IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 603/2017

Heard on: 9 March 2018

Delivered on: 8 June 2018

- REPORTABLE: **NO**
- CIRCULATE TO JUDGES: **YES**
- CIRCULATE TO MAGISTRATES: **NO**
- CIRCULATE TO REGIONAL MAGISTRATES: **NO**

8 June 2018
DATE SIGNATURE

In the matter between:

BARRY LONSDALE HOHNE	**APPLICANT**
and	
DALE LONSDALE HONHE	**RESPONDENT**
and	
SUPERSTONE MINING (PTY) LTD	**INTERVENING CREDITOR**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] The applicant seeks the provisional sequestration of the estate of the respondent alleging that, *prima facie:*

1.1 the applicant has a liquidated claim against the respondent, as contemplated in section 9(1) of the Insolvency Act 24 of 1936 ("the Act");

1.2 the respondent has committed an act of insolvency within the meaning of section 8(g) of the Act and, furthermore, is in fact, insolvent; and

1.3 there is reason to believe that it will be to the advantage of creditors if the respondent's estate is sequestrated.

[2] The applicant therefore contends that he has satisfied the requirements of section 10 of the Act for obtaining a provisional order for the sequestration of the respondent.

[3] The respondent does not oppose this application. However, the intervening creditor places every issue raised by the applicant in dispute and seeks an order of dismissal of the application, including an order of costs and that the costs of the application to intervene in these proceedings be paid by the applicant.

[4] The intervening creditor opposes the application on the following grounds:

4.1 the application has not been brought with the genuine intention to seek the sequestration of the estate of the respondent, but rather for an ulterior motive, subtly suggesting that there is collusion between the respondent and the applicant to achieve the sequestration of the estate of the respondent to the detriment of the intervening creditor;

4.2 the applicant has not succeeded in "proving" an advantage to the creditors of the respondent if his estate is sequestrated; and

4.3 the act of insolvency relied upon by the applicant was not given at arm's length and/ or was not given formally, deliberately and with the required intention, but is rather indicative of collusion between the applicant and the respondent.

[5] The respondent allegedly admitted his liability to the intervening creditor.

FACTUAL BACKGROUND

[6] During the period between February 2009 until January 2010 the respondent was employed by the intervening creditor, whose manager was at that time the applicant. After obtaining courses in evaluating quality diamonds, he was appointed as the Recovery Manager of the intervening creditor, at which stage he earned approximately R45 000-00 per month.

[7] In 2010 the respondent, upon being accused by the intervening creditor of stealing diamonds to the value of **R6, 015, 000-00** (calculated as at 9 March 2018), allegedly admitted in writing to the alleged theft, which admission he allegedly repeated to the SAPS. Subsequent thereto, the respondent was dismissed and the applicant resigned almost a year thereafter and went to be employed as a Plant Manager of Superkolong Holdings for almost 30 months and then as a Managing Director at Mogale Resources (Pty) Ltd ("Mogale"). The respondent was employed on a contract basis and as a consultant by Mogale. In September 2016 Mogale was closed due financial considerations.

[8] It is not in dispute that the respondent's current indebtedness to the intervening creditor, with the accrued interest calculated, is an additional amount of **R7 993 439-13**.

[9] On December 2011 the Intervening Creditor caused an urgent anti-dissipation application to be issued and served on the respondent.

[10] In January 2012 the intervening creditor instituted damages action against the respondent. The respondent defended the action and denied the liability, which denial led to a protracted litigation at high legal costs. At the conclusion of the said trial, judgment was granted against the respondent. The respondent prosecuted an unsuccessful appeal against the intervening creditor in the Supreme Court of Appeal ("SCA") which was dismissed on 30 November 2016.

[11] The applicant claims that was funding the respondent's legal expenses of almost R1 6000 000-00 whilst the respondent was fighting the intervening creditor's action. The applicant alleges that the first advance of money to the respondent towards the latter's legal fees was made on 27 November 2012.

[12] Upon the conclusion of the litigation after the SCA's dismissal of the respondent's leave to appeal, the Intervening Creditor took its first step to execute on its judgment.

[13] On 1 February 2017 the Intervening Creditor's attorney addressed a letter to the respondent's attorney in which payment was demanded to the Intervening Creditor's attorney of the insurance money which was paid out to the respondent's attorney after a motor vehicle , which was listed included as a listed asset in the anti-dissipation order, had been written off.

[14] On 4 February 2017 the applicant sent a letter of demand to the respondent for payment of a loan in the amount of R1 629 578-00, to which the respondent replied on 17 February 2017 stating that he was not in a financial position to make payment of the amount claimed nor to make an offer.

[15] On 17 March 2017 the respondent was served with this sequestration application, in terms of which the applicant moved for the provisional sequestration of the former's estate.

[16] On 8 August 2017 the intervening creditor issued an application for leave to intervene in the sequestration application, which was granted on 22 September 2017.

[17] Having been granted leave to intervene, the intervening creditor served and filed its answering affidavit on 24 October 2017 in opposition to the application *in casu*.

[18] In his founding affidavit, the applicant alleges that the order he seeks for the sequestration of the respondent's estate is borne out of the following facts:

18.1 In January 2012 the Intervening Creditor served summons upon the respondent for the payment of monies arising out of the diamonds allegedly stolen by the respondent.

18.2 The applicant and the respondent then entered into an oral agreement in the following terms:

16.8.1 The applicant would loan to the respondent the necessary funds to defend the matter.

16.8.2 The monies loaned and advanced in respect of the costs of the defence of the respondent, would become due and payable after the trial was finalised and on demand by the applicant.

18.3 The trial thereof lasted approximately thirty days and was extremely expensive. On 15 May 2015, judgment was granted in favour of the intervening creditor in the amount of R6 015 000-00 as well as interest and costs.

18.4 The trial court granted the respondent leave to appeal to the Supreme Court of Appeal (SCA), which appeal was dismissed on 30 November 2016.

18.5 Once the matter was finalised, on 14 February 2017 the respondent then demanded in writing from the respondent payment in the amount of R1 629 578-00 which he had paid in respect of the defence of the respondent.

18.6 Peripheral to the parties' oral agreement appearing in 15.2 above, they had also agreed to open a bank account in which the applicant paid monies in on a monthly basis so as to provide for the payment of the debit orders from which the respondent's debit orders for, *inter alia,* bond repayments, insurance, had been paid. In addition hereto, the respondent was remunerated on a monthly basis for the services he rendered that particular month, which remuneration varied from approximately R20 000-00.

18.7 The applicant further alleges that the net value of the respondent's assets is approximately R2 334 171-05 and that since the amount payable to the

intervening creditor will be in excess off R7 million and to the applicant an amount of R1 629 578-00, that such amounts leave the respondent's estate hopelessly insolvent.

SUBMISSION BY THE APPLICANT

[19] The applicant further submits the following:

19.1 that the respondent is indebted to him in the amount of approximately R1.6 million;

19.2 that the respondent has committed an Act of insolvency as contemplated in section 8(g) of the Act;

19.3 that the respondent is, in fact, insolvent;

19.4 that it would be to the advantage of his creditors if his estate is sequestrated; and

19.5 that he has satisfied the requirements of section 10 of the Act and is as such entitled to the order prayed for.

[20] Regarding the intervening creditor's contention that the applicant and the respondent are colluding in respect of this application, it is submitted on behalf of the applicant that a friendly sequestration is not, without more, collusive. He further contends that since such a finding amounts to a legal conclusion, then a person making such an

allegation, in this case the intervening creditor, bears the substantive onus of proving the facts from which the conclusion can be derived. He adds that the intervening creditor must therefore further prove, on a preponderance of probability, the existence of a donation he alleges. The applicant further submits that the intervening creditor's allegations of collusion are completely unsubstantiated, as the latter has failed to allege and to establish the existence of any agreement between the applicant and the respondent, *inter alia*, suppress facts with a view to mislead this court. The applicant submits that there is simply no evidence which can lead to a conclusion of collusion.

SUBMISSIONS ON BEHALF OF THE INTERVENING CREDITOR

[21] The intervening creditor contends that but for steps it had taken in execution of the judgment against the respondent, the applicant would not have instituted this sequestration application.

[22] Furthermore, it contends that regarding the issue of benefit to the creditors, the applicant has failed to discharge the burden of providing reasons, with sufficient substance, for the court to come to the conclusion that the sequestration of the respondent's estate will be to the benefit of creditors.

[23] It further contends that the circumstances prevailing before and at the time of the application, for example, the applicant's deafening silence regarding a demand for the

repayment of the alleged loan, show on a balance of probabilities, that the applicant never expected the alleged loan advanced to fund the respondent's legal expenses, to be repaid but that it was rather a donation and/or gratuitous payment. It submits that thus the applicant cannot be regarded as a creditor of the respondent.

[24] As stated above, the intervening creditor further submits that the circumstances further indicate, on the balance of probabilities, that the applicant and respondent colluded in moving this application.

[25] It is further contended that the evidence presented to the court to prove an advantage to creditors falls short of the required proof and/or is inadmissible. The intervening creditor submits that the most useful tool to determine same is to compare the forced sale value of the debtor's assets with his liabilities and to then calculate, whether out of the free residue, there is a reasonable prospect of a not negligible dividend, which prospect must not be too remote. It submits that the debtor's forced value *re* his assets must be proved by cogent, admissible expert evidence. It further submits that sections 9 provisions are peremptory and that without any explanation as to the compliance therewith, the court cannot condone same since it constitutes a defect and / or an irregularity.

[26] The intervening creditor further submits that to the extent that the applicant alleges that Mogale was the vehicle through which the respondent's legal costs were paid since

the latter had in fact loaned the applicant the said amount for purposes of loaning the respondent, the applicant has failed to prove that it has *locus standi* to demand the payment of the loan from the respondent since there is no evidence that the applicant did repay Mogale the alleged loaned money. The intervening creditor submits that the applicant therefore does not have the requisite *locus standi* to approach the court for the relief sought.

[27] Lastly the intervening creditor submits that the applicant has failed to comply with the peremptory section 9 provisions of the Act (the provisions of which appear in paragraph 25.3 below) and that this application stands to be dismissed with costs on a punitive scale.

ISSUES

[28] Based on the above, this court is called upon to make a determination in respect of the following issues, namely:

28.1 Whether the applicant has made out a *prima facie* case for the relief sought.

28.2 Whether the applicant has proved that it has a claim against the respondent in terms of the provisions of section 9(1) of the Act;

28.3 Whether the applicant and the respondent colluded to obtain an order as sought *per* the Notice of Motion.

28.4 Whether the applicant has shown an advantage to creditors in the event of the respondent's estate being sequestrated.

28.5 Whether the applicant has met the peremptory requirements of the Act.

LEGAL PRINCIPLES

[29] In terms of section of the Act a debtor, *inter alia*, commits an act of insolvency if he:

29.1 makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another (section 8(c); and

29.2 gives notice in writing to anyone of his creditors that he is unable to pay any of his debts (section 8(g)).

29.3 Section 9(1) read with section 9(3)(a)(iii) provides that the applicant must set out in his founding affidavit that he is a creditor having a liquidated claim for not less than R100-00, and the amount, cause and nature of the claim.

[30] In respect of an act of insolvency envisaged in section 8(c) of the Act, Meskin – Insolvency Law, summarizes the position as follows:

30.1 the statutory provision creates two acts of insolvency: the first is the actual disposition by the debtor of any of his property, which has the effect either of prejudicing his creditors or by preferring one of them above another; and the

second is an attempted disposition of any of his property by the debtor, which, had it been accomplished, would have had such effect;

30.2 the intention with which the disposition was made or was attempted to be made is immaterial: the act of insolvency is committed where, objectively judged, the facts show an actual or attempted disposition of the property and the result or consequence thereof was, or would have been, the prejudice or preference, which the statutory provisions envisage;

30.3 the relevant statutory provisions do not qualify the word "prejudicing" and, thus, the act of insolvency is committed whatever form the prejudice to the creditors may take.

[31] In terms of section 8(g) of the Act, an act of insolvency is committed regardless of the motive for which it was given.

[32] In terms of section 10 of the Act, a court may make an order sequestrating the estate of a debtor provisionally if it is of the opinion that, *prima facie*:

32.1 the applicant for a provisional of sequestration has established against the debtor a claim as is mentioned in section 9(1) and section 10(a) of the Act;

32.2 the debtor has committed an act of insolvency or is insolvent (section 10(b); and

32.3 there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated (section 10(c)).

CASE LAW

[33] In **Sevan v Sevan and Ward**1908 TH 193 at 197, Curlewis J described collusion as follows:

"In our law, ordinarily speaking, collusion is akin to connivance, and means an agreement or mutual understanding between the parties that the one shall commit or pretend to commit an act in order that the other may obtain a remedy at law as for a real injury."

And

In **Kuhn v Karp** 1948 (4) SA 825 (T) at 827, Roper J stated the following:

"In my view collusion consists in our law in an agreement between the parties to refute or to suppress facts, or to put false evidence before the court, or to manufacture evidence, in order to make it appear to the court that one of the parties has a cause of action, or a ground of defence, which in fact he has not." (see;; **Huntrex 337 (Pty) Ltd v Vosloo and Another** 2014 (1) SA 227 GNP.

[34] Also, in the matter of **Kuhn v Kuhn** 1948 (4) SA 825 (T) at 827, collusion was defined as follows:

"In my view collusion consists in our law in an agreement between parties to a suit to suppress facts, or to falsify evidence before the Court, or to manufacture evidence, in order to make it appear to the court that one of the parties has a cause of action, or a ground of defence, when in fact he has not".

[35] With regard to the statutory requirement that there must be reason to believe, *prima facie*, that it will be to the advantage of creditors of the debtor if his estate is sequestrated, in **Meskin & Co v Friedman** 1948 (1) SA 555 (W) at 559 it was held that "the facts before the Court must satisfy it that there is a reasonable prospect- not necessarily a likelihood, but a prospect which is not too remote- that some pecuniary benefit will result to creditors. The abovementioned passage was cited with approval by the Constitutional Court in **Stratford and Others v Investec Bank Ltd and Others** 2015 (3) SA 1 CC.

[36] The Constitutional Court held further that:

"The correct approach in evaluating advantage to creditors is for a court to exercise its discretion guided by the *dicta* in *Friedman*. For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment, except through sequestration; or that some pecuniary benefit will result to the creditors".

[37] In the matter of **Beinash & Co v Nathan (Standard Bank of South Africa Limited intervening)** 1998 (3) SA 540 (W) where at paragraph 542 thereof the court cited a passage from **Yenson & Co v Garlick** 1926 WLD 53 at 57, the following was held:

"Now a friendly creditor, seeing other creditors pressing the debtor and, in that way, obtaining payment of the debts in installments, may think it desirable to sequestrate the

estate of the debtor; the fact that one of his motives in doing so may be to assist the debtor does not necessarily prove that the application is collusive. If he makes the application not only with that object but also with the object of coming in and sharing *pro rata* in any dividends which may be obtained by means of sequestration, I do not think that an application of that kind could be described as collusive.

[38] With regard to friendly sequestrations, the Intervening creditor makes reference to the description made by Conradie J in the matter of **Craggs v Dedekind; Baartman v Baartman & Another; Van Jaarsveld v Roebuck; Van Aard v Borrett** 1996 (1) SA 935 (C) at B where he held the following:

"Friendly sequestrations seem to have certain characteristics. Although, like pornography, they may be hard to define, they are easy to recognize. The debt…is almost always a loan…very often made in circumstances where it would have been apparent to the whole world that the Respondent was in serious financial difficulty. Despite this, the loan is customarily made without security of any sort. It is seldom evidenced by a written agreement, or even subsequently recorded in writing. The only writing that is produced to the Court is the letter stating, with appropriate expressions of dismay that the debt cannot be repaid….Very often debtor and creditor are related: fathers commonly sequestrate sons, …., without, I am sure, any damaging effect on their relationship."

[39] The intervening creditor further makes reference to the matter of **Mthimkulu v Rampersad and Another (BOE Bank Ltd, Intervening creditor)** [2000] 3 All SA 512 (N) at 514 where the following was held:

"The majority of [friendly sequestration] applications are sparked off by the imminent sale of the respondent's property by the Bank. The respondent hurries off to an attorney... and is briefed on the requirements of a friendly sequestration. He duly finds a 'creditor' to whom he is purportedly indebted by virtue of an unsecured loan....He then supposedly writes a letter to his 'creditor' ... An application for the sequestration of the debtor is then drafted in which the friendly creditor makes the necessary allegations and in particular expresses his concern for the interest of the body of creditors....A value of the property on the open market is then given and duly supported by a valuer....the debtor waits for the dust to settle and with his old creditors off his back carries on business as normal".

[40] To the above end, the intervening creditor submits that the court should adopt the approach in the matter of **Epstein v Epstein** 1987 (4) SA 606 (C) at 611 where it was held that the courts should scrutinize friendly sequestration applications with particular care to ensure that the requirements of the Act are complied with and that the interests of the creditors are protected and not prejudiced.

ANALYSIS

[41] The following is common, that:

41.1 The applicant and the respondent are father and son;

41.2 The applicant concedes that this application is indeed a friendly sequestration.

41.3 Presently, the respondent's estate, estimated by the applicant being to the value of almost R3 million, is under attachment at the instance of the intervening creditor.

[42] As already stated above, a court to which an application for the provisional sequestration of a debtor's estate is presented, may only grant such an order if it is of the opinion that, *prima facie*, *inter alia*, the applicant has established against the respondent a claim such as is mentioned in section 9(1) of the Act.

[43] I am of the view that the starting point in approaching the determination of this application, is to interrogate the question which I find to be the most pertinent and key, namely: do the facts prove that the applicant has a claim against the respondent. I am of the further view that in the event this question is answered in the negative, then every other question becomes moot. This question must be juxtaposed against the intervening creditor's contention that the moneys paid on behalf of the respondent were never intended to be a loan but a donation and that the alleged acts of insolvency committed by the respondent towards the applicant are just a smoke screen to frustrate the intervening creditor to execute on the judgment obtained against the respondent. As stated above, it is common cause that the applicant has conceded that indeed this is a friendly sequestration.

[44] It is further common cause that the applicant and the respondent did not formalise their transaction as it would normally be the case in the ordinary course of conducting business of this nature, for example, reducing the agreement to writing, securing the said loan, *etc.* To the extent that despite the applicant fully knowing the respondent's financial situation, he did ensure that the loan was at least secured, no explanation was proffered by the applicant. Neither does the applicant explain the respondent's ability to repay the loan, the anticipated source of the repayment and also the basis for any confidence that it is a safe risk. Neither does the applicant disclose any previous successful financial transaction, if any, between the parties which could have allayed his fears to "loan" the respondent the money.

[45] In addition to the Authority cited above, Satchwell J also described in Huntrex 337 (Pty) Ltd v Vosloo and Another 2014 (1) SA 227 GNP, the hallmarks of collusive friendly sequestration applications as where the borrower frequently finds himself in dire financial straits shortly after the loan was extended and then, with surprising haste, advises the lender of his unexpected insolvency. The borrower, horrified at his own abject financial situation, immediately writes a letter advising the lender of his inability to repay the loan. Therein is stated a bare inability to pay, no requests for extension of time, no proposals to pay in installments, no offer to render services or even a suggestion that the lender initiates another course of action. (Paraphrase)

[46] Now taking into account all of the above, including the parties' submissions, can it be found that on the balance of probabilities the applicant has make out a *prima facie* case entitling to the relief he seeks. Curtly, did the applicant prove that he has a claim against the respondent?

[47] It is common cause that a court to which an application for the provisional sequestration of a debtor's estate is presented, may only grant such an order if it is of the opinion that, *prima facie,* the requirements set out in section 10 of the Act has been met. However, in an instance where the applicant's averments in the founding papers are challenged, a litigant who bears the onus, has to provide proof sufficient enough to avoid a decree of absolution. Where an applicant's case is challenged as to whether a litigant has provided *prima facie* proof, the courts' approach is not to consider the applicant's evidence in isolation, but by also considering evidence adduced in opposition thereof (see **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (AD).

[48] The intervening's contention is that the applicant has failed to comply with the peremptory provisions of the Act in that the applicant has, *inter alia,* and *prima facie,* failed to establish against the respondent a claim as mentioned in section 9 of the Act in that the alleged debt owing to the applicant by the respondent was in fact a donation and not a loan as such. Simply put by the intervening creditor, the respondent does not owe the applicant the alleged R1.6 million, the parties are simply colluding and that this application is for all intents and purposes a friendly sequestration.

[49] With regard to the question of collusion, it is common cause that during the course of this litigation between the intervening creditor and the respondent, over and above paying for the respondent's legal costs, the applicant was also paying monies into the respondent's bank account to cover the latter's debit orders. As pointed out by the intervening creditor, the applicant never made any demand in respect of the monies he paid into the respondent's bank account to cover for the latter's debit orders.

[50] I am of the view that the intervening creditor's contention that the applicant never made any demand in respect of the monies he paid into the respondent's bank account to cover for the latter's debit orders, on the balance of probabilities, lends support to the intervening creditor's contention that there was never a loan nor any expectation of being repaid.

[51] As contended by the intervening creditor, I am of the view that the totality of the evidence before me gives traction to the collusion allegations made by the latter for, *inter alia*, the following reasons:

51.1 The applicant has failed to disclose Mogale's financial statements to show that a loan account was indeed created;

51.2 The speed with which and the circumstances under which the sequestration application was issued;

51.3 The improbability of the averment that the applicant only and for the first time learnt of the respondent's inability to repay the loan and the judgment debt only when he consulted with his attorney and the respondent.

[52] The applicant's did not even calculate the advantage to creditors in his founding affidavit, which is against the standard practice. The applicant only filed such a calculation in his supplementary affidavit filed 3 (three) months after filing the replying affidavit. No leave of court was sought in this regard and the said supplementary affidavit is regarded as *pro non scripto*.

[53] With regard to the valuation of the assets/ properties, it is significant to note that the valuer gave no factual basis for his averments in respect of the respondent's property in Monument Heights, situated in Kimberley. At best all he does is make just bare averments without providing any evidence thereto. The same goes for the respondent's vehicles, the Kruger Rand Gold Coin and the boat. No evidence of a comparison of respondent's vehicle with other similar vehicles' market value or forced sale value has been provided.

[54] For me the scenario in this matter is best illustrated in the matter of **Kuhn v Kuhn** *supra* where collusion was defined as consisting *"in our law of an agreement between parties to a suit to suppress facts, or to falsify evidence before the Court, or to manufacture evidence, in order to make it appear to the court that one of the parties has*

a cause of action, or a ground of defence, when in fact he has not". I am of the view that Kuhn could not have given a better summation of what probably happened in *casu*. Furthermore, the description made by Conradie J in the matter of **Craggs v Dedekind; Baartman v Baartman & Another; Van Jaarsveld v Roebuck; Van Aard v Borrett** holds true in this matter, including the **Mthimkulu** matter *supra*.

[55] In light of all of the above, I am satisfied that the legal fees paid by the applicant in respect of the respondent's legal costs were nothing more than a father donating to his son. The reason for this finding is because, from the facts, there is nothing indicating that there was ever an intention or agreement between the two that the respondent will have to repay same. I find 'the letter of demand' from the applicant and the respondent's reply thereto to be very opportunistic, given the execution of judgment the intervening creditor had embarked on. As to why the applicant had to wait for period of over five years before issuing a demand has not been explained by the applicant. I further find that, as was correctly submitted by the intervening creditor, the sequestration notice was issued simply for purposes of frustrating the intervening creditor's endeavour to enforce his legal right to recover the damages through execution based on the judgment it had obtained against the respondent.

[56] Based on the above finding, it I find that the applicant has failed to discharge his onus as envisaged in section 9(1) of the Act in respect of a claim he has against the respondent. No cogent nor credible evidence was presented before the court, the

absence of which bolster the donation contention by the intervening creditor and the court's finding respectively.

[57] As already stated above, I am of the further view that the rest of the issues meant for determination become moot based on the finding that, *prima facie,* the applicant does not have a claim against the respondent.

[58] I find that this application is a classic case of collusion at its best and that as was held in the matter of Epstein *supra* 'that the courts should scrutinize friendly sequestration applications with particular care to ensure that the requirements of the Act are complied with and that the interests of the creditors are protected and not prejudiced', this court must adopt the same approach.

COSTS

[59] The respondent did not join the applicant in this application. However, the intervening creditor submits that a punitive costs order be made against both the applicant and respondent on a punitive scale.

[60] I am of the view that since the respondent did not participate in this application, despite him being the subject matter hereof, if a costs order was to be made against him, it would result in an unjustifiable injustice to him. However, based on the level of the

superfluity with which the applicant has dealt with this application, I am of the view that a punitive costs order against the applicant is justifiable.

RESULT

[61] In the result I am therefore satisfied that the applicant has failed to make out a *prima facie* case and that this application ought to be dismissed with costs on an attorney and client scale, including costs incurred by the intervening creditor in the application to be granted leave to intervene in these proceedings.

[62] In the result the following Order is made:

ORDER

1. The application is dismissed.
2. Costs are awarded to the intervening creditor on an attorney and client scale, including costs incurred by the intervening creditor in the application for leave to intervene in these proceedings.

L Vuma
Acting Judge
Northern Cape High Court

Head on: 9 March 2018
Judgment delivered: 8 June 2018

Appearances

For Appellant: Adv. OH Ronaasen SC
Instructed by: Roelf Nel Inc.

For the Intervening Creditor: Adv. JG Gilliland
Instructed by: Haarhoffs Inc.