CASE NO. 2038/08

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

DATE 2.4.2009

ZELDA YOLANDE LEMLEY	Applicant
and	
JOSEPH A E LEMLEY	Respondent
ABSA BANK LTD	Intervening Creditor

J U D G M E N T

PICKERING, J

This is the return day of a rule nisi which was issued by this court on 24 October 2008 in terms whereof the respondent was called upon to show cause to this court why a final order of sequestration should not be granted against his estate. The respondent does not oppose. Confirmation of the rule is, however, opposed by an intervening creditor, Absa Bank Ltd.

The application for the respondent's sequestration is a striking example of a so-called "friendly sequestration". (Compare EPSTEIN v EPSTEIN 1987(4) SA 606 (C)).

Applicant is respondent's mother. She avers in her founding affidavit that respondent endured a number of personal crises during 2007, in consequence whereof he became divorced and also lost his employment. She accordingly assisted him, she says, from time to time

"advancing funds to him to enable him to survive on a month to month basis". She does not provide any details thereof because, so she states in reply, her attorney was subject to severe time restraints in preparing the application. Be that as it may, she alleges that on 27 September 2008 she loaned respondent the amount of R2 500 "to assist him to pay his creditors". In proof thereof, she attaches the relevant bank deposit slip. She lists respondent's creditors at the time that she loaned respondent the aforesaid amount as follows:

"Absa mortgage bond	R650 000,00
WesBank HP Agreement	R408 750,40
Absa Credit Card	R 46 057,26
FNB Credit Card	R 21 376,34
American Express Credit Card	R 33 584,15
Blue Bean Credit Card	R 44 523,36
Absa HP Agreement	R 27 220,94."

Respondent's total liabilities amounted to R1 231 512,20 whereas, according to applicant, his assets amounted to R783 404,46. Quite how the amount of R2 500 was going to assist respondent in paying off these creditors is not apparent.

The next step in this saga followed as the night the day and, sure enough, on 30 September 2008 respondent addressed a letter to applicant in which he stated, inter alia, as follows:

"Dear Mother

I refer to our numerous conversations regarding my financial situation and the money you lent me. I want to thank you for helping me where you could and for lending me money in an attempt to recover from this financial crisis that I find myself in. As you know I have really tried my best to pay you back the money that I owe you, but I now find myself in the position where I just do not have enough money to pay everything I have to pay. I asked you to lend me some more money in order to be able to pay everything at the end of this month, but this is not even enough. I cannot even come close to paying everything I have to."

The present application followed very shortly thereafter on the 2nd October 2008. It is not in dispute between the applicant and the intervening creditor that applicant's loan to respondent is prima facie evidence of a liquidated claim entitling her to apply for the sequestration of respondent's estate and that respondent's letter to her constitutes an act of insolvency in terms of section 8 of the Insolvency Act 24 of 1936.

The intervening creditor opposes the confirmation of the rule on the basis that the sequestration of respondent's estate

would not be to the advantage of creditors. It has been held in a number of cases that the fact that a sequestration may be "friendly" will not preclude the grant of a sequestration order when the requirements of the Insolvency Act are generally satisfied but that the court should scrutinise such an application with particular care in order to protect the interests of creditors. (See EPSTEIN v EPSTEIN supra,; ex parte STEENKAMP AND RELATED CASES 1996(3) SA 822 (W)). LEACH J VAN ECK v KIRKWOOD 1997(1) SA 289 (SECLD) stated as follows at 290C-D:

> "But as this is a "friendly sequestration" one must guard against there being collusion between the applicant and the respondent- see in this regard the remarks of Conradie J in Craggs v Dedekind; Baartman v Baartman & Another; Van Jaarsveld v Roebuck; Van Aardt v Borrett 1996(1) SA 935(C) at 937. Particular in a case such as this one must be careful to ensure that the 'friendly' creditor does not obtain an order which cannot be said to be in the interests of creditors and, accordingly, the allegations made in regard to this issue should be closely construed".

(See too VAN ROOYEN v VAN ROOYEN [2004]2 All SA, 485 (SE) at 489H-490E and ESTERHUIZEN v

SWANEPOEL AND SIX-TEEN OTHER CASES 2004(4) SA 89 (W). In Esterhuizen SATCHWELL J stated as follows at paragraph 8 with regard to "collusion" namely:

> "The collusion is frequently found in the following pattern of behaviour or modus operandi:
>
> (a) a debtor owes money, frequently in significant amount(s), to creditor(s) who expect and rely upon the anticipated repayment of this outstanding debt. The debtor cannot make payment of the debt.
>
> (b) He seeks the assistance of a third party who agrees to initiate sequestration proceedings to '*aid or shield [the] harassed debtor*" from his genuine and perhaps demanding creditor(s). (EPSTEIN v EPSTEIN 1987(4) SA 606 (C)).
>
> (c) A friend or relative masquerades as a "creditor" and alleges that a (non-existent) debt is owed him by the "debtor". The "creditor" then avers of a "debtor" has not only failed or refused to repay this "debt" but has written a letter advising of his inability to pay the "debt".

(d) An act of insolvency in terms of s 8(g) of the Insolvency Act 24 of 1936 has now purportedly been committed and the "creditor" proceeds with sequestration proceedings against "the debtor".

(e) This "friendly" application (or sequestration) procures an order declaring the respondent insolvent. The respondent is then relieved of his or her legal, financial and moral obligations to the original and genuine creditor(s) save to the extent that the insolvent estate is able to satisfy such debt(s). The balance of the genuine indebtedness remains unsatisfied and, with the connivance of another, the insolvent has been enabled to escape payment of his just debts'.

Accepting in the present case that a loan was indeed made, the following remarks by the learned Judge are nevertheless also pertinent, namely paragraph 10:

"(j) The borrower frequently finds himself or herself in dire financial straits within days or weeks. Surprising is the haste with which a defaulting borrower seeks to advise of this unexpected insolvency.

No proof is ever provided of the time period which was granted to the borrower to make use of and repay the loan.

The Court should be forgiven for finding it strange that an inability to repay a loan within 5 days or 12 days or 20 days or even 30 days is so shocking to the lender that he or she feels obliged to pursue the route of initiating sequestration proceedings.

(k) The borrower is so horrified at his own abject financial situation that he or she immediately writes a letter advising of an inability to repay the loan. There is stated a bare inability to pay - no request for extensions of time, no proposals to pay in instalments, no offer to render services or even suggestions that the lender initiate another course of action."

With that as background I turn to the requirement in s 2010(c) of the Insolvency Act as to whether there is reason to believe that it will be to the advantage of creditors if respondent's estate is sequestrated.

In HILLHOUSE VS STOTT; FREBAN INVESTMENTS (Pty) Ltd v ITZKIN; BOTHA v BOTHA 1990(4) SA 580 (W) LEVESON, 25J stated as follows at 585C-I:

"To return to the proposition made by ROPER J in the MESKIN case supra, the Court need not be satisfied that there will be advantage to creditors, only that there is reason to believe that this will be so. That, in turn, in my opinion, leads to the conclusion 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...In a broad sense it seems improper to say, on the basis of the cases, that 'advantage to creditors' ought to have some bearing on the question as to whether the granting of the application would secure some useful purpose. I express it thus because, as ROPER, J has shown in the MESKIN case, there need not always be immediate financial benefit. It is sufficient if it be shown that investigation and inquiry under the relevant provisions of the Act might unearth assets, thereby benefiting creditors. But for cases such as the present where the only question is to what extent creditors can benefit from the moneys known to be available (there

being no other assets), I think it proper to adopt the test of Seligson AJ in Epstein v Epstein 1987(4) SA 606 (C) at 609:

'The correct test to be applied is whether the facts placed before the Court show that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some not negligible pecuniary benefit will result to creditors'".

This dicta was approved by the Supreme Court of Appeal in COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v HAWKER AIR SERVICES (PTY) LTD; COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v HAWKER AVIATION PARTNERSHIP & OTHERS 2006(4) SA 292 (SCA) at 306D where CAMERON, J A stated as follows at paragraph 29, namely:

"The question is whether the Commissioner has established that sequestration would render any benefit to creditors, given that the partnership is now defunct. The answer seems to lie in those decisions that have held that a court need not be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The court need be satisfied only that there is a reason to believe -

not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and inquiry assets might be unearthed that will benefit creditors."

It is clear in my view in the present matter that there are no prospects of any other assets being unearthed. Although reference is made in this regard by the applicant to respondent having obtained temporary employment, applicant coyly refrains from furnishing any details whatsoever of the nature of this employment and the amount of salary being received by respondent. Although Miss Beneke, who appears for the applicant, raised the possibility of a postponement in order to supplement the papers of the applicant, she wisely abandoned this course of action, having regard to the costs implication should such an application for postponement be granted. She submitted, however, that it was possible that a trustee might unearth some assets in respondent's estate.

As was stated in MAMACOS v DAVIDS 1976(1) SA 19 (C) an applicant should go further than merely alleging, as in the present case, that a trustee will be in a position to investigate whether respondent has any further assets. If an applicant wishes to rely upon this, then facts should be alleged which indicate that such an examination of the respondent has some prospect of revealing additional assets, so that a creditor knows whether such an examination could result in some

financial advantage to him or it, and therefore file a claim.

In the circumstances of this case, however, the only question that remains is whether some not negligible pecuniary benefit will result to creditors in the event of the rule being confirmed. The onus in this regard rests on the applicant. I have set out above the nature of respondent's assets and liabilities as listed by the applicant. It is further common cause that the intervening creditor is a secured creditor in terms of certain immovable property, being the holder of a mortgage bond registered in its favour by respondent and his ex-wife. It is also common cause that on 3 September 2008 the intervening creditor obtained judgment against respondent and his ex-wife jointly and severally in the amount of R1 268 784,65 together with interest thereon from 12 June 2008 to date of payment and that the balance outstanding as at 11 November 2008 was the sum of R1 339 448, 21. Assuming, as alleged by applicant, the value of the property to be R1 000 000, the shortfall of the intervening creditor's security would be R289 448,21. The intervening creditor would accordingly be the major concurrent creditor in respect of such shortfall. It is also a concurrent creditor in respect of the instalment sale agreement listed in paragraph 15.2 of applicant's founding affidavit. The balance of that account was R28 911,33 as at 12 November 2008.The subject matter of that agreement has been repossessed and sold leaving the aforesaid outstanding

balance.

At my request counsel prepared a schedule detailing the amount of the dividend which would in all likelihood be derived from the sequestration and be available for distribution to creditors. I am indebted to counsel for the time and trouble taken by them in this regard. It is not necessary to set out the various permutations upon which calculations have been based. Suffice to say that, at best for applicant, a dividend of 5 cents in the rand would be produced on the basis that applicant, as stated by her, waives her right to claim any costs as also the applicant's attorney. That has not taken into account, however, applicant's counsel's fees of today. It also does not take into account the costs of the intervening creditor.

In MEAKER N.O. v HAINES & OTHERS 1965(3) SA 496 (SR) the following is stated at 502C concerning the costs of an intervening creditor in the event of a sequestration order being granted:

> "The respondents' opposition to the confirmation of the rule has been supported by a great many creditors. These creditors represent the majority in value and in numbers and include well known financial institutions whose views deserve special consideration. The respondents have displayed a desire to adopt a pro-

> cedure which would in their view, as supported by his creditors, result in creditors obtaining a larger dividend and even hold out the hope that they could be paid in full. The respondents had reasonable grounds for thinking that their opposition would succeed. It is neither necessary nor desirable to define "special circumstances" or what is "reasonable" - each case must turn on its own facts. I am satisfied that this is a proper case for directing that the costs of opposition be part of the costs of sequestration."

In the present case I am satisfied that were a sequestration order to be granted, the intervening creditor would be entitled to an order that the costs of opposition be included in the taxed costs of the sequestration. If a sequestration order were to be granted, and those costs were to be included, then it is abundantly clear that there would be no dividend available whatsoever for distribution to creditors.

I am in any event of the view that a dividend of 5 cents in the rand is negligible in the circumstances of this case. The matter of ABSA BANK LTD v DE KLERK AND RELATED CASES 1999(4) SA 835 (E) relied upon by Miss Beneke, in which it was held that a dividend as low as 5 cents in the rand was not negligible in the circumstances there pertaining, is in my view

distinguishable.

In my view this is the type of case where, as was stated by JONES, J in NOSWORTHY v HOLMAN 1993(2) SA 774 (E) at 775B:

> "The balance available remains so small that few, if any, sensible creditors will think it worth their while to recover it."

I would refer further to what was stressed by JENNETT, J in VAN ROOYEN v VAN ROOYEN supra at 493D-E, namely:

> "The major creditors are the intervening creditor and ABSA Bank and due regard must be had for what they say is in their best interests. If I am to issue an order for the provisional sequestration of respondent's estate, I must be satisfied, prima facie, that they are wrong when they say that sequestration is not in their interests."

(See too FESI AND ANOTHER v ABSA BANK LTD 2000(1) SA 499 (C) at 504G-505).

In all the circumstances the applicant has failed to discharge the onus upon her of showing that there is reason to believe that the sequestration of the respondent will be to the advantage of creditors within the meaning of section 10(c) of the Act.

The rule nisi IS ACCORDINGLY DISCHARGED WITH

COSTS, SUCH COSTS TO INCLUDE THE COSTS OF OPPOSITION BY THE INTERVENING CREDITOR.

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J D PICKERING

JUDGE OF THE HIGH COURT

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