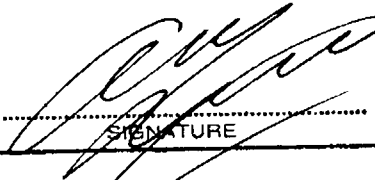


IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED.	
7/1/2013	
DATE	SIGNATURE

Case Number: 46832/2012

8/1/2013

In the matter between

HUNTREX 337 (PTY) LTD t/a

HUNTREX DEBT COLLECTION SERVICES APPLICANT

and

PETRUS VOSLOO

FIRST RESPONDENT

DALLAS GAYE VOSLOO

SECOND RESPONDENT

JUDGMENT

A A LOUW J

Introduction

[1] There is something so peculiar to the applicant's sequestration applications which appear regularly on the motion rolls of this court, that one cannot help but "smell a rat".

[2] The plaintiff is Huntrex 337 (Pty) Ltd trading as Huntrex Debt Collection Services (hereinafter "Huntrex").

- [3] This is an application for the sequestration of the respondents' estates in accordance with the provisions of s 9 of the Insolvency Act, 24 of 1936. This application and others by Huntrex that I have encountered before in the motion court follow a similar pattern. Huntrex purchases and takes cession of debts "from reputable companies" as it is put in the founding affidavit. Thereafter Huntrex enters into an agreement with the debtor that the full amount of the ceded claim be paid in two instalments.
- [4] Failure to pay invariably leads to a judgment in the Cullinan Magistrate's Court. A warrant of execution and *nulla bona* return follow which creates the basis for an application such as the present one.
- [5] This application was first enrolled on 25 September 2012 when it was postponed by Preller J. On 30 October 2012 Potterill J granted a provisional order of sequestration against both respondents. I heard this matter on the return day i.e. 3 December 2012 when I ordered, for reasons as will appear hereunder, that the deponent to the founding affidavit, a director of Huntrex, Gerbrecht Maria Roos, be ordered to give evidence on Friday 7 December about the nature of Huntrex's business and certain other concerns I have with these application, which concerns I mentioned to mr Z Schoeman who normally appears for Huntrex in these matters.

[6] Before the hearing of the 7th, I was informed that mr M C Erasmus SC will appear and I communicated with him. During a telephone call I pointed out to him the aspects which were of concern to me and which I expected to be addressed in evidence. On 7 December another director of Huntrex mr Paul de Beer, elected to give evidence. I heard his evidence as well as that of his sister Elzani Coetzer, who is the attorney of record. I was also furnished with a bundle of documents – exhibit “A” pages 1-192. After the hearing, mr Erasmus SC provided me with helpful written argument.

[7] As a first glance at the papers reveals, two persons were provisionally sequestrated in the same application. The two respondents are married out of community of property. It is not permissible to join two individuals (not married in community of property) in an application for sequestration of their respective estates.¹ This counsel agrees with in his written argument and proposes that the *rule nisi* be discharged. This should obviously happen as the provisional sequestration order should not have been made in the first place. In the interests of justice, and having heard all the evidence, it is however necessary to go further.

¹ *Ferela (Pty) Ltd v Craigie & Others* 1980 (3) SA 167 (W) at 171F-172D; Mars *The Law of Insolvency*, 9th edition (2008) p102 par 5.1

The nature of the ceded claim

[8] Paragraph 6.1 of the founding affidavit reads as follows:

"The Applicant is a debt collection services company specializing in the collection of debtors books (which is purchased from reputable companies) and the collection of the debtors as a result thereof."

What the applicant does not tell the court is that these "reputable companies" are debt counsellors and the claims purchased are all so-called "termination fees" of these counsellors. Strikingly the agreement in terms of which these claims are purchased and ceded is not annexed to the affidavit.

[9] Paragraph 6.2 of the affidavit then proceeds to state that on 5 December 2011 and at Pretoria, Huntrex entered into an agreement with the first and second respondents. In terms of this agreement, it is alleged, the respondents admitted their liability for payment of the amount of R14 441,80 for debt counselling cancellation fees. This amount had to be paid on or before 31 January 2012. Once again this agreement is not annexed to the affidavit, as is required.

[10] I proceed to deal with the relevant agreements which were put before me in evidence. The first relevant agreement was entered into between Independent Debt Counsellors ("INDC") and Huntrex as represented by the witness Paul de Beer on 30 November 2011. In terms of this agreement Huntrex purchased "the claim" described as

“statutory debt counselling cancellation fees” in the amount of R14 441,80 for R1 500. Clause 4 of this agreement obliges INDC to deliver its entire file about “the consumer” (in this case the respondents) to Huntrex.

- [11] An annexure to this agreement was entered between the same parties on the same date in terms of which “the said claim” was ceded to Huntrex.
- [12] Exhibit “A188-192” is the agreement referred to (but not annexed) in paragraphs 6.2; 6.2.1; 6.2.1 [sic]; 6.2.3; 6.2.4; and 6.2.5. The only specific reference to a clause of this agreement is to be found in paragraph 6.2.5. This refers to clause 12 of the agreement. Such a clause does not exist! The agreement has 9 clauses only. It is titled “Acknowledgement of Debt”.
- [13] Be that as it may, in terms of this agreement the respondents admit their indebtedness to Huntrex in the amount R 14 441,80 for debt counselling cancellation fees, together with all legal costs on a scale as between attorney and client, incurred until the date of signing of that document. Clause 2 of the annexure thereto provides that the principal debt shall bear interest at the maximum rate of interest provided for from time to time under the Usury Act. The principal debt is to be paid in two instalments namely two equal instalments of R7 220,90 on 31 December 2011 and 31 January 2012. In the light of the fact that we

are dealing with respondents who could not perform their debt counselling obligations, this payment schedule seems strangely optimistic.

Domicilium Citandi Et Executandi

[14] On the first page of the acknowledgement of debt² the respondents are stated to be “of physical address 27 South Street, Rayton.” They chose that address as their *domicile*. This is, to say the least, misleading. As appears from the application before me³ this address is the main place of business of Huntrex. The respondents reside at 125 Kemston Avenue, Benoni.

[15] The respondents paid nothing. Summons was issued in the Cullinan Magistrate’s Court on 16 April 2012. This summons was then served by the sheriff on Huntrex itself at the so-called *domicilium* of the respondents at 27 South Street, Rayton! Default judgment was obtained as well as *nulla bona* returns on the warrant of execution.⁴

[16] These *nulla bona* returns form the basis of the present application.

[17] In evidence, when I asked Huntrex’s attorney about the absurdity of serving court processes on oneself, the only explanation she came up with was that “ons het ‘n ontsaglike problem met balju’s om hul werk te

² Exhibit “A188”

³ Founding affidavit p 7 par 1

⁴ Application p 20 and 21

doen". She was admitted in March 2009. Her evidence was that since September 2011 she dealt with the Huntrex cases. Before that her brother, JC de Beer who is also a director of the firm dealt with these cases. Apparently she never questioned the propriety of this practice as she had inherited this from her brother.⁵ How an attorney can ever believe that such service can be proper is beyond me. This in itself is a deliberate and serious abuse of the legal process and merits the attention of the Law Society.

The *nulla bona* returns

[18] These returns are dated 23 June 2012. The warrants were executed at the residential address in Benoni.

[19] Paragraph 8 of the founding affidavit reads as follows:

"The First and Second Respondents have, to the best of my knowledge and on their own version, extended movables (sic) assets which can be used to procure advantage to the creditors of the Respondents. The attention of the Honourable Court is specifically drawn to the fact that the Respondents are the owner (sic) of a 1996 Model Mercedes Benz Power Liner 25/28, a 1996 Model Mazda Midge 1.3l, a 2007 Model Chevrolet Spark, a Road Runner Trailer, a Trojan Exercise Bike, a Trek Hydro Professional (sic) Mountain Bike, a Panasonic Camera and

⁵ Huntrex is a family business as Paul de Beer is a director and shareholder. In its related companies (see par29 and footnote 11 hereunder) he, his father Jan du Plessis de Beer and sister Elzani Coetzer are also shareholders. As already mentioned J C de Beer and Elzani Coetzer are directors of Huntrex's firm of attorneys.

accessories and a computer to the value of approximately R 390 000, 00 as set out in annexure "D" attached hereto." (my emphasis)

[20] In the light of the above allegations regarding the assets of the respondents, I asked mr Paul de Beer whether the attention of the sheriff Benoni was specifically drawn to the fact that these assets exist. He said, no, Huntrex does not do that. A general business resolution was made to not specifically ask the sheriff to look for specified assets which Huntrex well knew were in the possession of the respondents. Whilst Huntrex was astute to point out in this application that those assets exist, it is strange that they did not feel it fit to do so when it wanted execution of the judgment.

[21] His evidence was that he was surprised that *nulla bona's* were rendered. He said that Huntrex does not want *nulla bona's* – the aim is to obtain satisfaction of the debt. His further explanation on this point, namely that debtors sometimes hide their assets and lie to the sheriff seems specifically lame in the light of the full co-operation of the respondents throughout.

[22] This co-operation is evident from the following: Within one week of the cession the respondents come to Pretoria to sign the acknowledgement of debt; they go to the sheriff's office to collect this application; they once more attend at the sheriff's office to receive the

rule nisi.

Collusion

[23] *"Co-operation may tend towards collusion. The Courts should be scrupulous in ensuring that assistance does not conceal abuse. Several judgments have scrutinised 'friendly' applications for sequestration for signs of collusion..."*⁶

[24] There are so many sign of collusion that it is difficult to find that this is a *bona fide* application for sequestration. To summarise, the following features stand out:

1. Having unsuccessfully tried debt counselling, and shortly after the cession of the debt, the respondents hasten to the office of Huntrex in Pretoria to sign the acknowledgement of debt;
2. In this document they choose a *domicile* which is in fact not theirs and at which address they knew that they would not receive any court processes.
3. They tell the sheriff that they do not have any assets.
4. Huntrex does not instruct the sheriff to search for the specific assets which it at all times knew the respondents should have.
5. They collect all the documents in this application from the sheriff's office.

⁶ *Esterhuizen v Swanepoel* 2004 (4) SA 89 (WLD) par 9.

6. The business practice of Huntrex is an underhand scheme with ulterior motives. The motive can either be to benefit the business of its related companies (to be dealt with hereunder) or assist debtors, who so wish, to be sequestrated.
7. Material information is withheld from this court. This includes the fact that the agreements referred to in par 8 and 9 above are not attached to the papers as well as the further facts which came to light in oral evidence.

Jurisdiction of the Cullinan Magistrate's Court

[25] In this regard mr Erasmus SC's written argument reads as follows:

" 21

*No case law could be found regarding the election of an address as domicilium citandi et executandi but in the work by **Van Loggerenberg, Jones & Buckle**⁷, the learned writer expressed the view that the election of such an address does not confer jurisdiction upon a Magistrate's Court over the person of a Defendant.*

22.

The question arises whether the appointment of 27 South Street, Rayton is a proper submission to the jurisdiction of the Cullinan Magistrate's Court as contemplated in Section 45 of the Magistrate's Court Act. In terms of Section 45 if consent is given

⁷ The Civil Practice of the Magistrates' Courts in South Africa, Vol 1, p 95

specifically with reference to particular proceedings already instituted or about to be instituted in a particular Magistrate's Court, that Magistrate's Court will have jurisdiction by virtue of such consent alone.⁸"

[26] I agree that the Cullinan court did not have jurisdiction. It will only have jurisdiction in those few cases if any, where the defendant resides in that jurisdiction.

[27] What is shocking to me, and that goes to the professionalism of Huntrex's attorneys, is that it is always alleged that the whole cause of action arose within the jurisdiction of the Cullinan court as the plaintiff and defendant entered into their agreement in the jurisdiction of that court.⁹ In fact it seems to be standard practice that the acknowledgement of debt is signed by both parties in Pretoria¹⁰

Further relevant evidence

[28] From Paul de Beer's evidence it appears that the Huntrex business commenced during October 2010. Since then it has instituted approximately 250 sequestration applications. He strongly denies any collusion.

[29] He further testified that provided the respondents have complied with their obligations to repay the aforesaid amount to the applicant, two

⁸ *Van Heerden v Muir* 1955 (2) SA 376 (A)

⁹ Exhibit "A" p 185 par 4.

¹⁰ exhibit "A" p 189 and 192

other companies¹¹ may assist the respondents with:

“a consolidation loan whereby the repayment amount by the respondents to the various creditors may be decreased;

and/or

the respondents may be able to rent a vehicle with a view to acquire ownership thereof, provided the monthly rentals are promptly paid.”

[30] The reference in paragraph 6.1 of the founding affidavit to “reputable companies” is a reference to approximately 15-30 major debt counsellors in Gauteng, Mpumalanga and Limpopo. The debtors normally co-operate, for example, a debtor from Mbombela will travel to Pretoria to sign the acknowledgement of debt.

[31] He rates Huntrex’s success rate as 80% i.e. debtors who pay the total debt in the required two instalments.

[32] When debtors do not perform, judgment is always taken in the Cullinan Magistrate’s Court.

Conclusion

[33] I therefore find that this application has to be dismissed i.e. the rule nisi discharged, on the following bases: firstly it is a collusive friendly sequestration, secondly the application is based on an invalid warrant of execution and nulla bona as the Cuilinan judgment is invalid because of the lack of jurisdiction, thirdly two persons with separate

¹¹ Dimonex (Pty) Ltd and Auto Rent-to-own (Pty) Ltd

estates can not be sequestrated in the same application.

The future

[34] The following questions need to be investigated further:

1. The validity of all the judgments in the Cullinan Magistrate's Court.
2. The validity of sequestrations granted on the basis of the nulla bona returns, which are dependent on the existence of a valid judgment.
3. Whether the conduct of any party hereto merits criminal investigation.
4. The professional conduct of Huntrex's legal advisors has to be investigated by the Law Society of the Northern Provinces.

[35] Mr Erasmus SC has made a number of sensible proposals in his written argument, some of which I shall include in my order.

[36] Once the further information has been furnished on 22 January 2013, the Deputy Judge President will further deal with the matters in par 34 above and those arising from my order.

[37] I therefore order as follows:

1. The provisional sequestration order granted by Potterill J on 30 October 2012 is discharged.
2. The Applicant's attorney shall compile a list of all matters

in which the Applicant has already obtained default judgment against any person in the Magistrate's Court of Cullinan. If it is contended that in any of those matters it had jurisdiction, the ground must be stated.

3. The list in 2 above must include the case number, particulars of the defendants and their residential addresses, date of issue of summons, date served (and if not served at the plaintiff's office in Rayton, where served?), date of judgment, amount of judgment, date of service of warrant of execution, address where warrant was served and whether a nulla bona return was received or not.
4. The Applicant's attorney shall give notice in writing per registered post to all such persons that the judgment may have been incorrectly granted and may be rescinded in terms of section 36 of the Magistrates' Court Act;
5. That a list be compiled by the Applicant's attorney in respect of all sequestration orders already obtained by the Applicant where the judgment was erroneously granted by the Magistrate's Court, Cullinan. The list must also include pending cases and the present status thereof.
6. The list in 5 above must also include in respect of each case the following:

- 6.1 each date it was enrolled in the motion courts;
 - 6.2 who heard the matter;
 - 6.3 what order was made on each date;
 - 6.4 if there was any postponement or extension of a rule nisi what was the reason? In particular, I must be informed of any concerns raised/queries or further directions given by the particular judge;
 - 6.5 in respect of cases 21821/12 and 13408/12 which I heard on 12 July 2012 copies of the affidavits filed consequent to my enquiries.
7. That the Applicant's attorney notify in writing per registered post all such persons of the fact that the sequestrations may have been incorrectly granted and may be set aside;
 8. That the Applicant's attorney file an affidavit by 22 January 2013 that paragraphs 4 and 7 have been complied with.
 9. The lists and affidavit referred to above shall be delivered to Van der Merwe DJP no later than 13h00 on 22 January 2013.

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A A LOUW
JUDGE OF THE HIGH COURT