



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2406/2017

In the application of:

JOHANNES BOTHA

Applicant

and

MARIUS BOTHA

Respondent

[Identity number : [...]]

Married in community of property with
HILETTE BOTHA

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 25 MAY 2017

DELIVERED ON: 15 JUNE 2017

- [1] During September 2016 the applicant , who is the father of the respondent, applied for the sequestration of the respondent, in terms of Section 8(G) of the Insolvency Act, 24 of 1936. The applicant alleged that the respondent borrowed an amount of R60 000,00 from him during December 2015. The respondent, after payment of such amount had been demanded by the applicant, then in writing indicated that he is not able to repay the amount to the applicant. It is the applicant's that the respondent committed an act of insolvency as envisaged in Section 8(G) of the Insolvency Act referred to.
- [2] The application also then set out the respondent's financial situation with reference to his assets being both immovable as movable as well as his liabilities which consisted of preferent- as well as concurrent creditors.
- [3] A provisional order of sequestration was granted during September 2016. However, on the return date, Daffue J discharged the provisional order of sequestration. In his comprehensive reasons for judgment, Daffue J set out the motivation for discharging such provisional order of sequestration and in effect dismissing the application for sequestration.
- [4] In the present application, the applicant again seeks the sequestration of the respondent, his son.
- [5] The facts upon which this application are based, are with the exception of a few, the same as those relied upon by the applicant during the first application for sequestration.

[6] At the hearing of the matter, I enquired from counsel appearing on behalf of the applicant, *Mr Lubbe*, to address me in particular in regards to the question of *res judicata*, namely that the matter, based on the same facts, between the same parties had already been adjudicated upon and a judgment had already been delivered in regards to such facts.

[7] *Mr Lubbe* referred me to amongst others, **Kerbal v Kerbal** 1987 (2) SA 562 W in support of his proposition that *res judicata*, similar to *lis pendens*, cannot be raised by a court *mero moto*. In the **Kerbal**-matter, however, the court was concerned with an application for edictal citation in regards to a divorce action which was instituted in the Witwatersrand Local Division. Prior to this action, the applicant has also instituted action in Israel for similar relief. The court stated the following at 567 D – E:

“Once it appears that the court has jurisdiction and it is clear that the action is not vexatious and is properly brought in this court, I would certainly grant such an order as a matter of course in the belief that it is the applicant’s right to institute action if she wishes to do so. Even if the facts given by an applicant might indicate a possible defence to the action, that in my view, is irrelevant. The defendant may or may not take that defence and it is not for the court mero moto to take at that stage the equivalent of either exceptions or defences for the prospective defendant”.

[8] The court then also confirmed that the *exceptio lis alibi pendens* is not an absolute bar. The court has a discretion to allow a matter to

proceed notwithstanding that the same issue might be pending in another court of competent jurisdiction.

- [9] It has been established that there must be an end to litigation and from this flows the rule that legal proceedings can be stayed if it can be shown that the point at issue has already been adjudicated upon between the parties.

See: **Erasmus Superior Court Practice**, 2nd Edition, Vol. 2, p. D1 – 283.

- [10] I do consider the defence of *res judicata* on a different footing than the *exceptio lis alibi pendens*. In the latter instance there are two or more actions which are pending simultaneously with each other. In regards to *res judicata*, however, the court has adjudicated upon the facts brought before it. I have already referred to the doctrine that there must be an end to litigation. If a plea of *res judicata* is upheld, it will mean the end of the matter and will not result in only staying such matter.

- [11] In **Owen-Smith v Owen-Smith** 1982 (1) SA 513 ZSC, Lewis JP said that is the essence of the defence of *res judicata* that it must be pleaded and referred in this regard to **Vooght v Winch** 106 ER 507; (1814-23) ALL ER 270. The latter judgment, however, did not specifically contain findings to the effect that a court cannot raise the defence of *res judicata mero moto*.

- [12] It is trite law that in regards to the special plea of prescription, a court cannot on its own motion take notice of prescription. However, as far as *res judicata* is concerned, where a court has knowledge of the

fact that the matter has already been adjudicated upon by another court it should take cognisance thereof and consider what effect such previous adjudication of the matter has when it is again brought before Court.

- [13] In the matter of **Boland Konstruksie Bpk v Petlen Properties Bpk** 1974 (4) SA 980 KPA, the court had to consider an application for condonation for the non-compliance of the rules regarding the continuation of appeals. On behalf of the respondent it was alleged that, because a previous application for condonation had been refused, the matter was *res judicata* and may therefore not be considered. In this regard Burger, J said the following:

“Omrede die aansoek vir kondonasie in die onderhawige geval nie behoorlik voor die hof geplaas was nie, en die nodige stawende getuienis nie voorgelê was nie, is die aansoek van die hand gewys; daar was egter geen beslissing van enige geskil nie. Na my mening het die hof toe hy die aansoek ‘van die hand gewys het’ bedoel om ’n bevel te maak wat neerkom op absolusie of wat ’n soortgelyke strekking het.” (P. 982 D – E).

- [14] Burger J also then came to the conclusion that the objection which was based on *res judicata* could not be upheld. What is important is that at p. 98 G – H the following was said:

“Onder die omstandighede van die saak meen ek dat, selfs al was die beswaar egter gegrond, dit nie in die belang van die reg sal wees dat die hof die beswaar mero moto opper.”

[15] The importance of the latter is that it would appear that a Court may on its own accord take note of *res judicata*. Furthermore, it appears that a court will only raise the matter of *res judicata mero moto* once it has been established that it will be in the interest of the law and therefore also the interest of justice that this fact should be raised by a court of law. I consider it in the interests of justice that the court should indeed be able to *mero moro* raise such a plea and not allow a litigant to continue with litigation after the matter had been adjudicated upon previously.

[16] *Mr Lubbe* further referred me to the matter of **Smit v Poritt & Others** 2008 (6) SA 303 SCA where the court with reference to **Bertram v Wood** (1893) 10 SC 177 at 180 held that recognition of the defence of *res judicata* will require a careful scrutiny. Relevant considerations will include the question of equity and fairness not only to the parties themselves but also to others. It was said:

“Unless carefully circumscribed, (the defence of res judicata) is capable to producing great hardship and even positive injustice to individuals.”

[17] Upon perusal of Daffue J's reasons for discharging the provisional order for sequestration, such reasons can be summarised as follows:

- (a) The valuer who valued the immovable property, according to the written valuation presented to court did not inspect the property when the valuation was done;

- (b) The outstanding amount in regards to rates and taxes due to the Mantsopa Local Municipality was not taken into consideration when calculating the dividend required in the Free State Division as a rule of practice;
- (c) No valuation was obtained in regards to the Honda Quad Bike which forms part of the respondent's movable assets.
- (d) It was unacceptable that the applicant did not employ the services of a valuer in Ladybrand or if such person was not available, that an experienced estate agent residing and practising as such in the town of Ladybrand, should have inspected such property and valued it accordingly. Such person's evidence, given under oath, referring to comparable sales, would have provided the court with detailed information pertaining to the property market in Ladybrand at the time of his or her reasons for arriving at a valuation.
- (e) Major errors were committed in arriving at the dividend of 30 cent in the Rand.
- (f) Contrary to the calculations by the applicant and/or his attorney, the calculations in regards to the dividend should read different.

[18] In using his own calculations, Daffue J calculated the dividend payable to be nil.

- [19] The applicant himself is apparently not the draftsman of the application. He is represented by an attorney who, in probability, also prepared the Notice of Motion as well as the founding affidavit in support of the application before court. The omissions pointed out by Daffue J were in all likelihood due to the draftsman of such application. For that reason, and for that reason alone, I do consider it in the interest of the law and of justice that I may adjudicate upon the matter although I am entitled to raise the defence of *res judicata mero moto*.
- [20] In considering the merits of the application, I intend to take into consideration the degree in which the applicant's application and in particular the omissions as contained in the first application for sequestration have been improved.
- [21] As far as the valuer of the immovable property is concerned, the applicant did not deem it necessary to obtain a new valuation report. What the application now contains is the same valuation report upon which the first application for sequestration was founded. In an attempt to circumvent the point raised by Daffue J, namely that the valuer did not inspect the property, the one page referring to the fact that there was no inspection of the property is now omitted. Furthermore there is now an affidavit by the same valuer, confirming that he allegedly did inspect the property when evaluating such property. However, such report still contains a paragraph 4.2 "*Buildings*" where it is again stated that no inspection was done. This report therefore contradicts the allegations as contained in the confirmatory affidavit filed by such valuer. The confirmatory affidavit furthermore does not state when such inspection was done and

does not explain why the report refers to the fact that no inspection was done. I wish to voice my dissatisfaction in the manner in which this evidence was placed before court. For the reasons referred to, I therefore disregard such evidence in totality.

[22] In regards to Daffue J's further point raised in regards to the valuer not being a local resident of Ladybrand, the confirmatory affidavit by the valuer referred to previously, is also absolutely silent on this aspect. No explanation is provided at all in regards to the basis for such comparable sales as contained in the valuer's report. The applicant now, however, also relies on two additional letters with accompanying confirmatory affidavits regarding the valuation of the immovable property with reference to certain comparable sales in Ladybrand. No details are, however, provided in regards to which comparable sales such valuer then refers to. Although I am sceptical of the evidence, in favour of the applicant, I do then accept the evidence of these two latter valuers, namely Margaret Hofmeyer as well as Alrie Eiendomme.

[23] As far as the Honda Quad Bike is concerned, no valuation report in regards to this asset was before Daffue J with the first sequestration application. Before me there is now a valuation report in regards to this vehicle which, according to the report itself, was valued on 7 October 2016. Whereas the same valuer in regards to this asset is the one who allegedly valued the immovable property, I am sceptical of such valuer's allegations pertaining to the immovable property. I do not, however, have a reason to reject the valuation report in regards to the Honda Quad Bike.

- [24] As far as the amount which is due and payable in regards to outstanding rates and taxes to the relevant local municipality is concerned, such amount would, taking into consideration the period of time since the date of the previous valuation report have increased. It is, however, not reflected as part of the respondent's liabilities as contained in the founding affidavit by the applicant. Again, as far as this point is concerned, I wish to voice my dissatisfaction towards the draftsman of the application. I did, however, in my own calculation of a dividend in the matter, take such outstanding rates and taxes in the amount of R5 600,00 in consideration.
- [25] What remains to be considered is the dividend as calculated by the applicant in comparison with the dividend as calculated by Daffue J. The applicant now relies upon an undated final liquidation and distribution account apparently compiled by the curator of the erstwhile provisionally sequestrated estate of the respondent. In response to Daffue J's calculation of the dividend at being Rnil, the applicant does not go any further than to refer to the said first and final liquidation account in insolvent estate of the respondent.
- [26] The applicant's contention is that the creditors will receive a dividend of 10 cent in the Rand. However, this contention is completely incorrect. Based on the figures now provided by the applicant, in particular the increase of the liabilities since the previous application for sequestration as well as the administration costs as contained in the first and final liquidation account, I calculated such dividend also to be approximately Rnil.

- [27] It is further trite law that in considering a sequestration application, that it must be shown that such sequestration will be to the advantage of creditors as a whole. In the present instance, taking into account that the amount of R5 600,00 in regards to outstanding rates and taxes should be included in the respondent's liabilities, the respondent's concurrent creditors, excluding the applicant, amount to R663 523,09. The amount of the assets, being the balance of the value of the immovable property, the value of the motor vehicle as well as the value of the Quad motorbike is R347 996,07.
- [28] According to the final distribution and liquidation account, the administration costs in regards to the insolvent estate will amount to approximately R127 000,00. The total of the curator's fee in terms of this account amounts to R55 998,00.
- [29] If one then considers that according to the liquidation and distribution account, the only amount available for distribution is the amount of approximately R44 500,00, it is difficult to see how the sequestration of the respondent's estate can ever be in the interests of the creditors as a whole. From the calculations as contained in the said account, it appears that the curator will receive more than the creditors who have claims in excess of R600 000,00.
- [30] The sequestration of the estate of the respondent will therefore not be in the interests of respondent's creditors as a whole.

ORDER

The application is dismissed

J.J.F. HEFER, AJ

On behalf of the applicant:

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