

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 14259/2008

DATE: 1 DECEMBER 2008

5 In the matter between:

H P BOCK & ISAACS Applicant

and

SUSAN PETERS Respondent

10

JUDGMENT

GAUNTLETT, AJ:

15 In this matter the applicant firm of attorneys seeks a provisional sequestration order against the respondent, its former client. The claim relates to professional services rendered to the respondent in the sum of R34 247,65.

20 In response to the summons which was issued in this matter the respondent directed a letter to the applicant in which she stated, without disputing the amount of the claim, that she could not pay

/ds

it. She undertook however to pay it off in payments of R400 per month.

5 The founding affidavit refers also to a subsequent letter which was received from the University of Stellenbosch Legal Aid Clinic, now representing the respondent, in which it was again stated that she was not in a financial position to discharge what was referred to, without any debate as regards the quantum owing, "die uitstaande skuld". She thereupon offered again to pay off a limited sum per
10 month.

The applicant proceeded to obtain a warrant for execution. On 18 August 2008 the Sheriff endeavoured to attach assets of the respondent but was informed by her that she had no money or
15 assets which were capable of conversion in any form. No moveable goods or alienable assets were indeed pointed out to the sheriff or could be found by him after a search of the residential address of the respondent, and consequently he issued a *nulla bona* return.

20

The case for the applicant is accordingly that the letters to which I have referred constitute acts of insolvency in terms of section 8(g)

of the Insolvency Act, 1936 and that furthermore the *nulla bona* return constitutes an act of insolvency in terms of section 8(b).

On 9 September 2008, when this application first proceeded
5 before court, an order was made by agreement directing that it be heard today, and agreeing times for the filing of an opposing affidavit and a replying affidavit.

Without explanation for the course embarked upon the respondent
10 instead has now launched on one court day's notice an application for the postponement of the present application, pending the hearing of the (indistinct) determination of an application in the Magistrate's Court, Somerset West to rescind a default judgment taken in relation to the fees claimed by the applicant. The new
15 application does not address this default in any way, it does not properly address the implicit urgency with which it has been brought, and entirely fails to explain the non-compliance with the agreed court order to which I have referred. Its contention however is that the default judgment was obtained "in bad faith as
20 judgment was taken after I had made arrangements" for the payment of a certain sum to avoid further legal action. Furthermore it contends that at no stage has the bill of the plaintiff been taxed, and "I have been subsequently advised that I

am fully entitled to request such taxation which would then allow me to query the amount and details of the amounts charged". Furthermore there is the declaration of an intention "to repay all outstanding amounts", and to do this after taxation upon which "I tender payment of such amounts".

Counsel for the applicant has sought a provisional sequestration order, on the basis that the trite requirements for such an order have been made out. He points to the various acts of insolvency, and furthermore to the failure by the respondent to file any opposing affidavit, as she had agreed to do, to set out any viable defence to the matter. Counsel for the respondent however has sought a postponement of the application in order for the determination of the rescission proceedings to take place. The question which arises in these circumstances, there being no material answer to the provisional sequestration application itself, is whether such a deferment is to be granted in all the circumstances of the matter.

Counsel for the respondent relied for his primary ground on the entitlement of a person in the position of the respondent to require taxation of a bill of costs before – and to secure a postponement of sequestration proceedings pending - taxation. He has pointed

me in this regard to the analysis by Meskin at 2-3 Law of Insolvency, where this is stated:

“It is submitted that an attorney may bring sequestration proceedings against his client based on his claim for attorney and client costs without first taxing a bill in respect of such costs: since he may sue for such costs without taxation [see Benson v Walters 1984(1) SA 74(A) at 86]; however it would be open to the debtor to demand taxation and it is submitted that such demand would inevitably involve a postponement of the proceedings pending taxation.”

He further referred me to the authority of Mars, Law of Insolvency, 83 to 84 and to Gillant 1954(2) SA 278 (C).

It seems to me that the principle indicated by Meskin must be clearly understood. The departure point (as to which Benson v Walters is leading authority), is that an attorney (like another professional person) may indeed bring sequestration proceedings against his client on a claim for costs (even attorney and client costs) without first taxing a bill in respect of such costs. The

point which is thereafter made is that the debtor however may answer such a claim, by first demanding taxation and, in appropriate circumstances, thereupon procuring a postponement of the proceedings pending taxation.

5

The difficulty however in this matter is as follows. First of all, on at least three occasions the respondent, having had an opportunity to place the amount of the claim in some way in issue, has not done so, and has, indeed, accepted its correctness.

10 There is no genuine query anywhere expressed as regards what is prima facie a modest sum in fees. Secondly, and more importantly, any such application (such as is posited by Meskin) is one which should have properly been brought in answer to the application for sequestration. At the very least it should be the

15 subject of an opposing affidavit filed in this application in compliance with the court order. In my view, the general circumstances of the matter indicate that the defence is belated, opportunistic, and not one which is advanced in good faith. There is, as I have said, no indication of any genuine dispute of the

20 amount of the claim; it is apparent from the affidavit filed in the postponement application that it is the product of belated legal advice that such a claim, even at this stage, is an appropriate basis on which the application for sequestration may be deferred.

I have been invited in this regard by counsel for the respondent to exercise my discretion in relation to the full circumstances of the matter. That seems to be indeed to be apposite. He points to the tender to pay whatever may be in fact taxed, the reality however is that in the unequivocal language that the respondent has chosen for herself, it is clear that she is unable to make any sensible and *bona fide* tender of the kind which, the belated legal advice, seems to have persuaded her to make in her latest affidavit. Then there is the issue of the house to which I have been referred. A short answer in that regard is that when the Sheriff attempted to execute in respect of the default judgment, he was unable to find any assets and he was not pointed to any asset by the respondent herself such as might meet the claim. More important, too, is that my overall sense of the matter is that the respondent is not litigating in good faith, but is contriving a delay with a view to putting off the consequences of her earlier acts of insolvency and failure to make interim payments. In these circumstances, it seems to me, there is the significant danger that any asset which may be held in the form of the house would be realised by the respondent and might ultimately result in the serious prejudice of the applicant.

As I have indicated the application for postponement is brought inexcusably and inexplicably late. It is not brought on a basis of urgency, no case is made out for urgency, it is redolent of an attempt to procure a delay at any cost – meaning, in particular, at the cost of the admitted claim held by the applicant.

In the circumstances the application for postponement is dismissed with costs and the application for a provision order of sequestration against the respondent is granted with costs. There will be the usual order as to service.

15



GAUNTLETT, AJ