IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED.

DATE **SIGNATURE**

Case Number: 39948/14

In the matter between: DATE: 26/6/2014

REUNERT LIMITED Applicant

and

JOHN CHARLES HOLDSWORTH

(Identity number: 6[...]) First Respondent

THE REGISTRAR OF DEEDS, PRETORIA Second Respondent

JUDGMENT

POTTERILL J

[1] Before me is an urgent application in terms of which the applicant seeks the following interim relief as set out in Part A of the notice of motion:

> *"1.1 The first respondent, John Charles Holdsworth be interdicted and restrained from selling, disposing of or in any manner alienating, transferring, or encumberting any of his assets, including the property owned by him which is situated at no 2 [...], 128 1[...] Street, Bryanston, Gauteng ("the Bryanston Property");*
>
> *1.2 John Charles Holdsworth be interdicted and restrained from taking any steps whatsoever to give effect to any sale, disposition, alienation, encumbrance or transfer of any of his assets, including the Bryanston Property, which he may have agreed to, concluded or entered into prior to the launch of this application;*
>
> *1.3 The Registrar of Deeds be directed to register a caveat against the title deed of the Bryanston Property against alienation to give effect to the order set out in paragraph 1.1 and 1.2 above, in favour of Reunert Limited in respect of its interest in the Bryanston Property;*

1.4 The Registrar of Deeds be interdicted and restrained from registering the transfer of the Bryanston Property into the name of any purchaser thereof; and

1.5 Ordering John Charles Holdsworth to pay Reunert Limited's costs of suit."

Part B to the notice of motion does not form part of the urgent application and therein the applicant seeks the sequestration of the first respondent on the basis that he committed several acts of insolvency within the definitions as set out in section 8 of the Insolvency Act.

[2] The second respondent, the Registrar of Deeds, Pretoria, has not opposed this application.

[3] The first respondent represented himself in court.

[4] The reference to applicant and first respondent is throughout as reflected *in casu*.

[5] In response to the notice of motion served on the first respondent, the first respondent filed a notice in terms of Uniform Rule 6(5)(iii) in which he raised two questions of law. The first respondent chose not to file an answering affidavit.

[6] As background to this matter the following common cause facts are set out:

6.1 The first respondent had a 33,7 % shareholding in ECN Telecommunications (Pty) Ltd ("ECN"). This business was sold to the applicant herein for an amount of R172 million. The employees previously employed by ECN were transferred from ECN to the applicant in terms of the provisions of section 197 of the Labour Relations Act 66 of 1995 due to ECN being sold as a going concern. Restraint of trade contractual undertakings that had been given by the first respondent in favour of ECN were transferred to Reunert and became enforceable in the hands of the applicant.

6.2 The first respondent started a new business known as Altivex (Pty) Ltd ("Altivex') which was in the same business as that of Nashua ECN. On 21 November 2011 the first respondent signed a termination agreement in terms of which he and Nashua ECN parted ways. As part of the separation agreement the first

respondent's restraint of trade in favour of the applicant was reduced to a period of 9 months which expired on 30 August 2012.

6.3 On 26 March 2012 the applicant launched urgent interdict proceedings against both the first respondent and Altivex under case number 17335/12 ("the main application"). Interim relief was granted on the main application on 17 April 2012 with a final determination by Baqwa J on 24 August 2012. The applicant herein was successful against the respondents and the order included that the first respondent and Altivex pay the applicant's wasted costs of the hearing that had taken place on 17 April 2012 including the costs of two counsel.

6.4 On 13 September 2012 the first respondent and Altivex applied for leave to appeal against the order of Baqwa J. The applicant in turn filed an application in terms of Rule 49(11) of the Uniform Rules in order to ensure that the final order remain in force pending the final outcome of the appeal process.

6.5 On 22 October 2012 Baqwa J dismissed the application for leave to appeal and the Rule 49(11) application was postponed *sine die*.

6.6 On 20 November 2012 the first respondent and Altivex filed a petition to the Supreme Court of Appeal for leave to appeal against the order of Baqwa J.

6.7 The applicant again set down the Rule 49(11) application for hearing. On 10 December 2012 Baqwa J delivered judgment in favour of the applicant in terms of the Rule 49(11) order.

6.8 On petition the Supreme Court of Appeal granted the first respondent leave to appeal to the Full Bench of this court. The appeal is currently enrolled for hearing on 17 September 2014. It is common cause that no security has been filed and that a proper record is not before the court. The applicant has launched an application in terms of Rule 30 of the Uniform Rules to set aside the appeal record together with the date allocated for the hearing of the appeal.

6.9 As previously stated the Rule 49(11) order included an order that the first respondent and Altivex were to pay the costs of the Rule 49(11) application jointly and severally, the one paying the other to be absolved which costs included the costs occasioned by the employment of two counsel. Consequent thereupon the applicant caused a notice of intention to tax the bills of cost in respect of the final order and Rule 49(11). The first respondent and Altivex filed a notice of their

intention to oppose the taxation of the bills of costs on 5 June 2013. On 19 June 2013 Altivex was placed into voluntary liquidation in terms of resolutions taken by Altivex. On 7 November 2013 joint final liquidators were appointed in respect of this estate. In light of the liquidation of Altivex the taxation could not proceed on 30 August 2013 and the taxation was postponed by agreement to 17 September 2013. The joint liquidators of Altivex were then served with the bills of costs on 5 September 2013. On 8 November 2013 the bill of costs was taxed and an amount of R886 378.80 was allowed. The *allocatur* is against both the first respondent and Altivex.

6.10 On 12 November 2013 the applicant caused a writ of execution to be issued by the court against the first respondent and Altivex in the amount as set out in the *allocatur*. The applicant has a liquidated claim against the first respondent in the amount of R886 378.80.

6.11 On 8 November 2013 the first respondent launched a second application to set aside the Rule 49(11) order. A prior application to set aside the Rule 49(11) order was brought by the first respondent in July 2013.

6.12 On 11 November 2013, after the launch of the second application to set aside the award of the Taxing Master of the North Gauteng High Court, the first respondent wrote the applicant's attorneys ("NRF") advising them that he request that the applicant stay the execution of any warrant of execution in order to recover its taxed costs. He further offered to mitigate any risk of non-payment by tendering security for the applicant's costs plus a reasonable rate of interest pending the outcome of an urgent application to be launched by the first respondent to interdict the applicant from proceeding to execute on any warrant of execution, alternatively, pending the outcome of the second application to set aside the Rule 49(11) order. On 11 November 2013 the first respondent withdrew the second application. On the same date NRF responded to the first respondent advising that they would only consider the security referred to by the first respondent to be sufficient if the first respondent deposited the entire amount due to the applicant in terms of the taxed bills of costs into NRF's trust account. Pursuant to a request by the first respondent on 11 November 2013 for a final stamped bill of costs the *allocatur* was e-mailed to the first respondent on 11 November 2013.

6.13 On 12 November 2013 the first respondent again e-mailed NRF and advised that he would provide the applicant with a form of security in respect of the amount owed to him by 14h00 on 12 November 2013. Again the applicant was requested to hold over execution of any warrant of execution until it had received and considered the

first respondent's formal offer of security. As security for the applicant's claim against the first respondent a cession agreement signed by the first respondent was forwarded to the applicant wherein he purported to cede, assign and make over and transfer unto and in favour of the applicant, his right, title and interest in and to his "Glacier Policy" as covering security for the applicant's claim arising out of the taxation of its bills of costs. The applicant did not accept this tender due to the fact that it was an unliquidated policy which was held by the first respondent abroad and in respect of which there already was a part cession to another party.

6.14 On 14 November 2013 the sheriff thus attended at the first respondent's place of residence namely 2 [...], 1[...] Street, Bryanston in order to serve the writ of execution. After three attempts the sheriff did on 14 November 2013 manage to demand payment of the applicant's judgment debt. The first respondent was unable to pay the judgment debt or costs and the sheriff demanded that the first respondent point out movable and disposable property that could be attached. Certain movable property was attached by the sheriff as reflected in the notice of attachment in execution. The value of the goods attached was in the amount of R239 000.00. The first respondent was not able to indicate sufficient disposable property to satisfy the applicant's claim. It is also common cause that the goods attached now has to be dealt with in interpleading proceedings as third parties being his wife and a family trust now aver that they in fact own the attached goods.

6.15 On 18 November 2013 the first respondent launched an urgent application to stay the execution of the applicant's writ of execution pending the outcome of his appeal against the final order or an application to set aside the Rule 49(11) order. On 19 November 2013 Ismail J stood the matter down to 22 November 2013 in order for the applicant to establish the veracity and appropriateness of the various tenders of security that were made by the first respondent during oral argument as well as in correspondence to the applicant. Upon investigation it is common cause that the first respondent's erstwhile attorney, Horak, held a first cession limited to R1 million over the Glacier Policy. On 22 November 2013 pursuant to the applicant having filed and served an answering affidavit as well as further argument Ismail J reserved judgment in the urgent application in order to give the first respondent an opportunity to pay the applicant. This was done because in argument the first respondent had indicated that he was in the process of transferring a half share of the property owned by him at 2 C[...], 1[...] Street, Bryanston to his wife and in the process a second mortgage bond would be registered over the property. The proceeds of such would then enable him to pay the applicant.

6.16 On 30 January 2014 a day before Ismail J was to hand down judgment an application for leave to appeal against the Rule 49(11) order was filed and served on the applicant. This application was brought in terms of section 18 of the Superior

Courts Act, Act 10 of 2013. This application has not been prosecuted further and the attorneys acting on behalf of the first respondent withdrew shortly after the delivery of Ismail J's judgment.

6.17 On 31 January 2014 Ismail J struck the urgent application from the roll with costs against the first respondent. On 14 November 2013 the sheriff was barred from removing the attached goods as the sworn affidavits of the owners of the attached goods were presented to the sheriff. The sheriff accordingly issued a return of non-service in respect of the removal of the attached assets.

6.18 The sheriff attended the first respondent's place of residence again in February 2014 and on 24 February 2014 finally gained access to the first respondent's place of residence. The first respondent informed the sheriff that he had no money or movables or disposable property to satisfy the writ. He did however inform the sheriff that he owned a 50 % share in two immovable properties, being his place of residence and a sectional title unit held in the SS Lone Hill Village Estate. *Ex facie* a deed search it appeared that his wife was not the joint owner of the Bryanston Property as the first respondent had indicated to Ismail J.

6.19 On 22 January 2014 the first respondent tendered payment of the applicant's taxed bill from the proceeds of the further bond that had been approved by Standard Bank. A letter dated 17 January 2014 from conveyancers CA Nolte and Rossouw confirmed that they were attending to the transfer of the half share of the Bryanston Property from the first respondent to his wife and in the process were registering a further mortgage bond over the Bryanston Property in favour of Standard Bank. In this letter Nolte recorded that extreme delays was experienced in obtaining a rates clearance certificate. A further deed search on 20 May 2014 indicated that the first respondent is the sole owner of the Bryanston Property and that the Lonehill property which was owned by the first respondent and his ex-wife was sold for an amount of R2 140 000.00 on 13 December 2013 and was transferred to the new owner on 8 April 2014. Despite the first respondent's recovery of some cash pursuant to the sale no payment was made to the applicant herein. The first respondent also failed to inform the sheriff on 24 February 2014 that one of the properties had in fact been sold and that transfer was pending. Despite Ismail J affording the first respondent an opportunity to afford payment the first respondent did not inform the Judge that the Lonehill property was sold and that he accordingly came into money. The first respondent also did not inform Phatudi J on 6 March 2014 but in fact stated that he was entitled to legal aid as he was without means and was awaiting a decision by the Legal Aid Board that in fact he had sold the Lonehill property.

6.20 The first respondent also did not deny that he had advertised the Bryanston property via Remax Estate Agents on the website www.privateproperty.co.za. In fact, in oral argument he informed the court that he was made an offer of R5 million which he declined.

[7] At the outset the respondent raised three points *in limine*. The first one being a procedural defect in that the identification number of the first respondent on the papers read 6[...] as opposed to his correct identification number being 6[...]. It was conceded that this does not take the matter any further and it accordingly needs no further address.

[8] The second point *in limine* was that in an application for compulsory sequestration a certificate by the Master must be filed certifying that sufficient security was given. As Part B, being the application for sequestration, is not for adjudication before this court at this time this point *in limine* also requires no further address and stands to be dismissed.

[9] The last point *in limine* was that the applicant had no *locus standi* because the order they are relying is suspended. This argument is reliant on the same submissions pertaining to the first point of law raised in the Rule 6(5)(d)(iii) notice. It was in essence argued that even an interim order could be appealed if it would be in the interests of justice and if irreparable harm would result if the application for leave to appeal is refused. The conclusion was that an order is suspended pending appeal and that the Rule 49(11) order is thus suspended and the applicant accordingly has no *locus standi*. The respondent placed reliance on ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*** **1977 (3) SA 534 (A)**. The reasons set out below pertaining to the first point *in limine* and specifically with reference to section 18 of the Superior Courts Act is applicable and I find that the applicant has the necessary *locus standi* to bring an application to preserve the *status quo* pertaining to the assets of the first respondent.

[10] On the common cause facts set out *supra* the relief in Part A must be granted. I need not even apply the approach for interim relief as set out in ***Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son (SA) (Pty) Ltd*** **1995 (1) SA 725 (T)** and specifically at paragraph 730B:

> *"When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is prima facie*

established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities the applicant should (not could) on those facts, obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed."

With no facts under oath to the contrary the common cause facts *per se* allow for the relief granted in Part A. The only question thus remains is whether the reliance of the respondent exclusively on the questions of law in his Rule 6(5)(d)(iii) notice can impact on the above finding.

[11] The first point raised is that the application for leave to appeal against the Rule 49(11) was averredly brought in terms of section 18 of the Superior Courts Act, Act 10 of 2013 ("the Act"). As it was brought in terms of Rule 18 the Rule 49(11) order is suspended and it was thus argued that the debt upon which the applicant seeks execution is not due, the applicant is thus consequentially not a creditor and the application must thus fall away. This point has no *nexus* to the relief claimed in Part A of the notice of motion which seeks only the preservation of the *status quo*

pending a sequestration application. It does not seek execution of the Rule 49(11) order. On this point alone the question of law stands to be dismissed and it is dismissed. I will accordingly only briefly touch on the other issues raised in this notice.

[12] The respondent's contention is that as the application for leave to appeal was brought in terms of section 18 of the Act the Rule 49(11) order is automatically suspended. This point is bad in law. The application for leave to appeal was brought on 30 January 2014 i.e. a year after judgment was delivered. Section 18 only came into operation on 23 August 2013 and section 52(1) of the Act regulates that the application should continue and be concluded as if this Act had not been passed. Section 52(2) reads as follows:

> *"Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed."*

In terms of section 52 the Act is thus not applied retrospectively and also not to a pending proceeding.

[13] The respondent's reliance on section 18 of the Act is further bad in law as the very section he relies on bars the suspension of the Rule 49(11) order. Section 18(2) of the Act reads as follows:

> *"18(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or an appeal, is not suspending pending the decision of the application or appeal.*
>
> *18(3) A court may only order otherwise as contemplated in subsection (1) or (2) if the party who applied to court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."*

A Rule 49(11) order is an interlocutory order. Even if section 18(2) created a right of appeal against Rule 49(11) such application for leave to appeal would not suspend the operation of a Rule 49(11) order in the absence of an application

demonstrating exceptional circumstances. In fact there are exceptional circumstances to the contrary as to why the application *in casu* must succeed.

[14] It is common cause that on 13 December 2013 the respondent sold a half share of a property at Lonehill Village Estate for an amount of R2 140 000.00 half of which would have been due to the first respondent. The first respondent's indication to the sheriff on 24 February 2014 that he still owns this property was thus an untruth. The first respondent was also not forthcoming with this information to my brother Ismail J on the 30th of January 2014. This information was also not disclosed to my brother Phatudi J in the hearing of the application for leave to appeal on the 6th of March 2014. All these failings of disclosure are ascertained from the record of proceedings attached to the application *in casu*. This was done before my brother Phatudi J while pleading poverty in having to obtain legal aid assistance. It would thus be in the interests of justice to preserve the *status quo* pending the application for sequestration as the first respondent herein is not prone to disclosing information pertinent to applications before court and dissipation of his assets are prevalent. The balance of convenience favours the granting of the interim relief in favour of the applicant vis-à-vis the first respondent. The applicant has no other remedy.

[15] The second question of law is raised in terms of Rule 22(4) of the Uniform Rules of Court. The first respondent argued that he had a proven claim against the applicant which claim would extinguish the applicant's claim in respect of the taxed bill of costs. The point is thus that he be granted leave to proceed with the claim in reconvention against the applicant. The basis for this claim is a tender made by the applicant in terms of its founding affidavit in support of the Rule 49(11) application. This tender was incorporated into the Rule 49(11) order of Baqwa J. The upshot of the tender is that should *"Holdsworth ultimately be successful in the appeal, the applicant would indemnify Holdsworth for any proven damages that they may have suffered."* This is not the time or place to bring an application for a claim in reconvention. The pleadings in previous court matters have long closed and judgment has been delivered. This question of law is thus ill-founded and bad in law. In fact, such a tender which has become an order of court further justifies the order granted by Baqwa J in terms of Rule 49(11). Once again this point in law has no *nexus* to the relief claimed in Part A of the notice of motion and is thus irrelevant to the urgent relief sought. This point in law is accordingly also dismissed.

[16] I accordingly make the following order. I have marked the draft order "X" and it is made an order of court.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 39948/14

HEARD ON: 24 June 2014

FOR THE APPLICANT: ADV. A.R. BHANA SC

ADV. P. BOSMAN

INSTRUCTED BY: Norton Rose Fulbright South Africa

FOR THE FIRST RESPONDENT: IN PERSON

DATE OF JUDGMENT: 26 June 2014