FORM A

FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES**:** **OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED v J C BRAND + 1**

NOT REPORTABLE

Case Number: **532/08**

[1] High Court: **PORT ELIZABETH**

- DATE HEARD: **20 AUGUST 2009**
- DATE DELIVERED: **3 SEPTEMBER 2009**

JUDGE(S): **EKSTEEN AJ**

LEGAL REPRESENTATIVES –

Appearances:

[1] for the Plaintiff(s): **ADV MULLINS**

[2] for the Defendant(s): **MR SPRUYT**

[3]

Instructing attorneys:

- Plaintiff(s): **JOUBERT GALPIN AND SEARLE**
- Defendant(s): **FRIEDMAN SCHECKTER**

CASE INFORMATION -

[1] *Nature of proceedings*:

[2] *Key Words*:

[3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: **532/08**

Date delivered:

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED Applicant

and

JOHANNES CHRISTOFFEL BRAND First Respondent

CAROL ANN BRAND Second Respondent

JUDGMENT

EKSTEEN AJ:

[4] This the return day of a provisional sequestration order in respect of the estate of the first respondent. The applicant seeks a final order of sequestration. The application is opposed by the first respondent. At the hearing hereof the first respondent sought leave to introduce a fourth set of affidavits. The application was not opposed and I accordingly ordered that such further affidavits, together with the applicants reply thereto, be admitted.

[5] The applicant relies in its founding affidavit on a judgment debt granted in his favour against the first respondent in the amount of R595 498,43, together with interest thereon, on 7 July 2008. Pursuant to the judgment

the applicant caused a writ of execution to be issued and received a *nulla bona* return. Prompted by these events the applicant launched an application for the sequestration of the first respondent's estate.

[6] In its application it alleged that the first respondent was the joint owner, together with the second respondent of a property valued in an amount of R1 750 000 over which bonds were registered in the amount of R982 000. The applicant accordingly alleged that the first respondent's half share in the equity in the property amounted to approximately R384 000 and accordingly that there was an advantage to creditors if the estate of the first respondent were sequestrated.

[7] The application for a provisional order of sequestration was vehemently opposed. The sole basis of the opposition to the granting of the provisional order of sequestration was that first respondent alleged that there would be no advantage to creditors if his estate was sequestrated. Affidavits were filed on both sides and the matter was fully argued before Tshiki AJ who found in favour of the applicant holding that an advantage to creditors had been established.

[8] On the return day the first respondent filed a fresh affidavit in opposition, now relying on very different grounds.

[9] The first respondent alleges that at all times material hereto he has operated as an independent insurance broker and he is registered as a

financial services provider. This registration entitles him, *inter alia*, to render the services of a personal financial planner ("*PFA*"), which entails individual insurance, retirement annunities and investment products. In this capacity he had contracts with a number of major insurance and investment houses in South Africa, including the applicant. In terms of his contract with the applicant he was awarded a "*broker's code*". As and when the first respondent sold products of the applicant to a member of the public his application for the product was submitted to the applicant under his broker's code. Upon approval of the application and the issuing of the policy, annuity or investment, as the case may be, he was paid his commission.

[10] In the event of any policy subsequently lapsing for any reason, then, in terms of the agreement with the applicant, the first respondent would become liable to the applicant to repay the balance of the commission which had already been paid to the respondent as broker. The first respondent states that a distinction is to be drawn in the insurance industry between PFA's and Group Insurance Advisors. Whilst the former deals with private individuals relating to individual products, the latter deals with corporate entities with group insurance and annuity products, in terms whereof such an entity will take out a product for its employees as a group. A person who is authorised to do group insurance, cannot render PFA services unless he is also registered to do so. The first respondent, as an independent broker, marketed the products of various companies. The applicant, on the other hand, employs on its own staff financial service

providers who market exclusively the applicant's products on its behalf. Such persons do not always hold a licence to practice as such in their personal names, they
practice under the licence of the applicant.

[11]The first respondent alleges that during 2004 the applicant had in its employ one Vuyani Pikashe. Pikashe was employed in the group products division and he was not a registered financial services provider in his own name. He was not authorised to market individual products. The first respondent alleges that Pikashe "*was ostensibly of value to the applicant in the sense that he could penetrate the black market for the purpose of marketing the products of the applicant*". For this reason, so the first respondent contends, one Carl Geyi, employed as "*an assistant broker consultant*" with the applicant, acting as a "*representative of the applicant*", introduced the first respondent to Pikashe with the intention that Pikashe would market the products of the applicant in the black market and submit those products to the applicant under the first respondent's broker's code. The first respondent alleges that his role in the exercise would be to ensure that all the papers were in order and to make his broker's code available to Pikashe. As the application was submitted under the respondents brokers code the applicant would pay the commission to the first respondent.

[12]An agreement was entered into between Pikashe and the first respondent that the first respondent would pay 70% of such commission's received on

this business to Pikashe. Pikashe proceeded to sell 60-70 policies in respect of which commission was paid to the first respondent. In due course all these policies lapsed and first respondent was called upon to repay all the commissions received. It is this debt which gave rise to the judgment debt upon which the applicant relies. Whilst first respondent suspected that Pikashe may have acted fraudulently he did nothing about it until the application for his sequestration was filed. Thereafter he investigated the matter and "*new facts*" came to light. These new facts were that Pikashe had in fact committed fraud in respect of all the policies and that an investigation launched by the applicant internally during 2005 and 2006 had revealed that. The first respondent contends further that it now emerged that Pikashe had a criminal record including two counts of robbery and one of theft. He contends, on the facts of the case, that applicant was duty bound to reveal this to him.

[13]On this basis the first respondent contends that the relationship between him and Pikashe was instigated by the applicant and that it was implemented with full knowledge, approval and support of the applicant. For this reason it is contended that the applicant owed a duty of care to ensure that, when it placed the first respondent in relationship with Pikashe as its employee and for its own benefit, Pikashe would be honest and that the applicant breached its said duty. It is further advanced that Pikashe conducted himself in the course and scope of his employment with the applicant and that the applicant was accordingly vicariously liable for the conduct of Pikashe.

[14]These averments are, of course, strongly denied by the applicant. Affidavits were filed by numerous managers in the broker's division of the applicant denying any knowledge during 2004 of the relationship between Pikashe and the first respondent.

[15]The applicant alleges that the Pikashe was employed on 1 October 2001 as a retirement fund manager and that he remained in that position throughout. He was referred to the applicant by an employment agency "*PAG*" which was responsible for and conducted all reference checks regarding Pikashe. The applicant contends that it further conducted its own checks including ITC checks. All checks regarding Pikashe were positive, he had an impressive CV and enquiries from the South African Police elicited the response that Pikashe had no criminal record.

[16]Geyi, for his part, was employed as a "*work portfolio clerk*". He was indeed the administrative assistance assigned to Mr Roberts, the consultant dealing with the first respondent's portfolio and his role was purely to process policy application forms, attend to general office administrative work and to respond to administrative queries from brokers, including the first respondent. The applicant accordingly alleges that Geyi had no authority to market the applicant's products, either himself or through any third person. Geyi was not employed for the purpose of selling products and he had no management functions. Significantly, the applicant contends that he had no need to utilise Pikashe to penetrate the

black market as it had in its own employ more that thirty duly registered black PFA's who were qualified and authorised to do this business.

[17]The applicant further annexes an affidavit deposed to by the first respondent in September 2006 wherein the first respondent records:

1. When Pikashe proposed the "*arrangement*" to him in 2004 he was concerned about the lapsing of policies due to the non- payment of premiums;
2. he told Mr Pikashe that he required to meet with clients personally;
3. Pikashe, however, told him that this was not possible as the clients would not trust him;
4. He decided, nevertheless, to proceed with the arrangement on the basis that he would not meet the clients personally, because he calculated that he would still make money in a postulated "*worst case scenario*" of one third of the policies lapsing.

[18]Finally, the first respondent sued Pikashe in 2007 for repayment of the commission's paid by him to Pikashe in terms of their arrangement. He obtained judgment against Pikashe. In the summons, first respondent alleged that it was a term of his arrangement with Pikashe that, in the event of any cancellation or lapse of any policies, he "*would be liable to pay back the commissions to Old Mutual*" and that Pikashe would be liable

to pay back "*to Jan Brand Brokers*" the commissions he had received from first respondent. Applicant therefore contends that on first respondent's own version he was liable to applicant in respect of such commissions.

[19]The first respondent contends that what emerges from these allegations is irresoluble disputes of fact as to whether the applicant's management had been aware of Pikashe's background and his relationship with the first respondent. He accordingly requests that the matter be referred to oral evidence. On these averments the application falls to be considered.

[20]Section 12(1) of the Insolvency Act No. 24 of 1936 ("*the Insolvency Act*") provides that where, on a return day of a provisional sequestration order, the court is satisfied that the petitioning creditor has established against the debtor a claim which would entitle him to an order of sequestration, an act of insolvency and a reasonable belief in an advantage to creditors the court may grant a final order of sequestration.

[21]On the papers there is no dispute relating to the debt. For as long as the judgment stands the debt is, in my view, indisputable. To the extent that it is argued on behalf of the first respondent that any dispute of fact between the parties can have bearing upon the proof of the first respondent's debt to the applicant, this argument is misplaced. The dispute relating to the debt has already been the subject of litigation and a binding judgment stands. In the present application there is no attack on the judgment.

[22]There is no dispute that a *nulla bona* return was issued which constitutes a deed of insolvency in terms of the provisions of section 8(b) of the Insolvency Act. The dispute relating to the advantage to creditors has already been resolved and this Court has passed judgment on that issue. The three essential requirements set out in section 12(1) of the Insolvency Act are accordingly unequivocally established.

[23]Notwithstanding that the three essential elements required for the issue of a final order for sequestration have been established the court nevertheless retains a discretion not to grant a final order of sequestration. Where, however, the three essential elements have been established the court will not exercise its discretion in favour of the respondent unless there are special circumstances which justify the withholding of a final order of sequestration. The onus to establish such special circumstances upon a balance of probabilities rests upon the respondent. See ***Millward v Glaser*** 1950 (3) SA 547 (W) at 553-554 and the cases there cited; ***Chenille Industries v Vorster*** 1953 (2) SA 691 (O) at 700; ***Realisations Limited v Ager*** 1961 (4) SA 10 (D) at 11-12 and ***Benade v Boedel Alexander*** 1967 (1) SA 648 (O) at 655-656. The essence of the argument presented on behalf of the respondent was that I should exercise my discretion in favour of the respondent, firstly, because the issues between the parties should be resolved by litigation and, secondly, because the applicant has suppressed and withheld information in its application to Court.

[24]It has been held that where the respondent *prima facie* has a claim for damages against the applicant such consideration may constitute special circumstances. See ***Els v Priest*** 1931 EDL 2. The respondent does not say that he intends to institute an action against the applicant although the thrust of the averments set out in the answering affidavit are to the effect that the applicant is liable to the respondent for damages.

[25]The first basis upon which it is alleged that the applicant would be liable to the respondent is that the applicant itself instigated the relationship between Pikashe and the first respondent as Pikashe was ostensibly of value to the applicant in the sense that he could penetrate the black market for the purpose of marketing the products of the applicant. For this reason, it is suggested that the applicant introduced Pikashe to the first respondent with the intention that Pikashe would market the products of the applicant in the black market and submit those products to the applicant under the first respondent's code. These averments are, of course, denied by the applicant.

[26]The applicant contends that it has thirty black PFA's in its own employ who are qualified and registered to sell the applicant's products to the black market. Pikashe was accordingly of no special value to them for this purpose. In addition, Rossouw, the regional general manager of the applicant, states that Pikashe did indeed approach him raising the possibility of referring clients to the applicant's individual life division for marketing individual retirement annuities to them. He informed Pikashe

that he was to refer these clients to the applicant's PFA's and must ensure that the relevant regulations were complied with. I consider that it is most improbable that the applicant, having employed thirty people to do precisely what Pikashe wanted to achieve, would instigate an arrangement to utilise an independent broker for this purpose, thereby jeopardising the opportunities of its own employees. I am satisfied on a consideration of all the evidence, that the applicant's allegations in this regard are inherently credible and I accept them as correct.

[27]The second basis for the alleged liability of the applicant to the first respondent is to be found in the allegations of vicarious liability for the actions of Pikashe and of Geyi. Pikashe was employed in the group products division of the applicant and was not registered as a financial service provider. He had no authority to market individual products. It was accordingly not within the scope of Pikashe's role or authority in the applicant to market any products in respect of individuals, either directly or through any third person. The very purpose of the agreement entered into between Pikashe and the first respondent appears to have been to enable Pikashe to sell products which he was not authorised to market in his employment. It was for the very reason that he was neither authorised nor employed to do what he intended to do that he required the co-operation of the first respondent. It is inconceivable that the first respondent did not appreciate the nature of the scheme. To put it differently, it was because the proposed activity fell outside of the scope of his employment that the agreement with first respondent was necessary.

[28]In the matter of ***Absa Bank Limited v Bond Equipment (Pretoria) (Pty) Limited*** 2001 (1) SA 372 Zullman JA, at 378B-G said:

> "[*5]* *The standard test for vicarious liability of a master for the delict of a servant is whether the delict was committed by the employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the relevant time the employee was about the affairs, or business, or doing the work of, the employer…. It should not be overlooked, however, that the affairs of the employer must relate to what the employee was generally employed or specifically instructed to do. Provided that the employee was engaged in activity reasonably necessary to achieve either objective, the employer will be liable, even where the employee acts contrary to express instructions …. It is also clear that it is not every act committed by an employee during the time of his employment which is for his own benefit or the achievement of his own goals which falls outside the course and scope of his employment …. A master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity qua servant and not as an independent individual*."

[29]On a consideration of the evidence which is not in dispute I consider that it is clear that in entering into the agreement with the first respondent Pikashe was not about any affairs of the employer which relate "*to what (he) was generally employed or specifically instructed to do*". On the contrary it was precisely to enable him to go about affairs which had

nothing to do with the purpose for which he was employed. First respondent was fully aware thereof. In these circumstances I consider, on the averments which are not in dispute, that Pikashe was plainly not acting within the course and scope of his employment and his relationship with the first respondent, even if it was with the permission of managers in the employ of the applicant, fell outside of the scope of his employment.

[30]Similarly, Geyi, was employed as an administrative clerk. His functions were merely to process policy application forms and to attend to general officer administrative work. He had no management function whatsoever and the scope of his employment had no bearing on the marketing of any products. Moreover, Geyi was employed as an assistant to Mr Roberts, a broker consultant who dealt with the first respondent's position. Geyi's function in the applicant must accordingly have been known to the first respondent. In these circumstances I can find no basis upon which the applicant would be vicariously liable to the first respondent in respect of conduct of Geyi when he introduces Pikashe to the first respondent.

[31]The third basis upon which it is alleged that the applicant may be liable to the first respondent is that the applicant is alleged to have made a representation to the first respondent relating to the integrity of Pikashe. This, it is said, was in breach of its duty of care to the first respondent. This duty of care, in turn is alleged to arise from the introduction of Pikashe to the first respondent and the ongoing knowledge of the applicant of the relationship between Pikashe and the first respondent. I have already

stated that on the issue of the introduction of the respondent I accept the inherent credibility of the applicant's version and I accordingly reject the version put up by the first respondent that applicant instigated the relationship (compare ***Plascon-Evans Paints v Van Riebeeck Paints*** 1984 (3) SA 623 at 635A-C).

[32]In all the circumstances I do not consider that the first respondent has discharged the onus of establishing on a balance of probability that, *prima facie*, he has a claim of damages against the applicant. I do not consider that a reference to evidence will disturb the probability in favour of the applicant's version.

[33]Finally, the first respondent urges upon me to exercise my discretion in his favour as a mark of disapproval for the applicant having failed to disclose all material facts that might influence the Court in deciding the application. In support of this argument I am referred to a number of authorities dealing with the principle, which is trite, that an *ex parte* applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in the provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. The difficulty with this argument is that the application was not brought *ex parte*. It was brought on notice, respondents filed papers and it was fully argued at the provisional stage on the basis that the respondent's

contended that there was no advantage to creditors. These authorities can accordingly find no application in the present matter.

[34]Even if I were incorrect in the conclusion which I have drawn, I do not consider, where the applicant has issued summons and obtained a judgment, that it was incumbent upon the applicant to set out information relating to the underlying cause of action in the prior litigation for purposes of an application for sequestration.

[35]In view of the conclusions to which I have come above I am of the view that the disputes of fact, such as they are, which emerge from the papers are not material to the exercise of my discretion.

In the result, the order which I make is the following:

1. The first respondent's estate is finally sequestrated.
2. The application to refer the matter to oral evidence is dismissed.
3. The costs of this application to be costs in the sequestration.

J W EKSTEEN
ACTING JUDGE OF THE HIGH COURT