In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 8331/12

In the matter between :

Plumb on Plumbers — Applicant

and

Trevor Lauderdale (identity number)
(date of birth :) — First Respondent
Natasha Katherine Lauderdale
(identity number)
(date of birth :) — Second Respondent

Judgment

Lopes J

[1] This is the return day of a provisional sequestration order granted on the 20th August 2012. The matter first came before me on the 20th September 2012.

[2] When I was reading the application papers in preparation, some of the allegations of fact in the founding affidavit seemed familiar to me. I investigated the matter and my registrar located three further sequestration applications which

had been before this court on the 29th August 2012 and the 18th September 2012 and which contained certain identical allegations of fact in the founding affidavits. It seemed to me too much of a coincidence that certain of the allegations of fact in all the applications could be identical.

[3] I accordingly issued an order extending the rule, and adjourning the matter to the 27th September 2012 before me. I made the following additional order :

'2. The applicant's attorney is directed to deliver an affidavit by no later than the 25th September setting out precisely how the allegations of fact contained in the founding affidavits in cases number 8331/12, 8440/12, 8439/12 and 6849/12 and which are identical or similar in form and content came to form part of each of the affidavits in question.

3. In particular the applicant's attorney is to identify :

(a) the source of the instructions which he received in each case;

(b) if the affidavits were finalised by anyone other than the applicant's attorney, he is required to identify

(i) the identity of the person concerned;

(ii) all instructions given to the person finalising the affidavits.

4. The applicant's attorney is to explain why the requirements in the *Mthimkhulu v Rampersad and Another (BOE Bank Intervening Creditor)* [2000] 3 All SA 512, a judgment of Combrinck J, were not followed in all the cases.

5. The applicant's attorney is directed to provide a list of all cases involving provisional sequestration which have come out of his office in the last two years and which contain the same allegations.

6. Costs are reserved.'

[4] Pursuant to my order, the applicant's attorney filed two affidavits in which he purported to set out replies to the queries I had raised. As part of the reply to my queries, the attorney for the applicant set out the details of seventeen sequestration matters which had been dealt with by his office in the last 24 months. I have managed to locate a number of those files and I set out below matters which are of concern to me, which are revealed by the applications :

(a) in the applications numbered 10988/2011, 11412/2011, 5610/2011, 6849/2012, 8439/2012, 8440/2012 and this matter, the following allegations of fact are made in each affidavit :

'Despite many promises, the First Respondent (or Respondent as the matter required) has not paid the applicant.

The First Respondent (or Respondent as the case in each matter required) has been avoiding my phone calls and has said to me in many phone conversations that he (or she as applicable) was "sorting the matter out".

The First Respondent (or Respondent) has simply "not sorted the matter out".'

In each affidavit the following allegation appears :

'The Applicant did not take security from the First Respondent (or Respondents as each matter required) as I have known the Respondent/s for many years and I trusted the First Respondent (or Respondent as the matter required).'

Not only was the identical nature of the allegations of fact significant, but in some cases they were contained in affidavits deposed in the first person wherein the applicant refers to himself or herself in the third person as 'the applicant.'

Further, in each affidavit the following allegation appears :

'I subsequently telephoned the First Respondent (or Respondent) and I could gather from his (or her) voice, that he (or she) was under a great amount of stress and I have ascertained that the assets and liabilities of the Respondents (or Respondent) are as follows ...'

In the affidavit which the applicant's then attorney produced in response to my order of the 20th August 2012, he attached instructions which he had sent to counsel in three of the cases referred to above. Those instructions which were in almost identical form contained only some of the allegations of fact referred to in the founding affidavits. Some of the allegations of fact in the founding affidavits did not appear anywhere in the instructions to counsel. The attorney records that the founding affidavits were drafted by counsel. In his supplementary affidavit which he provided in response to a further query by me, he stated that he had neither had occasion to arrange a consultation with counsel, nor had he had occasion where the counsel involved requested that he be provided with further information. He recorded that he did not draft papers in respect of sequestration applications.

(b) in cases 8439/2012 and 8440/2012 the respondents were husband and wife. The allegations in each of the founding affidavits were identical. This may not be a remarkable circumstance in view of the fact that they are husband and wife, but what is remarkable is that the letters which they each allegedly wrote to the sequestrating creditor and which were relied

upon in each case, were identical in every way, save that they were signed by the respective respondents. In the present application, the letter addressed by the first respondent was also in identical terms :

'I wish to advise you that I am unable to pay to you the amount of R (the applicable amount in each case was inserted here), you may do as you like. I am unable to pay my current liabilities.'

(c) in the cases numbered 4310/2012 and 3751/2012, the following letter was allegedly addressed to the applicant's attorneys by the respondent in each case :

'Dear Sir,

I am in dire financial straits at the moment.

I have no monies to pay to your client.

I am at a complete loss.

...

I am in the process of selling my furniture just to make ends meet.

Your client is at liberty to do whatever your client feels necessary.'

(d) In cases 11412/2011, 8439/2012, 8440/12 and 3455/2011 acknowledgements of debt allegedly made by the debtor in each case are remarkably similar. In three of those cases the language is identical, save for the names of the parties and the amounts owed. Similarities in those documents makes it almost certain that they were prepared from a precedent under the authority of the same person. They are rendered all the more suspicious by the fact that the parties are (except the respondents in 8439/2012 and 8440/2012) apparently unrelated.

[5] In almost all the applications there are numerous other expressions used which are identical. It is understandable that where a particular deponent deposes to a number of affidavits in separate applications (for example; a member of a litigious company or organisation) that that deponent may use similar or identical phrases in describing events. For example, in sequestration applications many affidavits may contain similar allegations regarding the advantage to creditors. Some of those allegations may however, be particular to the matter concerned, and require allegations of fact regarding the debtor in question. Other allegations may be more general conclusions of law or fact (for example that the sequestration would be to the advantage of creditors because a liquidator would be appointed who would investigate the affairs of the debtor, and that such an investigation may reveal the existence of further assets, etc). That explanation, however, cannot justify what has taken place here!

[6] However much the practice of swearing an oath may have become diluted in modern society by the inexperience or lack of training of commissioners of oaths, or a lack of appreciation of their functions, the swearing of an oath by a deponent is a serious and important function. The oath underlines the seriousness of making the allegations of fact contained therein, and entitles a court to rely on these facts as evidence where they are not challenged or disputed. The repercussions for an untruthful deponent can be very serious indeed, and practitioners are cautioned against the dangers inherent in using

precedents to prepare affidavits, without ensuring that all allegations of fact are believed by the deponent to be true.

[7] Bearing in mind that the founding affidavits in all the above cases came from the same firm of attorneys, it is clear that :

a) the affidavits referred to above cannot have correctly represented, in each case, facts which the deponent believed to be true;

b) all of the applications were moved by the same counsel who, according to the affidavit of the applicant's then attorney, drafted at least some of the affidavits referred to in paragraph 4(a) above;

c) the preparation and finalisation of the affidavits was performed by the same person or persons who should have, or must have had, knowledge of the falsity of the allegations contained in at least some, if not all, of the affidavits.

[8] A further disturbing factor in almost all the applications is that they fall into the category of 'friendly' sequestrations. This suspicion is highlighted by the fact that in many of the applications, proof of the service of the provisional order was by way of an affidavit from the debtor who had been provisionally sequestrated. This occurs in no less than nine of the above applications. As stated by PC Combrinck in *Mthimkhulu v Rampersad and Another (BOE Bank Ltd, Intervening Creditor)* [2000] 3 All SA 512 (N) at 514 h*:*

'The facts of the present case illustrate the manner in which the process of friendly sequestration has been abused and is continuing to be abused.'

See also the remarks of Gorven J in *Ex Parte Arntzen* (2333/2012) [2012] ZAKZPHC 66 (28 September 2012).

[9] After my order of the 20th September 2012, the attorneys for the applicant withdrew and the present firm of attorneys placed themselves on record. Mr *Collingwood* who appeared for the applicant, submitted that I should consider this application without reference to the others, in order to determine whether a final order should be granted. (I emphasize that neither the present attorneys of record, nor Mr *Collingwood*, had anything to do with the preparation of any of the applications).

In this regard, and in a not dissimilar context, Wallis J said in *Sibiya v Director-General : Home Affairs and Others*, *and 55 related cases* 2009 (5) SA 145 (KZP) at page 170 G – I :

"I am well aware the a court does not lightly disbelieve what is said on oath in an affidavit, especially in circumstances where no opposing affidavits have been filed and the allegations made by the applicants have not been directly challenged. However, the deficiencies in these standard affidavits are so extensive and demonstrate such a disregard for accuracy and completeness that I am compelled to say that I regard any such affidavit in standard form as being thoroughly untrustworthy. That is a misfortune for those applicants who have genuinely been the victims of bureaucratic incompetence, and I lay the blame squarely on the shoulders of the legal practitioners responsible for the preparation of the applications.'

[10] Having considered the above applications, and given the similarities between some of them and this application, I have no confidence whatsoever

that the affidavit deposed to by the applicant in this application contains allegations which are entirely accurate. In those circumstances I do not propose to confirm the rule nisi.

[11] I make the following order :

1. The rule nisi issued on the 20th August 2012 is discharged;
2. This judgment, the affidavits furnished by the applicant's erstwhile attorney, and the matters referred to above are referred to the Law Society and the Society of Advocates for further investigation and for the taking of whatever steps those organisations may deem appropriate;
3. The applicant in this application is not to bear any costs whatsoever in relation to the bringing of the application prior to the withdrawal of its erstwhile attorneys.

Date of hearing :27th September 2012

Date of judgment :15th October 2012

Counsel for the Applicant : A Collingwood (instructed by Naidoo Maharaj)