REPORTABLE

10924/2015

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 10924/2015

DATE: 4 DECEMBER 2015

In the matter between:

J V ATTORNEYS Applicant

And

L P VERMEULEN & ANOTHER Respondent

J U D G M E N T

DAVIS, J:

Introduction

On the 19th June 2015 applicant obtained a provisional sequestration order against respondent for whom applicant was acting as an attorney. The intervening creditor appeared to be unaware of this application and became aware of it only after the provisional order had been granted. Accordingly, the intervening creditor brought an application on the 28th August

2015 for leave to intervene in order to argue that the final

order of sequestration sought by applicant should be refused.

Briefly applicant is a creditor of respondent in the amount of R13 455.00. According to applicant, respondent only has assets in the amount R170 000,00 being a sum of money that was paid into a trust account of attorneys, Thompson Wilks, who also at a point in time represented respondent. According to the papers, applicant envisages that a dividend of 6 cents in the Rand will be payable respondent's creditors.

The background to the dispute which constitutes the obstacle to a final order of sequestration being granted can be summarised albeit briefly, as follows: In terms of a consent paper which was incorporated in an order of court on the 24th October 2014 respondent and Gysbert Johannes Vermeulen, the previous husband of respondent, agreed that, in full and final settlement of any proprietary claims they may have or may have had against each other, Vermeulen would make payment of R3 200 000.00 to the Chianti Trust (the 'trust') of which R2 700 000.00 would be paid within 10 days of receipt of a letter from the Masters Office or date of decree of divorce, whichever date occurred last, whereafter the balance of R500 000.00 would be payable in equal instalments of R100 000.00 each on or before the 31 December 2014 for a period of five years.

Apart from the assets in the amount of R170 000.00 and maintenance payable to respondent terms of the settlement agreement, the intervening creditor contended that the respondent had a claim of at least R3.2m against the trust which, in the intervening creditor's view, should be reflected as a loan account in respondent's favour in the records of the trust. The intervening creditor contends that Mr Vermeulen was required to pay this amount in favour of the respondent in settlement of respondent's monetary claim but, instead paid the amount to the trust, in discharge of his proprietary obligations.

According to the intervening creditor, this was not a donation by Mr Vermeulen or the respondent to the trust. This averment has not been denied by applicant, respondent or Mr Vermeulen. Therefore, the intervening creditor's argument runs that the money was received by the trust from Mr Vermeulen in payment of the debt owing to respondent. There is no legal cause for the payment on behalf of respondent to the trust, other than a loan that now stands to be reflected as a loan account owing by the trust to the respondent. Accordingly the respondent should reflect an additional R3.2m in her assets.

Mr Nel, who appeared on behalf of the intervening creditor,

submitted that the consent paper made it clear that this was the legal position on a clear interpretation of the settlement agreement and hence the R3.2m was an asset in respondent's estate.

The relevant section of the consent paper reads thus:

> "In full and final settlement of any proprietary claims the parties may have or may have had against each other they agree as follows:
>
> 6.1 First defendant will keep plaintiff on his current medical plan or a similar scheme until 31 December 2014.
>
> 6.2 First defendant will be entitled to remain on the current cell phone contract until the date of the expiry of the cell phone contract with a limit of R1 000.00 per month until date of expiry of the cell phone contract.
>
> 6.3 Plaintiff shall be entitled to retain her motor vehicle with registration number CY130 as her sole property and will transfer such motor vehicle into the name of the Chianti Trust.
>
> 6.4 First defendant shall make payment of R3 200 000.00 to the Chianti Trust as follows:

6.4.1 An amount of R2 700 000.00 will be paid into the Chianti Trust's bank account within 10 days of receipt of the letter of executor from the Masters Office or date of decree of divorce whichever date occurs last.

6.4.2 The balance of R500 000.00 will be paid in equal instalments of R100 000.00 on or before 31 December from date of divorce for a period of five years."

Whatever the construction which is required to be placed on these clauses of the settlement agreement might be, it should be placed on record that this Court has not had the benefit of a copy of the trust deed of the trust nor any of the trust accounts. Appellant informs the Court, in his replying affidavit, however, that the respondent and her children are the trust beneficiaries and that the respondent is a co-trustee of the trust. The question that requires some determination is whether the construction of the consent papers urged upon this Court by the intervening creditors justified in the circumstance.

There are two aspects on which I wish to concentrate. Mr Nel

submitted that clause 6.3 made it clear that Mr Vermeulen would discharge the proprietary obligations of the divorce by settling property on the respondent pursuant to which she would then transfer such property into the trust. On this construction it would be clear that what was transferred would have been a loan by the respondent to the trust. Therefore it would follow that an asset had to be added to the calculation of the respondent's assets for the purposes of assessing her solvency.

The clause is not without pointers to interpretation. Clause 6.3 provides that plaintiff retains a motor vehicle as her property. That vehicle is then transferred into the name of the trust. I would have thought that, if this clause was disputed with a measure of cogency, it could be argued that, unless the trust paid value for the property, it would have either been a donation or a transfer on loan account. So much is clear by way of the emphasis of the phrase "as her sole property" as it appears in clause 6.3. By contrast, clause 6.4, which is the clause in dispute, makes no such provision. All it says is that Mr Vermeulen will make payment to the trust.

The question therefore that has to be asked is whether this payment constitutes property in the name of the respondent which, in turn, was lent by the respondent to the trust. In this

case an asset has to be reflected in respondent's estate. Without the benefit of the trust deed or the trust accounts and, given the wording as employed in 6.4, this Court is constrained for guidance to have recourse to the legal nature of a trust. In Land and Agricultural Bank of South Africa v Parker 2005(2) SA 77 (SCA) at paras 10-11, Cameron JA (as he then was) said:

> "A trust is an accumulation of assets and liabilities. These constitute the trust estate which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality, it vests in the trust and must be administered by them and it is only through the trustees specified as in the trust instrument that the trust can act."

Thus, if Mr Vermeulen transferred assets to the trust, absent any evidence to the contrary, the common law of trusts would apply. The assets so transferred would be assets of the trust.

This is not a surprising conclusion as this approach features significantly in the case of Estate Welch v Commissioner for SARS [2004] 2 ALL SA 586 (SCA), the importance of which bears some attention in this judgment. In this case, Mr Welch married twice. His second marriage was dissolved by a decree

of divorce in 1996. The action was unopposed because the parties had negotiated a consent paper, which governed a range of matters, including the proprietary consequences of the marriage and maintenance for both Ms Welch and the minor child.

In terms of the consent paper, the parties agreed to the setting up by Mr Welch of a trust and the transfer to it of assets to enable the trustees to fulfil the obligation to be undertaken by them. The primary obligation of the trustees was to ensure that the provision of the consent paper which had been made an order of court was so implemented. The consent paper recognised that Mr Welch had a legal obligation to pay rehabilitative maintenance to Ms Welch as well as to contribute to the maintenance of the minor child. It provided that in discharge thereof, Mr Welch would settle certain assets upon a trust to be created with the specific intention of providing income for purposes, thereafter set out in the consent paper.

This is indeed what then happened. The question before the Court was whether a donation had been made by Mr Welch to the trust. Marais JA at para 39 said the following:

"There is no intention to make a donation in any sense of

the word. The funds settled upon the trust are not intended to be given to anybody as a gift; they are intended to be used and settle legal obligations which burden the settlor. The trustee undertakes to fulfil the mandate given to him and in fulfilling it discharges the obligations of the settlor to the relevant third parties. If the mere fact that the trustee in his own right has not paid the settlor anything or given some *quid pro quo* (other than an undertaking to fulfil the mandate imposed by the trust deed) for the funds given to him for that purpose is to be the sole criterion for imposing a liability to pay donations tax, it is difficult to conceive of any case in which a trust can be established and assets transferred to trust where a liability for donations tax would not arise."

The learned judge of appeal then concluded at para 44:

"In the present case, the facts are such that whatever view one takes of the definition of 'donation' there has been no donation of R3 216 760,00. If one accepts that a motive of sheer liberality or disinterested benevolence remains an essential element in the inquiry and has not been excluded by the definition, it is clear that the assets were not settled upon the trustees with any such motive. The primary and

dominant purpose was to enable them to satisfy the legal obligations which the consent paper which had been an order of court imposed upon Mr Welch." (my emphasis)

In my view, this case is relevant to the present dispute. The taxpayer in that case had proprietary obligations which he owed to his ex-wife. They were discharged by way of a settlement of money to a trust. There is no suggestion that the assets were not those of the trust. Indeed this position was the basis upon which the entire judgment turned.

It must follow therefore on the strength of this case and the law relating to trusts, that, absent clear evidence to the contrary, which is certainly not available to this Court, it is the trust which is the owner of the amount of money which the intervening creditor claims to be a loan account owed to respondent. There is no basis for the latter conclusion, however dissatisfied the instructing attorney, who acted on behalf of the respondent, might feel about the matter. In short, it is not possible to include the R3.2m as an asset within the estate of the respondent.

This is not the end of the matter. Much was made of the nature of this application. Mr Nel contended that, having regard to the content of the applicant's founding affidavit and the various

arguments advanced by applicant on behalf of respondent against the intervening creditor, it was clear that the applicant was well disposed towards the respondent and that the application was aimed, in his view, solely at giving respondent relief against an intervening creditor. It was therefore a friendly sequestration which had to be dealt with by the court with the most greatest of care.

Indeed this caution is correct. However the fact that an application for compulsory sequestration is brought by a creditor, who is prepared to cooperate with the debtor or who is motivated partly by a desire to assist the debtor, does not preclude the granting of the sequestration order. See for example Maritz t/a Maritz and Kie Rekenmeester v Walters and Another 2002(1) SA 689 (C) at 703. Courts have accepted, as they must, that as a matter of policy, friendly sequestration, such as the present, have to be scrutinised with a great deal of care to ensure that the requirements of the Act are not subverted and that the interests of creditors are not prejudiced. See for example, Epstein v Epstein 1987(4) SA 606 (C) at 611.

But, in this case there is, absent the claim of R3.2m, abundant evidence that the respondent is insolvent. On the basis of these papers a small dividend will be paid to the creditors. This

dividend may not produce a princely purse but, whatever arguments have been raised by Mr Nel, it appears that there is little reason to contend that some dividend sufficient to justify a friendly sequestration notwithstanding, a careful scrutiny, as is required in such applications, would justify a discharge of the provisional order.

In summary, the main argument of the intervening creditor was that the respondent is insolvent. There is no evidence that has been put up by the intervening creditor, other than some inferences which cannot irresistibly be drawn from the papers, that the respondent is not solvent. The secondary argument which was not pressed with the same level of enthusiasm, namely, that the order should be denied on the basis that there is no advantage to creditors, cannot be justified on these papers.

Accordingly, on these facts the provisional order of 19 June 2016 is made final.

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DAVIS, J