispute – liquidation order to issue – Sequestration – Insolvency Act 24 of 1936, s 13 – one of partners a company which cannot be sequestrated – no impediment to sequestration of partnership – benefit to creditors – disappearance of substantial partnership asset – investigation justified

Neutral citation: Commissioner for the South African Revenue Service v Hawker Air Services (Pty) Ltd [2006] SCA 55 (RSA)

JUDGMENT

CAMERON JA:

[1] In the Pretoria high court the appellant (the Commissioner; SARS) sought the liquidation and sequestration respectively of Hawker Air Services (Pty) Ltd (HAS) and a now-defunct partnership to which it belonged, Hawker Aviation Services (the partnership). Patel J dismissed both applications with punitive costs orders, and later refused leave to appeal. His judgment has been reported.[1] These are appeals against his orders with leave granted by this court. HAS is the respondent in the liquidation appeal and the second respondent in the sequestration appeal, where the

[1] *Commissioner, South African Revenue Service v Hawker Aviation Services Partnership* 2005 (5) SA 283 (T).

partnership is the first respondent and Hawker Management Co (Pty) Ltd (ManCo) the third respondent.

[2] Patel J dismissed the applications on the grounds that they had not been urgent; that the Commissioner had acted with an improper ulterior purpose in bringing them; that the applications constituted an impermissible collateral challenge to an earlier court finding; that the statutory tax judgment on which the Commissioner relied as constituting the debt rendering him an unpaid creditor of the company and the partnership was invalid and therefore that the Commissioner could not apply for either liquidation or sequestration; that the sequestration application was fatally defective because it failed to embrace a liquidation application directed at the other corporate partner, ManCo; and that the applications should be refused in any event in the exercise of the court's residual discretion. The learned judge passed strong criticism on the conduct of SARS's officials. In addition he determined that certain statutory provisions were unconstitutional. He granted the respondents the costs of four counsel, and ordered the Commissioner to pay them, not on the

party and party scale, nor even on the attorney and client scale, but on the ‘attorney and own client scale’.

[3] Though it is unnecessary to traverse all its findings, the judgment is incorrect and the criticism of the Commissioner and his staff unjustified. Some background is necessary. At the centre are very substantial tax debts the Commissioner claims Mr David King, the sole director of HAS, and a number of parties connected to him owe; and the Commissioner’s attempts over the last four years to ensure that HAS’s principal asset, its interest in a Falcon 900B jet aircraft, remains available for the satisfaction of that and other tax debts. The partnership was formed in August 1999 to conduct a charter business with a Hawker Executive Jet. The partnership registered as a vendor in terms of the Value-Added Tax Act 89 of 1991 and claimed 100% of the customs VAT on the Hawker’s acquisition as an input tax. On the premise that the Hawker was used solely to convey passengers and goods for reward, the Commissioner paid this claim. Just more than a year later, in September 2000, the partnership purchased the Falcon. A similar VAT input claim was made and paid.

[4] HAS was the manager of the partnership's charter business and both aircraft were registered in its name, though beneficial ownership vested in the partnership. HAS remains the registered owner in respect of the Falcon. The partnership sold the Hawker in May 2001 to a foreign-registered company King represented in South Africa, Ben Nevis Ltd (Ben Nevis) (from which the partnership had originally bought the Hawker). In February 2002, the Commissioner issued income tax assessments for the tax years 1998, 1999 and 2000 against King (for R912 million) and against Ben Nevis (for nearly R1.5 billion). In the same month, the high court granted the Commissioner certain orders designed to preserve the Falcon – which the Commissioner claims is valued at some R175 million – as an asset from which these tax debts might be satisfied. But the orders were not effective to prevent the Falcon's being flown abroad without being returned: and it has been hangared in Europe, idle, since May 2002.

[5] In September 2002 a new partnership was formed when Rand Merchant Bank Ltd, an en commandite partner (RMB), and ManCo, the other public partner, sold their interests. HAS continued as a partner in the new partnership, with an

undiminished interest in the Falcon. It is from its standing as a partner in the old partnership that the Commissioner claims HAS continues to be liable for that entity's tax debts; and from its continuing interest in the same asset – the Falcon – that the Commissioner claims its winding-up may render reward. The tax debts arise, the Commissioner asserts, from VAT assessments issued against the partnership on 13 March 2003 after SARS determined that the Hawker and Falcon aircraft were used predominantly for unrecompensed private purposes (mainly the conveyance of Mr King) and not for commercial chartering. The Commissioner has fixed the partnership's VAT liability at approximately R73 million in tax, additional tax, penalties and interest.

[6] Between March and early December 2003, correspondence passed between SARS and the legal representatives of HAS and the partnership in regard to the VAT assessment. An objection was partly successful, but within a few days in early December, the Commissioner made a final ruling, took statutory judgments in terms of s 40 of the VAT Act against HAS and the partnership, obtained nulla bona returns in respect of the judgments, and

moved urgently for the liquidation of HAS and the sequestration of the partnership.

[7] The urgency, the Commissioner said, lay in the fact not only that the Falcon while stationary was unproductive and deteriorating, but that attempts had been made to de-register it in South Africa, and to transfer its registration abroad in defiance of court rulings. For in February 2003 Hartzenberg J had granted the Commissioner an order requiring the new partnership to take all necessary steps to procure the Falcon's return to South Africa. In September 2003 Hartzenberg J had granted the new partnership and associated entities leave to appeal against this order, and had refused the Commissioner's application for interim enforcement of the order under Rule 49(11).

[8] On Friday afternoon 5 December and Saturday 6 December 2003, the Commissioner launched the liquidation and sequestration applications on an urgent basis. Patel J was the judge on urgent duty in the Pretoria high court that week. On Tuesday 9 December he directed the parties to submit written argument. The matters were argued on Wednesday 10 and Thursday 11 December, when they were postponed sine die. The

hearing resumed on 14 and 15 June 2004. After the prolonged hearing before Patel J, and before he delivered judgment, this court upheld Hartzenberg J's order requiring the new partnership to procure the return of the Falcon to South Africa.[2] Patel J dismissed the applications on 26 November 2004 and handed down his written judgment on 5 January 2005.

Urgency

[9] One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge

[2] *Metlika Trading Ltd v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA). A subsequent application for leave to appeal to the Constitutional Court was dismissed.

its own rules[3] (which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll.[4] This enables the applicant to set the matter down again, on proper notice and compliance.[5]

[10] Far from striking the applications from his roll, Patel J heard lengthy argument over two days in December, and then permitted the parties to postpone the matters, in the event to a date more than six months later. In the meanwhile, on Monday 8 December King on behalf of both HAS and the partnership lodged affidavits (which he described as 'preliminary answering affidavits'), which engaged with the merits of the applications. There was no suggestion that deponents other than King wished to testify or could testify, and King, having the assistance of his legal team,

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[3] See *Republikeinses Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972(1) SA 773 (A) 782A-783H.
[4] *Luna Meubel Vervaardigers (Edms) Bpk v Makin* 1977 (4) SA 135 (W) 139F-140A.
[5] Cf Rule 6(6): 'The court, after hearing an application whether brought ex parte or otherwise, may make no order thereon (save as to costs if any) but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.'

took a deliberate decision not to ask for extra time to deal with any other points he may have wished to raise. In addition, from December 2003 to June 2004, King and his advisors chose deliberately not to file additional affidavits, though it was open to them to do so. Instead, HAS and the partnership made it clear that if they lost on the points they did raise, they would, in defiance of the rule of practice that a matter may not be dealt with in this piecemeal fashion, ask for a postponement in order to deal with other points they had not raised.

[11] In this court the respondents persisted in submitting that the application was not urgent when it was brought in December 2003, but even if that were so, there is nothing now to be made of that. I have already pointed out that lack of urgency will entitle a high court in the exercise of its discretion to refuse to enrol a matter where the ordinary forms and procedures have not been followed. But that is not what occurred. Patel J traversed the full ambit of the merits of the relief that was sought, and far from striking the matter from the roll for want of such compliance, dismissed it. Whether or not it was urgent in December 2003 is

immaterial to the question now before us, which is whether the application ought to have been dismissed.

The liquidation application

[12] The Commissioner applied for the winding-up of HAS as a creditor of the company.[6] He claimed in the founding papers that HAS owed SARS a VAT debt of 'approximately R73 million', the computation of which he set out in detail. The founding affidavit referred to the assessments on which the tax claim was based, and recorded that SARS had obtained judgment against both HAS and the partnership in terms of s 40(2)(a) of the VAT Act.[7] Both in the high court and in this court, HAS contested the validity of the statutory judgments on extensive grounds both formal (invoking the decision of this court in *Singh v Commissioner, South African Revenue Service*)[8] and constitutional (invoking inter

[6] Companies Act 61 of 1973 s 346(1): 'An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made – (a) by the company; (b) by one or more of its creditors (including contingent or prospective creditors); …'
[7] VAT Act s 40(2)(a): 'If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so far due and payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.'
[8] 2003 (4) SA 520 (SCA).

alia the separation of powers and the penal nature of some of the tax claimed). Patel J upheld these defences.

[13] It is not necessary to consider the objections to the judgments, because the founding affidavit relies also on the assessments that underlie them. The founding deponent states that SARS 'applies for the liquidation of [HAS] based on a VAT debt of approximately R73 million for which the [partnership] was assessed and for which [HAS] is liable in terms of s 51(3) of the VAT Act'.[9] The assessments constituted SARS a creditor of the partnership and of HAS. And at no stage did deponents on behalf of the partnership or HAS dispute the existence of the debts on bona fide and reasonable grounds.[10]

[14] The defences raised by HAS against the assessments may be shortly disposed of. The first was that it is constitutionally not permissible for the Commissioner to usurp the function of a court of law by imposing on a taxpayer any additional burden that has a penal element. However, the imposition of additional tax or a

[9] VAT Act s 51(3): 'Subject to the provisions of section 46 [dealing with persons acting in a representative capacity], every member of a partnership shall be liable jointly and severally with other members of the partnership for performing the duties of the partnership in terms of this Act and paying the tax imposed by this Act on the partnership in respect of supplies made by the partnership while such member was a member of the partnership'.
[10] See *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) 980-982.

penalty is no more than provisional; its imposition is appealable so that the ultimate arbiter of the fairness of an additional tax or a penalty is the court.

[15] On a formal level the assessments were challenged on the footing that having upheld an objection by HAS the Commissioner had, despite an undertaking to issue a revised assessment, by the time the application for liquidation was made, not yet done so.

[16] There are two answers to this point. First, the objection applies to only one of the assessments. The assessment for the period ending December 2000 was not revised. Secondly, according to the plain meaning of s 31(1) of the VAT Act any assessment issued by the Commissioner creates a debt which is payable whether or not the taxpayer disputes his liability. If the Commissioner decides to revise the assessment downwards that has the effect of reducing the debt. It does not mean that there is no debt until all a taxpayer's objections have been dealt with and a 'final' assessment has been issued (see *Singh*'s case para 11)

[17] The argument that the 'pay now argue later' rule, the constitutionality of which was established by *Metcash Trading Ltd*

v Commissioner, South African Revenue Service,[11] applies only where the Commissioner takes a statutory 'judgment', and not to an application for liquidation, is unsustainable. Once the Commissioner is a creditor, he is entitled to whatever remedy a creditor may have for the enforcement or collection of the debt.

[18] Finally, it was argued in this regard that since the existence of the debts is disputed on 'reasonable and bona fide grounds' a court should in the exercise of its discretion not wind up HAS. As I have indicated, there is no evidence on the papers of a bona fide dispute. The assessments derived from SARS's conclusion that, in contradiction of the intentions expressed in procuring the VAT input credits, the aircraft had been used preponderantly for the private conveyance of King without recompense to the partnership. King's 'preliminary answering affidavit' scrupulously avoids dealing with SARS's detailed audit that provided the basis for the assessments. He refers only to objections made in letters on behalf of the partnership by the tax attorneys representing it. These objections were of a factual and legal nature. It was contended that the reporting partner, ManCo, entirely under the

[11] 2001 (1) SA 1109 (CC).

control of RMB, at the outset formed the intention that both aircraft would be used only for making 'VATable' supplies. Since ManCo did not know that the aircraft were not being used as alleged by SARS, it had no reason to change its original intention which accordingly persisted with the result that, whatever the actual use, the original VAT input tax could not be reclaimed by the Commissioner.

[19] But these objections were never – despite express invitation – affirmed on oath. Between March 2003, when the assessments were first raised, and June 2004, when argument on the applications was concluded, no attested affirmation was ever forthcoming that contradicted the detailed investigation and findings of SARS in relation to the use of the aircraft. In addition, SARS's assertion that those responsible for the management of the partnership, effectively employees of the financing partner, RMB, were turning a blind eye to the actual use of the aircraft, was never controverted. On the contrary, the RMB employees were notably silent. If I find, as I do, that the evidence as to the intention (whether of HAS or of ManCo) on acquisition of the aircraft, to use them only for the making of 'VATable' supplies is

not bona fide, there is no longer any basis for counsel's contention that, as a matter of law, such intention as to the use of the aircraft on their acquisition must be taken to have persisted throughout the period of their use.

[20] Though the Commissioner relied also on the statutory judgments obtained against HAS, those judgments neither extinguished nor superseded the assessments: they were designed merely to strengthen the revenue's right to enforce the assessments.[12] Under the VAT Act the issue of the assessments against the partnership created a deemed debt.[13] There can thus be no doubt that SARS enjoys standing as a creditor of the partnership, for whose debts HAS is liable. And it is common cause, on information supplied by King himself, that HAS is quite incapable of paying any its debts. In these circumstances the court had a discretion whether to order the winding-up of the company[14] and it is clear that that discretion should have been exercised in favour of doing so.

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[12] *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) 940-944.

[13] VAT Act 89 of 1991 s 31(1); 36(1): 'The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law ...'

[14] See PM Meskin and others *Henochsberg on the Companies Act* (5 ed, 1994, with updates) vol 1 p 693f.

[21] The partnership remained free to contest the deemed debt.[15] And no doubt a court, in the exercise of its discretion, may withhold a w-up order even in respect of a deemed debt if it is shown that the debt is disputed on bona fide and reasonable grounds. That was never done here. There were no other proper grounds to withhold a winding-up order, for the reasons that follow, and it ought to have been granted.

[22] HAS and the partnership contended that SARS's real motive in bringing the applications was to procure the return of the Falcon, thereby rendering it available for execution in respect of the tax debts of King and Ben Nevis – an object thwarted when Hartzenberg J declined to order interim enforcement of the order requiring the new partnership to procure its return to South Africa. They thus contended that SARS thus acted with improper ulterior purpose, and that the applications constituted an impermissible collateral challenge to the prior rulings. There is no merit in these imputations. The real motive of SARS was plainly to collect VAT. No acceptable basis was advanced for impugning this. The liquidation and sequestration applications, and the attendant focus

[15] *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC)

on the Falcon's recovery, flowed from this. It does not constitute an ulterior purpose.

[23] King and a number of persons are alleged to have interests in the aircraft, including HAS. Previous efforts to recover the Falcon related to the interests of King and other parties associated with him. In the present case, the Commissioner seeks the appointment of a liquidator to pursue whatever interests HAS enjoys in the aircraft. That is not an ulterior purpose. The extent to which these interests may coincide with interests pursued in related applications is irrelevant and does not constitute an ulterior purpose. King claims that HAS's interest in the aircraft is limited to the extent of its share in the partnership, which is no more than 0.1%. The Commissioner contests this construction. A liquidator will be able to investigate the truth of these claims, and follow up any interest he may discover.

[24] The proceedings before Hartzenberg J, though also directed to the preservation and recovery of the Falcon, involved differing parties and different considerations. An application under Rule 49(11) for interim enforcement of a court order pending appeal is

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paras 34-48.

considered and granted on quite different grounds from those at issue when a liquidation is sought. The applications for the liquidation of HAS and the sequestration of the partnership were thus not collateral challenges to the refusal by Hartzenberg J to grant the Commissioner interim enforcement of the order to return the Falcon, but a legitimate claim that entailed an alternative means to the same end. There was thus no impropriety, ulteriority or impermissibility in SARS seeking to pursue its purposes through liquidation and sequestration proceedings.

The sequestration application

[25] The partnership sought to be sequestrated consisted of HAS, ManCo and RMB. The Commissioner has applied for the sequestration of the partnership, but not for the liquidation of ManCo. The question is whether in these circumstances the sequestration of the partnership is competent. Section 13(1) of the Insolvency Act 24 of 1936 provides:

‘If the court sequestrates the estate of a partnership (whether provisionally or finally or on acceptance of surrender), it shall simultaneously sequestrate the estate of every member of that partnership other than a partner en commandite or a special partner as defined in the Special Partnerships’

Limited Liability Act, 1861 (Act No 24 of 1861) of the Cape of Good Hope or in Law No 1 of 1865 of Natal, who has not held himself out as an ordinary or general partner of the partnership in question: Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be sequestrated by reason only of the sequestration of the estate of the partnership.'

[26] Does s 13, by requiring that the court 'shall simultaneously sequestrate' the estates of all the partners, render impossible a partnership sequestration where not all the members can be sequestrated? In *Partridge v Harrison and Harrison*,[16] Greenberg JP held No. There, the estate of one of the partners could not be sequestrated because of a military service moratorium. Greenberg JP held that the partnership could nevertheless be sequestrated. He found that s 13, though imperatively expressed, must be limited to cases where the estates of the partners can be sequestrated, and that it does not apply where there is a lawful bar to sequestration. He said:

'Notwithstanding that this is couched in imperative language, there are cases where it could not be carried out. For instance if a partner has been sequestrated and has not acquired an estate as against his trustee so as to

allow a second sequestration, the Court could do no more than to sequestrate the partnership estate and the estates of the remaining partners. The same would probably be the case if one of the partners was a limited company. It would appear therefore that the section must at least be limited to cases where the estates of the partners can be sequestrated and does not apply where there is a lawful bar to such sequestration.'

Greenberg JP also stated that the proviso to s 13 'shows that it was contemplated that sequestration of the private estates does not follow automatically in all cases upon a sequestration of the partnership estate'.

[27] The reasoning of Greenberg JP was followed for nearly half a century. The sequestration of partnerships was ordered where one of the partners was married in community of property,[17] where one was the beneficiary of an agricultural moratorium,[18] and where one was a company under judicial management,[19] in each case rendering sequestration impossible. But in *P de V Reklame (Edms) Bpk v Gesamentlike Onderneming van SA*

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[16] 1940 WLD 265 266-7.
[17] *SA Incorporated Merchants' Protection Agency Ltd v Kruger* 1947 (3) SA 304 (T).
[18] *Laymore (Pty) Ltd v Five Streams Wattle Estate* 1957 (3) SA 671 (N) (even though Holmes J only assumed, without deciding, that the partnership could be sequestrated, the order was indeed granted on the return day).
[19] *SA Leather Co (Pty) Ltd v Main Clothing Manufacturers (Pty) Ltd* 1958 (2) SA 118 (O).

Numismatiese Buro (Edms) Bpk en Vitaware (Edms) Bpk,[20] these decisions were criticised as conceptually flawed, since the statutorily created concursus creditorum presupposes the simultaneous sequestration of all the members of the partnership and cannot operate effectively without it.[21] That the concursus the statute envisages is incomplete, and that it would operate incompletely where a partnership sequestration excludes the estate of one of the partners is correct. Yet the criticism is not persuasive. It proceeds on the premise that a complete concursus is imperative, when the exceptions s 13 itself creates show that this is not so. The interpretation favoured by Greenberg JP and the decisions that followed him achieve a pragmatic, if partial, result, which is compatible with the language of s 13 when interpreted, as Greenberg JP did, as requiring the sequestration of only those partners whose estates are capable of

[20] 1985 (4) SA 852 (C).

[21] Insolvency Act 24 of 1936, s 49(1): 'When the estate of a partnership and the estates of the partners in that partnership are under sequestration simultaneously, the creditors of the partnership shall not be entitled to prove claims against the estate of a partner and the creditors of a partner shall not be entitled to prove claims against the estate of the partnership; but the trustee of the estate of the partnership shall be entitled to any balance of the partner's estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as that balance is required to pay the partnership's debts and the trustee of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto, if his estate had not been sequestrated.'

sequestration.[22] Even though this means that in such situations the statutory concursus will be incomplete, it seems to me to offer a more practicable and coherent approach to the difficulties that would result if s 13 were interpreted to render sequestration of a partnership impossible where one of the partners cannot be sequestrated.

[28] I therefore conclude that the interpretation adopted in the *Partridge* case is preferable and that since ManCo is a company, which is not capable of being sequestrated, s 13 did not require its sequestration. It follows that the application for the partnership's sequestration is not defective.

[29] The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The court need be satisfied only that there is reason to believe – not necessarily a likelihood, but a prospect not

[22] Catherine Smith, *The Law of Insolvency* (3ed, 1988) pp 70-71 favours the approach of Greenberg JP; while PM Meskin *Insolvency Law and its operation in winding-up* (1990, with updates) 2-29, who favours the analysis in *P de V Reklame* concedes 'that the resulting situation clearly is unsatisfactory, given the policy of achieving a sequestration of the partnership's estate

too remote – that as a result of investigation and inquiry assets might be unearthed that will benefit creditors.[23]

[30] In the present case, the partnership was the beneficial owner of the Falcon which, in circumstances set out in the judgment in *Metlika Trading Ltd v Commissioner, South African Revenue Service*,[24] was transferred to a new partnership. It is true that HAS continued as a partner in the new partnership; but in substance the partnership lost an asset of very considerable value for no discernible return to it. That, at least, is something in regard to which investigation and inquiry may yield a benefit for the creditors of the partnership, if it were found for instance that the transfer to the new partnership involved a voidable disposition, or a disposition without value or was, as SARS contends, a simulated transaction in fraud of the revenue.

[31] Reverting to the liquidation, given that only one creditor is involved, and only one shareholder, both of whom have had the opportunity to be heard, it will serve no purpose to issue an interim winding-up order. A final order will therefore issue. The

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as such' and recommends remedy by legislative amendment.

[23] *Meskin & Co v Friedman* 1948 (2) SA 555 (W) 559, per Roper J; *Hillhouse v Stott* 1990 (4) SA 580 (W) 585 and *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 585 per Leveson J.

[24] 2005 (3) SA 1 (SCA).

Commissioner, though employing three, asked for the costs of only two counsel.

Order:

1. The appeal succeeds with costs, including the costs of two counsel.

2. The order of the court below is set aside, and in its place is substituted the following:

   A: In the liquidation application, case number 34593/2003:
   (i) There is a winding-up order in respect of the respondent company;
   (ii) The costs of the applicant, including the costs of two counsel, are costs in the winding-up.

   B: In the sequestration application, case number 34724/2003:
   (i) The estate of the Hawker Aviation Services Partnership is placed under provisional sequestration in the hands of the Master of the High Court;
   (ii) The Partnership is called upon to advance reasons, if any, on Tuesday 25 April 2006 why the court should not order the final sequestration of its estate.

E CAMERON
JUDGE OF APPEAL

CONCUR:
HOWIE P
STREICHER JA
NUGENT JA
CONRADIE JA