THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 21284/2015

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

(Reg No: [1…….])

And

CHARLES CILLIERS POTGIETER **Defendant**

(ID No: [5……..])
Address: [5…….] [T…….] [V……], [T…….], Western Cape
Marital Status: Divorced

CHRISTA POTGIETER **Intervening Party**

Coram: **KOEN AJ**

Heard: **3 March 2016**

Delivered: **9 March 2016**

JUDGMENT

KOEN AJ

[1] This is an application by the Standard Bank of South Africa Limited ("the Bank") for the provisional sequestration of the estate of the respondent, Mr Potgieter.

[2] The application was issued on 5 November 2015 and set down for hearing on 19 November 2015. On 19 November 2015 when the matter was called an attorney appeared on behalf of the respondent and indicated that he opposed the application. Accordingly, on that date, and by agreement, an order postponing the application for hearing until 3 March 2016 on the semi-urgent roll, and regulating the filing of further papers, was made. In terms of that order the respondent was directed to file his answering affidavits, by 17 December 2015.

[3] No answering affidavits were filed by the due date. On 18 December 2015 and 12 January 2016 the applicant's attorney addressed an electronic mail to the respondent's attorney in order to point out the fact that the respondent had not complied with his obligation to file answering affidavits by 17 December 2015. The first communication went without a response. The second communication, which reminded the respondent's attorney that the matter was to proceed on 3 March 2016, and stated that any application for a postponement would be resisted, elicited a one-word response being *"Noted!"*. Until the day of the hearing that is the last that was heard of the respondent.

[4] On the afternoon of 1 March 2016, less than 48 hours prior to the hearing of the application, an application for leave to intervene in the sequestration application and, if leave was granted, for a postponement of the application, was delivered. The applicant for leave to intervene is the ex-wife of the respondent, Mrs Potgieter. She stated that she had become aware of the sequestration application for the first time on 26 February 2016. Although the notice of motion filed in support of the application for leave to intervene did not state that Mrs Potgieter intended to oppose the sequestration application it is evident from the content of her affidavit that that is her intention. The affidavit filed in support of the application for leave to intervene

does not hint at the reason why a postponement was sought by her. The application for leave to intervene and for a postponement was opposed by the Bank.

[5] In *Ansari and Another v Barakat and Other, In re: Barakat v Copper Sunset Trading 424 (Pty) Ltd and Others* (5530/2011) [2012] ZAKZDHC 1 (16 January 2012) the test for intervening as a party in these circumstances was expressed to be as follows:

> *"[9] A party seeking to intervene in proceedings can either do so in terms of rule 12 of the Rules of Court, or in terms of the common law.*
> *[10] A party seeking leave to intervene must prove that:*
> *(a) he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the court; and*
> *(b) that the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a prima facie defence to the relief sought in the main application.*
> *The test to be applied in determining whether or not a bona fide defence to the main application has been demonstrated is the same as the one that applies to warding off summary judgment."* (footnotes omitted).

[6] It was common cause between the Bank and Mrs Potgieter that she is a creditor of the respondent, in the amount of R 7.2 million, in respect of the respondent's maintenance obligations towards her, set forth in their divorce order. That she has a direct and substantial interest in the sequestration application is clear. She opposes the granting of a provisional sequestration order on the basis, she contends, that it has not been shown that it would be to the advantage of creditors for such an order to be made. Applying the principles regarding intervention described in *Ansari* it is necessary only to consider, at this stage, whether Mrs Potgieter has shown that there is a reasonable possibility that the defences to the provisional sequestration application she has advanced may succeed. One undertakes this analysis of the case put up by her without investigating the defence and deciding whether the probabilities of success are with her or not (see *Venter v Venter* 1971 (3) SA 848 (NPD) at 51G).

[7] Mrs Potgieter is a creditor in a substantial amount, and has contended that there will be no advantage to creditors. To be granted leave to intervene she does not have to satisfy the Court that there will be no advantage to creditors, only that there is a reasonable possibility that her

opposition to the provisional order may succeed. What is in issue at this stage is whether Mrs Potgieter has done enough to be permitted to intervene and be heard in regard to the main case, not whether or not her opposition to the relief sought in the main case is valid. Mrs Potgieter has satisfied me that there is a reasonable possibility that her opposition to the granting of a provisional order of sequestration may succeed. She is entitled to be granted leave to intervene in this application, and to be heard on the question whether *prima facie*, there is reason to believe that it will be to the advantage of creditors that the respondent's estate be sequestrated.

[8] That leaves for consideration Mrs Potgieter's application that the matter be postponed. As stated above, there is no hint in the affidavit she made in support of her application for leave to intervene why it is that she seeks a postponement. In argument, it was submitted that a postponement was necessary in order to enable her to place all relevant facts before the court so as to enable it to make a decision whether or not provisionally to sequestrate the respondent. There is nothing in the affidavit she deposed to which indicate what these facts might be and why they could not have been included in the affidavit she has already deposed to. Refusing a postponement will not deprive Mrs Potgieter of the opportunity to advance such further facts as may come to light, if there are any, and to be heard in relation to the question whether a final sequestration order should be granted. Any prejudice which she may suffer will, in my view, be minimal. To grant a postponement on the vague and entirely unsubstantiated supposition that further relevant facts might come to light is not, in my judgment, warranted. I therefore refused the request for a postponement.

[9] Next it is necessary to deal with the position of the respondent. As indicated above, he had not complied with the provisions of the order made with his agreement in terms of which answering affidavits were to be filed by 17 December 2015. A formal notice of intention to oppose the application had not been filed on his behalf. Nor had heads of argument been filed on his behalf, assuming that he thought he could oppose the application without the necessity for filing an answering affidavit. His last communication with the Bank's attorney was to the effect

that he had "noted" that the matter would proceed on 3 March 2016, and that any attempt by him to defer the application would be opposed by the Bank.

[10] At the commencement of the matter I was informed by Mr Victor, an attorney of this court, who had previously represented the respondent and who had appeared on his behalf in the motion court on 19 November 2015, that he was attending the proceedings as he held a watching brief. However, it became clear in view of submissions he made that his position was not that of a benign spectator. After I made enquiries Mr Victor informed me that he had received instructions that the respondent now wanted to oppose the application, and he applied for a postponement of the application from the bar.

[11] Mr Victor advised me that his client did not have the funds to oppose the application, and that he had thus not been in a position to engage legal representatives to draft answering affidavits. Furthermore, it was submitted that the respondent had been paralysed by the fact that the application was pending, and had not been able to decide what to do about it. It was not suggested how Mr Potgieter intended to raise funds to engage legal representatives, which was one of the obstacles confronting him. As will appear from what follows, it seems highly unlikely that he will be able to raise money for legal expenses.

[12] These are not good reasons to postpone this application. Moreover, applications for a postponement must be made timeously, and not at the very last minute. The respondent had obtained a postponement previously so as to oppose the application, and had failed to comply with the terms of an order regulating the conduct of this application which he had agreed to. If a postponement were to be granted in these circumstances one would be justified in thinking that postponements were to be had for the asking. That is not the position in our law. Prejudice to the Bank, which has incurred costs, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the interest of all in the finality of litigation motivated me to refuse the application for a postponement.

[13] To turn, now, to the merits of the Bank's application for the provisional sequestration of Mr Potgieter. Only one of the requirements for the grant of a provisional sequestration order set forth in section 10 of the Insolvency Act 24 of 1936 is in contention. That is the question whether the bank has established, *prima facie*, that there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated.

[14] The respondent's financial position, it is common cause, is parlous and there is no dispute that he is insolvent. He has no movable assets. He is indebted to Mrs Potgieter in the sum of R7.2 million. In a replying affidavit filed in the application for leave to intervene it is stated that the respondent is also indebted to Mrs Potgieter in a further amount of R 20 million, apparently due in terms of the divorce order. He is in arrears with his maintenance obligations towards her and has not been able to meet his full maintenance obligation to his children. He owes the Bank approximately R 1.9 million. Mrs Potgieter annexed to her affidavit a copy of a letter addressed to the respondent during February 2015 from which it appears that Investec Bank Ltd were owed an aggregate of approximately R37 million by the respondent, although it is not possible to discern from the papers before me what the status of that claim presently is.

[15] The respondent is a director of five companies. According to Mrs Potgieter the respondent told her that three of the five companies in question were dormant. The respondent also told her about the Money Maker Trust which holds the shares in the remaining two companies which were not said to be dormant. Who the trustees and beneficiaries of the trust are is not disclosed by Mrs Potgieter. Nor is the financial position of the companies and the respondent's stake in them, disclosed. These are issues, so the Bank contends, which call for investigation.

[16] The respondent owns three immovable properties. Two appear to be residential properties with a combined estimated market value of R3.89 million. These properties are bonded to ABSA

Bank in the aggregate amount of R 3.34 million. This leaves an estimated equity in the two residential properties of R0.55 million.

[17] The third immovable property owned by the respondent, a farm, was recently sold for an amount of R 3.51 million. The farm was purchased for an amount in excess of R10 million in 2005. The farm is presently bonded to ABSA Bank for an amount of R 10.26 million. The Bank contends that the disparity between the amount for which the farm was purchased over ten years ago and the amount for which it has been recently sold cries out for investigation by a trustee.

[18] Can it be said from the above summary of the respondent's financial position that the Bank has satisfied the Court that *prima facie* there is reason to believe that it will be to the advantage of creditors of the respondent if his estate is sequestrated? It is helpful at the outset to make some observations about the concept of "advantage to creditors".

[19] Firstly, it is not incumbent on the Bank to establish an actual advantage to creditors, but only that there is reason to believe that sequestration will bring about such an advantage.

[20] Secondly, as is stated in Meskin et al, *Insolvency Law*, service issue 45 at 2-21, *"the concept of 'advantage' to creditors is a broad one (demonstrated by, for example, a not negligible pecuniary benefit to creditors, or that advantage is to be gained through an enquiry into the debtor's financial affairs), but in essence there must be some useful purpose."*

[21] In *Stratford and Others v Investec Bank and Others* 2015 (3) SA 1 (CC) Leeuw AJ, writing for the Court, observed at para [44] that *"The meaning of the term 'advantage' is broad and should not be rigidified. This includes the nebulous 'not-negligible' pecuniary benefit on which the appellants rely. To my mind, specifying the cents in the rand or 'not-negligible' benefit in the context of a hostile sequestration where there could be many creditors is unhelpful."*

[22] Sight should not be lost of the fact that the purpose and effect of a sequestration order, even at the provisional stage, is *"to bring about a convergence of the claims in an insolvent*

estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally" (see *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) at 275 H). Where the respondent is plainly insolvent but possessed of assets another inherent advantage to sequestration is *"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 the 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"* (see *Chenille Industries v Vorster* 1953 (2) SA 691 (OPD) at 699 F – H.

[23] What is significant in this case, in my opinion, is that it is quite clear that the respondent's position will go from bad to worse unless something is done to stop his financial demise. It is evident from the papers that his income, if any, is limited. Interest on the debts he has incurred continues to run up. Unless a line is drawn in the sand the prospect of obtaining some form of dividend to creditors becomes ever more diminished.

[24] Drawing a line in the sand will have, as I see it, a number of other potential advantages. Firstly, a provisional order will afford all of the respondent's creditors, and not only the Bank and Mrs Potgieter, the opportunity to participate in the decision whether or not a final sequestration order should be made. Secondly, the *concursus* brought about by a provisional order will prevent one creditor from stealing a march on the others and obtaining payment preferentially. Thirdly, a provisional sequestration will set in motion the machinery which will allow for the investigation of the sale of the farm for what, on the face of it, is a worryingly low amount. And a provisional trustee will also be able to investigate the financial position of the companies in which the respondent holds directorships, as well as the extent to which the respondent may derive benefit from those companies and the Money Maker Trust. And finally, the respondent's estate will not be further decimated by mounting interest or other debt, and the

likelihood of an even lesser dividend accruing to creditors in the fullness of time will be moderated.

[25] For these reasons, I am of the opinion that the bank has shown, *prima facie*, that there is reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated.

[26] I therefore make the following order:

1. The intervening creditor's application for leave to intervene is granted and her application for a postponement refused;
2. The respondent's application for a postponement is refused;
3. The estate of the respondent is placed under provisional sequestration in the hands of the Master of the High Court;
4. A rule nisi is issued calling upon the respondent and all interested persons to show cause, if any, to this Court on **Tuesday, 26 April 2016**, at 10:00 or so soon thereafter as counsel may be heard;
    4.1. why the estate of the respondent should not be placed under final sequestration; and,
    4.2. why the costs of this application should not be costs in the administration of the respondent's insolvent estate.
5. Service of this order must be effected:
    5.1. By the Sheriff, on the respondent at [5……] [T…….] [V……], [V…….], [T…….], Western Cape;
    5.2. By the Sheriff, on the respondent at Itakane Trading 291 (Pty) Ltd, [T……] chambers, [Block …….], [W…….] [S…..] [D…….], [B……], Western Cape;
    5.3. By the Sheriff, on the South African Revenue Services at [2…..] [H……] [S……] [A……], Cape Town;

5.4. By the Sheriff, on the employees of the respondents, if any;

5.5. By the Sheriff, on any registered trade union representing the employees of the respondent, if any, and;

5.6. By the Sheriff, together with copies of the papers filed in this application, on ABSA Bank Limited and Investec Bank Limited, at their principal place of business in Cape Town. The affidavit of service to be filed prior to the return day must indicate that the place at which service on ABSA Bank Limited and Investec Bank Limited is affected is the principal place of business of those banks in Cape Town, and that this application has come to the attention of the persons dealing with the respondent's accounts at those banks.

KOEN AJ

APPEARANCES

For the Applicant	:	Mr S Fergus
As Instructed by	:	ENS Africa
For the Respondent	:	Mr J Victor
As Instructed by	:	Johan Victor Attorneys
For the Intervening Party	:	Mr Z Joubert
As Instructed by	:	Thomson Wilks