IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: **2016/32219**

Reportable: No

Of interest to other judges: No

Revised.

7/3/2017

In the matter between:

MAREE, CHRISTINE MARIE	First Applicant
MORARA, YASMIN	Second Applicant

and

BOBROFF, RONALD	First Respondent
BOBROFF, DARREN RODNEY	Second Respondent

JUDGMENT

THERON AJ:

[1] This is an opposed application for the provisional sequestration of Ronald Bobroff and Darren Rodney Bobroff, both erstwhile attorneys of the High Court.

[2] The Bobroffs' alleged indebtedness to the Applicants stems from the consequences of the Full Bench decision in **De la Guerre v Ronald Bobroff &**

Partners Inc [2013] ZAGPPHC 33 (to be found on the invaluable website of the South African Legal Information Institute (SAFLII)) and the unsuccessful appeal to the Constitutional Court in **Ronald Bobroff** & **Partners Inc v De la Guerre** 2014 (3) SA 134 (CC).

[3] After these judgments, various erstwhile clients of Ronald Bobroff & Partners Inc ("the firm") sued for similar orders to the one sought by the Plaintiff and granted by the Full Bench in **De la Guerre.**[1]

[4] The Applicants sued for similar relief.

[5] Against this background, I consider the issues arising from the papers before me.

[6] As the Respondents took issue with new matter in reply, and I refused to entertain further sets of affidavits or an application to strike out certain matter, I disregarded all new matter in reply.[2]

[7] The Respondents contended that the joinder of both the Bobroffs in one application for sequestration is a fatal misjoinder. There is some weighty authority in support of this proposition.[3]

[8] Although the findings in **Breetveldt and Others v Van Zyl and Others** 1972 (1) SA 304 (T), **Engen Petroleum Limited v Multi_Waste (Pty) Limited and Others** 2012 (5) SA 596 (GSJ) and); **Brack v Front Runner Racks 2000 (Pty) Limited** (GSJ case number 45084/2010) are *obiter* in relation to sequestration proceedings, they accord with **Ferela (Pty) Limited v Craigie and Others** 1980 (3) SA 167 (W), from which I may only depart if convinced that it is clearly or palpably erroneous.[4]

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[1] See Wong v Ronald Bobroff & Partners Inc 2016 JDR 0203 (GJ); Chetty NO v Ronald Bobroff & Partners Inc 2016 JDR 0210 (GJ)
[2] See Titty's Bar and Bottlestore (Pty) Limited v ABC Garage (Pty) Limited and Others 1974 (4) SA 362 (T) at 368 G-H
[3] See Breetveldt and Others v Van Zyl and Others 1972 (1) SA 304 (T); Ferela (Pty) Limited v Craigie and Others 1980 (3) SA 167 (W); Engen Petroleum Limited v Multiwaste (Pty) Limited and Others 2012 (5) SA 596 (GSJ); Brack v Front Runner Racks 2000 (Pty) Limited (GSJ case number 45084/2010).
[4] See Bloemfontein Town Council v Richter 1938 AD 195 at 232

[9] Boruchowitz J in **Brack** quoted a portion of Kroon J's judgment in **Business Partners Limited v Vecto Trade 87 (Pty) Limited and Others** 2004 (5) SA 296 (SE) at paragraph 34:

> "*I have, however, some difficulty with the stance that* a *complete identity of interests is a sine qua non for the valid joinder of more than one debtor in liquidation and/or sequestration proceedings. One cannot readily conceive of a situation where there would in fact be* a *complete identity of interests between debtors. Perhaps* a *preferable test would be that mooted by counsel for the Applicant, vis.* a *sufficiently substantial coincidence of interests such* as *would practically or at least substantially place the case outside the objections to joinder that were averted to in the three cases referred to above and properly bring the case within the ambit of Rule 10."*

[10] Boruchowitz J went on to find that the quoted dictum was persuasive but insufficient to persuade him to depart from binding authority in his division.[5]

[11] I find the qualification of Kroon J persuasive and that the judgment of **Ferela** is clearly wrong. The qualification of **Business Partners** is to be preferred.

[12] An applicant for an order of provisional sequestration must move the court to form the opinion that *prima* facie:

> [12.1] the Applicant has a claim such as mentioned in subsection (1) of section 9 of the Insolvency Act 24 of 1936 ("the Act");
>
> [12.2] the Respondent has committed an act of insolvency or is insolvent; and
>
> [12.3] there is reason to believe that it will be to the advantage of creditors if the Respondent's estate is sequestrated,
>
> (see section 10 of the Act).

[5] See Brack, paragraph 8

[13] The Applicants contend that the Respondents are jointly and severally liable for the debts arising from settlement agreements which were made orders of court against the firm because of the working of section 19(3) of the Companies Act 71 of 2008 ("the Companies Act") read with Section 23 of the Attorneys Act 53 of 1979 ("the Attorneys Act").

[14] The acts of insolvency relied on as against both Respondents are those contained in Sections 8(a) and 8(b) of the Act.

[15] The advantage to creditors relied upon is that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of investigation and enquiry, assets might be unearthed that will benefit creditors.[6]

[16] The Applicants also rely on the Respondents' actual insolvency. In relation to this ground, there is not an identity of interests.

[17] I find that there is a sufficiently substantial coincidence of interests on the facts of this case to find that there is not a misjoinder.

[18] In an opposed application for provisional sequestration, the necessary *prima facie* case is established when the Applicant can show that on a consideration of all the affidavits filed a case for sequestration has been established on a balance of probabilities.[7]

[19] Section 19(3) of the Companies Act applies to the firm which is a personal liability company. The Section reads as follows:

> *"If* a *company is* a *personal liability company, the directors and past directors are jointly and severally liable, together with the company, for any debts and*

[6] See Commissioner, South African Revenue Services v Hawker Air Services (Pty) Limited; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others 2006 (4) SA 292 (SCA) ("Hawker Air")
[7] See Schneider v Raikin 1954 (4) SA 449 (W) at 453; Provincial Building Society of South Africa v Du Bois 1966 (3) SA 76 (W) and Kalil v Decotex (Pty) Limited and Another 1988 (1) SA 943 (A) at 978 E-F

liabilities of the company as *were contracted during their respective periods of office."*

[20] It is common cause that the Respondents were directors of the firm when the disputed settlement agreements were concluded and made orders of Court.

[21] I am satisfied that the settlement agreements alone and in their reinforced state (after being made orders of court) were *"contracted"* for the purpose of Section 19(3).[8]

[22] Section 23(1) to Section 23(3) of the Attorneys Act reads as follows:

"(1) A company may, notwithstanding anything to the contrary contained in this Act, conduct a *practice if:*

(a) Such company is a personal liability company contemplated in the Companies Act, 2008 (Act 71 of 2008);
(b) only natural persons who are practitioners and who are in possession *of current Fidelity Fund certificates are members or shareholders of the company or persons having any interest in the* shares *of the company;*
(c) …

(2) Every shareholder of the company shall be a *director of the company, and only* a *shareholder of the company shall be* a *director thereof.*

(3) If a *shareholder of the company or* a *person having any interest in the* shares *of the company, dies or* ceases *to conform to any requirements of subsection (1)(b), he or she or his or her estate, as the* case *may be, may,* as *from the date on which he or she dies or* ceases *to conform, continue to hold the relevant* shares *or interest in the* shares *in the company for* a *period of* six *months or for such longer period* as *the Council of the Society having jurisdiction in the area in which the company is registered office is situate, may approve."*

[8] See Fundstrust (Pty) Limited (in liquidation) v Van Deventer 1997 (1) SA 710 (A); M v Ivory Tirupati: M v

[23] The Applicants rely on settlement agreements and taxations settled by one of the three directors of the firm with the participation of the attorney of record for the firm in the litigation between the firm and the Applicants.

[24] It seems to me that the Respondents are bound to the settlements, although I do not have to decide this issue.[9] Neither the agreements nor the consent orders have been set aside.

[25] The Respondents unsuccessfully sought rescission of the consent orders before Foulkes-Jones AJ. They have filed a notice of application for leave to appeal against her dismissal.

[26] To the extent that it might be said that the rescission applications are therefore still pending, which I doubt, I must deal with the debate whether a rescission application suspends a judgment.

[27] The judgments in **Khoza and Others v Body Corporate of Ella Court** 2014 (2) SA 112 (GSJ) and **Peniel Development (Pty) Limited** are respectfully, clearly wrong, for the reasons set out in **Erstwhile Tenants of Williston Court and Others v Sewray Investments (Pty) Limited and Another** 2016 (6) SA 466 (GJ).

[28] I also agree with the judgment of Roux J in **United Reflective**

Converters (Pty) Limited v Levine 1988 (4) SA 460 (W) at 463 J to 464 B.

Ivory Tirupati and Another v Sadan Urusan Logistik (aka Bulog) 2003 (3) SA 104 (SCA) at paragraphs 28 to 30

[9] See Hlobo v Multilateral Motor Vehicle Accidents Fund 2001 (2) SA 59 (SCA); One Stop Financial Services (Pty) Limited v Neffensaan Ontwikkelings (Pty) Limited and Another 2015 (4) SA 623 (WCC) at paragraphs

[29] I also agree with Meyer J's reasoning and findings in **Tenants of Williston Court,** paragraphs 17-21.

[30] Even if I am wrong, the settlement agreements (and agreements to settle the taxations) are not affected by the rescission applications.

[31] The Applicants' attorney raised an interim interdict granted by Foulkes- Jones AJ on 2 December 2016 in the following terms:

> *"The Respondents are interdicted from taking any further steps to enforce the 9 settlement agreements which were subsequently made orders of court until the final determination of this application."* (my underlining)
>
> as a reason for the late filing of answering papers.

[32] It is not raised again in the answering affidavits as a bar to these proceedings. Even if it were, the order (an interlocutory interdict application itself pending the rescission application) did not survive the refusal of the interlocutory interdict application and the refusal of the rescission applications and is not revived by a notice of application for leave to appeal.

[33] Sequestration proceedings are also not *"enforcement of the agreements".*[10]

[34] I, therefore, find that the Applicants have established that they are *prima facie* creditors of the Respondent jointly and severally in the amounts of R1 334 980,00 and R1 872 757,52 respectively.

[35] The Applicants rely on an act of insolvency created by Section 8(a) of the Act:

> *".A debtor commits an act of insolvency –*

21-41

[10] See Naidoo v ABSA Bank Limited 2010 (4) SA 597 (SCA) at paragraph 4; Collet v Priest 1931 AD 290 at 299; and Investec Bank Limited and Another v Mutemeri and Another 2010 (1) SA 265 (GSJ) at paragraphs 27-

(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with the intent by so *doing to evade or delay the payment of his debts;"*

[36] The Respondents contend, that threats made by an attorney, Jeffrey Katz, on 16 June 2015 (some 7 months before their hasty departure from the Republic) and a telephonic threat of arrest and assault prompted their departure and that they intended to investigate the threats and return on 22 March 2016 (a couple of days after their departure).

[37] The Respondents do not indicate that the threats were indeed investigated in a press release by a well-known firm of attorneys on their behalf on 23 March 2016 (after the date of their intended return) denying that they are fugitives from justice and does not proffer the threats and their investigation as a reason for their departure nor does it indicate their intention to return.

[38] The alleged threats by Katz included the following:

"The Hawks are onto you and will be arresting you soon." *and*

"You should pay back the contingency fees *money you stole from your clients to reduce your sentence."*

[39] It is apposite to mention that on the 11th of March 2016, the firm, represented by the Respondents, sold most of its clients (using the Respondents' words) to Attorney Rael Zimerman for R30 million.

[40] The Respondents were thus attempting to liquidate one of their largest assets days before hurriedly leaving the country. Their fear for their, and their families' safety, however, did not extend to the First Respondent's wife who was left behind.

[41] The threats made by Zimerman some 7 months before the Respondents'

departure are qualitatively little different from the alleged threats eventually prompting their departure.

[42] On 25 August 2016 (some 5 months after their departure), the Applicants sent a written demand for payment to the Respondents' attorney which included the following statements:

> *"In the event that payment is not made into our firm's Trust Account by 15h00 on Monday, 29 August 2016, we may without further notice proceed with applications to sequestrate the estates of both Ronald and Darren Rodney Bobroff.*
>
> *In the event that we are to proceed with such applications, kindly confirm that you are indeed, as their attorney, authorised to accept service of such applications at your offices.*
>
> *The costs of serving such applications on your clients at either of their addresses in Australia, aside the application to court here in South Africa to authorise such service are likely to be substantial and will only serve to exacerbate what already seems to be a dire financial situation.*
>
> *We would appreciate it if you as an officer of Court (and bearing in mind that your clients are fugitives), and in the event that payment* is *not made timeously, are prepared to confirm whether or not you hold any funds in your Trust Account or are aware of anyone* else *within the Republic holding funds for or on behalf of Ronald and Darren Rodney which funds could be attached in order to satisfy their legal obligations to their former clients."*

[43] On the same day, the Respondents' attorney, Mr Cameron, responds in writing saying *inter alia* that:

> *"Our clients have instructed ourselves to record that:-*
>
> *1. …*

2. …

3. any application to sequestrate the estates *of the Bobroffs will be opposed; and*

4. we are not authorised to accept service of any sequestration applications.

In closing we record, which recordal we are not obliged to convey to you, that the writer's firm holds no funds in our trust account on behalf of the Bobroffs and there are no circumstances under which the writer would be privy to the relevant knowledge as to funds held by any third parties on behalf of the Bobroffs."

[44] Intention is established by *a* process of inferential reasoning and is not dependent upon the *ipse dixit* of the debtor who may well deny that he has any such intention. A court, in considering whether there was such an intention, is required to weigh up all the relevant facts and circumstances to determine what, on the probabilities, was the *'dominant, operative or effectual intention in substance and in truth'* of the debtor.[11]

[45] I agree with the authors of *Mars: The Law of Insolvency in South Africa,* 9th edition at pages 82-83 where they say:

"The cumulative effect of a number of diverse factors taken together with several suspicious and unusual acts by the debtor before and at the time of his departure may be sufficient to convince the court that he departed or absented himself with the intention of evading or delaying payment of his debts."

[46] The Supreme Court of Appeal in **Hassan and Another v Berrange N.O**. 2012 (6) SA 329 (SCA), paragraphs 38 and 39, seems to have considered the cumulative

[11] See Hassan and Another v Berrange N.O. 2012 (6) SA 329 (SCA) at paragraph 37; Cooper and Another NNO

effect of a number of diverse factors in line with the opinion expressed in Mars.

[47] Applying these tests, I find that the Applicants have established, *prima facie,* that the Respondents:

[47.1] left the Republic with the intent to delay or evade payment; and/or

[47.2] remain absent from the Republic with the intent to delay or evade payment; and/or

[47.3] departed from their dwellings with the intent to delay or evade payment.

[48] The Applicants also relied on the act of insolvency created by Section 8(b) of the Act. Factually, demand was not made by the Sheriff. This act of insolvency is therefore not proven.

[49] The Applicants lastly rely on the Respondents' general, and actual, insolvency.

[50] The Applicants must, therefore, prove factual insolvency. To do so they must allege, and indeed prove, that the Respondents' liabilities fairly estimated exceed their assets fairly valued. This must be determined objectively.[12]

[51] The Applicants failed to put up admissible facts to prove factual insolvency and did not press this ground in argument. The Respondents, in turn, failed to put up admissible facts to prove their solvency.

[52] The Applicants put up evidence that the Respondents, after their flight to Australia, registered a company, RES Properties (Pty) Limited under Australian law, and that the Second Respondent holds its entire shareholding. The company owns immovable property in St Ives, Sydney (the current residential address of the First

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v Merchant Trade Finance Limited 2000 (3) SA 1009 (SCA) at paragraph 10

[12] See Ohlsson's Cape Breweries Limited v Totten 1911 TPD 48 at 50; and Bhyat v Khurishi 1929 TPD 896 at 900; and Venter v Volkskas 1973 (3) SA 175 (T) at 178-9

Respondent).

[53] They also pointed to further entities, a trust and companies, and raised the possibility that these entities are in truth and in fact mere alter egos of the Respondents.

[54] I am *prima facie* of the opinion that there is, based on the evidence before me, 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.[13]

[55] I see no reason why South African trustees would not be recognised in terms of the Australia Cross-Border Insolvency Act 2008 (No. 24 of 2008) or in comity.

[56] The obligation to furnish a copy of the application to employees and any trade union representing them can only arise if there are in fact employees.[14]

[57] There is no evidence, not even in the Respondents' answer, that there are any employees.

[58] The requirement for a service affidavit would only arise if there were employees and service of the application was effected on them.

[59] The Supreme Court of Appeal in similar circumstances and interpreting similar provisions in the Companies Act issued a provisional winding-up on appeal and found that such an order should have been given in the Court a *quo* together with directions in relation to the identification of employees and for service of the application papers on them.[15]

[60] I intend giving such directions out of an abundance of caution in circumstances where the Respondents did not allege non-service on employees in their answering

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[13] See Hawker Air
[14] See Section 9(4A) of the Act
[15] See EB Steam Co (Pty) Limited v Eskom Holdings SOC Limited 2015 (2) SA 526 (SCA)

papers.

In the circumstances, I grant the following orders:

1. The estate of Ronald Bobroff with South African identity number […] is placed under provisional sequestration;

2. Ronald Bobroff and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the Court should not grant a final order of sequestration of the said estate on the 8th day of May 2017 at 10:00 or as soon thereafter as the matter may be heard;

3. A copy of this order must forthwith be served:

    3.1 on Ronald Bobroff in the manner and at the address or addresses already authorised for the service of this application on him and by e-mail at […] and […];

    3.2 on any employees of the Respondents in terms of Uniform Rules 4(1) and/or 4(2).

    3.3 only employees disclosed in writing to the Applicants' attorneys by Ronald Bobroff or his attorney within ten (10) days of this order need to be served at an address so disclosed;

    3.4 on any trade union of employees so disclosed if the written notification by Ronald Bobroff or his attorney indicates that the employees are represented by a trade union; and

    3.5 on the Master; and

    3.6 on the South African Revenue Services.

4. The estate of Darren Rodney Bobroff with South African identity number […]

is placed under provisional sequestration;

5. Darren Rodney Bobroff and any other party who wishes to avoid such an order being made final, are called upon to advance the reasons, if any, why the Court should not grant a final order of sequestration of the said estate on the 8th day of May 2017 at 10:00 or as soon thereafter as the matter may be heard;

6. A copy of this order must forthwith be served:

   6.1 on Darren Rodney Bobroff in the manner and at the address or addresses already authorised for the service of this application on him and by e-mail at […];

   6.2 on any employees of the Respondents in terms of Uniform Rules 4(1) and/or 4(2) disclosed in writing to the Applicants' attorneys by Darren Rodney Bobroff or his attorney within ten (10) days of this order;

   6.3 only employees disclosed in writing to the Applicants' attorneys by Darren Rodney Bobroff or his attorney within ten (10) days of this order need to be served at an address so disclosed;

   6.4 on any trade union of employees so disclosed if the written notification by Darren Rodney Bobroff or his attorney indicates that the employees are represented by a trade union; and

   6.5 on the Master; and

   6.6 on the South African Revenue Services.

7. The costs of this application are costs in the sequestration of the First and Second Respondents' estates.

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THERON AJ