

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 3525/2011
Date Heard: 1 December 2011
Date Delivered: 2 December 2011

In the matter between:

DEBORAH ABADER

First Applicant

NASIEM ABADER

Second Applicant

and

PRUDENCE GILLESPIE

Respondent

JUDGMENT

EKSTEEN J:

[1] This is an application in terms of Rule 42 of the Uniform Rules of Court for the rescission of a provisional order of sequestration granted on 15 November 2011.

[2] The undisputed facts are that the respondent herein (the applicant in the main application to whom I shall refer herein as the respondent) caused an application for the sequestration of the applicants (the respondents in the main application to whom I shall refer to herein as the applicants) to be issued. The notice of motion commenced by giving notice to the respondent that an application would be made to this court on 15 November 2011 for the relief set out in the notice of motion. The

relief the respondent sought in terms of the notice of motion was a provisional order of sequestration of the applicants' estate and a rule *nisi* calling upon parties to show cause on the stipulated return day why such order should not be made final. The notice of motion concludes in the following terms:

"TAKE NOTE THAT if you wish to oppose this application you must notify the Applicant's attorney, by no later than **12h30**, on **FRIDAY 11 NOVEMBER 2011** of your intention and thereafter file such opposing papers as you may wish to file by no later than **12h30** on **FRIDAY 25 NOVEMBER 2011.**"

[3] The notice of motion was duly served on the applicants on 7 November 2011. The applicants consulted Attorney Randell and notice of their intention to oppose the relief sought in the notice of motion was timeously given by filing in the court file a notice of intention to defend and faxing a copy thereof to the respondent's attorney. In these circumstances Attorney Randell advised the applicants that it was not necessary for them to attend court on 15 November 2011.

[4] Notwithstanding the notification of their intention to oppose the relief sought in the notice of motion and the invitation extended to the applicants to file their opposing papers by 25 November 2011 the respondent nevertheless sought and obtained a provisional sequestration order of the estates of the first and second applicants herein on 15

November 2011. A transcript of the proceedings on 15 November 2011 is annexed to the applicants' papers. The following exchange is reflected therein:

"COURT There is a notice of opposition that has been filed here on 11th of November.

COUNSEL I believe that is correct M'Lady. In any event M'Lady I believe there is no appearance here today and there has been no further papers filed with regard to that notice of opposition and M'Lady. I would submit that in the circumstances the statutory requirements regarding service had been complied with. That a prima facie case has been made out which would satisfy Your Ladyship that a provisional order would be justified in the circumstances and if Your Ladyship is satisfied, I would move M'Lady for an order in terms of paragraphs 1, 2, 3 and 4 of the notice of motion before Your Ladyship ..."

[5] In this manner the order was obtained in the absence of the applicants.

[6] On the same day the granting of the order came to the notice of Attorney Randell. Attorney Randell immediately contacted the respondent's attorney of record. The respondent's attorney informed Attorney Randell that he believed that the matter could have proceeded in court because there was no appearance on behalf of the applicants. Attorney Randell, on behalf of the applicants, requested of the respondent's attorney to agree that they return forthwith to court to inform the presiding Judge that the order had been granted in error.

Respondent's attorney undertook to consult with his counsel and later reverted to Attorney Randell stating that the respondent would not agree to return to the court. He advised Attorney Randell that if he wished to reverse the order he should bring a substantive application.

[7] The applicants now contend that the order was erroneously sought and/or granted as the process was tainted by irregularity. On behalf of the respondent it is argued that no irregularity has occurred, the matter was correctly enrolled, the presiding Judge was apprised of the notice of opposition and the order was properly granted. He argues that an order for the provisional sequestration may, on the authority of the Insolvency Act, 24 of 1936 (herein referred to as "the Insolvency Act") be sought *ex parte*. Rule 6(5) of the Uniform Rules does therefore not, so the argument runs, apply to an application of this nature. The notice of motion, it is argued, notifies that a provisional order would be sought on the 15th of November and therefore, because the applicants had not appeared nor filed opposing papers prior to the 15th the court was entitled to grant the order.

[8] Section 10 of the Insolvency Act provides that the court to which a petition for the sequestration of an estate has been presented may grant such an order if it is of the opinion that prima facie – "(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9; and (b) the debtor has committed an act

of insolvency or is insolvent; and (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.” Such a provisional order is granted along with a rule *nisi* in respect of the envisaged final order. The Act does not deal, however, with the procedures relating to its enrolment.

[9] Rule 6 of the Uniform Rules provides for two kinds of applications – *ex parte* applications and applications which are not brought *ex parte*. Rule 6(4) provides for applications brought *ex parte* to be as near as may be in accordance with Form 2 of the first Schedule to the Rules. All other applications must, in terms of Rule 6(5), be as near as may be in accordance with Form 2(a) of the Schedule. The essential difference between the two is that Form 2 does not provide for an opportunity to oppose the application nor for the filing of opposing papers prior to the granting of the relief. That is because the application is brought *ex parte*. All other applications are brought on notice. The purpose of notice is, of course, to provide to the respondents an opportunity to oppose the granting of the relief sought in the notice of motion. For that reason Form 2(a) is so structured as to notify a respondent in such an application of the time frames which he must comply with if he wishes to oppose the granting of the order.

[10] The Insolvency Act does not require an application for provisional sequestration to be brought on notice, however, in terms of the Eastern

Cape Rules of Practice notification is required in certain limited circumstances.

[11] The phrase “*ex parte* application” is undefined. It has however repeatedly been held that an “*ex parte* application” in our practice is simply an application of which notice was as a fact not given to the person against whom some relief is claimed in his absence. See for example ***Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen*** 1978 (1) SA 779 (T) at 783A; ***Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd and Others*** 2002 (1) SA (T) 155 at 165E-F; see also ***Sizwe Development v Auditor General, Transkei*** 1991 (1) SA 291 (Tk) at 292I.

[12] It has, however, also been repeatedly held that an application for a rule *nisi* is in essence an *ex parte* application, with or without prior notice. (Compare ***Turquoise River Incorporated v McMenemy and Others*** 1992 (3) SA 653 (D&CLD) at 657D.) I am prepared to accept this view to be correct. The effect thereof is that the *dies induciae* set out in section 27 of the Supreme Court Act 59 of 1959 and rule 6(5) do not apply. An application for a rule *nisi* can accordingly be brought in terms of the provisions of rule 6(4) and in accordance with Form 2 to the Schedule and it would make no difference if a respondent is notified in advance. This, however, the respondent chose not to do.

[13] In the present matter the application was as a fact brought on notice. It was not brought on an *ex parte* basis and it was, save for its introduction, not couched in accordance with Form 2. The notice of motion expressly stipulated the time by when the applicants were to notify the respondent of their intention to oppose the granting of the relief set out in the notice of motion. The applicants duly complied. In these circumstances, in accordance with the express terms of the notice of motion, they were afforded time until 25 November 2011 to file opposing papers. The obvious and inescapable consequence of this communication is that, in the event that the applicants notify the respondent of their intention to oppose, the relief set out in the notice of motion would not be sought prior to the lapse of the time afforded to the applicants to file their opposing papers. The proposition that the respondent was entitled, in these circumstances, to move for the relief set out in the notice of motion on 15 November 2011 needs only to be stated to be rejected. What, one may rightly ask, would be the purpose of filing opposing papers on 25 November if the relief which it seeks to resist has already been granted?

[14] At the hearing of the matter, as appears from what I have already set out, counsel for the respondent referred the presiding Judge to the notice of intention to oppose and proceeded to submit that because there was no appearance on behalf of the applicants and the applicants had

filed no further papers he was entitled to the order. He did not draw the attention of the presiding Judge to the provisions of the notice of motion and that the respondent had expressly afforded the applicants until 25 November to file their answering papers. On the contrary the submission made tends to suggest to the presiding Judge that the applicants were at that stage in default, which they clearly were not. In view of the process which the respondent had chosen to adopt in her notice of motion I do not think that there was any obligation on the applicants to have appeared at the hearing, and certainly not to have filed papers. I have no doubt that had the attention of the presiding Judge been drawn to the form of the notice of motion and the time provided to the applicants for the filing of opposing papers the order would not have been forthcoming.

[15] I think that to have sought and obtained the order in this manner was opportunistic and surreptitious. To add insult to injury, when the applicants sought the opportunity to bring the provisions of the notice of motion and the inevitable consequence of the filing of the notice of intention to defend to the attention of the presiding Judge the respondent's representatives resisted it. The conduct of this matter falls to be deprecated. It does not behove an officer of this court.

[16] Rule 42(1) of the Uniform Rules of Court provides for the rescission of an order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby. It follows from what I have set out

above that the provisional sequestration order was erroneously sought. It is not disputed that it was sought in the absence of the applicants. Unlike the provisions of the common law where a rescission of judgment is sought it is not required of the applicants under rule 42 to establish "good cause". Once it is established that the order has been "erroneously sought" and that it was granted in the absence of the applicants the applicants are entitled to the rescission of the order. Section 149(2) of the Insolvency Act further empowers a court to set aside an order made in terms of that Act. This section places no part limitation on this power. I am satisfied that the applicants are entitled to such an order.

[17] On behalf of the respondent it is argued that the applicants were not entitled to bring the application as one of urgency and that a proper case has not been made for urgency. I do not intend herein to deal fully with the various arguments in this regard. Applications for sequestration are of themselves inherently urgent. (Compare for example **Gouws v Scholtz** 1989 (4) SA 315 (NC).) It seems to me, by parity of reasoning that where a provisional order of sequestration has been improperly obtained and application for rescission is inherently urgent.

[18] Finally there remains the question of costs. The applicants seek a costs order on a scale as between attorney and client. The respondent resists same. I have recorded above my disapproval of the manner in which this matter was dealt with on behalf of the respondent and I

consider, in the exercise of my discretion, that for those reasons this is an appropriate matter in which to make an order of costs on a scale as between attorney and client.

[19] In the result I make the following order:

1. The provisional order of sequestration granted on 15 November 2011 is rescinded.
2. The respondent is ordered to pay the applicants' costs of this application on a scale as between attorney and client.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv Moorhouse instructed by Michael Randell Inc,
Port Elizabeth

For Respondent: Adv Richards instructed by Robert J Martindale,
Port Elizabeth

