

REPUBLIC OF SOUTH AFRICA
 NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE ☒ YES

(2) OF INTEREST TO OTHER JUDGES: ☒ YES

(3) REVISED: ☐ YES

DATE: 18/08/09

SIGNATURE: *[Signature]*

18/08/09

CASE NO: 45751/2009

CAROL PATRICIA DE BEER

Applicant

and

DERICK AUBREY COVERDALE

First Respondent

NATACIA TRACEY-ANN COVERDALE

Second Respondent

CASE NO: 47257/2009

JAN DAVID JOHANNES ELS

Applicant

and

MINDY ROSSOUE

Respondent

CASE NO: 34375/2009

JOHN FRANCIS SOMERS

Applicant

and

ANDRIES JACOBUS MOUTON

First Respondent

JUDY MOUTON

Second Respondent

CASE NO: 32075/2009

MARIUS CILLIERS

Applicant

and

MARTIN JUAN CILLIERS

Respondent

CASE NO: 4983/2009

RENÉ BARNARD

Applicant

and

LINDA LOTTER

Respondent

J U D G M E N T

MAKGOKA. J:

[1] This is a composite judgement, concerning five applications which came before me in the unopposed motion court. All are for compulsory sequestration of the respondents' respective estates in terms of section 9 (1) of the Insolvency Act, 24 of 1936 ("the Act"). All of them have features of a "friendly" sequestration. Because of the concerns I had in each one of them, I requested counsel to submit written argument in each. I am grateful to counsel in the respective applications for their submissions.

Friendly sequestration or collusion?

[2] There is a difference between a "friendly" sequestration and collusion.

My Sister Satchwell J has conveniently compacted the general principles on this aspect in *Esterhuizen v Swanepoel and Sixteen Other Cases* 2004 (4) SA 89 (W). At 91 B-F, the following is stated:

'The practise of the 'friendly' sequestration is not new, having been discussed by Curlewis JP in Kerbel v Chames 1952 WLD 72 at 75-6:

'It is said that very frequently, in this Court particularly, what are called "friendly sequestrations" take place... and one has a strong suspicion that in a very large number of sequestrations in this Court, these sequestration proceedings are not for the benefit of the creditors, but are entirely for the benefit of the insolvent, and are very often instituted by a friend to help the debtor out of his difficulties.'

There is not necessarily anything sinister in a 'friendly' sequestration and an order should not be refused merely because of 'goodwill between the parties'. (See *Beinash & Co v Nathan (Standard Bank of South Africa Ltd Intervening)* 1998 (3) SA 540 (W).)

What is of concern is the prospect of 'collusion' in the sense attributed thereto by Curlewis J in *Bevan v Bevan and Ward* 1908 TH 193 at 197:

'In our law, ordinarily speaking, collusion is akin to connivance, and means an agreement or mutual understanding between the parties that the one shall commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury;

and Roper J in Kuhn v Karp 1984 (4) SA 825 (T) at 827:

'In my view collusion consists in our law in an agreement between the parties to a suit to suppress facts, or to put false evidence before the Court or to manufacture evidence, in order to make it appear to the Court that one of the parties has a cause of action, or ground of defence, which in fact has not.'



At 91G- 92D the learned Judge proceeds:

'Where there is such collusion 'the sole object of the applicant is to assist the debtor's' with the result that 'the only effect of sequestration will be to give the debtor relief against his creditors'. (*Wepener v Ericson* 1926 WLD 81.)

The collusion is frequently found in the following pattern of behaviour or *modus operandi*:

- (a) A debtor owes money, frequently in significant amounts(s), to creditors(s) who expect and rely upon the anticipated repayments of this outstanding debt. The debtor cannot make payment of the debt.
- (b) He seeks the assistance of a third party who agrees to initiate sequestration proceedings to "aid or shield [the] harassed debtor" from his genuine and perhaps demanding creditors(s). (*Epstein v Epstein* 1987 (4) SA 606 (C).)
- (c) A friend or relative masquerades as a 'creditor' and alleges that a (non-existent) debt is owed by the 'debtor'. The 'creditor' then avers that the 'debtor' has not only failed or refused to repay this 'debt' but has written a letter advising of his inability to pay the 'debt'.
- (d) An act of insolvency in terms of s 8 (g) of the Insolvency Act 24 of 1936 has now purportedly been committed and the 'creditor' proceeds with sequestration proceedings against the 'debtor'.
- (e) This 'friendly' application (or sequestration) procures an order declaring the respondent insolvent. The respondent is then relieved of his or her legal, financial and moral obligations to the original and genuine creditor(s) save to the extent that the insolvent estate is able to satisfy such debt(s). The balance of the genuine indebtedness remains unsatisfied and, with the connivance of another, the insolvent has been 'enabled to escape payments of his just debts'. (*Kerbel* (supra).)

Co-operation may tend towards collusion. The Courts should be scrupulous in ensuring that assistance does not conceal abuse. Several judgements have scrutinised 'friendly' application of sequestrations for signs of collusion.

between applicant and respondent vis-à-vis his creditors not to advance their interests." *Epstein (supra)*

[4] In *Yenson & Co v Garlick* 1926 WLD 53 at 57, Tindall J said:

"Now a friendly creditor seeing other creditors pressing the debtor and in that way obtaining payment of their debts in instalments, may think it desirable to sequester the estate of the debtor; the fact that one of his motives in doing that may be to assist the debtor does not necessarily prove that the application is collusive. If he makes the application not only with that object but also with the object of coming in and sharing *pro rata* in any dividends which may be obtained by means of sequestration, I do not think that an application of that kind could be described as collusive."

Sequestration or litigation?

[5] I also find it necessary to set out the Courts' views on friendly sequestrations where the alleged debt is a small amount, and the election of sequestration as against litigation. The Courts have in the past emphasized that neither creditors nor debtors should prefer insolvency proceedings above litigation and execution in the ordinary course. In *Ex Parte van den Berg* 1950 (1) SA 816 (W) Ramsbottom J stated the following at 817:

"... (T) o use the machinery of sequestration to distribute amongst these concurrent creditors the small amount which might be available from the sale of immovable property after paying the costs of realization and the costs of administration of the estate is really to use a sledge hammer to break a nut".

[6] In *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) at 1069H-1070A, Didcott J held that, in addition to establishing the likelihood of a

not negligible advantage to creditors, a single creditor who uses sequestration proceedings as a mode of execution, must also demonstrate some reasonable expectation that an amount recovered under sequestration will exceed the likely proceeds of ordinary execution. Unless he does that, the "laborious and substantially more expensive" remedy of sequestration can hardly be thought advantageous.

[7] The learned Judge also rejected the notion that the creditor is entitled to ask the court to look at the effect of sequestration in *vacuo*, and not against the background of competing methods of dealing with the debtor's affairs.

At 1070 C, the learned Judge expressed himself as follows:

"(T) he notion of advantage to creditors is a relative and not an absolute one. Sequestration cannot be said to be to the creditors' advantage unless it suited them better than any feasible and reasonably available alternative course. It follows that the enquiry postulates a comparison..."

[8] As to the approach to be adopted in considering these applications, Nicholas J (as he then was) stated the approach in *Klemrock (Pty) Ltd v De Klerk And Another* 1973 (3) SA 925 (W) at 927A, to be as follows:

"Where proceedings for compulsory sequestration are by way of a friendly application, it is not a statutory requirement that the provisions of sec 4 should be complied with, and in consequence there is a possibility that the interests of creditors may be prejudiced. For that reason, the Court should scrutinise such applications with particular care."

Abuse of process?

[9] There is always a lurking possibility that the process of sequestration is abused. In this regard Leveson J said the following in *Ex Parte Steenkamp and Related Cases* 1996 (3) SA 822 (W) at 827 I-J:

"It seems to me that the time has certainly come for further words on the subject. According to the Master of the Supreme Court, it has become a rare thing for the sequestrating creditor to prove his own claim at the first meeting of creditors or at all. I can readily apprehend the reason. He is invariably the sequestrating creditor in a "friendly" application. He knows, in advance, that there are no assets in the estate or, being a close friend or relative of the debtor, he has simply lent his name for the purpose of the application. The mission is accomplished. The debtor is relieved of his misery and may safely cock a snook at his creditors"

[10] What is stated by Leveson J, above is supported by my own experience in this Division. For example, on 3 December 2009, sitting in the unopposed motion court, an application for rehabilitation of M C Bekker, Case No 55320/2009 came before me. The applicant had been sequestrated in February 2009, pursuant to a "friendly" sequestration. The application for rehabilitation was launched in August 2009, six months after the sequestration order was granted. Since no claim had been proved against his estate, he was able to bring the application in terms section 124 (3) (b) of the Act. The sequestrating creditor did not lodge a claim, which he, a mere six months earlier, pursued with much vigour. This points to an abuse of the process of

this court. The debtor is now relieved of his misery and may safely “cock a snook at his creditors” - *Ex Parte Steenkamp*. (*supra*).

[11] It is with the views expressed above that I set out to consider the individual applications herein.

CP de Beer v DA Coverdale and Another

[12] The application for the sequestration of the respondents' estate is brought by the applicant who alleges that the respondents owe her a fairly small amount of R1600.00. The respondents' total debts amount to R412 442.60. In the list of creditors, there is a debt of R20 000.00 allegedly owed to a certain T. Matroos. No further details were provided in the supporting affidavit concerning this debt.

[13] At the hearing, I requested a supplementary affidavit by one of the respondents, clarifying the following about the debt: the reason for the loan; the manner of transmission of the money from the creditor to the respondents, and the purpose of the loan. The first respondent accordingly deposed to a supplementary affidavit, and stated the following with regard to the loan:

“I humbly submit that the creditor in question is Tammy Matroos, my sister who had borrowed me the amount of R20 000.00. I made a loan from my sister when I had lost my employment so that I could pay for our living expenses”.

[14] It is instructive that the first respondent did not deal with how the money was received by him from his sister. I pointed to counsel during

argument that, the probability of such a fairly substantial sum of money being given to the respondent in cash was but almost non-existent. It is also improbable that the parties would not have signed any form of acknowledgement of receipt or indebtedness, given the substantial amount of the loan.

[15] Mr. Kotze, who appeared for the applicant, conceded that the *bona fides* of the Matroos debt were questionable. However, he argued that the said debt represented approximately only 5% of the total debts. Even if the debt is excluded from the list of creditors, the respondent would still be hopelessly insolvent. The application, so goes the argument, is not dependent on the said debt, but on another debt, distinct from the Matroos one.

[16] I cannot fault counsel's submission in this regard. It does however, overlook an important aspect: in applications of this nature, where the applicant and the respondents are family members, the parties must be candid to the Court in every material respect. The respondents have, on the probabilities, contrived this debt. This casts a huge doubt on their credibility and *bona fides*. For the application to be considered *bona fide*, nothing should emerge from any aspect thereof, suggestive of dishonesty. Given these considerations, I would refuse the application for the sequestration of the respondents' estate.

Jan David Johannes Els / Mindy Rossoué

[17] The applicant alleges that he lent an amount of R10 000.00 to the respondent, which the latter had failed to repay. In response to my query regarding the source of the money, and its transmission from the applicant to the respondent, the applicant stated in his supplementary affidavit that he had won the money at gambling and gave it to the respondent in cash. No acknowledgement of receipt, nor an agreement regarding repayment details were provided. On the facts, I am persuaded that this debt too, was contrived by the parties for the purposes of this application. The application would therefore be refused.

J F Sommers v A J Mouton

[18] It is alleged that an amount of R10 000.00 was loaned to the respondents on 3 March 2009, in cash, from the applicant's savings. No proof of the transaction or transfer and receipt of funds was provided, nor is proof of the applicant's withdrawal of such money from his savings account is furnished. On 3 June 2009 the respondents wrote to the applicant, advising him of their inability to repay the loan. On the same considerations as above, I would similarly refuse the application.

Barnard v Lotter and Cilliers v Cilliers

[19] Both these applications were before me on the return day of provisional orders granted by my Brothers Ledwaba J and Msimeki J on 22 and 30 September 2009, respectively. The applicants seek confirmation of the provisional orders.

[20] Section 12 (2) of the Act provides, among others that, if at the hearing for the confirmation of a provisional order, the Court is not satisfied, among others, that there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration. The court therefore has a discretion on the return day of the rule nisi whether or not to grant a final order. See *Esterhuizen*, supra at 95 D-H. In any event, this court has an inherent power to regulate its procedure and prevent an abuse of its process. See *Potchestroom Town Council v Botha* 1939 TPD 4; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Courourakis* 1979 (2) SA 457 (W) at 463 A-B; *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G and *Hurter v Hough* 1989 (3) SA 545 (C) at C-E.

[21] In *Cilliers v Cilliers*, the respondent allegedly borrowed an amount of R20 000.00 to the applicant on 3 October 2008, due and payable at the end of December 2008. The applicant alleges that he gave the amount of R20 000.00 in cash. In this case too, no record of transmission, no acknowledgement of debt, or of receipt, is alleged or attached. The applicant discloses no basis on which it can be inferred that he has the capacity to make a loan of R20 000.00. I would set aside the provisional order.

[22] In *Barnard v Lotter*, the applicant alleges that he lent the respondent an amount of R2 000.00 in June 2008, which was given to the respondent in cash. The applicant alleges the following with regard to the debt:

"Op ongeveer Junie 2008 het ek 'n bedrag van R 2 0000.00 aan die respondent geleen. Ek het die gelde (sic) kontant aan die Respondent betaal. Ek het terugbetaling van die bedrag soos ooreengekom. van die Respondent versoek maar daar is geheel en al nie aan die my versoek om betaling voldoen nie. Op sterkte hiervan het ek 'n gelikwideerde vordering van meer as R100.00 (een honderd rand) teen die Respondent."

[23] It is alleged that respondent's assets consist of three vehicles, one of which is a luxury Toyota RAV4, valued at R250 000.00. It is alleged that the respondent owns no other movable property, she has no investments, or insurance policies.

[24] Her liabilities amount to R482 758.20. The sequestration costs are estimated at R11 555.20. She has R68 000.00 available for payment of sequestration costs and distributions amongst her creditors. An amount of R56 444.80 would remain after payment of sequestration costs, which amount is to be distributed amongst the creditors to the tune of R482 785.80, resulting in a supposed dividend of 12 cents in a rand.

[25] The applicant relies, for the respondent's alleged act of insolvency, on a letter dated 10 December 2008. The affidavit in support of this application was signed in June 2008, six months before the alleged loan was even incurred.

[26] Mr. Voster, for the applicant submitted that the applicant had satisfied the requirements of the Act, namely establishment of a debt over R100.00; an act of insolvency and advantage to creditors. On the face of it this is correct, insofar as the first two requirements are concerned.

[27] However, in order to ensure that the process of this court is not abused, I must still exercise a judicious discretion. My view is that the respondent has not made a full and frank disclosure of her financial affairs and moveable assets. I find it extremely difficult to accept that the applicant does not own any TV set, household appliances, furniture etc. She does not disclose the source of the amount of R68 000.00 she has made available for the purposes of this application. She does not disclose whether she has any monthly income or not. How is she able to maintain the three vehicles? Has she made arrangements to return any or all the vehicles under the National Credit Act, 34 of 2005?

[28] In her list of creditors totalling R482 785.20, R401 353.35 is towards vehicle finance. There are five financial institutions she owes for vehicle finance. Yet in her list of her assets, she mentions only three vehicles. Applicants who bring "friendly" sequestration applications before court are to ensure that all information relevant to the debtor's financial affairs and assets is obtained and placed before Court. See *Hillhouse v Stott*; *Freban Investments (Pty) Ltd v Itzkin*; *Botha v Botha* 1990 (4) SA 580 (W) at 584H. In

this instance I do not have such information, and I am not prepared to speculate about these aspects.

[29] Regard being had to the concerns raised above, I have come to the conclusion that the provisional order be set aside.

[30] The applications in **Cilliers v Cilliers** and **Somers v Mouton**, emanate from the same firm of attorneys. It is worth noting that the letters indicating inability to pay, are striking identical - the grammar, the wording and phrases used, and even the font type. This is disquieting in view of the fact that the letter constituting an act of insolvency, is supposed to be "a spontaneous act and not a collusive act". *Esterhuizen (supra)*, at 96 D-E. The fact that the letter constituting an act of insolvency appears to emanate from the applicants' attorney's office, is disturbing.

[31] In conclusion, I am of the view that it would be useful, if the following information, in addition to other requirements, appears from the affidavit in support of an application for a friendly sequestration:

- (a) Full nature and details of the transaction which resulted in the debt;
- (b) Proof of the transaction forming the basis of the debt: e.g. copy of bank statement disclosing bank transfer from an account in the name of the creditor to one in the name of the debtor;

- (c) The relationship, if any, between the debtor and the creditor;
- (d) Full disclosure of the respondent's past and present financial activities, employment details, income and expenditure, as well as assets and liabilities;
- (e) A statement why under the circumstances, sequestration is best suited in comparison to litigation and execution. This is especially in instances where the debt is small.

[32] In general, practitioners are encouraged to revisit the generality of views expressed by Leveson J both in *Hillhouse* and *Ex Parte Steenkamp* (*supra*) and by Satchwell J in *Ex Parte Esterhuizen* (*supra*)

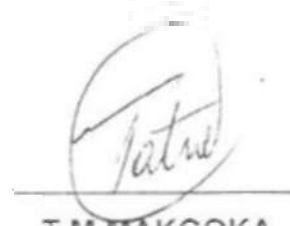
[33] Given the above considerations, I make the following orders:

1. In De Beer v Coverdale & Another, Case No: 45751/09; Els v Rossouw Case No: 47257/2009; Somers v Mouton & Another Case No: 34375/2009;

The applications for sequestration are refused.

2. In *Barnard v Lotter*, Case No: 4983/2009: the provisional order granted by Ledwaba J on 22 September 2009 is discharged.

3. In *Cilliers v Cilliers*, Case No: 32075/2009: the provisional order granted by Msimeki J on 30 September 2009 is discharged.



T M MAKGOKA
JUDGE OF THE HIGH COURT

MATTERS HEARD ON : 8 OCTOBER 2009, 22 OCTOBER AND
10 DECEMBER 2009

JUDGEMENT DELIVERED: 18 FEBRUARY 2010

DE BEER V COVERDALE
FOR THE APPLICANT : ADV D J KOTZE
INSTRUCTED BY : RIAAN MEYER ATTORNEYS,
PRETORIA

BARNAD V LOTTER
FOR THE APPLICANT : ADV J VORSTER
INSTRUCTED BY : SCHABORT INC, PRETORIA

ELS V ROSSOUW
FOR THE APPLICANT : ADV L LEBALLO
INSTRUCTED BY : STIAAN BEKKER ATTORNEYS,
PRETORIA

CILLIERS V CILLIERS
FOR THE PLAINTIFF : ADV L SWART
INSTRUCTED BY : CREMER & STRYDOM, PRETORIA

SOMERS v MOUTON
FOR THE APPLICANT : ADV L SWART
INSTRUCTED BY : CREMER & STRYDOM, PRETORIA