REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/34535

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

NEDBANK LIMITED (formerly NEDCOR BANL LIMITED **Intervening Party**

In re:

NICOLAAS ALBERTUS VAN RHYN **Applicant**

and

DEAN STEYN **Respondent**

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction.** This is the application for final sequestration order by the Applicant in respect of the Respondent's estate. A provisional order was granted unopposed on 28 October 2012 in the form of rule *nisi*. At the same time the Intervening Party (Nedbank Limited) applies for intervention order; condonation for the late filing of the Intervening Party opposing affidavit; the provisional sequestration order to be discharged and for costs against the Applicant on attorney and client scale alternatively, party on party scale.

2. The Intervening Party opposes the application for sequestration on the basis that it would not be to the advantage of the Respondent's creditors.

3. **Background.** The Applicant is the Respondent's creditor, having obtained a default judgment against him for an amount of R1 038 406.00. From the affidavit deposed to by the Applicant in support of the application for sequestration, it appears that this amount accrued to the Applicant following an agreement (both verbal and written) between him and MWC Motors CC whereby he would supply motor vehicles to be sold by the later with the arrangement that they would share the proceeds of sale. MWC Motors CC has since been deregistered and at that time it owed him R1 038 406.00. The Respondent became liable for the money owed by virtue of his membership in MWC Motors CC at the time of its deregistration.

4. The sheriff served a writ of execution on the Respondent at his place of work and found nothing movable to attach. The Respondent also indicated to him that he was not in a position to pay the amount owed to the Applicant. His return was therefore *nulla bona*.

5. **The Intervening Party's calculation of the advantage of sequestration to the creditors.** The Applicant submits that the sequestration of the Respondent would be to the advantage of the Respondent's creditors in that first, he is the registered owner of three immovable properties to wit, ERF 435, NR. 3 Antares Avenue, Morehill, Gauteng (property A); ERF 3377, Rynfield Ext 62, Gauteng (property B) and ERF 590, Unit 49, Aspen Creek, Brentwood Ext 19, Gauteng (property C). Second, he is currently employed by Hyundai East Rand and it is evident that he earns a substantial monthly income that falls into his estate. Thirdly, there is a strong likelihood that there are movable assets which fall within the Respondent's estate which can be realised for the benefit of his creditors.

6. The Intervening Party became interested parties in this application in that in 2007, it granted a loan to the Respondent in the amount of R1 200 000.00 together with R300 000.00 as security for the payment of the capital amount, interests and costs. The said loan was secured over a mortgage bond on property A at R900 000.00. Given the failure by the Respondent to make payment to the Intervening Party of the instalment due by him under the mortgage bond, the full amount owing by the Respondent to the Intervening Party is R1 168 204.65.

7. There are two other creditors with interest in this application although they did not apply to intervene in the proceedings. In 2005 and 2007, First Rand Bank Limited granted loans to the Respondent at R525 000.00 and R1 025 000.00 respectively. These loans were granted with additional R105 000.00 and R205 000.00 as security for the payment of the capital amount, interests and costs for the respective loan amounts. The said loans were secured over a mortgage bond on property B at R1 350 000.00. Lastly, in 2008 Standard Bank of South Africa Limited granted a loan in to the Respondent in the

amount of 620 398.00 together with R155 099.50 as security for the payment of the capital amount, interests and costs. The said loan was secured over a mortgage bond on property C at R500 000.00.

8. The Intervening Party did some property valuation and calculated sequestration and related costs in order to determine if the sequestration of the Respondent's estate would be to its (or other creditors') advantage, relying on calculations done by Mr. Wampach (Wampach), a registered professional valuer. Wampach puts the forced value of property A at R1 100 000.00, property B at R1 350 000.00 and property C at R500 000.00. In determining the immovable property's forced sale valuation, Wampach took into consideration the age and qualities of the properties, current economic climate, condition of the properties and their locations.

9. The Intervening Party puts the costs of the application for property A at R137 155.00, property B at R165 480.00 and property C at R69 175.00. These costs include 3 % trustees fees on the value of the property plus VAT, 6 % auctioneers commission on value of the property plus VAT, provision for pro rata Master's fee, provision for pro rata bond of security and advertising costs in selling the property. Administration costs such as estimated attorneys' costs, notice to creditors and two postponements is estimated at R20 080.00. Other costs such as advertisements in newspapers and in Government Gazette and related costs are estimated to be R1 319.33.

10. In the event of the sale of these properties in the amount valued by Wampach, and after the costs deductions in the figures reflected above, the intervening creditor would become a secured creditor for R962 845.00 and a concurrent creditor for the remaining portion of its claim in the amount of R205 359.65 in respect of property A. First Rand Limited would become a secured creditor for R1 184 520.00 and a concurrent creditor for the

remaining portion of its claim in the amount of R365 480.00 in respect of property B. Standard Bank of South Africa Limited would become a secured creditor for R430 825.00 and a concurrent creditor for the remaining portion of its claim in the amount of R189 573.00 in respect of property C. The effect of this is that there would be an amount of R1 798 818.65 needing to be paid to concurrent creditors after the sale of these immovable properties. This amount would be R1 778 419.32 after deducting the R20 399.33 for the other specified costs.

11. The Intervening Party submits therefore that presuming there are no other assets to be attached, this would result in a very real and likely fear of danger of a contribution towards costs arising. Having put up these figures in an attempt to demonstrate that the sequestration of the Respondent's estate would not benefit the creditors, the Intervening Party applies for the dismissal of the application for the sequestration of the Respondent's estate.

12. Although the Applicant is still adamant that there is a likelihood possibility that the creditors could benefit from the sequestration of the Respondent; he could not meaningfully challenge the figures put up by the Intervening Party. The short falls suggested by the Intervening Party for all the creditors remain therefore unchallenged.

13. **Applicant's notice to withdraw the sequestration application.** Faced with these figures, the Applicant seems to have given the sequestration application a second thought and communicated its decision to withdraw its application to the Intervening Party. In a letter to the Intervening Party's attorneys dated 30 January 2013 sent by fax and by e-mail, the Applicant's attorneys indicated that "[h]aving read the contents of your client's application; we confirm that we have consulted with our client and counsel… and we are

instructed to withdraw our client's application…"[1] A copy of the said withdrawal notice was also attached. The Intervening Party responded demanding that the Applicant should also tender the costs, a demand that went unheeded. Costs were therefore reserved for argument before the court.

14. Another letter was however sent to the Intervening Party dated 20 February 2013 in which the Applicant's attorneys informed the Intervening Party that after a conversation with the liquidator appointed for the Respondent's sequestration, the liquidator informed them that any withdrawal would be vehemently opposed by her because the Respondent's estate is insolvent, sequestration of the Respondent's estate will be to the advantage of his creditors and that her stance was supported by the Master of the High Court and other creditors of the Respondent. Based on this, the Applicant's notice of withdrawal was withdrawn. The Applicant proceeded therefore to file a Replying Affidavit dated 20 March 2013.

15. **Issues for determination. A:** The court is called upon to determine if the Applicant is at liberty to withdraw a notice of withdrawal that was served on the Intervening Party. **B:** Would the sequestration of the Respondent's estate be to the advantage of his creditors.

16. **Notice of withdrawal.** Once a party withdraws an application, he or she would be barred from changing the choice by the doctrine of election which provides that once a choice is made, a party should stay with that choice.[2] Any withdrawal of the application is instituted in terms of Rule 41 of the Uniform Rules of Court which provides,

[1] See paragraph 2 of Annexure RA2 attached to the Replying affidavit by the Intervening Party.

[2] See *Angern and Piel v Federal Cold Storage Co limited* 1908 TS 761 and *Public Servants Association of South Africa obo Strydom v SARS* [2007] JOL 20040 (LC).

> (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.
>
> (b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.
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> (c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.
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> …
>
> (3) If in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or Applicant immediately to inform the registrar accordingly.
>
> [Own Emphasis]

The question as to whether there is a withdrawal of the application by the Applicant is a question on whether there is consent between the parties in this application on the withdrawal.

17. The notice of withdrawal of the application by the Applicant was not served with the Registrar as it is expected.[3] This was not due to short notice from the time of withdrawal to the date of hearing since more than two months lapsed in between. The reason is because the Applicant changed his mind. The exchange in e-mails between the Applicant and the Intervening Party does not reflect anything closer to "consent" as it is provided in Rule 41.[4] Even as the parties argued before the court, there was no suggestion that they agreed to a withdrawal. A party is permitted to change his mind until it is able to confirm its consent to a withdrawal in court. Unless there is a clear confirmation of such consent, there cannot be a consent to withdraw upon which the court can order such a withdrawal, a judgment of the court. Any withdrawal without such consent or at least the leave of the court

[3] See Rule 41 (3).
[4] See Annexures RA2 - RA7 attached to the Intervening Party's Replying Affidavit.

would therefore be invalid.[5] For the reason that there is no consent to withdraw the application and no leave of the court was sought, the Applicant cannot be said to have withdrawn its application.

18. **Requirements for sequestration.** Section 10 of the Insolvency Act 24 of 1936 (the Act) provides,

> "If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie—
>
> …
>
> (b) the debtor has committed an act of insolvency or is insolvent; and
>
> (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
>
> it may make an order sequestrating the estate of the debtor provisionally."

From the facts of the case, there is no dispute that the Respondent has committed an act of insolvency as required by section 10 (b) of the Act. The only dispute is on whether the sequestration of his estate would be to the advantage of the creditors. The court must be satisfied that sequestration would be to the advantage of the creditors before granting the final order.[6]

19. It is trite law that the Applicant is not required to show that the sequestration would definitely be to the advantage of the creditors. The Applicant should rather satisfy the court that there is a reason to believe that the sequestration of the Respondent will be to the advantage of the creditors. In interpreting the phrase 'reason to believe', Roper J said,

> "[t]he phrase 'reason to believe', used as it is in both these sections (section 10 and 12), indicates that it is not necessary, either at the first or the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be

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[5] See *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 465G

[6] See Saber Motors (Pty) Ltd v Morophane 1961 (1) SA 759 (W).

> to the financial advantage of creditors. At the final hearing, though the Court must be "satisfied", it is not to be satisfied that sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so."[7]

20. The Applicant in an attempt to show that there is a reason to believe that the sequestration of the Respondent's estate would be to the advantage of the creditors, referred to the three properties, a belief that the Respondent earns a substantial income and the likelihood that movable properties could be found. Again, in his Replying Affidavit, the Applicant alleges that the trustee established *prima facie* that it shall be in the best interest of the creditors of the Respondent that his estate be wound up. An affidavit by the trustee was also attached.

21. From the affidavit compiled by the trustee, it would appear that the only reason that makes her to hold a view that it would be in the best interests of the creditors for the Respondent's estate to be sequestrated is that the Respondent has not been able to pay his debts for the past 8 months. Since the Applicant suggested the availability of the trustee in court to give evidence to substantiate her affidavit, on 3 May 2013 the court allowed the case to be postponed so the Applicant may file a supplementary affidavit to cover whatever the trustee was to give evidence about.[8] The Applicant opted not to do so and there is therefore no other reason advanced as to why the trustee alleges the sequestration will be in the best interests of the creditors.

22. While the Applicant insists that there could be movable properties that may be uncovered, it is important to note that the sheriff returned a *nulla bona* return after serving the writ of execution on the Respondent at his place of employment. The Founding Affidavit by the Applicant is silent on where the

[7] Meskin & Co v Friedman [1948] 2 All SA 416 (W) at p. 419.
[8] See the Applicant's practice note.

writ of execution was served rather simply saying it was served on him personally. While there is nothing wrong in personal service, the Applicant Founding Affidavit claimed to know the Respondent's place of residence. He opted not to direct the sheriff to the place of residence where the movable properties could be found. Obviously such properties could not be reasonably expected to be at the Respondent's place of work. The Applicant however believes that movable items could be found that might cover the short fall exposed by the Intervening Party.

23. From the papers before the court, there is clearly no basis to believe that movable items would be uncovered. If the Applicant genuinely believed in that assumption, he would have redirected the sheriff to serve the writ of execution at the place of residence which he did not do.

24. Although the Applicant's counsel argues against the findings and valuations done by Wampach, I have already indicated that there is nothing advanced by the Applicant or any other person to discredit this registered professional valuer's calculations. That is the only valuation that is before the court and its credibility remains intact. By the time the court granted the provisional sequestration order against the Respondent, it was not aware that once all the known immovable properties registered in the name of the Respondent are sold, there would be R1 798 818.65 needing to be paid to concurrent creditors. This means the sequestration of the Respondent's estate caused by the Applicant's debt of R1 038 406.00 would cause the creditors to run short of R1 798 818.65 after the sale of immovable properties. If this figure is accepted, there is therefore no way that this could be interpreted as being to the advantage of the creditors. It is in fact to their disadvantage. There is nothing presented by the Applicant to counter these figures.

25. A mere allegation to the effect that a reason exists to believe that the creditors would be advantaged by the sequestration order is not sufficient. The Applicant has a duty to show and demonstrate a reason to believe that it would be to the advantage of the creditors of the Respondent if the estate was to be sequestrated.[9]

26. While Annexures RA2 to RA7 do not bind the Applicant to withdraw the application, the contents thereof can clarify the disputed issues. The Applicant does not distance himself with the contents of the letters of correspondence to the Intervening Party. It therefore remains true that after reading through the Intervening Party affidavit, he learned what he did not know at the time he initiated this application. This caused him to consider withdrawing the application. Again, the reason for reconsidering the withdrawal was the result of the conversation with the trustee who indicated that she would oppose the withdrawal of the application. While I do not have an affidavit by the trustee to that effect, I can indicate that the trustee is not a party to these proceedings. The trustee would therefore lack *locus standi* to oppose the said withdrawal if one was to be made. Although it is alleged that the trustee claimed to have the support of other creditors, I equally to not have the purported support in writing or otherwise.

27. It was held in *Borchers v Kaehne*[10] that "sequestration is an extraordinary process in execution – if it can all be appropriately be regarded as such – and each creditor is presumed to be the best judge of what is to his benefit. The Intervening Party in this case does not believe that the final sequestration of the Applicant's estate will be to its advantage."

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[9] See *Standard Bank of SA Ltd v Sewpersadh & Another* 2005 (4) SA 148 (C).
[10] 1933 SWA 105 at 108. See also *Fesi and another v ABSA Bank Ltd* [1999] JOL 5634 (C)

28. Having considered that although an act of insolvency may have been proved in this matter, I am not satisfied that the Applicant has successfully proved that there is a reason to believe that it would be to the advantage of the creditors if the Respondent's estate is finally sequestrated.

29. For the reasons stated above, I make the following order:

1. Leave is granted to the Intervening Party to intervene in the application for sequestration of the Respondent's estate;

2. The provisional sequestration order granted by this Court on 23 October 2012 is discharged;

3. The Applicant is ordered to pay the wasted costs as a result of the postponement of the opposed application on 3 May 2013; including the costs of the Intervening Party on a party to party scale.

4. The Applicant is ordered to pay the costs of the Intervening Party on a party and party scale.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**22 May 2013**
Judgment Delivered:	**13 June 2013**
For the Applicant:	**Adv. S Stevens**
Instructed by:	**Jurgen Bekker Attorneys** **Bedfordview**
For the Respondent:	**Adv. HM Vermaak**
Instructed by:	**Van Hulsteyn Attorneys** **Sandton**