

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.:1781/08

In the case between:

EUGENE NEL N.O.

1st Applicant

KAREL JOHAN SPAGENBERG N.O.

2nd Applicant

STEPHEN JAMES GROENEWALD N.O

3rd

Applicant

(In their capacities as Trustees of AL2 Vervoer Trust)

and

SUSANNA JOHANNA CILLIERS N.O

Respondent

(in her capacity as Trustee of Cilliers Family Trust)

JUDGEMENT:

MOCUMIE, J

HEARD ON:

18 APRIL 2008

DELIVERED ON:

30 APRIL 2008

[1] The three applicants in their capacity as trustees of AL2 Vervoer Trust (“AL2”) sought an order on urgency for a provisional sequestration of the respondent in her capacity as the trustee of the Cilliers Family Trust (“CFT”). The application was not served on the respondent. I granted a provisional

sequestration order on 10 April 2008 with the rule *nisi* returnable on 15 May 2008.

[2] On 18 April 2008 the respondent approached this Court in terms of Rule 6(12)(c) of the Superior Courts Practice with an application for the reconsideration of the same order on the basis that the order was granted in the respondent's absence contrary to the provisions of section 9(4A) of the Insolvency Act 24 of 1936 (*"the Insolvency Act"*).

[3] The history of this application is shortly as follows. The respondent is the sole remaining trustee of CFT. CFT is the registered owner of an immovable property, Farm No 311, Registration Division Boshoff Road known as Botha's Hoek (*"the game farm"*). The respondent is a former trustee of AL2 which was finally sequestrated by order of the High Court of Kimberley on 23 November 2007 under case no: 1031/2007. During the sequestration of AL2, one (*"L Cilliers"*), the respondent's husband and the respondent informed the Court

that AL2 had no assets to satisfy the judgment in the amount of R 2 417 036,40 obtained by Scania South Africa (Pty) Ltd (“Scania”) in respect of which the sheriff returned a *nulla bona* return.

[4] Scania contended that L Cilliers and the respondent were complicit in the dissipation of the assets of CFT which amounted to more than R15 million rand as at the end of 28 February 2003. L Cilliers had paid himself amounts of money from CFT and made a loan to a fictitious close corporation. AL2 made certain determinable payments for the game farm and the game thereon which payments could not be accounted for. What Scania stated in 2007 was never refuted by either L Cilliers or the respondent. L Cilliers’ personal property was also sequestered by an order of the High Court Kimberley on 23 November 2007.

[5] Soon after the sequestration the applicants were appointed as trustees of AL2 and were fully authorised to administer the sequestered estate. On 25 January 2008 they called a meeting with L Cilliers and the respondent to determine what had happened to the assets of AL2 based on what Scania had deposed to. L Cilliers intimated during the meeting, which was mechanically recorded, that AL2 made a loan to CFT to buy the farm. The amounts AL2 paid out were not accounted for in any records kept at and by AL2.

[6] On further investigation it became apparent that the trusts (CFT and AL2) operated as a single entity as monies moved from one trust to the other and that L Cilliers was running both trusts as evidenced when he acquired the farm and the game with AL2 funds. The respondent despite being the sole trustee of CFT was not the signatory of the transaction. AL2 paid instalments in respect of the mortgage bond held by BOE Bank over the farm. AL2 paid the seller of the farm a substantial amount as well as the transfer duties and the cost of registration of the mortgage bond. In essence and as confirmed by L Cilliers on 7 April 2008, CFT owed AL2 an amount of R1, 866,630.76. Both L Cilliers and respondent consented to the sequestration of CFT.

- [7] On 29 February 2008, one Mr Eugene Nel, one of the applicant trustees, learnt that CFT had not only entered into a transaction to dispose of the farm but had sold it to a Mr Derek Corns for R2, 7 million and that there was no game on the farm. Two bonds were registered over the farm. When this matter was raised at the enquiry the respondent said she was unaware of the sale of the farm and did not sign any document pertaining thereto. L Cilliers concluded the transaction and clearly divested CFT of assets with the knowledge and consent of the respondent. Despite the respondent's protestation to the contrary the objective facts establish this to be so.
- [8] The applicants trustees brought an application for the sequestration of CFT on 3 March 2008 under case number 1075/2008. The application was opposed and postponed.
- [9] An enquiry in terms of section 154 of the Insolvency Act was

conducted and revealed that the beneficiaries of CFT, L Cilliers' daughters were not even aware that they were beneficiaries, that the sale of the assets of CFT was not in their interest, that both L Cilliers and respondent acted contrary to the provisions of the trust deed of AL2 and CFT and without any resolution by the trustees.

[10] The basis upon which the applicants approached this Court was that CFT is clearly insolvent as it cannot pay the amounts owing to AL2. They contended further that the registration of the farm in favour of HCL Familie Trust and the sale of the farm per se constitute an act of insolvency.

[10] Mr. Zietsman for the respondent submitted that the provisions of section 9(4A) of the Insolvency Act are couched in peremptory terms and give the Court no discretion to grant a provisional order without prior notice to interested parties especially the debtor. The exception being the instance of *nulla bona return* by the sheriff. He argued that it is only fair that the *audi alteram partem* rule be observed especially in instances of this nature.

[11] It is trite that in all applications for sequestration the respondent ought to be notified of such application in terms of Rule 6(2) read with Rule 6(5)(a) of the Uniform Rules of Court.

Apart from the fact that the Uniform Rules of Court require such notification, fairness and equity also demand such notification in that provisional sequestration affects a person's status and freezes his assets. See **Gouws v Scholtz** 1989 (4) SA 315 (NC) at 320j-321A

- [12] Mr. Zietsman submitted further that the difference in practice on whether the Courts had discretionary powers to grant or refuse provisional orders without first notifying the respondent in the High Courts has now been settled by the incorporation of section 9(4A) inserted by section 2 of Act 69 of 2002 which took away any discretionary powers the Courts had in the past to entertain *ex parte* applications in sequestration matters. See **Gouws v Scholtz** at 316-317 *supra* for an overview of the practice of the various High courts.

- [13] Section 9(4A) of the Insolvency Act reads as follows:

“(4A) (a) *When a petition is presented to the court, the petitioner **must** furnish a copy of the petition-*

- (i) *to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and*
- (ii) *to the employees themselves-*
 - (aa) *by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or*
 - (bb) *if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;*
- (iii) *to the South African Revenue Service; and*
- (iv) *to the debtor, **unless the court, at its discretion,***
***dispenses with the furnishing of a copy** where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.*
- (b) *The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (a) was complied with.*

[Sub-s. (4A) inserted by s. 2 of Act 69 of 2002.]” (My emphasis)

[15] It is correct that the amendment sets out clearly that the application must be served on the debtor before it can be entertained by the Court. It is also correct that the use of the

word “*must*” indicates that the provisions are peremptory. It is however not correct as contended on behalf of respondent that the amendment has taken away the entire discretionary powers that the Court has. That discretion is accommodated by the use of the qualifying words “*unless the court, at its discretion dispenses with the furnishing of the copy...* ”.

- [16] It is clear from the cited cases including **MacKay v Cahill** 1962 (4) SA 193 (O) that in appropriate cases the Court can grant the applicant leave to proceed without notice to the debtor. The cases referred to convey one message that because of the seriousness of the order and its effect on the person and status of a debtor it is undesirable to grant sequestration orders without prior notice. These decisions nowhere stipulate that it cannot and should not be done. Each case will be determined on its own merits and circumstances. The Legislature could not have intended to protect recalcitrant debtors to the disadvantage of the very creditors the Act was designed to protect.

[17] In my view, looking at the papers before me it is clear that the respondent is not acting in the interests of the creditors by allowing and standing by as L. Cilliers, her husband, dissipates the assets of CFT. There is sufficient evidence which signify that unlawful dispositions have been made and same will in all probability continue. This conduct has the effect of prejudicing the creditors. We have here to deal with people who have dealt with assets of one trust which is under sequestration without an order of the Court or the knowledge of the appointed administrators to benefit another trust. If they were made aware of the impending application there was a grave risk that they would have continued to get rid of or dissipate the assets of CFT.

[18] The order is not fatal. I cannot see what prejudice the respondent will suffer as she has herself consented to the sequestration of the estate of CFT as alluded to above. I am inclined to condone a deviation of the established practice in

the light of these exceptional circumstances.

- [19] The effect of the decision of the full Bench of the Free State in **MackKay v Cah***i supra* or section 9(4A) cannot be interpreted to have taken away the Court's discretion to grant a provisional order of sequestration without notice to a debtor where a proper case has been made out. The administrators of the estate, the applicants, acted diligently to safeguard the interests of the creditors but were eluded by the respondent and L. Cilliers.
- [20] It is not as if the respondent has no remedy. The provisional order gives her the option of anticipating the return date and show cause why the order should not be made final.
- [21] **In the circumstances the application is dismissed with costs.**

B. C. MOCUMIE, J

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