IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

CASE NO: 3119/2002

In the matter between:

DENNIS HAROLD VOGET AND 2 OTHERS

and

ANDRE KLEYNHANS

JUDGMENT: 8 AUGUST 2002

VAN REENEN, J:

1] First-, second- and third plaintiffs have instituted an action in this court in which they claim payment from the defendant of an amount of R970 000; interest thereon **a tempore morae;** and costs of suit.

2] The plaintiffs base their cause of action thereon that the defendant, an attorney who represented second- and third plaintiffs in an action instituted against them by one L. Naude (Naude) under Case No: 49/96, acted in breach of an express alternatively, an implied term of their

agreement to "… perform the services in a proper and professional manner and without negligence" and that they, as a consequence thereof, suffered damages in the amount claimed.

3] First- and second plaintiffs are married in community of property.

4] As second- and third plaintiffs were unable to satisfy the judgment obtained against them pursuant to a settlement that had been reached with Naude, the joint estate of first- and second plaintiffs was sequestrated. That resulted in both of them being insolvents for the purposes of the provisions of the Insolvency Act, No 24 and 1936 (the Act) (See: **De Wet N.O. vs Jurgens** 1970(3) SA 38 (A) at 48 C – H; **Ex Parte Geeringh** 1980(2) SA 788 (O) at 788 in fine – 789 A; **Acar v Pierce and Other Like Applications** 1986(2) SA 827 (W)).

5] The defendant entered an appearance to defend and in addition to filing a plea in which he denied liability, filed an exception in the following terms:

"1. The FIRST and SECOND PLAINTIFF are unrehabilitated insolvents;

2. The alleged cause of action upon which the FIRST and SECOND PLAINTIFFS rely arose prior to the sequestration of the FIRST and SECOND PLAINTIFFS;

3. The FIRST and SECOND PLAINTIFFS' claim does not fall within the scope of claims in Section 23 of the Insolvency Act No. 24 of 1936 in terms of which the FIRST and SECOND PLAINTIFFS can sue in their own name;

4. Accordingly the FIRST and SECOND PLAINTIFFS have no **locus standi** to bring the action against the DEFENDANT"

6] I assume that the concept "**locus standi**" in paragraph 4 of the Notice of Exception has been used in the sense of a direct and substantial interest in the right which is the subject-matter of the litigation and the outcome thereof (See: **Jacobs en 'n Ander v Waks en Andere** 1992(1) SA 521 (A) at 533 in fine – 534 B) and not in the sense of legal capacity to litigate.

7] The question whether a party has **locus standi** to sue may be dealt with by means of an exception (See: **Van Zyl NO v Bolton** 1994(4) SA 648 (C) at 651 D – E and the cases there cited).

8] The onus to show that a pleading is excipiable rests on an excipient (See: **Kotsopoulus v Bilardi** 1970(2) SA 391 (C) at 395 D; **Amalgamated Footwear and Leather Industries v Jordan & Co Ltd** 1948(2) SA 891 (C) at 893; **South African National Parks v Ras** 2002(2) SA 537 (C) at 541 E – 542 F).

9] For the purpose of deciding an exception a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot

be accepted (See: **Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others** 1990(4) SA 749 (N) at 754 J – 755 B; **Van Zyl N.O. v Bolton** (supra) at 651 E – F).

10] The factual averments in the plaintiffs' particulars of claim, if accepted as correct, in my view, do constitute a cause of action against the defendant in respect of at least part of the damages that they are claiming from the defendant.

11] Does thát cause of action form part of the first and second plaintiffs' insolvent estate?

12] In terms of the provisions of Section 20(1) of the Act the effect of the sequestration of the estate of an insolvent is to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest it in him/her.

13] Section 20(2) of the Act provides that for the purposes of Section 20(1) thereof, the estate of an insolvent shall include

a) all the property of an insolvent at the date of sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of

attachment;

b) all property which the insolvent may acquire or which may accrue to him/her during sequestration, except as otherwise provided in Section 23.

14] "Property" is in section 2 of the Act defined as movable or immovable property where-ever situate within the Republic of South Africa and includes contingent interests in property other than the contingent interests of a fidei commissary heir or legatee and "movable property" is defined as every kind of property and every right or interest which is not immovable property.

15] A right of action constitutes "movable incorporeal property" (per Caney J, in **Ormerod v Deputy Sheriff, Durban** 1965(4) SA 670 (D & CLD) at 673

G – H) capable of forming part of an insolvent's estate (See: **De Villiers N.O. v Kaplan** 1960(4) SA 476 (C) at 479 E – H; **Van Niekerk v Bayer Suid Afrika (Edms) Bpk** 1998(4) All SA 212 (NC)) if it exists at the date of sequestration or accrues during sequestration, unless section 23 of the Act provides otherwise.

16] A cause of action comes into being when all the **facta probanda** i.e. the entire set of facts which gives rise to an enforceable claim, including every fact which is material to be proved to entitle a plaintiff to succeed in his/her/its claim, have arisen (See: **Thomas v BMW South Africa (Pty) Ltd** 1996(2) SA 106 (C) at 118 D – E and the cases there cited). On the basis of the averments made in the Particulars of Claim the plaintiffs' cause of action, in my view, came into existence prior to the first and second plaintiffs' sequestration and accordingly, forms part of their insolvent estate.

17] Even if, as counsel for the plaintiff's submitted, first and second plaintiffs' claim against the defendant came into existence during their sequestration, it would in terms of the provisions of section 20(2)(b) of the Act, still form part of their insolvent estate "… except as otherwise provided in section twenty-three".

18] Section 23 of the Act provides that, subject to its own

provisions and that of Section 24, all property acquired by an insolvent shall belong to his/her estate. The first and second plaintiffs' claim against the respondent has nothing to do with any of the matters enumerated in the above-mentioned two sections and are conveniently and succinctly set out in Sharrock et al: **Hockley's Insolvency Law,** 6th Ed, 46 and **Lawsa,** Volume II (First Reissue) paragraph 165. Respondent's counsel submitted that the first and second plaintiffs' claim against the defendant constitutes a right that does not affect the first and second plaintiffs' insolvent estate and that for thát reason they were entitled to sue the respondent in their own names and without reference to their trustee. Examples of rights that have been held not to affect an insolvent's estate are the right to receive maintenance from an insolvent (See:

Weinberg v Weinberg 1958(2) SA 618 (C) at 620 H) and the right to protect his/her possession of movables by means of the possessory remedies (See: **Marais v Engler Earthworks (Pty) Ltd: Engler Earthworks (Pty) Ltd v Marais** 1998(2) SA 450 (ECD) at 454 B – C). First and second plaintiffs' cause of action, in my view, is not of such a nature. It is founded on the deleterious consequences the respondent's alleged breach of contract had on the patrimony of their joint estate. To the extent that the purpose of the action is to restore their joint estate's patrimonial position it in my view, is clearly affected thereby.

19] In any event, section 23(6) of the Act deals with instances where an insolvent can sue and be sued in his/her own name, without reference to his/her trustee and presumably for his/her own benefit. The plaintiffs in paragraph 1 of their particulars of claim made the following averment:

"The 1st and 2nd Plaintiff's are both unrehabilitated insolvents [Master's

reference: C34699] and have brought this action with the knowledge and consent of their Trustee/Liquidator, S.A. Roux of George"

If those averments are accepted as correct, as one should for the purposes of deciding this exception, the first- and second plaintiffs are not suing "without reference" to their trustee and accordingly are not purporting to act in terms of Section 23(6) of the Act.

20] In view of the aforegoing I incline to the view that first and second plaintiffs' cause of action forms part of their insolvent estate and does not fall within the ambit of any of the claims in Section 23 of the Act in respect of which they could sue in their own names and without reference to their trustee.

21] Paragraph 3 of the Notice of Exception was formulated on the assumption that the exception should succeed if it were to be found that first and second plaintiffs' claim does not fall within the ambit of the provisions of Section 23 of the Act. That assumption is wrong.

22] Sequestration does not deprive an insolvent of his/her **locus standi** other than in those instances mentioned in Section 23(6) of the Act. The deprivation of an insolvent's **locus standi** is a

consequence of the fact that his/her estate vests in his/her trustee who exercises all rights in respect of the property comprising it (See: **Marais v Engler Earthwords (Pty) Ltd: Engler Earthworks (Pty) Ltd v Marais** at 453 H – I). Where however an insolvent's trustee refuses to institute proceedings against a debtor of an insolvent estate for the recovery of any benefit to which the insolvent estate is entitled, the right of an insolvent, by virtue of his/her reversionary interest in the insolvent estate, is recognised by our courts (See: **Mears v Rissik, Mackenzie NO and Mears' Trustee** 1905 TS 303 at 305; **Nieuwoudt v The Master and Others NNO** 1988(4) SA 513 (A) at 524 H – 525 G; **Marais v Engler Earthwords (Pty) Ltd : Engler Earthworks v Marais** (supra) at 453 I; sed vide: **Muller v De Wet NO and Others** 1999(2) SA 1024 (W) at 1027 J

– 1030 H (reversed on appeal)).

23] In my view the most plausible of the inferences that could be drawn from the fact that first- and second plaintiffs' trustee has knowledge of and has consented to the institution of the action by them in their own names, is that he was not prepared to do so (Cf: **De Polo and Another v Dreyer and Others** 1991(2) SA 164 W at 177 F – G). Accordingly, first- and second plaintiffs are entitled, by virtue of their reversionary interest in their sequestrated joint estate, to institute these proceedings and do have **locus standi,** in the first of the two senses mentioned in paragraph 6 above.

24] An insolvent's residual interest in his/her insolvent estate is an entitlement to be paid any residue remaining after the estate has been wound up (See:

Mears v Rissik, MacKenzie NO and Mears' Trustee (supra) at 305). Although an insolvent may institute proceedings in his/her own name to recover assets for the insolvent estate where the trustee refuses to do so, it seems logical that what is recovered, is for the benefit of the insolvent estate and not the insolvent personally (See: **De Polo and Another v Dreyer and Others** (supra) at 179 D – F). That however, does not detract from such an insolvent's **locus standi.**

25] The question whether first- and second plaintiffs should have joined their trustee as a defendant or whether averments to the effect that the trustee is unwilling to act - an aspect that was left open by the then Appellate Division in **Nieuwoudt v The Master and Others NNO** (supra) at 525 I - is not an

aspect that can be dealt with on exception.

26] In the circumstances the exception is dismissed with costs.

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D. VAN REENEN