IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO: 57474/13

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between: DATE: 9/6/2015

PHILIP FOURIE NO First Applicant

MOHERANE WILLIAM HARRY MATHIBETI NO Second Applicant

and

VINCENT TREVOR SMITH First Respondent

INGRID BELITA SMITH Second Respondent

J U D G M E N T

DEWRANCE AJ

[1] This is an application for the sequestration of the estate of the respondents. The respondents are married to one another in community of property.

[2] The applicants are the liquidators of Zeta Capital (Pty) Ltd (in liquidation) ("hereinafter referred to as "Zeta"). The first respondent was a director of Zeta. Zeta's shareholders are the Jackal Trust and the Kairos Trust. The respondents are the trustees of the Jackal Trust. They, together with their children, are the beneficiaries of the Jackal Trust. For the purposes of this judgment, the trustees and beneficiaries of the Kairos Trust are irrelevant and, therefore, I will not discuss it.

[3] Zeta was liquidated by an entity, Corporate Money Managers (Pty) Ltd ("CMM"). I will return to CMM later. Zeta, in turn, obtained judgment in the amount of R150 000.00 together with interest and two costs orders against the first respondent. After obtaining the aforementioned judgment, Zeta obtained a warrant of execution against the first respondent. When the Sheriff attended to the first respondent's residence to attach movable assets to satisfy the judgment debt, insufficient assets were pointed out to satisfy it. This, according to the applicants, is an act of insolvency as contemplated by the Insolvency Act 1936. I will return to this aspect later.

[4] At first blush, the application appears to be a normal run-of-the-mill sequestration application in that there is a judgment debt; an act of insolvency and an allegation that the sequestration will be to the advantage of creditors. Not so, contends the respondents. They steadfastly believe that this application is an abuse of process and

therefore it should be dismissed. They say that by, *inter alia*, introducing certain background facts the applicants have abused the court process. I deal with this later hereunder.

[5] The applicants, by way of background, explained that this application has some history with CMM. It is common cause that CMM was placed under provisional curatorship on 25 April 2009. This was done pursuant to investigations by the Financial Services Board ("FSB") into the affairs of CMM and the companies forming part of the so-called "*CMM group of companies*". When the provisional order was confirmed on 18 June 2009, this court eventually appointed three final curators to administer CMM and the CMM group of companies.

[6] The applicants explained in their founding affidavit that CMM was an "*authorised agent*" in terms of the Collective Investment Schemes Control Act, 45 of 2002 ("CISCA"). They also explained that CMM Cash Management Fund ("the Fund") also formed part of the CMM group of companies which was placed under curatorship. The Fund is a CISCA-regulated fund and was managed by CMM.

[7] The applicants then go on to explain that CMM lured investors into investing in the Fund and attracted large and numerous investments from investors. They could do so because CMM offered very attractive interest rates, which were less attractive than other CISCA-regulated investments. In essence, they contend that these

"*investments*" were in direct contravention of the stringent provisions of CISCA and contrary to the investors' mandates.

[8] The investors' monies were "*invested*" into high risk segregated portfolios utilised to provide bridging finance and short term loans to third parties. In most instances, CMM made use of so-called special purpose vehicles ("SPVs") forming part of the CMM group of companies to provide loans to parties at an extremely high price. One such SPV was CMM Corporate Finance (Pty) Ltd ("Corpfin"), which was controlled by the first respondent.

[9] The applicants further explained that many of the loans (funded with Fund money) have not been repaid and it is the primary responsibility of the curators to ensure that these debts are recovered in order for the investors of CMM to be refunded or at least partially refunded. The outstanding balance due to the investors amounts to approximately R1.2 billion.

[10] In paragraph 6.13 of the founding papers, the applicants make the following statement:

> "*6.13 The curators found that senior officials within CMM not only granted loans indiscriminately prior to the curatorship becoming effective, but also did so with the purpose of enriching themselves. This was also admitted by one Philip Sevenster ('Sevenster'), a former CMM official who worked closely with the other CMM officials, including the respondents. The loans often entailed possible fraudulent transactions with co-operating third parties to whom the loans were made. This often included that such officials obtained a direct or indirect interest in*

> *the party to whom the loan was made. As far as the [first] respondent is concerned, he for example, arranged loans to his companies, Zeta, in the amount of R950,000.00 ("the Zeta loan") and Matika Investments (Pty) Ltd (in liquidation 'Matika'), in the amount of R2,250,000.0 (sic) (the Matika loan").*"

[11] The applicants further explained that Zeta and Matika were two of the CMM debtors who did not repay their loans, which resulted in the curators successfully applying for the liquidation of both Zeta and Matika after the negotiations for repayment failed. The first applicant is the joint liquidator of Matika.

[12] Paragraph 6.15, which, in particular, irked the respondents, provides that:

> '*6.15 The curators have requested the South African Police Services to investigate the fraud and theft perpetrated, but have also instituted civil proceedings against 21 (twenty-one) former CMM directors and officials, including the respondent, jointly and severally, for the payment of an amount in excess of R1 billion ("the 424 action"). The 424 action was instituted under case number 21263/2012 in this honourable Court and is based on the provisions of section 424 of the old Companies Act and/or section 218 of the new Companies Act. The respondent is one of the defendants who defend (sic) the 424 action. Pleadings in the 424 action are closed and the matter is set down for 3 (three) month trial from 17 March next year…*"

[13] It is common cause that the curators of CMM did not pursue the section 424 agreement with first respondent.

[14] It is common cause that, on 30 November 2011, a commission of enquiry, in terms of sections 417 and 418 of the Companies Act, 1973

("the enquiry"), was held into the affairs of Zeta. The first respondent gave evidence at the enquiry. During the enquiry he made the following admissions: he sold a BMW 730d motor vehicle ("the BMW"), which was an asset in the estate of Zeta, for an amount of R150,000.00 to defray his expenses; he did not have sufficient funds to repay the amount of R150,000.00 to the estate of Zeta; he signed personal surety in favour of CMM for the Matika loan; and his house was registered in the Geoflise Trust ("the Trust") of which he is a trustee and a beneficiary.

[15] After the enquiry the applicants issued an application against the first respondent for the payment of the R150,000.00, together with interest, relating to the sale of the BMW ("the BMW money application").

[16] The applicants explained that the curators of CMM also issued a summons against the respondents for the payment of the amount of R2,250,000.00, together with interest, relating to the respondents' surety in respect of the Matika loan ("the surety action").

[17] The first respondent defended both the BMW money application as well as the surety action.

[18] On 1 October 2012, this court granted judgment against the first respondent in the BMW money application for the payment of an amount of R150,000.00; *mora* interest at the rate of 15.5% per

annum, from 1 April 2010 until date of payment; and costs on the scale as between attorney and client ("the BMW judgment").

[19] On 6 March 2013, judgment was granted against the first respondent in the surety action for: payment of the amount of R2,250,000.00; interest calculated on the sum of R2,250,000.00 at 3% per month calculated from 19 August 2008 to date of payment; and costs on the scale as between attorney and client, including costs of senior counsel ("the surety judgment").

[20] As a consequence of obtaining the BMW judgment, a warrant of execution was issued on 16 November 2012. The Sheriff attached the respondents' movable assets. The Sheriff found that the approximate value of the movable assets of the respondents amounted to R18,800.00. This was not enough to satisfy the BMW judgment debt. This is the act of insolvency the applicants say the respondents committed.

[21] After the first respondent's movable assets were attached, he launched proceedings for the rescission of the BMW judgment ("the rescission application"). The application was opposed. Before the rescission application was argued, the respondent withdrew the application. The first respondent was ordered to pay the costs on the party and party scale.

[22] After the curators obtained the surety judgment, the first respondent gave notice of his intention to make application for leave to appeal. The applicants allege that to date the application for leave to appeal has not yet been enrolled. They contend that as the first respondent conceded at the enquiry that he stood surety for the Matika loan and that the prospects of success of his appeal are "*extremely slim*".

[23] The applicants contend that if the interest and attorney-client costs taken into consideration, the outstanding balance on the Matika loan is approximately R4.7 million. For the purposes of this calculation, the deponent applied the *in duplum* principle and estimated the attorney-client costs extremely conservatively at R200,000.00. Accordingly, the first respondent's outstanding liability in respect of the Matika loan and surety judgment should be no less than R3 million.

[24] The applicants also contend that, as far as the respondents' indebtedness to Zeta is concerned, the outstanding balance thereof is no less than R500,000.00.

[25] These are the background facts which the respondents allege constitute an abuse of process. I will return to this aspect later.

[26] Before I proceed with the merits of this application for sequestration, it is important to deal with two matters. The first is the application for

removal, which was heard on 1 June 2015. The second is whether this application is an abuse of process.

APPLICATION FOR REMOVAL

[27] Shortly before the hearing, the applicants delivered an application for the removal of the application from the roll. I dismissed the application and indicated that reasons will follow. I now turn to deal with the reasons for the dismissal.

[28] At the outset, I must point out that, at the hearing of the application, the respondents counsel conceded that the applicants were entitled to enrol the application. However, the reason for the application for removal was that this matter ought to be heard by Murphy J, who is seized with other matters.

[29] The respondents' attorney, on 7 May 2015, addressed a letter to the Deputy Judge President of this Division wherein he requested that "*the legal representatives of the parties approach and meet [Justice Murphy] directly to make detailed arrangements for the hearings before him*".

[30] The request was made on the supposition that all the CMM matters and matters related thereto are interrelated and that Justice Murphy was *au fait* with all the facts. Therefore, it would be prudent for

Justice Murphy to hear all the matters related to CMM, including this one.

[31] The applicants' attorney, in response to this letter, wrote to the Deputy Judge President and, in essence, did not object to certain matters being placed before Justice Murphy but objected to other matters, and this matter in particular, to be placed before Justice Murphy.

[32] The Deputy Judge President, in a letter dated 12 May 2015, requested the applicants' attorneys to contact Justice Murphy directly regarding this matter but informed them that Justice Murphy is on long leave until the beginning of the third term, which starts on 27 July 2015.

[33] The respondents, in their affidavit supporting the application for removal, contended that the aforesaid letter of the Deputy Judge President was a "*directive*".

[34] They also contended that they would be prejudiced should this matter be heard before another judge other than Judge Murphy and "*that it is in the best interest of justice that the directive of the Honourable Deputy Judge President that the (sic) manner and sequence of all remaining applications be determined by His Lordship be adhered to strictly and diligently*." (**emphasis added**)

[35] The applicants contend that the Deputy Judge President did not give any directive at all.

[36] It is necessary to have regard to a proper interpretation of the letters exchanged between the parties and the Deputy Judge President to determine whether a directive was given by the Deputy Judge President. In my view, there is no basis for the contention that the DJP made a directive. *Ex facie* the letter it is abundantly clear that no directive was granted. If regard is given to the contents of the letters, the respondent objected that this matter should be placed before Justice Murphy. The Deputy Judge President cannot be said to have given any directive. Accordingly, insofar as the applicants interpret the letter from the Deputy Judge President as a directive, they are mistaken. No reasonable person could interpret the Deputy Judge President's letter as a directive.

[37] The respondents also contend that this is a complex matter and that this is an additional reason why it should come before Murphy J.

[38] I disagree with the respondents' contention that "*[t]his is a complex matter*". The facts of the sequestration application are relatively straightforward and uncomplicated.

[39] Accordingly, the application for removal is dismissed with costs, including the costs of two counsel.

ABUSE OF PROCESS

[40] As indicated, the respondents contend that this application is an abuse of process. The respondents' counsel say this for the following reasons: the applicants used evidence in the founding affidavit which is inadmissible; the applicants repeated defamatory matter used by the curators of CMM; they breached the *sub judice* rule; and the use of findings by the curators of CMM are an illegality. The aforementioned reasons are not apparent from the respondents' answering affidavit.

[41] In *Lipschitz and Schwartz NNO v Markowitz* 1976 (3) SA 772 (W) the court observed at 775 H-776 A that:

> "*A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice and which is designed and which still evolved as a means of accurately identifying issues and conflicts so that the Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed*".

[42] It was difficult to establish with sufficient particularity the grounds for the contention that the application is an abuse of process. I will attempt to summarise the reasons advanced by the respondents as to why this application is an abuse of process. They say, *inter alia*, that it is an abuse of process for the following reasons:

[42.1] the application is an unlawful and fraudulent series of oppressive acts executed by the curators and, by colluding with them, the applicants;

[42.2] the applicants "*are clearly solely beholden to the opinions and views conveniently adopted by the 'plaintiffs' and their legal advisers and failed to investigate or consider the implications of the withdrawal of [the 424 action against him] and the circumstances and consequences that arise from this fact. As a consequence, the 'applicants' are clearly the agents of the curators, taking their instructions from the legal advisers of the curators and not otherwise as they suggest. They are acting merely as puppets and lackeys*";

[42.3] the applicants have manifestly failed to conduct an independent investigation into the affairs of Zeta;

[42.4] an enquiry into Zeta was not conducted "*in good faith and in the interest of its creditors and its affairs in liquidation, but in collusion, and on the instructions of, the curators solely as a pretext to compromise any defence [the first respondent] may have against the section 424 the case (sic) of the plaintiffs in the CMM action*";

[42.5] by proceeding with the application it "*constitutes an abuse of the process of the court, is a breach of the fiduciary duties of*

the applicants as officers of the Court, is essentially unlawful, and that [he has a] prima facie if not incontestable (sic) grounds to set aside all the relief that had been fraudulently obtained against [him] and adverse to [his] interests, including setting aside the liquidations of Zeta and Matika and the appointment of the [a]pplicants, and claim damages against CMM, the curators, the plaintiffs and the applicants";

[42.6] the facts and circumstances relating to the relationship and disputes between "*CMM, Bakkes, the curators and [the first respondent] are material to these proceedings and that the [a]pplicants are either bound, or, alternatively, are bound to disclose, any legal outcome and relevant circumstances relating to the those relationships and disputes to the Court*";

[42.7] the natural conduct of legal proceedings in this matter will require extensive discovery and disclosure from all sides and the first respondent contends that it cannot be resolved on the basis of an application for sequestration nor on the basis of motion proceedings;

[42.8] the curators of CMM were duty bound to conduct impartial and objective investigations and to conduct the affairs of CMM in terms of the rules of good governance as formulated in terms of the Banks Act. They failed to do so;

[42.9] the basis of the questions and statements put to the first respondent at the enquiry by the attorney on behalf of the curators was at all times unfounded, if not false;

[42.10] no evidence exists that the first respondent participated in any unlawful actions regarding CMM or colluded with CMM and Bakkes;

[42.11] the curators continue, contrary to their duties, to present material misrepresentations that they knew, or were duty bound to have known, to be false on behalf of CMM in various legal actions and proceedings;

[42.12] his application to represent Corpfin and to obtain leave to institute damages against CMM and the curators is still pending.

[43] I now turn to deal with the application as an abuse. Broadly speaking, it appears that the respondents are saying that the applicants have an ulterior purpose.

[44] When a court finds an attempt to use, for ulterior purposes, machinery devised for the better administration of justice, it is the duty of the court to prevent such an abuse. But it is a power which has to be exercised with great caution, and only in a clear case.[1] In *Beinash v Wixley*,[2] the late Chief Justice Mahomed said the following:

> "*What does constitute an abuse of the process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. …*"

[45] In *Estate Logi v Priest*,[3] Solomon JA, with reference to *King v Henderson* (1898, A.C, 720) said the following:

> "*It is neither fraud nor an abuse of the powers of the Court to petition for a sequestration order with an indirect motive, that is, for a purpose other than the equal distribution of the testator's assets, as, for example, to exclude the appellant from a partnership.*"

[46] In *Brummer v Gorfal Brothers Investments (Pty) Ltd en Andere*,[4] Streicher JA said that the aforementioned passage does not mean that motive is always applicable. Thus, he put it as follows:[5]

> "*Hierdie passasie was egter nie bedoel om te sê dat motief of doel nooit ter sake is nie en dit is ook nie hoe Solomon AR dit verstaan het nie. Al wat in King beslis is, is dat motief op sigself nie `n misbruik van die regsproses daarstel nie. Lord Watson het op 731 gesê:*
>
> > *'In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose (to constitute an abuse of process or a fraud on the Court); it must be shewn that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.*'"

[47] Streicher JA also said that:[6]

> "…*Na verwysing na en goedkeuring van die stelling in Wilbran dat 'the courts of justice had no concern with the motives of parties who asserted a legal right' het Lord Watson op 732 gesê:*
>
> > *'Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud.*'"

[48] Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused. A legal process is abused when it is used for a purpose other than for what it has been intended or designed for.

[49] In *Standard Credit Corporation Ltd v Bester and Others*[7] the court stated that:

> "*In general terms, however, an abuse of the process of the court can be said to take place when its procedures used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings.*"

[50] In *Brummer supra*,[8] the court said the following:

> *In Goldsmith v Sperrings Limited [1977] 2 All ER 566 (CA) was die vraag of sekere aksies `n misbruik van die regsproses daargestel het. Scarman LJ het die toets soos volg geformuleer op 582c:*
>
> > *'In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out 'to effect an object not within the scope of the process': … In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought: ...'*
>
> *Dit is nie net die hoofdoel waarvoor 'n spesifieke regsproses bestem is wat geoorloof is nie en ek meen nie dat die voormelde formulerings van die toets om te bepaal of 'n aanwending van die regsproses 'n misbruik daarvan is, verstaan moet word om te sê dat dit die geval is nie. Die aanwending van 'n regsproses vir 'n doel anders as die spesifieke doel waarvoor dit bestem is, kan nietemin redelik wees. Dit sal die geval wees indien daardie doel binne die breë bestek van die betrokke regsproses val. So byvoorbeeld kan in sekere omstandighede aansoek gedoen word vir 'n bevel dat die eiser sekuriteit vir koste verskaf. 'n Verweerder wat so 'n aansoek doen met die doel om 'n einde aan die litigasie te maak, maak nietemin redelike gebruik van die betrokke regsproses omrede sy doel binne die breë bestek van die betrokke regsproses val. Dit is in die woorde van Mahomed HR 'n 'legitimate purpose'. Daarteenoor, indien dit onredelik is om die regsproses vir sodanige doel te gebruik, word dit misbruik. Dit sal die geval wees indien die regsproses gebruik word vir 'n doel wat geen verband hou met die doel waarvoor dit bestem is nie*." (**emphasis added**)

[51] In this case I have to decide whether the application for sequestration is an abuse of process. I have already demonstrated that in *Estate Logi supra*, the erstwhile Appellate Division found that it is neither fraud nor an abuse of powers of the court to petition for the sequestration order with an indirect motive for a purpose other than

the equal distribution of the testator's assets, for example, to exclude the appellant from a partnership.

[52] *In casu*, Zeta obtained a judgment against the first respondent. The judgment stands. Application for rescission was launched and aborted. The Sheriff could not obtain sufficient assets to satisfy the judgment. This is an act of insolvency as contemplated in section 8(b) of the Insolvency Act. The applicants allege that the sequestration will be to the benefit of creditors.

[53] It can hardly be said that the remedy which the applicants are seeking is unsuitable. This is the only cause of action left open to them. They are duty bound to finalise the affairs of Zeta which will ultimately allow them to be discharged as liquidators of Zeta.

[54] It can also hardly be said that the applicants are obtaining the remedy fraudulently to defeat the rights of others, whether legal or equitable. The respondents' venom is mostly directed at the curators of CMM. They contend that the liquidators are "*puppets and lackeys*" of the curators of CMM. No evidence has been adduced to sustain this allegation. It is mere conjecture and speculation.

[55] With regard to the possible claims for damages which the first respondent has against the CMM curators, there is nothing to suggest that the applicants will not pursue such an action or compromise the action.

[56] Accordingly, for the reasons set out above, I am satisfied that the applicants are not guilty of abuse of process.

BMW JUDGMENT

[57] I have already indicated that the applicants obtained the BMW judgment and that the first respondent launched an aborted application to rescind the BMW judgment. In the process, two costs orders were obtained against the first respondent.

[58] The first respondent contends that he is desirous to have the BMW and surety judgments, and all the ancillary judgments that followed thereafter, set aside. Mr Terblanche, on behalf of the respondents, referred me to the matter of *Behrman v Sideris and Another*[9] as a proposition that the BMW order, until set aside, stands. Roper J, at page 368 stated the following:

> "*The application for sequestration is opposed on behalf of the respondents on two main grounds. It is said that the petitioner is only a cessionary of the judgment debt and not of the original cause of action, and that it is a debt apparently for goods sold and delivered. It is said that the judgment was illegally obtained in view of the fact that, at the time when it was obtained, the administration order was in existence, and that, therefore, the Court must treat the judgment debt as a nullity. The other ground of opposition is that, in any case, there would be no benefit to creditors in superseding the administration order and sequestrating the estate of the respondents.*
>
> *With regard to the first of these grounds I am unable to see how I can treat the judgment debt in question as null and void. Under section 36(b) of the Magistrates' Courts Act the court is given power to rescind or vary any judgment granted by it which was void ab origine, and if the contention of the*

respondents is that this judgment was void, they should, as seems to me, have applied to the magistrate's court under that section for an order rescinding the judgment on the ground alleged. This step was not taken by the respondents and the judgment, therefore, stands unrescinded."

[59] The learned judge stated further that:[10]

"*The ordinary rule, however, is that the judgment stands and must be recognised as valid until it is set aside by the Court… I am obliged, therefore, to regard the judgment debt as a valid one and the applicant as having a valid claim as a judgment creditor by cession in place of the original judgment creditors. …*"

[60] I am bound by the aforementioned judgment by Roper J and there are no compelling grounds for me to deviate therefrom. As indicated, the first respondent launched an aborted application for rescission of the BMW judgment. It stands until set aside.

[61] The same applies to the surety judgment.

[62] Accordingly, I am satisfied that the BMW judgment is valid.

ACT OF INSOLVENCY AND INSOLVENCY

[63] As previously indicated, the Sheriff could not obtain sufficient assets to satisfy the BMW judgment. Section 8(b) of the Insolvency Act provides that:

"*A debtor commits an act of insolvency -*

(a) …

(b) if a court gives judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;

(c) …

(d) …

(e) …

(f) …

(g) …

(h) …"

[64] During the hearing of this matter, respondents' counsel wisely and correctly conceded that the first respondent committed an act of insolvency. This is clearly an act of insolvency and there is no other way to construe it.

[65] The applicants also contend that the first respondent is hopelessly insolvent. They say so with reference to the BMW judgment and the surety judgment, which remains unsatisfied. Not so say the respondents. The first respondent says he is clearly solvent. He does so on the basis of a "*balance sheet*" attached to his answering affidavit. The balance sheet, which appears to be unaudited, suggests that his net worth runs into millions of rands. Much more than the BMW judgment and the surety judgment.

[66] For instance, the first respondent claims that his household goods and movable assets amount to R450 000. This is contrary to the

valuations of the movable assets which the Sheriff attached and valued. He valued them at approximately R18 800. The other claims are for salary, legal costs and civil claims against the curators of CMM and CMM. In short, he claims that his assets are worth R32 million.

[67] However, one thing stands out as a sore thumb. He cannot and is not in a position to satisfy the BMW judgment and the surety judgment. In this regard, Mr Terblanche referred me to a passage by Innes CJ in the matter of *De Waardt v Andrew and Thienhaus Ltd*[11] where the following was said:

> "*Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him … Of course; the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes*." (**emphasis added**)

[68] I agree with the aforementioned passage. The first respondent, however much he protests that he is solvent, cannot pay what he owes. Any promise that he will eventually pay rings hollow. This is simply not good enough.

[69] Accordingly, I am satisfied that the first respondent committed an act of insolvency as contemplated by section 8(b) of the Insolvency Act and that the respondents are insolvent.

ADVANTAGE TO CREDITOR

[70] The applicants say that this application will be to the advantage of creditors. They say that this is the case even though the respondents do not own immovable property and do not own sufficient movable assets to cover their known indebtedness.

[71] Mr Terblanche submitted that it will be to the advantage of creditors for the following reasons:

[71.1] the first respondent is a trustee and beneficiary of the Geoflise Trust which owns the immovable property in which the respondents reside;

[71.2] the first respondent alleges that he has a claim for a salary from AFSEF amounting to R400 000, which is an asset which may well be applied to the advantage of his creditors;

[71.3] the first respondent is an astute and experienced businessman with numerous and varied interests, and who is likely to have structured his financial affairs in a manner calculated to his creditors. These affairs should be investigated. Trustees will be able to scrutinise the respondents' financial affairs and recover any assets that may have been concealed;

[71.4] the first respondent is dissipating his assets in pursuing fruitless and costly litigation.

[72] The first respondent, in his answering affidavit, specifically refrained from dealing with the merits of the sequestration application. Instead, he dealt with the alleged abuse of process of court. A bare denial is made that the allegations contained in the sequestration application are correct. This is not good enough.

[73] Accordingly, I am satisfied that there is reason to believe that the sequestration will be to the advantage of the respondents' creditors.

EXERCISE OF DISCRETION

[74] If a court which hears an application for the sequestration of a debtor's estate is of the opinion that *prima facie*:[12]

[74.1] the applicant has established against a debtor a liquidated claim for not less than R100;

[74.2] the debtor has committed an act of insolvency or is insolvent; and

[74.3] has reason to believe that it will be to the advantage of creditors of the debtor if the estate is sequestrated

it may grant a provisional sequestration order. No more than *prima facie* proof of these facts needs to be produced for the provisional order to be granted. The onus of proving facts rests on the applicant and it remains on him throughout.

[75] If a court is *prima facie* of the opinion that three *facta probanda* enumerated in the Insolvency Act have been established, it is empowered, but not obliged, to provide a provisional order of sequestration. It may instead dismiss the application, or postpone its hearing or make such other order as in the circumstances appears to be just.

[76] In exercising its discretion in this regard, the court may take into consideration whether other alternative methods of obtaining judgment might not bring better results. There is no reason why, at this stage, the court should not dismiss the application by virtue of its inherent jurisdiction to prevent abuse of its process if, in fact, there has been such abuse. However, before refusing an order and, by doing so, effectively giving moratorium to the debtor, the court must be satisfied that creditors will stand to lose nothing.[13] Smith[14] says that:

> "*If the court, in the case of a provisional order, is prima facie of the opinion and in the case of a final order, is satisfied there are three facta probanda, and enumerated in sections 10 and 12 respectively of the act (sic), have been established, it is empowered but not obliged to provide either a provisional or final order of sequestration as the case may be. <u>The court has an overriding discretion to be exercised judicially upon consideration of all the facts and</u>*

> *circumstances of the particular case. The discretion has been referred to as 'large' or 'wide' but be that as it may, the discretion is not to be exercised lightly. Accordingly, to paraphrase the words of Broom J, when a sequestrating creditor has proved an act of insolvency and there is reason to believe that the sequestration will be to the advantage of the creditors, very special considerations are necessary to disentitle him to his order.*" (**emphasis added**)

[77] I have already indicated that the applicants have made out a case for the sequestration of the respondents' estate. They have satisfied the three *facta probanda* enumerated in section 10 of the Insolvency Act. That leaves me with the question of whether to exercise my discretion in not granting the order.

[78] The authorities referred to above are clear. I have a wide discretion but the discretion is not to be exercised lightly. Special considerations must be present which disentitle the applicants to their order.

[79] *Smith*[15] summarises special considerations which were present in cases where courts have refused to grant final sequestration orders. They are: that the respondent was not insolvent; that the respondent has brought an action against the sequestrating creditor which, if successful, might wipe out the debt; that if the sequestration took place any damages recovered in the action would be excluded from the insolvent estate and would not be available for creditors; the sequestrating creditor was in no appreciable danger of losing her money; and there was no suggestion that any other creditors were pressing the respondent for payment.

[80] In my view, the aforementioned examples are not a *numerus clausus*. Each case must be judged on its merits.

[81] In my view, in this matter there are no special considerations present which will disentitle the applicants to the order they seek. There is simply no alternative method which may bring a better result.

[82] Accordingly, I decline to exercise my discretion against granting the order.

ORDER

[83] I am satisfied that the applicants have made out a case for the relief they seek. Therefore, the following order is made:

[83.1] the application for removal is dismissed;

[83.2] the estate of the respondents is provisionally sequestrated;

[83.3] a *rule nisi* is issued calling on the respondents and any other interested parties to show cause to this court on 16 July 2015 at 10h00 why the respondents should not be finally sequestrated;

[83.4] that the costs of the application for sequestration and removal, including the costs of two counsel, are costs of sequestration.

DEWRANCE, AJ

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1 *Hudson v Hudson and Another* 1927 AD 259 at p 268
2 [1997] 2 All SA 241 (A) at p 251
3 1926 AD 312 at 320
4 1992 (2) All SA 127 (A)
5 See p 136
6 See p 136
7 1987 (1) SA 812 (W) at 820 A - D
8 See p 137
9 1950 [2] SA 366 (TPD)
10 At p 370
11 1907 TS 727 at 733
12 See the *Laws of South Africa* (2nd ed) vol 11, p 229, para 225
13 See *LAWSA supra* p 232 para 226; Smith *Law of Insolvency* (3rd ed) p 65
14 *Supra p 65*
15 *Supra* p 65