REPUBLIC OF SOUTH AFRICA

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

Case No.: **3842/09**

In the matter between:

RIANA LEMMER	Applicant
and	
KLAUS DIETER BORNGRÄBER NO	First Respondent
HEINDRÉ KEITH RADEMAN NO	Second Respondent
MELISSA RADEMAN NO	Third Respondent

JUDGMENT DELIVERED THIS 18TH DAY OF FEBRUARY 2010

KOEN AJ.

1. This is an application for the provisional sequestration of the Klaus and Laureen Trust ("the trust").

2. The Applicant is an attorney of this Court who sues in her capacity as the *curator bonis* of Laureen Borngräber. The Applicant is also the *curator*

bonis of the first Respondent. The first Respondent and Mrs Borngräber are married to each other out of community of property.

3. Although the first Respondent has been declared by this Court to be incapable of managing his own affairs, and ought therefore to be removed from his office as trustee by the Master, this has not happened. The second and third Respondents are cited in their capacity as trustees of the trust. In the affidavits filed by them they tender their resignation as trustees, but do not allege that notice of such resignation has been given to the Master of this Court, and the trust beneficiaries, as is required by the provisions of section 21 of the Trust Property Control Act, 57 of 1988. It follows, as I see it, that they continue to be trustees.

4. The matter first came before Court on 11 March 2009. On that date an order was made, *inter alia*, postponing the hearing of the application until 1 February 2010, and directing that the trust deliver its answering affidavits by Wednesday 15 April 2009.

5. In the event, on 19 May 2009, the first and second Respondents filed affidavits. But it was not averred in either of those affidavits that the trust intended to oppose the application, or that it had resolved to do so. Indeed, it is clear that the trust could not properly have taken a decision to oppose the application because the provisions of the trust deed required that the first Respondent be part of any such decision and it was not in dispute that this had not occurred.

6. Although the first and second Respondents sought an order dismissing the application, their attitude did not appear to be unequivocal from their affidavits, the first Respondent stating in his affidavit that *"he"*, and not the trust, had decided to oppose the application; that he wished to place certain material and facts before the Court; and that he would leave it in the hands of the Court to make an appropriate order.

7. Be this as it may, I have had regard to the arguments put up on behalf of the second and third Respondents by counsel. They are, after all, trustees, and I consider that they have sufficient of a legal interest in the matter to be heard.

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

9. The Applicant contends that Mrs Borngräber has a claim against the trust for repayment of the amount of R 600 000 owed by the trust to her on loan account. These funds came from the proceeds of a mortgage bond. The second Respondent admits in his affidavit that an amount of R 600 000 was transferred by him from the bond account in Mrs Borngräber's name to the trust.

10. It is common cause that the mortgage bond was registered over immovable property owned by Mrs Borngräber in favour of ABSA Bank to secure a loan from the bank to her of the sum of R4.6 million. It is also common cause that (at least) R 600 000 of Mrs Borngräber's funds were transferred to the trust.

11. Payment of the R 600 000 was demanded by way of an electronic mail sent by the Applicant to the second Respondent on 29 April 2008. The demand is in unequivocal terms, claiming payment of the amount of R 600 000 owed by the trust to the Mrs Borngräber on loan account before 5 May 2008, under threat of proceedings against the trust. In response to this demand the second Respondent wrote a letter from which it is apparent that the trust was unable to repay the amount claimed.

12. In his affidavit the second Respondent appears to contend that the demand ought not to have been made of the trust, but of the Applicant's husband. He states that the funds originated from the bond, and that they were paid to the first Respondent, concluding that the demand ought therefore to have been directed at the first Respondent. But he does not attempt to reconcile this version with the admission by him that he had effected payment electronically, ostensibly on the written authority of the first Respondent, who was - he says - acting under a power of attorney given to him by Mrs Borngräber, of the amount claimed directly from the Applicant's bond account to the trust. It seems to me that on the second Respondent's own version it is clear that the R 600 000 belonged to Mrs Borngräber. After all it is she who had borrowed it from ABSA.

13. It was also contended in argument on behalf of the second Respondent that he did not have the authority of the trust to write the letter relied upon by the Applicant as an act of insolvency and that the letter did thus not bind the trust. In this regard his affidavit contains a bare and unsubstantiated denial that the letter he wrote amounts to an act of insolvency.

14. I do not think that there is any merit in this argument. The second Respondent wrote the letter not on behalf of a principal, but as a trustee. And there is no suggestion in the affidavit he filed that he did not intend to convey to the Applicant that the trust was unable to repay the amounted of R 600 000 claimed from it.

15. In *Reynolds v Mecklenberg* (Pty) Ltd 1996 (1) SA 75 (W) Stegmann J wrote: *"Where the allegations of fact relied upon by the ... applicant creditor are disputed by the respondent [the] ... Court is required to adopt an approach which is not permissible in motion proceedings generally, viz contrary to the general rule that any bona fide dispute of fact arising on affidavit evidence can only be resolved by referring the dispute to oral evidence or to trial ... [T]he Court is required to ... [consider] whether, so far as can be determined from the affidavits, there is a balance of probabilities which favours the conclusion that the requirements of section 10 of Act 24 of 1936 have been satisfied. If so, the requirements of s 10 will have been satisfied 'prima facie', and a provisional sequestration order may be issued."*

16. Having regard to the facts put up by the Applicant, and those contained in the affidavit made by the second Respondent, I am satisfied that the balance of probabilities favours the conclusion that the requirements of s 10 have been satisfied. It follows that a provisional order of sequestration must be made.

17. In the circumstances I make the following order:

(a) The Klaus en Laureen Trust [Registration No: IT4023/2007] [**"the Trust"**] is hereby placed under provisional sequestration in the hands of the Master of the High Court;

(b) that a rule nisi is hereby issued in terms whereof the Trust and all interested parties are called upon to appear before this Court on Wednesday 14 April 2010 at 10h00 to show cause why a final order in the following terms should not be granted:

(i) that the Trust be placed under final sequestration;

(ii) that the costs of this application shall form part of the costs of the administration of the Trust of the Estate;

(c) that service of this order be effected as follows:

(i) on second and third Respondents personally by the Sheriff of this Court;

(ii) on the Office of the South African Revenue Services;

(iii) on the beneficiaries of the trust by registered mail.

S J KOEN AJ