IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2011-09-20

Case Number: 67502/2010

REPORTABLE

In the matter between:

SIVAPRAKASH NAIDOO	First Applicant
IROOSHKA GOVINSAMY	Second Applicant

and

NANA ABRAM MATLALA N.O.	First Respondent
AMOS NDLOVU	Second Respondent
ANNA NDLOVU	Third Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	Fourth Respondent
NEDBANK LIMITED	Fifth Respondent
MASTER OF THE NORTH GAUTENG HIGH COURT, PRETORIA	Sixth Respondent

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JUDGMENT

SOUTHWOOD J

[1] (1) On 4 March 2009 on the instructions of attorney, David Johan Schoonraad of Schoonraad Attorneys, 955 Arcadia Street, Arcadia, Pretoria, Mr. Altus Viljoen of Dominium Valuers, carried out a valuation of the remaining extent of Erf 1494 Mondeor Township situated at 12 Edward Place, Daylesford Road, Mondeor ('the property') 'to determine the forced value of the subject property for legal purposes'. Mr. Viljoen determined a 'forced value' of R120 000 for the property;

(2) On 10 March 2009 the applicants purchased the property for R761 000 at a sale in execution conducted by the Sheriff on the instructions of the judgment creditor, the fourth respondent. The Sheriff had attached the property which belonged to the second and third respondents pursuant to a writ issued on 17 August 2005 under case number 22647/2005;

(3) On 23 March 2009 Schoonraad Attorneys served copies of the second and third respondents' application for surrender on the Master of the High Court and the Receiver of Revenue;

(4) On 25 March 2009 (i.e. after service of the application on the Master and the Receiver of Revenue) the second and third respondents signed the affidavit confirming that the contents of their statement of affairs (attached to their application for surrender) were true and correct and that every estimated

amount contained therein was correctly estimated and on 26 March 2009 the second and third respondents signed their affidavits in support of the application. In the statement of affairs and the second respondent's affidavit the (forced) sale value of the property is reflected as R1 200 000. There is no explanation for the difference between this value and the value in the valuation of Altus Viljoen (i.e. R120 000) which is attached to the application in support of the allegation that the value of the property is R1 200 000;

(5) Neither the statement of affairs nor the affidavits deposed to by the second and third respondents refer to the fact that on 10 March 2009 the property had been sold in execution for a purchase price of R761 000;

(6) On 27 March 2009 Mr. Schoonraad gave notice in the Government Gazette and The Citizen newspaper that on 20 April 2009 the second and third respondents would apply for the acceptance of the surrender of their estate in terms of the Insolvency Act 24 of 1936 ('the Act') and on 3 April 2009 Mr. Schoonraad posted a copy of the second and third respondents' notice of surrender to all their creditors. He did not post a copy of the notice to either of the applicants;

(7) On 6 April 2009 the applicants and the second and third respondents entered into a written lease agreement in terms of which the applicants leased the property to the second and third respondents for a fixed period of one year from 1 June 2009 to 31 May 2010 at a rental of R9 000 per month. Neither when they entered into the lease nor subsequently did the second and third respondents inform the applicants of their application for the surrender of their estate;

(8) On 20 April 2009 the second and third respondents' application for surrender was postponed to 3 June 2009;

(9) On 3 June 2009 the second and third respondents' application for the surrender of their estate was accepted by the court. The court obviously relied on the contents of the application and, in particular, the alleged forced sale value of the property (i.e. R1 200 000) and the calculation of a dividend of 25 cents in the Rand based on that value;

(10) The second and third respondents failed to pay the rental for the property for June 2009;

(11) On 30 June 2009, unaware that the second and third respondents' estate had been sequestrated, the applicants took

transfer of the property and a mortgage bond for R689 944 was registered in favour of the fifth respondent;

(12) On 14 July 2009 the applicants' attorney of record, Wayne van Niekerk of Wayne van Niekerk Incorporated addressed letters to the second and third respondents in which he gave notice to them that the lease agreement was cancelled because they had failed to pay the June rental;

(13) On 14 July 2009, when he served the letters of cancellation on the second and third respondents, the first applicant received a letter dated 10 June 2009 on the letterhead of Schoonraad Attorneys addressed to 'To whom it may concern' in which it is stated that the second and third respondents had been sequestrated on 3 June 2009 and that, in terms of the Act, they may not be evicted from the property until a trustee has been appointed and instructed them to leave;

(14) On about 14 July 2009, in answer to his letter of 20 June 2009, Wayne van Niekerk received a letter from Schoonraad Attorneys in which Schoonraad Attorneys confirmed that the second and third respondents had been sequestrated on 3 June 2009 and that they, Schoonraad Attorneys, had now become aware that the property had been transferred on 30 June 2009. They also said –

> 'We are presently awaiting the appointment of the trustee and will then request the trustee to set aside the sale and transfer of the property';

(15) On 23 July 2009 the first respondent was appointed provisional trustee in the second and third respondents' insolvent estate;

(16) On 28 July 2009 Wayne van Niekerk addressed a letter to Schoonraad Attorneys in which he asked when the second and third respondents would vacate the property. This letter was never answered;

(17) From the time the property was sold to the applicants on 10 March 2009 the second and third respondents have continued to live and conduct a business in the property;

(18) At all times, as a result of their dealings with representatives of the fourth respondent, the applicants were aware that the fourth respondent did not wish to have the sale and transfer of the property set aside. The fourth respondent considered that this was not in the interest of creditors because a higher price would not be realised on a second auction;

(19) For a period of about a year before they launched this application the applicants, represented by Wayne van Niekerk, attempted to ascertain the first respondent's intention with

regard to the property. Wayne van Niekerk addressed letters to the first respondent in this connection on 7 August 2009, 17 August 2009 and 26 August 2009. The first respondent did not reply to these letters. However, on 1 September 2009 Elmarie Booysen of Legae Trust (Pty) Ltd, acting on behalf of the first respondent, telephoned Wayne van Niekerk. She told him that an offer of R900 000 for the property had been received but she could not disclose the identity of the offeror. She said she had sent this offer to Lynne Nicholson of the fourth respondent;

(20) On 8 September 2009 Ms. Booysen informed Wayne van Niekerk that it appeared that the fourth respondent wanted to accept the sale to the applicants on 10 March 2009 and on the same day the first applicant provided her with a copy of the agreement;

(21) Since the first respondent does not return telephone calls Wayne van Niekerk followed up this information by telephoning Elmarie Booysen. On 22 September 2009 she told him that she was awaiting further instructions from the first respondent but that the fourth respondent had intimated that the applicants should retain the property as it would serve no purpose to cancel the sale of 10 March 2009 and auction the property again;

(22) Thereafter, Wayne van Niekerk communicated with Tsipiso Tshivase of the first respondent's office on 5 October 2009 and 15 November 2009. On the second occasion Mr. Tshivase told Wayne van Niekerk that the first respondent was awaiting final appointment as trustee and that the first respondent intended to ratify the sale of 10 March 2009 but was entertaining an improved offer from a potential purchaser. He would not disclose the identity of the offeror but said that the offer had been referred to the fourth respondent. Wayne van Niekerk addressed further letters to Mr. Tshivase on 17 November 2009, 27 November 2009 and 8 December 2009 but received no reply.

(23) Wayne van Niekerk wrote to Mr. Tshivase again on 6 January 2010 and, after no response was received, did nothing further until May 2010;

(24) On 21 May 2010 the first respondent addressed a letter to Wayne van Niekerk in which he requested the applicants' bond account number with the fifth respondent as he wished to obtain cancellation figures as well as the total paid by the applicants;

(25) On 21 May 2010 Wayne van Niekerk replied to the first respondent's letter of 21 May 2010 pointing out that his intention to cancel the sale of 10 March 2009 appeared to be irrational as the mortgagee (i.e. the fourth respondent) was satisfied with the

situation. Wayne van Niekerk requested an answer 'as a matter of extreme urgency' and furnished the first respondent with the number of his cellular phone. The first respondent did not respond to this letter and Wayne van Niekerk faxed another letter to the first respondent on the 1st of June 2010. He enclosed a copy of his letter of 21 May 2010 and asked for the first respondent's response 'as a matter of urgency'. After no reply was received he faxed a third letter to the first respondent on 7 June 2010 again attaching a copy of his letter of 21 May 2010 and requesting an answer as a matter of urgency. On 24 June 2010 Wayne van Niekerk received an answer from the first respondent. He did not reply to the question raised in Wayne van Niekerk's letters and said he was waiting for the response to his letter of 21 May 2010 (i.e. the account number);

(26) The first respondent attached to his letter a copy of the minutes of the second creditors' meeting in the second and third respondents' insolvent estate but not the annexures to the minute: i.e. the first respondent's report and the proposed resolution. On 1 July 2010 Wayne van Niekerk faxed a letter to the first respondent requesting copies of these documents as a matter of urgency. The first respondent did not reply to this letter. On 6 July 2010 Wayne van Niekerk faxed another letter to the first respondent requesting copies of the first respondent's report and the proposed resolution. This time Wayne van

Niekerk obtained confirmation from the first respondent's office that that fax had been received. The first respondent did not reply to this letter;

(27) Wayne van Niekerk's enquiries at the Master's office reflected that there were two minutes for the same meeting of creditors, one of which reflects that no meeting was held and the other that a meeting did take place;

(28) The first respondent has refused to disclose his report and the proposed resolution to Wayne van Niekerk (and has not disclosed them in these proceedings);

(29) On 19 July 2010 Wayne van Niekerk telephoned Elmarie Booysen. She told him that the first respondent had decided to auction the property again as it had been transferred to the applicants after the sequestration of the second and third respondents and the applicants had accepted the risk of the defective title;

(30) The news that the first respondent intended to sell the property again came as a surprise to the applicants as the fourth respondent was satisfied with the sale on 10 March 2009 and no concurrent creditors had proved claims against the estate;

(31) On 20 September 2010 Wayne van Niekerk received a copy of a letter from the first respondent to the fifth respondent in which the first respondent informed the fifth respondent that he intended to apply for the setting aside of the sale in execution of the property on 10 March 2009. He also informed the fifth respondent that he intended to sell the property to a purchaser who had already made him an offer in the sum of R1 200 000;

(32) On 21 September 2010 Wayne van Niekerk faxed a letter to the first respondent to request a copy of the offer in the sum of R1 200 000. The first respondent did not reply to that letter and did not furnish a copy of an offer of R1 200 000.

(33) The applicants launched this application on 3 November 2010 and only the first respondent gave notice of his intention to oppose.

(34) On 28 February 2011 the first respondent delivered his answering affidavit in which he referred to a valuation of the property by Aucor on 21 January 2010 in which the market value of the property is said to be R1 570 000;

(35) On 28 March 2011 (i.e. after the first respondent filed his answering affidavit) Wayne van Niekerk delivered a notice in terms of Rule 35(12) requiring the first respondent to produce a

number of documents referred to in the first respondent's answering affidavit. Before the first respondent replied to the notice the first respondent's attorney of record, Ms. M.J. Ramagaga of Matshego Ramagaga Attorneys and Conveyancers addressed a letter dated 29 April 2011 to Wayne van Niekerk. On 3 May 2011 Ms. Ramagaga replied to the notice in a letter in which she referred *inter alia* to her letter of 29 April 2011;

(36) The letter dated 29 April 2011 related to the applicants' request that the first respondent produce for inspection a copy of the offer to purchase and a copy of the acceptance letter referred to in paragraphs 4.13, 4.14 and 5.17.2 of the first respondent's answering affidavit. In these paragraphs, the first respondent stated that during March 2010 he received an offer to purchase the property for R1 100 000 which he had accepted and, in that regard, he referred the court to the annexed letter of acceptance marked NNM4. The relevant part of Ms. Ramagaga's letter reads as follows:

> 'Kindly note that there is no copy of Attachment "NNM4" to the First Respondent's answering affidavit at paragraph 4.13.
>
> The First Respondent has given an instruction to one of his professional staff to accept Dimitri Monokandilos Mining CC's offer of R1 100 000 for the sale of Erf 1494

> Mondeor, however, due to an oversight on the part of the staff member, the acceptance was not conveyed in writing to the prospective buyer, though the staff did so verbally.
>
> The First Respondent's Attachment "NNM4" (letter of acceptance) was based upon the fact that the staff had fully carried out his instructions.'

(37) Ms. Ramagaga's letter dated 3 May 2011 is a reply to the applicants' notice in terms of Rule 35(12) and attaches a number of documents. A copy of the offer to purchase (referred to in paragraphs 4.13 and 5.17.2 of the first respondent's answering affidavit) is attached. It is an undated Deed of Sale signed only by the purchaser. There is no indication that it was signed by or on behalf of the first respondent. If it had been accepted it would have been subject to a suspensive condition that the purchaser was able to obtain a loan of at least R990 000. In his answering affidavit the first respondent did not refer to this suspensive condition or its fulfilment. Obviously it has not been fulfilled;

(38) The other documents show that only the fourth respondent submitted a claim in the second and third respondents' insolvent estate. This claim was submitted on condition that it would be lodged once Legae Trust was satisfied that 'there is no fear of contribution being levied against creditors'. None of the

concurrent creditors listed in the second and third respondents' statement of affairs has proved a claim.

[2] All the facts set out above are not in dispute. The first respondent has not shown any inclination to engage with the facts alleged by the applicants and has contented himself with raising technical points and bald denials of most of the applicants' factual allegations. He has even denied his own letters and letters clearly emanating from his firm, Maluleke Seriti Makume Matlala Inc. In dealing with the applicants' allegations in this manner the first respondent has ignored the requirement that a litigant who wishes to deny factual averments in the opposing party's affidavits of which the litigant has personal knowledge must set out the contrary facts – see e.g. ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*** **2008 (3) SA 371 (SCA)** paras 12 and 13. It also appears from these undisputed facts that the first respondent has not been truthful with regard to a material fact on at least two occasions both relating to the sale of the property. On two occasions the first respondent alleged that he had received an offer to purchase the property:

(a) In his letter dated 20 September 2010 (165 FA40) the first respondent said that he intended to sell the property to the purchaser who had already made him an offer in the sum of R1 200 000. Immediately after receiving that letter, on 21 September 2010, Wayne van Niekerk requested the first respondent in a letter (167 FA41) to make a copy of the offer to purchase available. The first respondent did not reply to the letter or make a copy of the document available. Obviously if he had received such an offer this would have been easy to do and would have put the matter beyond doubt. The first applicant states that the first respondent did not make a copy available for self-evident reasons (i.e. that it does not exist which means that the first respondent was untruthful). The first respondent does not even attempt to explain his failure to make the offer available. He simply puts up a bald denial (47 paras 86 and 87: 258 para 5.24).

(b) In paragraphs 4.13, 4.14 and 5.17.2 of his answering affidavit the first respondent stated unambiguously that during March 2010 (i.e. almost a year before he deposed to his affidavit) he had received an offer to purchase the property in the amount of R1 100 000 which he had accepted. (This was something the first respondent had not previously mentioned). In that regard the first respondent pertinently referred the court to his acceptance letter which was annexed and marked NNM4 (244 para 4.13). He then submitted that this offer will benefit all the creditors in the estate because there will be more money available for distribution than at the time of the acceptance of surrender and because all the creditors stand a chance of receiving payment of their claims in full. He also said that this would be to the advantage of the insolvents when they applied for their rehabilitation (244 para 4.14). These averments were clearly meant to convey that the first respondent had concluded an agreement to sell the property for R1 100 000. It will be remembered that Ms. Ramagaga's letter of 29 April 2011, states that there was no acceptance letter which could be annexed as NNM4 and indicates that there was no acceptance of the offer at all and accordingly no valid agreement. Furthermore, as already mentioned the deed of sale signed by the intending purchaser was subject to a suspensive condition that the purchaser obtain a loan of at least R990 000. Clearly this condition has not been satisfied.

In the absence of any explanation by the first respondent the conclusion is unavoidable that in his letter of 20 September 2010 and again in his answering affidavit the first respondent was deliberately untruthful about a material aspect of his case.

[3] In view of this conclusion the first respondent's allegation that he entered into an agreement to sell the property for R1 100 000 (or any other price) is rejected. It is also found that it is doubtful that the fourth respondent proved a claim against the insolvent estate and that no other creditor has proved a claim against the estate. Finally it is found that no creditor will be prejudiced if the sequestration order is set aside.

[4] A sequestration order may be set aside in terms of section 149(2) of the Act which provides:

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

Since no grounds are referred to the court must exercise its discretion in the light of the circumstances disclosed to it – see ***Hoffenberg & Co v Pearl*** **1952 SR 298;** ***Ex parte Van der Merwe*** **1962 (4) SA 71 (O)** at 72F-G; **Mars** ***The Law of Insolvency in South Africa*** **9 ed** Bertelsmann et al **('Mars')** at 24 para 2.4. The learned authors of **Mars** point out that there is a long line of authority that section 149(2) may be invoked both where the order should not have been granted and where it was properly made but supervening factors make its rescission necessary or desirable. For present purposes I shall accept the statement of the relevant principles gleaned from the authorities by Gautschi AJ in ***Storti v Nugent*** **2001 (3) SA 783 (W)** at 806D-G:

'(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) This 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.'

[5] A sequestration order may also be set aside at common law if the applicant satisfies the common law requirements. These are encapsulated in the requirement that 'sufficient cause' for rescission must be shown. This involves three essential elements: the applicant must (1) give a reasonable (and obviously acceptable) explanation for his default; (2) show that his application is made *bona fide,* and (3) show that on the merits he has a *bona fide* defence which, *prima facie*, carries some prospect of success – see ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*** **2003 (6) SA 1 (SCA)** para 11; ***Chetty v Law Society, Transvaal*** **1985 (2) SA 756 (A)** at 764J-765D: ***De Wet v Western Bank Limited*** **1979 (2) SA 1031 (A)** at 1042F-1043A; **Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed** Cilliers et al **('Herbstein & Van Winsen') Vol 1** 938-9.

[6] A sequestration order may also be set aside in terms of Rule 42(1) of the Uniform Rules the relevant part of which provides:

> 'The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

In general terms, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment – see ***Nyingwa v Moolman NO*** **1993 (2) SA 508 (Tk GD)** at 510D-G; **Herbstein & Van Winsen Vol 1** 931. It follows that if material facts are not disclosed in an *ex parte* application – see ***Schlesinger v Schlesinger*** **1979 (4) SA 342 (W)** at 348C-349E; ***National Director of Public Prosecutions v Basson*** **2001 (2) SACR 712 (SCA)** para 21; ***United Diamond Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*** **1972 (4) SA 410 (C)** at 414F-415C – or if a fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted. It has been held that an order granted in an application brought *ex parte* without notice to a party who has a direct and substantial interest in the matter is an order erroneously granted – see ***Clegg v Priestly*** **1985 (3) SA 950 (W)** at 953I-954I.

[7] The applicants seek to set aside a sequestration order which was not made against them. Whether they bring the application in terms of section 149(2) of the Act or in terms of the common law or in terms of Rule 42(1)(a) they must have *locus standi*: i.e. they must show that they had and have a direct and substantial interest in the order sought – see ***Amalgamated Engineering Union v Minister of Labour*** **1949 (3) SA 637 (A)** at 651. As pointed out in ***United Watch & Diamond Co v Disa Hotels*** **1972 (4) SA 409 (C)** at 414D-G:

> 'Before it is possible to consider these various arguments, it is necessary to determine whether the applicants have *locus standi* to bring an application for the rescission, or setting aside, of para 4 of the Court's order and for the further consequential relief claimed. … It is obvious that this is fundamental to the whole application and that it is, therefore, the first matter that must be considered.
>
> Whether the application be founded upon Rule of Court 42(1)(a) or upon the common law rule relating to the non-disclosure of material facts in an *ex parte* application, it is clear that it is only a limited class of persons who are entitled to bring an application of this nature. The Rule of Court specifically speaks of the application being brought by "any party affected"; and it is manifest that the Court would not entertain an application under the common law at the instance of a disinterested third party. This much is transparently clear; but what is not so clear is how that limited class of persons is to be defined. In this connection neither Mr. Friedman nor Mr. Grosskopf appeared to draw any positive distinction between the Rule of Court and the common

law rule, and I accept that the position as to *locus standi* is broadly the same under both.'

and at 415A-B:

'… an applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish *locus standi,* that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted.'

See also ***Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd*** **1981 (2) SA 52 (T)** at 54H-55C.

[8] In my view the applicants had and have such a direct and substantial interest in the grant of the sequestration order. Having bought the property at the sale in execution on 10 March 2009 the applicants were entitled to demand transfer from the Sheriff. However, if the judgment debtors (i.e. the second and third respondents) were to be sequestrated after the sale in execution but before the transfer of the property to the purchasers in execution (i.e. the applicants), the effect of insolvency would be to vest the dominium of the property in the second and third respondents' insolvent estate and it would have to be dealt with in terms of section 20(1)(a) and (2)(a) of the Act (i.e. it would first vest in the Master and then, on his appointment the trustee) – see ***Simpson v Klein NO*** **1987 (1) SA 405 (W)** at 412F-G; ***Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central***

***and Another* 1997 (1) SA 764 (D)** at 772C-778D. If they had received notice of the application for surrender they could have intervened to oppose the application and shown at the very least that there would be no advantage to creditors. Now that the first respondent apparently wishes to set aside the sale and transfer of the property to the applicants, the applicants have an interest in setting aside the sequestration order to prevent this from happening. Neither in his answering affidavit nor in argument before this court does the first respondent contend that the applicants do not have *locus standi*.

[9] Although the affidavits and annexures did not establish two essential requirements for the acceptance of the surrender (i.e. that the second and third respondents owned realisable property of a sufficient value to defray all costs of the sequestration payable out of the free residue of the estate and that it would be to the advantage creditors if their estate was sequestrated – see section 6(1) of the Act) the court was obviously satisfied that they did. According to the second and third respondents' affidavits the surrender of their estate would not only see all costs paid out of the free residue of the estate but payment of a dividend of 25 cents in the Rand. These allegations were based on the property having a forced sale value of R1 200 000 and the second and third respondents' movable assets (furniture and appliances) having a forced sale value of R2 100.

[10] To prove these values the second and third respondents relied on two valuations by Altus Viljoen of Dominium Valuers. Reference has already been made to the fact that the valuation of the property (repeatedly) states that the forced sale value is R120 000 (not R1 200 000). But even if it is accepted that Mr. Viljoen intended to say R1 200 000 his valuation does not comply with the requirements laid down in a number of judgments. It has consistently been stated that it is not sufficient for a valuer (assuming that he or she is qualified to express an opinion) to furnish a valuation which is, in effect, a bald statement of opinion. The valuer's opinion must be based on facts or data which have been established either by the valuer or other witnesses, and the process of reasoning by which the valuer arrived at the particular valuation must be set out – see ***Nel v Lubbe* 1999 (3) SA 109 (W)** at 111D-G; ***Ex parte Anthony en 'n Ander en Ses Soortgelyke Aansoeke* 2000 (4) SA 116 (C)** at 124F-I; ***Ex parte Mathysen et Uxor (First Rand Bank Ltd Intervening)* 2003 (2) SA 308 (T)** at 311I-312G; ***Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP)** paras 11-18 and ***Ex parte Samuel Adeleke Ogunlaja and Five Other*** case number 53146/09 (Bertelsmann J, GNP, 19 January 2010). Mr. Viljoen claimed to have used comparable sales to determine the value of the property. However he did not explain what this method entails and there is no evidence of sales which are alleged to be comparable. The rest of this reasoning consists of vague generalisations which are not based on facts. His conclusion is therefore nothing more than a bald statement of opinion. His valuation

of the movable assets is similarly unacceptable. He merely lists the goods and expresses his opinion.

[11] It will be remembered that the second and third respondents had already consulted Schoonraad Attorneys before the sale in execution on 10 March 2009. Mr. Viljoen's valuation shows that on 4 March 2009 he valued the property on Schoonraad Attorneys' instructions 'to determine the forced value of the subject property for legal purposes'. This clearly meant for the purposes of an application for the acceptance of the surrender of the second and third respondents' estate. Mr. Schoonraad and the two respondents therefore knew from a date prior to the sale that the two respondents intended to apply for the surrender of their estate. The second and third respondents owned only one asset of substantial value: the property. Consequently the sale in execution of the property for R761 000 on 10 March 2009 was an important fact which would affect their application. They also knew that sequestration could prejudice the purchasers. These were material facts which should have been disclosed to the court in the *ex parte* application. In addition the papers should have been served on the applicants to give them an opportunity to intervene in the application. Even if the applicants did not intervene it is clear that disclosure of the sale in execution for R761 000 would have completely destroyed the applicants' case. It would have shown that the forced sale value of R1 200 000 alleged by the second and third respondents in their affidavits was unattainable and that neither the costs nor a

dividend would be paid from the free residue. The fourth respondent's claim was R853 721,24, almost R100 000 more than the sale price.

[12] The most plausible conclusion from the facts – see ***Skilya Property Investments (Pty) Ltd v Lloyds of London*** **2002 (3) SA 765 (T)** at 781B-D – is that the second and third respondents decided to conceal from the court the details of the sale and not to give the applicants notice of the application. The deliberate concealment of the information pertaining to the sale in execution was fraudulent and clearly induced the court to grant the order on the 3rd of June 2009 – see ***Schierhout v Union Government*** **1927 AD 94** at 98; **Herbstein & Van Winsen Vol 1** 939-940. The applicants have therefore established the facts necessary for the court to set aside the sequestration order – see ***Swart v Wessels*** **1924 OPD 187** at 189-190; **Herbstein & Van Winsen Vol 1** 940-941.

[13] The second and third respondents obviously wanted to use the sequestration process to negate the sale of the property to the applicants. If they had allowed the property to be transferred they would have been no better off financially but they would have had to vacate the property. By surrendering their estate they have delayed their eviction from the property where they have lived and carried on business by at least two years. This is borne out by the fact that within a week after the sequestration order was granted Mr. Schoonraad prepared a letter dated 10 June 2009 'To whom it may concern' in

which he said that in terms of the Act the second and third respondents could not be evicted until the trustee had given instructions that they be evicted and that on 14 July 2009 Mr. Schoonraad addressed a letter to Wayne van Niekerk in which he said that as soon as the trustee had been appointed he would request the trustee to set aside the sale and the transfer of the property. The most plausible inference on all the facts is that Mr. Schoonraad advised the second and third respondents to apply for their sequestration because of the impending sale in execution and that he advised them to withhold the facts relating to the sale in execution and not give notice to the applicants. It is inconceivable that he did not know about the sale in execution.

[14] The first respondent has raised two preliminary points: the applicants' delay in bringing these proceedings and the applicants' failure to join all interested parties. There is no merit in either point. There was no need for the applicants to apply to set aside the sequestration order until it was clear that the first respondent intended to apply to set aside the sale and transfer of the property. As appears from the undisputed facts, on this issue the first respondent blew hot and cold. At first the first respondent's representatives indicated that he would stand by the sale and then there were suggestions that he would set aside the sale and transfer because he had another purchaser for a much higher price. Only in September 2010 did the first respondent unequivocally state that he intended to apply for the setting aside of the sale and the transfer of the property. This clearly precipitated the application. The

applicants only have to join parties with an interest in the order sought and they did so. The applicants joined the first respondent who is the proper person to sue on behalf of the estate – see **Mars** 293 para 14.1; 339-341 paras 15.24-15.25. The applicants were not obliged to join creditors who had not proved claims.

[15] The applicants have therefore made out a case for the relief which they seek and the only issue remaining is the question of costs. The applicants seek an order *de bonis propriis* against the first respondent that the first respondent pay the costs on the scale as between attorney and client. The first respondent's counsel contends that this is not justified by the facts of the case and refers to the fact that the notice of motion contains no prayer for an order for costs against the first respondent. The absence of a prayer is no obstacle. In the applicants' counsel's heads of argument notice was given that such an order would be sought. The general rule is that the unsuccessful party is mulcted in costs and the failure to pray for costs is not sufficient reason *per se* for depriving a successful litigant of his costs where the other party has appeared and opposed the claim – see ***Sing v Sing*** **1911 TPD 1034** at 1038-1039; ***Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others*** **1999 (2) SA 599 (T)** at 632J-633B.

[16] In my view there is no reason to depart from the general rule and there is good reason to order the first respondent to pay the costs in his

personal capacity on the scale as between attorney and client. These reasons can be listed as follows:

(1) The first respondent opposed the application without a *bona fide* defence. It will be remembered that the first respondent raised only procedural issues (i.e. delay and non-joinder) and did not engage with the facts alleged by the applicants to show that they were erroneous. The first respondent did not dispute the applicants' *locus standi* but denied that they were entitled to relief because the second and third respondents had not misled the court in their application for sequestration. The first respondent's denial flies in the face of the facts. Finally, the allegation that the first respondent had entered into an agreement to sell the property for a much higher price than the price for which the applicants bought the property has been shown to be devoid of truth. No agreement had been entered into. The first respondent clearly knew that he did not have a *bona fide* defence;

(2) The decision to persist in opposing the application is inexplicable unless the first respondent had decided to assist the second and third respondents as alleged by the applicants. The first respondent did not deem it necessary to dispute this contention or the other even more serious allegations that he had told deliberate untruths. The court must conclude that the

first respondent cannot explain these matters. (These have been dealt with in detail earlier);

(3) The first respondent did not reply to numerous letters which substantially protracted the dispute. Not only did this cause prejudice to the applicants but it is a contravention of Rule 89.23 of the Attorneys Rules;

(4) At the very least the first respondent's opposition has been vexatious – see ***In re Alluvial Creek Ltd*** **1929 CPD 532** at 535; ***Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and Another*** **1997 (1) SA 157 (A)** at 177D-F;

(5) There is no evidence that the first respondent is authorised in terms of section 73 of the Act to oppose this application; and

(6) The estate has no funds or other assets with which to pay the costs of the application.

[17] The conduct of Mr. Schoonraad and the conduct of Mr. Matlala must be investigated by the Law Society and, if necessary, appropriate action taken against them. Their misconduct appears from this judgment.

[18] The following order is made:

I The order of 3 June 2009 sequestrating the second and third respondents' estate is set aside;

II The second and third respondents' joint insolvent estate is discharged from administration by the first respondent;

III Nana Abram Matlala in his personal capacity is ordered to pay the costs of this application on the scale as between attorney and client;

IV The registrar is requested and directed to send a copy of this judgment together with the record and the heads of argument filed to the President of the Law Society of the Northern Provinces to investigate the conduct of Mr. David Johan Schoonraad of Schoonraad Attorneys and Mr. Nana Abram Matlala of Maluleke Seriti Makume Matlala Inc. in the light of this judgment and to take whatever action against them which the Law Society considers appropriate.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 67502/2010

HEARD ON: 24 August 2011

FOR THE APPLICANTS: ADV. N. KRUGER-HECKROODT

INSTRUCTED BY: Wayne van Niekerk Inc.

FOR THE FIRST RESPONDENT: ADV. D. MTSWENI

INSTRUCTED BY: Matshego Ramagaga Attorneys

DATE OF JUDGMENT: 20 September 2011