IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 1746/2011
Date Heard: 16 February 2012
Date Delivered: 12 March 2012
REPORTABLE

In the matter between:

PHILLIP MOUNSEY GILFILLAN
t/a GRAHAMSTOWN VETERINARY CLINIC First Applicant

CANCRI TROPICUS 144 CC Second Applicant

and

LOUISE BOWKER Respondent

JUDGMENT

GOOSEN, J:

[1] The applicant seeks a final order of sequestration of the estate of the respondent. The basis upon which an order of sequestration is moved is a liquidated claim arising from admitted misappropriation of funds committed by the respondent whilst she was employed by the applicant and alleged factual insolvency of the respondent. The final order is opposed by the respondent essentially upon two grounds. The first is that set out in the opposing affidavits, namely that the respondent tenders payment in full of her admitted liability to the applicant provided that the application is withdrawn. On this

basis it is contended that there is no advantage to creditors in the confirmation of the provisional order of sequestration. It is also suggested that the pursuit of a final order is an abuse of the insolvency process. The second ground, not raised on the papers, is one which was raised at the hearing of the application, namely that the provisional order should be discharged by reason of the fact that there are criminal proceedings pending against the respondent, which proceedings relate to the very basis upon which the claim for sequestration is founded, namely the misappropriation of funds by the respondent. It is common cause that criminal proceedings are pending and that a preservation order in terms of section 26 of the Prevention of Organised Crime Act, 1998 has been obtained against the respondent.

[2] The point based on the effect of the pending criminal proceedings is not taken by way of an application for the stay of the sequestration proceedings. Nevertheless in advancing argument the respondent relied on the principles applicable to an application to stay civil proceedings.

[3] The first applicant is a professional veterinary surgeon who conducts the business of a veterinary surgeon via the second applicant as a corporate entity. Save where it is necessary to refer to a specific applicant I intend to refer to the applicants in the singular. The respondent was employed by the applicant in the position of an administrator who was responsible for the management of the day to day financial affairs of the veterinary practice. In this position she had access to both first and

second applicants bank accounts and was responsible for managing income and expenditure of the practice.

[4] During November 2010 the applicant's wife raised a concern regarding the state of the first applicant's financial affairs as reflected in bank statements which had come to hand. As a result of this certain queries were addressed to the applicant's auditors which resulted in the discovery of unauthorised expenditure incurred by the respondent. An audit was then initiated by the applicant's auditors to fully investigate the circumstances.

[5] During the course of the audit investigations the respondent was confronted with the fact of alleged irregularities. She denied any such irregularities and alleged in turn that certain funds had been paid to the South African Revenue Services by her husband on behalf of the applicants. No proof of such transactions were however forthcoming and when pressed for such proof the respondent resigned from the employment of the second applicant.

[6] The audit investigations continued and in February 2011 a meeting was held between the applicant, applicant's wife and attorney Poole on the one hand and the respondent, the respondent's mother and respondent's legal representative, on the other. At this meeting the respondent admitted that she had misappropriated an amount of R1,260,000.00 from the first and second applicants. The audit investigation which was subsequently completed established that the respondent had misappropriated some R3,143,796.80 from the second applicant and an amount of R192,588.00 from the first applicant.

[7] It is upon this admitted misappropriation and the allegation of factual insolvency that the applicants proceeded to obtain a provisional order of sequestration granted on 17 October 2011 by Beyleveld AJ, and upon which the applicants now seek a final order.

[8] I turn first to deal with the contention advanced by the respondent that the provisional order ought not to be confirmed because of the potential prejudice that this may cause to her in the pending criminal prosecution.

[9] The argument for a discharge of the provisional order of sequestration by reason of the pending criminal proceedings was raised at the hearing of the application by the submission of supplementary heads of argument on behalf of the respondent. Respondent's counsel sought to suggest that the issue had indeed been raised on the papers and referred in this regard to a paragraph in the answering affidavit where the respondent states the following:

> "Mounsey [the first applicant] is currently the complainant in an ongoing commercial crimes investigation against me in respect of charges of fraud and theft. Mounsey has, through Wellington, also instigated proceedings which are being brought by the Asset Forfeiture Unit for a restraining order against me. I respectfully submit that Mounsey is bringing this application to sequestrate me solely in an attempt to coerce from me a statement under oath which Mounsey intends to utilise in an endeavour to incriminate me."

[10] There follows thereafter a complaint that the first applicant has *mala fide* rejected offers in respect of the respondent's admitted indebtedness to him in order to pursue an abuse of the mechanism of an insolvency interrogation. The respondent does not pertinently oppose the granting of a sequestration order (whether provisional or final) on

the assertion of prejudice which may be occasioned by the continuation of sequestration proceedings in the light of the pending criminal prosecution. Nor indeed is it alleged that the respondent will suffer prejudice by reason of the fact that statements made by her under oath, will result in prejudice to her in the criminal trial. On the contrary the respondent proceeds to make such statements under oath, and pertinently admits to having misappropriated funds from the second applicant.

[11] In a supplementary affidavit filed by the respondent she alleges that the first applicant has procured the provisional trustee to convene an interrogation of a number of persons including the respondent. Notwithstanding this there is still no specific plea to either suspend the sequestration proceedings or discharge the rule on account of the pending criminal proceedings.

[12] The issue is accordingly not raised on the papers. There is also no counter-application in which a stay of proceedings is sought. In the ordinary course a stay of proceedings is sought by way of a substantive application on notice and supported by affidavits in which the applicant sets out the manner in which it is likely that he or she will suffer prejudice. In *Donaldson v Veleris* 1936 WLD 84 it was held that an applicant for a stay must establish a probability of prejudice occurring in the event that the civil proceedings sought to be stayed are not stayed pending the finalisation of the criminal proceedings.

[13] The respondent's argument is based on the assertion of potential prejudice that may flow from findings which this court may make in confirming the provisional order of sequestration. In asserting that all that needs to be established is a potential for

prejudice, reliance was placed on the decision in *Standard Bank of South Africa Ltd v Johnson* 1923 CPD 303, it being submitted that *Johnson* is authority for the proposition that a provisional order of sequestration ought to be discharged where criminal proceedings are also pending.

[14] In *Johnson* a final order of sequestration was sought by the bank in respect of an indebtedness of £5,525.00 which had been misappropriated by the respondent. The report of the judgment makes it clear that the bank had first obtained a provisional order of sequestration in November 1922. On the return date in December 1922 the provisional order was discharged. At that stage Gardiner J granted an order interdicting the respondent from dealing with or otherwise disposing of his assets. Subsequently a provisional order was again granted upon a further petition lodged by the bank. It is not clear from the judgment on what basis this was sought and granted. On the return day Van Zyl J again discharged the rule. At page 305 of the judgment the following is said:

> "It seems to me that danger might arise if the provisional order were allowed to stand and the matter be postponed. The sum of £5,525.00 forms part of the amount involved in the criminal proceedings, and I do not think that I can make the order final. If I did I would really find that Johnson owed the money whereas the matter is in dispute in the criminal proceedings. Johnson denies his indebtedness, and says that in view of the criminal proceedings, he cannot go into the matter."

[15] Respondent's counsel argued that the principle expressed in *Johnson* has been expressly approved by Smith J in *Michael Wharton Randell v Cape Law Society* (unreported, ECG case no. 2645/11, delivered on 27 October 2011) and by *Kleynhans v Van der Westhuizen NO* 1970(2) SA 742 (A).

[16] The reliance on *Kleynhans* is misplaced. The *Kleynhans* matter was not concerned with the question of a stay of proceedings at all. At issue in that matter was whether a claim based on theft constituted a liquidated claim for purposes of the Insolvency Act. It is in this context that reference was made to the *Johnson* matter and although the *dictum* at 305 was referred to it was referred to as reflecting that court's acceptance of the fact that a claim based on theft of money may constitute a liquidated claim upon which a petition for sequestration may be founded (*Kleynhans* at 751 F – G).

[17] The principle enunciated in *Johnson* reflects, as subsequent authority has elucidated, no more than that a court may in its discretion make an appropriate order to avoid prejudice being suffered by a person in criminal proceedings by reason of antecedent civil proceedings. In exercising its discretion a court may stay such civil proceedings or (as has occurred in numerous insolvency matters) make an order specifically directed to prevent prejudice arising by reason of the interrogation of the insolvent.

[18] *Gratus & Gratus (Proprietary) Ltd v Jackelow* 1930 WLD 226 involved an application for a provisional order of sequestration. The claim was based on a claim arising out of the theft of money by the respondent who had admitted the misappropriation. In the sequestration proceedings the respondent did not dispute the admission but alleged that it had been unduly induced. He sought a stay of the sequestration proceedings until the conclusion of the criminal proceedings pending against him on the basis that he would suffer prejudice. Tindall J said the following (at page 229 – 230):

> "But this point has been taken on behalf of the respondent – that the usual practice, where civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person, is to stay the civil proceedings until the criminal proceedings have been disposed of. The principle at the root of that practice is, I think, that the accused may be prejudiced in the criminal proceedings if the civil proceedings were heard first, because he might give evidence in the civil proceedings and might be subjected to cross-examination, or he might be compelled to disclose information in his possession before the criminal proceedings were disposed of."
>
> (Emphasis added).

[19] The court proceeded to distinguish *Johnson* on the facts holding that since the form of the order to be made would safeguard the respondent against possible prejudice the application for a stay should not be granted. The order made restrained interrogation pending the completion of the criminal proceedings.

[20] This approach was followed in *Donaldson v Veleris* 1936 WLD 84 and in *Du Toit v Van Rensburg* 1967(4) SA 433 (C) at 435H – 436B) where Corbett J (as the then was) expressed the rationale for the exercise of the discretion (at 435 H – 436 B) in similar terms to that in *Gratus*.

[21] It is significant to note that the development of the principle upon which the practice is based and its formulation occurs in the context of sequestration proceedings. I could find no authority where the principle is articulated as being of application in ordinary civil proceedings not involving an element of compelled testimony on the part of the party who seeks a stay of such proceedings. There is no rule of law which precludes civil proceedings continuing in circumstances where there is a pending criminal prosecution. (Cilliers *et al Herbstein and Van Winsen* Civil Practice of the High Court of South Africa, 5th Edition, vol 1, page 314).

[22] At the heart of the practice is the recognition that prejudice may flow from the civil proceedings themselves where a respondent is put to an election to commit to a statement under oath or to disclose information which may in due course be admissible as evidence against him or her in the criminal proceedings. This is the "hard choice" that arises from the intersection in time between civil proceedings and pending criminal proceedings (see *Davis v Tip NO & Others* 1996(1) SA 1152 (W); *Seapoint Computer Bureaux (Pty) Ltd v McCloughlin & De Wet NNO* 1997(2) SA 636 (W); *Williamson v Schoon* 1997(3) SA 1053 (T)).

[23] Respondent's counsel relied upon the judgment in *Randell* in which Smith J expressly disagreed with the judgments of Nugent J (in *Davis*) and Navsa J (in *Seapoint*) insofar as they found that a stay of proceedings would ordinarily only be where there is an element of state compulsion impacting on an accused's right to silence.

[24] I am, with respect, unable to agree with the approach and reasoning of Smith J inasmuch as he has expressed disagreement with the findings of both Nugent J and Nafsa J in the said judgments. I need not however enter the lists on this issue.

[25] The facts in the *Randell* matter are distinguishable. In that matter a substantive application was brought to stay proceedings for the striking-off of the applicant precisely to avoid the circumstance where the applicant would be placed on an election whether or not to file opposing affidavits in relation to the striking-off application. In other words the application to stay the striking-off application was founded upon potential prejudice

which would flow from the conduct of the striking-off proceedings themselves, such prejudice arising from the fact that the applicant would commit to a statement under oath where such statement may in due course be admissible against him in the criminal proceedings. Such circumstances do not exist in this matter, since the respondent has already filed affidavits in these proceedings and, as is pointed below, the respondent has the additional protection from prejudice which may flow from the consequential proceedings in terms of the Insolvency Act. The finding in the *Randall* matter is therefore not authority for the proposition that in these proceedings the equivalent of a stay should be granted by discharging the provisional order of sequestration.

[26] In the context of sequestration proceedings prejudice may also arise from the consequence of sequestration and the use of the investigative machinery for which provision is made in the Insolvency Act. It is this potential prejudice which gave rise to the particular orders in *Gratus* and *DuToit*.

[27] Although Mr *Pretorius* did not expressly contend for such prejudice it was inherent in his submissions that this indeed is the mischief he seeks to avoid. This aspect can, it seems to me, be easily disposed of. In *Equisec (Pty) Ltd v Rodriguez & Another* 1999(3) SA 113 (W) Nugent J (as he then was) pointed out that our courts have intervened in cases in which the potential exists for the person to be subjected to compulsion to divulge information in conflict with the right not to self-incriminate. This explained the orders made in the cases referred to. He pointed out however that the circumstances as they pertained when orders had been granted to protect an individual

from the effect of compulsory interrogation in terms of the Insolvency Act had fundamentally changed with the amendment of the Insolvency Act.

[28] Section 65(2) of the Insolvency Act specifically provides that a person who is liable to be interrogated in terms of the section may not decline to answer any question on the ground that such answer may incriminate him or her. Section 65(2A) goes further to provide that:

> "(a) Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions which may incriminate him or her, where he is to be tried on the criminal charge, may prejudice him at such trial, the presiding officer shall, notwithstanding the provisions of section 39(6), order that such part of the proceedings be held in camera and that no information regarding such questions and answers may be published in any manner whatsoever.
> (b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceeding, except in criminal proceedings where the person concerned stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, and in criminal proceedings contemplated in section 139(1) relating to a failure to answer lawful questions fully and satisfactorily."

[29] Taking the amended provisions of the Insolvency Act into account Nugent J dealt with the counter-application to stay the sequestration proceedings in the following terms at 117 D – I:

> "Clearly it was the intention of the Legislature when amending the Insolvency Act to render a person liable to answer questions under interrogation notwithstanding that criminal proceedings are pending against him. Furthermore, there is no suggestion in argument before me that the provisions of that section are unconstitutional and thus invalid and it is not immediately apparent to me that the section might be, taking into account the safeguards which have been introduced by section 65(2)(A) of the Act against the use of testimony given in the course of such inquiry. [References omitted]. That being so, it would seem to me that where the Legislature has expressly authorised the interrogation of a person who might have knowledge of the affairs of the insolvent estate, notwithstanding that he is facing a criminal prosecution, it is not open to me to frustrate the Legislation by staying the sequestration merely to avoid that occurring. If there are

> circumstances in which this might be done, in my view, they would at least require to be exceptional circumstances and there are none in the present case. One must not lose sight of the fact that the applicant has a legitimate interest in establishing the whereabouts and the assets which were in the possession of the first respondent and in doing so at the earliest opportunity in order to avoid there being dissipated or concealed and it is for that purpose that the Insolvency Act allows for such an inquiry. The safeguards contained in section 65(2)(A) seem to me to go a long way towards, at the same time, preserving the interests of the first respondent and I can see no good reason why it should be necessary to intervene any further. In my view, no good grounds have been made out for suspending the sequestration proceedings."

[30] I agree fully with these views. Although exceptional circumstances may warrant a stay of proceedings in appropriate circumstances, it will be for the applicant in such instance to establish exceptional circumstances. In this instance no such exceptional circumstances have been demonstrated.

[31] Respondent's sole contention was that prejudice would arise by reason of the fact that I would be called upon to make a finding as to the indebtedness of the respondent and that such finding would prejudice the respondent. It was accordingly suggested that the mere fact that a finding would be made in order to grant the final order of sequestration would give rise to potential prejudice.

[32] It is difficult to conceive why this should be so. I am required to determine on a balance of probabilities whether the applicant has established the requisites for a final order of sequestration. That requires that I should, based on the evidence before me, (including admissions made by the respondent whether or not such admissions are admissible in the criminal pending proceedings) determine whether the applicant has a liquidated claim against the respondent in excess of R100.00; whether the respondent

is factually insolvent or has committed an act of insolvency; and whether there is advantage to creditors in granting the sequestration order.

[33] A finding made by me in these proceedings is based on the facts as established in the evidence before me. Such finding cannot absolve the prosecution in the criminal proceedings of the duty to prove by way of admissible evidence all of the elements of the alleged offence beyond a reasonable doubt. A finding in these proceedings has no bearing on findings that another court may be called upon to make upon the evidence before that court even if similar evidence is before this court.

[34] In the circumstances of this matter it is in any event unnecessary to enquire into and determine the dispute regarding the quantum of respondent's indebtedness to the applicant. It suffices to find that the applicant has a liquidated claim in excess of R100.00. Where the respondent has admitted misappropriation of an amount of money such admission establishes a liquidated claim (see *Irvin & Johnson v Basson* 1977(3) SA 1067; *Gratus* (*supra*); *Kleyhans* (*supra*)). In this instance the respondent admits to misappropriation of an amount of R1,260,000.00. It is common cause that she has effected payment of an amount in excess of R650,000.00 and furthermore that she has incorporated in her opposition to the sequestration order a tender to pay a further amount in excess of R700,000.00, which it is alleged includes her liability for the payment of *morae* interest due to the applicant. Accordingly on the admitted facts the applicant has established a liquidated claim in the amount of the admitted liability. For the purpose of these proceedings I need not make any finding as to the balance of the applicant's claim which is substantiated by the affidavits filed on behalf of the auditor.

[35] Accordingly a final sequestration order can carry with it no prejudice whatsoever to the respondent in relation to matters which it will be require to prove in the criminal trial pending against her. Furthermore it should be borne in mind that the respondent has already committed to a version under oath in both her answering affidavit and supplementary affidavit filed in these proceedings. Whether those affidavits are to be received in evidence against her in the criminal proceedings is a matter for the criminal court to decide.

[36] It follows from what I have set out hereinabove that the respondent's point regarding the discharge of the provisional order on the basis that there are criminal proceedings pending must fail.

[37] That leaves the question of whether the applicant has succeeded in establishing the grounds for a final order. As I have already indicated the evidence presented by the applicant and the admissions made by the respondent establish on a balance of probabilities that the applicant has a liquidated claim in the amount of the respondent's admitted liability to the applicant and that the respondent is factually insolvent. The tender made by the respondent was alleged to destroy any advantage to creditors.

[38] Two issues flow from the tender. The first is that the payment to the applicant is not made out of any funds which the respondent now possesses. In my view this confirms beyond any doubt that the respondent is factually insolvent. The second issue concerns the effect that the tender has upon the advantage to creditors. Mr *Pretorius* argued that the applicant will not achieve, in sequestration proceedings, a better return

than that presently on offer by way of the tender. Therefore, so it was suggested, there can be no advantage in not accepting the tender, ie. there is no advantage to creditors in pursuing the sequestration order.

[39] The argument in my view is fallacious. The applicant is not obliged to accept the tender of a lesser amount than that which he contends is due to him by way of the misappropriation of funds by the respondent. It is the applicant's case that there will be significant advantage to be gained from the proper investigation of the affairs of the respondent inasmuch as a case has been made out that the respondent has failed to disclose certain assets and has failed to adequately or properly explain the whereabouts of assets acquired by way of the misappropriation of funds. In this regard there is also the question as to the basis upon which the respondent effected payment of a significant amount of money to her mother and to her mother-in-law upon the sale of immoveable property owned by her and her husband. These are matters which, so the applicant alleges, ought properly to be investigated by a trustee in the interests of the creditors albeit that it appears that the applicant is the sole creditor. Advantage to creditors does not only lie in the extent of the free residue in an insolvent estate and the dividend that may be earned upon liquidation of the assets and distribution to creditors, a clear advantage to creditors may arise by reason of the employment of the machinery of the Insolvency Act which permits of interrogation and investigation of an insolvent.

[40] This advantage to creditors is clearly established on the papers and there is in my view no basis upon which the applicant as sequestrating creditor can be deprived of the use of the machinery provided for in the Act merely by reason of a conditional tender

to pay an amount where such tender is made by a third party on behalf of the respondent.

[41] A final word should be said about the tender. The respondent sought to suggest that the applicant's refusal to accept an offer to pay the balance of the funds which respondent admits she stole reflects *mala fides* on the part of the applicant. This suggestion of *mala fides* is astonishing. The original offer to pay the misappropriated funds was made with a clear intention of ensuring that the criminal prosecution should not proceed. The applicant's rejection of the offer in these circumstances cannot be criticised. Nor can the applicant be criticised for wishing to recover the full amount of the loss he is advised he suffered. Insofar as the offer to pay the admitted liability by way of a conditional payment to be made by the respondent's parents is concerned, the very nature of the offer raises questions regarding the lawfulness of the transaction in the context of insolvency proceedings and, in my view, is a further basis upon which the applicant was reasonably entitled to reject the offer.

[42] In the circumstances a final order of sequestration is granted. Costs, including all reserved costs, to be costs in the sequestration.

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GG GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCE:

FOR THE PLAINTIFF:	Mr de la Harpe, instructed by NN Dullabh & Co
FOR THE DEFENDANT:	Mr Pretorius, instructed by Neville Borman & Botha