

CASE NO. 943/2003

IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

JOHANNES PRELLER

Applicant

and

ALICE HARRIET SAAYMAN

1st Respondent

STEVEN ANTHONY BOTES

2nd Respondent

ANTON LOHSE N.O.

3rd Respondent

MASTER OF THE HIGH COURT, MMABATHO

4th Respondent

APPLICATION

MAFIKENG

HENDRICKS J.

DATE OF HEARING

: **27 May 2004**

DATE OF JUDGMENT

: **03 June 2004**

COUNSEL FOR APPLICANT

: **Adv. C.J. Zwiegelaar**

COUNSEL FOR RESPONDENTS

: **Adv. M.P. van der Merwe**

HENDRICKS J:

- [1] The applicant in this matter applied, on an urgent basis, for an order setting aside the provisional and final sequestration orders granted in this Court under case number 289/03. At first, Applicant only cited the first Respondent.
- [2] When this matter appeared before my brother Landman AJ, an interim order was granted. It was ordered inter-alia that the curator of the insolvent estate of Mr Stephen Antony Botes, Mr Stephen Antony Botes and the Master of the High Court of South Africa (Bophuthatswana Provincial Division) be cited as Respondents. The curator being Mr Anton Lohse. A ***rule nisi*** was issued returnable, on 11th December 2003.
- [3] The applicant then filed an Amended Notice of Motion dated 03 December 2003. The Amended Notice of Motion differs from the original Notice of Motion in that an additional paragraph is added that reads:-
- “ 2. That the 3rd Respondent be ordered to release to the Applicant the amount of R460 000-00 currently frozen by the 3rd Respondent in terms of the provisions of Section 21 of the Insolvency Act, Act 24 of 1936 (as amended);”
- [4] On 11th December 2003 the matter appeared before my brother Lever AJ. who granted an order inter-alia ordering the joinder of the Second, Third and Fourth Respondents respectively.

Mr Anton Lohse N.O. was joined as the third Respondent seeing that he is the appointed curator of the second Respondent's estate.

[5] Lever A.J. in that order (11th December 2003) further ordered that:-

“ the issue or question whether the Applicant was entitled to amend the Notice of Motion, as reflected in the Notice of Amendment dated 3rd December 2003, is reserved”.

[6] The Third Respondent is the only party who opposes the Applicant's application. The Third Respondent does not oppose the setting aside of the sequestration orders granted under case number 289/03, he only opposes the application in terms of paragraph 2 of the amended Notice of Motion, on the basis that this court lacks jurisdiction.

[7] Two issues need to be decided by this court. They are namely:-

a)whether this court can order the release of the money held by Second Respondent's wife in a bank in Gauteng.

and

b)the issue of costs.

[8] It appears to be common cause between the parties that the

Respondent did freeze the bank account in which the wife of Second Respondent namely Samantha Botes deposited an amount of R460 000-00 allegedly belonging to Applicants. It is undisputed that the freezing of the bank account was done in terms of a court order granted by the Transvaal Provincial Division and not in terms of the court orders issue in this court under case number 289/03.

[9] The basis for setting aside the orders under case number 289/03 issued in this court is because this court lacks jurisdiction over the First Respondent and her property. The same also applies to the bank account which is held in Gauteng and which falls outside the area of jurisdiction of this court. This court therefore cannot order the release of that money.

[10] Furthermore, Applicant cannot claim an amendment of the Notice of Motion as of right.

An Application for such an amendment must be made to court after due notice that such an amendment will be sought, be given to the other parties.

Leave of the court were not obtained for the amendment of the Notice of Motion. Despite the fact that leave were not obtained from the court Applicant then filed an Amended Notice of Motion. This practice cannot be condoned and this court will not allow it.

Costs

[11] The other issue that need to be decided is the question of costs. In the Notice of Motion as well as the Amended Notice of Motion the Applicant volunteered to pay the costs for the setting aside of the orders granted under case number 289/03. No costs order is sought by the Applicant against the Third Respondent.

[12] It is trite law that costs follow the result unless there are circumstances present in a case which justifies the contrary.

[13] The Third Respondent is seeking a penal costs order against Applicant in the form of costs on an Attorney and own Client scale.

I am unconvinced that for the reasons advanced by Third Respondent, such a cost order would be fair and just under the circumstances of this case. I am however of the view that the Applicant should pay the costs of the Third Respondent which is as a result of the ill-founded Amended Notice of Motion, that Applicant filed.

In the result , I make the following orders:-

1)The provisional and final sequestration orders granted in this court under case number 289/03 are set aside,

2)The Applicant is ordered to pay the costs of the Third Respondent, which costs include the costs of 11th December 2003.

R.D. HENDRICKS

JUDGE OF THE HIGH COURT

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