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

Case No: 26149/2011

In the matter between:

RALPH MICHAEL MARCUS	**First Applicant**
WALTER MARCUS	**Second Applicant**
and	
KENNETH PAUL MARCUS	**First Respondent**
JEANETTE MARCUS (Formerly Curtiz, born Zinn)	**Second Respondent**

JUDGMENT DELIVERED 15 MARCH 2012

ALLIE, J

[1] This is an application for the provisional sequestration of first respondent.

[2] Applicants are the biological brothers of First Respondent and have been his creditors since 2009 in respect of R582 030 which each applicant lent first respondent to enable him to repay the loan of R2 614 909 which first respondent owed to Xenotech (Pty) Ltd. The loan due to Xenotech had to be paid before dividends due to members, including applicants could be paid.

[3] The accountant of Xenotech, Mr Solomon, deposed to an affidavit in support of the financial statement of Xenotech which reflects the loan due to Xenotech and

the dividends declared. He also supports the allegations of applicants about the loan due by first respondent to the applicants.

[4] Second respondent is married out of community of property to first respondent and they have been separated since 2004. Second respondent instituted divorce proceedings against first respondent who opposes the relief sought.

[5] It is common cause that first respondent has made financial contributions toward the renovation and furnishing of second respondent's house which she acquired before the marriage.

[6] First respondent has been paying second respondent large sums of money in the 8 years that they have been separated. Applicants allege that those payments were made by preferring second respondent over first respondent's other creditors. Second respondent alleges that those payments were made for maintenance and other expenses.

[7] It is common cause that first respondent is factually insolvent and that his two preferential creditors are Investec and the SARS.

[8] It was pointed out by second respondent's counsel that first respondent has repaid further amounts lent to him by second applicant during the period

November 2011 to February 2012 and that the repayment to second applicant may be further instances of preferring one creditor over others.

[9] The first respondent does not oppose the application.

[10] Second respondent opposes the application on the bases that the applicants have not shown that there will be an advantage to creditors if the application was granted and the court should view the allegations of applicants with great caution because this is what is commonly referred to as a "friendly" sequestration. On second applicant's behalf, it was submitted that the real purpose of the application is to frustrate the finalization of the divorce, and as such it is an abuse of process.

[11] On applicant's behalf, it was argued that the provisions of section 23(5) of the Insolvency Act 24 of 1936 oblige a trustee of an insolvent estate to take control of any monies received by the insolvent from his occupation, which will not be necessary for his support.

[12] Section 23(6) states that an insolvent may be sued in any matter affecting status. There can be no question that the divorce matter may proceed even if the first respondent were sequestrated and that any maintenance order will not be affected by his sequestration.

[13] It is common cause that the first respondent earns approximately R165 000 per month. His creditors would accordingly benefit from an equitable distribution of the free residue derived from his monthly income.

[14] The applicants allege that the first respondent has been paying large sums of money to second respondent after second respondent made excessive demands on him, put pressure on him and threatened him.

[15] The first respondent has been paying second respondent without a court order for interim maintenance. He is in fact opposing her claim for maintenance in the divorce action.

[16] In terms of section 10 of the Insolvency Act, the applicants must show the following for an order of provisional sequestration, namely:

16.1 a liquidated claim of not less than R100;

16.2 that the debtor has committed an act of insolvency; and

16.3 there is reason to believe that it will be to the advantage of creditors

[17] It was argued on behalf of second respondent that the applicants do not allege that the monies they lent to the first respondent are due and payable and

they do not annex any proof of having demanded the money from first respondent. It is clear from the replying affidavit, that the money was payable on demand. It is further clear that the applicants waited for a period in excess of two years before bringing this application as they were affording first respondent an opportunity to pay the money he owed. It became increasingly clear to the applicants, as time passed, that the first respondent was not able to satisfy all demands for payment placed on him and accordingly borrowed more monies from second applicant.

[18] Since the applicants' claims against first respondent have been confirmed by the accountant, Mr Solomon, I am of the view that applicants have shown that they have a valid claim and this satisfies the first requirement of section 10.

[19] It is common cause that the first respondent is factually insolvent and therefore the second requirement of section 10 has been complied with.

[20] It is so, that in "friendly" sequestrations the court should establish whether the co-operation between applicant and respondent goes beyond mere capitulation and in fact becomes collusion in the sense of connivance. [see: **Bevan v Bevan and Ward 1908 TH 193 at 197** and **Esterhuizen v Swanepoel and Sixteen Others 2004(4) SA 89 (W) at 91 E**].

[21] In *casu*, the first respondent has co-operated with applicants and he supports the application. He does appear to have an ongoing attorney and client relationship

with applicant's attorneys and he has provided applicants with a letter stating that he is unable to pay them. That letter was clearly meant to constitute an act of insolvency in terms of section 8(g). However, the objective proof put up by the applicants have led the second respondent to concede that first respondent is factually insolvent and the applicants do not need to rely on the section 8(g) letter.

[22] Applying the criteria suggested in the Esterhuizen's case, I have considered whether applicants have set out the details of the loans and whether there is some other means of applicants obtaining satisfaction of their claims.

[23] Applicants set out with sufficient particularity how and when first respondent came to owe them money in excess of one million rand in total.

[24] The fact of the loans to respondent is confirmed in writing by the accountant.

[25] Should the applicants accept payment in instalments of the money due to them at this stage, it will have the effect of preferring them over other creditors and the court cannot be suggesting to applicants that they should do so, despite second respondent's argument that this course be followed.

[26] In **Beinash & Co v Nathan (Standard Bank of S A Ltd Intervening)1998(3) SA 540 (W)** at 541G the court found that the mere fact of good relations between the applicant and respondent does not by itself justify a

refusal of an order for sequestration. Something more is required for such refusal, for example, an abuse of process. Since the divorce process will not necessarily be frustrated by an order of sequestration and since it is common cause that the first respondent is factually insolvent and he has been preferring some creditors over others, I cannot conclude that the application is an abuse of process.

[27] On second respondent's behalf, it was submitted that the alleged impeachable transactions in which first respondent paid second respondent money, will not fall to be set aside because the payments were made by first respondent in fulfilment of his maintenance obligations to second respondent. The argument continues, that should those transactions not be impeached, the shortfall in first respondent's estate will be so large that there will be a danger of a contribution and accordingly the applicants have not shown that the sequestration will be to the advantage of creditors.

[28] Section 29 of the Insolvency Act deals with voidable preferences in instances where a debtor has disposed of his property not more than 6 months before the sequestration which has the effect of preferring one creditor above another when, at the time after he made the disposition, his liabilities exceeded his assets.

[29] Section 30 deals with a situation where the disposition was made with the intention of preferring one creditor over another at a time when the debtor's liabilities already exceeded his assets.

[30] Section 31 provides for collusive dealings which have the effect of preferring one creditor over another, being set aside.

[31] In response to applicants' allegation that second respondent made excessive demands on first respondent who paid an amount of R4 846 184, 26 over the period January 2010 to September 2011 to second respondent or on her behalf, second respondent states that she denies she made excessive demands and she cannot comment on the amount alleged but she admits that first respondent paid substantial amounts to her or on her behalf.

[32] Second respondent has not shown that all those payments were made in fulfilment of first respondent's maintenance obligations. All that the court was given was a bald allegation to that effect. *Prima facie,* the lack of a detailed explanation of those payments creates a reasonable belief that some impeachable transactions may be found to exist.

[33] When I consider that first respondent earns approximately R165 000 per month, then the shortfall created by the extent to which his liabilities exceed his assets ought to be addressed by his income as well as by money recovered from any impeachable transactions that are set aside.

[34] **Meskin *et al,*** in the work titled: "**Insolvency Law and its operation in winding up**" at page 2-21 states the following: "*In determining the reasonableness*

of the prospect of there being some payment to creditors in sequestration, however, the Court should take account of the significance itself of the very fact of the administration in insolvency;..."

[35] The authors refer to the case of **Chenille Industries v Vorster 1953(2) SA 691 at 699 F-G** where the following was said: "*Apart from the financial advantage resulting from sequestration, the Court must have regard, inter alia, to the superior legal machinery which creditors acquire by sequestration, 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 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.*"

[36] The court should accordingly take into consideration that a trustee will be able to do justice among creditors. I am of the view that a trustee will be best suited to establish whether any payments made by first respondent to second respondent fall to be set aside on the basis of the provisions of the Act mentioned above.

[37] I accordingly find that there is a prospect, that is not too remote, that some not negligible pecuniary benefit will result to creditors. [see: **Meskin & Co v Friedman 1948(2) SA 555 (W) at 559; London Estates (Pty) Ltd v Nair 1957(3) SA 591(D) at 592G to 593C; Gardee v Dhanmanta Holding & Others 1978 (1) SA 1066 (N) at 1069 G – 1070 A; Epstein v Epstein 1987(4) SA 606 (C) at 609**

B – E]. This leads me to conclude that there is reason to believe that the sequestration will be to the advantage of creditors

[38] I am satisfied that the applicants have made out a case for the relief sought.

It is ordered that:

1 The estate of the first respondent be placed under provisional sequestration;

2. That a *rule nisi* be issued calling upon the first respondent to show cause, if any, to this Honourable Court, **at 10h00 on Thursday, 19 April 2012** why;

2.1 his estate should not be placed under final sequestration;

2.2 the costs of this application should not be costs in the administration of the first respondent's insolvent estate;

3. Directing that this order be served on:

3.1 The first respondent at 12A Upper Kloof Street, Tamboerskloof, Cape Town;

3.2 The second respondent at 288 Kloof Road, Clifton, Cape Town;

3.3 The employees of the first respondent, if any, at 12A Upper Kloof Street, Tamboerskloof, Cape Town;

3.4 Every registered trade union representing the employees of the respondent, if any; and

3.5 The South African Revenue Service at 22 Hans Strijdom Avenue, Cape Town.

4. Second respondent shall bear her own costs.

ALLIE, J