IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

12/11/2014

CASE NO: 49342/13

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

12.11.14
DATE

SIGNATURE

In the matter between:

MARCEL DE BEER	**FIRST APPLICANT**
STEFAN CHARLES DE BEER	**SECOND APPLICANT**
AND	
PETER JOHN COWLING	**RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] On 7 October 2013 Thobane AJ made an order provisionally sequestrating the estate of the respondent. A *rule nisi* returnable on 29 November 2013 was issued. From then onwards the rule was extended until 20 0ctober 2014 when the matter served before me. My task was to determine whether the provisional order ought to be made final. The respondent opposed the granting of the final order of sequestration.

BRIEF FACTS

[2] The respondent practiced as an attorney in partnership with Christiaan Mauritz Janeke under the name and style: Trollip, Cowling and Janeke Attorneys at First Floor, Libertas Building, 612 Voortrekeer Street, Brakpan in the Gauteng Province. The partnership has been dissolved and Attorney Janeke has been sequestrated. The applicants in the application allege that the respondent's firm did work for the applicants and received money on their behalf. The money that was received by the respondent's firm was trust money. The respondent's firm, according to the applicants, acted for their business called Z Manufacturing CC and for them in their personal capacities. Substantial amounts, according to the applicants, were deposited into the respondent's firm's trust account. The applicants contend that the respondent advised them that their money, in the trust account, would attract lucrative interest and they,in that way, would avoid unnecessary delays and bank charges associated with large electronic fund transfer. An amount in excess of R50. 000.000.00, they further contend, over the years, was paid into the trust account operated by the respondent and his firm. Their relationship is said to have commenced during 2004. The applicants, to their greatest surprise and shock, around March 2012 discovered that their money which was supposed to have been in trust had been improperly used by the respondent and could not be repaid. The respondent, according to the applicants, made such disclosure to the applicants. The applicants further contend that the respondent, to their disbelief, informed them, at the meeting, that the money had been available for the respondent to use as he wanted. The applicants immediately engaged the firm of Senekal and Senekal to pursue the matter. This, according to the applicants, resulted in the respondent undertaking to repay the debt which, at the time, amounted to R22 000 000.00. The respondent then signed an acknowledgement of debt in that amount. A few payments

were made and the respondent stopped paying. This resulted in the provisional sequestration of the respondent. The applicants contend that the respondent is factual insolvent and unable to pay his debts. This, the respondent denies and opposes the granting of the final sequestration order.

THE ISSUE

[3] The issue is whether the respondent is indeed insolvent as the applicants allege and whether a case has, in fact, been made out for the applicants to be entitled to the final order which they now seek.

THE LAW

[4] A provisional sequestration order has been made. Once the applicant has made out a *prima facie* case of insolvency, the respondent must, then rebut such *prima facie* case by placing facts before the court relating to his financial affairs which are best known to him. The applicants then have an opportunity to rebut the respondent's evidence. This is done by way of affidavits which are the founding affidavit, answering affidavit and the replying affidavit. The court has been furnished with the affidavits. See ***Uys and another V Du Plessis*** (Ferreira Intervening) ***2001 (3) SA 250 at 253 G-H*** and De le Rey Mars The Law of Insolvency in South Africa 8th ed at 108.

THIS CASE

[5] It is noteworthy that:

1. the respondent has provisionally been sequestrated
2. The partnership of the respondent has been dissolved
3. the respondent's partner has been sequestrated

4. the respondent. In terms of Phatudi AJ's order of 5 December 2013 has been suspended from practice as an attorney on an urgent basis pending the finalisation of the application for the removal of his name from the roll of attorneys.

5. On 17 December 2013, the respondent's urgent application to anticipate the return day of the provisional sequestration order was dismissed by Wright AJ. There was no replying affidavit in that application.

6. The respondent's suspension from practice has something to do with appropriation of trust money.

[6] The applicants' application is based on the fact that the respondent has committed an act of insolvency. It is their contention that the respondent is hopelessly and factually insolvent.

[7] In support of their allegation, the applicants have referred to the respondent's suspension from practice by the law Society of the Northern Provinces and documentary evidence.

[8] On 22 March 2012 the firm Trollip, Cowling & Janeke, by way of a letter, annexure FA1 to their founding affidavit, admitted that they were indebted to the applicants in the sum of R22.000 000.00. Their letter reads:

"As requested by you, we must advise that at 29th February 2012 the sum due to yourselves was approximately R22.000 000.00 made up as follows:

M De Beer - R12.000.000.00

SC De Beer – R10.000.000.00"

It is noteworthy that the letter was written by the respondent.

[9] The respondent and his firm acknowledged their indebtedness to the applicants in the form of annexure "FA2" to the founding affidavit which, however, is unsigned.

[10] The applicants contend that the respondent owns several immovable properties which are heavily bonded. These properties, according to the applicants, do not constitute easily releasable assets in the respondent's estate. It is their view that on forced sales the properties are in all probability worth less than the values of the outstanding bonds. There could be merit in this. Several other people or concerns, according to the applicants, are heavily owed by the respondent.

[11] On 13 September 2012, which is approximately six months after the letter of 22 March 2012, the respondent signed the acknowledgement of debt involving the R22.000 000.00 referred to in the letter. The respondent, however, contends that the acknowledgement of debt is invalid and unenforceable. This does not seem convincing regard being had to the fact that the respondent, in so many words, informed the court that he has 45 years experience in the legal profession. The letter is simple and straight forward. The acknowledgement of debt has been prepared, amended and initialled where necessary by the respondent. It too is simple, straightforward and easy to understand. The reasons advanced by the respondent to explain the invalidity and the unenforceability of the acknowledgement of debt are inexplicable and never plausible. It is hard to accept them in the face of overwhelming evidence in favour of the applicants.

[12] The respondent contends that the applicants were involved in money laundering. This is not properly demonstrated by the respondent. Should this have been the case, this, indeed, would long have been unearthed and appropriate action taken. Evidence demonstrates that the respondent's debts are substantial and that the respondent is unable to pay them.

[13] Mr Greyling, for the applicants, when the hearing was just about to start, and when the respondent was seeking a postponement of the matter to enable him to obtain legal representation, submitted that the respondent had the benefit of a number of attorneys who withdrew from the matter. He submitted that a similar application had been brought by the respondent on the day of the provisional sequestration order which, however, was refused by the court. Mr Greyling, as a result, submitted that the respondent was endeavouring to delay the inevitable. There is merit in the submission. Again, just before the matter was heard the respondent advised the court that his legal representatives had withdrawn in the matter due to conflict of interest. It was evident that the respondent had been afforded sufficient time to procure another legal representative but that he, in fact, had done nothing. The application was refused and the matter proceeded.

[14] The replying affidavit was filed out of time and condonation was sought. The reasons advanced therefor were and are persuasive and nothing standing in the way of granting the condonation, which is duly granted, has been demonstrated.

[15] The respondent has been suspended from practice and his files have duly been confiscated by the Law Society according to standard practice. The respondent has substantial debts which he, indeed, appear to be unable to pay. The applicants have also proved that they are creditors of the respondent. The acknowledgement of debt has been signed by the respondent and did not have to be signed by the applicants as contended for by the respondent. The applicants, in my view, would never have given the respondent a leeway to use their money as he pleased. The respondent, indeed, is endeavouring to delay the inevitable. The respondent is factually and hopelessly insolvent.

[16] That the respondent's estate deserves to be investigated cannot be gainsaid. The process has commenced and has to be proceeded with to its logical conclusion. A final order is necessary to enable proper investigation and administration of the respondent's estate for the benefit of all the creditors. I reasonably believe that the sequestration of the respondent will be to the advantage of all creditors. **See Meskine Co v Friedman 1948 (2) SA 555 (W).**

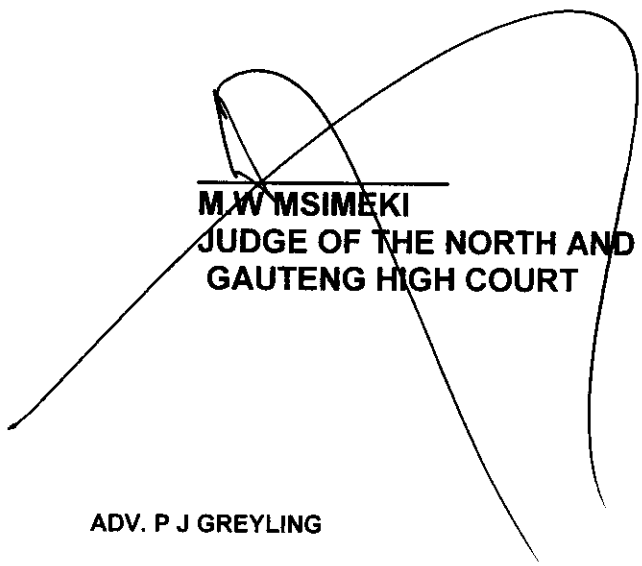
FORMALITIES

[17] All the formalities, in my view, appear to have been complied with. Service of the application and all the necessary documents was duly effected as provided for in terms of Section 9 (4A)(a)(ii) 9(4)(a)(i) 9(4A)(a)(iii) and 9(3)(b) of the Insolvency Act, 1936, on SARS, the Master of the High Court as well as the respondent. The provisional order was served on the respondent personally. The provisional order was published in the Citizen of 8 November 2013 and the Government Gazette of 8 November 2013.

[18] The respondent, in my view, failed to discharge the evidential burden which lied on him to rebut the *prima facie* case of insolvency which the applicants made out. His factual insolvency remained proved and there is nothing to demonstrate that the relief that the applicants seek should not be granted. The final order for the sequestration of the respondent should be granted.

[19] The following order is made:

The respondent's estate is finally sequestrated.



M.W MSIMEKI
JUDGE OF THE NORTH AND
GAUTENG HIGH COURT

COUNSEL FOR THE APPLICANT:	**ADV. P J GREYLING**
INSTRUCTED BY:	SCHABORT INC
COUNSEL FOR THE RESPONDENT:	**IN PERSON**
INSTRUCTED BY:	WERTHSCHRöDER INC

DATE OF HEARING: 22/10/2014
DATE OF JUDGMENT: 12/11/2014