REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

Case No.: **18194/08**

In the matter between:

KULENKAMPFF & ASSOCIATES	Applicant
and	
ADRIAAN MARTIN VOSLOO	First Respondent
JULIE-ANN LYN VOSLOO	Second Respondent/First Intervening Creditor
VINCENT ALEXANDER	Second Intervening Creditor
THE TRUST FOR THE TIME BEING OF THE ROSY TRUST	Third Intervening Creditor
FAREX CC	Fourth Intervening Creditor

JUDGMENT DELIVERED THIS 26th DAY OF FEBRUARY 2010

KOEN AJ.

[1] This is an application for the provisional sequestration of first Respondent. I propose, in this judgment, to refer to him as Mr Vosloo.

[2] The matter has an unusually long history which it is necessary to traverse. It first came before Court by way of an application at the instance of Kulenkampff and Associates on 10 November 2008. The application was opposed and postponed by agreement to 20 November 2008 to enable Mr Vosloo to file an answering affidavit.

[3] On 20 November 2008 the matter was argued before Gauntlett AJ who made an order provisionally sequestrating Mr Vosloo. A provisional order of sequestration returnable on 27 January 2009 was issued.

[4] On 27 January 2009 the second Respondent, Mr Vosloo's wife, applied for leave to intervene as a creditor in her own right. For the sake of convenience I shall refer to her as Mrs Vosloo. The matter was postponed for hearing to 2 February 2009. Shortly thereafter, on 30 January 2009, a second intervening creditor (Mr Alexander) launched an application for leave to intervene in the proceedings.

[5] On 2 February 2009 an order was made regulating the exchange of affidavits. This order also recorded that Kulenkampff and Associates had withdrawn its application having been paid by a third party. Notwithstanding that the Kulenkampff application had been withdrawn, and that neither Mrs Vosloo nor Mr Alexander had been given leave to intervene at that stage, the provisional order was extended until 27 March 2009.

[6] On 10 March 2009 Mr Alexander's application was withdrawn.

[7] On 27 March 2009 the application came before Court again. It was postponed in terms of an order made by the agreement of the parties for hearing on the semi-urgent roll to 10 February 2010, and the provisional order was again extended.

[8] On the same day the third intervening creditor (to which I shall refer as "the Trust") issued an application, set down for hearing at 10h00 that day, for leave to be granted to it to intervene in this application. But the Trust's application never came before, or was considered, by this Court on that day and no order was made in regard to it.

[9] For many months nothing further transpired until, on 27 January 2010, a fourth intervening creditor, Farex CC ("Farex"), launched an application for leave to be granted to it to enter the fray and for a provisional order to made at its instance. Its application was set down for hearing on 10 February 2010.

[10] The next day, 28 January 2010, the Trust delivered a notice stating that its application was also set down for hearing on 10 February 2010. How it came to be assumed that the Trust was entitled simply to enrol the matter on the semi-urgent roll is not explained. A few days later the notice of set down was followed by an application made through the Chamber Book for leave to set down the Trust's application for hearing on 10 February 2010. That the Chamber Book application was made suggests that it was

appreciated that the unilateral enrolment of the Trust's application on the semi-urgent roll was irregular.

[11] The Chamber Book application never came before a Judge in Chambers and the order relating to the set down of the Trust's application was never granted. This notwithstanding the Trust's application made its way into the Court file and counsel appeared on behalf of the Trust seeking to move for a provisional order of sequestration against Mr Vosloo. The same counsel sought to move for the same relief, on behalf of Farex. The papers relating to Farex's application were not before the Court at all when the matter was called. Not unsurprisingly, the Registrar has not enrolled Farex's application for hearing in the 4th Division of this Court, but in the 3rd Division, where such matters should be enrolled.

[12] Because of the unsatisfactory state of affairs regarding the applications made by the Trust and Farex I enquired of counsel for Mr Vosloo whether these applications were opposed. I was informed that this was the case and that answering affidavits would be available later in the day, in respect of the Trust's application, and at a time in the near future in regard to Farex's application.

[13] It seemed to me quite clear that the applications in respect of the Trust and Farex could not justly and fairly be dealt with at the hearing on the 10th February 2010. Aside from the fact that neither application was properly enrolled on the opposed motion roll no fair opportunity had been given to Mr Vosloo to oppose the matters and he had not filed answering

affidavits. In regard to the application made by the Trust nothing had happened for almost eleven months when the notice of set down was filed. Plainly, these two applications were not ripe for hearing.

[14] From the aforegoing it is apparent that of the five applications on behalf of alleged creditors who have sought an order provisionally sequestrating the estate of Mr Vosloo, two have withdrawn their applications and two matters cannot be heard. What remains for consideration, then, is Mrs Vosloo's application. Before dealing with the merits of the matter it should be mentioned at this stage, to contextualise the matter, that Mr and Mrs Vosloo are married to each other out of community of property, and that there are presently divorce proceedings pending between them. The antenuptial contract they concluded provides that should either of them be sequestrated then that party would not have a claim against the estate of the other for a share in any accrual in his or her estate. Much was made of this fact, to which I shall later advert, it being contended that Mrs Vosloo's prime purpose in seeking an order sequestrating her husband was to deny him a share in any accrual in her estate.

[15] In brief, section 10 of the Insolvency Act 24 of 1936 requires that Mrs Vosloo satisfy the Court *prima facie* that she has a liquidated claim against Mr Vosloo; that Mr Vosloo has committed an act of insolvency or is actually insolvent; and that there is reason to believe that it will be to the advantage of creditors that Mr Vosloo be sequestrated.

[16] It was not in dispute that Mr Vosloo is actually insolvent. The application was opposed on three grounds, namely, (1) that Mrs Vosloo had not established that she was a creditor because the existence of the alleged debts was disputed *bona fide* on reasonable grounds, (2) that it had not been shown that sequestration was to the advantage of creditors, and (3) that even if the Court were to find against Mr Vosloo on these grounds, this was a matter where in the exercise of its discretion the Court should not make a provisional order.

[17] It is well established that applications for the provisional sequestration orders should not be used in order to recover debts which are *bona fide* disputed on reasonable grounds. This is so because the procedure for a provisional sequestration is not designed for the resolution of disputes as to the existence or otherwise of a debt (see *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (TPD) at 347H – 348C; *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (AD) at 980 B – D; *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (CPD) at 218D – 219C; *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (CPD) at 783F – J). In *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (CPD) (at 116 F-G) Griesel J held that these principles, enunciated in applications for the provisional winding up of companies, apply equally in applications for provisional sequestration. I respectfully agree. There is no logical reason why the rule, which is designed to deter creditors from collecting debts which are *bona fide* disputed on reasonable grounds by way of liquidation proceedings, should not apply equally in sequestration proceedings. Insolvency proceedings are plainly not appropriate where

the existence of a debt, and thus the legal standing of the creditor, is the subject matter of a genuine dispute.

[18] Where legal standing as a creditor is placed in dispute by the respondent opposing the grant of a provisional sequestration order the respondent attracts an onus to establish that the existence of the debt is *bona fide* disputed by him on reasonable grounds. If he discharges this onus then a provisional order will not be made. That this is so appears from the cases referred to above.

[19] The question which then arises is whether Mr Vosloo has discharged the onus of showing that the debts claimed to be due by him to Mrs Vosloo are *bona fide* disputed on reasonable grounds. Mrs Vosloo has alleged that there are a number of debts owing to her by her husband. It is necessary to deal with each claim in turn.

[20] In the first place Mrs Vosloo relies upon a claim for maintenance payable to her in respect of her son. She contends that Mr Vosloo tendered to pay R2000 per month in this regard – this indicating his ability to pay. She also refers to a claim for maintenance for herself, made in the divorce action referred to above. No agreement in respect of maintenance is alleged by Mrs Vosloo, nor is there any Court order in terms of which an amount of maintenance must be paid.

[21] Mrs Vosloo also contends that her husband agreed to pay rates, taxes, electricity and related costs in respect of the immovable property she

owns and resides in. He failed to pay these, and she was required to make payment, this giving rise - she alleges - to a claim against him for payment of the amount of R 64 180,62. Mr Vosloo denies such an agreement. He says that he paid these expenses until he ran into financial difficulty and that it was then agreed that Mrs Vosloo would pay these costs.

[22] A third claim contended for by Mrs Vosloo relates to a Corsa vehicle bought by Mrs Vosloo *"on behalf of"* Mr Vosloo which their daughter now utilises. Mrs Vosloo contends that it was agreed that Mr Vosloo would pay a balance of R 46 444 by way of instalments to the bank which financed the vehicle. Mr Vosloo denies this. He says that he paid the instalments and only later became aware that the bank had been paid in full, when he then stopped making such payments.

[23] A fourth claim alleged by Mrs Vosloo relates to loans she says she advanced to Mr Vosloo during 2000 and 2002. In support of this claim she attaches certain cheque stubs which reflect that the loans were made. On the face of it the stubs reflect payments made to Mr Vosloo and the annotation on the certain cheque stubs indicates that these were loans. She also alleges that she lent a further amount of R 6000 in cash to Mr Vosloo during 2005.

[24] Returning to the first of Mrs Vosloo's claims it is settled law that the obligation to pay maintenance is determined by the needs of the person requiring maintenance, and the ability on the part of the person from

whom maintenance is claimed to pay it. Because the amount of the claim is not capable of ready ascertainment I cannot see that a claim for maintenance, in the absence of an agreement or order, is a liquidated claim. It follows, in my view, that this claim does not confer upon Mrs Vosloo standing as a creditor in this application.

[25] The claims in regard to rates and the payment of taxes, and for the amounts paid in regard to the Corsa, are based upon disputed agreements. In my view there is nothing inherently suspicious about Mr Vosloo's opposition to these claims and it cannot be said that he is not *bona fide*. He denies the agreements alleged by his wife. The probabilities do not point in any direction. I consider his opposition to these claims to be *bona fide* disputed on reasonable grounds.

[26] As indicated above Mrs Vosloo also contends that her husband is indebted to her in regard to four loans made to him during the period 7 February 2000 to 6 March 2002, and one loan in the sum of R 6000 which she avers was made *"in cash during 2005."* In regard to the claim for repayment of the four 2002 loans her claim is supported by cheque stubs which, on the face of it, provide some evidence of the making of the loans. The stubs state that the cheques were payable to Mr Vosloo and three cheque stubs have the word *"loan"* written upon them. It is apparent that the alleged loans fall into two categories, those ostensibly evidenced by the cheque stubs, all of which date back to 2002, and the cash loan made during 2005 in regard to which no documentary evidence exists.

[27] All that is put up by Mr Vosloo to refute the claims based upon the alleged loans is a bare denial backed by a challenge to Mrs Vosloo to provide further details of the loans. On these facts can the Court find that the loans are *bona fide* disputed by him on reasonable grounds?

[28] In regard to the loans apparently evidenced by the cheque stubs that I find that Mrs Vosloo has established the required standing as a creditor of her husband. Mr Vosloo says nothing to dislodge the *prima facie* evidence of the making of the loans. Simply for Mr Vosloo to deny these loans, without further elaboration, does not suffice to raise a *bona fide* dispute on reasonable grounds. It will be noted, however, that these loans were made considerably over three years ago, and have probably prescribed, a fact which none of the parties addresses in the affidavits filed by them in these proceedings. It is, however, a fact to which I shall later advert.

[29] In regard to the single cash loan allegedly made during 2005 I take a different view. One would have expected Mrs Vosloo to state with more detail when the loan was made, where this occurred, or why it was made. But that is not the case. Her claim is so vague and so little information is given by Mrs Vosloo about the making of the loan that it can hardly be expected of Mr Vosloo, if he denies the existence of the loan - as he does - to say anything other than that. There is nothing from which I can conclude that the denial of this loan is not *bona fide* and, in the circumstances, based on reasonable grounds. I therefore find in regard to the cash loan of R 6000 that Mrs Vosloo has not established the

necessary standing as a creditor. I might add that this loan, too, on the face of it has prescribed.

[30] The next question which arises for consideration is whether a provisional order of sequestration is to the advantage of creditors. Although there is a dispute about the amount of any dividend which may be payable to creditors in a sequestration I think that Mrs Vosloo has established that a dividend will accrue, and that it would not be insignificant. It is also common cause that there are a number of creditors pursuing Mr Vosloo; that he has substantial debts; that he is, to use his own words *"at present unable to meet all* [his] *obligations"*; and that certain creditors are being paid whilst others are not. In these circumstances it seems to me that it would be to the advantage of creditors that his estate be administered under the Insolvency Act, rather than to leave it to each creditor to pursue his own remedy.

[31] In the result I find that Mrs Vosloo has established standing as a creditor in regard only to the four loan debts evidenced by cheque stubs, all of which date back to 2000 and 2002, and that it would be to the advantage of creditors if Mr Vosloo's estate were to be sequestrated. Because it is common cause that Mr Vosloo is actually insolvent, all three of the requirements set forth in section 10 of the Insolvency Act have therefore been proved *prima facie*.

[32] What remains for consideration is whether, notwithstanding that the requirements of section 10 have been proved, this Court should exercise

the discretion vested in it to grant a provisional order of sequestration. It will be noted that I have observed that the debts in respect of which Mrs Vosloo has obtained standing as a creditor arose, on her version, during 2000 and 2002 and that these debts have probably prescribed.

[33] *Jhatam and Others v Jhatam* 1958(4) SA 36 (NPD) is authority for the proposition that the discretion vested in a Court by section 10 of the Insolvency Act 24 of 1936 should not be exercised in favour of an applicant where the debt relied upon by the applicant has *prima facie* become prescribed. In *Jhatam* the Court observed that even though the respondent in the application for his provisional sequestration did not raise the defence of prescription it did *"not feel disposed to grant an order for compulsory sequestration on a claim which might well turn out to be unenforceable"* (at 38E - F).

[34] The Court in *Jhatam* relied upon the decision in *Nichol v Nichol* 1916 WLD 10 in which Mason J discharged a provisional order of sequestration at the instance of an intervening creditor because the applicant's claim was prescribed. In *Nichol* it was said that: *"To hold otherwise would produce the remarkable result that the estate of a debtor might be sequestrated upon a claim which could not be proved in insolvency"* (at page 13 of the judgment). The decisions in *Jhatam* and *Nicol* were approved of by Goldstone AJ, as he then was, in *Misnun's Heilbron Roller v Nobel Str Central Inv* 1972 (2) SA 1127 (WLD).

[35]Whilst accepting that the discretion conferred by upon the Court is one which must be exercised judicially, in the light of the circumstances of each case, and that it is unwise for hard and fast rules to be laid down, I respectfully agree with the reasoning in the judgments referred to. In this case the claims upon which Mrs Vosloo derives her standing as a creditor have, on the face of it, become prescribed. No facts from which a contrary conclusion can be drawn are before the Court. Even if Mr Vosloo does not raise prescription other creditors in the *concursus* will probably take the point. Why would they not, as they would increase the amount of the dividend payable to them by excluding from any distribution claims which can lawfully be objected to? It seems to me to be undesirable to grant an order for the provisional sequestration of a debtor at the instance of a creditor who will, on the probabilities, be disqualified in participating in any *concursus creditorum*.

[36]I should add that a further consideration which, taken together with the factor mentioned above, persuades me not to make a provisional order of sequestration notwithstanding that the requirements of section 10 have been fulfilled, is that in this case is the claims alleged by Mrs Vosloo are of the kind which would ordinarily be determined in the divorce proceedings currently pending between the parties. There seems to me to be no pressing reason why these disputes should not be taken into account in the resolution of the divorce action between them, as opposed to the disputes being resolved piecemeal in different forums.

[37] Finally, I do not think that the interests of other creditors will be harmed if I refuse to grant an order of provisional sequestration at the instance of Mrs Vosloo. Indeed, their interests will be advanced if it transpires that Mr Vosloo does have a claim to share in any accrual in Mrs Vosloo's estate.

[38] In the circumstances I make the following order:

(1) The applications for leave to intervene made by the third and fourth intervening creditors are struck off the roll;

(2) The application for leave to intervene made by the first intervening creditor is dismissed with costs.

S J KOEN AJ