**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

SIGNATURE

05 July 2017
DATE

**CASE NO: 21119/2015**

In the matter between:

**BLUE STRATA TRADING PTY LTD** **APPLICANT**

**and**

**ERIC ARTHUR DARRIER** **1ST RESPONDENT**
**JEAN ELIZABETH DARRIER** **2ND RESPONDENT**

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**JUDGMENT**

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**VICTOR J:**

[1] This is the return day of a provisional order of sequestration granted on 22 March 2016 and extended on 13 June 2016. The respondents also seek an extension of the provisional order of sequestration. The indebtedness of the respondents arises out of a suretyship agreement signed in favour of Cimco, a company which

owed the applicant money and which is now in liquidation. The essential issues for determination are the applicant's locus standi to bring these proceedings and following upon that whether the matter should be postponed so the respondents can place the evidence before the court regarding the applicant's lack of locus standi.

**Extension of the provisional order of sequestration**

[2] The respondents brought a substantive application to extend the rule. The case that they make out for this is as follows. They seek time to have the provisional order of sequestration rescinded on the basis that the applicant did not have the requisite *locus standi* to have launched and prosecuted the sequestration application in the first instance. They claim that the applicant has no locus standi as it has ceded its book debts to Investec Bank. It has always been the applicant's case that notwithstanding the cession of book debts to Investec Bank the wording of the cession is such that only in the event of a default by it does locus standi of the applicant become an issue. The applicant has not defaulted so the question of locus standing is irrelevant and in terms of the cession agreement with Investec Bank it was obliged to institute proceedings in respect of the ceded debt.

[3] The respondents contend that the letter of 9 March 2016 from the applicant's attorney confirms its lack of locus standi. The letter is as follows in paragraph 5.1:

> "5.1 The indebtedness, which is the ultimate basis for this application, is the subject of a cession in *securitatem debiti* that was entered into between our client and Investec Bank on 3 August 2012.
>
> 5.2 Save in the event of default in terms of this agreement on the part of our client, (which we are instructed has not occurred), our client is the party who is authorised, and indeed contractually required, to recover moneys owing, which it is entitled to do in its own name and for its own account. Thus, our client's *locus standi* and is not affected by the cession."

[4] This led to the respondents inspecting the cession agreement. The respondents complained that they were not allowed to make a copy or retain a copy of the cession agreement to show to the court. The respondents also contend that because of the nature of the cession in *securitatem debiti* it is an outright cession and accordingly the applicant does not have the necessary *locus standi*.

[5] The respondents also seek a postponement on the basis that they made a complaint to the Human Rights Commission on 8 March 2016, seeking certain documentation and they have not received this documentation. They also require a postponement because they have secured the services of a forensic investigator to assist them in this investigation. Because of the seriousness of the application and the effect of the sequestration they seek an indulgence from this court to grant the necessary postponement.

[6] In this regard the respondents submit that the test for postponement where evidence is not to hand is whether there is prejudice to the parties. See *The National Bank of SA Ltd v Assigned Estate Lentin and Tobias* 1924 SWA 84. They claim the applicant would not be prejudiced while they obtain further evidence. A further consideration where evidence is not to hand is where the ends so of justice would not be attained without the production of certain material evidence. See *Shapiro v Shapiro* 1904 TS 673. The respondents submit that the court, in the exercise of its discretion, ought to not grant a final order of sequestration. The respondents rely on the question of convenience and the question of prejudice to be taken into account as set out by Colman J in Centirugo AG v Firestone (SA) 1969(3) 318. The dictum does not assist the respondents as in applying that test I find that it favours the applicant on the basis that the respondents have had ample time to obtain the evidence which they require and their conduct in these proceedings is tantamount to delaying tactics.

**Locus Standi**

[7] The respondents further submit that reliance should be placed on the case of *Mars Incorporated v Candy World (Pty) Ltd 1991 (4) SA 567 (A)*, where the general rule is that the party instituting proceedings has to allege and prove the *locus standi* and the onus of establishing that issue rests upon the applicant. Therefore it must appear, *ex facie* the founding affidavit, that the parties have the necessary *locus standi in judicio.* See *Kommissaris van Binnelandse*

*Inkomste v Van der Heever* 1990 [3] SA 1051 [SCA] at para 10.

[8] The respondents also contend that *locus standi* concerns the sufficiency and directness of a litigant's interest in proceedings, which warrants his or her title to prosecute the claim asserted. See *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Another* 2009 (1) SA 317 (SCA).

[9] The applicant submits that the letter of 9 March 2016 spells out that the applicant retained its *locus standi* in the cession agreement concluded with the bank. The respondents have inspected the Cession Agreement.

[10] The applicant has set out the terms of the cession agreement and submits that the cession agreement clearly indicates that it does not become effective until the applicant causes a default event. The applicant has not caused a default event with Investec Bank. In this regard, in response to the postponement application the applicant contends as follows: that at all times it did have *locus standi* in respect of the claim against the respondents, which resulted in judgment being granted in favour of the applicant against the respondents. It also has *locus standi* as a creditor of the respondent in seeking the sequestration of the estate of the respondent. The applicant also submits that the respondent's allegations are bald and unsubstantiated.

[11] The affidavit refers to the clause relating to the cession. On 3 August 2012 the applicant and Investec Bank Limited concluded a written cession agreement. The relevant clause is 1.1.2:

> "Ceded claims means: 1.1.2.1: All claims, right of action and receivables which the cedent now has, and may at any time during the currency of the cession hereafter have (excluding the trade finance claims), against and/or all obligations which are now owed and may at any time during the currency of the cession hereafter become owing to the cedent by all persons and partnerships, from whatsoever cause, whether arising out of contract, delict, unjust enrichment, statutory enactment or operation of the common law and without in any way limiting or affecting the generality of the aforegoing, whether such indebtedness be incurred or owed to the cedent by any debtor on its own, or jointly or in partnership with any person, or jointly and severally as a guarantor and/or indemnitor ... clause 2 as security for the secured obligations the cedent hereby cedes in *securitatem debiti* the ceded claims to the cessionary for the duration of the security period. 3: Prior to the occurrence of the event of default and the exercise of its rights in terms clause 4 hereof the cedent shall be entitled to collect and claim in its own name and for its own account all amounts payable on account of the ceded claims."

[12] It is important to note that clause 3 enables the applicant in its own name and for its own account to claim all amounts payable on

account of the ceded claims. This is the essence of the applicant's case. The applicant submits that it is clearly distinguishable from the case of *Picardi Hotels Ltd v Thekweni Properties* (Pty) Ltd 2009 (1) SA 493 SCA where Boruchowitz AJA, made a finding based on the wording of a particular clause which amounted to an outright cession.

[13] Therefore, the respondents reliance on the wording in the case of *Picardi Hotels* is fatal, in that clause 3 clearly provides that the cedent, in this case Blue Strata, the applicant, shall be entitled to collect and claim in its own name and for its own account all amounts payable. The applicants have made out a case for the final sequestration of the respondents.

[14] The question of postponement must be assessed in its entirety. At the end of the day the basis for the postponement was the lack of locus standi based on the cession. Once the respondents fail on the question of locus standi there is no further basis for a postponement.

[15] It transpired during argument that what the respondents were in fact trying to achieve is a postponement of the sequestration application in order to allow them time to liquidate the immovable property. The applicant obtained a judgment on 19 February 2015 under case number 2014/20497, and as at date hereof, some one and a half years later the respondents have not been able to pay their indebtedness. In the case of *De Waardt v Andrew & Thienhaus Ltd* 1907 TS 727 at 733 Innes CJ said:

> "Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, I am sorry that I cannot pay my creditors but my assets far exceed my liabilities. To my mind the best proof of solvent is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

[16] In this case it is clear that the respondents, whilst they might have had considerable assets are currently, and have for almost two years, been unable to pay their indebtedness to the applicant. It was also submitted from the bar that the respondents are really struggling to sell their residential property and what they need is a postponement of a further nine months in order to liquidate their property so as to be able to pay what is owing.

[17] In the light of the basis upon which the respondent sought a postponement, namely the lack of *locus standi*, this ground must fail as a basis for the postponement. I even take into account the plea *ad misericordiam* that they simply need another nine months to solve their financial problems. I have to, however, look at the case in its entirety and it was clear that by 19 February 2015 a lot of time had gone by before the judgment was granted, and as of date hereof another one and a half years has gone by without the respondents being able to pay or sell their property.

[18] The amount of the indebtedness is undisputed. The applicant has established, and it is common cause that pursuant to section 10 as read with Section 9 [1] of the Insolvency Act, 24 of 1936, that the joint estates of the respondents need to be sequestrated as they are indebted to the applicant in the amount of R3 972 381.34 plus interests and costs. The respondents are unable to pay their debts and the applicant has also established that it will be to the advantage of the creditors, respondent's creditors, to sequestrate the estate. The formalities have been complied with. The application was served on the employees, the master and SARS. An affidavit has been filed dealing with compliance in terms of Section 9(4)(a) of the Insolvency Act. Security has been obtained.

[19] The further question to be addressed is whether the estate, the sequestrated estate must pay the costs of opposition to the sequestration. I was referred to S 97(3) of the Insolvency Act dealing with the costs of sequestration. S '97(3) In para (c) of ss (2) the expression "taxed costs of sequestration" means the costs (as taxed by the Registrar of the Court) incurred in connection with the petition of the debtor for acceptance of the surrender of his estate or of a creditor for the sequestration of the debtor's estate, but it does not include the costs of opposition to such a petition, unless the Court directs that they shall be included.'

[20] The applicant submits that in the light of the opposition by the respondents, such opposition was not justified, in particular the respondents were given an opportunity to inspect the documents

containing cession. They did indeed inspect the cession clause and they must have been aware of the provisions of clause 3, entitling the applicant to sue in its own name, and therefore the belated opposition on the basis of the lack of *locus standi* was not justified in the circumstances.

**ORDER**

In the result I make the following order:

1) The joint estate of the first and second respondents is placed under final sequestration.
2) The applicant's costs in respect of the application for the sequestration of the joint estate of the first and second respondents are costs in the sequestration of the first and second respondents.
3) The costs of opposition are excluded from the sequestration costs.

There is a draft order containing that order, which I mark X. I accordingly make an order in terms of the draft marked X.

**M VICTOR**

**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION**