IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 18194/2008

DATE: 20 NOVEMBER 2008

In the matter between:

KULENKAMPFF AND ASSOCIATES APPLICANT

versus

A M VOSLOO RESPONDENT

JUDGMENT

GAUNTLETT, A J:

In this matter, the applicant seeks a provisional order of sequestration against the first respondent. The applicant is an attorney practising at Somerset West. The first respondent is a businessman currently married to the second respondent, against whom no order was sought. The respondents are married out of community of property; there are pending divorce proceedings between them.

When the matter was called this morning, counsel for the first respondent indicated that the application is resisted *in limine* on a basis

of a contended lack of urgency, and a contended deficiency as regards the bond of security furnished in this matter. Furthermore, it was indicated that the application is resisted on its merits, with heavy reliance placed on a contended failure to disclose material facts in circumstances amounting to an abuse. It is contended in particular that the applicant was actuated by an improper motive in bringing the present application.

I heard preliminary argument as regards the issue of urgency, together with that relating to the objection regarding security. I indicated at the conclusion of this argument that I was not minded to sustain either *in limine* objection (my reasons to follow), and directed that argument proceed before me in relation to the merits of the application.

As regards urgency, my reasons for not sustaining the objection are these. The position is that this application was evidently launched on 3 November 2008, and was due initially to be heard on 10 November 2008. On that date, at the instance of the first respondent himself - a factor not without significance in a respect to which I shall later advert - the application was postponed until today (20 November 2008). The position today before me is that full papers have been filed on both sides, and there is no application (understandably

in the circumstances) that the matter stand down for the filing of further affidavits. The parties have, quite properly in the circumstances, elected to argue this application for a provisional order on the papers as they stand.

It follows that the circumstances pertaining today are no longer ones which impute any immediate suggestion of urgency. In this regard a situation not dissimilar to that which was invoked in Commissioner, SARS, v Hawker and Services (Pty) Limited, 2006(4) SA 292 (SCA) at 299G - 300D has arisen. This is, in the first place that applications for provisional sequestration are generally regarded, in this division at least, as requiring in principle that they be dealt with in principle expeditiously. That may not necessarily be dispositive of the matter, but that is the departure point. Secondly, the objection becomes close to fatuous in circumstances where there has been a timescale in terms of which something like 17 days have elapsed since the initiation of the application, and there has been an agreed deferment of the date of hearing to today. In that respect, too, there are echoes of the decision in Hawker supra where a party persisted in seeking the dismissal, no less, of the matter in circumstances where an application initially brought on short notice had been significantly deferred, a full opportunity had been allowed for the filing of papers, and full argument had ensued.

In the present case urgency, as Mr Kulenkampff for the applicant pointed out, is in any event indicated by a number of transactions such as those indicated in the answering affidavit at page 51 paragraphs 21.8 and 21.15. These are indicative of dispositions having taken place.

Accordingly, there is in my judgment no proper basis to seek to suggest that the matter be struck from the roll for a lack of urgency.

The second preliminary issue, as I have indicated, related to a contended deficiency in the provision of security. A number of difficulties immediately present themselves in this regard. First of all, the alleged deficiency appears nowhere on the papers. The normal practice is that the security bond does not constitute a part of the papers filed before Court, nor, more important, has the point been taken, as it should have been, in the opposing affidavit. Had it been, the applicant would have been entitled to answer it. But more fundamentally, as I put to counsel for the applicant, is the fact that what the argument materially entails is an attempt at collateral review of the decision taken by the Master in certifying, as he has done before me, the provision of good security. I see no basis to go behind his certification in the

circumstances I have described. As was indicated in the line of authority culminating in the SCA decision in Oudekraal Estates v City of Cape Town 2004 (6) SA 222 (SCA), the circumstances in which a Court permits the collateral review of an administrative decision are very limited. It seems to me that the point is one without substance.

I turn now to a consideration of the merits of the application. Although the argument before me this morning essentially related to two aspects- the contended abuse of proceedings, and an asserted lack of benefit to creditors - I think it is advisable shortly to traverse a slightly wider terrain indicating why I consider that an adequate case is made out according to the tests applicable at the stage of a provisional order of sequestration. First of all, it appears that there is (correctly) no challenge to the *locus standi* of the applicant. It seeks a judgment on the basis of fees and disbursements which are outstanding and in relation to which the indebtedness has been admitted by the first respondent. Secondly there is a judgment debt which is likewise admitted.

I turn now then to whether or not a requisite case is made out in terms of the accepted elements for a provisional order of sequestration, in other respects. First of all, the applicant relies on a *mulla bona* return (invoking section 8(b) of the

Insolvency Act, 24 of 1936 (as amended)). The applicant contends namely that the first respondent has committed an act of insolvency in this regard. There was some attempt on the papers to suggest that the return of service on which this particular claim relies does not constitute a return of service as envisaged in section 8(b) of the Insolvency Act. The argument was not pressed in oral debate this morning, and it seems to me that this was for good reason. I can see no basis whatsoever for contending that there is no act of insolvency committed as alleged in this first respect.

The second ground relied upon involves section 8(e) of the Insolvency Act. In this regard there is either a deliberate or other evasion of the main point which is made in the founding affidavit. It is namely asserted in sub-paragraph 21.2 of the founding affidavit that first respondent was indebted to one Trevor Piercy in an amount of about R500 000,00. The answer the first respondent seeks immediately to give in the answering affidavit is to deny "that I am indebted...". But this misses the point. The point made in the founding affidavit is quite explicit: namely that in order to procure a release from that obligation, the first respondent transferred his rights in and to the trading name "Hunters Choice" to Piercy. The point which has been missed, either deliberately or otherwise, is that that arrangement is on the face of it, an arrangement with

the creditor of the first respondent for releasing him wholly or partially from his debts. In those circumstances, too, it seems to me that an act of insolvency is indeed established. I should add in this regard that if the assets of the first respondent be considered and the amount by which his liabilities exceed his assets, it is quite clear of course that the dispossession of the name "Hunters Choice" indeed had the effect of prejudicing his creditors (other of course than Piercy himself), or in preferring Piercy above the other creditors.

The third ground of insolvency relied upon entails section 8(c) of the affidavit. This fastens upon paragraph 21 of the answering affidavit, where the first respondent from his own mouth alleges that creditors with claims against him for payment of a sum of R99 898,79 "were taken over by Peregrine Meats, who have undertaken to effect payment".

I agree with Mr Kulenkampff that the inference is inescapable at this stage that Peregrine Meats would not have taken over this counter-obligation and view it only with a Christmas spirit. There would have to have been some counter-prestation. It would seem to follow in my view that the first respondent at the very least has sought to make a disposition of his property (in the form of the counter-performance to Peregrine Meats), which would have the effect of prejudicing his creditors or

preferring creditors who now will be settled by Peregrine Meats.

These acts of insolvency aside, I am also satisfied that in any event actual insolvency is established on the required evidential level applicable to this stage of the insolvency proceedings. As I was reminded in argument, where an act of insolvency is proved and the debtor in opposing the application alleges that his assets exceeded his liabilities, the onus is on him to show that this is the case (De Beer v Isaacson 1929 AD 345). Furthermore, if the Court is left in doubt as to whether the assets will meet the liabilities, as a general principle it would tend to grant the order (Swellendam Municipality v Kennedy 1934 CPD 448 - 450).

In this regard the applicant alleges that the liabilities of the first respondent are of the order of R384 501,31. In answer, the first respondent does not contest the claims of creditors with claims to a value of R204 914,82. In addition, there is the nearly R100 000 of claims "taken over" by Peregrine Meats. It is not suggested that those creditors have released the first respondent from his obligation to pay, and until such time then as Peregrine Meats settle the liability to those creditors, it unavoidably follows that they remain creditors of the first respondent. In addition, there is a liability in an

undisclosed amount to the South African Revenue Services.

As against this the first respondent asserts assets with a value of R37 997,56. But this, as has been pointed out, must be added to the value of the rights to the trading name "Hunters Choice" which, as Mr Kulenkampff has observed, is clearly not of inconsiderable value inasmuch as it was part of an arrangement to procure the release from an obligation of R500 000,00. In addition there is the admission by the first respondent that he owns firearms and a crossbow evidently of not insignificant value and that he had to claim for about R80 000,00 against Peregrine. The first respondent in addition alleges that he has a claim against the second respondent in respect of the accrual, but inasmuch as those proceedings are both pending and imminent, a matter to which I shall refer again shortly in a slightly different context, it is not necessary to take that into account.

So for these reasons, it seems to me that a case is made out (on the test applicable at this stage) that the liabilities of the first respondent exceed his assets.

I turn now to consider whether in the circumstances a benefit to creditors has been demonstrated. In this regard, it is evident to me that the assets listed in paragraph 20 of the

founding affidavit, to the sum of R37 997,56, first of all can be realised and be to the benefit of creditors. In addition there is the claim against Peregrine Meats in the sum of R80 000,00 to which I have referred, which can also be realised. There is furthermore the question of the release from Peregrine Meats and the sum of R99 898,79 presenting itself as an amount which potentially can be reclaimed and realised for the benefits of the first respondent's creditors in terms of the provisions relating to undue preference and dispositions.

In short, it seems that one is at this stage considering that an overall position appears to be established of claims of the order of R800 000,00 against the first respondent with assets which may be of the order of R500 000,00. Whether these amounts are exact, it seems to me, need not be further debated at this stage, given the relatively clear position regarding those assets and liabilities to which I have already made reference, and which establish a benefit to creditors.

I turn finally to the question of an abuse of proceedings. As Mr Robertson for the applicant pointed out to me this terminology is used in paragraph 13 of the opposing affidavit. The exact formulation which the first respondent had in mind, however, is not consistent: it straddles various references to motive, a sham and a general strategy of pursuing this

application now in the immediate advance of the scheduling of the divorce proceedings. It is stressed in this regard that this application was launched on 3 November and the coincidence of this date and that relating to the divorce proceedings is a matter which has been stressed in oral argument and which I have taken into consideration.

It seems to me that the matter, however, is disposed of in two ways. First of all, as Mr Kulenkampff pointed out in reply, the factual sub-stratum for the contention of an abuse and an object to pursue these proceedings for an improper purpose is not readily supported by conduct in relation to the securing of the hearing. As I already noted, while it was launched on 3 November, and was initially due to be heard on 10 November, even prior to the filing of the answering affidavit in this matter the applicant readily agreed to the postponement of this matter to 20 November 2008. It seems to me entirely correct to state, as he does (record page 111, para 18.6):

> "I state the obvious to emphasise that within the timeframe applicable, it was simply not possible to engineer the result claimed by the first respondent and that I made no endeavour to do so. On the contrary I readily agreed to a postponement beyond 14 November 2008."

These facts, it seems to me, entirely vitiate a factual basis for the allegation of an abuse or a sham. Indeed, they are such - coupled with the decision, quite properly, not to seek to file further affidavits and to deal with the matter as it stood - which makes it unfortunate and even reprehensible that the contention was still advanced in argument. It seems to me that there was no responsible basis for the contention that the strategy which is being pursued in this matter has been one which has entailed the sequestration of the first respondent to advance, it would seem, the interests of the second respondent (for whom the applicant used to act, but has not acted since 3 November, in the divorce proceedings). It was apparent in oral argument that the leading *dicta* regarding the questions of improper motives and their relevance juristically in Tsose v Minister of Justice 1951 (3) SA 10 (A) and in Brummer v Gorfil Brothers 1999 (3) SA 389 (SCA), have not been considered and applied. It has been emphasised in those decisions and in others that the law is generally not interested in motives, least of all in commercial transactions.

In oral argument Mr Robertson however relied on the decision in Amond v Khan, a copy of which has been handed up to me, a 1947 NPD decision (full bench). In that matter, the Court concluded thus:

> "...the answer in my judgment is that he was determined to sequestrate respondent's estate, not for the purpose of obtaining payment of his debt, but for the purpose of preventing the respondent from obtaining payment of his claims against the appellant's son. Thus the appellant deliberately abused the process of the court, for I have no doubt whatsoever that he must have known all about the position between is son and the respondent...".

As was most latterly emphasised by Cameron, J A in Commissioner of SARS v Hawker Air Service (Pty) Limited supra at 303 - 304, a Court is slow to find that a party has acted with an improper ulterior purpose. In that matter, reversing the conclusion of the court of first instance, the SCA held that:

> "The real motive of SARS was plainly to collect VAT. No acceptable basis was advanced for impugning this."

It seems to me that similar considerations apply in the first instance. Obviously it may be to the benefit of the applicant for sequestration to be achieved prior to any resolution of the

(opposed and therefore protracted) divorce proceedings between the parties. That however does not detract from the fact that the applicant is owed the money. The respondent has offered no answer to it (other than the insouciant answer that the applicant should rather have moved to execute against his property and not to seek a provisional sequestration order, despite the trite authority in Logie v Priest 1934 AD and subsequent decisions). It seems to me clear that the contention regarding improper motive, to the extent that this is supposed to relate to an improper object, and in turn to an abuse, lacks a proper legal-cum-factual foundation.

Lastly in this regard, and it was not clear to me whether this was intended to be argued as an adjunct to the improper motive contention or as a separate ground for abuse, it was argued at some considerable length that the applicant was obliged to disclose in the founding affidavit that it had acted not only for the first respondent as her attorneys, but that (at the time) was acting in the divorce proceedings for the second respondent. Once again, it seems to me that a simple legal observation has been overlooked. This is that the present application was clearly not an *ex parte* application, and that accordingly the strictures of cases like Schlesinger v Schlesinger and others do not apply. Secondly, it seems to me that there was no materiality in the question of the

applicant acting for the second respondent in the divorce proceedings. In fact, the founding affidavit does record that the applicant had been advised by the second respondent as to the correct factual state of affairs, and so the source of information for the applicant in particular respects was itself explicitly disclosed. I reject the suggestion that in the circumstances of this matter, where the applicant, seeking to recover admitted fees and admitted debt, was obliged to annex - as the argument went - the ante-nuptial contract of the first and second respondents. The application of the duty of disclosure in this matter it seems to me has been wholly misconceived.

For these reasons I am satisfied that a proper order has been made out for a provisional order of sequestration. I intend to grant an order in the usual terms regarding service (unless there is anything that the counsel on either side wishes to say to me in that regard), and furthermore that it be returnable on, if somebody has a diary, I think Tuesday, 26 January is a court day .

MR ROBERTSON (?): I don't have my diary here, M'Lord, but I'll check that if I may when I... (intervention).

COURT: Yes.

MR ROBERTSON: It's a Tuesday.

COURT: I think it's Tuesday, 26 January. So in short there will be a provisional order of sequestration, there will be the usual order as to service, the order will be returnable on Tuesday, 27 January, or the nearest provisional day, with the usual order at this stage as to costs.

I see, Mr Camptor (?), you are there clutching papers, is there a particular matter you wanted an order to be made in?

MR CAMPTOR: Yes, (indistinct - not speaking into microphone).

COURT: Yes?

MR CAMPTOR: (Indistinct) waiting outside chambers and we... (intervention).

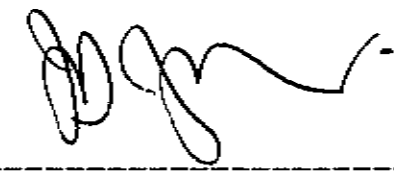
COURT: I gather, yes, I... (intervention).

MR CAMPTOR: ...(indistinct) the matter.

COURT: Oh, I see, well then let's go up to chambers and

you'll be welcome to..(indistinct).

The Court will now adjourn.



GAUNTLETT, A J