IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 1091/2004

In the matter between:

ROBERT PAUL EDMUND BRINKMAN

Applicant

and

JOHAN BOTHA **1ST**

Respondent

LIZELLE BOTHA **2ND**

Respondent

ANNA-MARIé SWART (nee BOTHA) **Intervening**

Creditor

JUDGMENT DELIVERED ON: 11 OCTOBER 2004

Meer, J:

Introduction

[1] On 20 February 2004 the first respondent's estate was placed under provisional sequestration.

[2] On 26 March 2004 his former wife applied to intervene as an intervening creditor in his sequestration application. The basis for her intervention is that the first respondent owes her R329 340.62 as part of a divorce settlement agreement which was made an order of Court on 18 June 2000 when a decree of divorce was granted, dissolving her marriage to the first respondent. The intervening creditor contends that she is the first respondent's chief creditor and he refuses to undertake his obligation to pay his debt to her in terms of the deed of settlement. In October 2003 she instituted proceedings against first respondent for the recovery of the amount owing to her. As her claim had by that stage become superannuated, these proceedings took the form of an application for the issue of a warrant of execution to recover the amount in terms of Rule 66(1) of the Uniform Rules of Court, ("the Rule 66(1) proceedings"). It is her contention that the real purpose for the sequestration application is to frustrate her claim against the first respondent, and that the applicant and first respondent have colluded in the bringing of the sequestration application to prevent her claim from succeeding. The first respondent she contends, is not insolvent.

Background Facts

[3] It is common cause that this is a friendly sequestration. The applicant and first respondent whose sequestration he seeks, have been colleagues and friends for years. The first respondent, an ear, nose and throat surgeon and the applicant an anesthetist, work together regularly. The first respondent uses the services of the applicant in most of his operations.

[4] In addition, the applicant and the first respondent share a common lawyer namely one Mr Louw, who represents the first respondent in the Rule 66(1) proceedings brought against him by the intervening creditor. He also represents the applicant in the sequestration proceedings which the intervening creditor opposes. These have been conducted as parallel applications with Mr Louw's active participation in both, as appears from the following chronology:

[5] On 7 October 2003 the intervening creditor commenced the Rule 66(1) proceedings to recover her debt of R329340.62 from the first respondent.

[6] On 23 October 2003 at the request of Mr Louw, representing the first respondent and by agreement, the Rule 66(1) proceedings were postponed until 3 November 2003 (to allow for the filing of opposing and replying papers and heads of argument).

[7] On 19 November 2003 the first respondent borrowed an amount of R20,000.00 from the applicant for an undisclosed reason and the applicant gave him a cheque for that amount by way of loan. The first respondent undertook to repay the loan on 31 December 2003.

[8] On 9 December 2003 the intervening creditor filed her replying papers in the Rule 66 (1) proceedings.

[9] On 31 December 2003, the date upon which the first respondent was to repay the applicant's loan, the loan remained unpaid.

[10] On 6 January 2003 the first respondent wrote a letter to the applicant informing him that he was unable to repay the loan. Applicant relied upon this letter as constituting a deed of insolvency in terms of section 8(g) of the Insolvency Act No 24 of 1936. Also on 6 January 2003 applicant called upon first respondent to discuss the non payment of the loan with him and later that day the applicant's founding affidavit for a provisional sequestration application ("the first sequestration application") was sworn to at the Parow Police Station. The notice of motion in the first sequestration application was issued on 7 January 2004 and a hearing was set down for 2 March 2004.

[11] Shortly thereafter, ABSA Bank intervened as an intervening creditor in the first sequestration application, with a debt of R120 000.00 against the first respondent.

[12] On 23 January 2004, as a consequence of ABSA's intervention, the applicant withdrew the first sequestration application, his reason being that he did not want to become involved in litigation with ABSA who could out-litigate him.

[13] The intervening creditor in the current application is of the view that the applicant and the first respondent colluded to withdraw the first sequestration application to afford first respondent an opportunity to repay the loan to ABSA, which he did in full. According to applicant the debt was settled with funds donated by first respondent's current wife, also a medical doctor.

[14] In the interim, the hearing of the Rule 66(1) proceedings had been set down for 25 February 2004, and on 11 February 2004 the intervening creditor furnished heads of argument to Mr Louw, as first respondent's attorney. On the very next day the applicant, also represented by Mr Louw, signed his founding affidavit preparatory to commencing the second, and current provisional sequestration application ("the second sequestration application"). The notice of motion was signed by Mr Louw, also on 12 February 2004.

[15] On 18 February 2004 the second sequestration application was issued and although Mr Louw was the common attorney in both applications, he did not inform the intervening creditor of the provisional sequestration application, which was crucially pertinent to her Rule 66(1) proceedings. Mr Louw instructed a separate advocate in each of the parallel proceedings, one to appear for applicant in the second provisional sequestration application and a different one to defend the first respondent in the Rule 66(1) proceedings. It appears that Mr Louw informed neither advocate about the other litigation. In this way, the intervening creditor contends, the Rule 66 (1) counsel instructed by Mr Louw was kept in the dark about the sequestration proceedings and so could not inform his opponent, the intervening creditor's counsel about such proceedings. Mr Louw, she says, thereby achieved the joint objectives of preventing any opposition to the provisional sequestration application and sabotaging the Rule 66(1) application.

[16] On 18 February 2004 heads of argument in the Rule 66(1) application were filed.

[17] Also on 18 February 2004 the second sequestration application was postponed to 29 February 2004 because the papers were not in order. Thereafter, on 20 February 2004 an order for the provisional sequestration of the respondent was granted.

[18] On 22 February 2004 heads of argument in the Rule 66(1) proceedings were filed by the intervening creditor, who was at that stage oblivious to the fact that a provisional sequestration application had been granted against her former husband.

[19] On 23 February 2004 the intervening creditor's attorney discovered, as she describes, purely by chance that a provisional sequestration order had been granted against first respondent on 20 February 2004. Consequently, on 25 February 2004 the Rule 66(1) proceedings were postponed to 30 March 2004, and on 19 March 2004 the intervening creditor commenced this application in opposition to the second sequestration application, the return day of which had at that stage been set down for 30 March 2004. The return day has subsequently been extended various times.

[20] In contending that the first respondent is not insolvent, the intervening creditor states that he earns R60 000.00 per month, a fact which is not disputed. She contends that he can easily repay the loan of R20 000.00 to the applicant. According to her, the applicant was aware of first respondent's debt to her and knew that she was engaged in litigation against him when he brought the second sequestration application. The applicant, in reply does not deny this, but states that the first respondent informed him that he owed his former wife nothing.

[21] Applicant's founding affidavit in the second sequestration application cites under his liabilities a category of "*diverse skuldeisers en klein skulder*" who are owed R100 000.00. The provisional sequestration order granted, made provision for service thereof by registered post on all creditors owed more than R5 000.00. To date, no such service has occurred and this provision of the *rule nisi* remains unfulfilled.

Was there collusion between the Applicant and the First Respondent in bringing the Sequestration application?

[22] In the light of the aspersions cast by the intervening creditor on first respondent's professed insolvency status, a consideration as to whether there was collusion should commence by enqiuring whether the first respondent is indeed factually insolvent. The provisional sequestration application lists the value of first respondent's assets at R390 000.00. As against this, it lists his liabilities at R490 000.00. Of his liabilities two items present cause for concern. The first of these is a debt of R250 000.00 to Systems Analyst, an entity which the intervening creditor states is owned by the first respondent himself. This is not disputed. No detail is given as to how this debt was incurred, when it arose or to what it relates, information which one would expect to be fully furnished, especially in a friendly sequestration.

[23] The second item of concern is the aforementioned debt of R100 000.00 to "*diverse skuldeisers en klein skulder*". Here too no details are given as to who these debtors are or how and when the debts were incurred. Given that this category of debtors have to date not received service of the provisional sequestration order, notwithstanding the *rule nisi,* one may well ponder whether they actually exist.

[24] If one were to remove either of these disconcerting debts from the liabilities the first respondent would be rendered solvent and there would in the circumstances be no reason to believe that a sequestration of his estate would be to the advantage of creditors. A deduction of the debt of R250 000.00 owed to Systems Analyst (which in effect is a debt the first respondent owes to himself), reduces his liabilities to R240 000.00, as compared with his assets of R390 000.00. This clearly flies in the face of insolvency. If one deducts only the "*diverse skulders*" debt his liabilities are reduced to R390 000.00 being the sum of his assets, and if one deducts both these debts his liabilities are further reduced to R140 000.00 which is less than his assets.

[25] It is disquieting that the Provisional Trustee to first respondent's estate in his report, makes no comment about these two categories of debtors and the paucity of information about them, in the face of a friendly sequestration.

[26] Equally disquieting in the light of first respondent's professed insolvency status is his ability to repayment of the loan of R120 000.00 to ABSA with such alacrity. This lends credence to the intervening creditor's submission that he is a man of means, who would similarly have been able to repay the debt to the applicant of R20 000.00. The fact that he had access to R120 000.00 begs the question as to why he could not as easily have arranged access to R20 000.00 in lieu of his debt to applicant.

[27] On the facts before me, I am unable to find that the first respondent is factually insolvent.

On the all important question of collusion I make the following observations:

[28] Applicant's founding affidavit in the second provisional sequestration application is disturbingly short on detail about the loan to first respondent of R20 000.00. It is not explained for what purpose the loan was advanced, or why it could not be repaid. Also disquieting is that applicant appears to have made no great effort to obtain repayment of his loan, as one might expect, before resorting to the drastic step of applying for first respondent's provisional sequestration. No explanation is given for the alacrity in which the sequestration application was brought.

[29] In the circumstances the following comments by Conradie, R, (as he then was) in *Craggs v Dedekind; Baartman v Baartman & Another*; *van Jaarsveld v Roebuh; van Aardt v Borrett* 1996(1) SA 935(C) at 937D-E, are apposite:

> "Co-operation between debtor and creditor, which is fine, can easily turn into collusion which is not. A Court should, I consider, be on its guard against it. Because of this, and when the signs are there, a Court may be forgiven for requiring rather more from a friendly petitioner in the way of establishing his claim than it might otherwise do. He should, I believe, present sufficiently detailed evidence to satisfy a sceptical Court that he indeed has a claim against the respondent."

[30] As to first respondent's inability to repay the loan and applicant's haste in bringing the sequestration application the following remarks by Satchwell, J in *Esterhuizen v Swanepoel* and 16 other cases 2004(4) SA 89 (W) at 94 A are also apposite :

> "(k) The borrower is so horrified at his own abject financial situation, that he/she immediately writes a letter advising of an inability to repay the loan. There is stated bare inability to pay - no requests for extensions of time, no proposals to pay in installments, no offer to render services or even suggestions that the lender initiate another cause of action" and at 94G to I:
>
> "(m) The dissatisfied lender apparently chooses the most drastic remedy to attempt to recover portion of the moneys owed. No indication is given that attempts have been made to negotiate a more satisfactory solution to this desperate state of affairs. The lender does not advise the Court that he or she has given the borrower time to improve his or her financial position, negotiated payment of the outstanding debt in installments, looked for a contribution from other relatives or friends, considered proceedings in other Courts or fora.

[31] It is trite that collusion is an abuse of the Court process and will not be tolerated. In *Bevan v Bevan & Ward* 1908 TH 193 at 197 Curlewis, J stated:

> "*In our law, ordinarily speaking, collusion is akin to connivance, and means an agreement or mutual understanding between the parties that the one commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury*"

[32] A final order of sequestration will not be granted where the sole or predominant motive of the applicant is something other than the *bona fide* achievement of the sequestration of the estate. The procuring of a suspension of legal proceedings by or against the debtor is such a motive[1] As Roper, J stated in *Millward v Glaser* 1950(3) SA 547 at 551B:

> "*If the facts were such as to justify the inference that the motive of the applicant in filing her petition was not to bring about the respondent's insolvency for its own sake but to harass or oppress the respondent or (as it was put in King v Henderson (1898, A.C. 720)) 'fraudulently to defeat her rights' by stifling her action for damages, there is in my view no doubt that the Court would be entitled to discharge the provisional order either in the exercise of the discretion conferred upon it by sec. 12 of the Insolvency Act or by virtue of its inherent jurisdiction to prevent abuse of its process (see, e.g., Ex parte Griffin: in re Adams (L.R. 12 Ch.D. 480); Berman v Brimacombe (1925 TPD 548); Borchers v Kaehne (1933, S.W.A. 105); Amod v Khan (1947(1), S.A.L.R. 150 (N.P.D.)".*

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1 **see *Meskin Insolvency Law,* Butterworths p2-22 par 2.1.5 and the cases mentioned therein: *Dal's Service Station (Pty) Ltd v Labuschagne* 1962(3) SA 723(SR).**

[33] The undisputed facts of this case lend themselves to precisely such an inference. The application for the sequestration of the first respondent is shrouded in collusion. The friendship between the applicant and the first respondent, the former's knowledge of the Rule 66 (1) litigation by the intervening creditor against the first respondent, the flimsy information about the act of insolvency relied upon, the unsatisfactory and undetailed information pertaining to the first respondent's debts and, crucially, the underhand manner in which the attorney common to both applications conducted himself, all bear the hallmark of collusion.

[34] The conduct of Mr Louw and that of his clients, the first respondent and the applicant constitute an abuse of the Court process. Mr Louw had a professional and ethical duty to disclose all relevant facts about both applications. His material nondisclosure is a dereliction of such duty.

[35] Regard being had to all of the above, a final order of sequestration cannot be granted.

[36] As regards costs the intervening creditor requests attorney and client costs against applicant, first respondent and Mr Louw jointly and severally. I have no doubt that their conduct warrants a punitive cost order of such a nature. In respect of Mr Louw, it is trite that costs de bonis propriis are not lightly awarded. However by any standard Mr Louw's conduct was an abuse of the court process and reprehensible.

Mr Louw was not before me on the question of costs. I however note that he would have been aware that a punitive costs order was being sought against him at least a week before the hearing when Mr Dippenaar filed heads of

argument requesting such costs. He chose neither to attend the hearing, challenge the allegations against him, nor to explain his actions, or apologise therefor. It is right, proper and just that he be made to bear the costs of his conduct.2

There will therefore be an order in the following terms:

1 The provisional order of sequestration against the first respondent granted on 20 February 2003 is hereby discharged;

2 The applicant, first respondent and Mr Louw of Visagie Vos & Vennote shall bear the costs of this application jointly and severally on a scale as between attorney and client.

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Y S MEER

2 See *Washaya v Washaya* 1990 (4) SA 41 at 45G

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In the matter between:

ROBERT PAUL EDMUND BRINKMAN Applicant

and

JOHAN BOTHA 1ST Respondent

LIZELLE BOTHA 2ND Respondent

ANNA-MARIé SWART (nee BOTHA) Intervening Creditor

JUDGMENT BY : MEER, J

For the Applicant : Adv. L M OLIVIER

Instructed by : VISAGIE VOS & ASSOCIATES
(Per J S LOUW / LB0081)
501 Wale Street Chambers
33 Church Street
Cape Town

For the Respondents : (1) and (2) not represented.

For the Intervening Creditor: Adv. D J DIPPENAAR

Instructed by : H J SWART ATTORNEYS
TYGERVALLEY
Per HEYNS & ASSOCIATES INC.
50 Keerom Street. The Chambers
Cape Town (Ref: H J Swart/lk/B182)

Date(s) of hearing : Tuesday, 07 September 2004

Judgment delivered : Monday, 11 October 2004