IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

In the matters of:

CASE NO. 10598/12

Brian Lambert Kurz N.O. **First Applicant**

Mark John Perrow N.O. **Second Applicant**

and

Jennifer Ann van den Berg **Respondent**

and

CASE NO. 10600/12

Brian Lambert Kurz N.O. **First Applicant**

Mark John Perrow N.O. **Second Applicant**

and

Jan Albert Jacobus van den Berg **Respondent**

JUDGMENT Delivered on 17 July 2013

STRETCH AJ:

[1] The respondents in these two cases are married to each other out of community of property. They will hereinafter be referred to as Ms and Mr van den Berg.

[2] On 22 June 2012 each of the respondents published notices of surrender of their respective estates.

[3] On 22 March 2013 this court provisionally sequestrated both their estates and issued rules nisi inviting them and all other interested parties to show cause why their estates should not be finally sequestrated.

[4] For ease of reference and for practical reasons, I shall refer to both these cases as one matter and will distinguish between them when it is necessary.

[5] The return date of the rules nisi was previously extended at the request of the respondents. The issue of whether the applicants' petition for final sequestration should be dismissed (as contended for by the respondents) or whether an order for final sequestration should be granted (as contended for by the applicants), was argued before me on 8 May 2013.

[6] At this stage these proceedings are governed by section 12 of the Insolvency Act 24 of 1936 ("the Act"). This section determines that I may sequestrate the estate of a debtor, if I am satisfied of the following:

(a) that the petitioning creditor has established against the debtor a claim of not less than R100,00, or that two or more creditors have in the aggregate liquidated claims of not less than R200,00;

(b) that the debtor has committed an act of insolvency or is insolvent; and

(c) that there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated.

<u>The quantum of the claim</u>

[7] The applicants aver that the two respondents are jointly indebted to the Ekuthuleni Trust ("the Trust") as represented by the applicants as trustees, in the sum of R293 437,22, which means that each of the respondents owes the Trust not less than R146 718,61. This claim is in respect of allocaturs of taxed costs orders which had been granted against the respondents in respect of litigation between the parties.

[8] The respondents contend that they intend challenging these allocaturs. It is significant however that nowhere in the 76 page answering affidavit which was delivered by Mr van den Berg in his matter and which has been duplicated as an answer on behalf of Ms van den Berg in her matter, is this sum mentioned at all. Nor is it suggested, in this prolific document, that the claim has not been accurately calculated. On the contrary the respondents' own list of creditors reflects the claim as being slightly more, viz R293 518,00.

[9] The fact of the matter is that this affidavit, which was issued on 20 December 2012, was in any event before Madondo J when he granted the provisional sequestration order on 22 March 2013. This debt was also included in the respondents' statement of affairs when they published notices of the "provisional" voluntary surrender of their estates which step they purport to have taken in terms of section 4 of the Act. It is trite that the purpose of a notice of surrender in terms of section 4 is for the debtor to advise interested parties that he is literally voluntarily surrendering his estate for sequestration by the court (as opposed to a compulsory sequestration, where the debtor whose estate is to be sequestrated is the respondent in the application). It is furthermore trite that the affidavit in support of an ex parte application for the court to accept the surrender of the estate, must not only aver that the estate is insolvent, but must furnish details of the insolvency.

[10] In the premises I am satisfied that the applicants have succeeded in establishing, on a balance of probabilities a liquidated claim against each of the respondents of not less than R100,00.

An act of insolvency or factual insolvency

[11] Mr van den Berg has contended in argument that he and his spouse "provisionally" voluntarily surrendered their estates for the following reasons:

(a) There were a number of unproven claims against the estate;.

(b) The applicants had resorted to "smash and grab" tactics apparently prejudicing other creditors such as Standard Bank, Kwasani Municipality and Sisonke District Municipality.

[12] Indeed, Mr van den Berg in his answering and counter-claim affidavit sums the respondents' position up as follows (and I quote from the affidavit):

"The Respondent(s)/Opposer(s) proceeded for Provisional Voluntary Surrender of Estate as a defensive action to prevent the Applicants from raping the estate(s) by malicious and unlawful self-help to the detriment of the purported Respondent/Opposer and theirs as well as other potential creditors".

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[13] I do not intend speculating at length on what Mr van den Berg intends to convey by these emotive and scathing remarks. Insofar as he may have intended to convey that he and Ms van den Berg took these drastic steps simply to protect the rights of other creditors to whom he and his spouse owed vast sums of money, this purportedly noble step does not detract from the fact that voluntary surrender is probably the simplest and clearest act of insolvency conceivable. By causing a notice of surrender to be published in the Government Gazette and in the Witness newspaper, the respondents gave notice in writing to their creditors that they were unable to pay their debts. In so doing they committed an act of insolvency as defined in section 8(g) of the Act. A reasonable entity in the position of the Trust would no doubt interpret and construe these notices of surrender as advices that the respondents could not pay their debts. I agree with counsel (who represented the applicants at the provisional sequestration stage), that in the interpretation or

construction of the notice, the Trust's knowledge must be attributed to the reasonable reader of such a notice (see *FirstRand Bank v Evans 2011 (4) SA 597(KZD) at para [14]*). Also, upon service of the warrant of execution upon the respondents for payment in the sum of R200 803,59 together with costs, the respondents were neither individually or even collectively able to meet the judgment debt, nor were they able to identify disposable property sufficient to satisfy this debt. In this regard the respondents committed a further act of insolvency as contemplated in section 8(g) of the Act (see *NatalseLandboukooperasieBpk V Moolman 1961 (3) SA 10 (N) at 11 A-C).*

[14] Apart from these acts of insolvency, in order for an ex parte application of this nature to succeed, the applicants in the voluntary surrender application (the respondents in this matter) must also allege that they are factually insolvent. To this end both respondents lodged a statement of affairs with the Master of this Court as required in terms of section 4(3) of the Act. The balance sheet demonstrates that the collective liabilities of the respondents exceed their assets by R1 095 443,00. Moreover, Mr van den Berg in both his own affidavit and an affidavit in which he purports to be the voice of Ms van den Berg (which affidavit is in turn confirmed by his spouse on oath), says the following:

"The Petitioners, mere laymen acting as any responsible reasonable persons would, have drawn up statements of their financial affairs as placed before the Master of this honourable (sic) Court, came to the realisation that under the prevailing circumstances, their estates, both jointly and severally, has (sic) been rendered insolvent … The shortfall by which their Liabilities exceed their Assets is calculated to reasonably be about R1,095,443."

[15] I am accordingly satisfied that the respondents have not only committed acts of insolvency, but that they are in fact insolvent.

<u>Advantage to the creditors</u>

[16] All that needs to be established in this regard is that the debtor has assets which would be sufficient, after the payment of the costs of the sequestration, to ensure that creditors receive some significant monetary dividend ("a not negligible dividend").

[17] In fact all the Act requires is that there must be "reason to believe" that it will be to the advantage of the creditors if the debtor's estate is sequestrated. It is not necessary for the applicants to prove actual advantage. This reduced requirement is no doubt in recognition of the fact that a creditor would not ordinarily have knowledge of the precise state of the debtor's financial affairs. However, in the case of voluntary surrender, the debtor is obliged to state and demonstrate that it will actually be to the advantage of creditors if his estate is sequestrated. The debtor must also state and demonstrate that the estate owns realisable property of sufficient value to defray all costs of the sequestration which will be payable out of the free residue of the estate (section 6(1) of the Act).

[18] According to the respondents' statement of affairs in their own ex parte applications for the sequestration of their estates, they own an immovable property with an estimated value of R1 375 000,00. This property is mortgaged to Standard Bank. I agree with the applicants that it is probable that this bank will rely solely on the security constituted by the mortgage bond for the satisfaction of its claim in the event of it proving such claim against the estates of the respondents, and the bank will accordingly not compete with the respondents' remaining creditors in respect of the free residue.

[19] Also, according to the same statement of affairs:

(a) The respondents own unencumbered assets to the value of R371 848,00 of which R113 775,00 is the surrender value of an endowment policy.

(b) The concurrent creditors of the respondents are owed R 1 162 982,00.

[20] It was contended by the applicants (even before this court ordered provisional sequestration), that if allowance is made for the costs of sequestration to be in the region of R50 000,00, a free residue of R321 848,00 will become available towards satisfying the claims of concurrent creditors. This means that concurrent creditors would receive a dividend of not less than 26,6 cents in the rand.

[21] Over and above that, it is not disputed that goods belonging to the respondents to the estimated value of R177 000,00 have already been attached. In fact, the respondents themselves in an annexure to their statement of affairs lodged with the Master, estimated the value of these attached goods to be slightly more, in the region of R189 310,00.

[22] It seems to me, on a reading of the papers, that the applicants did not make allowance for the value of the goods already attached. If they did not, it simply means that the aforesaid dividend will be increased substantially to somewhere in the region of 43 cents in the rand. But even if I am wrong, it goes without saying that 26,6 cents in the rand is clearly a significant monetary dividend, justifying sequestration.

[23] In the premises I am of the view that it will be to the advantage of the creditors if the estates of Mr and Ms van den Berg are sequestrated.

[24] Mr van den Berg has raised a number of contentions in argument, none of which have the slightest bearing on an application of this nature. Even his argument that this application is premature (because an application for the applicants' allocaturs on taxation to be reviewed is still pending), holds no water.

[25] I say so because in order to successfully oppose final sequestration it is required of the respondents in good faith, to adduce facts which, if proved at a trial, would

constitute good defences to each of the claims against them. For their part, all the applicants need establish before me is a single claim in excess of R100 in respect of each of the respondents (as required by section 9(1) of the Act) (see *Helderberg Laboratories CC v Sola Technologies (Pty) Ltd 2008 (2) SA 627 (C) para 23*). Even if the respondents were to succeed in showing that the allocaturs should be reduced substantially (which is highly unlikely), the position can never be such that these five costs orders will be reduced to less than R100,00 with respect to each of the respondents. In my view this contention is nothing less than a subterfuge to create the impression that some tenuous grounds exist for refusing or delaying a final order (see *Gungudoo and Another v Hannover Reinsurance Group Africa(Pty) Ltd and Another 2012 (6) SA 537 SCA*).

[26] Despite the fact that I granted the parties further opportunities to place relevant facts before me after the provisional sequestration order was granted on 22 March 2013, and notwithstanding the purpose of such an extension, the further affidavits delivered do not demonstrate that anything at all has changed since the granting of the provisional order. I agree with counsel for the applicants that no new issues of fact or law have been raised or traversed. I am accordingly satisfied that the applicants have made out a case for final sequestration.

[27] In conclusion, it would be remiss of me not to express this Court's displeasure with regard to the malicious, vexatious and unduly litigious stance which has been adopted by Mr van den Berg (purportedly supported by his wife) in these proceedings. Because of this, this Court has been constrained to peruse reams of documentation, most of which is emotionally charged and none of which has any bearing on this matter. This includes the identical counter claims brought in both applications inter alia seeking:

(a) to interdict the applicants from further litigation;

(b) for costs and damages to be paid jointly and severally by the applicants and their attorney;

(c) an order authorising the respondents to bring an application “as to the quantum of their wasted costs and/or damages so occasioned”(?) presumably by the application;

(d) an order authorising warrants of arrest to facilitate criminal investigations against the applicants and their attorney.

[28] I am alive tor the need in some cases to make concessions for laypersons entering into the seemingly unfamiliar territory of litigation. Allowing such laypersons to abuse the function, availability and the process of this Court as a platform for the spouting of this type of nonsensical vitriol is another question altogether. This, in my view, is exactly what Mr van den Berg has done with impunity. I can only commend the drafters of the papers on behalf of the applicants for not resorting to similar unprofessional tactics.

[29] But for the fact that a punitive costs order will only serve to punish the body of creditors as a whole, and would detract from the purpose of an application of this nature, I would not have hesitated to express the displeasure and disapproval of this Court by issuing such an order. I am however of the view (regard being had to the fact that the respondents have elected to annex to their papers at least three lengthy letters to the Judge President of this Division ranging from complaints about disrespect for the rule of law on the one hand, to challenging the constitutional validity of the “8km rules” on the other, that in the circumstances it is necessary for a copy of this judgment to be placed before the Judge President.

[27] In the premises the orders which I make are as follows:

ORDERS:

Case no. 10598/12

1. The estate of the respondent Jennifer Ann van den Berg is placed under final sequestration in the hands of the Master of this Court.

2. The costs of this application for sequestration shall be costs in the sequestration.
3. The respondent's counter application is dismissed with costs.
4. The registrar of this court is directed to cause a copy of this judgment to be placed before the Judge President of this Division.

Case no. 10600/12

1. The estate of the respondent Jan Albert Jacobus van den Berg is placed under final sequestration in the hands of the Master of this Court.
2. The costs of this application for sequestration shall be costs in the sequestration.
3. The respondent's counter application is dismissed with costs.
4. The registrar of this court is directed to cause a copy of this judgment to be placed before the Judge President of this Division.

STRETCH AJ

APPEARANCES:

For the applicants:
Mr C. Hattingh instructed by Stowell& Co. (ref. Mr A. Irons)

For the respondents:
Case no. 10598/12: in person assisted by her spouse who is the respondent in case no. 10600/12
Case no. 10600/12: in person

Judgment reserved on

Duly handed down on 17 July 2013