



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO. 5034/13

In the matter between:

17/10/2013

PELSER C J + 4

APPLICANT

and

LOUBSER K B + 3

RESPONDENT

JUDGMENT

HASSIM A AJ

1. This is an application for the payment of money to the Applicants that the Applicant argues was misappropriated by the First Respondent while he was executor of the estate of the father of the First Applicant. The First Respondent has not opposed the application. The Second Respondent was married to the first respondent at the time that the cause of action arose. They divorced on 14 June 2012. The Applicant however seeks to recover the money from the joint estate, the division of the estate,

according to the Applicant, not having been finalized. The Second Respondent has opposed the application. For the reasons I provide in this judgment, it is not necessary for me to make a finding in relation to the Second Respondent.

2. Circumstances have changed since the filing of the application. An intervening party, Ms Violet May Visagie, was granted leave to intervene. It appears that Ms Visagie has also suffered under the hand of the First Respondent during his tenure as executor of the estate of Ms Visagie's late husband. Ms Visagie has also, separately, brought sequestration proceedings against the first respondent. There was no appearance for Ms Visagie at the hearing.
3. It is common cause that a provisional order for the sequestration of the first respondent has been issued. No information was place before the court as to the appointment of a trustee or the stage at which the sequestration proceedings are. However, counsel for the Applicants sought to persuade the court that the application should not be stayed despite the provisional sequestration. He submitted that this matter has a long history and that the applicants should not be prejudiced merely because another creditor has brought sequestration proceedings against the first respondent. I was urged to grant the order sought in the notice of motion. In order to assuage my concern regarding the provisional sequestration, counsel submitted that I may make a further order to the effect that the trustee of the insolvent estate may apply for a rescission of this court's order if there are grounds to do so. This I cannot do. I am constrained by section 20(1)(b) of the Insolvency Act 24 of 1936.
4. Section 20 (1)(b) of the Insolvency Act provides that the effect of sequestration of the estate of an insolvent shall be: *"to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent..."* Reference to a trustee in this context means a trustee as finally appointed [Meskin, Insolvency Law, at page 6-6(3)]. The section contains a proviso, which is not applicable in this case.

5. The purpose of sequestration proceedings is to bring about a *concursum creditorum* so as to achieve the realization of the debtor's assets for the benefit of all creditors. [Meskin, Insolvency Law, at page 2-42]. Ms Visagie probably instituted the insolvency proceedings in order to obtain payment of the debt owed to her, or at least as much of it as she can get. [See *Estate Logie v Priest* 1926 AD 312 at 319]. However, once an order for sequestration is made, all creditors, including the sequestrating creditor, will have to prove their claim in accordance with the Insolvency Act. *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) at 275I-J per Trengove AJ. Similarly, the applicants will have to prove their claim against the first respondent in the normal course under the Insolvency Act, along with other creditors. I therefore decline to grant the order they seek in this application. This application must be stayed in accordance with section 20(1)(b) of the Insolvency Act.

6. In respect of costs, the applicant seeks costs against the second respondent. The second respondent was entitled to oppose and to make legal submissions in order to secure her rights in the event that I found in the applicants' favour. While she was not ultimately successful because it is incumbent upon me to postpone these proceedings, neither are the applicants successful. In these circumstances, I am of the view that it would not be fair for the second respondent to be saddled with the costs of the application at this stage.

7. I therefore make the following order:

7.1. The application is postponed sine die.

7.2. Costs to be costs in the cause.



JUDGE HASSIM A AJ