THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED. ✓

25.9.09

DATE

SIGNATURE

Case 09/22247

In the matter between:

INVESTEC BANK LIMITED First Applicant

PRIVATE MORTGAGES 3 (PTY) LIMITED Second Applicant

and

MUTEMERI, GAMA First Respondent

MUTEMERI, NELLIE Second Respondent

and

BARRY KOTZE Intervening Applicant

JUDGMENT

Introduction

1. The applicants apply for the sequestration of the common estate of the respondents who are said to be married in community of property. The respondents raise a range of defences. Most prominent among them, is their contention that the applicants' claims against them are based on *"credit agreements"* within the meaning of the National Credit Act 34 of 2005 and that the application for their sequestration is barred under it.

2. The respondents applied to a debt counsellor for review of their debts in terms of s 86 of the NCA. The Debt Counsellor is Mr Barry Kotze. He accepted the respondents' application, gave notice to all their credit providers, concluded that they appeared to be over-indebted and applied to the Magistrate's Court for their debts to be re-structured in terms of ss 86 and 87 of the NCA. His application to the Magistrate's Court was launched on 15 May 2009 but is only enrolled for hearing on 11 August 2010, that is, almost a year from now. The respondents' case is that until then, no legal proceedings may be instituted against them for enforcement of the applicants' claims under the credit agreements and that their application for sequestration constitutes proceedings of that kind.

3. When this application for sequestration first came before this court for hearing on 25 August 2009, the respondents applied for a postponement. Beckerling AJ refused their application but stood the matter down until 28 August 2009. On that day, the Debt Counsellor sought and was granted a postponement to enable him to launch an application for leave to intervene as a party to the proceedings. He has since then made such an application. The applicants oppose his application for joinder. They

made it clear however that they had no objection to him making submissions as a friend of the court but that he lacked standing to be admitted as a party to the proceedings. I accordingly heard the Debt Counsellor, both on his application for joinder and on the merits of the application.

4. Although logic suggests that I should determine the Debt Counsellor's application for intervention at the outset, it would make no practical difference when I do so because I have already heard him on his application for intervention and on the merits of the application for sequestration. It will in the circumstances be more convenient to deal with his application for intervention at the end of this judgment because the reader will by then be better acquainted with the subject matter of this case and the Debt Counsellor's interest in it.

5. I turn to consider the grounds upon which the respondents and the Debt Counsellor submitted that the application for sequestration should be dismissed.

The respondents' marriage

6. The respondents were married in Zimbabwe. The applicants alleged in their founding affidavit that the respondents were deemed to be married in community of property. Their allegation seems to be borne out by declarations the respondents made in some of their loan agreements with the applicants. It is the basis on which they seek the sequestration of the respondents' joint estate.

7. The respondents did not dispute the allegation that they were deemed to be married in community of property and did not challenge the competence of the application for

sequestration of their joint estate in their answering affidavits. Their counsel however submitted an argument that, according to the law of Zimbabwe, their marriage is one out of community of property. But this is not a contention open to the respondents in the face of their implied admission on the papers that they were married in community of property and in the absence of any evidence to the contrary.

The applicants' claims

8. It is common cause that the applicants have substantial liquidated claims against the respondents. In an earlier application of which I shall say more later, the respondents admitted their indebtedness to the applicants in unambiguous terms:

> *"I entirely agree with the Applicant on the following:-*
>
> - *That Second Respondent and I are indebted to the two Applicants,*
> - *That our bond account fell into arrears,*
> - *That the Applicants are entitled at law to enforce payment by instituting legal proceedings and that they may seek an order declaring the property in question specially executable."*

9. In this application, the applicants give details of their claims against the respondents and then summarise them as follows:

> *"As at 27 August 2008, the respondents were indebted:*
>
> *52.1 to the second applicant as concerns the loan agreements and as concerns the mortgage bonds bearing account number 226105/003, in the amount of R2 041 506,20 together with interest thereon at the rate of prime minus 1.65% (prime currently 5.5%) equivalent to 13.85%*

from 27 August 2008 to date of payment, calculated daily, compounded monthly;

52.2 *to the first applicant as concerns the credit card agreement in respect of account number 10010776829, in the amount of R118 723,47 together with interest thereon at the rate of prime less one per centum being 14,5% as at 27 August 2008; and*

52.3 *to the first applicant as concerns the indebtedness of RAH in the amount of R500 000 together with interest thereon."*

10. The respondents did not take issue with any of the details of the applicants' claims except to deny that the third claim was one for R500 000. It is a claim under a suretyship in terms of which the respondents stood surety for the debts of RAH Products (Pty) Limited. It appears from a certificate of indebtedness issued by the first applicant's Recoveries Manager, that the respondents' debt under the suretyship is only R337 503 plus interest from 27 May 2008. Subject to this qualification however, the applicants' claims against the respondents are common cause.

The respondents' insolvency

11. In their founding affidavit, the applicants alleged that the respondents had committed various acts of insolvency in terms of s 8(g) of the Insolvency Act 34 of 1936 and, by inference, that their liabilities in fact exceeded their assets.

12. This inference was never seriously denied and has subsequently been fully borne out by the respondents' application to the Debt Counsellor which they had confirmed on

oath. They said in that application that they had assets of only R4 million and liabilities of R17,8 million. This evidence more than suffices to establish *prima facie* at least, that the respondents are in fact hopelessly insolvent.

Advantage to creditors

13. In their founding affidavit, the applicants contended that the sequestration of the respondents' estate would be of advantage to their creditors for a variety of reasons which may be reduced to two fundamental grounds. First, the respondents are the owners of immovable property. The applicants did not adduce any evidence of the value of this property and did not place any particular value on it. The applicants secondly said that a trustee would be able to determine whether the respondents had disposed of their assets to third parties. They advanced some evidence from which it might be inferred that the respondents might have done so.

14. This evidence should also now be seen in the light of the respondents' statements confirmed on oath in their application to the Debt Counsellor, about the assets and liabilities in their estate. As already mentioned, they claim to have assets of R4 million and liabilities of R17,8 million. Their assets include three immovable properties on which they placed values without substantiating them.

15. The respondents submitted that the applicants have not shown any advantage to creditors because the property values upon which they rely, have not been proved by expert evidence. They relied for this submission on paragraph F4.2 of the Gauteng High Court Practice Directives Manual which reads as follows:

"If the existence of adequate advantage to creditors depends on the extent to which a specific asset will contribute to the free residue, evidence of a person with appropriate skill must prove what price can be expected on an expeditious sale which is not delayed in order to obtain a satisfactory negotiated price."

16. But this rule of practice must be seen in context. As a matter of law, an applicant may generally rely on an admission by the respondent, of any fact upon which the applicant's case is based. But the weight of such an admission depends entirely on the circumstances in which it is made. It may be conclusive in some circumstances and wholly unpersuasive in others. An example of the latter, is a self-serving *"admission"* made by a respondent in a *"friendly"* application for his or her sequestration. Such an admission made by a respondent, of the value of his or her property, in order to show advantage to creditors, often carries so little weight as to be insufficient to establish a cause of action for sequestration. The rule of practice then comes into play. The court declines to make a sequestration order unless the applicant produces proper expert evidence of the property values in question.[1]

17. A case such as this one on the other hand, is very different. It is not a friendly sequestration. The parties are at arm's length. The respondents actively oppose the application for their sequestration. They have not given any other evidence of the values of their properties as they could easily have done. In these circumstances, the values they placed on their properties in their application to the Debt Counsellor, are

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1 Ex parte Steenkamp 1996 (3) SA 822 (W) 825 to 830; Nel v Lubbe 1999 (3) SA 109 (W) 110 to 112; Ex parte Anthony 2000 (4) SA 116 (C) paras 11 to 17; Ex parte Matthysen et uxor 2003 (2) SA 308 (T) 311 to 312

not inherently suspect. There is no reason why the applicants should not be allowed to rely on them in this application for their sequestration. Their earlier valuations are at the very least sufficiently credible to satisfy the requirements of s 10(c) of the Insolvency Act, that there must *prima facie* be *"reason to believe"* that the respondents' sequestration will be to the advantage of their creditors.

The National Credit Act

18. It is common cause that the applicants' claims against the respondents, are claims in terms of *"credit agreements"*, and that the applicants are the *"credit providers"* and the respondents the *"consumers"* under those agreements within the meaning of the NCA. The respondents contend that the applicants are precluded by the NCA from seeking their sequestration in this application.

19. The respondents rely in the first place on ss 129(1) and 130(1)(b) of the NCA. These provisions, shorn of their qualifications which are not relevant to the issues in this case, read as follows:

> *"129 Required procedures before debt enforcement*
>
> *(1) If the consumer is in default under a credit agreement, the credit provider –*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree*

on a plan to bring the payments under the agreement up to date; and

(b) ...

(c) ... may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a) ....; and

(ii) meeting any further requirements set out in section 130."

"130 Debt procedures in a Court

(1) ... a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

(a) ...

(b) in the case of a notice contemplated in section 129(1), the consumer has –

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals and

(c) ....".

20. It is common cause that the respondents were in default under their credit agreements by 7 August 2008. On that date, the applicants gave the respondents the prescribed notices of default in terms of s 129(1)(a). They proposed to the respondents as

required by s 129(1)(a), that the respondents "*refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction*".

21. The respondents did not initially adopt any of these proposals. They made promises instead, to pay their outstanding arrears under the credit agreements over time. They proposed a settlement on the basis of these promises in a letter to the applicants on 22 August 2008. To the applicants' suggestion that they refer the credit agreements to a debt counsellor, they responded as follows:

> "*You said that we may approach debt counsellors with our credit agreement. We are able to do so concurrently with our efforts now to settle the arrears with the bank. We have already identified a debt counsellor in Johannesburg who we are visiting in a week's time to assist us to consolidate our debts and to get over with the arrears.*"

22. This counter-proposal was not acceptable to the applicants. They launched an application in this court on 16 October 2008 for payment of their claims under the credit agreements. Motlaung AJ however dismissed their application in a judgment handed down on 13 February 2009. He held that the applicants were precluded by s 130(1) from enforcing their claims without first considering and either accepting or rejecting the respondents' counter-proposal. He put it as follows:

> "*The applicants are not entitled to ignore the respondents' response and/or offer. The (applicants), whilst not obliged to agree to any offer, whether made by the respondents themselves or as a result of the debt counselling process, are obliged to consider the offer and either accept or reject it or participate in the debt counselling process and either accept or reject the offer the process*

of debt counselling has brought forward, before they can be entitled to proceed to court by way of this application.

I therefore find that the applicants have failed to comply with the provisions of the NCA, in particular, with section 130 of the NCA, by failing to respond to the response by the respondents regarding the settlement offer and/or debt counselling process."

23. The applicants submitted that Motlaung AJ erred in coming to this conclusion and informed me that his judgment was being taken on appeal. They submitted that they had complied with s 130(1)(b) because the respondents' failure to adopt and implement the applicants' proposals and their counter-proposal, amounted to a failure to respond to, or a rejection of, the applicants' proposals within the meaning of s 130(1)(b).

24. Although the respondents had not adopted or implemented any of the applicants' proposals before the previous application was launched, they did so while the judgment in that application was pending. They applied to the Debt Counsellor on 13 January 2009, for review of their credit agreements in terms of s 86 of the NCA. It means that the respondents had adopted and implemented the applicants' proposals by the time the applicants launched the present application on 29 May 2009. The applicants however submit that the respondents' application to the Debt Counsellor for review of their credit agreements in terms of s 86, was not competent and should be disregarded because s 86(2) provides that an applicant for debt review in terms of s 86, may not be made in respect of a credit agreement once the credit provider "*has proceeded to take the steps contemplated in section 129 to enforce that agreement*". The applicants argue that their default notices in terms of s 129(1)(a) were steps of this

kind and that the respondents were consequently precluded by s 86(2) from applying for review of their credit agreements.

25. This argument exposes an anomaly in the applicants' case and indeed in the NCA itself, if a default notice in terms of s 129(1) were to be regarded as a *"step contemplated in s 129"* to enforce a credit agreement. It would be anomalous because the credit provider's default notice in terms of s 129(1)(a) must propose to the consumer *inter alia* that he or she *"refer the credit agreement to a debt counsellor"*. But if the selfsame notice is a *"step contemplated in section 129"*, then it would prevent the consumer from referring the credit agreement to a debt counsellor in terms of s 86(2). In other words, on this interpretation, a default notice would propose to the consumer that he or she make application to a debt counsellor but at the same time trigger the bar in terms of s 86(2) which precludes the consumer from doing so.

26. It is fortunately not necessary for me to resolve this issue. I shall assume in favour of the respondents, as Motlaung AJ had found, that the applicants did not meet the requirements of s 130(1) and were accordingly precluded from approaching the court *"for an order to enforce a credit agreement"*. On this assumption, the applicants' earlier application for enforcement of their credit agreements with the respondents, was barred by s 130(1) as Motlaung AJ has found. The question in this application however, is whether an application for sequestration of a consumer's estate which is based on the applicant's claim against the consumer in terms of a credit agreement, is an application *"for an order to enforce a credit agreement"* within the meaning of s 130(1).

27. There is little doubt that a sequestrating creditor's motive in applying for the sequestration of its debtor, may be and often is, to obtain payment of its debt. The Appellate Division made this clear in Estate Logie v Priest 1926 AD 312 at 319 where Solomon AJ said the following:

> *"It appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons as a rule are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regard for the benefit of other creditors, who are able to look after themselves. What they want is payment of their debt, or as much of it as they can get."*

28. But the question whether an application for sequestration constitutes an application *"for an order to enforce a credit agreement"* within the meaning of s 130(1) of the NCA, depends on the nature of the relief the creditor seeks and not on the sequestrating creditor's underlying motive in bringing the application. Whatever a credit provider's underlying motive, the application is not barred by s 130(1) unless it is an application for an order *"to enforce a credit agreement"*.

29. In Collett v Priest 1931 AD 290 the Appellate Division considered whether a sequestration order made by the Eastern Districts Local Division could be taken on appeal to the Cape Provincial Division of the Supreme Court. The relevant statute permitted appeals from the one to the other in *"any civil suit"*. The Appellate Division held that a civil suit was a *"legal proceeding in which one party sues for or claims something from another"* and that it did not include an application for sequestration. De Villiers CJ explained at 299 why it could not be said that an application for

sequestration was a proceeding by which one party sued for or claimed something from another:

> *"The order placing a person's estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt before an order so serious in its consequences to the debtor is given the court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor upon any such claim."*

30. In Prudential Shippers SA Limited v Tempest Clothing Co (Pty) Limited 1976 (2) SA 856 (W), the applicant applied for the winding-up of the respondent's estate. The respondent alleged that the debt upon which the applicant relied, had arisen from a money-lending transaction subject to the Limitation and Disclosure of Finance Charges Act 73 of 1968. It asked that the applicant's officers be examined under s 11 of that Act. The section provided for such an examination in any proceedings *"for the recovery of a debt"* in pursuance of a money-lending transaction. After a full and careful consideration of the authorities, McEwan J held at 863D to 865A that an

application for the winding-up of a debtor's estate did not constitute proceedings *"for the recovery of a debt"*.

31. It seems to me that the rationale of these judgments is equally applicable to the proper interpretation of s 130(1) of the NCA which applies only to an application to court *"for an order to enforce a credit agreement"*. It does not apply to an application by a credit provider for the sequestration of a consumer's estate based on a claim in terms of a credit agreement between them. Such an application is not one for an order enforcing the credit provider's claim against the consumer. Section 9(2) of the Insolvency Act indeed makes it clear that the sequestrating creditor's claim need not even be due, that is, need not yet be enforceable. An application for sequestration may be made on the strength of a claim which is not yet enforceable, because a sequestration order is not an order for enforcement of the claim. Its purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An applicant for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to the claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim. I conclude that an application for sequestration is not an application for enforcement of the sequestrating creditor's claim and is thus not subject to the requirements of s 130(1) of the NCA.

32. The respondents however submitted that, whether or not an application for sequestration is subject to s 130(1), it is in any event subject to s 130(3) which is not limited to applications for the enforcement of credit agreements but extends to "*any proceedings commenced in a court in respect of a credit agreement*". The relevant provisions of this section read as follows:

> "*Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –*
> *(a) In the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with.*"

33. The respondents submitted that an application for sequestration is a proceeding "*in respect of a credit agreement*' within the meaning of s 130(3) and that it thus rendered such an application subject to the requirements of s 129 of the NCA. But s 130(3) does not extend the scope of s 129. It merely provides that, in proceedings (already) subject to the requirements of s 129, the court must be satisfied that there has been compliance with those requirements. One accordingly has to turn to s 129 to determine whether its requirements apply to applications for sequestration. The only relevant requirements are those laid down by s 129(1)(b) but they also apply only to "*legal proceedings to enforce*" credit agreements. I have already concluded that applications for sequestration are not proceedings of that kind. They are accordingly not subject to the requirements of s 129(1)(b) and thus do not have to comply with those requirements in terms of s 130(3).

34. The respondents lastly invoked s 88(3) of the NCA. It provides *inter alia* that a credit provider who receives notice of a consumer's application for debt review in terms of

s 86(4)(b)(i), "*may not exercise or enforce by litigation or other judicial process any right or security*" under a credit agreement between the credit provider and the consumer, until certain conditions have been met. But, for the reasons already mentioned, an application by a credit provider for the sequestration of a consumer, does not constitute litigation or other judicial process by which the credit provider exercises or enforces any right under the credit agreement between itself and the consumer. The credit provider may rely on its claim in terms of a credit agreement to qualify as a creditor with standing to bring the application for the sequestration of the consumer. But it does not exercise or enforce its right under the credit agreement by doing so. Such an application is accordingly also not precluded by s 88(3).

35. I conclude that the respondents' defences under the NCA cannot be upheld. None of the provisions upon which they rely precludes an application by a credit provider for the sequestration of a consumer based on a claim under the credit agreement between them.

The Debt Counsellor's application to intervene

36. The Debt Counsellor contended that he had a direct and substantial interest in the application for the respondents' sequestration by virtue of his functions as their debt counsellor in terms of s 86 of the NCA. He described his interest in his application for intervention as follows:

> "*My direct and substantial interest that stands to be affected by a judgment of the above Honourable Court is that I serve a prescribed function as provided for in the National Credit Act as set out in s 8(6) of the Act.*

A debt counsellor's position can be compared to that of a trustee in an insolvent estate or an executor in a deceased estate or an administrator in terms of s 74 of the Magistrate's Court Act (administration orders) to a function created by statute in respect of the assets and obligations of the first and second respondents as consumers.

I am by statute obliged and entitled to exercise the functions in respect of the credit agreements of the first and second respondents as prescribed by section 86 of the Act.

I furthermore have a direct and substantial interest to ensure that no enforcement by a credit provider by litigation or other judicial process takes place against the consumers (first and second respondents) as provided for in s 88(3) of the Act.

In terms of section 3 of the Act, the purpose of the Act is, inter alia, providing for mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all possible financial obligations, providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements and providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all possible consumer obligations under credit agreements. To achieve the purposes of the Act, section 8(6) provides for a procedure which I as debt counsellor must implement and it enjoins the applicant to anticipate (sic) in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement."

37. The role of debt counsellors under the NCA, is confined to the functions they perform in terms of ss 71 and 86. They are facilitators and mediators between consumers who

have become over-indebted on the one hand, and their credit providers on the other. The purpose of their intervention is ultimately to afford relief to consumers in distress in appropriate cases. But the debt counsellor's role goes no further than that of mediator and facilitator. He or she does not determine the relief afforded to over-indebted consumers. It is determined by agreement between the consumers and their credit providers or by court order. Debt counsellors do not take control of or assume responsibility for consumers' estates as the Debt Counsellor suggested by his analogy which compared debt counsellors with trustees, executors and administrators. While debt counsellors undoubtedly perform an important function in the implementation of the NCA and the achievement of some of its purposes, their role is not to police the implementation of the NCA or to act as guardians of the pursuit of its purposes.

38. An applicant for intervention in pending legal proceedings, has to show a direct and substantial interest in the proceedings concerned.[2] The applicant's interest in the proceedings must be a legal interest in the subject-matter of the proceedings which may be prejudicially affected by the court's judgment in the proceedings concerned. Mlambo JA put it as follows in Gordon's case:

> "*The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated*

[2] United Watch & Diamond Co v Disa Hotels 1972 (4) SA 409 (C) 415 to 417; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs 2005 (4) SA 212 (SCA) paras 64 to 66; Gory v Kolver NO 2007 (4) SA 97 (CC) paras 11 to 13; Gordon v Department of Health, Kwazulu-Natal 2008 (6) SA 522 (SCA) para 9; Independent Newspapers v Minister for Intelligence Services: In re Matselhla v President of the RSA 2008 (5) SA 31 (CC) paras 17 to 18; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 85

Engineering Union case (supra) it was found that 'the question of joinder should ... not depend on the nature of the subject-matter ... but, ... on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."[3]

39. The Debt Counsellor does not have such an interest in the application for the sequestration of the respondents' estate merely because he is acting as their debt counsellor in terms of s 86 of the NCA. He has no legal interest in the application for their sequestration which might be prejudicially affected by its outcome. His role is not to advance or protect any legal interest of his own. He also does not assume control over or responsibility for the respondents' estate. His role remains one of a mediator and facilitator.

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3 Gordon v Department of Health Kwazulu-Natal 2008 (6) SA 522 SCA para 9

40. I conclude that the Debt Counsellor does not have a direct and substantial interest in this application and that his application for intervention should accordingly fail.

Costs

41. Counsel for the Debt Counsellor accepted that, if his application for intervention failed, there was no reason for the costs of the application not to follow its result. These costs include, not only the costs of the application for intervention itself, but also the wasted costs of the postponement of the main application for sequestration on 28 August 2009.

42. It is common cause that the applicants' and respondents' costs in the main application for sequestration should be costs in the administration of the respondents' insolvent estate. These costs include the wasted costs if any, occasioned by the delay in the application on 25 August 2009. The applicants asked for a further order that the respondents pay the wasted costs of 25 August 2009 in the event of a discharge of the order for the sequestration of their estate for any reason. I am however of the view that the wasted costs of 25 August 2009 should follow the result of the application for sequestration, whatever its outcome.

Order

43. I make the following order:

43.1. The application for intervention by the Debt Counsellor Mr Barry Kotze, is dismissed with costs including the wasted costs occasioned by the postponement of the application for sequestration on 28 August 2009.

43.2. The respondents' joint estate is placed under provisional sequestration.

43.3. The respondents are called upon to advance reasons, if any, why the court should not place their estate under final sequestration on 20 October 2009 at 10h00 or as soon thereafter as the matter may be heard.

43.4. The applicants' and respondents' remaining costs in the application for sequestration are to form part of the costs of the administration of the respondents' estate.

43.5. The applicants' costs include the costs of two counsel where applicable.

W H Trengove AJ

25 September 2009