REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 4099/2008

In the matter between:

VINCEMUS INVESTMENTS (PTY) LIMITED Applicant

and

AHMED LAHER Respondent

and

ABSA BANK LIMITED Intervening Creditor

For the Applicant: Adv. L. Buikman

Attorneys: Korbers Inc

For the Respondent: Adv. M.E. Stewart (Durban Bar)

Attorneys: Pillay Nicols Hlahane

For the Intervening

Creditor: Adv. D.J. van der Walt (Bloemfontein)

Attorneys: Sandenbergh Nel Haggard

Date of hearing(s): 18 August 2008

JUDGMENT: 26 September 2008

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VAN REENEN, J:

1] This is an opposed application for the provisional sequestration

of the respondent's estate based on an unsatisfied judgment debt for the payment of an amount of R1165105,70, interest and costs pursuant to a judgment granted by the Natal Provincial Division on 13th November 2007.

2] The respondent did not initially file a notice of opposition but appeared in person on 14 March 2008 to request a postponement with a view to considering his position and as a consequence the matter was postponed to 8 April 2008.

3] On that date however, Absa Bank Limited (Absa) applied for and was granted leave to intervene and by agreement between the parties a time-table was determined for the filing of affidavits and heads of argument.

4] In terms of the said time-table the respondent was obliged to have filed his answering affidavit by 30 May 2008 but failed to do so. The respondent filed his notice of opposition and his

answering affidavit with the registrar of this court only on 14 August 2008. When the matter was argued on 18 August 2008 I requested to be provided with an explanation on oath for the late filing of the answering affidavit as well as an application for condonation of the delay. The respondent's attorney of record has now provided me with a detailed explanation, the gravamen whereof is that the candidate attorney to whom the matter had been entrusted abandoned his/her articles of clerkship during June 2008 and that his/her neglect to have given effect to instructions regarding the conduct of the matter only manifested itself afterwards. As it, in my view, would be unfair to penalise the respondent for the administrative shortcomings on the part of those professionally qualified persons to whom he had entrusted his affairs, the failure to have timeously filed the answering affidavit is condoned.

5] The only basis on which both the respondent and Absa oppose this application is that it would not be to the advantage of the

respondent's creditors, within the meaning thereof in section 10(c) of the Insolvency Act No 24 of 1936 (the Act) if his estate were to be sequestrated. By necessary implication the applicant's locus standi as well as the acts of insolvency on which it relies have not been placed in issue.

6] The thrust of the applicant's case, as regards advantage to creditors is firstly, that the "equity" in the respondent's immovable properties in Johannesburg and Cape Town are approximately R50 000 and that on the basis of his version the "equity" in an immovable property situate in Pietermaritzburg is R200 000 and; secondly, that there is a possibility that he owns other assests that have not been disclosed and that his true financial position is likely to be fully revealed only through an enquiry in terms of the provisions of section 152 of the Act.

7] The gravamen of Absa's case is that the applicant failed to adduce sufficient admissible proof that, prima facie, there is

reason to believe that the sequestration of the respondent's estate will be to the advantage of his creditors especially if regard is had thereto that immovable properties at forced sales yield less than market-value as well as that, if the costs of sequestration and realization are taken into account, there is likely to be a short-fall in respect of which it would merely be a concurrent creditor. As regards the applicant's reliance on an enquiry in terms of section 152 of the Act to determine the existence of other assets that could be realised for the benefit of creditors, it is Absa's case that the applicant has failed to put forward an adequate factual basis in support thereof and that, in any event, it has failed to show that sequestration will be more advantageous to the body of creditors than conventional execution.

8] The respondent, except for the terse statement that he "takes issue" with the applicant's statement that the net value of his estate is R250 000 (which incidentally is inaccurate), associated

himself with the views expressed by Absa regarding the potentially deleterious financial consequences that are likely to result from a forced sale of the Johannesburg property and accentuated that the same considerations apply also to the Cape Town properties of which Standard Bank is the mortgagee. He also accentuated the potentially negative consequences the prevailing depressed economic climate has had on the property market.

9] In assessing whether the applicant has discharged the onus that rests on it, regard must be had to the fact that the evidentiary burden for the granting of a provisional order of sequestration is prima facie proof - i.e. as yet unrefuted evidence which if accepted, constitutes proof of the required facta probanda (see: **Kalil v Decotex (Pty) Ltd and Another** 1988(1) SA 943 (A) at 976 G – H) - that there is reason to believe that sequestration of the respondent's estate will be to the advantage of creditors as a body in the sense of a "not negligible dividend" (See: **London**

Estates (Pty) Ltd v Nair 1957(3) SA 591 (D & CLD) at 591 G). The concept "reason to believe" in section 10(c) of the Act has its genesis in a realization by the legislature that applicants in applications for provisional sequestration, other than friendly ones, are unlikely to have access to sufficient facts to satisfy a more demanding evidentiary burden (See: **Amod v Khan** 1947(2) SA 432 (N) at 438; **Hillhouse & Stott; Freban Investments v Itzkin: Botha v Botha** 1990(4) SA 580 (W) at 584 H). Jansen J (as he then was) in the **London Estates** case (supra) at 592 F – 593 A, elucidated the meaning of that phrase in the following manner:

"Reason to believe", in my opinion, is constituted by facts giving rise to such belief. Clearly they need not show "advantage" on a balance of probability - that would constitute proof, not belief. When do they give rise then to such belief? I respectfully adopt what was said by Roper, J in **Meskin & Co. v Friedman** 1948(2) SA 555 (W) at page 559:

"… the facts put before the court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote that some pecuniary benefit will result to creditors."

As all the relevant facts are usually not known, it would be extremely difficult to work

with any more exacting standard.

Facts indicative of a prospect which is not too remote, that some pecuniary benefit will result to the creditors, may include the fact that a substantial estate exists (cf: **Hill & Co and Others v Ganie** 1925 CPD 242 at page 245). If no substantial estate is shown to exist, circumstances may yet establish a reasonable prospect, a prospect that is not too remote, that concealed assets will be found or others recovered. The mere fact that sequestration enables investigation of the insolvent's affairs is not sufficient: there must be additional facts establishing that not too remote possibility."

The meaning of that phrase was further refined by Leveson J in **Hillhouse v Stott; Freban Investments v Itzkin; Botha v Botha** (supra) who at 585 C – D said that the belief must be rational and reasonable and Cloete J (as he then was) who in **Vumba Intertrade CC v Geometric Intertrade CC** 2001(2) SA 1068 (W), in the context of an opposed application for the providing of security in terms of section 9 of the Close Corporations Act 69 of 1984 - which contains an identical phrase - at 1071 G said that such a belief must be based on facts giving rise thereto and that "… a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or should not give credence to, does not suffice."

Whether that less demanding evidentiary norm has been satisfied must be decided on the basis of an overall view of all the facts in the papers (See: **Dunlop Tyres (Pty) Ltd v Brewitt** 1999(2) SA 580 (W) at 583 F).

10] Sight must also not be lost of the fact that it is recognised that, absent any proof of an abuse of the court's process, it is perfectly legitimate for a creditor to institute sequestration proceedings against a debtor for the purpose of obtaining payment of an unpaid debt (See: **Estate Logie v Priest** 1926 AD 312 at 319). Whilst it is common cause that the applicant has not resorted to conventional execution prior to instituting the application, it was preceded by correspondence and other communications which manifested a genuine endeavour on the part of the applicant to procure payment of the judgment debt or part thereof. As the application was instituted only after such attempts had failed there is little room for contending that it was motivated by considerations other than a genuine desire to bring

about a concursus creditorum. I am further mindful thereof that the right to enforce an unfulfilled judgment of a court is an incident of the judicial process, access whereto has been guaranteed by section 34 of the Constitution of 1996 (See: **Chief Lesapo v North West Agricultural Bank and Another** 2000(1) SA 409 CC at paragraph 13).

11] It appears to be common cause that the respondent owns the following three immovable properties:

11.1] Unit 29, Villa La Montagne, Johannesburg which was purchased in July 2006 for an amount of R995 000 and is mortgaged to ABSA in an amount of R970 000, leaving an equity of R25 000 on the assumption that it has not increased in value and that the outstanding capital on the mortgage bond has not been reduced;

11.2] an undivided half share in a property known as Unit 56 Costa Brava, Cape Town, purchased in January 2007 for R1.3 million and mortgaged to Standard Bank in an

amount of R1.7 million; and

11.3] an undivided half share in a property known as Unit 57 Costa Brava, Cape Town, purchased in January 2007 for R1.3 million and mortgaged to Standard Bank in an amount of R1.7 million.

The applicant, presumably assuming an increase of R25 000 in the market value of the Johannesburg property, contended that the respondent's equity in the aforesaid three properties would be approximately R50 000, but no explanation is given of how it is arrived at.

12] The applicant in contending that the respondent's equity in the said immovable properties amounts to about R250 000, alleged that the respondent owns, either directly or through a corporate entity, a flat known as Unit 5 Highgrove, 341 Alexandria Road, Pietermaritzburg, to which - according to a letter addressed by the respondent to the applicant's attorney on 13 December 2007 - a value of R500 000 was attributed against a mortgage bond

registered in favour of Absa in an amount of R300 000. It appears to be common cause that the said flat is registered in the name of a close corporation Pegma 85 Investments CC (Pegma) in which the respondent has a 20% member's interest and that the outstanding balance on the mortgage bond in favour of Absa is an amount of R296 000. Absa, contending that the market value of the property is R375 000, assigned a theoretical equity of approximately R16 000 thereto, which represents 20% of the difference between R375 000 and R296 000. Absa contends that the theoretical equity in the Johannesburg property is R3 000. That amount is palpably wrong and should be R22 000 as it assumed a market value of R995 000 and averred that the outstanding capital in respect of the mortgage bond is R973 000.

13] The applicant's assessment of the free residue likely to be yielded by the immovable properties owned by the respondent or in which he has an interest, appears to be unduly optimistic.

Unsurprisingly, as it is based on facile assumptions devoid of any supporting factual averments and appears to disregard the corporate nature of the registered owner of the Pietermaritzburg property. To the extent that the first leg of the applicant's case as regards advantage to creditors is based on the existence of a sufficient free residue likely to be derived from the realization of the said immovable properties, from which creditors could receive a not insubstantial dividend, it has fallen woefully short of placing facts by means of sworn valuations of their likely yield in the event of a forced sale (See: **Nel v Lubbe** 1999(3) SA 109 (W) at 111 D; **Ex Parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke** 2000(4) SA 116 (C) at paragraphs 14 – 17. There furthermore is an absence of information as regards the costs of sequestration as particularised in, inter alia, **Mamacos v Davids** 1976(1) SA 19 (C) at 19 H – 20 B and **Ex Parte Anthony en 'n Ander Ses Soortgelyke Aansoeke** (supra) (paragraphs 6 – 10).

14] As the applicant's endeavour to place reliance on the existence of "some equity" in the immovable properties owned by the respondent as constituting prima facie proof that there is reason to belief that the sequestration of the respondent's estate will be to the advantage of creditors has been unsuccessful, the application can succeed only if the averment that the respondent owns as yet undisclosed assets as well as that his true financial position is likely to be fully revealed only through an enquiry in terms of section 152 of the Act, has been shown to have merit.

As was held in the **London Estates case** (supra) at 592 H – 593 A, the fact that sequestration enables the holding of an investigation is not sufficient in itself. Additional facts establishing a not too remote possibility that concealed assets will be found or others recovered must be shown to exist.

That enquiry is undoubtedly facilitated by the long established practice in this Division that where an act of insolvency has been established, very strong grounds will have to be adduced to cause a court to even doubt whether the sequestration will be to

the advantage of creditors (See: **Wilkins v Pieterse** 1937 CPD 165 at 169; **Cohen v Jacobs** 1949(4) SA 474 (C) at 481). That practice has been followed in the Eastern Cape Division (See: **Erasmus v Van Zyl** 1959(3) SA 146 (E)) but has not found favour in some of the other Divisions (See: **Paarl Wine and Brandy Co v Van As** 1955(3) SA 558 (O); **London Estates (Pty) Ltd v Nair** (supra). As **Wilkins v Pieterse** and **Cohen v Jacobs** have - to the best of my knowledge - not been overruled and, in my view, are not palpably wrong, I consider them as reflecting the prevailing practice in this Division. A further consideration is that there is ample authority for the proposition that if - as in the instant case - there is a substantial estate, and an applicant has been unable to procure payment in the ordinary course and is obliged to bring sequestration proceedings, such a modus operandi would prima facie be to the advantage of creditors (See: **Hill and Co and Others v Ganie** 1925 CPD 242 at 245; **Cohen v Mallinick** 1957(1) SA 615 (C) at 620 H; and **Puzyna v Puzyna** 1962(1)

SA 165 (C) at 166 G – H).

15] The applicant's attempt to rely on the contents of the letter addressed by Mr Rahman to Ms Ryan (Annexure "K") as showing that the respondent is possessed of other assets that have not been revealed, was less than successful. As correctly pointed out by the respondent in his belatedly filed answering affidavit, the said letter constituted inadmissible hearsay. The manner in which the respondent dealt with Annexure "K" in the said affidavit stands in stark contrast to the manner in which he dealt with the report by Precision Investigations and Security Consultants, Annexure "J". He did not challenge its admissibility or reliability - and could hardly have done so because of its accuracy as regards the Johannesburg and Cape Town properties and Pegma - but considered it sufficient not to challenge the averments in the founding affidavit seriatim, but requested that his failure to have done so should not be construed as an admission of their correctness and reserved the right to supplement his affidavit should the need therefor arise.

The contents of paragraph 13 of the respondent's answering affidavit sheds light on his failure to have disavowed the correctness as well as the existence of his interests in the corporate entities enumerated in Annexure "J":

"In conclusion I wish to state that I am a businessman and entrepreneur, I do not practice a profession. Were this Honourable Court to grant an Order sequestrating my estate I would suffer irreparable harm and would, I am further advised, be precluded from trading freely, in particular, would be precluded from holding Company directorships. This would, in my submission, severely hamper my abilities to earn a living, to trade freely and to trade out of my financial difficulties and to repay my creditors."

Whether annexure "J" correctly reflects the corporate entities in which the respondent appears to have interests is peculiarly within his personal knowledge and his failure to have dealt therewith warrants that the inference least favourable to his cause be drawn namely, that its correctness could not be disputed (Cf: **Galante v Dickenson** 1950(2) SA 460 (AD) at 465). That the respondent's shares / interests in the said corporate entities form part of his estate if he were to be

sequestrated is self-evident.

16] The respondent's desire to be allowed "to trade freely and to trade out of my financial difficulties and to repay my creditors" is susceptible of only one inference namely, that he is carrying on business by means of corporate entities and/or other business vehicles. That he must be in receipt of a substantial monthly cash flow is apparent from the amounts of the mortgage bonds that he has to service periodically. It is highly unlikely that either Absa or Standard Bank as holders of the mortgage bonds of the Johannesburg and Cape Town properties would have granted them unless the respondent had satisfied them as regards his ability to service them. The monthly repayments on mortgage bonds amounting to almost R2.7 million come to a substantial amount. A further indication of the respondent's access to cash - apart from his share of the bond over the Pietermaritzburg property - is his preparedness in correspondence with the applicant's attorney to have paid an amount of R250 000 in

monthly instalments of R12 500. The sources which generate cash-flows of such magnitude and the possibility of realizing them are matters that call for investigation in a hearing in terms of section 152 of the Act. So does the averment in annexure "F" - a letter written by the respondent to the applicant's attorney on 19 December 2007 - that "… my cash assets and liabilities are roughly the same."

Assuming that the amounts owing by the respondent on the mortgage bonds passed over the Johannesburg and Cape Town properties are roughly equal to the market values thereof and bearing in mind that the respondent owes the applicant in excess of R1.1 million, it follows logically that the respondent must be in possession of substantial other assets, the nature and whereabouts of which have not been divulged.

17] A further aspect that appears to lend itself to further investigation at an enquiry in terms of section 152 of the Act is the true extent of the respondent's interests in Pegma. The need to do so arises

from the fact that the respondent in correspondence with the applicant's attorneys offered the flat registered in that entity's name as security for the payment by him of an amount of R250 000 on the judgment debt whilst he was marketing it and from the proceeds to "fast track" payment thereof. That the respondent could market the Pietermaritzburg flat and utilise its proceeds towards the payment of a personal obligation belies the correctness of the assumption that he holds only a 20% interest in Pegma.

18] Despite the fact that the unfulfilled judgment debt is for obligations that were incurred prior to March 2006, the respondent resists the granting of a sequestration order on the basis that it would enable him "to trade out of my financial difficulties and to repay my creditors". That approach disregards that in considering any advantage to creditors, sight must not be lost of the fact that creditors have a right to obtain payment as soon as possible, failing which, they may resort to what has been

described as the ultimate form of execution namely sequestration (See: **Wilkins v Pieterse** (supra) at 170). The respondent requires the applicant to pursue time-consuming and laborious conventional execution procedures in respect of a number of different movable and immovable assets situated in different parts of South Africa or to make use of the notoriously deficient procedure of interrogation provided for by section 65 of the Magistrates' Court Act, No 32 of 1944 whilst he is subjecting such assets as he at present possesses to the commercial risks involved in trading in the hope of being able to pay his creditors at some undetermined juncture in the future. In my view, the present is a case, par excellence, to give recognition to the "superior legal machinery which creditors acquire by sequestration" and was articulated as follows by Horwitz J in **Chenille Industries v Vorster** 1953(2) SA 691 (O) at 699 F – G:

"… the right to control the collection, custody and disposal of all the assets through their nominee, the trustee, the right to control similarly the sale of the assets, the certainty that the insolvent cannot contract further debts and diminish the estate, and

the assurance that all creditors will be accorded the treatment prescribed by law in the division of the proceeds."

19] Of the respondent's creditors only Absa has opposed the application. It has succeeded in making out a convincing case that the applicant has failed to show that the sequestration of the respondent's estate would be to its advantage as a secured and possibly, a concurrent creditor. The question whether there is reason to believe that sequestration will be to the advantage of creditors may not be assessed with reference to the situation of a particular creditor but with reference to its effect on the general body of creditors (See; **Peycke v Nathoo** (1929) 50 NLR 178 at 185; **Stainer v Estate Bukes** 1933 OPD 86 at 89; **London Estates (Pty) Ltd v Nair** (supra) at 591 G). Taking a holistic view the question whether the sequestration of the respondent's estate will be to the advantage of his creditors as a body, I incline to the view that facts have been shown to be present which are sufficient to engender a rational and reasonable belief that, prima facie, the sequestration of the respondent's estate will be to the

advantage of his creditors.

20] As the only issue in dispute as between the parties has been decided in the applicant's favour it follows that it is entitled to an order in the terms as prayed for in the notice of motion. Accordingly an order is granted in terms of annexure "A" hereto.

21] In terms of the order made by this court on 16 April 2008 by agreement between the parties the costs of Absa's application for intervention was ordered to stand over for later determination. The effect of the order sequestrating the respondent's estate is that Absa has been unsuccessful in opposing the relief sought by the applicant. I have given consideration to the question whether the rule nisi should not make provision for an order calling upon interested parties to show cause why Absa's costs of intervention and opposition should not be included the costs of sequestration. The views of courts thereanent are divergent. Some require the existence of special circumstances and others

that the opposition should have been bona fide and reasonable. I prefer the approach followed in this division in **Calderco (Pty) Ltd v Elliot** 1940 CPD 248 namely that each application should be considered on its own merits free from any a priori approach. As I have come to the conclusion that although Absa's intervention and its opposing of the granting of the sequestration order was predominantly actuated by its own interests as a creditor and not those of the general body of creditors, I nevertheless incline to the view that the information placed by it before this court has significantly contributed towards a proper adjudication of this application and for that reason consider it appropriate to modify the proposed rule nisi as regards the costs of sequestration to read as follows:

"2.2 The costs of this application including the costs of intervention and opposition by the intervening creditor should not be considered to form part of the costs incurred in connection with the application for the sequestration of the respondent's estate.

22] As in my view the respondent's opposing of the granting of a

provisional order of sequestration was neither reasonable and/or bona fide and in any event, devoid of any special circumstances no order is made as regards the costs thereof.

23] In accordance with a long-standing practice in this division the relief which has been granted herein is a rule nisi operating as a provisional sequestration order pending the adjudication of the sequestration application on the return day in terms of a more demanding evidentiary norm than the prima facie proof applicable at this juncture namely, a balance of probabilities (See: **Paarwater v South Sahara Investments (Pty) Ltd** [2005] 4 All SA 185 (SCA) at 186 h). Accordingly, the question of the desirability of the handing down of a fully motivated judgment arose. As no guidance could be gleaned from decided cases and text book writers thereanent, I have had occasion to seek guidance from experienced present and past colleagues. The consensus of opinion appears to be that this Division's practice of not handing down a fully motivated judgment when a

provisional order of sequestration is granted, is a salutary one. Torn between that practice and my instinctive sense of fairness - which incidentally appears to be consistent with the view of the Supreme Court of Appeal (See: **Road Accident Fund v Marunga** 2003(5) SA 164 at paragraphs 31 and 32) - that where the issues have been fully argued in an opposed matter, litigants are entitled to be informed of the reasons for the conclusion arrived at, I, have chosen to steer the middle course of providing reasons but of a less encompassing nature that I would otherwise have done. That approach also enabled me to do a measure of justice to counsels' detailed and helpful submissions.

24] There is one remaining aspect that needs to be considered namely, liability for the costs of an opposed application brought by the applicant to compel Absa to comply with a notice in terms of Rule 35(12) delivered on 18 April 2008. That issue has arisen because Absa's attorneys complied with the said notice only

when delivering and filing its answering affidavit on 29 May 2008. The application to comply was preceded by unnecessarily vitriolic correspondence between the attorneys representing the applicant and Absa. Absa's attorney consistently adopted the stance that there was no need to comply with the Rule 34(12) notice. The refusal to do so was based on three broad grounds. The first is that Rule 35(12) has no application in the absence of a direction of the Court as envisaged in Rule 35(13); the second is that the document of which copies were sought had been referred to in the applicant's founding affidavit; and the third was that the applicant could have obtained an electronic copy thereof through the "Windeed" system. The practice in this division is that if a document is referred to in a pleading or application the party who does so is obliged to produce it for inspection unless it is not in his/her/its possession or cannot be produced or is privileged or irrelevant. In that case the recipient of the notice bears the onus to set out the facts relieving him/her/it of the obligation to comply (See: **Gorfinkel v Gross, Hendler &**

Frank 1987(3) SA 766 (C)). There appears to be ample authority for the proposition that the effect of the unambiguous language of Rule 35(13) is that the applicability of the discovery provisions of Rule 35 to applications is dependent on a direction by the court that it finds application in a particular matter (See: **Loretz v MacKenzie** 1999(2) SA 72 (T) at 74 G; **Afrisun Mpumalanga (Pty) Ltd v Kunene N.O. and Others** 1999(2) SA 599 (T) at 611 G – H). Although Absa's attorneys' approach, at first blush, may appear to be smacking of undue pedanticism it is supported by, in my view, unassailable authority. As that stance had been conveyed to the applicant's attorneys beforehand, the application was launched with full awareness of the basis on which compliance was being resisted. In the circumstances I incline to the view that the applicant should be ordered to pay the costs of the Rule 35(12) application on a party and party basis.

D. VAN REENEN

ANNEXURE "A"

ORDER:

1] The estate of the respondent is sequestrated and placed in the hands of the Master of this Court.

2] A rule nisi is issued calling upon the respondent to show cause on 29 October 2008 at 10h00 or as soon thereafter as counsel can be heard to why:

2.1 a final order of sequestration should not be granted;

2.2 The costs of this application including the costs of intervention and opposition by the intervening creditor should not be considered to form part of the costs incurred in connection with the application for the sequestration of the respondent's estate.

3] Service of the order must be effected by the Sheriff:

3.1 on the respondent personally at Flat 201, Costa Brava, Beach Road, Sea Point, Western Cape;

3.2 any registered union which may be found to represent any

of the respondent's employees;

3.3 on the employees themselves at the respondent's last known address;

3.4 the offices of the South African Revenue Service (SARS) at 22 Hans Strijdom Avenue, Cape Town.