

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

Case No.: 2393/08

In the case between:-

JAN HENDRIK DE KLERK

Applicant

and

CORNELIA PETRONELLA CATHARINA BORNMAN

Respondent

HEARD: 12 JUNE 2008

DELIVERED: 26 JUNE 2008

JUDGMENT

MOCUMIE, J

[1] On 12 June 2008 applicant applied to this Court for the provisional sequestration of the respondent's estate on the basis that the respondent was unable to pay her debts. In particular this application is based on an amount of R1 500,00 which she had borrowed from him and which has not been repaid. In addition the respondent had written a letter to the applicant informing him of her inability to pay him in the following words:

“Hiermee wil ek u meedeel dat a.g.v my finansiele

omstandighede dit nie moontlik is om die geld wat ek by u geleen het terug te betaal nie.”

[2] In addition the applicant alleges the following paragraph:

“10.U applikant doen eerbiediglik aan die hand dat dit in die belang van krediteure van die respondent sal wees indien die boedel van die respondent gesekwestreer word en wel vanweë die volgende rede:

10.1 Verskeie van die krediteure het reeds kennis gegee dat hulle van voornemens is om dagvaarding uit te reik aangesien die Respondent nie in staat is om enige betalings aan haar krediteure te maak nie in welke geval dit sal ly tot verdere regsonkoste.

10.2 Daar is 'n bedrag van R38 000,00 (AGT EN DERTIG DUISEND RAND) inbetaal by prokureurs Kriek & Van Wyk, Kerkstraat 17, Parys en sal u applikant toesien dat hierdie bedrag oorbetaal word aan die voogdyfonds te die Meester van die Hooggeregshof Bloemfontein en sal die kwitansie van die Meester hierby aangeheg word gemerk Bylae “B”.

10.3 Applikant het verneem dat die respondent oor geen ander bates van watter aard ookal beskik nie en in geval waarvan die respondent se boedel gesekwestreer word, kan 'n kurator aangestel word ten einde vas te stel wat die werklike posisie is.

10.4 Die bedrag wat inbetaal is by die voogdyfonds van die

Meester van die Hooggeregshof te Bloemfontein asook enige ander bates kan tegelde gemaak word en gelykop tussen die krediteure verdeel word.”

- [3] From these bare allegations one can ascertain that the only material asset the respondent has is a sum of money, R38 000,00 which has been deposited into the account of Attorneys Kriek & Van Wyk, Kerkstraat 17, of Parys, which is to be paid into the Guardian's Fund of the Master of the High Court to cover the administrative costs of sequestration. Such costs are estimated to be R20 000,00. The balance of, R18 000,00, it is alleged, will be distributed equally amongst the creditors.
- [4] The question that arises is whether applicant's allegations are sufficient to justify the granting of a provisional order in this case. Section 10(c) of the Insolvency Act 24 of 1936 ("the Insolvency Act") provides that the Court must in addition be of the opinion that *prima facie* there is reason to believe that it will be to the advantage of creditors of respondent if his or her estate is sequestrated before a provisional order can be

granted. Self-evidently the onus lies on the applicant. It is trite that the onus of establishing the existence of advantage to creditors remains on the sequestrating creditor throughout even when it is clear that the debtor has committed an act of insolvency. See **Wilkens v Pieterse** 1937 CPD 165. In dealing with this issue in **Paarl Wine & Brandy Co Ltd v Van As** 1955 (3) SA 558 (O) De Villiers J expressed himself as follows at 560:

“The fact that an act of insolvency has been committed is in itself not necessarily material to the question whether sequestration will be to the advantage of creditors. While some acts of insolvency, from their nature, tend to show that sequestration will be to the advantage of creditors, as, for instance, where the debtor has given preference and there is consequently matter for investigation, other acts of insolvency, such as a nulla bona return, provide no reinforcement for the contention that the sequestration will be to the advantage of creditors.”

- [5] However, that is not the end of the enquiry. A further and pertinent issue remains the degree of proof which is necessary to satisfy the requirements of the section. This question has

been considered in a number of cases. a discussion of the following will, to my mind, prove to be instructive and illuminating:

5.1 In **Meskin & Co v Friedman** 1948 (2) SA 555 (W) Roper J said at 558:

“Secs. 10 and 12 of the Insolvency Act, 24 of 1936, cast upon a petitioning creditor the onus of showing, not merely that the debtor has committed an act of insolvency or is insolvent, but also that there is 'reason to believe' that sequestration will be to the advantage of creditors. Under sec. 10, which sets out the powers of the Court to which the petition for sequestration is first presented, it is only necessary that the Court shall be of the opinion that prima facie there is such 'reason to believe'. Under sec. 12, which deals with the position when the rule nisi comes up for confirmation, the Court may make a final order of sequestration if it 'is satisfied' that there is such reason to believe. The phrase 'reason to believe', used as it is in both these sections, indicates that it is not necessary, either at the first or at the final hearing, for the creditor to induce in the mind of the Court a positive view that sequestration will be to the financial advantage of creditors. At the final hearing, though the Court must be 'satisfied', it is not to be satisfied that

sequestration will be to the advantage of creditors, but only that there is reason to believe that it will be so." (My own emphasis).

Later at 559 the learned Judge said:

"In my opinion, the facts put before the Court must satisfy it that there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Act some may be revealed or recovered for the benefit of creditors, that is sufficient..."

5.2 From the wording of the section it is clear that in applications for sequestration all that the legislature expects from the petitioner is that there is reason to believe that it will be so. In my view if that is all that is required of a creditor to prove, it shows that the proof is less than in instances referred to under section 12 of the Insolvency Act. In Hillhouse v Stott; Freban Investments (Pty) Ltd v Itzkin; Botha v Botha 1990 (4) SA 580 (W) Leveson J states at 585 that:

“... the expression 'reason to believe' means 'good reason to believe'. The belief itself must be rational or reasonable and, in my opinion, to come to such a belief, the Court must be furnished with sufficient facts to support it. Cf London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (D) at 592 - 3; United Democratic Front and Another v Acting Chief Magistrate, Johannesburg 1987 (1) SA 413 (W) at 421; Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A).”

- [6] In this case the vital averment is that the loan of R1 500,00 was made. The allegations I have quoted above in paragraph [1] were ostensibly made to satisfy section 9(1) of the Insolvency Act and to save the debtor from harassment from her creditors. There are no full details of the loan regarding, when and where it arose, what circumstances rendered it necessary for the debtor to be borrowing money from the creditor; the terms of payment or repayment as the case may be. Furthermore, it is not indicated whether it was in cash or with a cheque manifesting the payment by the creditor to the debtor. No receipt for proof of payment is attached, just the bald statement. For instance, assuming the transaction was one for sale, one

would have expected that invoices or some sort of proof could have been furnished. The allegation that some creditors have indicated an intention to sue the respondent are unsubstantiated and without basis. No letter of demand to prove these threats was attached. Nor were any summons attached. To compound the problem, there is no clear indication that the other listed creditors will benefit and how except that they will each receive at least 10c from the R18 000,00. As far as I could determine that dividend will not even be 10c but 9,2c which is very negligible to count as a real benefit to the creditors taken as a single entity. The respondent is fully employed by the South African Police Services. Yet there is no indication of any contribution from her salary to augment the money available for the benefit of the creditors. The applicant has not even indicated whether he attempted to get his money back in any other form including approaching the small claims court. It is a well-known fact that the small claim court provides a very cheap process especially for indigent litigants compared to this route. I mention just a few of these issues to indicate the paucity of facts in the papers in this

matter which is a peculiar feature of “*friendly sequestrations*”.

See **Esterhuisen v Swanepoel and Sixteen Other Cases**

2004 (4) SA 89 (W) for an exposition of characteristics of friendly sequestrations.

- [7] In my view, the present application qualifies as a “*friendly sequestration*” for the reasons enumerated above. This enjoins this Court on authority of what was said by Nicholas J in **Klemrock (Pty) Ltd v De Klerk and Another** 1973 (3) SA 925 (W), to scrutinise the application with particular care so as to protect the interests of the creditors. The Courts should not encourage, condone or countenance collusion between a creditor and debtor the sole object of which

“... will be to give the debtor relief against his creditors.”

See **Wepener v Ericson** 1926 WLD 81.

- [8] On these facts I am not satisfied that it will be to the advantage of creditors even were they to receive payment of at least 9.2c or 10c in the rand, should the respondent’s estate be

sequestered. In fact there is no other evidence that it will be to the advantage of creditors to have the respondent's estate sequestered. To my mind the *nulla bona* return herein does not change the situation at all. In fact, the facts of this case suggest that this application is contrived to circumvent the ordinary legal mechanisms made available by the law for debt collection. Such serious chicanery should be decried or deprecated with clear and strong terms.

[9] In the circumstances I make the following order:

Order:

Application for a provisional order of sequestration is dismissed.

B.C. MOCUMIE, J

On behalf of applicant:

Adv. J. Zietsman
Instructed by:
Naudes
BLOEMFONTEIN