

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Date: 2011-09-14

Case Number: 55727/2010

REPORTABLE

In the matter between:

URBAIN DJAH ZADI

First Applicant

JEANNE PASCALE ZADI

Second Applicant

and

THE BODY CORPORATE OF OUTENIQUA

First Respondent

JOHANNES ZACHARIAS HUMAN MULLER N.O.

Second Respondent

PHINEAS BONGANI MOKWENA N.O.

Third Respondent

THE MASTER OF THE HIGH COURT

Fourth Respondent

JUDGMENT

SOUTHWOOD J

- [1] The first applicant and his wife, Jeanne Pascale Zadi (who on 24 August 2011 was given leave to intervene in this application as the second applicant) seek –

- (1) An order rescinding and setting aside the final sequestration order made against the first applicant on 29 January 2009;
- (2) An order declaring that the first applicant is not responsible for the payment of any costs and/or expenses relevant to or arising from the sequestration of the first applicant's estate;
- (3) An order that the first respondent pay the costs of this application on the scale as between attorney and client.

Only the first respondent opposes the application. On 19 August 2011, Nedbank Ltd, which gave notice that it intended to apply at the hearing for leave to file its founding affidavit (merely to place certain facts before the court to enable it to make an appropriate order) formally withdrew its application because the first applicant had tendered payment of its agreed costs.

- [2] The parties filed the usual affidavits. When the first applicant filed his replying affidavit on 10 May 2011 he also delivered a supplementary founding affidavit. (This incorporated an application to file such an affidavit.) Thereafter, on 16 May 2011 and 19 July 2011 the applicant's attorney called on the first respondent to file a supplementary answering affidavit and when the first respondent failed to deliver such an affidavit, set the matter down for hearing on 22 August 2011. The applicant's attorney delivered the notice of set down to the first

respondent's attorney on 1 August 2008 but the first respondent still did not file a further answering affidavit. Eventually, on 19 August 2008 the first respondent's attorney, Mr. J.M. Krog, served a further opposing affidavit on the applicant's attorney, an answering affidavit to the first applicant's application to file a further founding affidavit and an answering affidavit to the second applicant's application to intervene. In the opposing affidavit the first respondent purports to deal with the applicant's supplementary affidavit and alleged new matter in the applicant's replying affidavit. On 23 August 2011 the first respondent's attorney deposed to an affidavit in which he purports to explain the delay in preparing and delivering the further opposing and answering affidavits. According to Mr. Krog he was unaware that the application had been enrolled for hearing on 22 August 2011. At the hearing the first respondent's counsel requested the court's leave to file these further affidavits and a ruling was made that the court would consider this request in the light of all the evidence and make a decision at the end of the matter.

- [3] In addition to the further affidavits filed, the applicants' counsel handed to the court, by agreement, a letter dated 22 August 2011 from Tshwane Trust Co (Pty) Ltd to Gildenhuis Lessing Malatji (marked exhibit 'A') and a letter dated 19 August 2011 from Gildenhuis Lessing Malatji to Matthys Krog (marked exhibit 'B'). These letters are incorporated in the record at pages 307-309. Finally, it must be recorded that the applicants' counsel, without objection from the first

respondent, attached to his Supplementary Practice Note dated 19 August 2011, copies of the following correspondence: a letter dated 16 May 2011 from Gildenhuis Lessing Malatji to Matthys Krog Attorneys (marked 'A'); an e-mail sent by Izak Boshoff of Tshwane Trust Company to Derick de Beer on 19 August 2011; a letter dated 6 July 2011 from Gildenhuis Lessing Malatji to Matthys Krog Attorneys (marked 'B'); a letter dated 6 July 2011 from Matthys Krog Attorneys to Gildenhuis Lessing Malatji (marked 'C'); a letter dated 8 July 2011 from Gildenhuis Lessing Malatji to Matthys Krog and a letter dated 19 July 2011 from Gildenhuis Lessing Malatji to Matthys Krog (marked 'D'). The Supplementary Practice Note and copies of the correspondence are incorporated in the record at pages 310-326.

- [4] The applicants seek the rescission or setting aside of the sequestration order in terms of section 149(2) of the Insolvency Act 24 of 1936 ('the Act') alternatively under the common law. Although the first respondent purports to be opposing the grant of this relief on the merits it appears that the real dispute is who must be ordered to pay the costs of the sequestration once the sequestration order has been set aside. The applicants' attitude is that the first applicant should not have to bear these costs (see prayer 2 of the notice of motion) as the first respondent abused the process of the court in order to obtain a sequestration order against him which should not have been granted. The first respondent contends that the first applicant should bear these costs as he failed to make proper arrangements to ensure that his

creditors were paid. The first applicant's supplementary affidavit deals with the steps taken by the first applicant to ensure that his creditors are paid. The first respondent's supplementary opposing affidavit attempts to show that these steps were not effective and that the creditors will be prejudiced if the sequestration order is set aside.

[5] Section 149(2) of the Act provides that:

'The court may rescind or vary any order made by it under the provisions of this Act'.

The section does not set out the grounds upon which the court may make such an order and the section has been the subject of much judicial comment. According to the learned authors of **Mars *The Law of Insolvency in South Africa* 9 ed Bertelsmann et al ('Mars')** at 154 para 6.2 the section covers the grounds upon which a sequestration order may be set aside at common law and it is firmly established that the court may set aside an order of sequestration if it is satisfied that there has been an abuse of its process. For present purposes the principles applicable to applications in terms of section 149(2) set out by the court in ***Storti v Nugent and Others* 2001 (3) SA 783 (W)** at 806D-G will be accepted as correct:

'(1) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.

- (2) Unusual or special or exceptional circumstances must exist to justify such relief.
- (3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.
- (4) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission.
- (5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.
- (6) A court will not exercise its discretion in favour of such an application if undesirable consequences would follow.'

[6] Under common law, an applicant for rescission of a judgment taken against him by default, must show 'sufficient cause' – see ***De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A)** at 1042F-1043C; ***Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)** at 764I-765F; ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)** para 11. This requires that the applicant establish that –

- (1) there is a reasonable and acceptable explanation for his default;
- (2) the application is made *bona fide*;

- (3) the applicant has a *bona fide* defence to the claim which *prima facie* has some prospect of success.

See ***Chetty v Law Society, Transvaal supra*** at 765A-C; ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) supra*** para 11.

[7] The following facts are not in dispute or cannot be disputed:

- (1) The first applicant is a United Nations International Civil Servant (a United Nations senior diplomat) who is the director of the Office of Strategic Planning and Programme Management of the United Nations Economic Commission for Africa in Addis Ababa, Ethiopia. The first applicant is French speaking and also understands and speaks English but not Afrikaans;
- (2) The second applicant is an International Civil Servant employed by the African Union Commission at its headquarters in Addis Ababa, Ethiopia. The second applicant is French speaking and also understands and speaks English but not Afrikaans;
- (3) On 16 July 1983 the first and second applicants married in California, United States of America where they were both domiciled;

- (4) At all times material hereto the applicants resided at Arat Kilo, Kebele No 7, House No 1166/19, Addis Ababa, Ethiopia;
- (5) In 1994, at the time of the South African elections, the first applicant was appointed a Peace and Electoral Observer with the United Nations Observers Mission in Pietermaritzburg, Kwa-Zulu Natal. While the applicants were in South Africa their son, William, was enrolled at Michaelhouse College where he eventually matriculated;
- (6) During his stay in South Africa the first applicant resolved to apply for permanent resident status in South Africa as he wished to retire here. As part of his retirement planning he purchased two immovable properties in South Africa: in 2003, Section 41 in the scheme known as Outeniqua situated in Arcadia, Pretoria ('the Outeniqua property') for R140 000, and in 2004, Section 5 in the scheme known as Houghton Heights, situated in Houghton, Johannesburg, for R700 000 ('the Houghton property'). When the Outeniqua property was registered in his name the first applicant registered mortgage bond no SB 120157/2004 in favour of Nedbank Ltd for the sum of R77 500 and when the Houghton property was registered in his name the first applicant registered mortgage bond no SB72995/2004 in favour of The Standard Bank of South Africa Ltd for the sum of R350 000;

- (7) The first respondent is the body corporate of the Outeniqua scheme;
- (8) During 2004 and until August 2005 the first applicant leased the Outeniqua property to an employee of the University of Pretoria which ensured that all levies were paid to the first respondent;
- (9) From August 2005 until December 2007 the applicants' son, William, and his girlfriend, Kate Legodi, lived in the Outeniqua property. During that period the first applicant made funds available to his son so that he could pay the levies;
- (10) Unbeknown to the first applicant, William got into financial difficulties and stopped paying the monthly levies to the first respondent. William failed to inform the first applicant of this fact;
- (11) In 2008 the first respondent instituted action against the first applicant in the Pretoria magistrates' court for payment of the levies. The summons was served at the Outeniqua property which was the first applicant's *domicilium citandi et executandi*, and it never came to the first applicant's attention;

- (12) On 6 March 2008 the first respondent obtained judgment by default against the first applicant for R19 808,91 and costs;
- (13) The first respondent issued a warrant of execution against the first applicant's movable property but no property was attached. (The warrant of execution does not contain a description of any immovable property to be attached.) According to the sheriff's return dated 10 July 2008 the sheriff was not able to execute the warrant. He had attended at the Outeniqua property on four occasions between April and June 2008 and on each occasion found the premises locked. He could not ascertain whether the first applicant lived at the property or whether the first applicant had any attachable assets;
- (14) There is no evidence that the first respondent's attorney instructed the sheriff to attach the Outeniqua property. The first respondent clearly knew that the first applicant owned the property and that there was a mortgage bond registered over the property. The Deeds Office report dated 9 January 2007, which was annexed to the first respondent's application to sequester the first applicant to prove that the first applicant owned the Outeniqua property, reflects that the first applicant purchased the property for R140 000 and that a mortgage bond for R77 500 was registered over the property;

- (15) The first applicant arranged for the instalments on the mortgage bond over the Outeniqua property to be paid by debit order. According to the first respondent's founding affidavit in the sequestration application these instalments were paid every month so that by the time the first respondent launched the application for the first applicant's sequestration in November 2008 the first applicant had not fallen into arrears. In its opposing affidavit in this application the first respondent alleges that the first applicant was in arrears with his instalments on both mortgage bonds;
- (16) There is no evidence about what the first applicant did with the Houghton property. The first applicant says that he arranged to pay the mortgage bond instalments by debit order and does not mention that he stopped paying. The first respondent's evidence indicates that he stopped paying the instalments on 31 October 2008. It appears that the first applicant also fell into arrears with the levies payable to the Body Corporate of the Houghton property;
- (17) On 31 October 2008 the first respondent applied to this court for leave to effect service of a sequestration application on the first applicant by way of substituted service. The court granted the leave sought by the first respondent: i.e. to effect service upon

the first applicant by way of publication in the Pretoria News and Citizen newspapers;

- (18) On 11 November 2008 the first respondent published notices in Afrikaans in the Pretoria News and Citizen newspapers that the first respondent intended to apply to this court for the sequestration of the first applicant;
- (19) On 16 January 2009 the court granted a rule *nisi* and on 29 January 2009 a final order of sequestration. There is no evidence of how this rule *nisi* was served on the first applicant but it must be inferred that this was done in the same way as the application;
- (20) The second and third respondents were appointed provisional trustees in the first applicant's insolvent estate on 13 March 2009 and trustees on 24 June 2009;
- (21) Some time after August 2009 the first applicant discovered that his estate had been sequestrated. (There is a dispute about precisely when the first applicant discovered this but it is not necessary to resolve the dispute. However, it is clear that the trustees did not inform the first applicant immediately as they did not know where he was. On 7 June 2010 the trustees sent an e-mail to the first applicant to confirm that his estate had been

sequestered, to inform him that they had been appointed joint provisional trustees and to draw his attention to various sections in the Act with which he was required to comply);

(22) On 12 April 2010 in accordance with section 82(1) of the Act the trustees sold the Outeniqua property on public auction to Mr. Ash Kerpel for R300 000. The auction was subject to confirmation and the trustees confirmed the sale on 17 May 2010. On 9 July 2010 in accordance with section 82(1) of the Act the trustees sold the Houghton property on public auction to Prof. B. Jacobson for R640 000. The two properties have not yet been transferred. The purchaser of the Houghton property has already paid the purchase price and it has been agreed that the property will be transferred to him. After deduction of the costs and the amount owing to the bond holder, Standard Bank, there will be a surplus of R138 000.

(23) On 7 March 2011 the applicants' attorney, Mr. J.F. de Beer, the first respondent's attorney, Mr. Krog and the trustee, Mr. Boshoff, had a meeting to determine what amounts were owing to creditors and to make arrangements for the transfer of the Houghton property. The applicants had no objection to the transfer of this property as the first applicant had already decided in April 2010 to sell it and he was satisfied with the

purchase price achieved. At the meeting a number of matters were discussed:

- (i) The trustee told Mr. De Beer and Mr. Krog that once the Houghton property had been transferred and the creditors in respect of that property (including the bondholder, Standard Bank, and the auctioneer) paid, there would be a surplus of R138 372. This calculation did not take into account the statutory fees and expenses provided for in the Act;
- (ii) The trustee told the two attorneys that an amount of R184 348 would be required to pay the relevant creditors in respect of the Outeniqua property (R100 000 for the first respondent for outstanding levies; R10 000 for Tshwane Municipality for arrear rates and taxes; R74 348 to Nedbank for the outstanding balance on the mortgage bond). (The first respondent's version is that the total for the three creditors was R186 000: R96 000 for the first respondent; R14 000 for Tshwane Municipality and R74 000 for Nedbank – but the first respondent contends that an amount of R32 550 was payable to the auctioneer. That appears to be an estate expense which is the subject of dispute);

- (iii) Mr. De Beer informed the trustee and Mr. Krog that he would advise the applicants to pay the amount of R184 348 in order to resolve the matter amicably;
 - (iv) The trustee raised the question of who would pay the costs and fees prescribed by the Act: the insolvent estate or the first respondent. No agreement was reached on this issue;
- (24) On 11 March 2011 Mr. De Beer reported to the first applicant what had transpired at the meeting and advised him to arrange for payment of R184 000 by 15 May 2011 which the first applicant undertook to do;
- (25) On 29 March 2011 Mr. Krog faxed a letter to Mr. De Beer in connection with the matter to confirm that Mr. De Beer had intimated that the proceeds from the sale of the Houghton property would be used to pay most of the creditors (i.e. of the estate) on or before 15 May 2011 and to enquire how the payment of the creditors would be effected if the funds remained in the trustee's trust account. On 30 March 2011 Mr. De Beer replied to this letter. He advised that the surplus on the sale of the Houghton property would remain in the trustee's trust account until this application was heard and he confirmed that

the first applicant would use his own funds to pay the first respondent and Nedbank;

(26) As the first applicant understood the position, he owed the creditors in respect of the Outeniqua property a total of R184 000 which meant, in effect, that he had to provide an additional R46 000 (R184 000 minus R138 000) for the trustee to pay the Outeniqua creditors. The first applicant arranged for an amount of R56 000 to be paid from his American Express account into his attorney's trust account for payment to the trustee on the understanding that it would be retained in the trustee's trust account pending the adjudication of this application. The first applicant paid more than R46 000 because the first respondent's managing agent had handed his attorney a statement reflecting that the outstanding amount payable to the first respondent on 25 March 2011 was R107 758,83;

(27) In addition to the payment of R56 000 from the first applicant's American Express' account the first applicant made arrangements for US\$ 30 000 to be transferred from the second applicant's account in New York to his attorney;

(28) The first applicant's attorney would consult with the trustee to arrange to make payment to creditors after 15 May 2011 to

avoid any suggestion that the first applicant was preferring one creditor above another;

- (29) The first applicant concluded that not only were there sufficient funds to pay all the creditors out of the trust account of the trustee but once the US\$ 30 000 had been received his attorney would be able to pay all the Outeniqua creditors;
- (30) On 28 June 2011 the applicants paid to the first respondent the sum of R113 552,73 which was the amount owing to the first respondent on 25 May 2011;
- (31) Despite the fact that Mr. Krog had advised Mr. De Beer on 6 July 2011 and 15 July 2011 that the applicants' indebtedness to the first respondent had been paid in full the first respondent complained that the first applicant had not paid the levies for June, July and August 2011 (something which had not been dealt with in the affidavits). As appears from exhibit 'A' the applicants' attorney has instructed the trustee to pay these levies to the first respondent with funds at his disposal (which amount to R4 412,95) and the trustee will pay the levies as soon as Mr. Krog provides his bank details.

- [8] It is clear that the sequestration orders were granted against the first applicant (and possibly the second applicant) when he (they) was

(were) in default of appearance and that the first applicant has provided a reasonable and acceptable explanation for his default. He and the second applicant were in Ethiopia at the time and the proceedings could not be and were not brought to their attention. It is also clear that the first respondent did not establish that the first applicant had committed an act of insolvency in terms of sections 8(a), 8(c) and 8(d) of the Act which were relied upon by the first respondent in its application for the sequestration of the first applicant. Jaco Breytenbach, the deponent to the first respondent's founding affidavit in the sequestration application, is simply a manager employed by the first respondent's managing agent, Huurkor Admin (Pty) Ltd. He clearly does not have knowledge of the facts which would justify a conclusion that the applicant committed any one of the acts of insolvency which he alleges. If he did, he would have set out these facts rather than simply repeat the wording of sections 8(a), (c) and (d) coupled with two bald allegations. Sections 8(a) and (d) require proof of the applicant's state of mind. Mr. Breytenbach obviously has no knowledge of any facts which would justify an inference that the first applicant had the required intention. As far as section 8(c) is concerned, payment of his mortgage bond instalments and irregular payment of his sectional title levies is not sufficient for a reasonable man to draw the inference that payment of his mortgage bond instalments would prejudice creditors. There is not sufficient evidence of all the relevant circumstances - see ***Mendel Bros v Selikman* 1930 WLD 243; *Fittinghoff v Hollins*; *Fittinghof v Stockton* 1997 (1) SA**

535 (W) and the cases there cited; **Mars 94** para 4.4. In any event the first applicant denies that he did anything that could be construed as an act of insolvency and this *prima facie* is correct. The first applicant therefore has a *bona fide* defence to the application. Finally, it cannot be doubted that the first applicant is *bona fide* in seeking to set aside the sequestration order. He states that it is an obstacle to his plan to obtain permanent residence status and this is not disputed. He has also made arrangements to pay all his creditors.

[9] The first applicant has therefore made out a case for rescission of the order at common law. The remaining issues are whether there are unusual or special or exceptional circumstances which would justify such relief and whether setting aside the order would result in undesirable consequences. These issues will be considered in turn.

[10] The first applicant relies on the fact that the first respondent abused the process of the court in order to obtain a sequestration order against him. He points out that if the first respondent had attached and sold the Outeniqua property in execution the first respondent would have recovered its claim and legal costs in full and that would have been the end of the matter.

(1) The first respondent obviously knew that the applicant owned a property in the scheme yet the first respondent never issued a writ of execution against the property itself. This is inexplicable

in view of the fact that on 9 January 2007 (i.e. one year before the first respondent obtained judgment against the first applicant) a Deeds Office search had been conducted by the first respondent or its agent which showed that the first applicant had purchased the property for R140 000 and registered a mortgage bond over it for R77 500 (94). On the face of it, there was sufficient equity available to pay the first respondent's claim and costs. It is noteworthy that in the sequestration application the first respondent relied on a valuation for the property of R280 000. The warrant of execution issued on 10 March 2008 omitted the description of the immovable property on which the warrant may be executed (96). This was not remedied even after the sheriff reported that he could not serve the warrant of execution and pointed out that the warrant is against movable property only and that the services of a locksmith were necessary to gain access to the premises (63). The failure to execute against immovable property is simply not explained. Despite knowing all these facts the first respondent obviously decided to apply for the sequestration of the first applicant;

- (2) In order to commence sequestration proceedings the first respondent had to comply with long-standing practice and serve the application on the first applicant personally – see **Mars** 120 para 5.18. Since the first respondent did not know where the first applicant was – or so it claimed – the first respondent's

attorney, Mr. Krog, instructed an investigator to ascertain the first applicant's whereabouts and on 29 August 2008 received a report from the investigator that he could not find the first applicant (i.e. that he was untraceable) but that the first applicant was in Gauteng and continually moved house and apparently worked for himself. The first respondent then launched an application in terms of Rule 4(2) for leave to effect service on the applicant by way of publication in the Pretoria News and The Citizen newspapers which the court granted on 31 October 2008. In view of the importance of service generally – see ***Dada v Dada* 1977 (2) SA 287 (T)** at 288C-F; ***SA Instrumentation (Pty) Ltd v Smithchem (Pty) Ltd* 1977 (3) SA 703 (D)** at 706E-H – and the general requirement of personal service in sequestration proceedings, the first respondent should have taken special care to ensure that all material facts were placed before the court in the *ex parte* application – see ***Schlesinger v Schlesinger* 1979 (4) SA 342 (W)** at 349A-B; ***National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA)** para 21;

- (3) If the purpose of an application for substituted service is borne in mind (i.e. to obtain the court's leave to serve by a method not permitted by the rules but which will effectively bring the relevant document to the notice of the affected party) the first respondent's application is a curious document. Mr. Krog

deposed to the founding affidavit and purported to speak on behalf of the first respondent. There is no confirming affidavit by the first respondent itself or its managing agent. Mr. Krog described the applicant as 'Mr. UD Zadi an adult person whose full and further details are unknown'. (This is a startling allegation in view of the deeds office search already referred to. There it appears that the deeds office was given the first applicant's full names: Urbain Djah Zadi and that the deeds office was in possession of the first applicant's ID number: 510525 – clearly neither the name nor the number were South African. It must also be contrasted with the allegation in the founding affidavit of the first respondent's sequestration application, deposed to only one month later, that the first applicant is Urbain Djah Zadi an adult male person 'presumably a foreigner' with only known ID number 510525, whose full and further particulars are unknown to the applicant (i.e. the first respondent)). Then Mr. Krog states that the Sheriff attempted to serve the warrant of execution: that on advice of the Sheriff the applicant (i.e. the first respondent) put up security in terms of Rule 38 of the Magistrates' Court Rules and the Sheriff confirmed the use of a locksmith but that the judgment debt remains unsatisfied. It is not clear what these statements mean and insofar as they are based on the Sheriff's return they are misleading. The Sheriff suggested that a locksmith be used. There is no evidence that a locksmith was in fact used to gain

access to the property and still could not find property to attach. Mr. Krog states that the first respondent does not know where the first applicant is and that the first respondent does not know about any family or friends of the first applicant. (The first respondent's deponent in these proceedings refers to the fact that the first applicant and his son came to the Huurkor Admin Offices on occasions and he knew that the first applicant's son lived in the property. It is common cause that William lived in the property during this period.) Finally Mr. Krog says that he employed an investigator to trace the applicant but the investigator was unsuccessful and he attaches to his affidavit the investigator's report. In view of the first respondent's professed ignorance about the applicant and his whereabouts it is difficult to imagine what instructions Mr. Krog gave to the investigator. (They are not attached). The investigator's report is an unimpressive document and is not confirmed under oath. He does not set out the facts he was given and he does not set out any facts to justify a conclusion that the applicant is in Gauteng and that the applicant continually moves house and apparently works for himself. In view of the undisputed facts this was clearly a fabrication. Then the first respondent sought leave to serve by publication in two English language newspapers without any indication that the applicant reads English or reads these newspapers. There is no suggestion that he could read Afrikaans;

- (4) The court gave leave to effect service by publication in the Pretoria News and Citizen newspapers. Mr. Krog arranged for publication of the relevant notice in Afrikaans in the two English language newspapers.
- (5) By the time the first respondent prepared the application for sequestration it clearly knew that the first applicant was a foreigner and in view of the lack of information as to his whereabouts in South Africa it should have appreciated, as any reasonable person would, that he may not be in South Africa and that the substituted service ordered by the court would not be effective. The first respondent obviously ignored this;
- (6) There is no suggestion in the papers that the first respondent consulted its records to ascertain the first applicant's whereabouts. If it had, it would have found the deed of sale completed by the first applicant when he purchased the Outeniqua property. It contains the first applicant's full names, residential address and contact details. It is noteworthy that on 7 June 2010, when the trustee notified the first applicant that he had been sequestrated, the message was sent by e-mail to the address in the deed of sale. This could only have come from the first respondent's or Huurkor Admin's records.

In view of these strange features I am driven to the conclusion that the first respondent's attorney, Mr. Krog, never intended to serve the papers on the applicant. No attempt appears to have been made to ensure that the method of service for which leave was sought was effective.

[11] The first respondent's application for the first applicant's sequestration was, in effect, an *ex parte* application. The first respondent and its attorney must have known that service in the manner ordered would not be effective. The first respondent should have taken great care to ensure that the correct information was placed before the court.

- (1) As already pointed out, Mr. Breytenbach, the deponent, has no personal knowledge of the facts. He could not allege that the first applicant had committed any acts of insolvency;
- (2) The first respondent sought to create the impression that the first applicant was in South Africa. Reference was made to his *domicilium citandi et executandi* which is irrelevant for purposes of the application and service was effected there and at Huurkor Admin despite the fact that this was not in accordance with the order for substituted service and the contents of the application itself. Clearly from the application service at these addresses would not come to the notice of the first applicant;

- (3) There is no mention of the fact that the summons in the magistrates' court action was not served on the first applicant but on his *domicilium citandi et executandi* and that the first respondent had obtained judgment by default;
- (4) The amount of the outstanding balance on the mortgage bond was misrepresented to be R140 000 whereas it was in fact only about R72 000;
- (5) It was alleged that the first respondent had done everything in its power to limit its damage and had taken steps to execute its judgment but this had not resulted in any proceeds. No mention was made of the first respondent's failure to attach the Outeniqua property and sell it in execution.

[12] In view of these facts I am of the view that there are exceptional circumstances present. The first respondent systematically misled the court about the first applicant's whereabouts and the need for a sequestration order. The facts alleged by the applicants show that they would never have had an opportunity to oppose the magistrates' court action or the sequestration application and that at least *prima facie* they have a valid and *bona fide* defence to the application.

[13] As far as prejudice to creditors is concerned it appears that despite the first respondent's contentions the first applicant has made proper

arrangements to pay all his creditors and that none will be prejudiced by the setting aside of the sequestration order. It is significant that the first applicant was able to pay the first respondent almost R120 000 from his own funds which indicates that his attorney did receive the US\$ 30 000. The issue of the sequestration costs is a separate matter and will be dealt with next. I do not regard that as prejudice which would prevent the court from making the order.

- [14] Both sides seek orders against the other party that the other party pay the costs of the sequestration. The applicants consider that they were not to blame in any way for an order which the first respondent should not have sought against them and which the first respondent obtained improperly. The first respondent contends that the first applicant should pay the costs because of his failure to make proper arrangements to pay his debtors in South Africa. It is also argued that the first applicant is opportunistically allowing the sale of the Houghton property to proceed without accepting that his estate is liable for the costs incurred. In view of the manner in which the first respondent has conducted this litigation I do not accept the first respondent's contentions. In my view the first respondent did abuse the process – see ***Price Waterhouse Coopers Inc v National Potato Co-op Ltd 2004 (6) SA 66 (SCA)*** para 50. It sought an order for substituted service to which it was not entitled and did not place all the material facts before the court. I have already referred to the fact that Mr. Krog never intended to serve the papers on the first applicant. With regard

to service on the first applicant the first respondent systematically misled the court about his whereabouts. The difficulty which the sequestration order caused the applicants is obvious. Neither party has satisfied me that I have the power to make the order which is sought. If nothing is ordered the unsuccessful applicant (i.e. the first respondent) will be responsible for the costs which is what I would order if I had the power.

[15] After considering the record and the argument I have decided to receive in evidence those parts of the first applicant's Supplementary Affidavit (paras 1, 10, 11, 12 and 13) and the first respondent's further opposing affidavit (paras 3.1, 3.2, 3.3, 3.7, 3.8 (first sentence only), 3.9, 3.15, 3.23, 4, 9, 10, 11 and 12 and the confirming affidavits of Johannes Matthys Krog and Izak Boshoff which deal with the arrangements made by the first applicant to pay his creditors and the whole of the opposing affidavit in the second applicant's application to intervene. See ***James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons* 1963 (4) SA 656 (A)** at 660D-H; ***York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (T)** at 483F-484I. In order to do justice in this matter the position regarding the first applicant's creditors needs to be clarified.

[16] The facts set out in paragraph [7] are gleaned from the affidavits and the letters referred to and enable the court to make the necessary findings to decide this case – ***National Director of Public***

Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 26. It is noteworthy that the first respondent's deponents have often not engaged with the facts and simply put up bald denials and allegations which do not create *bona fide* disputes of fact – see ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*** paras 12 and 13.

[17] Costs must follow the result. In view of my finding about the abuse of process the applicants' request that costs be paid on the scale of attorney and client is justified. The first respondent's conduct of these proceedings was also vexatious. If the real dispute was who was to be responsible for the sequestration costs this should have been dealt with in terms of Rule 33. Instead the first respondent attempted to create disputes of fact about prejudice to creditors by filing a further affidavit and then arguing the merits. The applicants have been obliged to go to a great deal of unnecessary effort and expense to deal with all the issues – see ***In re Alluvial Creek Ltd 1929 CPD 532*** at 535; ***Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another 1977 (1) SA 157 (A)*** at 177D-F.

[18] Although the first respondent did not object to the second applicant's application to intervene the first respondent made it clear that it did not accept that the second applicant was married in community of property and therefore should have been joined in the sequestration application in accordance with section 17(4)(b) of the Matrimonial Property Act 88

of 1984. In her application to intervene the second applicant alleged simply that on 16 July 1983 she and the first applicant were married in Claremont, California, United States of America, where they were domiciled and that their marriage is similar to a marriage in community of property in South Africa. The question of what matrimonial property regime applies to the applicants' marriage is clearly a matter of foreign law which must be proved by expert evidence – see ***Hlophe v Mahlalele and Another* 1998 (1) SA 449 (T)** at 457E-F: ***Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A)** at 294G-H. In the latter case the court said:

'The content and effect of a foreign law is a question of fact and must be proved (***Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A)** at 396G). Proof is usually furnished by the evidence of properly qualified persons who have an expert knowledge of the law in question. Where the relevant foreign law is statutory in nature, then, in my opinion, it is the right and duty of the court itself to examine the statute and to determine the meaning and effect thereof in the light of the expert testimony, especially where such testimony is of a conflicting nature. ... It follows that the party relying on the foreign statute should, generally speaking, place the statute before the court.'

There is no such evidence in the present case and the court cannot find that the applicants are indeed married in community of property in a similar manner to South African law. The second applicant has therefore not proved that it was necessary for her to be joined as a

respondent in the sequestration application. Clearly this issue could have been argued on the second applicant's own application and it was not necessary for the first respondent to file an answering affidavit. It is noteworthy that on the issue the first respondent's deponent, Mr. Breytenbach, repeatedly says that he is advised without disclosing the source of the advice or attaching the affidavit of an expert to confirm the advice. The joinder of the second applicant is therefore of academic interest. In my view the fairest order to make with regard to costs is that each party pay his/her/its own costs.

[19] The conduct of Mr. Krog in this case leaves much to be desired. He actively engaged in the proceedings and deposed to the founding affidavit in the application for substituted service and obviously prepared the sequestration application. He was involved in abusing the process of the court and made a number of misleading statements in his founding affidavit and drafted a founding affidavit which also contained misleading statements. This conduct must be investigated by the Law Society of the Northern Provinces and if necessary, appropriate steps taken against him. I record that the applicants gave notice that they would seek an order of costs against Mr. Krog *de bonis propriis* but at the end of the argument did not persist in this.

[20] The following order is made:

- I The sequestration order made against the first applicant on 29 January 2009 is set aside;

- II The first respondent is ordered to pay the costs of this application on the scale as between attorney and client;

- III The parties in the second applicant's application to intervene are ordered to pay their own costs;

- IV The registrar is requested and directed to send a copy of this judgment together with a copy of the record and the parties' heads of argument and practice notes to the President of the Law Society of the Northern Provinces to investigate the conduct of attorney Johannes Matthys Krog of Matthys Krog Attorneys, Pretoria in the light of this judgment and if it deems appropriate to take disciplinary steps against him.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 55727/2010

HEARD ON: 24 August 2011

FOR THE APPLICANTS: ADV. L. UYS

INSTRUCTED BY: Gildenhuis Lessing Malatji

FOR THE 1ST RESPONDENT: ADV. N.C. HARTMAN

INSTRUCTED BY: Mathys Krog Attorneys

DATE OF JUDGMENT: 14 September 2011