IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6935/13

In the matter between:

MIMI MAGRIET GOBEL Applicant

and

KLAUS GUSTAV GOBEL Respondent

Date of hearing: 11 June 2013.

REASONS FOR JUDGMENT

FURNISHED ON 28 JUNE 2013

DAVIS AJ

[1] On 13 June 2013 I dismissed an urgent application brought by the applicant for the sequestration of the respondent's estate with costs on an attorney and client scale. Due to time constraints I was not able to furnish reasons at the time, and indicated that reasons for judgment would follow. These are the said reasons.

[2] The applicant and the respondent are currently engaged in divorce proceedings in which the applicant claims, *inter alia,* payment of lifelong maintenance from the respondent. Applicant launched this application on an urgent basis on 6 May 2013 for the provisional sequestration of the respondent's estate, together with interim interdictory relief preventing the respondent from encumbering or disposing of assets in his estate in the event of the application being postponed. When the matter first came before me on 13 May 2013, the respondent opposed the application and sought a postponement so as to afford him time to prepare answering affidavits. The respondent also opposed the interim interdict sought by the applicant. I granted an order on 14 May 2013 postponing the matter and regulating the filing of further papers. I also granted certain interim relief, albeit of a narrower scope than that requested by the applicant, and indicated that I would furnish reasons for so doing at a later stage.

[3] The respondent opposes the application for the sequestration of his estate on the grounds that the applicant lacks the requisite *locus standi* as a creditor, that he has not committed and act of insolvency, that he is not insolvent, and that the application has been brought for an ulterior purpose and is an abuse of process.

[4] The applicant alleges that the respondent is indebted to her in an amount of at least R 289 557.31 in respect of arrear maintenance owing to her in terms of an order in terms of rule 43 of the Uniform Rules of Court, which was granted by this Court on 8 December 2011 ('the order'). More particularly, she alleges that an amount of R 170 500.00 is owing to her in respect of short payment of the monthly cash portion of

R 34 000.000 owing in terms of the order, and that the balance is owing to her in respect of various expenses which the respondent was ordered to bear in terms of the order, including, *inter alia*, monthly bond payments and rates and taxes owing on the matrimonial home,[1] medical aid premiums, reasonable medical expenses, educational expenses for the minor children, reasonable repairs and maintenance to the matrimonial home, and salary and bonus for the full time domestic worker employed in the matrimonial home.It is common cause that the respondent was obliged to pay amounts totaling some R 140 000.00 per month in terms of the rule 43 order.

[5] The respondent alleges that he complied with the order until and including July 2012, and that in July 2012 he launched an application in terms of rule 43(6) ('the July rule 43(6) application) to vary the order on account of the fact that he could not comply with the terms thereof due to a material change in his circumstances. The applicant challenged his application on the grounds that his supporting affidavit was unduly prolix, whereupon respondent withdrew the July rule 43(6) application and replaced it with a less voluminous application in November 2012 ('the November rule 43(6) application).

[6] The respondent seeks in the November rule 43(6) application to have the order varied retrospectively with effect from 1 August 2012, *inter alia* by reducing the monthly cash maintenance payable from R 34 000.00 to R 10 000.00, directing him to pay the wages of a domestic worker employed twice a week rather than full time, placing certain limitations on the medical expenses payable for the applicant and the minor children,

[1] The matrimonial home is occupied by the applicant and the minor children born of the marriage.

and doing away with the obligation to fund the monthly bond payments and various other household expenses in connection with the matrimonial home.

[7] The respondent alleges that, since August 2012, he has paid reduced maintenance to the applicant in the approximate sum of R 35 000.00per month, which exceeds the revised amount contemplated in the varied order which he seeks. The respondent contends that, if he is successful in the rule 43(6) application, the effect will be to expunge any claim which the applicant may have against him for arrear maintenance owing in terms of the order. These allegations are not disputed by the applicant.

Locus Standi

[8] Section 9(1) of the Insolvency Act 24 of 1936 ('the Act') requires that an applicant creditor shall have a liquidated claim against the debtor for not less than R 100.00.

[9] The respondent argues that the effect of the November rule 43(6) application, which preceded the present application, is that the applicant does not have a liquidated claim against the respondent inasmuch as the *quantum* of maintenance payable by him with effect from 1 August 2012 is as yet to be determined.He argues that the applicant's alleged claim against him is at best conditional and un-quantified, and does not, therefore, qualify as a liquidated claim for the purposes of section 9(1) of the Act.

[10] The applicant's argument may be summarized thus: the order is valid until such time as it is set aside, and that the applicant's claims based thereon are fixed and unconditional. It is the respondent's right to pay a reduced amount which is conditional upon the retrospective variation of the order in the terms sought by him. Accordingly, as in the case where a creditor relies on a default judgment which a debtor seeks to have rescinded, a provisional order of sequestration ought to be granted and the return day postponed pending determination of the November rule 43(6) application. At best the application ought to be postponed pending the outcome of the said application, with appropriate interim relief granted along with the postponement.

[11] As a starting point it is necessary to consider the nature and purpose of rule 43, namely to provide for the temporary regulation of relevant matters,including maintenance, pending the final determination of matrimonial proceedings. Rule 43 provides for a speedy, inexpensive and robust assessment of the issues on motion proceedings.[2]Rule 43(6) allows for the Court to vary its decision under rule 43(5) in the event of a material change taking place in the circumstances of either party or a child. The temporary nature of relief under rule 43 is underscored by the fact that orders granted in terms thereof are not subject to appeal.

[12] The respondent has applied for relief in terms of rule 43(6) with retrospective effect from 1 August 2012. Counsel for both parties accepted that it is competent for the

[2] See *Levin v Levin* 1962 (3) SA 330 (W) at 331D; *Taute v Taute*1974 (2) SA 675 (E) at 676 C – D; *Grauman v Grauman* 1984 (3) SA 479 F.

Court to grant retrospective relief in terms of rule 43(6), and I could not find any authority to the contrary. I can see no reason in principle why a Court should be prevented from granting a retrospective variation of an interim maintenance order in terms of rule 43(6), where the interests of justice so require, having regard to the nature and purpose of the sub-rule. Indeed the order, which was granted on 18 December 2011, was made with retrospective effect from 1 October 2011.

[13] It is common cause that, if the respondent is wholly successful in obtaining the relief which he seeks in terms of the November rule 43(6) application, the respondent will not owe the applicant any amount in respect of arrear maintenance. If he is partially successful in reducing his obligations in terms of the order, the applicant's claim will be reduced to the extent of his success.

[14] The position, therefore, is that the amount which the respondent owes the applicant, if any, depends on the outcome of the proceedings which are pending in terms of rule 43(6).

[15] Mr.Studti, who appeared for the respondent, referred me to the case of *Gilliatt v Sassin*[3] in support of his contention that the applicant's claim is not liquidated. In that case the issue was whether or not the applicant creditor had a liquidated claim in circumstances where she relied on an amount due to her as heir in terms of the first and final liquidation and distribution account in her late mother's estate, which the

[3] 1954 (2) SA 278 (C).

respondent, the executor, had misappropriated out of the estate.The respondent took the point that the estate account had not yet been finally approved by the Master, and that it was possible that the Master might require amendments to the estate account, in which case the amount due to the applicant would be subject to alteration. The court was called upon to determine whether, in these circumstances, the applicant had a liquidated claim entitling her to apply for the sequestration of the respondent's estate. Van Winsen J held that the claim was not liquidated, reasoning as follows: [4]

'To be regarded as a liquidated claim the petitioner's claim must be fixed and determined. This Court, in the case of *Stephan v Khan* 1917 CPD 24 – a decision which has frequently been followed not only in this Court but in other Courts – held that "liquidated claim", as those words are used in sec. 9(1) of the 1916 Insolvency Act, mean a claim the amount of which has been determined by a judgment of the Court, by agreement or otherwise.

Now, in the present case the amount of the petitioner's claim – and indeed whether she will have a claim at all – is conditional upon whether the account in the estate of the petitioner's late mother is accepted in the form in which it presently stands. The account has, however, still to be advertised and objection may successfully be taken thereto, which might have the effect of reducing her claim or even eliminating it altogether. Mr.Meyerowitz stated that in any event she had a *prima facie* claim to the amount appearing in this account and that it was highly probable that an amount would eventually be found to be due to her which would be in excess of £ 50. This may be so, but to my mind this does not go far enough to satisfy the provisions of sec. 9(1), which require a liquidated claim. The position appears to me to be analogous to the case of an untaxed bill of costs. It has been held that the amount of such a bill cannot be regarded as constituting a liquidated claim.' (Emphasis added.)

[4] At 280A –D.

[16] To my mind the facts in *Gilliatt v Sassin*are on all fours with those in the present case and the reasoning of Van Winsen J is equally apposite in this instance. It matters not, in my view, that we are dealing with a court order in this case as opposed to an estate account in *Gilliatt v Sassin*. As I see it, the essential principle, which applies in both cases, is that where the amount of the claim, or indeed its very existence, is subject to alteration and therefore uncertain, it cannot be said to be liquidated for the purposes of section 9(1) of the Act.

[17] Mr. Morrissey, who appeared for the applicant, relied on the cases of *Kemp v Fourie Jnr*[5]and *Benade v Boedel Alexander*[6]in support of his argument that the pending application in terms of rule 43(6) does not divest the applicant of *locus standi,* and is solely relevant to the exercise of the Court's discretion whether or not to grant the relief sought.

[18] In *Kemp v Fourie Jnr.*[7] the Court was seized with the return day of a provisional order of sequestration. The provisional order had been granted on the strength of a default judgment, in respect of which an application for rescission, which had been launched after the granting of the provisional order, was pending. It emerged that the respondent had previously sent letters to the applicant demanding the rescission of the default judgment on the basis that the claim was disputed, and that the applicant had

[5]1939 OPD 188.

[6]1967 (1) 648 (O).

[7]*Supra n 5.*

failed to disclose this fact in his founding affidavit. The respondent took a point *in limine,* asking the Court to discharge the provisional order on the ground that the applicant had failed in his application to disclose material facts which might have influenced the Court in arriving at its decision. Fischer J declined to discharge the provisional order as he was of the view that the letters sent by the respondent had not evinced a serious intention to bring an application for rescission. He ordered that the sequestration application should be postponed to enable the application for rescission to be heard. He made the following remark, however, which is significant for present purposes:[8]

'… if at the hearing of the application for [provisional] sequestration it had appeared that the validity of the judgments on which the application was founded was challenged, and that there was a serious intention to reopen the matter, the Court would not have prejudged the issue by granting the provisional order.' (Emphasis added.)

[19] In *Benade v Boedel Alexander* [9]the Court was likewise seized with the return day of a provisional order of sequestration which had been granted on the strength of a default judgment. The period allowed for bringing an application for rescission had not yet lapsed, and the respondent requested an extension of the return day of the provisional order in order to give her an opportunity to make application for the rescission of the default judgment. The Court granted the postponement on the basis of the procedure followed in *Kemp v Fourie Jnr.*[10]

[8] At p 193.

[9] *Supra n 6.*

[10] *Supra n 5.*

[20] Unlike the situation in this case, in *Kemp v Fourie Jnr.*[11]and *Benade v Boedel Alexander* [12]the Court was faced with the situation where the question of rescission of the default judgment on which the creditor's claim was founded, only arose after the provisional order of sequestration had already been granted. The question of the effect of a pending rescission application on the *locus standi* of the applicant was not considered in these cases.

[21] In *Van den Bergh v Kyriakou,*[13]however, the Court dealt pertinently with effect of a pending application for rescission of the judgment claim on the *locus standi* of an applicant for provisional sequestration. In that case the Court was similarly seized with the return day of a provisional order of sequestration granted on the strength of a default judgment. On the day following the granting of the provisional order of sequestration, the respondent applied for the rescission of the default judgment, and therescission application was still pending on the return day. The applicant had failed to disclose in its founding affidavit that he had been unsuccessful in enforcing his claim in an earlier action, which had been defended by the respondent, and in which the magistrate had granted absolution from the instance.The applicant sought a postponementof the sequestration proceedings in order that the rescission application could be heard and determined. Caney AJ came to the conclusion that the request for a

[11]*Supra n 6.*

[12]Supra n 5.

[13]1954 (4) SA 151 (N).

postponement ought to be refused and the provisional order of sequestration discharged. He reasoned as follows in this regard:[14]

'I come to this conclusion because the petitioner has not established, as he is required to do the terms of sec. 12 (1)(a) of the Insolvency Act to do, that he has such a claim as is required by the terms of section 9(1). The question whether the respondent is or is not indebted to him in the sum he claims is in dispute in the magistrate's court and is as yet undecided.'

[22] In the light of the decision in *Gilliatt v Sassin,*[15] which I consider binding on me, and that of *Van den Bergh v Kyriakou,*[16] which I consider to be correct and persuasive, I am unable to accept Mr. Morrissey's submission that the pending rule 43(6) application, which has the potential to reduce, if not expunge, the applicant's claim against the respondent, is irrelevant to the question of the applicant's *locus standi.*

[23] I find that, inasmuch as the quantum – and indeed the very existence – of the applicant's claim is undecided pending outcome of the rule 43(6) application, the applicant has failed to establish a liquidated claim as contemplated in section 9(1) of the Act. The application therefore falls to be dismissed on this ground alone.

[24] I would in any event be inclined to dismiss the application as an abuse of process on the basis that the applicant was aware that her claim against the respondent is the

[14] At 152 H – 153 A.

[15] *Supra* n 3.

[16] *Supra n 13.*

subject of a dispute pending before this Court in another matter. I deal with this aspect below.

Act of Insolvency / *De Facto* Insolvency

[25] In the light of the conclusion which I have reached regarding *locus standi* and abuse of process, it is not necessary for me to deal at length with the questions of whether or not the respondent has committed an act of insolvency or is actually insolvent. The following brief observations will suffice for the sake of completeness.

[26] The applicant relies on a number of statements made by the applicant under oath in the July and November rule 43(6) applications, contending that these statements constitute acts of insolvency in terms of section 8(g) of the Act. In essence the statements convey that the respondent is unable to comply with the order due to a material change in his financial circumstances, that he cannot continue to fund the maintenance payments as he has depleted his access to funds and cannot incur further loans, that he is unable to meet the obligations imposed on him in the order without selling certain immovable properties, and that his financial situation is deteriorating every month.

[27] I doubt whether a statement in an affidavit deposed to in support of an application for variation of an interim maintenance order in terms of rule 43(6)

qualifiesas an act of insolvency in terms of section 8(g) of the Act. I consider that there is much to be said for the view that the word ‘debt’, as used in section 8(g) of the Act,contemplates an obligation which is both final and undisputed, and that the temporary nature of an order in terms of rule 43, which is by its nature variable depending on financial circumstances and need, therefore lacks the element of finality to qualify as a ‘debt’ for purposes of section 8(g). In the same way that a liquidated claim is required to found an application for sequestration, it seems to me that the debt referred to in section 8(g) must likewise be certain and not subject to dispute, failing which the inference of inability as opposed to unwillingness to pay cannot be drawn.

[28] In the present case the respondent asserts that he is not able to fund interim maintenance payments on the level originally ordered. While he explicitly concedes his inability to pay the amount originally stipulated in the order, his case is that he should not be obliged to pay that amount, and that his altered circumstances warrant the amendment of the order to provide for a lesser amount which he is able to pay. To my mind a reasonable person in the position of the applicant would not understand the respondent’s statements in support of the rule 43(6) applications as notice of inability to pay a debt, but rather as an indication that the respondent is unwilling to pay as he disputes his obligation to pay in terms of the order and seeks a variation thereof, as expressly catered for in terms of rule 43(6).

[29] I do am not persuaded, therefore, that the respondent has committed an act of insolvency as contemplated in section 8(g) of the insolvency act.

[30] As regards the question of whether or not the respondent is *de facto* insolvent, it is common cause that the respondent's assets exceed his direct liabilities by almost R 5 000 000.00, and that the decisive factor is the value to be placed on the extent of his suretyship liabilities and the value of hisconcomitant rights of recourse against the principal debtors.

[31] The respondent has signed five deeds of suretyshiptotaling some R 13 455 000.00 in respect of amounts owed by various entities in which he has an interest. The main suretyship liabilities, for present purposes, are:

31.1. an amount of R 4 500 000.00 in favour of Absa Bank Limited ('Absa') in respect of a mortgage loan in favour of the C J Trust, secured by a bond over the matrimonial home held in the name of the C J Trust;

31.2. an amount of R 4 100 000.00 in favour of Investec Bank Limited ('Investec') in respect of a mortgage loan in favour of Sunflox6 CC ('Sunflox') secured by a bond over Unit 240 Pearl Valley ('Unit 240'), held in the name of Sunflox;

31.3. an amount of R 2 500 000.00 in favour of Nedbank Bank Limited ('Nedbank') in respect of a mortgage loan in favour of Sunflox secured by a bond over Unit 18 Pearl Valley ('Unit 18'), held in the name of Sunflox.

[32] It appears from a report compiled by Mr.Gemmel, the respondent's accountant, that the liabilities of the C J Trust exceed its assets by some R 3 000 000.00 and that Sunflox is in provisional liquidation, and that its liabilities exceed its assets of R19 million by some R 5 million.

[33] In *Millman and Another NNO v Masterbond Participation Bond Managers (Pty) Ltd (under Curatorship) and Others ('Millman')*[17] it was held that, in determining whether the liabilities of a surety and co-principal debtor exceed his assets, the obligations undertaken by him as surety and co-principal debtor must be included amongst his liabilities, and that, to the extent that an amount is recoverable pursuant to a right of recourse, a corresponding amount must be taken into account as an asset.

[34] In *Absa Bank Ltd v Scharrighuizen, ('Scharrighuizen')*[18]Griesel J referred to *Millman* and observed that:[19]

'This *dictum* makes it clear that the value of the right of recourse which must be taken into account as an asset will be determined in each particular instance by 'the extent to which an amount is recoverable pursuant to the right of recourse.'

[35] He went on to say that, in the case where the principal debtor is insolvent, a surety who has discharged the principal debt may exercise a right of recourse by

[17]1997 (1) SA 113 (C) at 123 B - C.

[18]2000 (2) SA 998 (C).

[19]At para [23].

proving a claim against the estate of the principal debtor, and that the extent of the surety's right of recourse is entirely dependent on the anticipated dividend (if any) to be expected from the insolvent estate of the principal debtor.[20] Where, however, the surety has not discharged the principal debt, as is here the case, he has only a notional right of recourse against the estate of the principal debtor. Griesel J said of such a right that:[21]

'(It) is at this stage both conditional and unliquidated and cannot be proved against the estates of the principal debtors in terms of s 48 of the Insolvency Act. As a potential claim its value is, at best, nebulous in view of the desperate financial position of the various principal debtors.'

[36] Mr. Morrissey submitted that it would be fair, based on the information contained in the Gemmelreport of, to work on a projected dividend of 50 cents in the rand in respect of Sunflox and 76 cents in the rand in respect of the C J Trust. On this basis he arrived at a figure of R 7 492 946.00 to be ascribed to the value of the respondent's notional rights or recourse in respect of the suretyships. The result of that exercise is that the respondent's suretyship liabilities exceed the value of his rights of recourse by some R 5.5 million, and his total liabilities exceed his assets by some R 545 000.00.

[37] I cannot fault Mr. Morrissey's calculations or the logic of his argument. It seems to me that it must be accepted that, on the papers before me, the respondent appears *prima facie* to be insolvent at this point in time.

[20] At para [25] and [27].

[21] At para [28].

[38] The particular circumstances of this case, however, are such that I would exercise my discretion against granting an order for the provisional sequestration of the respondent's estate, for the following reasons.

[39] The asset deficit on the papers of R 545 000.00 is relatively small. The calculation assumes a scenario where the respondent discharges the suretyship liabilities and then makes a concurrent claim against the insolvent entities in respect of his right of recourse. While this is technically correct, it ignores the practical reality that, in the present case, the respondent is illiquid and unable to pay his suretyship liabilities without the sale of the underlying assets. While the relevant financial institutions might be entitled in theoryto sue respondentand take judgment against him as co-principal debtor,[22] the fact of the matter is that they will be forced to execute against the bonded properties to recover the amounts owing. If the value of the relevant properties is sufficient to discharge the principal debts, that will be the end of the matter.

[40] In the case of the C J Trust, the value of the matrimonial home appears to be somewhere betweenR 5.5 million and R 6.3 million, which exceeds the respondent's suretyship liability in the amount of R 4.5 million.It appears from the papers that Absa is about to commence legal proceedings against the C J Trust for non-payment of the bond installments. There is no indication as to whether or not Absa intends to simultaneously institute action against the respondent as surety.

[22] It is assumed, for present purposes, that the respondent bound himself as surety and co-principal debtor in favour of Absa, Investec and Nedbank, as is ordinarily the case in standard form suretyships prepared by these financial institutions.

[41] In the case of Sunflox, Absa and Nedbank, as secured creditors, stand to be paid in full from the proceeds of the two Pearl Valley properties. Unit 240 was recently valued at approximately R 6.75 million and Unit 18 at approximately R 6.2 million by Pearl Valley Properties. The respondent alleges that, even on a forced sale basis, the two Pearl Valley properties are expected to yield 75% of market value. This is not disputed by the applicant. Thus the expected yield from Unit 240 is R 5.062 500.00, which exceeds the bond of R 4.1 million, and the expected yield from Unit 18 is R 4.65 million, which comfortably exceeds the bond of R 2.5 million.

[42] I therefore consider that there are good prospects that the respondent'ssuretyship liabilities will be considerably reduced, if not entirely discharged, from the proceeds of the sale of the relevant mortgaged properties in the not too distant future – in the case of Sunflox because a liquidation is already underway, and in the case of the C J Trust because Absa is on the point of foreclosing on the bond. If and when that happens, the respondent's financial situation will improve markedly and his balance sheet will reflect that he is solvent.

[43] To sum up, itappears that the respondent's financial situation is in flux at this point in time and is likely to settle and improve in the next few months. It seems to me that his liquidity problems are due in no small measure to the acrimonious divorce and concomitant lack of co-operation and sound financial management between the parties. The respondent's ability to earn a living would likely be impaired were his estate to be

sequestrated. In all the circumstances I consider that it would be premature and unduly prejudicial to respondent to grant a provisional order for the sequestration of the respondent's estate at this stage. Were it not for the conclusion I have reached with regard to *locus standi* and abuse of process, I would have been inclined to postpone the application for a number of months pending further developments relating to the sale of the relevant bonded properties owned by Sunflox and the C J Trust.

Abuse of Process

[44] It is trite law that sequestration proceedings are not designed for the resolution of disputes at to the existence or non-existence of debts, and that it is an abuse of the process of the court to resort to such proceedings to enforce payment of a claim which is disputed on *bona fide* and reasonable grounds.[23]

[45] The applicant was well aware, long before this application was launched, that the respondent had applied in terms of rule 43(6) for a retrospective variation of the order upon which her claim is based, and that the outcome of the rule 43(6) application could have the effect of substantially reducing, if not entirely expunging, her claim for arrear maintenance. The applicant did not make full disclosure of these facts in her founding

[23]See *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 347 – 348; *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980 B – D; *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218 E – 220 B; *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) at 116 C – F; Meskin*Insolvency Law* para 2.1.5 and cases cited at footnotes 9, 9B and 9C.

affidavit[24] in circumstances where it was incumbent upon her to have done so. This omission alone amounts to an abuse of process.

[46] In my view it was both premature and inappropriate, in these circumstances, for the applicant to make use of sequestration proceedings in an attempt to enforce payment her claim for arrear maintenance.There were more suitable remedies at the applicant's disposal for this purpose.In *Kook v Kook*[25]My burgh J expressed the view that the enforcement of maintenance orders *pendentelite* does not lie in the field of insolvency proceedings but in contempt of court proceedings. It was open to the applicant to issue a writ of execution against the respondent for the amount of the arrear maintenance, or to launch contempt proceedings against respondent based on his failure to comply with the order.

[47] If the applicant was genuinely concerned about the apparent delay in finalizing the November rule 43(6) application, she could have brought matters to a head by taking one of these steps.It is evident from the papers, however, that the applicant has not yet filed an affidavit in answer to the November rule 43(6) application, and appears to be in no hurry to do so. That being the case she can hardly be heard to complain that the applicant is delaying the finalization of the November rule 43(6) application.The fact of the matter is that she deliberately chose to resort to the drastic remedy of

[24] The applicant's references to the pending November rule 43(6) application are oblique and self-serving. There is no pertinent disclosure of the retrospective nature of the relief sought and the potential effect thereof on the applicant's claim.

[25]1974 (2) SA 657 (T) at 660 A - B.

sequestration rather thanmaking use of one of the conventional remedies available to her for the enforcement of maintenance claims.

[48] It is well established that it is an abuse of process to make use of sequestration proceedings where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* achievement of the sequestration of the debtor's estate for its own sake, but for some ulterior motive.[26]

[49] It is common cause that the applicant has hitherto held the view that the respondent is a wealthy man of means, and that his professed inability to comply with the order was due to 'unwillingness to pay rather than an inability to do so'. The bringing of this application represents a *volt face* on the part of respondent which calls for an explanation. The applicant says in this regard:

'I have historically treated his allegations of financial impotence with scepticism because they fly in the face of certain of his conduct which suggests that he is a man of means. However, **if it is so** that his financial position is as dire as he says it is, then his estate must be sequestrated. After reflection, and based on an objective review of the respondent's financial position, I brought my application to sequestrate him.' (Bold emphasis added.)

[50] This explanation strikes me as hollow and contrived. The applicant does not say when and how she conducted the 'objective review of the respondent's financial position' which made her change her mind about his financial situation. The founding

[26] Meskin*Insolvency Law* para 2.1.5 and cases cited at footnotes 2 and 9A.

affidavit does not disclose any new information which came to light which persuaded her to alter her views in this regard. The applicant's attempt to rely on the fact that the respondent is selling certain of his assets is opportunistic and does not avail her. It is clear from the papers that the respondent has made no secret of the fact, and the applicant has been aware for some time, that he intended to sell certain assets so as to reduce debts and free up funds. As far back as July 2012, the respondent stated as followsin an affidavit:[27]

'At the previous Rule 43 hearing I stated under oath that the Respondent and I needed to liquidate assets in order to reduce our collective debts, as well as those of the entities which we have an interest in, which would release funds to maintain ourselves and reduce monthly liabilities. I was hopeful that the aforesaid would indeed happen but to date hereof no substantial assets have been liquidated and I am unable to obtain further funds to adhere to the Rule 43 order.'

[51] To my mind the applicant's words, 'if his financial position is as dire as he says it is, then he must be sequestrated'are carefully chosen and cynical. They reveal that the applicant herself does not hold the *bona fide* view that the respondent is insolvent. The respondent alleges – and it is nowhere denied – that the applicant has rejected a number of divorce settlement offers involving millions of rands on the basis that the amount offered by the respondent is too low. Were the applicant genuinely of the view that the respondent is insolvent and unable to meet her demands, she would not be holding out for a more generous divorce settlement.

[27] In support of the July rule 43(6) application.

[52] On 3 April 2013, in the context of ongoing divorce settlement negotiations, and approximately one month before the present application was launched, the applicant sent an email to her attorney, which she copied to the respondent, in which she stated as follows:

'I am instructing you to continue with the sequestration procedure tomorrow 4 April 2013 after 12 noon, should our offer not be met.
Three years of negotiating a reasonable settlement with the other side will come to an end. We are too far apart.
Klaus is who he is, he will not change. My parents and I have peace with this decision.'
(Emphasis added.)

[53] To my mind the fact that this letter was copied to the respondent is indicative of an attempt to bully the respondent into giving in to her demands using the threat of sequestration as a weapon. The applicant candidly admits that she would not have brought the present application if the divorce had been settled and the respondent had complied with the terms of the settlement.

[54] In all the circumstances the conclusion is inescapable, in my view, that the applicant's objective in launching the present application was not a *bona fide* attempt to bring about a sequestration of the respondent's estate for its own sake, but a tactical manoeuvre aimed at pressuring the respondent into settling the divorce on her terms. The application was therefore brought for an ulterior motive, and falls to be dismissed as an abuse of process.

The Interim Order granted on 14 May 2013

[55] In her notice of motion the applicant sought an order that, in the event of the sequestration application being postponed, the respondent be prohibited from encumbering or disposing of his assets. This relief was opposed by the respondent.

[56] Mr.Studti referred to the case of *Knox D'Arcy Ltd and Others v Jamieson and Others*[28] *('Knox D'Arcy)*andargued that the applicant was not entitled to the interdictory relief sought as she had failed to show that the respondent was getting rid of funds, or was likely to do so, with the intention of defeating the applicant's claim.

[57] In *Knox D'Arcy* the Court was dealing with an application for an anti-dissipation interdict pending the outcome of an action for damages, where the applicant asserted no proprietary or quasi-proprietary interest in the respondent's assets. It was held that in these circumstances an applicant is required to show an intention on the part of the respondent to defeat the claims of creditors.Grosskopf JA stated in this regard that:[29]

'(T)he effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment

[28]1996 (4) SA 348 (A).
[29]At 372 H – I.

dealing with special situations which might arise, for instance, by contract or under the law of insolvency.'

[58] The applicant did not make out a case in her founding affidavit that the applicant's conduct in disposing of certain of his assets was *mala fide.* It was apparent from the contents of an annexure to applicant's own papers that the respondent had for some time been contemplating the sale of assets with a view to reducing debts and releasing funds.[30]

[59] The applicant's claim lay in respect of arrear maintenance owing to her in terms of a Court order. In that respect her case differs from that of *Knox D'Arcy*, where the applicant had not yet obtained judgment in respect of his claim for damages.To my mind a claim for arrear maintenance owing in terms of a Court order, albeit that an application to vary the order is pending, may be considered one of the special situations contemplated by Grosskopf JA, where justice requires that a respondent be compelled to retain funds in his patrimony for payment of the claim, particularly where the maintenance of minor children is involved.

[60] A further relevant consideration was that the interdictory relief was sought against the backdrop of an application for the sequestration of the respondent's estate on the basis of his actual insolvency.The applicant voiced the concern that, given the respondent's precarious financial situation, he would use the funds to pay his more

[30] Annexure MMG 12.

pressing creditors. To my mind the context of insolvency proceedings likewise constituted a special situation justifying relief aimed at compelling the respondent to preserve assets in his estate.

[61] The evidence before me showed that the respondent had sold his interest in Darling Golf and Country Estate for R 700 000.00, but that the proceeds of the said sale had not yet been received. Given the brief period for which the interim relief would operate, I considered that the balance of convenience clearly favoured the granting of the interim relief sought, but only to the extent of the quantum of the applicant's claim. [31]

[62] For these reasons I considered it appropriate, on 14 May 2013, to grant interim relief which was significantly narrower in scope than the relief sought by the applicant and was calculated to operate only until the finalization of the sequestration application, which was due to be heard on 11 June 2013. I therefore made an order directing that:

'On receipt by respondent of the proceeds of the sale of his interest in Darling Golf and Country Club Estate (Pty) Ltd, the respondent shall place R 290 000.00 of such proceeds in trust with his attorneys, such proceeds to be held in an interest bearing account pending the determination of the sequestration application or the rule 43(6) application, whichever is finalized first.'

Costs

[63] Mr.Studti argued that, in the event of my concluding that the application was an abuse of process, it would be appropriate for me to grant costs on the attorney and

[31] See *Knox D'Arcy Ltd and Others v Jamieson and Others* 1994 (3) SA 700 (W) at 710 H – I.

client scale, both as a punitive order and with a view to affording the respondent a fuller indemnification for his costs. Mr. Morrissey did not strenuously oppose the granting of attorney and client costs in the event that I made that finding; indeed he appeared to concede that such an order would be appropriate in that event.

[64] There is ample precedent for the granting of attorney and client costs against a litigant in circumstances where there has been an abuse of process.[32] I have found that the application was an abuse of process on two scores, namely that the applicant's claim was, to her knowledge, disputed, and that the application was brought for an ulterior motive. The respondent was put to unnecessary expense in resisting the application. In all the circumstances I consider it both fair and appropriate to grant costs on the scale of attorney and client, as requested.

Conclusion

[65] In the result I ordered that the application be dismissed with costs, such costs to be paid on the scale of attorney and client.

_____

D.M. DAVIS, AJ

Acting Judge of the High Court

[32] See A C Cilliers*Law of Costs*para 4.18, and particularly the cases cited at footnotes 4 and 9.