NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matters between:

Case No: 138/2010
139/2010
140/2010
141/2010

STANDARD BANK OF SOUTH AFRICA LIMITED	**Applicant**
And	
MEMOAK NO 6 CC (Case No. 138/2010)	**Respondent**
MEMOAK NO 7 CC (Case No. 139/2010)	**Respondent**
SHERYL JEANETTE WRIGHT (Case No. 140/2010)	**Respondent**
SHERYL JEANETTE WRIGHT N.O (Case No. 141/2010)	**Respondent**

Coram:	**Chetty, J**
Date Heard:	**16 September 2010**
Date Delivered:	**21 September 2010**
Summary:	*Credit Agreement – debt reinforcement – Whether application for sequestration/liquidation amounting to debt enforcement – Whether sequestration/liquidation precluded by s 66 of Act – Provisional orders for sequestration/liquidation confirmed*

JUDGMENT

Chetty, J

[1] The applicant seeks confirmation of provisional orders of liquidation granted in respect of two close corporations, Memoak 6 and Memoak 7, in case numbers 138/2010 and 139/2010 respectively and provisional orders of sequestration against *Sheryl Jeanette Wright* (Mrs. *Wright*) in her personal capacity in case number 140/2010 and in her representative capacity as sole trustee of the Capricorn Trust in case number 141/2010. The four matters came before Kroon, J, who after hearing argument from the applicant's counsel, and, in the exercise of his discretion, from Mrs. *Wright* personally and on behalf of the close corporation, granted the relief sought by the applicant. The aforestated provisional orders followed upon a composite judgment (the judgment) by the learned judge concerning all four matters and this judgment follows suit. For the sake of convenience I shall refer to the respondents collectively as the respondents.

[2] The court's powers on the return day of provisional orders of sequestration and liquidation are trite. The standard of proof required for a final order of sequestration is governed by s 12 of the **Insolvency Act** (the Act)[1] which permits a court to grant a final sequestration order upon satisfaction of the three requisites viz, that the insolvent had committed an act of insolvency or is actually insolvent and there is reason to believe that it will be in the interests of the debtor if his/her estate is sequestrated. As far as a final winding-up order is concerned the standard of proof is upon a clear balance of probabilities.

1 Act No, 24 of 1936

[3] In the opposing affidavit and brief heads of argument filed by Mrs. *Wright* the opposition to confirmation of the provisional orders is predicated upon the alleged failure by the learned judge to properly consider the respondents' defence to the various applications based on the **National Credit Act**[2] (the **NCA**) and in particular s 66 of the **NCA**. Although in argument Mrs. Wright initially expressly abandoned her argument raised before Kroon J concerning the competency of sequestration proceedings against a person under debt review and submitted that she relied solely on s 66 of the **NCA**, as the submissions unfolded, it became clear that the entire edifice of her resistance to the grant of a final order remains the **NCA**. There is no substance to the argument advanced on behalf of the respondents.

[4] Reliance on the provisions of s 66 (a) and (d) of the **NCA** is entirely misplaced. Neither the sequestration nor liquidation proceedings either:-

> *"discriminate directly or indirectly against the consumer, compared to the credit provider's treatment of any other consumer who has not exercised, asserted or sought to uphold such a right;*

or can be said to constitute proceedings to:-

> *"take any action to accelerate, enforce, suspend or terminate a credit agreement with the consumer."*

[5] Although there is no specific reference to s 66 of the **NCA** in the judgment,

2 Act No 34 of 2005

its omission is hardly surprising. In the opposing affidavits filed in each of the matters the respondents sought to rely on various provisions of the **NCA** which Mrs. *Wright* contended precluded an application for provisional liquidation or sequestration. She specifically referred to the judgment of Trengrove AJ in **Investec Bank Ltd and Another v Mutemeri and Another**[3] which she implied was incorrectly decided. In the judgment the learned judge considered the judgment in **Mutemeri** and, no doubt persuaded by the cogency and persuasiveness of the reasoning therein, held that the respondents' reliance on the **NCA** was entirely misplaced. **Mutemeri** decided that an application for sequestration is not a legal proceeding to enforce an agreement. The consumer's defence based on the provisions of s 129 (1) and 130 (1) (b), 130 (3) and 88 (3) failed. The correctness of the decision on **Mutemeri** was confirmed in the Supreme Court of Appeal by Cachalia, JA, in **Naidoo v Absa Bank Ltd**[4] where the learned judge stated the following[5]:-

> *"[4] Mr Reddy's submission, as I understand it, implicitly contains a concession that sequestration proceedings are not in and of themselves 'legal proceedings' to enforce the agreement' within the meaning of s 129 (1) (b). That his concession is correct is clear from the recent judgment in Investec Bank Ltd and Another v Mutemeri and Another, where Trengrove AJ concluded that an order for sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim, and sequestration is thus not a legal proceeding to enforce an agreement. He did so after carefully considering authorities which have held –*

3 2010 (1) SA 265 (GJS)
4 2010 (4) SA 597 (SCA)
5 At 600 para [4]

> *'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent' – they are not proceedings 'for the recovery of a debt'. The learned judge's reasoning accords with the court's description of a sequestration order as a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditor's ordinary remedies and imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor."*

[6] The respondents' dissatisfaction at what she perceived to be unlawful conduct on the part of Chevron SA (Pty) Ltd (Chevron) and her submission that the leaned judge's omission to consider its conduct in adjudicating the matter is a spurious argument. The fact of the matter was that the applicant had alleged, as it was entitled to do, that the respondents had committed an act of insolvency in as much as Chevron had obtained judgment against the two close corporations in a substantial amount. In any event, it is clear from the learned judge's judgment that it played no role in the decision to grant the provisional orders.

[7] The further submissions advanced on behalf of the respondents in resisting confirmation of the provisional orders were all characterised by repetitive arguments entirely irrelevant to the real issues which fall for determination. I am satisfied upon a consideration of the affidavits filed of record that the applicants in the sequestration proceedings have established the elements of its case, and in respect of the liquidation proceedings, satisfied the

requirement of proof upon a clear balance of probability. In the result the following order will issue:

> **In each of the matters, 138/2010, 139/2010, 140/2010 and 141/2010 the rule is confirmed.**

____

D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Applicant: Adv Buchanan SC
Instructed by Pagdens Stulting
18 Castle Hill
Central
Port Elizabeth
Ref: F Vienings
Tel: (041) 5852141

On behalf of the Respondents: Mrs. Wright
In her personal and representative capacity
80 Wellington Street
Colchester
Tel: (041) 4681902